ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8149 HOUSE STATE AFFAIRS

HB
368

(7)

Date Referred: January 13, 1994

FURTHER REFERRALS:

Date of Committee Action: 2-15-94

The STATE AFFAIRS Committee considered: HB 368

HOUSE BILL NO. 368 REAPPLICATION PERIOD FOR 1993 PF DIVIDEND

"An Act relating to reapplication for the 1993 permanent fund dividend when the United States Postal Service documents the loss of mail during the 1993 application period; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with ______ [ ] a new title

[ ] have attached amendments(s)

[X] do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the ______ Committee

ADOPTS: ______ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact ______

[ ] fiscal note(s) ______

[v] zero fiscal note Revenue

[ ] zero fiscal note(s) ______

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
[signature]	X				
Pete [signature]	✓				
[signature] Saunders	✓				
Gary L. Davis	✓				

[signature]

CHAIRMAN'S SIGNATURE

Alaska State Legislature

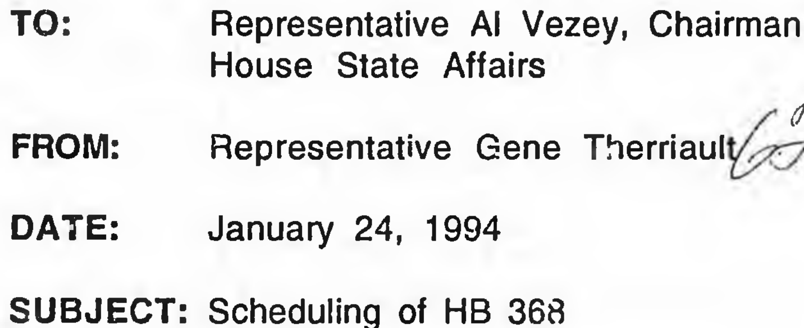
REPRESENTATIVE
GENE THERRIAULT
P.O. Box 55326
North Pole, Alaska 99705
(907) 488-0862

House District 33

While in Juneau
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4797

House Of Representatives

MEMORANDUM



TO: Representative Al Vezey, Chairman
House State Affairs

FROM: Representative Gene Therriault

DATE: January 24, 1994

SUBJECT: Scheduling of HB 368

I would like to request that HB 368, "An Act relating to the reapplication for the 1993 permanent fund dividend when the United States Postal Service documents the loss of mail during the 1993 application period; and providing for an effective date" be scheduled for a hearing before the House State Affairs Committee.

House Bill 368 is designed to address a problem that has come to light regarding 1993 PFD applications that were lost by the U.S. Postal Service. This bill would open a narrow window for PFD applicants by extending the reapplication period for the 1993 dividend year from September 1, 1993 to September 1, 1994. The applicant would be required to provide a sworn statement that the application was originally mailed in the postal area during the time mail from that area was lost, a sworn statement from another individual who witnessed the mailing or signed the residency verification of the original application before the 1993 deadline, and documentation from the United States Postal Service acknowledging the loss of mail entered into the mail stream during the 1993 permanent fund dividend application period.

Thank you for your consideration of my request.

Alaska State Legislature

REPRESENTATIVE
GENE THERRIAULT
P O Box 55326
North Pole, Alaska 99705
(907) 488-0862

House District 33

While in Juneau
State Capitol
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House Of Representatives

HB 368 Reapplication for the 1993 permanent fund dividend when the United States Postal Service documents the loss of mail during the 1993 application period; and providing for an effective date.

SPONSOR: Rep. Gene Therriault

SPONSOR STATEMENT:

House Bill 368 is designed to address a problem that has come to light regarding 1993 PFD applications that were lost by the U.S. Postal Service. In October of 1993 my office was contacted by numerous constituents regarding loss of their Permanent Fund Dividend applications. The PFD Division did not have record of receiving their applications, however the individuals noted mailing their applications early in January through the North Pole Post Office. After looking into this situation, my staff learned that the Postal Service had received calls in January 1993 from customers whose payments had not reached creditors. These complaints led to a U.S. Postal Inspection Service investigation which determined that an apparent loss of mail took place on January 8, 9, or 11, 1993, affecting residents in the North Pole area. A letter documenting the loss was supplied to customers for the notification of creditors.

HB 368 would open a narrow window for PFD applicants by extending the reapplication period for the 1993 dividend year from September 1, 1993 to September 1, 1994. The applicant would be required to provide a sworn statement that the application was originally mailed in the postal area during the time mail from that area was lost, a sworn statement from another individual who witnessed the mailing or signed the residency verification of the original application before the 1993 deadline, and documentation from the United States Postal Service acknowledging the loss of mail entered into the mail stream during the 1993 permanent fund dividend application period.

The PFD Division currently allows an applicant who timely filed an application that was not received by the PFD Division to reapply before September 1 of the dividend year (15 AAC 23.103 (h)). The Division has traditionally allowed reapplications, however 1993 was the first year the deadline was established. Although PFD applicants received batch cards that verify receipt of their application, a number of individuals did not expect to receive a batch card last year due to the new direct deposit method of payment and therefore did not get notice of a problem until it was too late.

An extension to this deadline is needed for the 1993 reapplication period due to this loss of mail at the North Pole Post Office and the new deadline for reapplying for the dividend. My staff and I have worked with the PFD Division within the Department of Revenue to draft the language of HB 368 to solve this problem without throwing the reapplication period wide open.

HOUSE BILL NO. 368

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES THERRIAULT, James, Parnell, Vezey

Introduced: 1/13/94
Referred: State Affairs

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to reapplication for the 1993 permanent fund dividend when the
2 United States Postal Service documents the loss of mail during the 1993
3 application period; and providing for an effective date."

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

5 * Section 1. REAPPLICATION FOR 1993 PERMANENT FUND DIVIDEND. (a)
6 Notwithstanding AS 43.23.011, 43.23.055(2), and sec. 19(b), ch. 4, SLA 1992, an individual
7 who completed and mailed an application for the 1993 dividend during the application period
8 for the 1993 dividend, but whose original application was not received by the Department of
9 Revenue due to a loss of mail during the 1993 application period that is documented by the
10 United States Postal Service, may reapply for the 1993 dividend during the period that begins
11 January 2, 1993, and ends September 1, 1994.

12 (b) The Department of Revenue shall prepare a form for reapplications under this
13 section. A reapplication must include

14 (1) a notarized affidavit in which the individual or the individual's sponsor

New Text Underlined [DELETED TEXT BRACKETED]

1 states, under penalty of unsworn falsification, that the application was mailed in the postal area
2 during the time mail from that area was lost as documented by the United States Postal
3 Service;
4 (2) a statement under penalty of unsworn falsification by another individual
5 that the individual
6 (A) witnessed the mailing of the original application; or
7 (B) signed the residency verification of the original application before
8 the '993 application deadline; and
9 (3) an official statement from the United States Postal Service documenting
10 the loss of mail that was entered into the mail stream during the 1993 permanent fund
11 dividend application period.
12 * Sec. 2. This Act takes effect immediately under AS 01.10.070(e).

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 368

1994 LEGISLATIVE SESSION

Revision Date:

Title: Reapplication Period For 1993 PF Dividend

Sponsor: THERRIAULT, James, Parnell, Vezey

Requestor: House State Affairs

Dept. Affected: Revenue

BRU: Permanent Fund Dividend

Component: Permanent Fund Dividend

COMPONENT SERIAL NO. 9 8 1

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-

REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

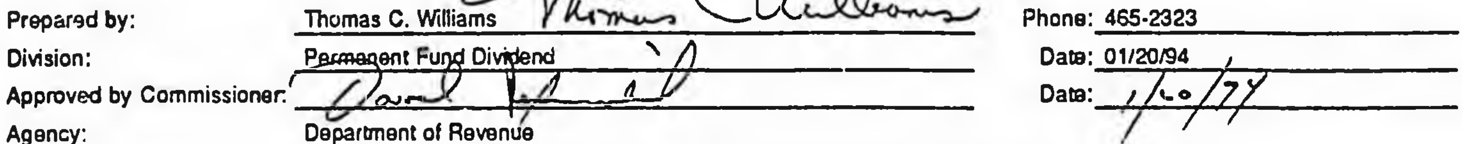
POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: $ -0-

ANALYSIS:

The Department has historically opposed any broad based reopening of an application period. However, since this legislation deals with the re-submission of applications that were allegedly originally filed timely but not received by the Department due to strictly defined circumstances, the Department's position on this legislation is *neutral.* This legislation is expected to affect 40 - 50 1993 applicants, many of whom have already submitted a late request-to-reapply. Consequently, the Department does not expect to receive a large number of additional reapplications and should be able to process all anticipated reapplications within its current budget. This legislation may result in an unanticipated large number of applicants. If so, a supplemental may be requested.



Prepared by: Thomas C. Williams Phone: 465-2323

Division: Permanent Fund Dividend Date: 01/20/94

Approved by Commissioner: Date: 1/20/94

Agency: Department of Revenue

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AS 43.23.005. ***Eligibility.***

(a) An individual is eligible to receive one permanent fund dividend each year in an amount to be determined under AS 43.23.025 if

(1) the individual applies to the department;

(2) on the date of application the individual is a state resident;

(3) the individual was a state resident for at least the calendar year immediately preceding January 1 of the current dividend year;

(4) the individual has been physically present in the state at some time during the prior two calendar years before the current dividend year; and

(5) the individual is

(A) a citizen of the United States;

(B) an alien lawfully admitted for permanent residence in the United States;

(C) an alien with refugee status under federal law; or

(D) an alien that has been granted asylum under federal law.

(b) *[Repealed, § 18 ch 4 SLA 1992]*

(c) A parent, guardian, or other authorized representative may claim a permanent fund dividend on behalf of an unemancipated minor or on behalf of a disabled or an incompetent individual who is eligible to receive a payment under this section. Notwithstanding (a)(2) - (4) of this section, a minor is eligible for a dividend if, during the two calendar years immediately preceding the current dividend year, the minor was born to or adopted by an individual who is eligible for a dividend for the current dividend year.

(d) Notwithstanding the provisions of (a) - (c) of this section, an individual who has been convicted of a felony is not eligible for a permanent fund dividend for a year when, during all or part of the previous calendar year, as a result of the conviction, the individual is incarcerated.

(e) *[Repealed, § 62 ch 21 SLA 1991]*

(f) In a time of national military emergency, the commissioner may waive the requirement of (a)(4) of this section for an individual absent from the state under military orders while serving in the armed forces of the United States, or for the spouse and dependents of that individual. *(§ 1 ch 102 SLA 1982; am § 1 ch 57 SLA 1987; am § 1 ch 54 SLA 1988; am § 1 ch 159 SLA 1988; am § 2,3 ch 107 SLA 1989; am § 1 ch 68 SLA 1990; am § 1 ch 66 SLA 1991; am § 4,5,6,7,8, ch 4 SLA 1992)*

AS 43.23.011. ***Application period.***

An application for a permanent fund dividend shall be filed during the period that begins January 2 and ends March 31 of that dividend year. *(§ 9 ch 4 SLA 1992, § 19b ch 4 SLA 1992 provides for a June 30, 1993 deadline for the 1993 dividend)*

AS 43.23.015. ***Application and proof of eligibility.***

(a) The commissioner shall adopt regulations under the Administrative Procedure Act (AS 44.62) for determining the eligibility of individuals for permanent fund dividends. The commissioner may require an individual to provide proof of eligibility, and the commissioner may use other information available from other state departments or agencies to determine the eligibility of an individual. The commissioner shall consider all relevant circumstances in determining the eligibility of an individual. However, the residency of an individual's spouse may not be the principal factor relied upon by the commissioner in determining the residency of the individual.

(b) The department shall prescribe and furnish an application form for claiming a permanent fund dividend. The application must include notice of the penalties provided for under AS 43.23.035 and contain a statement of eligibility and a certification of residency.

(c) Except as provided in (d) of this section or as may be provided by regulations adopted by the department, an individual must personally sign the application for permanent fund dividends, including the certification of residency required under (b) of this section.

(e) Notwithstanding (b) of this section, income earned on money awarded in or received as a result of State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District), including settlement, summary judgment, or adjustment to a royalty-in-kind contract that is tied to the outcome of this case, or interest earned on the money, or on the earnings of the money shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund, and shall be annually deposited into the principal of the Alaska permanent fund. *(§ 1 ch 102 SLA 1982; am § 24 ch 99 SLA 1985; am § 3 ch 57 SLA 1987; am § 1 ch 38 SLA 1989; am § 2,3 ch 18 SLA 1991)*

AS 43.23.055. Duties of the department.

The department shall

(1) annually pay permanent fund dividends from the dividend fund;

(2) subject to AS 43.23.011 and paragraph (8) of this section, adopt regulations under the Administrative Procedure Act (AS 44.62) that establish procedures and time limits for claiming a permanent fund dividend; the department shall determine the number of eligible applicants by October 1 of the year for which the dividend is declared and pay the dividends by December 31 of that year;

(3) adopt regulations under the Administrative Procedure Act (AS 44.62) that establish procedures and time limits for an individual upon emancipation or upon reaching majority to apply for permanent fund dividends not received during minority because the parent, guardian, or other authorized representative did not apply on behalf of the individual;

(4) assist residents of the state, particularly in rural areas, who because of language, disability, or inaccessibility to public transportation need assistance to establish eligibility and to apply for permanent fund dividends;

(5) annually determine, in cooperation with the Department of Corrections, the number and identity of individuals ineligible for a permanent fund dividend under AS 43.23.005(d);

(6) adopt regulations that are necessary to implement AS 43.23.005(d);

(7) adopt regulations that establish procedures for the parent, guardian, or other authorized representative of a disabled individual to apply for prior year permanent fund dividends not received by the disabled individual because no application was submitted on behalf of the individual; and

(8) adopt regulations that establish procedures for an individual to apply to have a dividend warrant reissued if it is returned to the department as undeliverable or it is not paid within two years of the date of its issuance; however, the department may not establish a time limit within which an application to have a warrant reissued must be filed. *(§ 1 ch 102 SLA 1982; am § 2 ch 55 SLA 1983; am § 3 ch 43 SLA 1984; am § 3 ch 54 SLA 1988; am § 5 ch 68 SLA 1990, am § 14 ch 4 SLA 1992)*

AS 43.23.065. Exemption of and levy on permanent fund dividends.

(a) Except as provided in (b) of this section, 45 percent of the annual permanent fund dividend payable to an individual is exempt from levy, execution, garnishment, attachment, or any other remedy for the collection of debt. This exemption applies to an eligible individual's permanent fund dividend both before and after payment is made to the individual. No other exemption applies to a dividend. Notwithstanding other laws, a writ of execution upon a dividend that has not been delivered to the debtor may be served on the commissioner by certified mail, return receipt requested. Upon receipt of a writ by certified mail, return receipt requested, the commissioner shall deliver that portion of the dividend executed upon to the court along with the case and number.

(b) An exemption is not available under this section for permanent fund dividends taken to satisfy

(1) child support obligations required by court order or decision of the child support enforcement agency under AS 25.27.140 -- 25.27.220;

(2) court ordered restitution under AS 12.55.045 -- 12.55.051 or 12.55.100;

(3) claims on defaulted scholarship loans under AS 43.23.067;

(4) court ordered fines; or

1 majority to apply for permanent fund dividends not received during minority because the parent,
2 guardian, or other authorized representative did not apply on behalf of the individual;
3 (4) assist residents of the state, particularly in rural areas, who because of
4 language, disability, or inaccessibility to public transportation need assistance to establish
5 eligibility and to apply for permanent fund dividends;
6 (5) annually determine, in cooperation with the Department of Corrections, the
7 number and identity of individuals ineligible for a permanent fund dividend under
8 AS 43.23.005(d);
9 (6) adopt regulations that are necessary to implement AS 43.23.005(d);
10 (7) adopt regulations that establish procedures for the parent, guardian, or other
11 authorized representative of a disabled individual to apply for prior year permanent fund
12 dividends not received by the disabled individual because no application was submitted on behalf
13 of the individual;
14 **(8) adopt regulations that establish procedures for an individual to apply to**
15 **have a dividend warrant reissued if it is returned to the department as undeliverable or it**
16 **is not paid within two years of the date of its issuance; however, the department may not**
17 **establish a time limit within which an application to have a warrant reissued must be filed.**
18 * Sec. 15. AS 43.23 is amended by adding a new section to read:
19 Sec. 43.23.069. ASSIGNMENTS. (a) Except as provided in (b) of this section, a person
20 eligible to receive a permanent fund dividend may not assign the right to the dividend. An
21 attempted assignment of the right to receive a permanent fund dividend is against public policy
22 and is void.
23 (b) A person may assign the right to receive a permanent fund dividend to a federal,
24 state, or municipal government agency or to a court.
25 * Sec. 16. AS 43.23.095(8) is amended to read:
26 (8) "state resident" means an individual who is physically present in the state with
27 the intent to remain permanently in the state **under the requirements of AS 01.10.055** or, if the
28 individual is not physically present in the state, intends to return to the state **and remain**
29 **permanently in the state under the requirements of AS 01.10.055,** and is absent only for any
30 of the following reasons:
31 (A) vocational, professional, or other specific education for which a

1 comparable program was not reasonably available in the state;
2 (B) secondary or postsecondary education;
3 (C) military service;
4 (D) medical treatment;
5 (E) service in Congress;
6 (F) other reasons which the commissioner may establish by regulation; or
7 (G) service in the Peace Corps;
8 * Sec. 17. AS 43.23.095 is amended by adding a new subsection to read:
9 (b) For purposes of AS 43.23.069, "state agency" includes a regional housing authority
10 created under AS 18.55.996.
11 * Sec. 18. AS 43.23.005(b) is repealed.
12 * Sec. 19. APPLICATION PERIODS. (a) Notwithstanding permanent fund dividend application
13 procedures or deadlines, a parent, guardian, or other authorized representative of a minor who qualified
14 for a dividend for 1992 because of the amendment to AS 43.23.005(c), made in sec. 5 of this Act, may
15 apply on behalf of the minor for the dividend by December 31, 1992. Notwithstanding permanent fund
16 dividend application procedures or deadlines, an individual who qualified for a dividend for 1992
17 because of the amendment to AS 43.23.015(a), made in sec. 10 of this Act, may apply for the dividend
18 by September 30, 1992. The Department of Revenue shall prepare a form for applications under this
19 section.
20 (b) Notwithstanding AS 43.23.011, as added by sec. 9 of this Act, the application period for
21 1993 is the period that begins January 2, 1993, and ends June 30, 1993.
22 * Sec. 20. Sections 5 and 10 of this Act are retroactive to January 1, 1992.
23 * Sec. 21. Sections 1 - 3, 5, 10, 12, 13, 15 - 17, 19, and 20 of this Act take effect immediately under
24 AS 01.10.070(c).
25 * Sec. 22. Sections 4, 6 - 9, 11, 14, and 18 of this Act take effect January 1, 1993.

United States
Postal Service

February 5, 1993

SUBJECT: **LOST MAIL**

To Whom It May Concern:

The U.S. Postal Inspection Service and the Fairbanks Post Office are investigating the apparent loss of a considerable amount of mail that was entered into the mailstream on January 8, 9 and 11, 1993. This loss was brought to our attention when the Post Office began receiving calls from customers whose payments had not reached the creditors.

We do not know the extent of the loss or the number of customers affected at this time. We ask that those creditors whose customers mailed their payments during this time,

JANUARY 8TH, 9TH OR 11, 1993,

take this into consideration when reviewing their accounts.

If you have questions about this matter, you may contact our office in North Pole. The phone number is (907) 488-2896.

Sincerely,

J. C. Thomas
Postmaster
U. S. Postal Service
5400 Mail Trail
Fairbanks, AK 99709-9998

JCT:gg

Residents may get second chance to get dividend check

By KATE RIPLEY
Staff Writer

JUNEAU—About 40 people whose 1993 Permanent Fund dividend applications were lost by the U.S. Postal Service last January would get a second chance for the free state money under a bill proposed by North Pole lawmakers.

Rep. Gene Therriault and Sen. Mike Miller, both R-North Pole, have introduced the legislation in response to the postal mishap last year. Therriault said about 40 people who mailed their 1993 dividend applications at the North Pole Post Office last January never received their checks from the state because the post office lost the applications.

Unfortunately, the Permanent Fund dividend division does not accept lost mail as an excuse.

"When you and I put something in the mailbox, you usually think that's the end of it," Therriault said. "Most people didn't think about it again until they realized they didn't get their Permanent Fund check." The Permanent Fund program sends applicants confirmation cards after the applications are received. The cards note when applicants can expect their checks.

North Pole resident Rick Emerson was among those whose application was lost. The 19-year-resident said his family has always received their dividends, and wasn't particularly alarmed when they did not receive confirmation cards.

"I filed mine direct deposit, so I thought maybe they didn't send a batch card then," he said.

But after a while, Emerson noticed friends who filed their application after he did were receiving their checks, and his family was not. So he called the Permanent Fund office.

"They told me that I never filed," Emerson said. "I couldn't believe what I was hearing." Later, the postal service investigated and realized the "apparent loss" of a "considerable amount" of mail that entered the mail stream Jan. 8, 9 and 11 of last year, according to a letter from J.C. Thomas, Fairbanks postmaster.

The bills introduced by the North Pole lawmakers would allow people like Emerson to apply for the 1993 dividend again through September. Such applicants must provide an official statement from the postal service documenting the mail loss, along with a notarized affidavit swearing the application was made during the time mail from the North Pole post office was lost, according to the bills.

Tom Williams, director of the Permanent Fund division, said he has no objection to extending the application deadline in this case.

"This bill is very narrowly defined," Williams said Friday. "I wouldn't support a broad-based reapplication period."

The deadline to file this year's Permanent Fund dividend applications is March 31.

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Vezey calls for investigation into railroad

Staff report

JUNEAU—Rep. Al Vezey, R-North Pole, has called for an investigation into the Alaska Railroad.

As chairman of the House State Affairs Committee, Vezey appointed a subcommittee to investigate the railroad's real estate development plans and other operations.

VEZEY

Subcommittee members are Rep. Richard Foster, D-Nome; Rep. Jerry Sanders, R-Anchorage; and Rep. Pete Kott, R-Eagle River. Vezey will chair the subcommittee.

Vezey said he has received numerous complaints that the railroad is using its status as a quasi-governmental operation to unfairly compete with the private sector. The railroad is a part-owner of a hotel in Anchorage, which has sparked concern. A similar idea for

State bars company from adding service

By KATE RIPLEY
Staff Writer

JUNEAU—Summit Telephone Co. would like to improve telephone service for residents of Wiseman and Coldfoot, but the state of Alaska won't let the company do it.

The small telephone company provides service at the end of Chena Hot Springs Road, Chatanika, Poker Flats and the Haystack Mountain area. It needs a couple of acres of land along the Dalton Highway for a radio tower and other equipment.

Trouble is, state law prohibits leasing land within 5 miles of the road's right of way for anything other than pipeline-related purposes.

A group of Fairbanks legislators wants to change state law to allow Summit Telephone—or any other private company—to lease land near the Dalton Highway.

The proposal, offered by Re-

hunting and fishing.

Fairbanks legislators, however, say improving the telecommunications system around Coldfoot and Wiseman is essential for public safety. There is only one phone line out of Wiseman, for instance, and about 15 lines out of Coldfoot.

"We're not going to be leasing a strip along the Dalton Highway. We're just talking about strategically placed parcels," Therriault said.

The federal Bureau of Land Management recently transferred much of the land around the Dalton to the state as part of Alaska's statehood selections. Before doing that, however, BLM identified several areas called "nodes of development" considered good spots for services such as campgrounds and gas stations.

The nodes ensure any development as a result land leases would occur in a controlled man

HOUSE STATE AFFAIRS COMMITTEE

DATE: FEBRUARY 15, 1994

PLACE: Capitol, Room 102

SUBJECT OF MEETING:

HB-368 Reapplication Period for 1993 Dividend
HB-363 No Fee for Car Registration in Person
HB-406 No Municipal Sales Taxes on Air Carriers
SB-128 Legislative Audits

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Juanita Hensley	DPS/DMV	PO Box 20020	99802		2650	Y Questions	N	HB363
Reed Stoops						Y	N	HB 406
Tom Williams	DOR/PFD Division				x2323	Y	N	HB 368
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

Page ___ of ___

HB

369

8 # HOUSE COMMITTEE REPORT 3/14/94

(7)
Date Referred: January 14, 1994 FURTHER REFERRALS: Finance

Date of Committee Action: 3-12-94

The STATE AFFAIRS Committee considered: HB 369

HOUSE BILL NO. 369 STATE LEASES & LEASE-PURCHASE FINANCING
"An Act relating to state leases and to state lease-purchase and lease-financing agreements, and repealing a legislative authorization previously given for acquisition of a facility through a lease-purchase agreement; and providing for an effective date."

RECOMMENDATIONS:
be replaced with CSHB369 (STA) [✓] the same title [ ] a new title

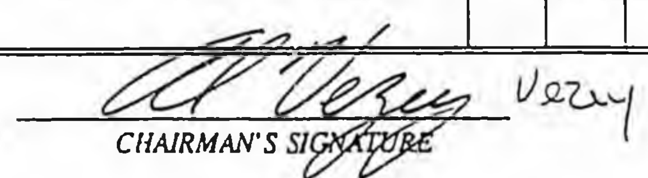
[ ] have attached amendments(s)
[✓] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the ______ Committee

ADOPTS: ______ letter of Intent

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

[ ] fiscal impact ______ [ ] fiscal note(s) ______
(3) [✓] zero fiscal notes Rev, Adm, UofAK [ ] zero fiscal note(s) ______

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Vezey	X	Olberg		✓	
Kott	X				
Sanders	✓				
G. Davis	X				
	(4)			(1)	


Vezey
CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 369

Revision Date:
Title: State leases and lease-purchase and lease-financing agreement
Sponsor: House Rules by Request
Requestor: House State Affairs

Dept. Affected: Revenue
BRU: Treasury
Component: Treasury
COMPONENT SERIAL NO. 121

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0	0	0	0.0	0.0	0.0
TRAVEL				0.0	0.0	0.0
CONTRACTUAL	0	0	0	0.0	0.0	0.0
SUPPLIES	0	0	0.0	0.0	0.0	0.0
EQUIPMENT	0	0	0	0.0	0.0	0.0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS				0.0	0.0	0.0
TOTAL OPERATING	0	0	0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (Thousands of Dollars)

	FY95	FY96	FY97	FY98	FY99	FY00
1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0	0	0.0	0.0	0.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other 1016 Fed Incent						
TOTAL	0.0	0	0	0.0	0.0	0.0

POSITIONS:

	FY95	FY96	FY97	FY98	FY99	FY00
FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: $ 0.0

ANALYSIS: (Attach a separate page if necessary.)

Any activity that would result from this bill would be routed through the debt manager in the Treasury Division. Financing costs such as underwriter fees, financial advisor fees, printing costs, etc. would be funded through issuance costs with the financing transaction. The debt manager's position is already funded through the General Fund.

Prepared by: Laraine L. Derr, Deputy Commissioner — Phone: 465-4880
Division: Treasury Division — Date:
Approved by Commissioner: Darrel J. Rexwinkel — Date: 3/4/94
Agency: Department of Revenue

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(Rev 11/93) 94fiscalnte/ll

FISCAL NOTE

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 369

Revision Date:
Title: An Act relating to state leases and to state lease-purchase and lease-financing agreements...
Sponsor: House Rules Committee
Requestor:

Dept. Affected: Administration
BRU: Leasing & Facilities
Component: Leasing
COMPONENT SERIAL NO. 81

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING:

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY94) impact: $ -0-

ANALYSIS: (attach a separate page if necessary.)

This bill has minimal fiscal impact to the leasing budget.

Prepared By: Dugan Petty, Director
Division: General Services
Phone: 465-2250
Date:

Approved by Commissioner: Nancy Bear Usera
Agency: Department of Administration
Date: 2-28-94

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Rev 11/92

FISCAL NOTE

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 369

Revision Date:
Title: State leases and lease purchase financing
Sponsor: Leg. Budget and Audit
Requestor: State Affairs

Department Affected: University of Alaska
BRU: all
Component:

COMPONENT SERIAL NO.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FD SOURCE						

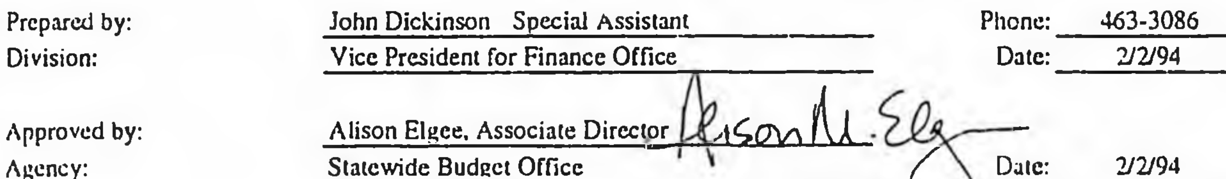
FUNDING: (Thousands of Dollars)						
1002 FEDERAL FUNDS						
1003 GF MATCH						
1004 GENERAL FUND						
1006 GF/MHTIA						
OTHER						
TOTAL FUNDING	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:						
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: John Dickinson Special Assistant   Phone: 463-3086
Division: Vice President for Finance Office   Date: 2/2/94



Approved by: Alison Elgee, Associate Director
Agency: Statewide Budget Office   Date: 2/2/94

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

Rev 10/90

FISCAL NOTE

ALASKA STATE LEGISLATURE
LEGISLATIVE BUDGET AND AUDIT COMMITTEE
Division of Legislative Audit

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MEMORANDUM

TO: The Honorable Al Vezey, Chairman
House State Affairs Committee

FROM: Randy S. Welker
Legislative Auditor

DATE: March 11, 1994

RE: Lease-Financing Legislation - HB 369

We have prepared the following to assist in your deliberations on the proposed amendments to statutes governing lease-financing acquisitions of real property by the State. This legislation is in response to our ongoing review and concern over lease-purchases of the Wildwood Correctional Center and the Court Plaza Building and the proposed purchase of the Anchorage Times Complex.

AS 36.30.080 permits the Department of Administration (DOA) to lease space for the use of the State. It also provides DOA, the legislature, and the judicial branch the authority to enter lease-purchase or lease-financing agreements for the acquisition of real property. AS 36.30.080(c), before SLA 1993 amendments became effective, required that for planned leases or lease-financing that exceed payments of $1,000,000 annually or $10,000,000 over the life of the lease or lease-financing notice must be provided to the legislature and a planned lease or lease-financing acquisition by the **department** must be approved by the legislature by law. Leases or lease-purchases less than $1,000,000 annually or $10,000,000 over the life of the lease did not require notice to, or approval by, the legislature.

After numerous failed attempts to obtain capital appropriations to acquire the leased Wildwood Correctional Center, in December 1992 the administration exercised its option under the lease, and acquired the facility under the authority of AS 36.30.080(c) by issuing Certificates of Participation (COP). However, the purchase price exceeded the dollar limitations requiring legislative approval imposed by statute. To circumvent legislative approval, the administration "split" the COP issue into two - each one falling below the $10,000,000 ceiling, thereby not requiring approval. The deal was also structured so that the annual debt service requirements under each COP debt issue would be slightly below the $1,000,000 limitation - again avoiding the need for legislative approval, and resulting in the legislature having to consider annual appropriations for the next eight years until debt service

of approximately $13 million is paid. Non-appropriation - which is an option under this type of arrangement - would result in a detrimental impact to the State's general obligation credit rating. A Division of Legislative Audit review of the Wildwood acquisition raised serious questions regarding the legality of the financing scheme employed to acquire the facility and the legality of the role of the Department of Natural Resources (DNR) in the process.

In the opinion of Legislative Counsel, the funds raised through the issuance of COPs are subject to legislative appropriation and were of a governmental and public purpose which under the Constitution requires legislative sanction before disbursement. Additionally, both Legislative Counsel and independent counsel engaged by the Legislative Budget and Audit Committee are of the opinion that DNR does not have the authority to issue debt to acquire real property.

Because of the purchase of the Wildwood facility in this manner, intentionally avoiding legislative approval - particularly at a time when the continuance of the facility itself was subject to intense legislative debate - legislation was adopted last session to specifically mandate legislative involvement in this debt issuance/property acquisition process.

Chapter 37, SLA 93 (SB 129) amended AS 36.30.080(c) requiring that "*if the department, legislative branch, or judicial branch intends to enter into or renew a lease-purchase or lease-financing agreement for real property . . .*" then "*. . . the department, legislative branch, or judicial branch shall provide notice to the legislature.*" The statute also requires that "*the **department** may not enter into or renew an agreement requiring notice under this subsection unless the project has been approved by the legislature.*" (emphasis added).

In the most recent attempt to utilize lease-purchase COP financing to purchase the Anchorage Times Complex, the Court System did provide notice to the legislature of its intentions, however, under the wording of the statute the Court System was not required to obtain legislative approval. HB 369 amends statute to require legislative approval **by law** for any real property acquisitions via lease-financing by the executive branch, the board of regents of the University of Alaska, the legislative council, and the supreme court.

Senate Bill 247 also amends AS 38.05.030 to specifically prohibit DNR from acquiring real property through the use of lease-purchase agreements or lease-financing agreements in which DNR is the lessor. We believe that there is clear authority under the statutory provisions of the Alaska Housing Finance Corporation to issue lease-backed revenue bonds in accordance with the Housing Project and Public Building Assistance Act (AS 18.55.010-.290) for the acquisition of public buildings. These statutes were previously Alaska State Housing Authority laws but were amended with the merger of ASHA with AHFC.

We have also included language in this bill to clearly **include** the University. If the legislature agrees with us that the provisions of leasing should apply to the University, I also recommend that legislature reconsider an exemption placed in statute last session which we have kept in this bill. Specifically, on page 7, lines 15 and 16, exempt University lease-purchase agreements secured by student fees or other university receipts from the legislative notification and approval requirements of the legislation.

Finally, the bill proposes the repeal of a temporary act, sec. 2, chapter 92, SLA 1986, which gives the courts system the authority to enter into a lease-purchase agreement not to exceed $29.9 million for construction of a court facility in Fairbanks.

We have attached a copy of AS 36.30.080 as it is currently written for reference. We have also included a copy of Chapter 92, SLA 86 and a sectional analysis.

Attachments

Sec. 36.30.080. Leases. (a) The department shall lease space for the use of the state or an agency wherever it is necessary and feasible, subject to compliance with the requirements of this chapter. A lease may not provide for a period of occupancy greater than 40 years. An agency requiring office, warehouse, or other space shall lease the space through the department.

(b) The department, legislative branch, or judicial branch may enter into lease-purchase agreements, including lease-financing agreements. A lease-purchase agreement must provide that lease payments are subject to annual appropriation.

(c) If the department, legislative branch, or judicial branch intends to enter into or renew a lease of real property with an annual rent to the department, legislative branch, or judicial branch that is anticipated to exceed $1,000,000, or with total lease payments to exceed $10,000,000 for the full term of the lease, the department, legislative branch, or judicial branch shall provide notice to the legislature. If the department, legislative branch, or judicial branch intends to enter into or renew a lease-purchase or lease-finance agreement for real property, other than (1) an agreement related to the refinancing of an outstanding balance owing or (2) a lease-purchase or lease-financing agreement by the University of Alaska that is secured by student fees or university receipts as defined in AS 14.40.491, that has annual lease payments of less than $1,000,000, and for which the total lease payments for the full term will not exceed $10,000,000, the department, legislative branch, or judicial branch shall provide notice to the legislature. The notice must include the anticipated annual lease obligation amount, the anticipated total construction, acquisition, or other costs of the project, and the total lease payments for the full term of the lease, if the agreement is a lease other than a lease-purchase or lease-financing agreement and the total lease payments for the full term of the lease exceed $10,000,000. The department may not enter into or renew an agreement requiring notice under this subsection unless the project has been approved by the legislature. An appropriation for the project constitutes approval of the project for purposes of this subsection. The department may not enter into an agreement under this subsection if the optional renewal period allowed under the agreement exceeds two years. In this subsection, "term" includes defined renewal options.

(d) When the department is evaluating proposals for a lease of space, the department shall consider, in addition to lease costs, the life cycle costs, function, indoor environment, public convenience, planning, design, appearance, and location of the proposed building.

(e) When the department is considering leasing space, the department should consider whether leasing is likely to be the least costly means to providing space. (§ 2 ch 106 SLA 1986; am § 1 ch 58 SLA 1990; am §§ 8, 9 ch 181 SLA 1990; am §§ 2, 3 ch 73 SLA 1992; am § 3 ch 37 SLA 1993)

AN ACT

Relating to a court facility in Fairbanks; and providing for an effective date.

---

* Section 1. The legislature finds that a need exists for a new court facility in Fairbanks and that the needed facility must be acquired in as economical manner as possible. In acquiring the necessary court facility the supreme court should

(1) investigate the feasibility of using state land in the Fairbanks area as a site for a court facility;

(2) investigate the feasibility of contracting with the Alaska State Housing Authority or with a local government utilizing municipal revenue bonds to provide the space necessary for a Fairbanks court facility; and

(3) coordinate space acquisition in Fairbanks with other state agencies.

* Sec. 2. The supreme court may enter into a lease-purchase agreement not to exceed a cost of $29,900,000 for construction and all other related costs of a court facility in Fairbanks, it

(1) a private licensed day-care facility for the use of employees, jurors, witnesses and the public is included in the project, and the space is rented to the private licensed day-care provider at a market rate; and

(2) 15 percent of parking spaces for the court facility are reserved for the public.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.10.070(c).

SECTIONAL ANALYSIS OF HOUSE BILL NO. 369

An Act relating to state leases and to state lease-purchase and lease-financing agreements, and repealing a legislative authorization previously given for acquisition of a facility through a lease-purchase agreement; and providing for an effective date.

Section 1. **Clarifies university statutes to show that leases, lease-purchases, and lease-financing of property by the university is subject to the provisions of procurement code being revised by this bill.**

Section 2. **Clarifies the supreme court's statutes to show that leases, lease-purchases, and lease-financing of property by the court system is subject to the provisions of procurement code being revised by this bill.**

Section 3. **Clarifies the legislative council's statutes to show that leases, lease-purchases, and lease-financing of property by the legislature is subject to the provisions of procurement code being revised by this bill.**

Section 4. **Amends the section of the Procurement Code for the Legislature to specify that the procurement procedures adopted by the Council for the legislature must be consistent with the provisions being revised by this bill.**

Section 5. **Amends the section of the Procurement Code for the court system to specify that the procurement procedures adopted by the court system must be consistent with the provisions being revised by this bill.**

Section 6. **Amends the current provisions by deleting provisions dealing with lease-purchases and lease-financing. After discussion with legal counsel, we decided it would be preferable to have two distinct sections of the leasing statute; one dealing exclusively with leases, and the other dealing only with lease-purchases (section 7 of this bill).**

The substantive change is on page 5, line 26 through page 6, line 3. This language now adds the provision of prior legislative approval by law for leases of the Board of Regents, the legislative council and the supreme court. It also provides that, for leases, an appropriation for the lease is approval for the purpose of this paragraph.

Section 7. This section adds a new section to the procurement code. It basically contains the lease-purchase and lease-financing language moved out of the previous section. In addition it provides that the department, Board of Regents, the legislative council, or the supreme court may only enter these agreements as the lessee. Like the leasing section above, this section adds the prior legislative approval by law requirement to lease-purchases and lease-financing by the Board of Regents, the legislative council and the supreme court.

Section 8. Makes a technical amendment to the procurement code to recognize the addition of the new section of the procurement code provided in Section 7 above.

Section 9. Makes a technical amendment to the procurement code to recognize the addition of the new section of the procurement code provided in Section 7 above.

Section 10. This section specifically prohibits the Department of Natural Resources from acquiring title to real property through lease financing in which the department is the lessor.

Section 11. Repeals the temporary act authorizing the court system to enter a lease-purchase agreement not to exceed $29.9 million.

Section 12. Effective date clause.

Prepared by the Division of Legislative Audit on 3/10/94.

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE
Division of Legislative Audit

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MEMORANDUM

TO: Members of the Legislative Budget and Audit Committee

FROM: Randy S. Welker, Legislative Auditor

DATE: January 12, 1994

RE: Court Plaza Building Acquisition

At your request we have reviewed the administration's past and currently planned usage of the Court Plaza Building.

Background

As part of its FY 94 budget request, the Department of Administration (DOA) submitted a written request for capital funding of the Court Plaza Building in April 1993. In its budget submission the Department of Administration had cited the significant savings that could be achieved by relocating agencies currently leasing space to the Court Plaza Building. The funding request did not receive an appropriation, however in the DOA section of the budget (CH 79/SLA 1993, section 19, lines 15-16) legislative intent was inserted, stating: "*It is the intent of the legislature that the Department of Administration pursue lease purchase funding for acquisition of the Court Plaza building in Juneau for office space.*"

Based on this intent, the Departments of Administration and Natural Resources, with the assistance of the State Bond Committee, proceeded to acquire the building by issuing Certificates of Participation (COP) in the amount of $5.5 million. The State closed the transaction and took ownership of the building on August 19, 1993. The acquisition of the building took place despite expressed concerns over the same method used to raise capital for the purchase of the Wildwood Correctional Center.

Financing

$5.5 million was raised through the issuance of COPs. From those proceeds $4.45 million was paid for the building and approximately $250,000 was allocated for underwriter fees and associated costs of issuance. The remaining estimated $800,000 was designated for renovation and relocation expenses, a majority of which were identified in a March, 1992 building condition survey conducted by professional architects on behalf of the Department of Transportation and Public Facilities. DOA estimates that renovation expenses for the following will be incurred before full occupancy of the building:

- Building Code upgrades - $110,000. Mostly dealing with fire code upgrades such as fire-rated doors and smoke gaskets.
- Upgrades for compliance with the Americans with Disabilities Act - $97,500. Most upgrades deal with access to, and enjoyment of, lavatories and drinking fountains and the designing of "areas of rescue assistance at each floor."
- Buildouts - $427,500. The most significant expenditure for buildouts as recommended by the architects is creating an "open office concept." The original building permit was issued under the premise that the building would utilize an open office concept and it is anticipated that it will be required that all floors be returned to the open concept when a permit is issued for new tenant improvements. Additional buildout costs include carpet replacement, leaky window repair/replacement, painting and other minor maintenance.
- Telephone and cabling costs - $37,000.
- Design, planning and contract administration - $45,000.
- Contract contingency - $45,000.
- Moving and relocation costs - $38,000. Full moving and relocation costs are unknown at this time.

As of January 11, 1994, improvement funds approximating $714,000 remain in the custody of the Standby Trustee and have not been expended. According to DOA officials, they are presently developing a Request For Proposal (RFP) for project management services. Once completed, an RFP for design services is anticipated. DOA expects the RFPs to be issued in January and/or February 1994. It appears that DOA considers these funds to be trust funds rather than state funds as opined by Legislative Counsel.

Some of the expenses listed above are considered essential, such as upgrades to meet fire code building standards, compliance with the American with Disabilities Act and to a certain extent telephone and computer cabling costs. However, these projected expenditures as well

as those for buildouts; design, planning and contract administration; contingencies; and moving and relocation costs should be viewed as estimates.

Occupancy

It appears that the administrations' priority for occupancy of the building called for the Department of Revenue to vacate the 11th floor of the State Office Building and move into the Court Plaza Building. The Governor's and Lt. Governor's Office and the Governor's Administrative Services Division would vacate the Capitol Building and Diamond Court Building, respectively, and occupy the space vacated by the Department of Revenue. This is evidenced by the December 2, 1993 *Governor's Office Relocation Study*. That study identified a three-phase move schedule that pegged the Department of Revenue occupancy in the Court Plaza Building at August 17, 1994 and the Governor's occupancy date in the State Office Building at December 5, 1994.

Under this scenario it was obvious that significantly smaller savings would be achieved than as originally forecasted by the Department of Administration in its funding request to purchase the building. Under this plan the only agencies moving that would have eliminated lease costs to the State are the Governor's Division of Governmental Coordination and the Media Center. These lease savings would approximate $95,000 annually.

However, the *Governor's Office Relocation Study* cost estimates appear to have caused the administration to reevaluate its occupancy plans for the Court Plaza Building. The Department of Transportation and Public Facilities (DOTPF)-sponsored study estimated moving costs at:

Relocate Department of Revenue	$ 649,700
Relocate Office of Governor	1,604,675
Total Estimated Move Costs	$2,254,375

On December 3, 1993 a Governor's Office press release stated:

In light of the estimated cost of renovating spaces and moving, Governor Walter J. Hickel said he will re-evaluate the idea of consolidating the governor's office on the eleventh floor of the State Office building (SOB), in a space now occupied by the Department of Revenue.

"The initial estimate came in at more than $2 million for a total move and consolidation," Hickel said. "Our goal of making the office more efficient will remain a priority, but it will have to be done without spending this kind of money."

The Governor further hinted that the administration would "*revisit*" the question of renovating the third floor of the Capitol building - for which $450,000 has already been appropriated.

The Department of Administration then developed a 'Draft Alternative 1' which proposed selected agencies currently leasing their facilities move into the Court Plaza Building. Agencies from the Departments of Law, Health and Social Services, Administration, and the Office of the Governor were recommended to move. Additionally, the Lt. Governor's Division of Elections and the Ombudsman, both whom currently occupy space in the Court Plaza Building, also were proposed to remain.

Agencies proposed to move are listed below with current space requirements and annual cost:

Agency	Lease No.	Square Footage	Annual Lease Cost
Governor's Office:			
Media Center	2147	1,613	$26,496
Govt. Coord.	2184	3,308	68,674
Dept. of Law:			
Bend Bldg.	1649A	4,233	81,929
Arcticorp Bldg.	1649B	1,950	50,400
DHSS:			
Radiology	2159	1,110	23,976
Energy Assistance and Food Stamps	2185	2,873	67,228
DOA: APOC	2162A	370	10,054
Ombudsman	*	1,510	37,400
Lt. Gov.- Elections	*	4,120	166,000
Total Lease Costs			$532,157

* Ombudsman and Lt. Governor - Elections are presently in the Court Plaza Building. Annual lease cost represent amounts paid for those leases before the State acquired the Court Plaza Building.

Under this scenario, each of the agencies proposed under "Draft Alternative 1" would generate a savings. However, these projected savings have been subjected to differing

interpretations. It has been stated by the administration that substantial savings will be realized, particularly considering the pay-off on the buildings debt service is limited to only eight years. We do not disagree that savings can be realized through consolidation of state agencies in a state-owned building. However, the true "pay-back" period extends beyond the eight year debt service schedule.

As shown in the attached graph and table, our net present value analysis shows that the buy decision will not realize a savings until fiscal year 2012. This calculation takes into consideration:

Buy and Operate the Court Plaza Building

Net Operating Costs include annual debt service requirements on the Certificates of Participation (COP's) for fiscal years 1994 through 2001. It also includes DOA estimated annual operating and maintenance costs, adjusted for inflation, and one time charges for moving and relocation as estimated by DOA, net of estimated rental receipts from non-state tenants, adjusted for inflation.

Continue Leasing

Lease Costs are based upon lease expenditures that would be incurred had the agencies now proposed under Draft Alternative 1 not moved into the Court Plaza Building. These costs were also adjusted for inflation.

Present Value Comparison

As shown on the attached graph and table, cumulative net present value of the lease costs increase steadily. Net operating costs increase at a greater rate for fiscal years 1994 - 2001, at which time the COPs are paid off. However, after debt service ends, operating and maintenance costs continue. It is projected that, on a net present value basis, in fiscal year 2012 the decision to buy and operate the building will begin to show a savings to the State.

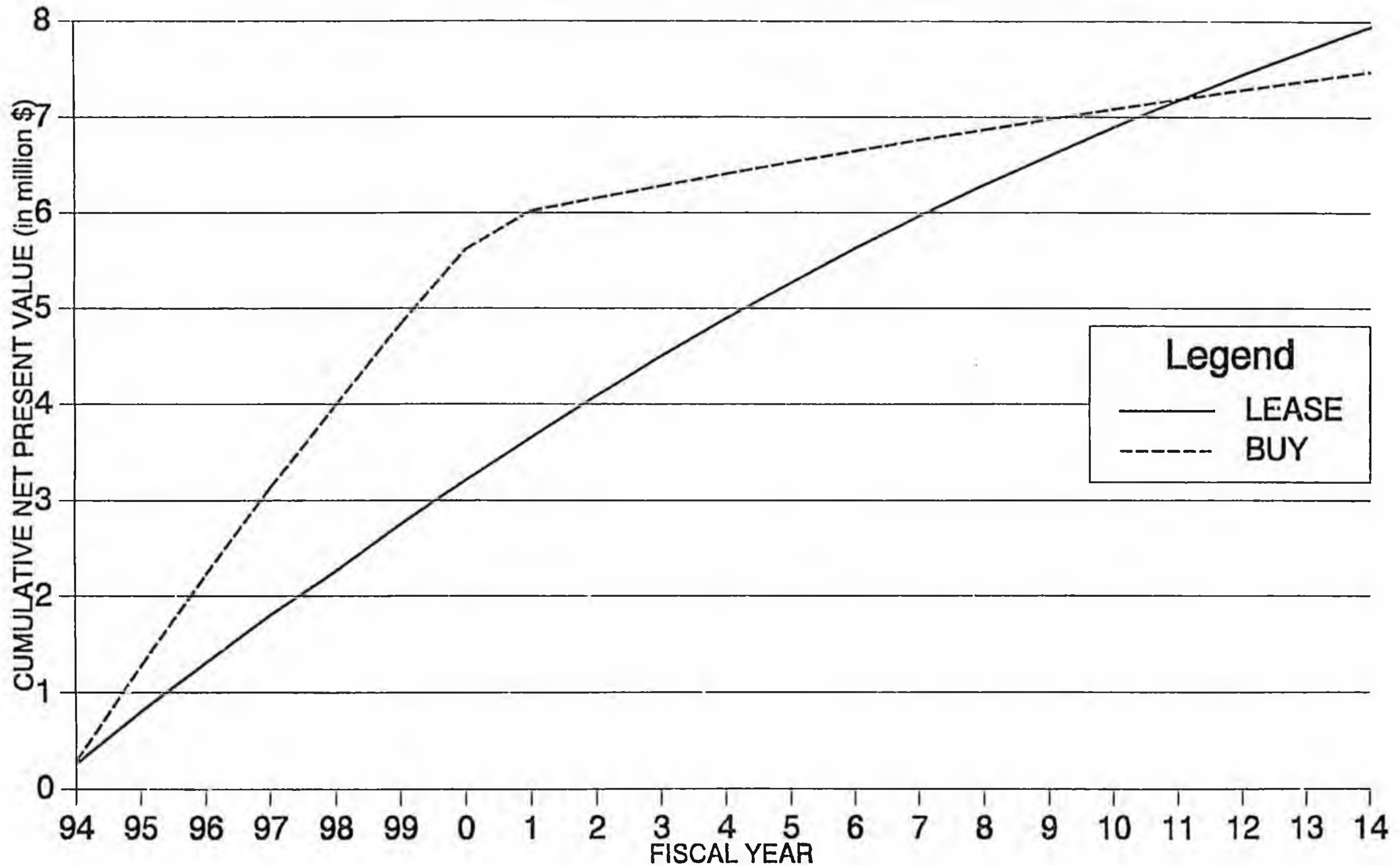
It is important to understand that the analysis does not reflect any unforeseen capital maintenance costs over the term of the analysis. It would not be unreasonable to expect those needs to arise over the next eighteen years.

Assumptions in Analysis:

* Discount rate of 6% for net present value calculations.
* Operating costs inflated at 3% annually.
* Lease costs and lease revenue inflated at 3% of 35% of lease.
* State agencies currently paying lease costs elsewhere will move into the building as current non-state agency leases expire (including options) in the building.

COURT PLAZA BUILDING

NET PRESENT VALUE ANALYSIS



COURT PLAZA BUILDING SAVINGS ANALYSIS								
FISCAL YEAR	CONTINUE LEASING		BUY AND OPERATE COURT PLAZA BUILDING					LEASE VS. BUY
	LEASE COST	CUMULATIVE NPV	OPERATING COST	COURT PLAZA DEBT	COURT PLAZA REV.	NET OPERATING COST	CUMULATIVE NPV	
94	266,079	266,079	204,000	128,144	(42,800)	289,344	289,344	(23,265)
95	568,056	801,980	170,980	958,425	(86,499)	1,042,906	1,273,218	(471,237)
96	574,020	1,312,856	176,109	983,175	(87,407)	1,071,877	2,227,184	(914,328)
97	580,047	1,799,875	181,393	978,706	(88,325)	1,071,774	3,127,066	(1,327,19[illegible]
98	586,138	2,264,151	186,834	980,177	(82,684)	1,084,327	3,985,955	(1,721,804)
99	644,672	2,745,888	192,439	977,427	(46,710)	1,123,156	4,825,243	(2,079,356)
00	657,301	3,209,259	198,213	976,700	(45,355)	1,129,558	5,621,537	(2,412,278)
01	664,202	3,650,991	204,159	445,331	(45,831)	603,659	6,023,004	(2,372,013)
02	690,098	4,083,967	210,284	-0-	(2,935)	207,349	6,153,098	(2,069,131)
03	697,344	4,496,723	216,592	-0-	-0-	216,592	6,281,298	(1,784,575)
04	704,666	4,890,205	223,090	-0-	-0-	223,090	6,405,871	(1,515,666)
05	712,065	5,265,312	229,783	-0-	-0-	229,783	6,526,917	(1,261,606)
06	719,541	5,622,902	236,676	-0-	-0-	236,676	6,644,538	(1,021,636
07	727,097	5,963,793	243,777	-0-	-0-	243,777	6,758,830	(795,037)
08	734,731	6,288,765	251,090	-0-	-0-	251,090	6,869,888	(581,122)
09	742,446	6,598,562	258,623	-0-	-0-	258,623	6,977,802	(379,240)
10	750,241	6,893,892	266,381	-0-	-0-	266,381	7,082,662	(188,770)
11	758,119	7,175,430	274,373	-0-	-0-	274,373	7,184,554	(9,124)
12	766,079	7,443,821	282,604	-0-	-0-	282,604	7,283,562	160,259
13	774,123	7,699,679	291,082	-0-	-0-	291,082	7,379,769	319,910
14	782,251	7,943,589	299,814	-0-	-0-	299,814	7,473,252	470,336

Audit Report

DEPARTMENT OF CORRECTIONS
WILDWOOD CORRECTIONAL CENTER
ACQUISITION

July 9, 1993

Audit Control Number:

20-4471-93

Division of Legislative Audit

P.O. Box 113300, Juneau, Alaska 99811-3300

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

DIVISION OF LEGISLATIVE AUDIT

The Legislative Budget and Audit Committee is a permanent interim committee of the Alaska Legislature. The committee is made up of five senators and five representatives, with one alternate from each legislative chamber. The chairmanship of the committee alternates between the two chambers every legislature.

The committee is responsible for providing the legislature with audits of state government agencies. The programs and activities of state government now cost more than $5 billion a year. As legislators and administrators try increasingly to allocate state revenues effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by the Division of Legislative Audit helps provide that information.

As a guide to all their work, the Division of Legislative Audit complies with generally accepted auditing standards established by the American Institute of Certified Public Accountants and with government auditing standards established by the U.S. General Accounting Office.

Audits are performed at the direction of the Legislative Budget and Audit Committee. Individual legislators or committees can submit requests for audits of specific programs or agencies to the committee for consideration. Copies of all completed audits are available from the Division of Legislative Audit's offices in either Anchorage or Juneau.

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July 9, 1993

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

DEPARTMENT OF CORRECTIONS
WILDWOOD CORRECTIONAL CENTER ACQUISITION

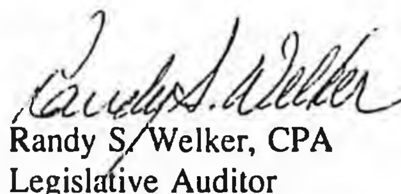
July 9, 1993

Audit Control Number

20-4471-93

The audit addresses the issues and circumstances surrounding the State's decision to exercise an option to purchase the facilities used as the Wildwood Correctional Center and the decisions made and procedures used to issue over $10 million in Certificates of Participation to obtain funding for the purchase. Additionally, the audit discusses the legal aspects of the transactions and the roles of those that were, or should have been, involved in a decision to acquire capital for the purposes of purchasing and improving land and facilities.

The audit was conducted in accordance with generally accepted government auditing standards. Fieldwork procedures utilized in the course of developing the findings and discussion presented in this report are discussed in the Objectives, Scope, and Methodology section of this report.



Randy S. Welker, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, an audit was conducted to review the issues and circumstances surrounding the State's decision to exercise an option to purchase the leased facilities used as the Wildwood Correctional Center and the issuance of over $10 million in Certificates of Participation to obtain capital for the purchase.

Objectives

The primary objective of this review was to review and document the December 1992 acquisition of the Wildwood Correctional Center, the means used to obtain the financing to effect the purchase, and to determine whether those means and other procedures followed were proper and in accordance with state law.

Scope

We focused our review primarily on the activities of the State Bond Committee; bond counsel; the Attorney General's Office; and the Departments of Administration (DOA), Natural Resources (DNR), and Corrections (DOC).

Methodology

Our evaluation of the acquisition of the Wildwood Correctional Center, its impact, and current concerns surrounding the transaction involved review and analysis of the following:

1. The official transaction records for the issue of the $5,655,000 Wildwood Acquisition and the $4,990,000 Wildwood Improvement Certificates of Participation, including but not limited to:

    - The delegation of authority to exercise the lease purchase option from DOA to DNR.
    - The notice of intent to exercise the option to purchase from DNR to Kenai Natives Association, Inc (KNA).
    - The purchase and sales agreement between KNA and DOA.
    - The best interest finding of DNR.
    - The lease/purchase agreement between DOA and DNR.
    - Deed of Trust transactions and assignments to the Standby Trustee, Seattle-First National Bank.
    - The master trust agreement.
    - Escrow agreement and investment instructions.

- The Certificates of Participation purchase agreement between the underwriter, Stephens, Inc., and DNR.
- The Certificates of Participation offering circular.
- Opinions of the Attorney General, bond counsel, and counsel for the Underwriter and KNA.

2. Review of State Bond Committee minutes.

3. Review of correspondence and various documents related to the environmental and related liability concerns associated with the acquired properties.

4. A review of the Alaska Constitution, statutes, and regulations pertaining to the issuance of public debt.

5. A review of a report (#20-04) on the acquisition issued by the Office of Management and Budget.

6. A legal opinion obtained on the various aspects of the acquisition from legislative counsel.

7. Discussions and interviews with:

   - Commissioner, Department of Revenue
   - Past and present State Debt Managers
   - Director, Division of General Services
   - Leasing Section Manager, Division of General Services
   - Facilities Manager, Department of Corrections
   - Assistant Attorney General, Department of Law
   - Office of Management and Budget
   - Bond Counsel to the State Bond Committee
   - Counsel from the Division of Legal Services, Legislative Affairs Agency
   - Officials of the Alaska Division of Banking, Securities, and Corporations
   - Officials of the Arkansas Department of Securities

ORGANIZATION AND FUNCTION

Department of Administration — leasing responsibilities

Under Alaska Statute (AS) 36.30.080 (State Procurement Code) and AS 44.21.020 the Department of Administration (DOA) has the authority to lease space for the use of the State or an agency of it and to allot space in state facilities to the various departments according to need and available space. As such, DOA has historically centrally budgeted and paid for most leases of the executive branch. It was DOA who in 1983 negotiated the original Wildwood Correctional Center lease providing for a lease term of three years and seventeen additional one-year renewals. During this time the Wildwood Correctional Center lease payments were appropriated to, and paid by, DOA.

Department of Corrections

The Department of Corrections (DOC) was created by Executive Order No. 55 on March 9, 1984. Prior to that time, DOC functioned as a division of the Department of Health and Social Services. The department oversees the operation of a number of correctional centers throughout the State, including the Wildwood Correctional Center and Wildwood Pre-Trial Facility. DOC is constitutionally mandated with the protection of the public and reformation of offenders. To carry out these responsibilities, the department:

- Enforces court ordered pre-trial supervision and detention of those accused of unlawful behavior prior to adjudication.

- Maintains the integrity of law by administering sanctions and punishments imposed by courts for unlawful behavior.

- Offers a wide range of correctional options, including community corrections, institutions, and community residential center services necessary to meet the needs of both society and offenders.

- Provides work and educational programs for offenders that will enhance community integration and economic self-sufficiency. These programs are to be administered in a just and equitable manner within the least restrictive environment consistent with public safety.

In addition, the department is responsible for housing persons held for federal offenses or on city ordinance charges.

Wildwood Correctional Center and Pre-Trial Facility

The Wildwood Correctional Center and Pre-Trial Facility are, respectively, medium and minimum security facilities. Located in the Kenai area of the Kenai peninsula, the correctional center and pre-trial facilities provides a "Cleary capacity" general population housing of 204 beds and 112 beds respectively. Established as a defense facility by the United States Army in 1951, the facility and surrounding lands were taken over by the Air Force in 1965. In 1974 the facility and adjoining properties were transferred to the Kenai Natives Association, Inc. under the Alaska Native Claims Settlement Act.

In 1983 the Department of Administration began leasing a portion of the facility as a correctional center and pre-trial facility.

Department of Natural Resources — Division of Land

The Department of Natural Resources, Division of Land is the primary manager of Alaska's land holdings. Responsibilities includes classifying land; selling land and materials; leasing state land for recreation, commercial, and industrial uses; managing major projects such as land selections to fulfill the State's land entitlement and reconstituting mental health lands.

Three stated major goals of the division are asset acquisition, asset identification and allocation, and asset management and development.

State Bond Committee

Created by AS 37.15, known as the State Bonding Act, the State Bond Committee is responsible for the adoption of resolutions and preparation of the documents necessary for the issuance, sale, and delivery of bonds.

The members of the State Bond Committee consist of the commissioner of the Department of Commerce and Economic Development (Chairman), the commissioner of the Department of Revenue (Secretary), and the commissioner of the Department of Administration. The debt manager within the Department of Revenue acts as staff to the Committee. AS 37.15.150 permits the Committee to contract for "*special services*" such as architectural or engineering, fiscal agent or municipal investment, legal, and other expert or specialized services in accomplishing the most advantageous sale of bonds. The Committee employs a financial advisor and bond counsel services are provided to the Committee by attorneys under contract with the Department of Law.

AUDITOR'S CONCLUSIONS

Preface

Many of issues involved in this report are matters of legal interpretation of the Alaska Constitution and Alaska Statutes. To assist us in our review of the legal matters, we requested the assistance of the Division of Legal Services. Legislative Counsel responded to our questions in a memorandum dated June 28, 1993.

In the memorandum, Counsel has presented an excellent analysis of many of the issues in question. Where there exists opposing views, Counsel has acknowledged them. For many of the legal questions, there is no clear opinion as to how the Alaska Courts would rule. From the opposing view, the Attorney General's Office has opined that the actions taken by the administration are entirely within their legal authority. This view is shared by the Bond Counsel under contract with the Department of Law in support of the State Bond Committee.

We wish to inform all readers of this report that there are no clear answers to several of the legal issues, primarily constitutional questions. We have considered the opinions of Legislative Counsel, the Attorney General's Office, and the Bond Counsel. This report takes a conservative position from the perspective of protecting legislative prerogative. Accordingly, from this perspective, we question any incursion into the legislature's constitutional power of appropriation and right to participate in significant state policy decisions.

We have included as appendixes to this report the legal memorandum from Legislative Counsel and the opposing analysis of that memorandum prepared by the Bond Counsel.

Finally, we wish to acknowledge that during our review, we found no indication that the State Bond Committee acted contrary to any financial or legal advice provided to them in the review and issuance of the Certificates of Participation for the Wildwood facilities.

Auditor's Conclusions

In 1983 the Department of Administration (DOA), on behalf of the (now) Department of Corrections (DOC), negotiated a lease with the Kenai Natives Association, Inc. (KNA) to obtain approximately 108,572 square feet of net office, living, storage, and support space on 19 acres, more or less, of the former Wildwood station — a defense facility used by the United States Army and Air Force from 1951 to the early 1970s. DOA then allocated the facility to DOC for its use. From its inception DOC had identified the leased properties as a critical component of its overall facilities master plan and an important element of the criminal justice system providing service to the Kenai Peninsula. According to DOC estimates, over $10 million had been invested in upgrading the leased facility to correctional standards.

DOC had unsuccessfully tried a number of times to obtain a capital appropriation to acquire the Wildwood facility. From 1989 to 1992 DOC had explored the possibility of acquiring the facility via a lease-financing package. On April 30, 1992, the State Bond Committee unanimously approved the acquisition of, and improvements to, the Wildwood facility through a lease-financing arrangement by the issuance of Certificates of Participation (COPs). The COPs represent fractional interests or shares in lease payments from lessees, in this case DOA, and are sold to finance construction or purchase of the leased facilities. COPs are payable from the annual lease payments made by the lessee (DOA) to the lessor (DNR). The funding for the annual lease payment is contingent upon annual legislative appropriation. Therefore, as further described in the Auditor's Analysis section of this report, capital has been raised in this manner without subjecting the issue to voter approval.

In spite of known and unknown environmental hazards and potential liability for its cleanup at the Wildwood facility, DOA delegated its authority to exercise the purchase option contained in the original lease to the Department of Natural Resources (DNR). The State used DNR as the vehicle through which to issue the COPs. DNR acquired the facility and surrounding property and leased the facility to DOA. DOA then allocated the property to DOC for its continued use as a correctional facility.

As early as August 1991 the amount to be financed was estimated at $7 million with a planned maturity period of 20 to 25 years. Documentation also shows that, continuing through the spring and summer of 1992, it was the intention to have one lease financing package which would finance both the facility acquisition and the planned improvements, with a maturity period of 25 years.

Documentation shows that there was concern among Department of Revenue personnel and the State Bond Committee's bond counsel that the lease-financing package would reach a level of annual debt service requirement and total lease payments over the life of the lease that would, by law, require approval of the legislature before the project could continue. As discussed in greater detail in the Auditor's Analysis section of this report, this concern over involving the legislature in the acquisition of the Wildwood facility resulted in the "splitting" of the one lease-financing package into two packages: one for acquisition of the facility in the amount of $5.655 million and the other for improvements to the facility in the amount of $4.990 million. By doing so, the annual debt service requirement for the lease-financing was split into two components, thereby bringing the debt service requirement and the individual issuance amounts below the level at which legislative approval was required. We believe the action of bypassing the legislature by intentionally splitting the issues violated the spirit and intent of the statutes governing lease-financing projects. It also effectively denied the legislative process of appropriating funds and establishing correctional policy — all at a time when there was serious discussion within the legislature as to the merits of continuing the original Wildwood Correctional Center lease.

We also question the basis on which the COPs were issued. As stated above, the State issued the COPs under the legal opinion that DNR had the authority to acquire the facility and surrounding land. This authority was based upon AS 38.05.035(a)(12) — a law which appoints the director of the division of lands as a "*certifying agent*" to select, accept and

secure land "*by whatever action is necessary.*" The State has construed this to include raising capital outside the constitutionally required appropriation process, in this case by the issuance of COPs. As further elaborated in the following section of this report, the Legislative Affairs Agency, Division of Legal Services has opined (see Attachment I) that the director of the Division of Lands ". . .*may not conduct operations to select, accept, and secure title to land for which the state is prepared to give consideration without first securing the benefit of an appropriation.*"

Also as described in greater detail in the following section of this report, legislative counsel has opined that the issuance of the COPs generated state funds — funds which have governmental and public purpose characteristics and has the status of public money. Counsel has also opined that decisions and direction given to acquire and improve property are "*fundamentally legislative.*" These significant legal and constitutional factors show that prior legislative involvement and sanction was required before the disbursement of the proceeds from the issuance of the COPs. These principles apply equally to the acquisition and improvement funds.

Legislative counsel has also stated that there appears to be no authority for DNR involvement in the issuance of COPs for the purpose of obtaining funds to be used for improvements to the facility. Counsel has stated that the extent of DNR's involvement was limited by DOA's delegation of authority to exercise the purchase option — not for improving or refurbishing the facility. These improvement monies have been deposited in an Anchorage bank account which was originally designed to be drawn upon by DOC staff. These funds have not been appropriated, the legislature has not established capital improvement priority for any of those funds, and the funds are not recorded on the state accounting system.

In summary, the lease-purchase of the Wildwood Correctional Center is a classic example of circumventing both the legislature's constitutional power to appropriate and the legislature's involvement in the establishment of policy — in this case correctional policy.

In our opinion, decisions were made which intentionally reformatted the lease-purchase financing package to accommodate not having to obtain legislative approval for the financing and acquisition. The State erroneously relied on an obscure statute as having granted DNR the authority to acquire land and facilities outside of the appropriation process. The authority of the legislature to appropriate and establish policy was usurped. Millions of dollars of unappropriated funds remain in an Anchorage bank to be used at the discretion of the Department of Corrections. Additionally, the lease-purchase places the legislature in the difficult position of having to annually fund the debt service requirement (lease payments) or face the possibility of injuring the State's credit rating by non-appropriation.

Subsequent to the issuance of the COPs and the acquisition of the Wildwood facilities, the legislature, through Senate Finance Committee amendment of Senate Bill (SB) 129, required that if the executive, legislative, or judicial branches of government intend to enter into a lease-purchase of real property, in any amount, notice must be provided to the legislature. SB 129 became law as Chapter 37, SLA 93, and was approved by the governor on May 27, 1993. The section pertaining to the lease-purchase of real property is effective August 27, 1993.

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AUDITOR'S ANALYSIS

To understand the basis for the conclusions drawn in the preceding section of this report, one must be familiar with the sequence of events and circumstances at the time, the Alaska Constitution, and applicable statutes. As described below, the Departments of Administration, Natural Resources, and Corrections; the State Bond Committee and its bond counsel, in concert with the Department of Law, developed a unique method by which the State raised capital to acquire real property. While this financing method is not new to governmental entities in general, it is the first time the State itself has played the key roles of obtaining capital, buying land and facilities, and acting in the roles of both lessor and lessee — all of which occurred without the legislature providing policy oversight and exercising its authority of appropriation.

Background

The existing Wildwood Correctional Center and Pre-Trial Facility, located on the Kenai Peninsula, was originally established as a United States Department of Defense military facility operated by the United States Army and then the Air Force from the early 1950s to the early 1970s. The military installation consisted of approximately 5,300 acres, of which approximately 70 acres were developed for military uses including housing and support facilities. When the facility was no longer useful for military purposes, approximately 4,200 acres were conveyed to the Bureau of Land Management. Under terms of the Alaska Native Claims Settlement Act, Kenai Natives Association, Inc. (KNA) received title to the land and facilities.

In 1983, the Department of Administration (DOA), on behalf of the Department of Corrections (DOC), leased approximately 108,000 square feet of space on 19 acres, more or less, from KNA. The leased properties are used by DOC as a correctional center and pretrial facility. The lease agreement included an exclusive option to purchase the land and improvements on the leased properties. The lease also provided the State with the option to purchase all or any portion of the Wildwood station not covered by the lease.

In December 1992, the administration — after repeated unsuccessful attempts to obtain an appropriation to acquire the facility — exercised the option to purchase the original leased facility and surrounding property. The purchase was facilitated through the State Bond Committee with the issuance of Certificates of Participation: one issue in the amount of $5.655 million for acquisition of the leased and surrounding properties and the other issue in the amount of $4.99 million for improvements to those properties.

Lease-Purchase Financing and Certificates of Participation

Lease agreements and lease-purchases of real property by governmental units, like the State of Alaska, often times are limited by statutory or constitutional provisions related to the

incurring of debt and annual appropriation restrictions. Alaska enjoys such a constitutional restriction. No debt may be contracted unless approved by the voters.

Because of these restrictions, governmental lease agreements often contain a non-appropriation or cancellation clause that permits governmental lessees (the State) to terminate the agreement on an annual basis if funds are not appropriated to make the required payments.

A lease-purchase financing may take the form of either revenue bonds or Certificates of Participation (COPs). Lease-purchases which contain the non-appropriation or cancellation clauses where payments are subject to annual appropriation have historically not been considered state debt under the Constitution. However, in reality these financing methods do, at a minimum, create a responsibility on the part of the State to continue its payment stream under the lease-purchase.

Obligations of the State incurred by raising capital through innovative lease-purchase transactions are considered debt by the rating agencies when assessing and measuring the State's debt burden. The economic substance of most lease-purchase agreements with cancellation clauses is that they are basically long-term contracts. The potential for cancellation of most governmental lease-purchase agreements is remote. Routine cancellations would discourage potential investors from participating in future lease transactions or may adversely impact the investor community receptivity to other debt obligations issued in the future.

COPs represent fractional interest or shares in the lease payments from lessees, in this case DOA. COPs are payable solely from the annual lease payments which are subject to annual appropriation by the legislature. The <u>legal</u> form of COPs is such that they have not been considered State debt and therefore have not been subjected to voter approval. Again, the <u>economic substance</u> of a lease-purchase and the realities associated with such a financing must be considered in addition to its legal form.

The investing community — individuals, financial advisors, and rating agencies alike — look to the legislature to continue funding a lease as the real security. Even with non-appropriation and cancellation clauses and the fact that the full faith and credit of the State is not pledged, investors expect payments to continue. As stated in the June 1992 Journal of Housing:

> *Defaults on COPs, however, are rare since the bonds typically are used for essential government facilities, and non-appropriation by the taxing authority carries significant penalties, including a strong negative mark on its credit rating.*

Another sign as to investor confidence of continued state funding in spite of the cancellation clause is indicated in the November 30, 1992 Moody's Municipal Credit Report on the proposed sale of the COPs. In that assessment it is stated:

The obligation of the state, acting through its Department of Administration, to make lease payments is absolute and unconditional, subject however to annual appropriation. Environmental concerns on the leased site are mitigated by the lease provisions which encourage the legislature to appropriate in order to avoid remediation costs [see Discussion section below].

Another indication as to the impact lease-purchase by COPs has on the level of debt is provided by Government Finance Associates, Inc., the State Bond Committee's financial advisor. In a memorandum to the commissioner of the Department of Revenue and the former state debt manager, the financial advisor wrote, in part:

Debt Burden: Moody's has emphasized that the level of current revenues going to pay debt service on State-supported obligations has equalled nearly ten percent of unrestricted revenues. The rating agency believes that this level of indebtedness can create vulnerability for the State, particularly if unrestricted revenues were to decline over a long period of time.

Lease Purchase Debt: Even though this issue is not discussed in any detail in Moody's recent reports on the State, discussions with the agency have indicated that a sizeable enlargement of lease purchase debt payable out of the State's general fund will increase credit concerns at the agency about the direction of the State's credit standing.

Finally, in correspondence between the State Bond Committee's bond counsel and the Department of Law in regard to the standard cancellation clause of non-appropriation, bond counsel wrote "*Nonappropriation is an unlikely event because it affects the State's credit rating, but it can occur so the financing documents must allow for it.*"

In summary, the economic substance of a lease-purchase by issuance of COPs is critical in assessing the overall obligation and its affect on the State's overall debt burden.

Constitutional and Statutory aspects

As stated previously, the Constitution of the State of Alaska has explicit provisions for incurring debt. Specifically, Article IX, Section 8 of the Constitution states:

No state debt shall be contracted unless authorized by law for capital improvements or unless authorized by law for housing loans for veterans, and ratified by a majority of the qualified voters of the State who vote on the question. The State may, as provided by law and without ratification, contract debt for the purpose of repelling invasion, suppressing insurrection, defending the State in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this constitution becomes effective.

The Constitution is also explicit in regard to the authorization for expenditures, which states in pertinent part:

> *No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.*

The power of appropriation rests with the legislature.

The purchase of most goods and services utilized by the State is governed by the State Procurement Code. The code specifically outlines the procedures by which leases and lease-purchases are processed. AS 36.30.080, the pertinent section of the procurement code which addresses leases is shown in the sidebar on the right.

Of critical importance to the understanding of the questionable procedures used to acquire the Wildwood facility is to be familiar with the 1992 amendments made to section (c), which are highlighted in bold.

These amendments, which were approved by the Governor on June 16, 1992 and effective September 14, 1992, established monetary limits on how much a lease or lease-purchase could be for the term of the lease without legislative oversight. The legislature established that any lease exceeding $10 million over its term must be approved by the legislature. As addressed in the Discussion section on the following page, it is our opinion this statutory limitation was intentionally circumvented.

Finally, another statute was relied upon to further the purchase of the Wildwood facility. The Department of Natural Resources (DNR) acquired the facility and adjoining properties from the proceeds raised by the issuance of the COPs. DNR's presumed authority to acquire the property

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AS 36.30.080

(a) The department shall lease space for the use of the state or an agency wherever it is necessary and feasible, subject to compliance with the requirements of this chapter. A lease may not provide for a period of occupancy greater than 40 years. An agency requiring office, warehouse, or other space shall lease the space through the department.

(b) The department, legislative branch, or judicial branch may enter into lease-purchase agreements, including lease-financing agreements. A lease-purchase agreement must provide that lease payments are subject to annual appropriation.

*(c) If the department, legislative branch, or judicial branch intends to enter into or renew a lease or lease-purchase agreement, except an agreement related to a refinancing, with an annual rent to the department, legislative branch, or judicial branch that is anticipated to exceed $1,000,000, or **with total lease payments that exceed $10,000,000 for the full term of the lease**, the department, legislative branch, or judicial branch shall provide notice to the legislature. The notice must include the anticipated annual lease obligation amount, the anticipated total construction, acquisition, or other costs of the project, and, **if the total lease payments for the full term of the lease exceed $10,000,000, the total lease payments for the full term of the lease**. The department may not enter into or renew an agreement requiring notice under this subsection unless the project has been approved by the legislature by law. An appropriation for the project does not constitute approval of the project for purposes of this subsection. The department may not enter into an agreement under this subsection if the optional renewal period allowed under the agreement exceeds two years. **In this subsection, "term" includes defined renewal options** [emphasis added].*

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without legislative involvement or appropriation is placed in AS 38.05.035, which provides for the powers and duties of the director of the Division of Lands. The specific citation relied upon, AS 38.05.035(a)(12), states:

> *(a) The director shall . . .*
>
> *(12) be the certifying agent of the state to select, accept and secure by whatever action is necessary in the name of the state, by deed, sale, gift, devise, judgment, operation of law, or other means any land, of whatever nature or interest, available to the state; and be the certifying agent of the state, to select, accept or secure by whatever action is necessary in the name of the state any land, or title or interest to land available, granted, or subject to being transferred to the state for any purpose . . .*

As discussed in further detail below, the State erroneously relied on this statute to permit DNR to acquire land without the benefit of a legislative appropriation.

Discussion

As previously stated, the Department of Corrections (DOC) had tried unsuccessfully to obtain capital appropriations to purchase the Wildwood facility. DOC then approached the State Bond Committee seeking authorization to exercise the option to purchase the facility through the issuance of Certificates of Participation (COPs).

In August 1991 the DOC commissioner made a second appearance before the State Bond Committee requesting their approval and assistance in acquiring the facility. At that time the State Bond Committee considered a $7 million dollar capital package with a 20 to 25 year maturity. At its April 30, 1992 meeting the State Bond Committee approved the lease-purchase financing proposal through the issuance of COPs. Because of additional improvements to the facility deemed necessary, the financing package was slightly over $10 million with a proposed 25 year term.

The arrangement called for DOA to delegate its authority to exercise the purchase option to DNR. DNR would purchase the properties (from proceeds acquired through issuing COPs) from KNA. DNR would act as the nominal lessor with DOA as lessee. DOA would assign the properties to DOC for its use. DNR assigned its rights to the lease payments from DOA to the purchasers of the COPs, via a trustee. Security for the COPs was two of the five parcels purchased. Part of the purchase agreement called for escrowing $1.6 million pending the completion of demolition of certain buildings and asbestos abatement by KNA.

Single COP issue split in two issues

On or about September 4, 1992 DOC contacted the Division of General Services to verify certain costs of the original leasehold and to request a delegation of authority for DNR to exercise DOA's purchase option. A few days later the director of the Division of General

Services informed DOC and the State Bond Committee's bond counsel of the $10 million limitation on leases and lease-purchases without legislative approval which became law on September 14, 1992. This new law restricting the value of lease-purchases without legislative approval appears to have caught most everyone involved in the transaction by surprise.

Documentation shows that subsequent to the Division of General Services director's notification of the new limitation conversations were held regarding the monetary limitation, its impact, and what alternatives existed. Handwritten notes (for which we nor individuals we questioned could/would identify the author) suggest attempts to avoid presenting the financing package to the legislature as the new law would require. For example, notes to the files show the following:

> *Spoke with [former debt manager]. total lease payments will exceed $10,000,000 for the term. This is a problem.*

In another handwritten note, it appears that there was a discussion with the State Bond Committee's bond counsel on September 8, 1992. Those notations show:

> *We can do by splitting parcels ABE and CDF&G which would be under statutory limit. Or we can take out improvements and just [indiscernible] property, but some of the improvements must be carried out.*

Two days later on September 10, 1992 the State Bond Committee's bond counsel wrote to the Department of Law. In the correspondence bond counsel is outlining the structure of the lease-purchase transaction. It is interesting to note that only days after the director of the Division of General Services brought to their attention the impending effective date of the $10 million limitation that bond counsel is telling the Department of Law:

> *The legislature does not need to approve this transaction unless the lease payments exceed $1 million per year or the total payments over the life of the lease exceed $10 million.*

The letter continues on, stating:

> *. . . Kenai Native Association is selling the Wildwood Facility to the State of Alaska, Department of Natural Resources for over $5.5 million. The Department of Corrections would like to have additional funds for construction work of approximately $4.5 million. In order to accommodate this request, the State Bond Committee must split the financing in half. One issue will be for the land acquisition and a second issue will be for the improvements.*
>
> *The financial limitations on this matter, which are a function of the amount, interest rate and length of the lease, will control the form of the financing. At this point, we anticipate a ten year lease period and annual payments of*

slightly less than $1 million, with an issuance of slightly in excess of $5.5 million to cover the purchase price and costs of issuance.

We find it curious that only days after the discovery of the statutory monetary limitations without presenting the proposal to the legislature is made known that a flurry of conversations and correspondence occur discussing the splitting of the single COP issue as originally envisioned by all parties involved.

In our opinion the splitting of the single $10 million plus COP issue into two issues was an intentional act designed to exclude legislative deliberation on the acquisition. This assertion is particularly valid based upon the timing and sequence of events in September 1992 and the fact that the continuance of the original Wildwood lease itself was an on-going point of intense policy debate.

The circumvention of the statutory limitations aside, we have serious reservations about the legislature not participating in this type of fiscal and policy decision regardless of the amount involved.

<u>This transaction required legislative appropriation</u>

The purchase of the Wildwood Correctional Center was the first time a line agency of the State acted in the capacity of acquiring the capital and serving in the role of lessor. The State has participated in the past with local governments in obtaining lease-purchased properties by entering into similar financing arrangements such as for the lease of the Palmer and Kenai Courthouses and the Spring Creek Correctional Center at Seward. However, the difference between those lease-purchases and the Wildwood acquisition is a significant one.

In the cases of the Palmer, Kenai, and Seward properties the local government obtained the capital to construct or provide the facility leased by the State. It is the local government's obligation to satisfy the debt incurred on their behalf. The local governments would then lease the facility to the State, subject to annual appropriation. However, in the Wildwood lease-purchase a line agency of the State acquired the funding to purchase the facility and leased it to another line agency. This raises a serious question as to the authority for line agencies of the State to acquire capital for major acquisitions without legislative appropriation.

The Legislative Affairs Agency, Division of Legal Services has researched the issue and has opined that funds raised by line agencies of the State through the issuance of COPs are subject to legislative appropriation (see Appendix I). Legislative counsel relied on Article IX, section 13 of the Alaska Constitution which guides expenditures which states in part:

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law . . .

Legislative counsel advises that funds obtained by issuing COPs are State funds obtained for governmental purposes and therefore subject to appropriation. Counsel has stated:

> *. . . in the case of the Wildwood facility purchase, however, although the financing arrangement involves the appointment of trustees and other intermediaries who have actual custody of the dollars raised, the decision on how to allocate that money--to purchase the facility and surrounding land and to undertake improvements--and the direction given involves decisions and direction that are fundamentally legislative. Nor is the money raised by the Wildwood financing arrangement "non-state funds"; the money is obtained by decisions of key state employees pursuant to authority vested in them by law.*

Counsel further opines that:

> *When a state agency proposes sale of certificates of participation to secure state ownership of real property, the legislature may properly assert that the money raised by the department by sale of the certificates has the status of public money, subject to treatment as if it were depositable into the state treasury and disbursable only by appropriation. The money in question has a number of the characteristics of revenue derived for the discharge of a governmental or public purpose: it was money raised through the department's exercise of a power that, even the department's attorney would acknowledge, was authorized by statute; was obtained so that the department could acquire title to land in order to accomplish a public purpose; and was secured by the department's trustee for reasons that were deemed to be of ultimate benefit of the state. The purpose for which the money was obtained clearly relates to interest in and concern for the discharge of constitutional and statutory obligations relating to the care and custody of prisoners, and interest that, due to allocation of other available state revenue for competing considerations, constitutes a legislative concern. Finally, the transaction in which the department involved itself places the Eighteenth Legislature and a number of future legislatures under the constraint of having to decide whether to identify and allocate money for payment of rent or forego the continued use of the facility.*

We subscribe to legislative counsel's opinion that these funds were of a public and governmental purpose which under the Constitution required prior legislative sanction before disbursement.

<u>DNR did not have authority to acquire Wildwood</u>

As stated previously, DNR was delegated the authority to exercise the option to purchase the Wildwood facility by the Department of Administration. This delegation however was insufficient to permit DNR to proceed with the expenditure of funds for the acquisition.

Citing the same principles above regarding the expenditure of state funds and the required role of the legislature in appropriation matters, legislative counsel has opined that once again, lacking a legislative appropriation, DNR did not have the authority to proceed with the lease-purchase of the Wildwood facility.

The State relied upon AS 38.05.035(a)(12) as the authority for the purchase of the Wildwood facility. After reviewing the history of the legislation back to territorial days, legislative counsel has stated:

> *. . . despite the breadth of the authority impliedly given, the history of the paragraph cited by the department for its acquisition activities, AS 38.05.035(a)(12), lends support to the contention that the paragraph may not permit the director of the division of lands to act for the state to secure land that involves expenditure of money without an appropriation. In engaging in acquisition of land through a lease-purchase arrangement, the Department of Natural Resources has arguably stretched the phrase "select, accept and secure by whatever action is necessary in the name of the state. . . any land" beyond the parameters set in the original legislation, legislation that has been substantively unmodified down to the present time.*
>
> *Clearly, the territorial legislature provided, and, at Statehood, the new state government inherited, a statutory framework that empowered the director of the division of lands to obtain title to land. However, the director's empowerment was, at the time, circumscribed by making it subject to necessary legislative appropriation. Moreover, at the time the authority was given, the legislature understood that the director did not have the ability to indebt the territory (later, the state)--to require or compel a series of legislative appropriations--in order to secure land titles.*
>
> *. . . I believe that the better argument favors the conclusion that the division director may not conduct operations to select, accept, and secure title to land for which the state is prepared to give consideration without first securing the benefit of an appropriation.*

Legislative counsel's research clearly shows that the powers and duties assigned by statute to the director of the division of lands does not include the power of appropriation. DNR required authorization through the appropriation process before proceeding with the acquisition of the Wildwood facility and the expenditure of the funds.

The Department of Law also had initial concerns regarding the reliance on AS 38.05.035(a)(12) as the authority for DNR to acquire the properties. The Department of Law makes the following observations in a May 19,1992 memorandum to the former debt manager:

. . . we do not agree with [State bond committee bond counsel] conclusion that DNR has the statutory authority to acquire title to the facility or be involved in the lease-purchase financing arrangement.

We caution that the State Bond Committee and DNR could be on shaky legal ground if AS 38.05.035(a)(12) is relied upon as authority for DNR to acquire the facility and to finance it through a lease purchase agreement as described . . . We also disagree with [bond counsel] that "by whatever action is necessary," as used in AS 38.05.035(a)(12), somehow grants DNR the authority to do creative financing to purchase a public facility. Nowhere in Title 38 is DNR given explicit or implicit authority to establish special accounts or undertake creative financing to acquire a public facility or building.

However, the Department of Law eventually concluded that DNR was authorized and had the power to acquire the property and enter into the lease with DOA.

<u>DNR and DOC had no authority to acquire or expend the improvement funds</u>

The second COP issue in the amount of $4.99 million was issued to obtain funds to construct improvements to the Wildwood facility. The improvement funds in the amount of $4,715,000 (net of issue costs) were deposited directly to an account in an Anchorage bank. This account is accessible by DOC staff to perform whatever capital improvements at the Wildwood facility the department deems necessary. These funds have not been appropriated; the legislature was not permitted to make the necessary policy decisions over the expenditure of those improvement funds; and the funds are not recorded on the state accounting system. DOC has not received any authority to receive and expend those funds.

In addition to the central principle of legislative appropriation and the fact that it was missing in this transaction, there is doubt over DNR's authority to be involved in the issuance of COPs for the purposes of obtaining improvement funds. Legislative counsel has stated:

I did not find statutory authority by which the Department of Natural Resources may act to acquire capital for the purposes of improving or refurbishing facilities. The department's authority seems to have involved it only with the acquisition of title to the property, exercising, under a delegation from the Department of Administration, the purchase option set out in the 1981(sic)*lease between the Kenai Native Association and the state.*

In regard to DOC's authority to receive and expend the improvement funds without legislative sanction and appropriation, counsel has stated that:

. . . recent Alaska case law in this area gives some reason to believe that the court is disposed to extend protection of the legislature's appropriation authority beyond state money to transactions involving all state assets, there

is some reason to conclude that the courts may similarly act with respect to money constructively received.

State acquires Wildwood properties with known environmental hazards

The Wildwood facility was previously owned by the United States Army and Air Force. As a result of activities at that time substances which pose environmental risk may have contaminated the site. A full investigation as to the extent of environmental contamination has never been performed. However, some initial studies and analyses were performed in 1988 and 1989/1990. Documentation shows that the efforts of those preliminary investigations resulted in the removal and disposition of drummed chemicals, transformers and batteries. Documentation also shows that dioxin contaminated soil is present at the Wildwood facility, however, it appears not to be on the portion of the facility which the State purchased.

During DNR's and the Department of Environmental Conservation's (DEC) visit to the facility two months before the state purchased the facility, DEC identified additional substances including powdered chlorine (HTH), possible herbicides, pesticides, and other unidentified chemicals. Some substances could not be identified due to the deteriorated condition of the containers, which causes concern as to the possibility of soil and groundwater contamination.

According to a Department of Law memorandum there are 19 underground storage tanks on the property. It is not known what kind of fuel or other materials were/are contained in those tanks. We have found no documentation to indicate that any studies had been performed to determine what these tanks contain and whether any of them have leaked, contaminating the surrounding soil and jeopardizing the groundwater.

Who is liable for existing or future claims and environmental remediation? There is a hierarchy of indemnification:

1. The U.S. Army has agreed and confirmed to counsel for KNA that the former Wildwood Air Force Station is eligible for the Defense Environmental Restoration Program. KNA also was assured that a change in ownership of the property from KNA to the State of Alaska would not disqualify the site for Department of Defense environmental cleanup. The U.S. Army Corps of Engineers has taken some exception on certain tanks — those which were subsequently used by KNA — as qualifying for the remediation effort.

   While the Department of Defense has, for the most part, accepted responsibility for clean-up of the site, there has been difficulty obtaining the necessary funding for the clean-up. There is no guarantee when the Corps of Engineers would have the resources to clean-up the Wildwood facility. According to documentation, it is estimated that there are between 450 and 700 former military sites in Alaska that would probably qualify for the Defense Environmental Restoration Program — none of which have yet been fully remediated.

2. In article 11 of the Real Estate Purchase and Sale Agreement — dated October 30, 1992 and signed by KNA and DNR — KNA "*agrees to indemnify, hold harmless and defend State of Alaska from and against any cleanup expenses, liabilities, . . . in conjunction with any loss arising out of or related to environmental contamination, to the extent the material identified for clean-up was located upon the Property during Seller's period of ownership and prior to the conveyance of the Property to Buyer.*"

3. In a very significant concession in Section 3.05 of the lease purchase agreement, the line agencies involved agreed among themselves that in the event of non-appropriation of the annual lease payment, the lessor (DNR) and lessee (DOA) would immediately undertake the costly environmental remediation of the property. This effort would include:

   - The testing of any and all underground storage tanks, ensuring that they comply with all environmental laws. Any discovered contamination would be remediated by the State.

   - DOA and DNR would conduct a complete asbestos survey of all buildings and remove any and all friable asbestos in those structures.

   - DOA and DNR would retain an environmental consultant to conduct an environmental assessment of the property.

   - DOA and DNR would immediately remediate any other environmental contamination located on the property.

   This agreement in event of non-appropriation places the legislature in the difficult position of possibly being required to appropriate funds for environmental remediation which had been agreed to by the Administration. The cost of the environmental clean-up would undoubtedly exceed the annual funding requirement to maintain the lease. As noted earlier, Moody's Credit Report states that the environmental concerns are mitigated by this provision "*which encourage the legislature to appropriate in order avoid remediation costs.*"

   The lease-purchase terms requiring remediation in event of non-appropriation fails to mention that even if the State does determine that environmental remediation is warranted, such expenditure is also subject to appropriation by the legislature.

In October 1992, two months before the purchase of the facility, the Department of Law internally expressed concerns over the environmental issues and potential liabilities. In a memo from the Department of Law's Environmental Section to the Natural Resources Section, the following was stated regarding potential liability:

> *From a liability perspective, one important implication is the increased threat that some person or property may be exposed to any contamination that may*

> *exist at the facility until such time as the Corps or DNR or DEC cleans the site up. Additionally, the longer the Corps takes to undertake cleanup the more likelihood that any contamination on the property may migrate off-site and damage neighboring property and possibly pose a threat to public health and to the environment. Unless the Corps is willing to enter into an agreement with EPA and DEC to clean up Wildwood within a certain timeframe, perhaps with stipulated penalties for breach of the agreement, DNR would not only have the threat of third party lawsuits hanging over its head, but also would itself be liable for cleaning up the contamination under Alaska's strict liability statutes.*

One of the primary recommendations made in the memo was that an environmental consultant be retained to assess the extent of contamination. This was not done. We agree with the Department of Law attorney who concluded the memo by stating:

> *I would only add that I doubt any environmental attorney would recommend that their client purchase property with known contamination without an environmental assessment that indicates the extent and kind of contamination, and the cost of clean up.*

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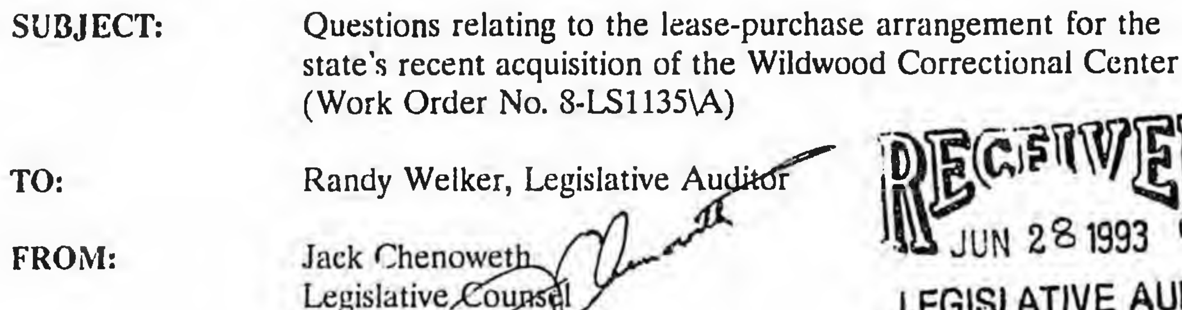
M E M O R A N D U M June 28, 1993



SUBJECT: Questions relating to the lease-purchase arrangement for the state's recent acquisition of the Wildwood Correctional Center (Work Order No. 8-LS1135\A)

TO: Randy Welker, Legislative Auditor

FROM: Jack Chenoweth
Legislative Counsel

RECEIVED
JUN 28 1993
LEGISLATIVE AUDIT

Your May 12 memo to Tam Cook was referred to me for preparation of a response.

Your inquiry concerns the state's recent acquisition of the Wildwood Correctional Center through employment of a purchase option in a 1981 lease agreement. Exercising the option, the state acquired the property from the Kenai Native Association in December, 1992.

The questions you submitted relate to the actions taken by two of the three state agencies that participated in that property acquisition, the Departments of Natural Resources and Corrections. They ask us to consider the critical subject of whether and to what extent the legislative branch shall have control over relevant state finances.

Specifically, you have inquired:

> 1. Does AS 38.05.035(a)(12), the statute on which the Department of Natural Resources relies, grant the authority to independently acquire capital outside of the legislative appropriation or approval process for the purposes of purchasing developed or undeveloped property?
>
> 2. Does the Department of Natural Resources have the authority to acquire capital for the purposes of improving or refurbishing facilities--projects which historically have been subjected to the public capital appropriation process?

3. On what authority does the Department of Corrections, or any state agency, obtain access to the improvement funds generated by the issuance of certificates of participation? Wherein lies the authority for the Department of Corrections to constructively receive and expend funds that have not been subjected to the appropriation process?

In the absence of directly relevant Alaska case decisions, providing definitive conclusions to any of these questions is not possible. However, the precedents that appear to apply indicate to me that, in the absence of statutory authority and relevant legislative appropriations, the two departments may have acted outside the legal authority that each enjoys.

I

DOES AS 38.05.035(a)(12) GRANT THE DEPARTMENT OF NATURAL RESOURCES THE AUTHORITY TO INDEPENDENTLY ACQUIRE CAPITAL OUTSIDE OF THE LEGISLATIVE APPROPRIATION OR APPROVAL PROCESS FOR THE PURPOSES OF PURCHASING DEVELOPED OR UNDEVELOPED PROPERTY?

The question infers its answer: AS 38.05.035(a)(12) does not, in and of itself, exempt the Department of Natural Resources from other legal requirements applicable to state agency performance. The paragraph does not permit the Department of Natural Resources to "acquire capital" outside the legislative appropriation or approval process. However, in fairness to the department, it should be pointed out that a court may not conclude that the Department of Natural Resources itself acted to "acquire capital"; the courts may decide that the raising of the money to purchase the property involved action by a private entity and was therefore not subject to relevant constitutional and statutory requirements.

In framing a response to this first question, I want to talk about the closely related question regarding the parameters of the power exercised, discussing to what extent the power exercised by the department is restricted by relevant constitutional and statutory fiscal controls.

*

To purchase the Wildwood Correctional Center property from the Kenai Native Association, the Department of Natural Resources entered into a master trust agreement and a master lease. The master trust agreement supported the issuance of "participations" or "certificates of participation," obligations issued to evidence ownership interests, under which the certificate holders become entitled to a proportional share of rent payments recovered by the trustee (for the benefit of the department). The department's trustee obtained money from the sale or placement

of these participations, used that money to acquire the property, and holds the site in trust for the department.

In the exchange of documents that supported the transaction, the Department of Natural Resources, as lessor, entered into the lease with another state agency, the Department of Administration, to let the facility. The lessor, the Department of Natural Resources, assigned its interests in the rent to its trustee. In turn, the Department of Administration assigned its interests as lessee to the Department of Corrections. Administration also covenanted to make lease payments, subject to legislative appropriation, for a period of years. When, at the end of the period of the lease, all financial obligations have been met, title is to be transmitted from the trustee to the Department of Natural Resources.

As authority for its role in the process of acquiring title to the Wildwood Correctional Center, the Department of Natural Resources itself has cited and apparently relied exclusively on AS 38.05.035(a)(12). The statute, spelling out the powers and duties of the director of the division of lands, provides:

> (a) The director shall
>
> . . .
>
> (12) be the certifying agent of the state to select, accept and secure by whatever action is necessary in the name of the state, by deed, sale, gift, devise, judgment, operation of law, or other means any land, of whatever nature or interest, available to the state; and be the certifying agent of the state, to select, accept or secure by whatever action is necessary in the name of the state any land, or title or interest to land available, granted, or subject to being transferred to the state for any purpose;
>
> . . . .

For purposes of this memo, the key, of course, is that portion of AS 38.05.035(a)(12) authorizing the director to "select, accept and secure by whatever action is necessary in the name of the state . . . any land". Bond counsel explicitly [1], and the

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[1] Counsel to the State Bond Committee contends:

> The public land provisions contained in Title 38 and set forth above [citing, among other sections, AS 38.05.035(a)(12)] authorize DNR to acquire land for the benefit of the state "by . . . other means any land . . . available to the state." There are no restrictions or other notice provisions in the public lands statutes relating to the acquisition of property.

(continued...)

Department of L.w at least implicitly, have concluded that the phrase permits the Department of Natu.al Resources to incur an obligation for payment of money in that it empowers the department to engage in long-term financing arrangements for the land it proposes to acquire. [2]

Statutes setting fiscal controls on state agenc s do not require the Department of Natural Resources to seek and obtain an appropriation before entering into an

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[1](...continued)

> Of course, constitutional restrictions on state debt are still applicable. However, the language of Alaska Stat. § 38.05 is broad enough to encompass an acquisition through the use of lease purchasing financing, thus avoiding the constitutional questions relating to state debt.

Memo of Barbara Simpson Kraft to George Mardikes, April 20, 1992.

[2] Initially, the Department of Law indicated that AS 38.05.035(a)(12) did not support the department's acquisition of the Wildwood Correctional Facility:

> . . . AS 38.05.035(a)(12) describes the director's power as being the ". . . certifying agent of the state to select, accept and secure by whatever action is necessary in the name of the state . . . any land . . . ." This statute concerns the selection or acquisition of "public land;" not public buildings or public facilities. We caution that the State Bond Committee and DNR could be on shaky legal ground if AS 38.05.035(a)(12) is relied upon as authority for DNR to acquire the facility and to finance it through a lease purchase agreement. . . . We also disagree with [counsel for the State Bond Committee] that "by whatever action is necessary," as used in AS 38.05.035(a)(12), somehow grants DNR the authority to do creative financing to purchase a public facility. Nowhere in Title 38 is DNR given explicit or implicit authority to establish special accounts or undertake creative financing to acquire a public facility or building.

Memo of Assistant Attorney General Marjorie Odland, May 19, 1992 (emphasis in original). However, Ms. Odland later acknowledged that the Department of Natural Resource did have power under state law to acquire the property and to enter into the financing arrangement:

> 1. The State of Alaska, Department of Natural Resources is authorized and has power under state law, to acquire the [Wildwood Correctional Center] Property under the Deed, to enter into the Lease with [the Department of Administration], to grant the Deed of Trust to [Seattle First National Bank], to assign the rights in the Lease under the Assignment to SFNB, to enter into the Master Trust Agreement and to carry out its obligations under them and the transactions contemplated by them.

Letter of December 10, 1992, co-addressed to several parties by Assistant Att'y. Gen. Marjorie Odland, page 2.

agreement under which "certificates of participation" issue in order to secure the acquisition of the Wildwood property.

For purposes of this discussion, I make the assumption that regular FY 93 appropriations to the office of the director of the Division of Lands and to the office of the Commissioner of Natural Resources are not in question, and that those appropriations permitted each to proceed to conduct the day-to-day business of the respective organizational units in a manner consistent with law. In other words, I treat this assignment as one in which I am asked to consider whether, in addition to those "regular" appropriations to the Department of Natural Resources for the operation of the respective offices, either unit should have been prohibited from acting to enter into the financing arrangement in question without a separate appropriation (or allocation) that recognized the receipt and expenditure of the money raised from the sale or placement of certificates of participation under the master agreement.

At issue is the money obtained in the sale of the "participations." That money derived, albeit indirectly, from the department's exercise of a power granted to it by law.

The Department of Natural Resources would likely argue that its acquisition of real property using financing contracts with contemporary assignment of its interests and responsibilities to a trustee under the master trust agreement does not bring the transaction within the statutory appropriation requirement. It can show that, in the course of this transaction, the department has not itself received and handled the money obtained from the placement of the "certificates of participation." The department may contend that the money raised by the sale of the certificates was not "state money" or a "state asset" as those terms are generally understood, and was therefore exempt from the statutory appropriation requirements.

That argument is not without support.

If any state statutes may apply, the Fiscal Procedures and Executive Budget Acts should. The Fiscal Procedures Act (AS 37.05) provides that money or revenue--"capital," to use the descriptive term indicated in your question--acquired by a state agency in the course of an agency's undertaking its duties and responsibilities constitutes an agency receipt--a "federal receipt" if the source of the payment is the United States government, an "interagency transfer" if the source is another state department, or a "program receipt" if the source is the agency's own activities. [3]

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[3] A pair of provisions in the state's Fiscal Procedures Act, AS 37.05, may be relevant.

(continued...)

Under the Executive Budget Act (AS 37.07), program receipts of a state agency are subject to appropriation. [4] The Fiscal Procedures Act is silent, however, as to

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[3](...continued)

AS 37.05.146 provides a broad definition for the term "program receipts":

> . . . "program receipts" means fees, charges, income earned on assets, and other state money received by a state agency in connection with the performance of its functions; . . . .

Longstanding practice directs that federal receipts for specific functions and purposes must be appropriated. Under AS 37.05.050,

> . . . [f]ederal funds received by an agency shall be deposited in the state treasury and disbursed in the same manner as other state money. Federal funds are subject to the fiscal controls imposed by this chapter, except where federal laws or regulations prevent the funds from being deposited, appropriated, allocated, accounted for, or expended as provided by this chapter and other laws not inconsistent with this chapter.

The requirement is supplemented by AS 37.10.060, directing that "[a]ll fees and receipts received by the Department of Revenue from any source shall be deposited in the state treasury at least once each month, and credited by the department to the proper fund." Once placed in the treasury, the amounts are presumably expendable only by appropriation. Surely the legislature would not require less in the handling of revenues from non-federal sources, even trust or custodial revenues from other sources, than what it has identified for federal receipts.

(Emphasis added).

[4] AS 37.07.080(h) provides:

> (h) The increase of an appropriation item based on additional federal or other program receipts not specifically appropriated by the full legislature may be expended in accordance with the following procedures:
>
> (1) the governor shall submit a revised program to the Legislative Budget and Audit Committee for review;
>
> (2) 45 days shall elapse before commencement of expenditures under the revised program unless the Legislative Budget and Audit Committee earlier recommends that the state take part in the federally or otherwise funded activity;
>
> (3) should the Legislative Budget and Audit Committee recommend within the 45-day period that the state not initiate the additional activity, the governor shall again review the revised program and if the governor determines to authorize the expenditure, the governor shall provide the Legislative Budget and Audit Committee with a statement of the governor's reasons before commencement of expenditures under the revised program.

money raised or secured by third parties to be used, in accordance with the terms of an agreement with a state agency, for the ultimate benefit of that agency.

United States Fire Insurance Company v. Minnesota State Zoological Board, 307 N.W.2d 490 (Minn. 1981), lends support to this contention. Minnesota's legislature had established a zoological board to initiate and operate a zoo. Initially, the board was provided a standing appropriation; later, the board was made subject to biennial legislative appropriations. In 1977 the legislature empowered the zoo board to acquire a transportation system for the zoo facility. However, though the legislature provided no appropriation to acquire the system, at the same time it specifically authorized the board to proceed to acquire a transportation system--the board eventually opted to develop a monorail--by lease-purchase or installment purchase contract, incorporating language in the authorizing Act to the effect that the transportation project could be paid for "from any funds of the board not pledged or appropriated for another purpose." The board entered into an agreement that contemplated financing the project through the use of certificates of participation. Thereafter, the zoo board later defaulted in the payments due to retire the certificates. In a civil action brought by the certificate holders to recover against the board, the court tacitly acknowledged that, despite the absence of an appropriation, the board could proceed as the legislature had indicated and had entered into a presumptively valid agreement. In the circumstances of the Minnesota decision and in the authoritative cases cited, each of the entities was a state agency or other public body whose contract had purported to commit or obligate it to pay. In those situations, the Minnesota court said, "[t]he mere creation of the liability on the part of the state to pay . . . is of no force in the absence of an appropriation of funds from which the liability may be discharged." 307 N.W.2d 490, at 496, quoting State ex rel. Chase v. Preus, 179 N.W. 725, 726 (Minn. 1920). Alaska's Supreme Court has reached a similar conclusion. McAlpine v. University of Alaska, 762 P.2d 81, at 90 - 91 (Alaska 1988).

On the strength of the Minnesota precedents, then, assuming other general authority to enter into an financing agreement and an appropriation to operate the department or division on a day-to-day basis, the absence of an appropriation may not preclude the department from entering into an agreement with Seattle-First National Bank to take action in the agency's behalf. The contract entered into is presumptively valid.

Moreover, the acquisition money in question cannot clearly be treated as a "program receipt" of the department; review of the relevant contract documents confirms that the money is properly that of the trustee, Seattle-First National Bank, and is not money for which the department has direct expenditure authority. Since the AS 37 provisions cited make no mention of requirements applicable to money not subject to the agency's expenditure authority, the fiscal controls set out in those chapters mentioned do not apply.

The Department of Natural Resources may have been constitutionally required to seek and obtain an appropriation before becoming involved in the issuance of "certificates of participation" to secure the acquisition of the Wildwood property.

At least two state constitutional provisions apply to prohibit the Department of Natural Resources from exercising powers without necessary legislative appropriations. Article II, section 1 of the state constitution vests the legislative power in the legislature. Article IX, section 13 guides expenditures, and reads in pertinent part:

> EXPENDITURES. No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. .... [5]

Each of the two sentences in section 13 of article IX establishes requirements, hence each may provide an independent basis for evaluating the action of the Department of Natural Resources.

"No money shall be withdrawn from the treasury except in accordance with appropriations made by law."

Resolution of the matter of the necessity of an appropriation turns on whether the money generated by the sale of the certificates of participation, issued by a trustee but used as directed by the department, were funds due the state treasury.

This office has generally contended that the state treasury consists of all public funds, that is, of all money raised by operation of law and usable for governmental purposes. In contrast, in behalf of the agencies of the executive branch, the Department of Law has long asserted that state agencies may, in fact, receive and expend trust and custodial funds--money "made available by others only on condition that [it] would be used for a designated purpose" [6]--without the necessity of a prior legislative appropriation. Since Statehood, the Department of Law has authored a

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[5] The two sections cited are tied together by article XII, section 11, that defines and assigns "law-making powers":

> LAW-MAKING POWER. As used in this constitution, the terms "by law" and "by the legislature," or variations of these terms, are used interchangeably when related to law-making powers. ....

[6] The definition derives from a characterization set out in Opinion of the Att'y. Gen'l. September 15, 1977, at page 2.

series of opinions supporting the ability of the executive to expend money without the necessity of a prior appropriation under certain circumstances:

> In delimiting the application of the appropriation requirement, the courts have engaged in a variety of distinctions or legal fictions which are summed up in Navajo Tribe v. Arizona Department of Administration, 528 P.2d 623 (Ariz. 1975). Suffice to say that the underlying rationale is that, where the funds may be used only for a given purpose and the legislature has authorized activities in furtherance of that purpose, the appropriation requirement has no application; indeed, its application would constitute a needless, excessive infringement on the executive (or, for that matter, judicial) branch's administration of monies.

Opinion of the Att'y. Gen'l., July 1, 1976, at page 5. The opinion concluded with a summary of the general position that has come to be endorsed by the department:

> The rule appears to be that if funds are placed in the treasury where they are available for appropriation by the legislature for any purpose, an appropriation is required. But if they are kept separate, e.g., in separate accounts or funds, for a specific purpose (and they are not the proceeds of a state tax or license or other revenue measure but rather are from federal sources for specific programs or are obtained subject to a trust for the benefit of a particular program, e.g. retirement), then no appropriation is required. And, indeed, in the case of federal funds for specific programs, an attempt to control their administration would infringe upon the executive (or judiciary) in violation of the separation of powers doctrine, . . . such funds being beyond the appropriation power of the legislature. . . . .

Opinion of July 1, 1976, at pp. 11, 12 (case citations omitted).

The question recently arose again during the deliberations over the disposition of the money committed to the joint state-federal trust fund under the Exxon settlement and consent decree. There, Attorney General Cole contended that the state constitution does not compel legislative appropriation of money that is not public revenue or assets of the state and that cannot be placed in the state treasury. In an extended footnote to his April 2, 1991, memo to the Special Legislative Committees on the Exxon Valdez Oil Spill Claims Settlement, the attorney general summarized the case law from other jurisdictions that, he contended, supported the proposition that

> . . . [the appropriation] power obviously does not extend to monies that are not assets belonging to the State, but are instead assets of a joint Trust Fund not subject to sole State ownership or control.

Opinion of the Att'y. Gen'l., April 2, 1991, at page 6. Here, in contrast to the joint "trust" fund situation cited by Attorney General Cole, the money in question is not subject to obligations imposed by a co-trusteeship agreement. [7]

As I have stated in the earlier discussion, without doubt the department would vigorously contend that the money raised by the department's trustee or agent from the issuance and sale of certificates of participation does not constitute money due the state treasury but that, even if it was, it was money that, at best, constitutes "trust or custodial money" subject to the exemption that the department has identified and regularly defended. That position is not without substantial support in the case law of other jurisdictions. However, courts in at least two states with constitutional provisions quite similar to article IX, sec. 13 of the Alaska constitution have, since 1976, forthrightly concluded that the respective constitutional provisions must be read to require that even federal funds must be appropriated by the legislatures before they may be spent by the agencies of the executive branch. In Anderson v. Regan, 425 N.E.2d 792 (N.Y. 1981), the New York Court of Appeals determined that federal matching funds, received for application to programs that were traditionally a state concern, must be appropriated, even though their use is severely limited by federal law, in order to restrain the executive from overspending, to maintain the balance of power between the executive and legislative branches, and to ensure accountability. [8] In Shapp v. Sloan, 391 A.2d 595 (Pa. 1978), app. dismissed sub nom. Thornburgh v. Casey, 440 U.S. 942, 59 L.Ed.2d 630, 99 S.Ct. 1415 (1979), Pennsylvania's Supreme Court reached the same conclusion. [9] The highest courts of these two jurisdictions

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[7] Other cases cited by the Attorney General to support the contention that money need not be subject to appropriation are generally distinguishable. In some instances, the cases cited involved money held by the state in trust for another political entity authorized to spend it; in the case of the Wildwood facility purchase, however, although the financing arrangement involves the appointment of trustees and other intermediaries who have actual custody of the dollars raised, the decision on how to allocate that money--to purchase the facility and surrounding land and to undertake improvements--and the direction given involves decisions and direction that are fundamentally legislative. Nor is the money raised by the Wildwood financing arrangement "non-state funds"; the money is obtained by decisions of key state employees pursuant to authority vested in them by law.

[8] In the case, the Court of Appeals was asked to apply art. VII, sec. 7 of the New York constitution, the relevant portion of which reads:

> No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; . . .

[9] The provision of the Pennsylvania constitution at issue, art. 3, sec. 24, reads, in relevant part:

(continued...)

have, between them, set out a number of reasons that have persuaded them to find in favor of an inclusive legislative role in all appropriations, identifying: minimizing the risk of unilateral executive overspending of anticipated federal revenues, thereby reducing the possibility of incurring obligations that may be dischargeable by state taxpayers; maintaining accountability for agency performance; allocating priorities among alternatives for which money is available; and maintaining a proper balance between the legislative and executive branches.

Significantly for those who contend that the legislative power over appropriations deserves to be safeguarded, Alaska's Supreme Court has tended to safeguard the legislature's appropriation power against efforts to circumscribe or limit it. The court's direction has come in response to the public use of initiatives. The cases that have arisen have extended that protection beyond the legislature's authority over the expenditure of state money to transactions involving all state assets. [10/] Further support for the notion that article IX, section 13 sets a minimum requirement applicable to all expenditures is to be found in the decision of Superior Court Judge Thomas Stewart concluding that "so-called trust or custodial monies received from federal or other sources for specific functions and purposes" were subject to appropriation under art. IX, sec. 13 of the state constitution. Kelley v. Hammond, Super. Ct., First Jud. Dist. at Juneau, Case No. 77-4 (May 30, 1978).

If, as has happened in the Alaska cases cited, the court is prepared to extend constitutional protection to "ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs," then

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[9/](...continued)

> No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; . . . .

[10/] Under article XI, section 7, the initiative may not be used, among other objectives, "to make or repeal appropriations." In Thomas v. Bailey, 595 P.2d 1 (Alaska 1979), the court struck down as violative of article XI, section 7 the Beirne Initiative's proposal to transfer state land to private persons, thereby extending the prohibition's protection to nonmonetary assets. The decision in Alaska Conservative Political Action Committee v. Municipality of Anchorage, 745 P.2d 936 (Alaska 1987), concluded that an appropriation was prohibited from reach by initiative if it involved the transfer of any government asset. Finally, in McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), the court invalidated portions of an initiative that would have required the University of Alaska to transfer its property to a proposed statewide community college system. In this last decision, the court observed that

> The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the legislature, retains control over the allocation of state assets among competing needs.

762 P.2d 81, at 88.

surely the court should be prepared to entertain serious consideration of the argument that the efforts of an agency, directly or indirectly (through trust agreements to accommodate the issuance of certificates of participation), to obtain title to property, and whether or not treated as "trust or custodial money," should be subject to the legislative appropriation process. Despite support for the Department of Law's assertion that use of trust or custodial money somehow escapes the appropriation process, the court may be willing to recognize that, in entering into an agreement initiating the issuance of certificates of participation, the Department of Natural Resources is serving not merely as a conduit or recipient of money "made available by others" but is, albeit through the use of a trustee, actively working to generate the revenue in question and giving control and direction to its use. This is precisely the kind of activity that the New York and Pennsylvania courts characterized as activity that should be subject to control by the state legislature.

When a state agency proposes sale of certificates of participation to secure state ownership of real property, the legislature may properly assert that the money raised by the department by sale of the certificates has the status of public money, subject to treatment as if it were depositable into the state treasury and disbursable only by appropriation. The money in question has a number of the characteristics of revenue derived for the discharge of a governmental or public purpose: it was money raised through the department's exercise of a power that, even the department's attorney would acknowledge, was authorized by statute; was obtained so that the department could acquire title to land in order to accomplish a public purpose; and was secured by the department's trustee for reasons that were deemed to be of ultimate benefit of state. The purpose for which the money was obtained clearly relates to interest in and concern for the discharge of constitutional and statutory obligations relating to the care and custody of prisoners, an interest that, due to allocation of other available state revenue for competing considerations, constitutes a legislative concern. Finally, the transaction in which the department involved itself places the Eighteenth Legislature and a number of future legislatures under the constraint of having to decide whether to identify and allocate money for payment of rent or forego the continued use of the facility. Taken all together, these factors fairly convincingly argue, in my judgment, for prior legislative sanction of disbursement of the revenue in question. Recent Alaska case law in this area gives some reason to believe that this argument may prevail.

"No obligation for the payment of money shall be incurred except as authorized by law."

This sentence, apparently unique to this state's constitution, [11] offers a second, independent basis by which to challenge the Department of Natural Resources'

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[11] From a review of records of the Finance and Taxation Committee of the Alaska Constitutional Convention, it appears that this provision was lifted virtually verbatim from the second half of the first sentence of sec. 706 of the Model State Constitution. The commentary accompanying the model constitution offers no clue as to what purpose the provision was to address. See, sec. 706, Model State Constitution (5th Edition revised, 1948), and related commentary.

actions. Depending upon the interpretation eventually given this sentence, the provision may, ultimately, provide the broadest general measure of the legislative branch's interest in the performance of executive branch agencies.

Let me speak, first, to a threshold question of whether execution of the master trust agreement, lease, and related arrangements constitute the incurring of an obligation for payment of money, or incurring of a form of "debt." Two state constitutional provisions are implicated, article IX, section 8:

> STATE DEBT. No state debt shall be contracted unless authorized by law for capital improvements or unless authorized by law for housing loans for veterans, and ratified by a majority of the qualified voters of the State who vote on the question. The State may, as provided by law and without ratification, contract debt for the purpose of repelling invasion, suppressing insurrection, defending the State in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this constitution becomes effective.

and article IX, section 11:

> EXCEPTIONS. The restrictions on contracting debt do not apply to debt incurred through the issuance of revenue bonds by a public enterprise or public corporation of the State or a political subdivision, when the only security is the revenues of the enterprise or corporation. The restrictions do not apply to indebtedness to be paid from special assessments on the benefitted property, nor do they apply to refunding indebtedness of the State or its political subdivisions.

If the transaction in question involves debt at all, it involves the debt of a state agency, not of a public enterprise or public corporation, and the section 11 exceptions have no applicability. Likewise, if the transaction involves debt, it is a debt incurred for which an exception is not enumerated in the second sentence of section 8.

Whether a lease-purchase arrangement involves the contraction of debt is an unanswered question in Alaska. In other jurisdictions, the greater number of decisions conclude that, if the agreements incorporate, as the one in question does, a "nonappropriation clause," that is, a provision that does not obligate the legislature to appropriate money to cover rent, the transaction does <u>not</u> involve the creation of a debt. <u>Department of Ecology v. State Finance Committee</u>, 804 P.2d 1241 (Washington 1991) and decisions of other jurisdictions cited therein at fn 9, p. 1246.

However, a few jurisdictions have concluded otherwise. In <u>Montano v. Gabaldon</u>, 766 P.2d 1328 (N. Mex. 1989), that state's supreme court rejected the contention that a county's lease-purchase arrangement did not involve the incurrence of debt in

violation of New Mexico's constitutional requirement directing submission of the question to county voters for approval. The court considered the transaction carefully and found that, despite the "non-appropriation" provision:

> The appellees argue that no unconstitutional debt is created by this lease because there is no legal obligation either to continue the lease from year to year or to purchase the facility. However, we are of the opinion that once the County accepted this lease, it would be obligated to continue making rental payments in order to protect a growing equitable interest in the facility, as well as to protect the County's interest in the title to County land. This is the type of future economic commitment that requires the arrangement be approved by the voters.
>
> Additionally, consistent with our conclusion that the obligation falls within the intended broad interpretation of indebtedness, we find the lease-purchase agreement to be a "lease" in form only. If an option price is nominal or nonexistent, a purported lease may be treated as a sale. In this case, the County acquires ownership of the facility simply by making the agreed rental payments over the twenty-year term; however, it loses all interest in the project if it exercises its termination rights or defaults. The only method by which the County may redeem its investment is by tendering the full purchase price of the facility, plus interest. Accordingly, each semi-annual "rental" payment represents more than just a present debt for the use of the facility for a six month period. The arrangement is in essence an installment-purchase agreement for the acquisition of a public building, with outside financing and payments spread over twenty years, and as such it requires voter approval.

766 P.2d 1328, at 1330 (citations and footnote omitted). See also State ex rel. Nevada Bldg. Authority v. Hancock, 468 P.2d 333 (Nev. 1970); City of Phoenix v. Phoenix Civic Auditorium and Convention Ctr., 408 P.2d 818 (Ariz. 1965).

In the Washington case cited, Department of Ecology v. Finance Committee, a minority of the closely-divided court observed in a vigorous dissenting opinion:

> [T]he certificates [of participation] constitute evidence of indebtedness. The amount to be financed will effectively be borrowed from those "purchasing" the certificates of participation. The certificates will include the specific schedule for repayment of both principal and interest. The holders of the certificates will be repaid out of the lease payments made by [the Department of] Ecology to the trustee. And, although the certificates will provide that the holders may not be

> paid if funds are not appropriated, the holders will retain a security interest in the land, the building, and its rental income until the expiration of the . . . lease. This security interest serves one purpose only--the guarantee of repayment should Ecology default or terminate its rental agreement. **The certificates constitute evidence of state indebtedness.**
>
> Moreover, the loan from the holders of the certificates is required to be paid from state revenues. Even though this arrangement has been carefully structured to avoid the appearance of an obligation through the use of the nonappropriation clause, the effort has been unsuccessful. On the surface, it appears that the State's obligation to pay rent will expire if the Legislature fails to appropriate funds, but reading between the lines indicates there is very little likelihood that such an event will ever occur. It is simply not in the best interests of the State to fail to pay rent.
>
> As stated previously, Ecology is currently headquartered at 18 separate locations in Thurston County. There is clearly a dire need for the acquisition of the proposed headquarters. . . . The clear purpose of this complex arrangement is to allow Ecology to acquire title to the building and improvements. Ecology will quickly be acquiring equity in the property . . . If at any point it defaults on its rent, it will be forced to vacate the premises. The State will lose the use of the premises until the end of the . . . lease period. Should the Legislature ever indicate an unwillingness to appropriate funds, it will undoubtedly face intense pressure to appropriate.
>
> . . .
>
> Thus, although the nonappropriation clause appears to allow the Legislature an escape hatch, the escape hatch is really an illusory one. The debt will be required to be repaid from general state revenues . . . .

804 P.2d 1241, at 1256-1257 (dissenting opinion, emphasis in original).

Assuming that the courts of this state decline to follow the majority rule, a related question would arise as to whether or not the debt incurred were the debt of the state. Again, in a lease-purchase situation, the authorities are in conflict. In the Washington case cited, Department of Ecology v. Finance Committee, a divided court determined that, when a lease-purchase arrangement that relied upon a trust agreement and master lease vested substantial responsibility in a trustee that was not a state agency, the arrangement placed all obligations on the trustee and did not

involve a state debt. 804 P.2d 1241, at 1245. By contrast, in Montano, the New Mexico decision, on substantially the same facts, the court concluded that the lease was one of form only, that the real purpose of the arrangement was the ultimate conveyance of the public work project in question, that the arrangement led to the purchaser's having at least an equitable interest in the improvement sought to be acquired, and that the arrangement ought to be viewed as creating a county (i.e. a public) debt.

Without knowing whether or not Alaska's courts would follow the majority line of decision, one can conclude that, should the state's courts decide that the Wildwood lease-purchase financing arrangement constitutes debt and that it were a debt incurred by the contracting agency, it would be logical to conclude that the incurral of it would have come in violation of article IX, section 8.

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The question of whether or not the financing arrangement constitutes debt incurred in violation of law aside, the question to be addressed is one of whether the Department of Natural Resources had authority to enter into the lease-financing agreement without prior legislative appropriation.

Research disclosed that, while no state constitution apart from Alaska's contains a provision exactly like the language quoted, limiting the state's obligation for payment of money to those that are authorized by law, the provision is not unlike prohibitions to be found in Illinois' Constitution of 1870:

> The General Assembly shall never . . . authorize the payment of any claim, or part thereof, hereafter created against the state under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void. [12/]

and in Missouri's Constitution of 1875:

> The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the state, or any

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[12/] Art. IV, sec. 19, Illinois Constitution of 1870 (superseded by Constitution of 1970).

> county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void. 13/

While there are, to be sure, differences in language and content between the two provisions cited and the sentence in the Alaska Constitution, there is a common relationship among the three provisions. 14/ That relationship, I suggest, is to prevent the legislative branch, in Illinois and Missouri, and all state officers, in this state, from committing the state to making payments from the treasury that are without sufficient legal basis.

How, then, should the second sentence of article IX, section 13, be construed and applied? A Missouri decision considering art. IV, sec. 48 of the former Missouri Constitution offers some guidance:

> . . . [W]e think that the constitutional provision in question was not adopted with the intention to abrogate the doctrine of the common law that incidental powers may accompany the grant of an express power, as necessary to the exercise of the latter, but to enforce the rule of strict construction in determining what agreements public agents and officials are given the right to make, in connection with the performance of some duty imposed on them, when such subsidiary agreements are not mentioned in the law imposing the duty.

State ex rel. Kelly v. Hackmann, 205 S.W. 161, 164 (Mo. 1918). Under the "rule of strict construction" identified in the Missouri opinion, an agency is generally limited to the exercise of the powers that have been expressly granted by the enabling statute on which it relies together with those other activities that may reasonably or necessarily be implied from the powers expressly granted. The rule infers that, beyond the express grant of authority set out in the words of the statute, a state agency may exercise under that grant of authority no more than the collateral powers that are incidental to the act that has been authorized.

The agency's power is arguably limited even when, as in this instance, the statutory grant of authority purports to give the agency the ability to take "whatever action is necessary" to secure title to land. For, despite the breadth of the authority impliedly

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13/ Art. IV, sec. 48, Missouri Constitution of 1875 (superseded by Constitution of 1945).

14/ The tie-in between the Illinois provision and the language of the Model State Constitution is specifically identified in George Braden and Rubin Cohn's "The Illinois Constitution: An Annotated and Comparative Analysis," Univ. of Illinois (Urbana, 1969), at page 196. A copy of the volume is on file in the Legislative Reference Library.

given, the history of the paragraph cited by the department for its acquisition activities, AS 38.05.035(a)(12), lends support to the contention that the paragraph may not permit the director of the division of lands to act for the state to secure land that involves expenditure of money without an appropriation. In engaging in acquisition of land through a lease-purchase arrangement, the Department of Natural Resources has arguably stretched the phrase "select, accept and secure by whatever action is necessary in the name of the state . . . any land" beyond the parameters set in the original legislation, legislation that has been substantively unmodified down to the present time.

In its present form, the operative provisions of AS 38.05.035(a)(12) were added to the body of Alaska law by the last territorial legislature. The current provision arises out of sec. 5, art. II, ch. 184, SLA 1957, detailing the duties of the Alaska Land Board, a creation of the territorial legislature:

> (5) The Board shall be the certifying agent of Alaska to select, accept and secure by any necessary action in the name of Alaska by deed, sale, gift, devise, judgment, operation of law, or any other means any lands, of whatever nature or interest, available to Alaska, and shall be the certifying agent of Alaska, to select, accept or secure by any necessary action in the name of Alaska any lands, or any title or interest thereto, available, granted, or subject to being transferred to Alaska for any purpose.

(The 1959 Act, legislation enacted with the advent of Statehood, establishing the Department of Natural Resources substituted reference to "the director" and "the state.") [15/] The 1957 addition occurred at a time when the then-territorial

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[15/] The 1957 Act was itself a reworking of a 1953 Territorial Act giving the territorial Land Commissioner certain responsibilities:

> The Land Commissioner is hereby empowered to accept, in the name of the Territory of Alaska, by deed of sale, gift or devise, or by judgment or operation of law any lands of whatsoever nature; to accept in the name of said Territory, and within the limits of applicable law to exercise administrative jurisdiction over, lands granted, transferred or reserved to or for the benefit of the said Territory by the United States or any instrumentality thereof, except that nothing in this Act shall be construed to deprive the Board of Regents of the University of Alaska of any of its existing duties, functions or powers. The authority conferred on the Commissioner by this section shall include specifically the authority to accept in the name of said Territory any lands granted or transferred to said Territory for public park or recreation purposes and to exercise administrative jurisdiction thereover.

(continued...)

legislature had what was, at best, only very limited authority to incur public indebtedness. [16/]

Under the 1957 enactment, the Territorial Land Commissioner and the Land Board could not exercise authority free of the necessity of first obtaining legislative appropriations for their work. That limitation arises by virtue of the legislature's addition of the "certifying officer" reference. So, in sec. 1, ch. 183, SLA 1955, the legislature declared that

> The Land Commissioner shall be the certifying officer for the Department of Public Lands and as such is hereby authorized to approve vouchers for disbursement of monies appropriated for said Department. . . . .

15/(...continued)

Section 12, ch. 126, SLA 1953. Arguably, the definition of the duties assigned first to the Land Commissioner, then to the Land Department and Board, was intended primarily, though not exclusively, to serve as an agent in dealing with the federal government on public land conveyances including, at the time, territorial school lands, submerged, shore, and tidelands, and the then-recently-enacted transfers to the territory of mental health lands.

16/ The 1953 and 1957 provisions were enactments of the territorial legislature under authority of the Organic Act of 1912, as amended. Section 9 of the Organic Act spelled out the authority of the territorial legislature and limits on the territorial legislature's authority. Among a very long list of enumerated and withheld powers is to be found:

> . . . nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year including as a part of such income appropriations then made by Congress, and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness;

In fact, the new state inherited virtually no territorial debt. A table prepared as part of a June 1958 report of the Alaska Legislative Council entitled "An Introductory Memorandum on the Study Devoted to Revenue and Taxation" identified no territorial debt outstanding at the end of the territory's 1957 fiscal year. Table IX, page 2, in report cited, available in Legislative Reference Library.

The 1957 revision, establishing the Board, reassigned certifying authority from the former commissioner to the Board, whose executive director was to be the director of the territorial Department of Lands.

Clearly, the territorial legislature provided, and, at Statehood, the new state government inherited, a statutory framework that empowered the director of the division of lands to obtain title to land. However, the director's empowerment was, at the time, circumscribed by making it subject to necessary legislative appropriation. Moreover, at the time the authority was given, the legislature understood that the director did not have the ability to indebt the territory (later, the state)--to require or compel a series of legislative appropriations--in order to secure land titles. To acquire title to land, the director, having and exercising the powers of a "certifying officer," was necessarily required to act within the parameters of legislative appropriations so that the division could undertake its work.

Has the passage of nearly thirty-five years broadened the director of lands' authority? Arguably it has not. Intervening legislatures have not rewritten in any substantive manner the powers of the director relating to acquisition of title to land. Consequently, based on a review of the history of the statute cited and the legislature's grant of authority as to its use. I believe that the better argument favors the conclusion that the division director may not conduct operations to select, accept, and secure title to land for which the state is prepared to give consideration without first securing the benefit of an appropriation.

In summary, the second sentence of article IX, section 13 opens two lines of inquiry into the question of whether the Department of Natural Resources has acted properly. The first, based on an assumption that the Alaska court will follow the minority rule, would conclude that a financing arrangement that looks to a series of legislative appropriations in order to secure the title to the property in the state constitutes debt and, further, that it is a debt incurred by the contracting agency in violation of article IX, section 8. Alternatively, if the courts adhere to the majority rule in the matter of debt, the court may conclude that the agency has overstepped the limits of the second sentence of article IX, section 13, finding that the department has incurred an obligation for the payment of money in a manner beyond that authorized by law.

II

DOES THE DEPARTMENT OF NATURAL RESOURCES HAVE THE AUTHORITY TO ACQUIRE CAPITAL FOR THE PURPOSES OF IMPROVING OR REFURBISHING FACILITIES -- PROJECTS WHICH HISTORICALLY HAVE BEEN SUBJECTED TO THE PUBLIC CAPITAL APPROPRIATION PROCESS?

In the context in which this question is presented, I did not find statutory authority

by which the Department of Natural Resources may act to acquire capital for the purposes of improving or refurbishing facilities. The department's authority seems to have involved it only with acquisition of title to the property, exercising, under a delegation from the Department of Administration, the purchase option set out in the 1981 lease between the Kenai Native Association and the state. [17]

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[17] In the same document in which it exercised the delegation of authority, the Department of Administration acknowledged retaining the status of a lessee of the Wildwood property, with the agency to which it made the delegation, the Department of Natural Resources, eventually to act as lessor. That relationship raises a question of whether the Department of Natural Resources' assent to and subsequent involvement as a party to the lease-purchase agreement involved an obligation for the payment of money incurred without the department having legal authority to do so.

The department may contend that its acquisition of real property through the use of financing contracts has been sanctioned by the adoption of the State Procurement Code, AS 36.30. Financing contracts--arrangements by which property, in this case, state-acquired property, abets its own purchase or acquisition by securing the purchaser's payment of an underlying debt obligation--are a recent phenomenon. So far as I can determine, they were first sanctioned in the body of Alaska statute law by the legislature's adoption of AS 36.30.-080, part of the adoption of the State Procurement Code (AS 36.30) by ch. 106, SLA 1986. The Code defines the acquisition of leasehold interests in privately owned real property for the use of state agencies as "supplies," assigns, under AS 36.30.005(a), responsibility for the procurement of "supplies" to the Department of Administration but, under AS 36.30.015(b), permits a delegation of that authority to another agency. The definition of "supplies" in AS 36.30.990(21) recognizes the Department of Administration's responsibilities for securing leasehold interests of benefit to state agencies but not of other interests in state lands:

> (21) "supplies" means all property of an agency, including equipment, materials, and insurance; it includes privately owned real property leased for the use of agencies, such as office space, **but does not include the acquisition or disposition of other interests in land**.

(Presumably, the distinction recognizes the principal role relating to the acquisition of land that is assigned under AS 38 to the Department of Natural Resources.) The Department of Administration's exercise of its authority under AS 36.30 stops short of securing interests in land apart from leasehold interests.

In the case of the facility at Wildwood, the commissioner of administration executed a delegation of authority to the Department of Natural Resources for the latter to exercise the state's purchase option. Under AS 36.30.005(a), the Department of Administration was empowered to procure "supplies"--i.e. "leases"--for state agencies. It could, under a usual reading of AS 36.30.015(b), delegate that authority.

However, the Department of Administration could not delegate to another agency a greater ability to procure supplies that it itself had by law. And, what the Department of Administration is not empowered to do by law was to procure interests in land apart from leasehold interests in privately owned real property for the use of state agencies. AS 37.05.-

(continued...)

III

ON WHAT AUTHORITY DOES THE DEPARTMENT OF CORRECTIONS, OR ANY STATE AGENCY, OBTAIN ACCESS TO THE IMPROVEMENT FUNDS GENERATED BY THE ISSUANCE OF CERTIFICATES OF PARTICIPATION? WHEREIN LIES THE AUTHORITY FOR THE DEPARTMENT OF CORRECTIONS TO CONSTRUCTIVELY RECEIVE AND EXPEND FUNDS THAT HAVE NOT BEEN SUBJECTED TO THE APPROPRIATION PROCESS?

Simultaneously with the series of transactions described for the Department of Natural Resources, the Department of Corrections also initiated a master trust agreement. That agreement supported the issuance of a different series of "certificates of participation" under which the certificate holders become entitled to a share of the rent payments recovered by the trustee (for the benefit of the department). The Department of Corrections' trustee, the National Bank of Alaska, obtained money from the sale or placement of these participations and, at the direction of Department of Corrections officials, is expending portions of the fund balance in order to complete improvements to the Wildwood facilities. 18/

The answers to these two questions necessarily follow the discussion responding to the question in the first subheading. There are statutory differences with respect to the definition of the Department of Corrections' authority, but the Fiscal Procedure Act and Executive Budget Act sections and the constitutional provisions at work are those set out in the earlier discussion.

17/(...continued)
990(21). Consequently, a delegation to exercise a purchase option for the acquisition of real property in which another state agency--a public entity--stands as prospective lessor may be arguably invalid.

18/ There is no doubt that the Department of Corrections generally enjoys authority to maintain and improve the facilities that are owned or leased by the department for correctional purposes. That authority arises under AS 33.30.011(1):

> The commissioner shall
>
> (1) establish, maintain, operate, and control correctional facilities suitable for the custody, care, and discipline of persons charged or convicted of offenses against the state or held under authority of state law;
>
> . . . .

and under AS 33.30.031(c):

> (c) The commissioner may enter into an agreement with the United States, another state, a municipality of this state, <u>or another state agency</u>, to provide a correctional facility for the custody, care, and discipline of a person held under authority of the law of that jurisdiction.