ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6420 SENATE LABOR & COMMERCE

824

THE EXACT DOLLAR AMOUNT OF THE LATTER MUST BE TREATED AS CONFIDENTIAL; HOWEVER, A FIGURE OF ABOUT $90,000.00 HAS BEEN SUGGESTED. ON THE BASIS OF THIS AMOUNT IT MAY BE INFERRED THAT THE ANNUAL SUB LEASE RENTAL PAID TO WHITE PASS BY CURRAUGH APPROXIMATES 2 MILLION AND THAT THE TOTAL ANNUAL RETURN TO THE CITY FROM THE TIDELANDS LEASE IS ABOUT $175,000.00 THIS RETURN MAY BE COMPARED WITH THAT WHICH MIGHT BE EXPECTED FROM THE PROPOSED LEASE OF THE CITY'S REMAINING TIDELANDS TO AIDEA. SUCH RETURNS WOULD CONSIST OF:

1) THE CITY'S LEASE RENTAL FEE FROM AIDEA.
2) THE CITY'S SALES TAX ON RENTALS PAID TO AIDEA BY SUB LESSEES (CURRAUGH HAS COMMITTED AND THERE LIKELY WOULD BE OTHER SUB LEASES)
3) CITY PROPERTY TAX ON ANY PROPERTY OWNED BY SUCH SUB LESSEES.

THERE WOULD BE NO SALES TAXES ON THE BASIC RENTAL FEE PAID OR PROPERTY TAXES ON IMPROVEMENTS OWNED BY AIDEA AS IT IS AN AGENCY OF THE STATE. THE CITY WOULD CONTINUE TO RECEIVE THE FIRST THREE TYPES OF RETURN UNDER THE ORIGINAL TIDELANDS LEASE: THEREFORE, OVER ALL FINANCIAL RETURNS TO THE CITY FROM A LEASE TO AIDEA WOULD BE NO LESS AND LIKELY BE GREATER.

THE SECOND CATEGORY, THE BENEFITS GENERATED BY ACTIVITIES ASSOCIATED WITH THE LEASED TIDELANDS CAN NOT BE MEASURED PRECISELY IN DOLLAR AMOUNTS: HOWEVER, THEY ARE OF GREATER LONG TERM VALUE TO THE CITY THAN THE CALCULABLE FINANCIAL RETURNS. THEY CONSIST OF SUCH THINGS AS INCREASED POPULATION, INCREASED EMPLOYMENT OPPORTUNITIES, INCREASED SCHOOL ENROLLMENT, INCREASED EXPENDITURES WITHIN THE COMMUNITY ALONG WITH THE MULTIPLIER EFFECT OF SUCH EXPENDITURES AND INCREASED ACCESSIBILITY AND VISITATION TO THE CITY RESULTING FROM YEAR AROUND MAINTENANCE AND OPERATION OF THE KLONDIKE HIGHWAY. CURRAUGH MAKES A MAJOR CONTRIBUTION TO HIGHWAY MAINTENANCE. IT IS UNLIKELY THAT THE ROAD WOULD BE OPERATIONAL YEAR AROUND WITHOUT THIS SOURCE OF FUNDING. AND, AS IN THE CASE OF THE FINANCIAL RETURNS, THE BENEFITS TO THE COMMUNITY WOULD BE GREATER THAN THOSE RECEIVED UNDER THE PRESENT LEASE AS THE MULTI PURPOSE DOCK FACILITY WOULD BE AVAILABLE FOR ADDITIONAL SUB LEASE BY COMMERCIAL CARGO CARRIERS AND CRUISE SHIPS.

MOST IMPORTANTLY, THE AVAILABILITY OF THE MULTI PURPOSE DOCK WOULD INSURE THE CONTINUATION OF SHIPMENT OF MINERALS THROUGH SKAGWAY AS CURRAUGH HAS COMMITTED TO AIDEA THAT IT WILL USE THIS DOCK. IN CONTRAST, IF CURRAUGH WERE TO DISCONTINUE USE OF THE WHITE PASS DOCK BY REASON OF OBSOLESCENCE, ENVIRONMENTAL UNSUITABILITY OR INABILITY TO AGREE TO LEASE TERMS WITH WHITE PASS AND THERE WERE NO ALTERNATIVE FACILITY AVAILABLE FOR ORE SHIPMENT THROUGH SKAGWAY, THE CITY WOULD LOSE A GREAT PORTION OF THE CURRENT FINANCIAL RETURNS AND ESSENTIALLY ALL OF

LESSOR - LESSEE RELATIONSHIPS

THE CITY ATTORNEY'S LETTER OF CAUTION OF JAN 1968 QUESTIONING THE EXTENT OF THE TIDELANDS LEASE AND WARNING OF THE DANGER OF FORECLOSING ADDITIONAL DEVELOPMENTS TO MEET FUTURE NEEDS HAS PROVEN TO HAVE BEEN PROPHETIC. THE TIDELANDS LEASE ESSENTIALLY GRANTED TO WHITE PASS A MONOPOLY FOR CONTROL OF COMMERCIAL USE OF THE PORT OF SKAGWAY. ALTHOUGH WHITE PASS HAS MADE ITS DOCKS AVAILABLE FOR USE BY ALL CARRIERS THE FEES HAVE BEEN WITHOUT COMPETITION OR ESSENTIALLY ON A "TAKE IT OR LEAVE IT " BASIS. THE WHITE PASS HAS EFFECTIVELY ACTED TO BLOCK CITY AND STATE PROPOSALS TO TAKE BACK A PORTION OF THE LEASED AREA FOR CONSTRUCTION OF A COMBINED FERRY - BARGE FACILITY ON THE EAST SIDE OF THE DREDGED BASIN.

THE RELATIONSHIPS BETWEEN THE CITY AND THE LESSEE HAVE BEEN LESS THAN AMICABLE AT TIMES AND PARTICULARLY SO DURING THE PERIODS OF THE FIFTH ANNIVERSARY RENTAL ADJUSTMENTS. THE WHITE PASS ALSO HAS FRLQUENTLY BEEN DELINQUENT IN MAKING THE RENTAL PAYMENTS. PRESENTLY THE WHITE PASS IS MAKING STRONG EFFORTS IN OPPOSITION TO THE CITYS PROPOSED LEASE OF ITS REMAINING WATERFRONT PROPERTY TO AIDEA FOR THE CONSTRUCTION OF A MULTIPURPOSE DOCK (PASSENGER, CARGO AND ORE TERMINAL).

THIS PATTERN OF CITY - LESSEE RELATIONSHIP UNDER THE TIDELANDS LEASE IS UNDERSTANDABLE. THE WHITE PASS IS A "FOR PROFIT" CORPORATION: HENCE, ITS ACTIONS TO OPPOSE COMPETITION, TO PROTECT ITS MONOPOLY AND TO MAXIMIZE PROFIT MAY BE VIEWED AS BEING SIMPLY THE RESULT OF EXERCISE OF ASTUTE BUSINESS ACUMEN IT IS QUESTIONABLE, HOWEVER, THAT THE OUTCOME OF THIS PATTERN OF CITY - WHITE PASS RELATIONSHIPS HAS BEEN IN THE PAST OR WILL BE IN THE FUTURE IN THE LONG TERM BEST INTERESTS OF THE COMMUNITY OF SKAGWAY.

COMMENTS AND ANALYSIS

TIDELANDS DESIGN AND DEVELOPMENT: THE WHITE PASS FULFILLED ITS INITIAL OBLIGATIONS UNDER THE TERMS OF THE LEASE BY CONSTRUCTION OF THE DEEP WATER BASIN, BULK STORAGE AND ORE HANDLING FACILITY AND THE DOCK AND DOLPHINS. HOWEVER, THE DESIGN FOLLOWED FOR THESE DEVELOPMENTS FAILED TO MAXIMIZE OR MAKE EFFICIENT USE OF THE LIMITED TIDELANDS SEAFRONT. PARENTHETICALLY, IT IS TO BE NOTED THAT THIS SAME WASTEFUL DESIGN IS BEING USED FOR THE CRUISE SHIP DOCK CURRENTLY UNDER CONSTRUCTION ON THE EAST SIDE OF THE BASIN.

THE SEAWARD BOUNDARY OF THE LEASED TIDELANDS MEASURES ONLY ABOUT 1160 FEET. THE WHITE PASS BY ADOPTING THE SLANTED SLOPE AND OFF LYING MOORING DOCK DESIGN HAS ESSENTIALLY LIMITED THE LEASED TIDELANDS, OR ABOUT ONE HALF OF SKAGWAY'S DEVELOPABLE WATER FRONT, TO TWO DOCKS. IN CONTRAST, THROUGH THE USE OF VERTICAL SEA WALL PILINGS AND FINGER PIERS MOORINGS FOR AT LEAST SIX SHIPS MIGHT HAVE BEEN PROVIDED.

SUMMARY: CONCLUSIONS AND RECOMMENDATION

THE OUTCOMES OF THE FIRST TWENTY TWO YEARS OF THE TIDELANDS LEASE HAVE BEEN BOTH FAVORABLE AND DETRIMENTAL TO THE COMMUNITY OF SKAGWAY. SUCCINCTLY, THE FAVORABLE RESULTS HAVE BEEN LIMITED TO THE FINANCIAL RETURNS TO THE CITY GOVERNMENT IN THE FORM OF LEASE RENTALS, PROPERTY AND SALES TAXES AND TO THE SPIN OFF BENEFITS ATTRIBUTABLE TO ORE TERMINAL EMPLOYMENT AND TO THE IMPETUS TRUCK TRANSPORT OF ORE PROVIDED FOR YEAR AROUND OPERATION OF THE KLONDIKE HIGHWAY. THE ADVERSE EFFECTS HAVE BEEN PERNICIOUS AND THEY HAVE BEEN PERVASIVE. IN TO-TO, THE LEASE HAS WORKED TO THWART OPTIMUM DEVELOPMENT AND OPERATION OF THE SEAPORT OF SKAGWAY.

THE PROPOSED LEASE WITH AIDEA AND THE DEVELOPMENT OF A MULTI PURPOSE DOCK OFFERS TO THE COMMUNITY OF SKAGWAY AN OPPORTUNITY TO SHED ITSELF, AT LEAST PARTIALLY, OF ITS SUBSERVIENT STATUS AS A "COMPANY TOWN". AND A MEANS AS WELL FOR REALIZATION OF ITS INHERENT ROLE OF THE GATEWAY TO THE YUKON. IN OTHER WORDS, THE CITY OF SKAGWAY HAS MUCH TO GAIN AND NOTHING TO LOSE BY APPROVING THE PROPOSED TIDELANDS LEASE WITH AIDEA. CONTRAWISE, THE CITY HAS MUCH TO LOSE AND NOTHING TO GAIN BY FAILURE TO SIGN THIS LEASE.

RECOMMENDATION: THAT THE CITY OF SKAGWAY ENTER INTO A LEASE OF ITS TIDELANDS WITH AIDEA.

CITY OF SKAGWAY

GATEWAY TO THE GOLD RUSH OF "98"
P. O. BOX 415 SKAGWAY, ALASKA 99840
(PHONE) 907-983-2297
(FAX) 907-983-2151

April 14, 1990

Senator Dick Eliason
P.O. Box V
Juneau, AK 99811

VIA FACSIMILE TRANSMISSION
ORIGINAL TO FOLLOW BY MAIL

Dear Senator Eliason;

Attached are copies of City of Skagway Resolutions 90-7R and 90-8R pertaining to the most recent developments in the port situation in Skagway. Also attached is my 4/13/90 letter to Representative Goll pertaining to HB 455, AIDEA's Bert Wagnon's 4/12/90 letter to me and AIDEA's suggested amendments to SB 525.

Briefly, the situation is this:

On April sixth, White Pass and Curragh Resources announced a sublease agreement that would transfer the *existing* ore terminal to Curragh subsidiary Selawik, Inc. The facility would be rehabilitated and used by Curragh. AIDEA may enter the picture as a further sublessee once the improvements are made--therefore the need for amendment and passage of HB 455 and SB 525.

Today, the City Council met in special session and took action on the following:

1. Passage of Resolution 90-3R to cancel the 4/17/90 special election.
2. Approval of the sublease between Selawik, Inc. (Curragh Resources) and Skagway Terminal Co. (White Pass) for the existing ore terminal.

The Council requests your assistance in the amendment and passage of SB 525 during this Legislative session. I will be in Juneau next week and would be pleased to meet with you or a member of your staff to provide further explanation of this issue.

Sincerely,

Thomas Healy
City Manager

CITY OF SKAGWAY

GATEWAY TO THE GOLD RUSH OF "98"
P. O. BOX 415 SKAGWAY, ALASKA 99840
(PHONE) 907-983-2297
(FAX) 907-983-2151

April 13, 1990

Representative Peter Goll
P.O. Box V
Juneau, AK 99811

Dear Representative Goll;

In reference to the enclosed Resolution 90-7R, passed unanimously yesterday by the City Council, the Council requests your prompt assistance in the amendment and passage of HB 455 to provide for AIDEA participation in the acquisition and rehabilitation of the *existing* ore terminal in Skagway.

Skagway Terminal Company and Curragh Resources have agreed to a sublease of the existing terminal. The City Council will consider approval of the sublease in a special meeting tomorrow.

This sublease represents the loss of Curragh Resources as the principal user of the port development project involving a *new* terminal, as represented by the lease agreement negotiated between the City and AIDEA and subject to voter approval. In reference to the attached letter from AIDEA Executive Director Bert Wagnon, this project is no longer economically viable. Accordingly, the Council yesterday voted to draft a resolution to cancel the vote scheduled for April 17, 1990. This resolution will be before the Council at the special meeting tomorrow.

We urge your immediate attention to HB 455 to allow participation by AIDEA in the recent arrangements involving the existing ore terminal.

I intend to be in Juneau April 18 to testify on HB 455, if necessary, before the House Labor and Commerce and Finance committees.

Thank you for your consideration of this matter. Please contact me if you have any questions.

Sincerely,

Thomas Healy
City Manager

CITY OF SKAGWAY, ALASKA
RESOLUTION 90-7R

A RESOLUTION REQUESTING AMENDMENT AND PASSAGE BY THE ALASKAN LEGISLATURE OF HOUSE BILL 455 AND SENATE BILL 525.

Whereas, the City of Skagway and the Alaska Industrial Development and Export Authority (AIDEA) have negotiated a tidelands lease for the purpose of development of an ore terminal and multi-use port facility; and

Whereas, the City of Skagway approved this lease by Ordinance 90-3 on condition that the ordinance be ratified by a vote of the citizens of Skagway on April 17, 1990; and

Whereas, House Bill 455 contained a provision that would authorize AIDEA to issue bonds in the amount of $40 million for purposes of port development in Skagway; and

Whereas, this provision for AIDEA participation in Skagway port development was subsequently removed from House Bill 455; and

Whereas, on April 6, 1990, Curragh Resources, the proposed principal user of the AIDEA port development project, made arrangements with Skagway Terminal Company to continue to use the existing ore transshipment facility in Skagway under a sublease agreement to be approved by the City of Skagway; and

Whereas, this agreement renders the port development project as proposed under Ordinance 90 - 3 unnecessary due to the loss of the principal facility user; and

Whereas, AIDEA participation in the agreement between Curragh Resources and Skagway Terminal Company is possible.

NOW THEREFORE BE IT RESOLVED THAT THE COMMON COUNCIL OF THE CITY OF SKAGWAY requests the immediate amendment and passage of House Bill 455 and Senate Bill 525 authorizing AIDEA to issue bonds for the financing of port improvements in Skagway, specifically to acquire and rehabilitate the existing ore terminal in Skagway; and

BE IT FURTHER RESOLVED that this authorization shall not apply to the port development plan as proposed by AIDEA involving construction of a new ore terminal on lands leased from the City, as proposed under City of Skagway Ordinance 90 - 3.

PASSED AND APPROVED THIS 12TH DAY OF APRIL, 1990.

Stan Selmer

Stan Selmer, Mayor

ATTEST:

Lorene S Gordon

Lorene S. Gordon, City Clerk

CITY OF SKAGWAY
RESOLUTION 90-8R

A RESOLUTION CANCELLING THE SPECIAL ELECTION OF APRIL 17,1990

WHEREAS; By Resolution 90-1 the Skagway City Council set the date of April 17, 1990 for a special election, and

WHEREAS; The purpose of the special election was to ratify a lease of City tidelands to the Alaska Industrial Development and Export Authority (AIDEA) for the construction of an ore terminal and multiple-use port facility, as proposed by Ordinance 90-3, and

WHEREAS; On April 6, 1990, Curragh Resources, the proposed principal user of the AIDEA port development project, made arrangements with Skagway Terminal Company to continue to use the existing ore transshipment facility in Skagway, and

WHEREAS; The loss of Curragh Resources as a user renders the project as proposed for voter approval no longer economically viable, and

WHEREAS; By letter of April 12, 1990, AIDEA notified the City of Skagway of the lack of economic viability of the proposed project.

NOW THEREFORE BE IT RESOLVED THAT THE COMMON COUNCIL OF THE CITY OF SKAGWAY cancels the special election scheduled for April 17, 1990.

PASSED AND APPROVED THIS 14TH DAY OF APRIL, 1990.

Stan Selmer

Stan Selmer,Mayor

ATTEST:

Lorene S. Gordon

Lorene S. Gordon, City Clerk

ALASKA INDUSTRIAL DEVELOPMENT
AND EXPORT AUTHORITY

480 WEST TUDOR • ANCHORAGE, ALASKA 99503-6690 • (907) 561-2051 • FAX (907) 561-6996

April 12, 1990

Mr. Tom Healy
City of Skagway
P.O. Box 415
Skagway, AK 99840

Dear Tom:

After discussions with the parties involved in the port project in Skagway, it's become apparent that an agreement has been reached for utilizing the existing ore terminal as opposed to constructing a new one. Authority involvement has been requested in acquiring and reconstructing the existing terminal which will be used by Curragh. As Curragh was to provide the financial strength and commitment for the new facility, I felt it important to convey this in writing as it means a totally new facility is no longer economically viable.

I understand the election is scheduled for April 17th and based upon the above, the question on the ballot is moot. The question of whether or not to proceed with the election is a matter of local concern. Should the City Counsel approve a resolution endorsing the Authority's pending legislation, please furnish it to me as soon as possible. Attached is a "draft" amendment to the legislation to reflect the changed circumstance.

Sincerely,

Bertram L. Wagnon

Bertram L. Wagnon
Executive Director

BLW:ec

Enclosure

DRAFT

Suggested Amendments to S.B. 525

Section 1. The Alaska Industrial Development and Export Authority may issue bonds to finance the acquisition, design, and [construction] reconstruction of a public use [multi-purpose] ore terminal [and dock facility] in Skagway to be owned by the Authority. The principal amount of the bonds may not exceed [$40,000,000] $20,000,000. This section grants the legislative approval required under AS 44.88.090 and 44.88.172(c).

Section 4. Deleted

Section 5. Deleted

P. O. Box 152
Skagway, Alaska 99840
March 30, 1990

Representative Peter Goll
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, Alaska 99811

Reference: House Bill 455

Dear Representative Goll:

Thank you for returning my telephone call of March 29. After considering our conversation, I am still of the opinion you betrayed what you told me, "The decision on the funding of the AIDEA Project in Skagway is Skagway's decision, I will support whatever Skagway decides in their election."

Your argument that Unalaska wanted out of the bill was a valid argument for Unalaska's representative, but not for Skagway's representative to offer substitute legislation!

I understand that you did not contact the Skagway Mayor, the City Manager, or the Citizens Committee for Public Port Development, prior to your action on this legislation. At last nights Skagway City Council work session, everyone expressed surprise on your action. Even Councilman John Mielke, who votes "no" on everything to do with the AIDEA Project said, "This is certainly a surprise to me, guess he wants the ore facility for Haines."

You are suppose to have said at the hearing that your mail was running heavily against the Skagway AIDEA Project. Do you think White Pass would be fighting this so hard if they thought they had the election "in the bag".

The secret ballot was invented for such issues as the AIDEA Project in Skagway. Few, if any people can afford to openly support the project. White Pass, and especially Marvin Taylor, are past masters at intimidation. Have you been intimidated by White Pass or do you want this project for Haines?

Skagway's best interest would have been best served by your staying out of the issue until after our election April 17, as you told me in early March that you were doing. Were your best interests served by your submitting the substitute legislation on House Bill 455?

Yours very truly,

Irene

Mavis Irene Henricksen

cc. Senator Eliasen

P. O. Box 152
Skagway, Alaska 99840
March 30, 1990

Senator Dick Eliason
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, Alaska 99811

Reference: Senate Bill 525
House Bill 455

Dear Senator Eliason:

Your support is requested on Senate Bill 525, "An Act authorizing the Alaska Industrial Development and Export Authority to issue bonds for the Skagway dock project and the Ballyhoo dock project in Unalaska."

I found out today that House Bill 455 was not passed out of the House Labor & Commerce Committee when it was heard March 27 and when Representative Goll dropped in with his substitute bill, deleting Skagway from the legislation. The bill is scheduled to come before the Labor & Commerce Committee again at their meeting of April 3. I plan on attending that committee meeting as well as meeting with most of the members of the Committee prior to the hearing. While this is very much a personal issue with me, I will also be representing the Skagway Citizens Committee for Public Port Development of which I am Vice Chairman.

Yours very truly,

Irene

Mavis Irene Henricksen

Enc.

Citizens For Public Port Development

Hon. Bill Feero, Chairman

P.O. Box 355 • Skagway, Alaska 99840

March 31, 1990

Senate Labor and Commerce Committee
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Chairman Eliason and Members:

We strongly support approval of Senate Bill 525, "An Act authorizing the Alaska Industrial Development and Export Authority to issue bonds for the Skagway dock project and the Ballyhoo dock project in Unalaska."

Yours very truly,

W. E. "Bill" Feero
Chairman

6-2332E
Utermohle
5/4/90

Original sponsor(s): Labor & Commerce Committee

IN THE SENATE BY THE LABOR & COMMERCE COMMITTEE

CS FOR SENATE BILL NO. 525 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the Alaska Industrial Development and Export Authority and authorizing the Alaska Industrial Development and Export Authority to issue bonds for the Skagway ore terminal project and the Ballyhoo dock project in Unalaska, to be owned by the authority; and providing for an effective date."

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

* Section 1. The Alaska Industrial Development and Export Authority may issue bonds to finance the acquisition, design, and reconstruction of a public use ore terminal in Skagway to be owned by the authority. The principal amount of the bonds may not exceed $25,000,000. This section grants the legislative approval required by AS 44.88.090 and 44.88.172(c).

* Sec. 2. The Alaska Industrial Development and Export Authority may issue bonds to finance the acquisition, design, and construction of improvements to the Ballyhoo dock in Unalaska to be owned by the authority. The principal amount of the bonds may not exceed $10,000,000. This section grants the legislative approval required by AS 44.88.090 and 44.88.172(c).

* Sec. 3. Before bonds authorized in secs. 1 and 2 of this Act are issued, the Alaska Industrial Development and Export Authority shall comply with the requirements of AS 44.88.173.

* Sec. 4. AS 44.88.010(c) is amended to read:

(c) It is further declared to be the policy of the state, in the interests of promoting the health, security, and general welfare of all the people of the state, and a public purpose of the state, to

accomplish the objectives set out in (b) of this section through the provision of financial support to a [IN COOPERATION WITH] federal, state, municipal, or [AND] private entity [INSTITUTIONS FOR THE PURPOSE OF INCREASING THE EXPORT OF ALASKA GOODS, TALENT, RAW MATERIALS, AND SERVICES].

* Sec. 5. AS 44.88.060 is amended to read:

Sec. 44.88.060. ALASKA INDUSTRIAL DEVELOPMENT AND EXPORT AUTHORITY REVOLVING FUND. The Alaska Industrial Development and Export Authority revolving fund is established in the authority. The revolving fund consists of appropriations made to the revolving fund by the legislature, money or other assets transferred to the revolving fund by the authority, and unrestricted payments on loans made or purchased by the authority. Unless otherwise expressly stated, the accounts created in this chapter are accounts in the revolving fund. The authority may create additional accounts either in the revolving fund or outside the revolving fund. Subject to agreements made with the holders of the authority's bonds or with other persons, the authority may transfer amounts in an account in the revolving fund to another account in the revolving fund. Amounts deposited in the revolving fund may be pledged to the payment of bonds of the authority or expended for the purposes of the authority under this chapter. The authority has the powers and responsibilities established in AS 37.10.071 with respect to the investment of amounts held in the revolving fund.

* Sec. 6. AS 44.88.155(c) is amended to read:

(c) Money and other assets of the enterprise development account may be used to secure bonds of the authority issued to finance the purchase of loans for projects [AND SHALL BE HELD AND INVESTED BY THE AUTHORITY IN ACCORDANCE WITH AS 37.10.071] or shall be used to

purchase loans for projects.

* Sec. 7. AS 44.88.172(b) is repealed.

* Sec. 8. This Act takes effect immediately under AS 01.10.070(c).

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE 4/20/90

FURTHER: State Affairs
Finance

Date of 5-Day Notice: 3/22/90
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 4/3/90

Labor and Commerce Committee considered SB 526

Appropriations for contract settlement costs for public employees who are members of collective bargaining units; salary increases for public employees who are not members of a bargaining unit; efd.

and recommended:

[✓] replace with _____ cs SB 526 (L&C) [✓] same title [ ] new title

[ ] attached amendment(s)

[ ] _____ letter of intent adopted

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

[ ] fiscal note(s) _____

Department(s)/Date:

[ ] zero fiscal note(s) _____

[✓] appropriation-no fiscal note

[ ] Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

Chair: Signature and Recommendation Do Pass

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 20, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that makes appropriations that are necessary to implement the monetary terms of the contracts agreed to with the Marine Engineers Beneficial Association and the Alaska Vocational Technical Center teachers; it also appropriates for a corresponding salary adjustment for employees not covered by collective bargaining.

The Administration has tendered an offer to all other public-employee bargaining unions of a contract settlement with a 3.3 percent wage increase effective in 1990. Several of the unions have this offer under consideration at this time. As additional agreements are reached and ratified by the union members, I will forward to the legislature amendments to this bill to cover the monetary provisions of the new agreements.

Public employees have received no adjustment to wage schedules during my tenure in office. Recent improvements in the Alaskan economy have also resulted in an increase in the cost of living for all Alaskans. Other employers have recognized that increase in their contract negotiations and settlements. The 3.3 percent wage adjustment corresponds to the increase in the Anchorage Consumer Price Index for 1989. Public employees provide a valuable service to all Alaskan citizenry. It is important that state employees receive this increase.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA

STEVE COWPER, GOVERNOR

OFFICE OF THE GOVERNOR

POUCH AM
JUNEAU, ALASKA 99811
PHONE: (907) 465-3568

OFFICE OF MANAGEMENT AND BUDGET
DIVISION OF BUDGET REVIEW

March 30, 1990

The Honorable Dick Eliason
Chairman, Senate Labor and
Commerce Committee
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Senator Eliason:

Attached is a proposed amendment to SB 526, "An act making appropriations for contract settlements for certain public employees...." The amendment is necessary to include funding for a contract settlement with the Public Safety Employees Association which was ratified March 28th by the union membership. The monetary terms of the contract are similar to other negotiated settlements with a 3.3% wage increase effective January 1, 1990.

Sincerely,

Alison M. Elgee

Alison M. Elgee
Director

Attachment

01 A33LH

AMENDMENT

Senate Bill 526 "An Act making appropriations for contract settlement costs for certain public employees who are members of collective bargaining units and for salary increases for public employees who are not members of a bargaining unit; and providing for an effective date."

Page 4, line 20 add a new section as follows and renumber remaining sections accordingly:

*Sec. 7. (a) The sum of $558,200 is appropriated to the Office of the Governor, Office of Management & Budget, to pay for a 3.3% contract settlement for the Public Safety Employees Association for the period January 1, 1990 through June 30, 1990 from the following sources:

Federal Receipts	$ 9,100
General Fund Match	800
General Fund	443,200
General Fund/Program Receipts	2,900
Inter-agency Receipts	3,700
International Airports Revenue Fund	98,500

(b) The sum of $1,162,700 is appropriated to the Office of the Governor, Office of Management & Budget, to pay for a 3.3% contract settlement for the Public Safety Employees Association for the fiscal year ending June 30, 1991 from the following sources:

Federal Receipts	$ 19,000
General Fund Match	1,700
General Fund	923,200
General Fund/Program Receipts	6,000
Inter-agency Receipts	7,600
International Airports Revenue Fund	205,200

Page 4, line 21 delete [AND 6(a)] and replace with 6(a) and 7(a).

Page 4, line 24 delete [AND 6(b)] and replace with 6(b) and 7(b).

Page 4, line 27 delete [AND 6(a)] and replace with 6(a) and 7(a).

OMB - 3/30/90 Allison M. Elgee

MEMORANDUM

STATE OF ALASKA

To: Alison Elgee
Director
Division of Budget Review
Office of the Governor

Date: March 28, 1990

File No:

Phone: 465-4404

From: Bruce Cummings
Director
Division of Labor Relations
Department of Administration

Subject: Terms of Pending Collective Bargaining Agreements, Ratified and Tentatively Agreed

Status Summary:

During March 1990 the State entered into, continued or completed negotiations with all ten bargaining units representing State employees. The status of those negotiations is as follows:

1. Agreements Obtained

   A. Agreements have been ratified by three groups (Public Safety Employees, Centralized Correspondence Study, Teachers Education Association of Mount Edgecumbe).

   B. In a fourth instance, the Marine Beneficial Association, ratification was not required.

2. Tentative Agreements

   Four bargaining units are in the final stages of voting on tentative agreements, with results due the week of April 2 (Confidential Employees Association, Supervisory Unit, Labor, Trades and Crafts, Masters, Mates and Pilots).

3. Unresolved

   A. No agreement has been reached with the General Government Unit (GGU) and no talks are currently scheduled. The arbitrator's decision establishing terms for GGU Class One employees is expected on or about April 15.

   B. Negotiations with the Inlandboatman's Union have been unsuccessful, although the parties do plan to meet at least one more time this week.

Bargaining Unit Summaries:

1. Public Safety Employees Association (ratified)

   A. Wages

      1) 1990: 3.3 percent across the board general wage increase.

      2) 1991: across the board general wage increase equal to the increase in the Anchorage Consumer Price Index--all Urban Wage Earners (CPI-U), not to exceed five (5) percent.

   B. Health Insurance: This issue has been submitted to interest arbitration.

      1) State Proposal:

         a. 1990: State will continue to pay current premium through December 31, 1990.

         b. 1991: If the premium increases during this year, the State will pay an additional premium amount equal to the Anchorage CPI-U increase during the previous year but not to exceed 5 percent.

            If the premium increase for current benefits exceeds the amount provided for above, the parties shall meet to discuss plan changes. If unable to agree, the State may modify plans to maintain the prescribed premium rate.

      2) Union Proposal:

         a. 1990-91: Maintain current benefits. Employer pay 90 percent of premium, including any increase; employees pay 10 percent.

   C. Holidays: No change

   D. Duration: 1990-91

   E. Other Issues: The parties agreed to continue current language on a number of disputed issues (seniority, relief and lunch periods, shift assignments) and to abide by the Arbitrator's decision on other issues already submitted to interest arbitration (geographic differentials on selected locations, overtime pay for recruits, etc).

2. Centralized Correspondence Study Education Association (ratified)

   A. Wages:

      1) 1990: In lieu of a 3.3 percent across the board general wage increase, eight days of annual leave will be accrued prorated monthly (5.36 hours per month) in 1990 only. Employees may cash out the additional eight days in 1990 only.

2. 1991 and 1992: Across the board general wage increase equal to the Anchorage CPI-U, but not to exceed 5 percent.

B. Health Insurance:

1. 1990: State will continue to pay current premium through December 31, 1990.

2. 1991-92: If the premium increases during these years, the State will pay an additional premium amount equal to the Anchorage CPI-U increase during the previous year but not to exceed 5 percent.

If the premium increase for current benefits exceeds the amount provided for above, the parties shall meet to discuss plan changes. If unable to agree, the State may modify plan to maintain the prescribed premium rate.

C. Holidays:

1. Martin Luther King Day, Jr, added

2. Employee's birthday deleted

3. Three floating holidays (Alaska Day, Seward's Day, President's Day) designated as fixed-date holidays.

D. Duration: 1990-92

E. Other Issues:

1. A two tier salary structure is adopted, providing additional compensation and incentive for possession of a Master's degree, and reducing the compensation rate for those with a Bachelor's Degree. This change is cost neutral.

2. Grievance procedure streamlined to reduce number of intermediate hearings.

3. Teachers Education Association of Mt. Edgecumbe (ratified)

A. Wages

1. 1990: 1.7 percent across the board general wage increase effective July 1, 1990. Difference between 1.7 percent and 3.3 percent used to fund Community Schools Program Fund to provide after school and weekend activities supervision.

2. 1991 and 1992 (cycled on the fiscal rather than calendar year):

Across the board general wage increase equal to the Anchorage CPI-U, but not to exceed 5 percent.

B. Health Insurance

1. 1990: State will continue to pay current premiums through December 31, 1990.

2. 1991-92: If the premium increases during these years, the State will pay an additional premium amount equal to the Anchorage CPI-U increase during the previous year but not to exceed 5 percent.

   If the premium increase for current benefits exceeds the amount provided for above, the parties shall meet to discuss plan changes. If unable to agree, the State may modify plan to maintain the prescribed premium rate or deduct the excess premium cost from the salary of eligible employees.

C. Duration: July 1, 1990, through June 30, 1993.

D. Other Issues: All other terms of the previous agreement will remain in effect.

4. Marine Engineers Beneficial Association (final: ratification not required)

A. Wages:

1. 1990: 3.3 percent across the board general wage increase. Some additional cost of living adjustments for employees in the Southwest System agreed in exchange for elimination of leave accrual for temporary dispatches and opportunity to test two crew procedure in Southwest System (costs offsetting).

2. Succeeding years: full contract negotiations will determine rates. Contract expires March 30, 1991.

B. Health Insurance: No change. MEBA Agreement ties State cost to the contribution rate for the General Government Unit.

C. Holidays: No change.

D. Duration: Contract expires March 30, 1991.

5. Confidential Employees Association (tentative agreement)

A. Wages

1. 1990: 3.3 percent across the board general wage increase.

2. 1991: across the board general wage increase equal to the increase in the Anchorage CPI-U, but not to exceed 5 percent.

3. 1992: across the board general wage increase equal to the increase in the Anchorage CPI-U, but not to exceed 5 percent.

B. Health Insurance:

1. 1990: State will continue to pay current premium through December 31, 1990.

2. 1991-92: If the premium increases during these years, the State will pay an additional premium amount equal to the Anchorage CPI-U increase during the previous year but not to exceed 5 percent.

   If the premium increase for current benefits exceeds the amount provided for above, the parties shall meet to discuss plan changes. If unable to agree, the State may modify plan to maintain the prescribed premium rate.

C. Holidays: Martin Luther King, Jr. Day added

D. Duration: 1990-1992

E. Other Issues: Specific layoff procedures and projections analogous to Supervisory Unit.

6. Supervisory Unit (tentative agreement)

Note: Terms for Class One employees in this unit were initially established by interest arbitration of outstanding issues in an economic reopener in the third year of the agreement. The arbitrator awarded Class One employees a 4.08 percent across the board increase and found for the State on all other issues. The parties reentered negotiations on an agreement for all employees in the unit, regardless of class.

A. Wages:

1. 1990:

   a. Class One employees will receive a 4.08 percent across the board general wage increase.

   b. Class Two and Three employees will receive a 3.3 percent across the board general wage increase and an additional leave accrual for 1990 only of 1.26 hours per month in compensation for the difference between 3.3 percent and 4.08 percent.

2. 1991:

   a. Class One employees will be placed on the same salary schedule as Twos and Threes. In 1991 only, Class One employees will receive additional leave accrual of 1.26 hours per month as compensation for their placement on the 3.3 percent wage schedule (a loss of .78 percent)

   b. Across the board general wage increase equal to the increase in the Anchorage CPI-U, but not to exceed 5 percent.

3. 1992: Across the board general wage increase equal to the increase in the Anchorage CPI-U, but not to exceed 5 percent.

B. Health Insurance:

1. 1990: State will continue to pay current premium through December 31, 1990.

2. 1991-92: If the premium increases during these years, the State will pay an additional premium amount equal to the Anchorage CPI-U increase during the previous year but not to exceed 5 percent.

The parties shall meet in a Health Benefits Evaluation to discuss plan changes. If unable to agree, the State may modify plan to maintain the prescribed premium rate or deduct the excess from the employee's salary.

C. Holidays:

1. Martin Luther King, Jr. Day added.

2. Three floating holidays (Alaska Day, Seward's Day, President's Day) designated as fixed-date holidays.

D. Duration: 1990-92

E. Other Issues:

1. Sea duty pay made consistent with PSEA, GGU tentative agreement on this issue.

2. Actual expenses allowed in lieu of per diem rates for official travel to Anchorage, Fairbanks, and Juneau consistent with Administrative Manual.

7. Labor, Trades and Crafts (tentative agreement)

Note: LTC is operating under the terms of an interest arbitration covering Class One employees for 1989-90, the contents of which were imposed upon Class Two and Three employees in August, 1989. That contract included wage reopeners for 1989 and 1990. Negotiations failed, and wage disputes for Class Ones were submitted to an arbitrator. Subsequent to receipt of an award granting a $675 compensatory payment in lieu of a 1989 wage increase, and an across the board increase for 1990 of 4.6 percent, the parties reentered negotiations for an agreement covering all classes.

Tentative agreement has been reached and the ratification process is underway. However, the parties entered into an agreement not to discuss the details of the settlement until voting is complete.

8. Masters, Mates and Pilots (balloting without Union recommendation)

    1. Wages: 3.3 percent across the board general wage increase.

    2. All other issues: continue current contract language.

EC/DMC/dkk
20/8/0873630.wp
cc: Frank S. Baxter
Commissioner
Department of Administration

S B

527

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 3/20/90

FURTHER: State Affairs
Finance

Date of 5-Day Notice: 3/22/90
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 4/3/90

Labor and Commerce Committee considered SB 527
Salaries for employees who are not members of a collective bargaining unit; efd.

and recommended:

[✓] replace with _____ cs SB 527 (L+C) [ ] same title [✓] new title

[ ] attached amendment(s)

[ ] _____ letter of intent adopted

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

[ ] fiscal note(s) _____

Department(s)/Date:

[ ] zero fiscal note(s) _____

[ ] appropriation-no fiscal note

[ ] Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

Patrick Rodney

Chair: Signature and Recommendation

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

March 20, 1990

The Honorable Tim Kelly
President of the Senate
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that grants a 3.3 percent pay increase to certain state employees not covered by collective bargaining agreements.

Section 1 of the bill increases the pay of certain legislative and classified and partially exempt executive-branch employees who are not covered by a collective bargaining agreement. It amends AS 39.27.011(a), the statutory salary schedule for such workers.

Section 2 provides the same increase to permanent employees of the judicial and legislative branches, the chief clerk of the house of representatives and the clerk's staff, the senate secretary and staff, the ombudsman's permanent staff, and permanent and temporary employees of the executive branch in the exempt service not otherwise covered by AS 39.27.011(a). The salaries of certain other officers, such as the ombudsman, are affected by the change, as they are tied to AS 39.27.011(a).

Section 3 provides that University of Alaska employees not covered by a collective bargaining agreement are entitled to receive salary increases in accordance with the university's compensation plan.

The bill amends legislative and judicial salary statutes so that judges' and legislative salaries will no longer be tied to the statutory scale. Sections 4 -- 7 set the salaries of the state's judges and justices at their current rate, by simply stating the dollar amount currently arrived at by referring to the salary schedule. Section 8 similarly sets the salaries of legislators at their current

rate. The 3.3 percent increase has not been applied to either group, or the lieutenant governor or me.

All provisions of the bill, including the pay increases, are retroactive to January 1, 1990.

This legislation should put these state employees on an equal footing with employees in collective bargaining units that have recently settled with the state. I urge your prompt and favorable action on the bill.

Sincerely,

Steve Cowper
Governor

Original sponsor(s): Rules/Governor

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 527 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to salaries for officers and employees who are not members of a collective bargaining unit; and providing for an effective date."

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

* Section 1. AS 39.27.011(a) is repealed and reenacted to read:

(a) SALARY SCHEDULE. The following monthly basic salary schedule is approved as the pay plan for classified and partially exempt employees in the executive branch of the state government who are not members of a collective bargaining unit established under the authority of the Public Employment Relations Act and employees of the legislature under AS 24.10 and AS 24.20:

Range No.	Step A	Step B	Step C	Step D	Step E	Step F
05	1433	1472	1515	1557	1603	1646
06	1515	1557	1603	1646	1693	1743
07	1603	1646	1693	1743	1797	1852
08	1693	1743	1797	1852	1906	1966
09	1797	1852	1906	1966	2030	2087
10	1906	1966	2030	2087	2151	2216
11	2030	2087	2151	2216	2290	2361
12	2151	2216	2290	2361	2443	2526
13	2290	2361	2443	2526	2615	2710
14	2443	2526	2615	2710	2805	2911
15	2615	2710	2805	2911	3006	3120

16	2805	2911	3006	3120	3232	3349
17	3006	3120	3232	3349	3464	3582
18	3232	3349	3464	3582	3700	3840
19	3464	3582	3700	3840	3957	4105
20	3700	3840	3957	4105	4230	4386
21	3957	4105	4230	4386	4524	4687
22	4230	4386	4524	4687	4842	5019
23	4524	4687	4842	5019	5187	5381
24	4842	5019	5187	5381	5563	5752
25	5187	5381	5563	5752	5964	6188
26	5381	5563	5752	5964	6188	6411
27	5563	5752	5964	6188	6411	6655
28	5752	5964	6188	6411	6655	6886
29	5964	6188	6411	6655	6886	7129
30	6188	6411	6655	6886	7129	7380

* Sec. 2. EMPLOYEES OF THE JUDICIAL AND LEGISLATIVE BRANCHES, AND CERTAIN EXEMPT EMPLOYEES OF THE EXECUTIVE BRANCH. The following employees are entitled to receive salary adjustments comparable to those received by the classified and partially exempt employees of the executive branch under AS 39.27.011(a) as that subsection is reenacted in sec. 1 of this Act:

(1) judges and permanent and temporary employees of the judicial branch;

(2) legislators and employees of the legislative branch, including staff of the ombudsman's office;

(3) permanent and temporary employees of the executive branch who are in the exempt service under AS 39.25, who are not members of a collective bargaining unit established under the Public Employment Relations Act (AS 23.40), and who are not otherwise covered by AS 39.27.011(a).

* Sec. 3. EMPLOYEES OF THE UNIVERSITY OF ALASKA. The employees of the

University of Alaska who are not members of a collective bargaining unit are entitled to receive salary increases in accordance with the compensation policy of the board of regents of the University of Alaska.

* Sec. 4. This Act is retroactive to January 1, 1990.

* Sec. 5. This Act takes effect immediately under AS 01.10.070(c).

S B
529

SENATE ...
FIRST COMMITTEE OF REFERRAL

DATE: 3/21/90 FURTHER:

Date of 5-Day Notice: 4/26/90
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: 5/1/90

Labor and Commerce Committee considered SB 529

Exemptions to the prohibition against unfair labor practices.

and recommended:

[✓] replace with _____ CS SB 529 (L+C) [✓] same title [ ] new title

[ ] attached amendment(s)

[ ] _____ letter of intent adopted

[ ] do pass

[ ] do not pass

[ ] no recommendation

[✓] individual recommendations

[ ] further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

[ ] fiscal note(s) _____

Department(s)/Date:

[ ] zero fiscal note(s) Dept of Labor 4/26/90 (for SB 529 + CS SB 529 (L+C))

[ ] appropriation-no fiscal note

[ ] Governor's bill w/fiscal note

SIGNING DO PASS:

Patel Bodey

OTHER RECOMMENDATIONS:

Jan Faiks - No Rec - to be appr
extensive legal problems

no rec.

Chair: Signature and Recommendation

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: SB 529
PUBLISH DATE:

FISCAL NOTE

REQUEST:
Revision Date:
Agency Affected: Labor
Title: "An Act relating to exemptions to the prohibition against unfair labor practices."
BRU: Labor Standards & Safety
Sponsor: Senate Labor & Commerce
Components: Wage & Hour
Requestor: Senate Labor & Commerce

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Note: There is no fiscal impact in FY'90.

Prepared by: Tom Stuart, Director
Phone: 465-4855
Division: Labor Standards & Safety
Date: 4/26/90

Approved by Commissioner: Jim Sampson
Date: 4/26/90
Agency: Department of Labor

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

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 20, 1990

SUBJECT: Exemptions to prohibition against unfair labor practices
(Work Order No. 6-2330)

TO: Senator Pat Rodey

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have requested comments on a memorandum prepared by Helene M. Antel dated January 30, 1990, concerning the draft language from which the draft bill referred to above was prepared.

The memo suggests that a state resident hiring preference can be implemented by unions representing state employees in the construction industry if the state Public Employment Relations Act (PERA) is amended to permit prehire agreements between the unions and the state. The contracts between the state and the unions would then require the state to use a union hiring hall to fill those positions and would prohibit the state from entering into subcontracts with non-union contractors. The internal union hiring hall procedures would impose residence standards on those referred to state jobs.

The procedures proposed by the draft appear to involve a significant change in the status of workers on public construction contracts. As I understand the present practice, the workers are employed by the contractors who bid for the state contracts. The bill proposes that the employees would be state employees. The practical consequences of this change include whether the employees would fall within an existing state employee bargaining unit, application of the Public Employees' Retirement System to these employees (however, nonpermanent, "project" employees are exempt from PERS) and state responsibility to provide employee benefits

(including workers compensation coverage and health insurance). The budget process should also reflect an increase in the number of state employees and a comparable decrease in the contracting out of these construction projects. Is it intended that the general contractors would also become state employees or would they remain independent contractors but be required to use the employees provided by the state?

The analysis relies on labor experience in the private sector. The federal constitution Privileges and Immunities Clause and the state and federal equal protection clauses apply to governmental rather than private action. Therefore, while the private sector experience is relevant, the application of that experience to the state must include consideration of those questions. Both the United States Supreme Court and the Alaska Supreme Court have held other attempts to legislate resident hire to be unconstitutional. In Robison v. Francis, 713 P.2d 259 (AK 1986), the Alaska Supreme Court relied on the federal privileges and immunities clause, stating that the opportunity to be employed in the construction industry in Alaska was a fundamental right for purposes of privileges and immunities analysis. To support infringing on nonresidents' rights, the state would have to establish that it had substantial justification for the discrimination, that nonresidents were a "peculiar source of the evil" of unemployment in the state, and that the means used to remedy the problem that nonresident employment in the state construction industry represented were closely tailored to the ends of the legislation. The state failed to meet its burden in Robison.

The state would not lose its obligation to abide by the federal constitution in order to comply with a state collective bargaining statute. The structure could fall to a constitutional challenge. If the hiring hall practices of the union contracting with the state defined the "local area" as the whole state, as the memo appears to suggest, it seems likely that a court would cut through the buffer that the union provided to forbid the state to enter into a contract that required it to discriminate against nonresidents. If a collective bargaining contract were in place, the court could find that the state had lacked the power to bind itself to an unconstitutional practice and require the state and the union to renegotiate the contract to permit the state to meet its constitutional obligations.

On a different subject, the memo analyzes the state Procurement Code requirements. Note that the definition of "service" contained in AS 36.30.990(15) excludes collective bargaining contracts. The state is not obligated to comply with the procurement code procedures when entering into collective bargaining agreements or other employment agreements.

If I may be of further assistance, please advise.

TBC:pl
WKP3/060

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

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

M E M O R A N D U M April 13, 1990

SUBJECT: Project labor agreements (SB 529)

TO: Senator Pat Rodey

FROM: Teresa B. Cramer TC
Legislative Counsel

You have requested additional comments on the contracting and hiring procedures proposed for public construction projects.

Your office has provided me with a copy of a memorandum from Carolyn E. Jones, Assistant Attorney General, in which Ms. Jones suggests that the state procurement code currently bars a state agency from requiring bidders to hire its labor force from a single source. She also suggests that the arrangement is vulnerable to constitutional attack. I would agree with both of these conclusions.

It would be possible to amend the procurement code so that specifications for public construction contracts could include a project labor agreement. SB 529 addresses the state's power as an employer to enter into a prehire agreement on its own behalf. It does not address the state's ability to enter into public construction contracts that require private contractors to secure their workers from a particular union. To do so, an amendment to AS 36.30.060, to permit agencies to include prehire agreements in the specifications for bids for public construction contracts, would be advisable.

The specifications for state contracts constitute state action and provide a basis for challenging the legislation. A bidder who did not use union labor or preferred to secure union labor through a local not included in the specifications could challenge the inclusion of the requirement in the bid specifications as a denial of equal protection. The state could point to the policy favoring collective bargaining for support of the bid specification requirement, but could not

justify, on the basis of resident hire, its choice of a union that included a resident hire policy over one that did not. In Robison v. Francis, 713 P.2d 259 (Alaska 1986), the court held that excluding nonresidents from public construction jobs so that more jobs would be available to state residents was not a permissible justification for discrimination under the privileges and immunities clause. Ms. Antel suggested that Image Carrier Corp. v. Beame, 567 F.2d 1197 (1977), offered some hope on the constitutional issues raised by the proposed contracting provisions. The case arose from a New York City resolution requiring that certain city forms be printed by union shops. Nonunion printing shops challenged the requirement as a denial of equal protection. The court held that the requirement imposed economic regulation only. The state policy in favor of collective bargaining provided a rational basis for the resolution. The dissent argued that the city, as trustee of the people, must conserve public funds and therefore found the union shop only policy as unreasonable and unrelated to qualifications for the job to be performed.

A challenge to the project labor agreements that are the basis for SB 529 would almost certainly include Privileges and Immunities and right to travel issues as well as equal protection claims. The Alaska courts have found the state's justifications for resident hire and local hire statutory requirements unpersuasive in recent years. It seems likely that if the court reaches the constitutional issues, the resident hire requirements would fall. However, a contractor's standing to raise the constitutional claims of a nonresident construction worker could be challenged and, as Ms. Antel points out, a nonresident's standing to assert claims against the state is also attenuated by the removal of the residence discrimination to the union.

If I may be of further assistance, please advise.

TBC:lmb
L10/066

STEVE COWPER, GOVERNOR

REPLY TO:

☐ 1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550
FAX: (907) 276-3697

☐ 1st NATIONAL CENTER
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☑ P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 20, 1990
HAND DELIVERED

Senator Patrick M. Rodey
Room 113-C, Capitol
Juneau, Alaska 99811

Re: SB 529 - project labor agreements

Dear Senator Rodey:

You have asked us to review a proposal by the International Brotherhood of Electrical Workers (IBEW) whereby the Alaska Energy Authority (AEA) would enter into project labor agreements which, it suggests, will permit the state to accomplish local hire objectives otherwise prohibited by the United States and Alaska constitutions. State v. Enserch Alaska Construction, Inc., No. 3539 (Alaska Supreme Court, December 18, 1989); Robison v. Francis, 713 P.2d 259 (Alaska 1986)

We have reviewed two memoranda by IBEW's counsel, the March 20, 1990 memorandum by legislative legal services attorney Teresa Cramer (No. 6-2330), and our own opinion of January 19, 1990. 1990 Inf. Op. Att'y Gen. (January 19; 661-90-0255). Each of IBEW's memoranda contains a different version of the proposal, but as nearly as we can make out, it suggests that AEA enter into agreements with building and construction trades unions to work on AEA projects and then require project general contractors to use the labor for which the state has contracted. It proposes legislation which would amend the Public Employment Relations Act (PERA) to permit public employers to enter prehire agreements to assure that such an arrangement would not be treated as an unfair labor practice under AS 23.40.110. SB 529 has been introduced to make this amendment to PERA.

IBEW suggests that internal union rules requiring persons who wish to be sent out from union hiring halls to be residents of the state or area where the construction is located will be immune from state court scrutiny because the unions in question would be governed exclusively by the National Labor Relations Act (NLRA) which preempts state action. It argues that the concern expressed in our January 19, 1990 opinion that requiring contractors to hire a particular labor force may constitute an anticompetitive practice under the Alaska procurement code is unfounded, as labor unions governed by the NLRA are generally exempt from prosecution under federal antitrust laws.

PERA and NLRA are mutually exclusive in their coverage; a single collective bargaining agreement between an employer and a unit of its employees cannot be both public sector and private sector. Thus, IBEW's proposal must be read as a choice by AEA between two alternatives: (1) hiring state employees and (2) requiring contractors to hire union labor. NLRA does not apply to public employers. Sec. 2 (2), NLRA, 29 U.S.C. sec. 152. Necessarily, any collective bargaining agreement between a state agency and a union would be outside NLRA, and any employees hired under such an agreement would be state employees. Temporary project employees are not entitled to participate in PERS or group health insurance, but hiring project employees does require the state to incur unemployment, workers' compensation, and other costs (including SBS, if AEA is a participating agency), and we imagine that such employees' bargaining representatives would seek at least health insurance in bargaining for their members. 1/ The state may be able to require contractors to use such employees in AEA's construction projects. However, it may be that AS 44.83.189, which provides that AEA's new projects are to be treated as public works of the state, can be read to make AS 35.15.010, disapproving construction by the state's own work force in most circumstances relevant here, applicable to AEA projects. 2/

We conclude, as did assistant legislative attorney Teresa Cramer, that an agreement between the state and labor unions would be subject to constitutional attack to the extent it required Alaska hire on AEA projects. In addition, we believe that our previous advice, that requiring contractors to use union labor may be unduly restrictive of competition under the procurement code, and vulnerable to constitutional attack under Enserch, is correct. In addition, after reviewing the authority cited by IBEW, we conclude that in fact such a requirement may pose antitrust problems, problems we did not consider in our earlier opinion. It appears to us that SB 529 is somewhat beside the point as far as local hire is concerned.

The time allowed us for a response to your inquiry is too brief to cover the legal questions raised by this issue in any detail, but we do explain our conclusions at some greater length below.

1/ But See 2 AAC 10.220(b)(2), which suggests that persons not eligible for retirement benefits are not employees under PERA.

2/ As AS 35.15.010 refers to construction by the department of transportation and public facilities, it could also be argued that it would not apply to AEA.

1. Collective bargaining agreements between the state and the building trades unions which require resident hire will be vulnerable to constitutional challenge.

Legislative legal counsel's analysis of the legal problems presented by imposing a residency requirement is correct: a local hire requirement in an agreement to which the state is a party is subject to constitutional challenge under the federal privileges and immunities clause. Cramer memorandum at 2, citing Robison. Such a scheme may also offend the equal protection clause of the Alaska Constitution. Enserch, slip op. at 25.

IBEW suggests in its March 22, 1990, letter to you that the jurisdiction of the Alaska Labor Relations Agency over unfair labor practices would preclude the jurisdiction of the court in a constitutional challenge to the collective bargaining agreement. Id. at 3. This is clearly incorrect; there is no doubt that the courts of this state have the jurisdiction to hear and decide cases where the constitutionality of the state's conduct is challenged. AS 22.05.010. The fact that an administrative tribunal has primary jurisdiction in a dispute does not preclude either the court's general jurisdiction, or appellate review; indeed the ALRA's decisions are reviewable under AS 44.62.560 and AS 22.05.010(c). See AS 23.40.130.

IBEW suggests in the same paragraph in which it addresses the above issue that the NLRA preempts any consideration by the Alaska courts of discrimination by unions covered by federal labor legislation. This assertion would be correct if the collective bargaining agreement were between the contractor and its workers, rather than the state and the building trades unions, and if the state did not require local hire in its contract with the successful bidder. However, it is our understanding that whether there is an agreement between the state and labor unions, or a contract between the state and its contractors requiring them to hire union labor, the idea of the proposal is that resident hire would be a condition of the contract. There would seem to be little difference between requiring the contractor to hire residents and requiring the union hiring hall to accept only resident applicants under either the federal or state constitutions. Cf. Enserch; Robison. The NLRA cannot protect the state from an Enserch or Robison challenge if such conditions are imposed by a state contract. 3/ If a union hiring hall happens to

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3/ The authority cited by IBEW for the proposition that unions may discriminate in favor of local residents does not involve state

(continued...)

impose a resident requirement, it may be that local hire will occur in the manner suggested by the IBEW. However, it must happen without the compulsion or involvement of the state to be protected by the NLRA.

2. Requiring contractors to hire only union labor may constitute an anticompetitive practice.

If the intent of the IBEW's proposal is that AEA require its contractors to hire union labor on its projects, and if the contractors are not restricted to local hire, a different question is presented. As we observed in our January 1990 opinion, the procurement code, AS 36.30, applies to AEA projects. The code prohibits unduly restrictive specifications and anticompetitive practices. AS 36.30.060(c); AS 36.30.920; AS 36.30.930. See also 2 AAC 12.090; 2 AAC 12.790. Requiring contractors to hire labor from a particular source would seem to offend these provisions, and may, as we noted, be subject to an Enserch challenge as well.

The procurement code exempts collective bargaining agreements from its provisions. See AS 36.30.990(15), excepting collective bargaining agreements from the definition of "services". However, that exemption is addressed to the state's entry into collective bargaining agreements, not to the specifications which may be imposed upon its contractors. 4/

3/ (...continued)
action. IBEW has also cited in support of its position the collective bargaining agreement between Public Employees Local 71 and the state, which calls for preferential hiring for residents. Federal courts have upheld residency (of no particular duration) and continued residency requirements for municipal police and fire employees. See, e.g. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) (per curiam). Some state courts have upheld such requirements as well. See, e.g. Detroit Police Officers Ass'n v. City of Detroit, 190 N.W. 2d 97 (Mich. 1971); Ector v. City of Torrance, 514 P.2d 433 (Cal. 1973). However, the question of whether public employment is subject to the federal privileges and immunities clause has been referred to as unsettled. Internat'l Organization of Masters, Mates, and Pilots, 831 F.2d 842, 846 (9th Cir. 1989). We leave to another day the question of the validity of the Local 71 contract provision in light of Robison and Enserch. See also, State v. Wylie, 516 P.2d 142 (Alaska 1973).

4/ IBEW suggests at page 10 of its January 30, 1990 internal memorandum that because AEA is involved in the construction of utility services, the allowance by the procurement code of sole
(continued...)

If the union's proposal (see March 22, 1990, letter at 6) can be construed as an agreement between building trades unions and AEA that AEA will require union labor on its projects, it may also have antitrust consequences. United Mine Workers of America v. Pennington, 381 U.S. 657 (1965), is cited in IBEW's January 30, 1990 memorandum in support of an argument that unions are broadly exempt from the requirements of antitrust statutes. In Pennington the United States Supreme Court noted that a union is not entitled to exemption from antitrust laws if it enters an agreement with a group of employers to impose terms and conditions of employment on bargaining units not covered by its collective bargaining agreement, even where the agreement concerns bargainable subjects such as wages. Id. at 665-6. Relying on similar reasoning, the court held in a later case that an agreement between a union and a contractor was not exempt under antitrust laws where it excluded all nonunion subcontractors from a portion of the market. Connell Co. v. Plumbers and Steamfitters, 421 U.S. 616, 623 (1975). Such an agreement would not be a collective bargaining agreement with an employer, or an agreement among employees for mutual aid and protection under AS 45.50.572. Thus such an agreement would not appear to be exempt from antitrust scrutiny.

This is not to suggest that we are certain an antitrust violation exists; the law of labor exemptions to antitrust legislation continues to evolve, rendering any meaningful advice on the subject difficult at best. C.A. Hills, Antitrust Advisor, sec. 13.13 at 832-3 (3d ed. 1985). However, we are bound to point out that restrictions such as those proposed by IBEW are not always protected by the labor exemption in the private sector, and may not be protected here. Connell presents ready analogy for interpreting state antitrust and procurement code provisions concerning anticompetitive practices and restrictive specifications.

The fact that subcontracting is a mandatory subject of bargaining in the private sector has no bearing here, where there is no state bargaining unit whose work is to be contracted out. See IBEW March 22, 1990 letter at 6.

3. SB 529 will have no impact on local hire; it is not clear that it is necessary for any other purpose.

4/ (...continued)
source contracts for the procurement of utility services applies. 2 AAC 12.410(d)(4). This regulation is clearly intended to apply to obtaining electricity, telephone, and other utility services usually delivered by monopolies, not to the construction of utility facilities.

SB 529 would exempt prehire agreements with the building trades (agreements between unions and employers entered into before a workforce is hired) from the unfair labor practices prohibited by AS 23.40.110. Such agreements are permitted under the NLRA for the construction industry.

A public employer may voluntarily recognize a labor organization as the exclusive representative of a unit of its employees. AS 23.40.100(d). The ALRA may approve such an arrangement if it is able to verify the majority status of the labor organization. 2 AAC 10.130. SB 529 would not alter this requirement, as it merely prevents the imposition of sanctions on an employer for entering into an agreement before such a determination is made. The legislation would not protect the state from constitutional litigation if a resident hire requirement were challenged. It would likely be little used, given AS 35.15.010.

SB 529 would not convert recruiting, selection, and hiring into a mandatory subject of bargaining. See IBEW January 30, 1990 memorandum at 24. While it is true that the NLRA has instructive value, and that the ALRA will give great weight to relevant National Labor Relations Board (NLRB) decisions when determining unfair labor practice cases (2 AAC 10.250(c)), it does not follow that in all matters it is an appropriate interpretive guide for PERA. In particular, hiring, recruiting, selection, and classification of employees are critical components of Alaska's constitutionally mandated merit system, and are among the "general policies describing the function and purpose of a public employer," not recognized by the NLRA, and excepted from those wages, hours, and working conditions required to be collectively bargained under PERA. AS 23.40.250(8). See also Order and Decision No. 110 (Alaska Labor Relations Agency, August 26, 1987). 5/

You may wish to consult with the department of administration's division of labor relations as to any policy implications of the bill. There seem to be no legal issues other than those mentioned above.

5/ The state's contracts with Local 71 do allow for the use of their hiring hall, in recognition that the positions Local 71's members hold have not lent themselves to traditional merit system recruiting and selection devices. However, the use of the hiring hall remains a permissive subject.

Summary and additional comments

In summary, we cannot assure you that AEA (or any other state agency) can enter into an agreement, either with collective bargaining representatives or with contractors, limiting labor on its projects to residents, without being subject to an Enserch or Robison challenge. If resident hire requirements are omitted from such agreements, AEA can (a) enter into collective bargaining agreements and thereby acquire its own work force, although its use of such a force for construction of public works may be restricted by AS 35.15.010 or (b) enter into agreements with labor unions that it will require its contractors to hire union labor, although this may constitute a violation either of the procurement code or antitrust legislation.

Another option not fully addressed in IBEW's proposals (although it may be what they had in mind when they wrote their March 22, 1990 letter to you) is a project labor agreement in which the owner of a project agrees with a union or group of unions as to the terms and conditions of employment which will govern the relationship between labor and the contractors on a project, including the requirement that all hiring be done through the unions' hiring hall(s). Such an arrangement was approved by the Massachusetts Commissioner of Labor for the Boston Harbor clean-up project on the theory that a no strike/ no jurisdictional dispute agreement by the union for the 10 year duration of the project was in the public interest. 35 Construction Labor Rept. 1264 (February 28, 1990). We are not familiar with the Massachusetts procurement code, but we would observe that under Alaska's procurement code (which is interpreted by regulations in the department of administration, not department of labor rulings), such an agreement is not a collective bargaining agreement, and thus AEA would have to put the project labor agreement itself out to bid. In addition, resident hire could not, under Robison and Enserch, be a condition of such a labor agreement. We must also point out that the Boston Harbor agreement has been challenged in federal district court on the grounds that it is anticompetitive, a violation of antitrust laws, of various provisions of the NLRA, the Employee Retirement Income Security Act (ERISA), and of the equal protection and due process guarantees of the United States Constitution. 36 Construction Labor Rept. 3 (March 7, 1990). The challengers also dispute the ruling that the agreement is in the public interest, claiming that it will increase the cost of the project. Id.

Please advise us if we can be of any further assistance in this matter.

Sincerely yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:
Kathleen Strasbaugh
Assistant Attorney General

KS:me

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GARY BROOKS
BUSINESS MANAGER • FINANCIAL SECRETARY

JOSEPH HODGE
PRESIDENT

March 22, 1990

Via Telefax

Senator Pat Rodey
P.O. Box V
Juneau, Alaska 99811

Re: Exemptions to Prohibition Against
Unfair Labor Practices

Dear Senator Rodey:

Thank you for the opportunity to review the thoughtful comments of Ms. Teresa Cramer and for your invitation to respond. In reviewing her memorandum, I find that many of Ms. Cramer's concerns can be readily addressed. In fact, there is only one which truly requires a detailed analysis. It is also a concern that I share. Apparently, we must have somehow given Ms. Cramer the impression that if our proposal were adopted, the State would become involved in actually hiring employees itself for work on State-funded construction projects. This is not the case. Our proposal involves no significant changes in the status of workers on public contracts at all. In fact, the present practice described by Ms. Cramer would continue and the workers on any State construction project would still be employed by private contractors. The only thing that would change is the number of Alaska resident workers on the job.

There are also several legal issues that should be reviewed. As explained in my earlier memoranda, the Public Employment Relations Act ("PERA") provides full collective bargaining rights to the State and its employees. Unlike the National Labor Relations Act ("NLRA"), however, PERA does not currently authorize the State as an "employer" to enter into a collective bargaining agreement ("CBA") with a labor organization in the absence of an actual workforce. Described alternatively, PERA does not currently allow an employer to enter into a collective bargaining relationship with a "non-majority status" union. The term of art used to describe such a relationship between an employer and a union in the absence of a workforce is a "pre-hire agreement." A pre-hire agreement, however, is as much a CBA as any agreement addressing the terms and conditions of an actual bargaining unit or

workforce.

Originally, the NLRA also neglected to provide statutory authority for such a relationship. The realities of work in the construction industry, however, brought to light a need for special consideration; since a business entity involved in construction contracting will rarely have a stable workforce and at times will have no workers at all, unless an exception were made, such an entity would not be able to avail itself of the opportunity to enter into a contractual relationship with a labor organization. Otherwise willing employers were thus estopped from engaging in collective bargaining.

For some time, we thought that given the absence of a prohibition in PERA against the State entering into a pre-hire agreement, there was no reason to assume a pre-hire relationship were not permitted. In fact, to a certain extent, I continue to be of that mind. On the other hand, enabling legislation would certainly eliminate any doubt; hence the introduction of SB 529. The real reason it is important to clarify the State's ability to execute a pre-hire agreement, however, is that there are certain very important rights that are available only to parties to a collective bargaining relationship. Conduct which is legal as part of a collective bargaining relationship is often illegal and under some circumstances, unconstitutional in any other context. In this case, the right at issue is that of a labor organization to discriminate against non-residents in the offering of its services as an employment agency.

Ms. Cramer is also correct that to a certain extent my analysis relies upon labor experience in the private sector. The NLRA does not apply to government employers. The reason it does not, however, is only because our federal system entitles the states to regulate their own labor relations. The inapplicability of the NLRA to a government employer only means that a government employer is free to obligate itself to the collective bargaining process to a lesser, an equal, or a greater extent. There is thus no reason to doubt the ability of the State of Alaska to legislate for itself the right to enter into pre-hire agreements in the conduct of the State's labor relations. This is particularly true since in deciding what is or is not an unfair labor practice, the State Labor Relations Agency ("LRA") would be obligated to look to the NLRA and its jurisprudence to determine the answer. Since approval of pre-hire agreements, including those with hiring hall clauses that discriminate on the basis of residency, would be unanimous in the federal sector, there is little reason to doubt the ability of the State to give itself similar authority. In

fact, SB 529 solves this problem by clearly stating on its face, that the execution of a pre-hire agreement is not an unfair labor practice.

The question then becomes what exposure would the State have were it to then enter into a pre-hire agreement that recognizes the right of a labor organization to discriminate on the basis of residency. First of all, that is not exactly how it will work. The pre-hire agreement would only require the State to establish a pre-qualification for bidders on State funded construction projects. All bidders, whether bidding as contractors or subcontractors, would be required to enter into a collective bargaining relationship with an appropriate labor organization. The labor organization would then have as part of its internal administrative rules, provisions which limit access to its employment referral services, to only Alaskan residents. As a result, when the successful low bidder then places a work call to the appropriate union, only Alaskan residents will be dispatched and thus there will only be Alaskans employed on State funded construction projects. The beauty of the system lies in the fact that both Congress and the United States Supreme Court have given this discriminatory union practice their seal of approval. In fact, it is a federally-guaranteed right.

Ms. Cramer was concerned that the Alaska Supreme Court would find the proposed PERA amendment arguably violative of the federal privileges and immunities clause. I do not share this concern. To reach that question, the Alaska Supreme Court would first have to find that the legislation authorized judicially reviewable government action as opposed to an unfair labor practice remediable only by the State Labor Relations Agency. Even assuming that finding were made, the Supreme Court would still be unable to void the pre-hire statute without adversely affecting the federally-guaranteed rights of the labor organization involved. The matter would then become even more complicated. The right to discriminate on residency grounds granted unions under the NLRA -- no matter how distasteful to our Supreme Court, has been upheld by the NLRB and the United States Supreme Court. See e.g., Bricklayers Union, 49 LRRM 1223 (1961), where the NLRB affirmed the validity of employment discrimination based upon area residence and IBT v. NLRB, 365 U.S. 667 (1961), 47 LRRM 2906, where the Supreme Court held that employment discrimination as provided for under Section 8(f) of the NLRA -- the direct source of our proposed legislation ". . . is not outlawed." Id. at 2908, 2909 (emphasis supplied).

Clearly, the question of State court jurisdiction will also be raised. Any lawsuit filed challenging the legality of the proposed

legislation will inevitably involve a challenge to the right of a labor organization to do what Congress and the United States Supreme Court have already said it may. Given the United States Supreme Court's ardent defense of the rights created by the NLRA against governmental interference at any level, however, it would be difficult for the State court to invalidate the proposed legislation without finding itself in the middle of a briar patch of challenges to its jurisdiction. A State court does not have jurisdiction to review, nonetheless invalidate any rights created by the NLRA.

The question whether the NLRA creates rights in labor organizations that are protected against government interference has been repeatedly upheld by the United States Supreme Court. See e.g., Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986) (Golden State I) and Golden State Transit Corporation v. Los Angeles (Golden State II), 58 U.S. Law Week at 4033 (December 5, 1989). The United States Supreme Court has also repeatedly interpreted the congressional intent in enacting the NLRA to require that parties to a CBA must be free of government regulation or interference. Machinists v. Wisconsin Employment Relations Comm., 427 U.S. 132, 150, 155 (1972). The right of a labor organization to enter into a pre-hire agreement with an employer, which does nothing more than accord recognition to another union right created by the NLRA to discriminate on the basis of residency, is a right which cannot be abridged by government regulation or State Supreme Court action. Only Congress has the right to retract, modify or limit the rights and liberties afforded a labor organization by the NLRA. In our opinion, then, it would be very difficult -- not impossible, but very difficult for the Alaska Supreme Court to strike down this particular provision as it affects the State without adversely, and therefor impermissibly affecting the union.

On the other hand, Ms. Cramer's suggestion that the Supreme Court might cut through the union's "hiring-hall buffer" and forbid the State to enter into a contract that required it to discriminate against non-residents is an astute and a very real possibility. I do share this concern. In fact, I believe that it is probably the only grounds on which the proposal could be challenged. I am still optimistic, however, although more cautious, that a constitutional challenge on this basis would also be unsuccessful. My optimism is based upon the fact that we would for the first time have before the court a compendium of compelling and legitimate interests justifying the right of a labor organization to discriminate, that go far beyond the interests that our Supreme Court rejected, when they were put forward by the State. And, voiding a contract as

having an unconstitutional effect is simply more difficult a task than directly voiding a statute.

Another question would be whether the State is somehow violating the federal constitution by doing what has been proposed. On this point, we should note that there is nothing in the Federal Service Labor Management Relations Act ("FSLMRA"), that prohibits pre-hire agreements in government labor-relations. And, in fact, there are CBAs between the federal government and unions representing federal employees that contain limitations upon the right of the federal government to subcontract federal construction work. In addition, the State of Alaska has actually been doing much of what we propose here for many years. For example, in its CBA with Local 71, the State has for sometime agreed to utilize Local 71's hiring hall -- a hiring hall which contains the very area or residence preference provisions discussed by this and my previous memoranda. See excerpt attached. Further, the Alaska State Labor Relations Agency has never taken the position that it is an unfair labor practice for the State of Alaska to enter into such an agreement and for the foregoing reasons, it is unlikely that it will. A pre-hire agreement which accords recognition to a union's hiring hall is simply not an unfair labor practice.

Finally, we would argue that even were the practice challenged, since the discriminatory provision is contained in the union's internal hiring hall rules or administrative procedures, the attack could only be properly be focused against the union and not the State. And, if that were the case, the complaint could only be lodged with the NLRB or the LRA. The NLRB and LRA have exclusive jurisdiction to determine whether a union has unlawfully discriminated in the operation of its hiring hall.

SUMMARY

Our proposal would not add any workers to the State employment rolls and, thus, there would be no increased costs to the State as a result of workers compensation coverage or health care insurance. We also believe that since the proposed legislation merely confirms in large part that certain rights traditionally enjoyed by labor organizations in the federal sector may likewise be enjoyed in the State, a constitutional attack upon the statute would probably be unsuccessful. It is, in fact, likely that the State court would be without jurisdiction to rule upon the validity of the statute since its analysis would inevitably have an adverse impact upon federally-guaranteed rights which the United States Supreme Court has said cannot be abridged by any government entity, State court or otherwise.

The legality of the State entering into an agreement which would limit its right to subcontract work to only contractors having a collective bargaining relationship with a labor organization is on firm ground. The anti-trust exemptions that pertain to the collective bargaining relationship are well established and would easily apply. Only where a labor organization attempts to restrain trade in commodities other than the services of its members and in the form of contractual relationships with entities other than employers, does the threat of an anti-trust violation become material. Since the bidder pre-qualifications discussed constitute nothing more than an agreement about subcontracting, there is no reason why they should not be legal. Subcontracting is a traditional mandatory subject of collective bargaining.

The only likely challenge in this case would be to the legality of the State entering into a contract which contains a commitment by the State to require its contractors and subcontractors to utilize a labor organization's hiring hall. Certainly, the attenuated nature of any such lawsuit should be plain and for that reason alone, we have more cause to be optimistic than we would if the anticipated lawsuit were simply a constitutional challenge to a state statute. In addition, since the discriminating entity is a labor organization whose right to discriminate has been consistently upheld by the United States Supreme Court as constitutional and by the NLRB as fair, we have further reason to be optimistic. Finally, there is a good possibility that the State court's jurisdiction could be successfully challenged and that the matter would either be resolved in federal court or before the NLRB -- two forums where a greater understanding can be had of the rights created by the NLRA, the proposed legislation and, thus, the latter's legitimacy.

If you have any further questions, please let me know.

Very truly yours,

IBEW LOCAL UNION 1547

Helene M. Antel
General Counsel

HMA/cfd
cc: Gary Brooks, Local 1547 Business Manager

ARTICLE 1
PURPOSE

It is the objective of the parties that the obligation of the Employer for the successful conduct of its business and the fulfillment of its responsibilities to the employees covered by this Agreement be carried on without interference arising from differences between the parties.

The Union, representing the employees of the Employer, and the Employer desire to establish and maintain, through harmonious cooperation, a standard of conditions and procedures to provide for orderly collective bargaining relations, prompt and equitable disposition of grievances, and fair wages, hours, and working conditions for the employees covered by this Agreement.

ARTICLE 2
RECOGNITION

The Employer recognizes, during the term of this Agreement, the Union as the sole and exclusive collective bargaining representative for all employees working in the classifications in the Labor, Trades and Crafts Unit and as the representative of all such employees in interpreting this Agreement and adjusting disputes.

ARTICLE 3
UNION ACTIVITIES

The Employer agrees that it will not in any manner, directly or indirectly, attempt to interfere between any of its employees and the Union; it will not in any manner restrain or attempt to restrain any employee from belonging to the Union or from taking an active part in Union affairs; and that it will not discriminate against any employee because of the employee's Union membership or lawful Union activity.

ARTICLE 4
EMPLOYMENT REFERRAL PROCEDURES

1. The Union agrees to maintain preferential hiring procedures for the purpose of soliciting qualified workers in order to fill all Employer referral requests. Except for promotions, demotions, transfers and emergency appointments, the Employer agrees to use such referral services and will call upon the Union to furnish all qualified workers required. The Employer further agrees to notify the Union of all promotions, demotions, transfers and emergency appointments.

2. The Union shall create a hiring committee within thirty (30) days of the signing of this contract, composed of not more than three (3) individuals appointed by the Union, to supervise and control the operation of the job referral system herein.

3. The Union agrees to accept and review applications, on forms provided by the Employer, from all those wishing to apply for possible openings with the State. Selection of applicants for referral to jobs shall be non-discriminatory and shall not be based on nor affected by race, creed, color, age, sex, national origin or political affiliation or activity. The Union agrees that it will not discriminate against non-Union workers in referring applicants to the Employer, and the Employer agrees that it will not discriminate against Union workers in selecting job applicants referred by the Union.

4. a. The parties recognize the primary importance to employ residents of Alaska. Both the Union and the Employer shall give first preference to qualified residents of Alaska. Also, preference shall be given to qualified residents in the immediate area of the job call.

   b. It is understood the Employer will have need for employees with special skills and abilities. The Union agrees to refer persons possessing such skills and abilities and to honor all such bona fide requests.

   c. The parties recognize the need to hire the handicapped. A handicapped individual is one so specified under regulations issued by the Vocational Rehabilitation Division of the Department of Education.

   d. Pursuant to the parties mutual recognition of the principles of Equal Employment Opportunity and Affirmative Action, the parties agree that selective certification by referral will be made to satisfy the State's affirmative action objectives. When a specific request is made for a referral to fill a position with an applicant in a protected category, the Union will make every effort to honor such request, providing such under utilization has been specified and approved by the Division of Equal Employment Opportunity. In such cases, the Union will have seventy-two (72) hours, rather than forty-eight (48) hours, to make the referral.

   e. The criteria expressed in the subsections above may be used as justification for an appointment from other than the top qualified and available candidates; provided, however, the individual is registered with the Union.

5. The Employer retains the right to reject any job applicant, but the applicant and the Union shall be entitled to the reason for such rejection.

6. In the event the Union is unable to supply the Employer with two (2) qualified workers within forty-eight (48) hours (Saturdays, Sundays and holidays excluded) when called upon by the Employer, the Employer may procure workers from other sources; provided, however, that in such instances the Employer shall promptly furnish the Union with the names of such workers, their classification and date of hiring. In any emergency resulting from an act of God or natural disaster, the Employer may temporarily procure workers from any source.

7. It is further agreed that all workers employed by the Employer who are not already members shall become members of the Union on or before the

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GARY BROOKS
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PRESIDENT

February 7, 1990

Senator Pat Rodey
Pouch V
Juneau, Alaska 99811

Dear Senator ~~Rodey~~ Pat:

Since the Alaska Supreme Court issued its opinion in State v. Enserch Alaska Construction, Inc. on December 18, 1989 an air of defeatism has replaced the hopes of many that a viable local hire law would ever be feasible. Apparently, we have yet to design a law that can both achieve that goal and at the same time pass constitutional muster. Defeatism, however, is still premature; there does exist another means to solve the State of Alaska's (the "State") compelling need to protect its local resident workers. The State can easily do by contract what it has been unable to accomplish by law.

In the context of collective bargaining, the federal government has long recognized the validity of an employer's need to assure a loyal, ready pool of local residents who will remain on the job until completion. Local hire preference provisions contained in a collective bargaining agreement ("CBA") have not only been upheld under federal case law but are expressly authorized by section 8(f) of the National Labor Relations Act which traditionally provides guidance for the State Labor Relations Agency in administering the Public Employment Relations Act.

All that is required is the execution of a CBA between the State and a labor organization whose internal rules require satisfaction of certain residency standards as a prerequisite to an applicant's utilization of the union's hiring hall or job referral services. If such an agreement were executed, the State would have secured a legally defensible means to limit work on state funded construction projects to Alaskan residents. In fact, since the means would be the product of collective bargaining instead of legislation, this kind of resident preference would not be vulnerable to constitutional challenge.

It is also important to note that even though the resident preference would be contained in a CBA, it is illegal for a union

to deny non-union workers the right to seek employment through its hiring hall. Thus, all qualified Alaska resident workers would be able to seek work on State-funded construction projects through the hiring hall of any union signatory to the CBA. And, all Alaskans, whether union members or not, would have secured a legally defensible priority status vis-a-vis non-residents in competing for State-funded construction jobs.

Certainly, this is an area warranting an in-depth analysis. I believe the International Brotherhood of Electrical Workers, Local Union 1547 ("IBEW") has found a viable way to ensure full employment for the Alaskan worker. The only questior is will the State have the courage and commitment to follow. To that end, I have enclosed a copy of an internal memorandum prepared by IBEW's General Counsel which should address most, if not all, of your questions. However, time is of the essence and I would appreciate the opportunity to discuss this proposal with you in person at your earliest opportunity.

Very truly yours,

IBEW LOCAL UNION 1547

Gary Brooks
Business Manager

GB:csd

Enclosure

MEMORANDUM

State of Alaska
Department of Law

TO: Robert E. LeResche
Executive Director
Alaska Energy Authority

DATE: January 19, 1990
FILE NO: 661-90-0255
TEL. NO: 276-3550
SUBJECT: Project labor agreements

FROM: DOUGLAS B. BAILY
ATTORNEY GENERAL
By: Carclyn E. Jones
Carclyn E. Jones
Assistant Attorney General

You have asked two questions: whether the Alaska Energy Authority (AEA) may negotiate and execute a project labor agreement with one or more unions, and whether the authority may then require, as a contract condition, that the successful bidder on a construction procurement operate within the terms of the project labor agreement. While the authority may execute contracts for construction of power projects, it probably cannot execute a project labor agreement that prefers the hire of employees who are members of a labor union.

The authority has the power to contract for the construction of a power project and "to enter into contracts or agreements with respect to the exercise of any of its powers...." AS 44.83.080(10), 44.83.080(14). Presumably, the authority may enter into a project labor agreement with one or more unions unless a general prohibition exists for all state agencies.

I have examined federal and state labor law. Title 29 of the United States Code Annotated and Title 23 of the Alaska Statutes are silent on this question. The state procurement act, however, is not.

The procurement of construction of state facilities -- including projects by the authority -- is governed by AS 36.30. The commissioner of the department of administration is responsible for adopting regulations governing the preparation, revision, and content of specifications for construction required by an agency. AS 36.30.060(a). The specifications required by the agency "must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive." AS 36.30.060(c). Not only is competition encouraged in state procurements but anticompetitive practices are strictly forbidden and may subject an offeror or bidder to prosecution of a class C felony. AS 36.30.920; AS 36.30.930(2).

The commissioner has implemented AS 36.30, in part, by adopting regulations that

> (1) prohibit the use of specifications that have "the effect of exclusively requiring a proprietary ... construction item, or procurement from a sole source, unless no other manner of description will suffice," 2 AAC 12.090;
>
> (2) prohibit the use of contract terms and conditions that "have the effect of unnecessarily limiting competition or exclusively requiring a proprietary ... construction item or procurement from a sole source unless no other requirements will suffice," 2 AAC 12.790.

A requirement that the successful bidder on a procurement contract hire its labor force from a single source would appear to come within the statutory and regulatory prohibitions contained in AS 36.30.060, AS 36.30.930(2), 2 AAC 12.090, and 2 AAC 12.790. A specification or contract term of this nature would only be permissible upon a showing that no other manner of description and no other requirement would suffice. 2 AAC 12.090, 2 AAC 12.790. Making this showing could prove to be a very heavy -- if not impossible -- burden for the authority.

An arrangement that would limit potential bidders to a particular labor agreement is also vulnerable to a constitutional attack. In the recent case of State v. Enserch Alaska Construction, Inc., No. 3539 (Alaska Supreme Court, December 18, 1989) the Alaska Supreme Court struck down on equal protection grounds the Regional Preference Law, a statute requiring local hire for publicly funded projects constructed in economically distressed areas. Many features of the proposed arrangement resemble those of the Enserch case.

AEA would give a preference to (or impose an absolute requirement on) contractors on its projects who employed union labor. Presumably, the rationale for such a preference is that unionized labor is better paid and protected than nonunion labor, and that this is a social and economic benefit to the state which outweighs the emphasis placed in public contracting on getting the best price.

The court in Enserch rejected a similar goal under the Regional Preference Law. The state had argued that, by conferring an economic benefit on the residents of a particular region, unemployment would be reduced and the social harms resulting from chronic unemployment could be remedied. Enserch, slip op. at 29. While such goals were important, they could not be achieved by the

disparate treatment of unemployed workers in another region. Id., at 30. 1/

Arguably, since all prospective contractors would be required to hire union labor, they would not be treated differently at least as to competition amongst themselves. However, if a contractor has no existing relationship with the trade unions or union subcontractors, they may be disadvantaged.

Construction workers not currently members of unions would be required to obtain membership in order to be employed on a project when the bid is ultimately awarded. Assuming that employment must be obtained through a hiring hall, and that some sort of seniority system were in force for referrals, nonunion workers would at a minimum be delayed in obtaining work, if not foreclosed altogether. This result is acceptable in the private sector. However, it may not be acceptable where occasioned by government action.

Having determined that the right to engage in an economic endeavor is an important right, the Alaska Supreme Court takes a dim view of government action which favors one economic group over another. Enserch, slip op. at 27 and 30. In Enserch, the court concluded that favoring one group of similarly situated workers over another was not a legitimate goal.

CONCLUSION

The Alaska Energy Authority has the power to enter into project labor agreements as long as they do not conflict with the language and intent of laws generally applicable to state agencies. A project labor agreement that required a project contractor to hire employees directly from one source -- that is, a labor union -- would probably discourage competition and be overly restrictive. Such a contract term would be permissible under the state procurement act only if the authority could demonstrate that it had no other alternative. Even if the agreement survived a challenge under the state procurement act, it would still be constitutionally vulnerable where it preferred one group of laborers over another.

CEJ/jds

1/ Even if we assume that the goal of protecting labor by ensuring better wages, this goal is already being served by existing prevailing wage legislation such as the Little Davis-Bacon Act, AS 36.05.

M E M O

DATE: January 30, 1990

TO: Gary Brooks, Business Manager

FROM: Helene M. Antel, General Counsel

SUBJECT: Alaska Energy Authority/Project Labor Agreements

CONFIDENTIAL ATTORNEY/CLIENT COMMUNICATION

****

At your request, I have analyzed whether the Alaska Energy Authority ("AEA") and a labor organization could lawfully negotiate and execute a collective bargaining agreement ("CBA") in the form of a project labor agreement or otherwise. You have also asked me to analyze whether, (1) AEA and a labor organization could as part of their agreement, include language that would limit the ability of AEA as the employer to subcontract work to non-signatory or non-union subcontractors and, (2) whether the agreement could contain a resident hire preference. In structuring my inquiry, I have assumed that any contract between AEA and the labor organization at issue would either prohibit subcontracting to other than signatory unions or require that all subcontractors utilize the labor organization's hiring hall. Finally, I have included a discussion of the availability of residency preference language when contained in a hiring hall agreement, under both federal statutory and case law.

At the outset, it is important to note that each of these inquiries entails a subtle analysis of several statutory schemes

both on the state and federal level as well as still developing lines of common law in the areas of anti-trust, labor relations as well as the Federal and State Procurement Acts ("FSPA"). The complexity of the issue, however, has not frustrated your desire for cogent answers to the questions posed. To the contrary, there is a very distinct course which, if chartered correctly, should fully facilitate the successful negotiation of precisely the type of CBA I believe you seek.

My inquiry began with AS 44.83.080, which defines the powers of the AEA to include the ability:

> (10) To enter into contracts with the united states or any person and, subject to the laws of the United States and subject to concurrence of the legislature, with a foreign country or its agencies, <u>for the financing, construction, acquisition, operation and maintenance of all or any part of a power project</u>, either inside or outside the state, and for the sale or transmission of power from a project or right to the capacity of it or for the security of any bonds of the authority issued or to be issued for the project. (emphasis supplied).
>
> (14) to enter into contracts or agreements with respect to the exercise of any of its powers, and to do all things necessary or convenient to carry out its corporate purposes and exercise the powers granted this chapter;"

Given this broad grant of statutory authority, there would appear to be little reason why the state could not enter into a contract with a labor organization or any other entity for the "construction, acquisition, operation or maintenance of all or any part of a power project . . ." AS 44.83.080 §§ 10. That such a

contract may include a labor organization as a party is supported by the Public Employment Relations Act ("PERA"), AS 23.40.070, et seq. In its Declaration of Policy PERA mandates that the state as an employer shall "negotiate and enter into written agreements with employee organizations on matters of wages, hours, and other conditions of employment. AS 23.40.070 §§ 2. In fact, the Declaration of Policy suggests more; not only may the state engage in collective bargaining, collective bargaining is actually viewed as the preferred means "to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government . . ." We thus have a state statutory scheme that both empowers and encourages the state as an employer to enter into contracts through the collective bargaining process.

AS 23.40.110(5) makes it an unfair labor practice for the state "to refuse to bargain collectively in good faith . . ." Bargaining is obligatory, however, only with respect to those matters considered mandatory subjects of bargaining by operation of law. AS 23.40.110(3), which defines unfair labor practices, would also prohibit the state from "discriminat[ing] in regard to hire or tenure of employment or a term of condition of employment to encourage or discourage membership in an organization." However, AS 23.41.110(5)(b) additionally provides that:

> Nothing in this chapter prohibits an employer from making an agreement with an organization to require as a condition of employment, (1) membership in the organization which represents the unit on or after the 30th day following the beginning of employment or on

the effective date of the agreement, whichever is later; . . .

The language of both sections is nearly identical to the language contained in the National Labor Relations Act ("NLRA"), dealing with an employer's obligation "to meet at reasonable times . . . and negotiate in good faith with respect to wages, hours and other terms and conditions of employment . . ." AS 23.40.250, and the legality of union or agency shop agreements. Section 8(a)(3) (authorizing union shops) and Section 8(a)(5) (requiring good faith bargaining obligation of the employer. 29 U.S.C. §§ 8(1)(3)(5). Accordingly, federal judicial and National Labor Relations Board ("NLRB") law on these subjects will be instructive[1]

For many years, the NLRB held that an employer had no duty under Section 8(a)(5) to consult with the bargaining representative of its employees before deciding whether to subcontract part of its operation. As late as 1961, the NLRB took the position that the decision to subcontract was not a mandatory subject of bargaining. An employer's decision to subcontract was not a mandatory subject because it was seen to relate "to a pre-condition [of employment [[necessary to the establishment and continuance]] employment] relationship from which conditions of employment arise." Fiberboard Paper Products Corp., 47 LRRM 1547 (1961), supplemented, 51 LRRM 1101 (1962), enforced, 322 F.2d 411, 53 LRRM 2666 (CA DC, 1963), aff'd, 379 U.S. 203, 57 LRRM 2609 (1964).

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[1] It is well established that the State Labor Relations Agency has traditionally looked to the NLRA for guidance in administering PERA.

In 1962, however, the NLRB changed its position dramatically. In Town and Country Mfg. Co., 49 LRRM 1918 (1962), enforced, 316 F.2d 846, 53 LRRM 2054 (CA 5 1963). The NLRB held that an employer does violate Section 8(a)(5) if it fails to bargain over a decision to subcontract work, even if that decision is based solely on economic considerations. In fact, since 1962 it has been the NLRB's view, upheld by the federal judiciary that "the elimination or preservation of bargaining unit jobs, albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the NLRA. Id. Under both state and federal law, then, the state clearly not only may but under some circumstances must bargain about limiting its own ability to subcontract work to non-union contractors. And, from this duty to bargain, the ability to agree logically follows.

The next question is when does a subcontracting prohibition risk running afoul of the NLRA's "Hot Cargo" provision, Section 8(e) and the Sherman Anti-Trust Act? Interestingly, in Operating Eng. Local 12 (Griffith Co.), 86 LRRM 1690 (1974), rev'd and remanded, 545 F.2d 1194, 93 LRRM 2834 (CA 9, 1976), cert. den., 434 U.S. 854 (1977), supplemented, 102 LRRM 1129 (1979), a union's master agreement included a provision declaring that signatory contractors would not subcontract work to any contractor signatory to the master agreement whose name appeared on monthly list of employers who were delinquent in their payments to the union's fringe benefit funds. Contractors who violated this provision

became liable for the subcontractor's delinquencies. The NLRB held that the provision, which applied only to subcontractors bound by the union's agreement, did not violate Section 8(e). The NLRB concluded that "the agreement subscribed to by all contracting employers was substantially interested in the protection of the employees of those employers. The Ninth Circuit Court of Appeals, however, reversed the NLRB's decision stating that primary union action must confer benefits on the relevant work unit. Because the clause was designed to benefit all employees who were beneficiaries of the fund and because they were members of several different bargaining units, the court held the clause unlawful.

This case is limited to its facts since the NLRB specifically declined to pass on the validity of such restrictive agreements in industries other than the construction industry or under different circumstances. Nonetheless, Operating Engineers, Local 12 does illustrate the extent to which actions taken to impact "secondary employers" not part of the immediate labor dispute or agreement will be considered a restraint of trade. See also Associated Gen. Contractors of Calif., Inc., 94 LRRM 1210 (1976).

Under the NLRA, Section 8(e), provides as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employers ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, that

> nothing in this Subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done on the site of the construction, alteration, painting or repair of a building structure or other work . . . (emphasis supplied)

Clearly, under the NLRA, subcontracting language is not only a mandatory subject of bargaining, it is a legal restraint upon trade when made part of a CBA between a labor organization and a construction industry employer.[2] The Section 8(e) "proviso" is an anti-trust exemption contained within the NLRA itself. The Clayton Act exemption, which is external to the NLRA, is discussed in detail below.

At this juncture, it is important to note that Section 2(2) of the NLRA does not apply to "the United States or any wholly-owned government, corporation, or any federal reserve bank, or any state or political subdivision thereof . . ." (emphasis supplied). Section 2(2) would thus exempt the State of Alaska from coverage of the NLRA and arguably the express exemption from anti-trust considerations contained in Section 8(e) would not apply to AEA or its collective bargaining relationships. To determine what restrictions, if any, would apply to the ability of AEA and a labor

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[2] A construction industry "employer is defined by the primary nature and location of the work done by its employees. See Local Union 294, Teamster's, 145 NLRB 484, enforced, 342 F.2d 18 (CA 2) and Drivers, Local 694, 152 NLRB 577, enforced, 361 F.2d 547, 552 (CA DC), when both the NLRB and two Courts of Appeals held that the activities of ready mix drivers in delivering dry cement to the construction site was not work for a construction industry employer within the meaning of the "construction proviso."

organization to enter into an agreement restricting AEA's ability to subcontract work to non-union or non-signatory contractors, then our attention must rather be refocused on both PERA, the state's monopoly statute, and its procurement code.

AS 45.50.564 makes it "unlawful for a person to monopolize, or attempt to monopolize, or combine or conspire with another person to monopolize any part of trade or commerce." Not only is the language parallel to that which exists under federal law, the Alaska Supreme Court in West v. Whitney-Hidalgo Seafoods, Inc., 628 P.2d 10 (1981), ruled that this section is expressly based on Section 2 of the Sherman Anti-Trust Act ("Sherman Act"), 15 U.S.C. § 2. AS 45.50.566 thus renders transactions and agreements which restrain the sale of commodities or services unlawful. Like the proviso to Section 8(e), however, AS 45.50.572 expressly exempts labor organizations from these provisions, as follows:

> AS 45.50.562 - 45.50.596 do not forbid the existence or operation of labor . . . organizations created for the purpose of mutual health, and not conducted for profit, or forbid or restrain members of those organizations from lawfully carrying out the legitimate objectives of them; nor are these organizations or members illegal combinations or conspiracies in restraint of trade under the provisions of AS 45.50.562 - 45.50.596.

In fact, AS 45.50.572 §§ (b) makes clear that the state's monopoly statute does:

> [N]ot forbid actions or arrangements that are authorized or regulated under the laws of the United States which exempt these actions or arrangements from application of the anti-trust laws of the United States . . .

Accordingly, AS 45.50.572(b) makes legal any actions undertaken by a labor organization or arrangements that are authorized or regulated under federal law as exempt from application of the federal anti-trust laws. An agreement exempt under Section 8(e) would thus clearly pass muster under state law scrutiny. For this reason, the next section of this memorandum will address pertinent federal decisions rendered in the area of anti-trust. These decisions provide clear guidance as how to navigate through the federal anti-monopoly statutes and stay safely within the federal exemption from their provisions incorporated into state law by AS 45.55.572(b). In fact, AS 45.55.572(b) aside, state regulations dealing with anti-trust as it impacts labor relations are preempted by federal law.

In Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959), the Supreme Court ruled that application of Ohio's anti-trust law to a collectively bargained minimal truck rental and lease agreement was preempted by federal law. The court reasoned that the rental and lease provisions were designed to protect the union's negotiated wage scale and were thus subjects about which the employers were obligated to bargain. The state court's determination that the parties had negotiated a price-fixing arrangement in restraint of trade was not permitted to stand because it "would frustrate the parties' solution of a problem which congress had required them to [resolve] by negotiat[ing] in good faith . . ." Id. at 296.

The real question in this case, then, is how to harmonize the

conflicting policies of the State Procurement Act ("SPA") which is committed to the competitive process with that of PERA and the NLRA, both of which preserve and protect the right of labor organizations to restrain the labor market, limit competition and create monopolistic enterprises. The answer to that question is contained in a provision of the SPA itself.

The State's Procurement Code is found at AS 36.30.005 et. seq. It's general policy is set forth at AS 36.30.100(a) as follows: "Except as otherwise provided in this chapter, or unless specifically exempted by law, an agency contract shall be awarded by competitive bidding . . ." (emphasis supplied) Competitive bidding is thus mandatory unless there is, as here, a legal exemption from its requirements. Accordingly, as a matter of logic, the State Procurement Code is inapplicable to the collective bargaining process.[3] Competitive practices are not required as a part thereof by virtue of PERA and AS 45.55.572(a) and (b). This analysis fully supported by the necessary interaction of these statutory sections. In addition, sole source procurement is considered acceptable "if public utility services are to be procured." 2 AAC 12.410(d)(4).

The rules governing this state's policy in favor of competitive bidding are set forth in its procurement code. The

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[3] Unlike the Anchorage Municipal Code, however, AS 36.30.990, does not specifically exempt collective bargaining agreements from the definition of "contract." See AMC 7.10.011 at p. 28, infra.

procurement code is primarily guarded and enforced, however, by the state's statutory prohibitions against anti-competitive practices set forth in its monopoly statutes. Since the inherently anti-competitive practices of a labor union are endorsed by PERA and immunized against anti-trust scrutiny by both the state's monopoly statutes and federal law, the kind of agreement proposed by this memorandum falls squarely within the exemption set forth in AS 36.30.100(a), above.

Some historical perspective may now be helpful. Under federal law, the Sherman Act, enacted in 1890, rendered illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." In a series of cases in the early 1900's, the Supreme Court addressed the threshold question of the Sherman Act's role in labor cases. Loewe v. Lawlor, 208 U.S. 274 (1908), the celebrated Danberry Hatter's case, involved a determination by the Supreme Court that labor organizations were not excluded from the category of potential violators of the Sherman Act. In response to the Danberry Hatter's decision, federal legislation in the form of the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. § 12-27 (1964), was enacted. Two provisions of the Clayton Act, Sections 6 and 20, were thought to relieve the restrictions the Danberry Hatter's case had imposed on union activity. Unfortunately, these exceptions were narrowly construed by the Supreme Court in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), where it exempted only concerted activity already regarded as lawful at common law. Given

the Court's narrow view of this exception, however, most concerted activity was still viewed as a violation of the Sherman Act if it produced a disruption in the flow of goods in interstate commerce.

While the federal courts exhausted their quest for an answer to the conflict between the NLRA and the Sherman Acts,[4] Congress sought a more simple statutory resolution. Since the Supreme Court had admonished that the affirmative promotion of unionism by regulation of employer conduct was unconstitutional, Congress's only means to advance the same policy was to do so in a negative fashion -- by limiting the circumstances in which the courts might intervene. There appears to have been some fear after the Danberry Hatter's decision the Supreme Court might construe the Sherman Act so that all organized labor activity interfering with the flow of goods in interstate commerce would be a violation of the NLRA. Since the basic principle of labor organization is to combine to control the supply and therefore the price of labor in a given market, the anti-trust laws could not be allowed to prohibit the existence of labor organizations or their "lawfully carrying out" of their "legitimate objectives."[5] Section 6 of the Clayton Act was designed to eliminate this possibility by providing that labor

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[4] Much like the focus of our inquiry here as to the relationship between PERA, the State's Procurement Code and its monopoly statute.

[5] Congress did not completely effectuate its national policy of fostering collective bargaining until passage of the Railway Labor Act, 44 Stat. 577 (1926); 45 U.S.C. §§ 161-63 (1964); and the Norris-LaGuardia Act, 47 Stat. 70 (1932); 29 U.S.C. §§ 101-15 (1964). However, a detailed discussion of these enactments is not essential to this analysis.

was no longer "an article of commerce." The anti-trust laws after the Clayton Act no longer prohibited the existence of labor organizations or their "lawfully carrying out" their "legitimate objectives."[6]

Even today, the full meaning of Section 6 standing alone is somewhat uncertain; in order to determine what concerted activity is exempted from the anti-trust laws at the federal level, it is necessary to give some content to the phrase "lawfully carrying out . . . legitimate objectives." It is insufficient to say that the concerted activity must itself not be an illegal means and it must be justified by a legitimate purpose.

Since its 1940 decision in Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940), the Supreme Court began to apply the anti-trust laws less stringently to labor unions. A combination of employees necessarily restrains competition amongst themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade. The inherent conflict between the Federal Government's policy mandating competitive business practices under one statutory scheme had been reconciled with an equally important federal policy mandating the peaceful resolution of labor disputes through the inherently anti-competitive process of collective bargaining. Id.

Since the enactment of Section 6 of the Clayton Act the "labor of a human being is not a commodity or article of commerce . . .

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[6] This is the same language that appears in the State anti-trust exemption at AS 45.50.572(b).

nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws." Restraints on the sale of employee services to an employer, however much they curtail competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act. Id. at 502-503. However, subsequent litigation focused on something far more important to this analysis: The extent to which labor groups may lose this exemption from the anti-trust laws if they combine with non-labor groups to restrain trade utilizing means other than the collective bargaining process.

In Allen-Bradley Co. v. Local 3, Electrical Workers (IBEW), 325 U.S. 797 (1945), Local 3 was found to have entered into an illegal conspiracy with manufacturers and installation contractors in the electric equipment industry. The purpose of the agreement at issue was solely to give the employers a monopoly in the industry and the unions a monopoly of work opportunity in the New York area. The fact that the conspiracy was achieved in part through collective bargaining agreements did not save the union from the anti-trust laws. The mistake was their participation with a combination of businessmen who had complete power to eliminate all competition amongst themselves and to prevent all competition from other like businessmen -- a aim not reasonably within the legitimate goals of a labor organization. The union cannot lawfully agree to impact an employer other than one with whom it had or sought a collective bargaining relationship.

In Premier Elec. Constr. Co. v. National Elec. Contractors Assoc., 814 F.2d 358 (CA 7, 1987), an agreement between the union and a trade association that "[a]ll construction agreements in the electrical industry shall contain" a requirement that each contractor pay one 1% of gross payroll into an association-created fund was per se in violation of the Sherman Act. The union was seen to have assisted the association in acting as a cartel--something that was clearly neither an appropriate nor "lawful objective" of the union.

On the other hand, when the problem again reached the Supreme Court in Mine Workers v. Pennington, 381 U.S. 657 (1965) and Meat Cutters Local 189 v. Jewell Tea Co., 381 U.S. 676 (1965), the agreements at issue were sustained. The Pennington case arose out of the National Bituminous Coal Wage Agreement of 1950 ("NBCWA") entered into by the mine workers and the larger operating companies. The agreements were sustained because they were found intended to secure similar wages, hours, and other conditions of employment for the union and its members from not only the employers with whom the union had CBAs, but from the remaining employers in the industry. Had the union conspired with its employers, however, to directly eliminate all anti-union competitors from the industry as opposed to secure employment for its members, the union and the employer would have been liable as parties to an illegal conspiracy. 381 U.S. 657.

In Jewell Tea, it was claimed that the Meat Cutters Union had violated the Sherman Act by negotiating separate agreements with

several Chicago Food Stores, including Jewell Tea each forbidding the stores to sell meat at night. The court, however, found no evidence of a union-employer conspiracy, but rather a "a situation where the unions having obtained a marketing-hours agreement from one group of employers successfully sought the same terms from a single employer, Jewell Meats, not as a result of a bargain between the unions and some employer directed against other employers, but pursuant to what the unions deemed to be in their labor-union's interest." 381 U.S. at 688. Given that finding, the agreements were sustained. See also Richards v. Neilson Freight Lines, 810 F.2d 898 (CA 9, 1987). Where no violation of the anti-trust laws were found when a union which persuaded certain employers, with whom it had a CBA, not to do business with a company that was the specific target of an organizational effort.

What becomes clear from these cases is that the restraining effect of a CBA on competition, is less significant than the intent of the union and the employer in entering into the agreement. If their intent is to secure a legitimate benefit for themselves, the agreement will be upheld regardless of its restraining effect. On the other hand, if it can be said that the intent of the agreement is to disadvantage or eliminate the threat of competition from competitors of the employer, then even a CBA otherwise lawful might not survive close anti-trust scrutiny. Later cases have noted that in order to realize the benefit of the broad labor exemption carved from the anti-trust laws refined in Pennington and Jewell Tea, supra, the union must be involved in "a labor dispute" for the

purpose of protecting its own interest and must not combine with any non-labor group to impact a secondary employer in the process.[7]

In a notable 1973 case, Connell Constr. Co., Inc. v. Plumbers Local 100, 42 U.S. 6616 1973, the Supreme Court concluded that a union's picketing of a general contractor for the purpose of forcing it to execute a contract containing a provision which would only permit it to subcontract work to firms that had a current contract with the union was illegal. The Supreme Court considered significant the fact that the union had no interest in representing the general contractor, Connell's employees, and thus had no basis for contending that the federal policy in favor of collective bargaining entitled the union to an anti-trust exemption. The union's picketing activities had been solely intended to pressure Connell into entering into an agreement to limit its subcontracting rights but not necessarily within the collective bargaining process. On those facts, the union's activities were found illegal.

This case teaches an important lesson. Efforts by a union, whether successful or not, to pressure an employer into an agreement to refrain from subcontracting to non-union contractors in the absence of a legitimate labor dispute, or where the union has no interest in actually representing the employer's employees, will be considered violative of the federal anti-trust laws. To avoid that problem in this case it will be important for the labor

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[7] By "combining" with another group, the courts do refer to the collective bargaining process.

union at issue to actually seek to represent the employees of AEA and any agreement that results should be the product thereof. AEA and a labor organization cannot enter into an agreement to limit the ability of AEA to subcontract to non-union contractors in the absence of a CBA affecting AEA's employees or some portion thereof.

This principle was even more recently upheld in the case of Muko, Inc. v. Southwestern Pennsylvania Bldg. & Constr. Trades Council, 609 F.2d 1368 (CA 3, 1979) (en banc), on rehearing of 99 LRRM 2001 (CA 3, 1978). Where the Third Circuit adopted and relied on the Connell principle that:

> An agreement between the union and a business organization, outside a collective bargaining relationship, which imposes a direct restraint upon a market and which is not justified by congressional labor policy because it has actual or potential anti-competitive effects that would not flow naturally from the elimination of competition over wages and working conditions, is not exempt from anti-trust scrutiny.

Id. at 1373. The anti-trust exemption, as explained in Connell, may be invoked only in cases involving agreements between unions and employers on wages and working conditions. See State Council of Carpenters v. Associated General Contractors of California, Inc., 404 F.Supp 1067, 90 LRRM 2511 (ND CA, 1975), affirmed in part and reversed in part, and remanded 648 F.2d 527, 105 LRRM 3311 (CA 9, 1980).

On the other hand, there are recent federal cases applying the non-statutory exemption discussed in Connell and Woelke & Romero, 456 U.S. 645 (1982), where courts have held subcontracting clauses

contained in pre-hire agreements, lawful under Section 8(e) and (f), and thus exempt from anti-trust liability. The Circuit Court for the District of Columbia held that a lawful pre-hire agreement satisfied the collective bargaining relationship requirement of Connell because the union's primary interest "was not to apply organizational or pressure to other employers, but to standardize the working conditions of the employees of the contractors with whom they had agreements. Donald Shriver, Inc. v. NLRB, 635 F.2d 859, 873 (CA DC, 1980), cert. den. 451 U.S. 976 (1981). The Ninth Circuit, while refusing to rule that such clauses are wholly exempt from anti-trust scrutiny, held that a valid subcontracting clause contained in any CBA cannot serve as the basis of an anti-trust claim. Sund-Land Nursery v. Laborers Distr. Council (So. Calif.), 793 F.2d 1110, 1117 (CA 9, 1987), cert. den. 479 U.S. 1090 (1987).

In a subsequent case, the Ninth Circuit reaffirmed that the non-statutory exemption does apply to a union's organizing efforts. They will not be viewed as part of an anti-trust conspiracy unless the complaining party can demonstrate that the labor action created substantial anti-competitive effects unrelated to the legitimate purpose of organizing. See Richards v. Neilson Freight Lines, 810 F.2d 898 (CA 9, 1987), where the court found no violation of the anti-trust laws by virtue of a union's actions to pressure or persuade certain employers with whom it had existing CBAs not to do business with a company that was the specific target of its organizing effort. See also Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Distr. Council, 817 F.2d 1391

(CA 9, 1987).

The question now becomes, may the state enter into a pre-hire agreement with a labor organization? In order to answer that question, we must first remember that a union's ability to represent an employer's future employees, and an employer's ability to bargain with a non-majority status union is a creature of federal statute. In response to pressure from construction industry unions and employers who under ordinary circumstances would never have a work force sufficiently stable so as to allow for a successful union organizing effort, Congress expressly provided in Section 8(f) of the NLRA as follows:

> (f) It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established . . . prior to the making of the agreement, . . ."

While PERA does not contain similar express statutory approval of pre-hire agreements, AS 23.40.100 does provide that: "nothing in this chapter prohibits recognition of an organization as the exclusive representative [of] a public agency by mutual consent" (emphasis supplied). Like Section 8(b) of the NLRA, then, PERA would seem to authorize agreements between an employer and a non-majority-status union and, thus, the execution of pre-hire

agreements. 2 AAC 10.130, however, allows for recognition by mutual consent, only "if investigation by the labor relations agency verifies the majority status of the labor or employee organization." The question whether the state can enter into a pre-hire agreement without an amendment to PERA would seem to require a negative answer; at best, it is a grey area.

From these cases, some fundamental precepts become clear. In fact, the fundamental question any court will still ask in its examination of a CBA, is whether the provisions are so intimately related to wages, hours, and other terms and conditions of employment as to be mandatory subjects of bargaining. If they are, generally they will be exempt from application of the federal and, thus, state anti-trust laws. Thus, if it can be found that the union engaged in the bargaining had a direct interest in securing the contract provision at issue to preserve work for the individuals it represents, it is unlikely that the provision will be invalidated. On the other hand, the parties' intent is still significant.

We have already noted that subcontracting language limiting the ability of an employer to employ contractors that do not have a contractual relationship with the union, is a mandatory subject of bargaining. Given the analysis above, the state's agreement to such language is not likely to be deemed violative of the federal or state anti-trust laws; it is clearly within the realm of standard collective bargaining. We must still consider, however, the extent to which the collective bargaining relationship at issue

us really being sought by the parties for the purpose of accomplishing by contract what the state has not been able to accomplish by legislation, i.e. the regulation or imposition of a local hire requirement in the State of Alaska.

Without a doubt, the recent case of State v. Enserch Alaska Constr., Inc., Case No. 3539 (December 18, 1989) stands for the unconstitutionality of a state statute requiring local hire for publicly-funded projects. And, if the state were to bargain for and secure from the union a commitment to only refer local resident applicants, it could be said that the purpose of the CBA had gone beyond the legitimate interests of either party. However, it is well established that a labor organization may utilize internal rules which require as a condition of referral an applicant's satisfaction of certain residency requirements. The state could thus reach its end goal with respect to local hire by entering into an agreement with a labor union which had residency requirements contained in its administrative rules; the direct consequence would be a lawful local hire preference.

AEA and a labor organization can enter into a CBA limiting the state's ability to subcontract work to other than union contractors. If the same labor organization had within its internal administrative rules for dispatch certain residency requirements to which the state would by contract be bound to adhere, local hire legislation would not be necessary. A legally defensible contractual means to limit work on state funded construction projects to Alaskan residents would have been