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STATE OF WASHINGTON ATTORNEY GENERAL'S RECOMMENDED PROCESS AND ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO AVOID UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY

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The Office of the Attorney General is required under the Growth Management Act to advise state agencies and local governments on an orderly, consistent process that better enables government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in unconstitutional takings of private property. RCW 36.70A.370.

This process must be used by state agencies and local governments that are required to or choose to plan under RCW 36.70A.040. A private party, however, does not have a cause of action against an agency for failure to utilize the recommended process. The Act also provides that "[t]he process used by government agencies shall be protected by attorney client privilege". *See* RCW 36.70A.370(4).

The Attorney General's recommended process and advisory memorandum was initially published and circulated in February 1992, with a subsequent edition in April 1993. This memorandum has been updated to reflect recent court decisions.

Attorney General's Recommended Process

1. The Attorney General's Office prepares and distributes an advisory memorandum to all government agencies which exercise regulatory authority impacting private property rights. This advisory memorandum includes discussions of the most recent Supreme Court decisions, along with examples of specific types of situations which raise constitutional questions.

2. Local governments and state agencies should review the advisory memorandum with their legal counsel and distribute it to all decision makers and key staff. Government sensitivity regarding private property rights can be further increased if agency decision makers at all levels of government have consistent, authoritative guidance on the applicable constitutional limitations. This is particularly important for potential property uses which may be subject to the regulatory jurisdiction of multiple agencies.

3. Local governments and state agencies should use the warning signals in the advisory memorandum as a checklist to determine whether a proposed regulatory action may violate a constitutional requirement. The warning signals are phrased as questions. If there are affirmative answers to any of these questions, the proposed regulatory action should be reviewed in detail by staff and approved by counsel.

4. State agency and local government actions implementing the Growth Management Act programs, such as planning under the Growth Management Act, should be assessed by both staff and legal counsel. Examples of these actions include the adoption of development regulations and designations for natural resource lands and critical areas, and the establishment of policies or guidelines for conditions, exactions, or impact fees incident to permit approval. This assessment should also be used for the issuance or denial of permits for land use development.

5. The assessment should be incorporated into the agency's review process. Since the extent of the assessment necessarily depends on the type of regulatory action and the specific impacts on private property, the agency should have some discretion to determine the extent and the form of the assessment. For some types of actions, the assessment might focus on a specific piece of property. For others, it may be useful to consider the potential impacts on types of property or geographic areas. It is strongly suggested, however, that any government regulatory actions which involve warning signals be carefully and thoroughly reviewed by legal counsel. As mentioned above, the Legislature has specifically indicated that the process used shall be protected by attorney client privilege. The agencies, therefore, have the discretion to determine the extent of distribution and publication of reports developed as part of the recommended process.

STATE OF WASHINGTON ATTORNEY GENERAL'S ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO AVOID UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY

The purpose of this advisory memorandum is to provide a tool to assist state agencies and local governments in evaluating whether proposed administrative or regulatory actions may violate constitutional limitations. Government agencies, exercising regulatory authority which impacts the use of property, must be sensitive to the constitutional limits on their authority, and thereby respect private property rights. The failure to recognize these constitutional limits erodes public confidence in government. It may also subject the government agency to liability for costs and damages associated with the invalidation of the government regulatory action, or the imposition of an obligation to pay compensation for the taking of the property.

The memorandum outlines some general legal principles derived from cases which have interpreted the constitutional provisions in specific fact situations. Most of the cases involving regulatory takings issues have discussed the takings clause of the United States Constitution. Some opinions also refer to a substantive due process right under the Constitution. Both constitutional provisions are discussed. The memorandum also includes a list of warning signals, i.e., situations which may involve constitutional issues and should be further assessed by staff and legal counsel. Some important cases are described briefly in Appendix A.

This memorandum is intended as an internal management tool for agency decisionmakers. It is not a formal Attorney General's Opinion under RCW 43.10.030(7), and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a taking or a violation of substantive due process. Legal counsel should be consulted for advice as to any particular action which may involve a constitutional taking or due process violation.

I. GENERAL PRINCIPLES

Government has the authority and responsibility to protect the public health, safety, and welfare. This is an inherent attribute of sovereignty. Pursuant to this authority, the government may properly regulate or limit the use of property.

Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements. The government may limit the use of property through land use planning, zoning ordinances, setback requirements, and environmental regulations.

The government may also establish conditions or requirements for potential uses of property which may have adverse impacts. Conditions may include the granting of easements or donation of property for public use.

Courts have recognized, however, that if government regulation goes "too far", it may constitute a taking of property. The next section of the memorandum outlines the general principles courts use to determine whether a given government regulation effects a "taking" under the Constitution.

A. Takings Clause

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article 1, section 16 of the Washington State Constitution provides that "[n]o private property shall be taken or damaged . . . without just compensation". The government may not, therefore, take property except for public purposes within its constitutional authority and only upon payment of just compensation.

When the government seeks to use private property for a public building, a highway, or some other public purpose, it must compensate the property owner. Government historically acquires property and compensates landowners through a condemnation proceeding.

The government may also become liable for the payment of just compensation to private property owners whose land has been either physically occupied or invaded by the government on a permanent basis. This is generally referred to as an inverse condemnation.

Most comprehensive land use regulation does not, in itself, constitute a taking of property. Zoning and other comprehensive regulations are a legitimate exercise of the government's police power. The regulation, however, must advance a legitimate public interest and not deprive the owner of all economic or beneficial use of the property. Also, a regulation which destroys a fundamental property right, such as the right to possess, exclude others from, or dispose of property, could, on its face, constitute a taking.

A regulation which prohibits all economically viable or beneficial uses of property is not a taking if the government can demonstrate that the proposed uses are prohibited by laws of nuisance or other preexisting limitations on use of property. Limitations on the use of tidelands under the public trust doctrine would be an example of a preexisting limitation on use of property which might insulate government from takings liability.

When government may deny a land use, it may condition a permit to engage in that use. For example, the government may condition a development permit on measures to mitigate adverse impacts of the development. However, a permit condition which imposes substantial costs or limitations on property use could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated.

One factor in assessing the economic impact of a permit condition is the extent of interference with a property owner's reasonable investment-backed development expectations. For instance, in determining whether a taking has occurred, a court would, among other things, weigh the extent of a condition's impact on vested development rights against the government's interest in promulgating the regulation.

B. Substantive Due Process

The Fourteenth Amendment to the United States Constitution has been interpreted by courts to include a right of substantive due process which protects an individual's property from arbitrary regulation. There is also a due process clause in article 1, section 3 of the Washington State Constitution. Recent Washington Supreme Court decisions state that, in addition to the takings clause, the substantive due process limitation protects landowners from unduly oppressive regulation. The court described a balancing test similar to the takings analysis involving the nature of the government interest and the extent of the impact on private property rights.

C. Remedies

The violation of constitutional limits on the scope of regulatory authority may have financial consequences to government agencies. The specific remedy depends on the nature of the government action and the impact on the property owner.

The government must pay just compensation to the property owner if property has been taken and used for a public purpose. In determining just compensation, the court will consider the impact on the value of the property.

If a court determines there has been a regulatory taking, the government has the option of either paying just compensation or withdrawing the regulatory limitation. Even if the regulation is withdrawn, the government might be obligated to compensate the property owner for the temporary taking of the property before the regulation was withdrawn.

The remedy for a violation of the substantive due process requirement is the invalidation of the regulation. The government agency should be aware that if the regulation is invalidated under this constitutional provision and the landowner proves that the agency's actions were irrational or invidious, damages and reasonable attorney's fees may be recovered under the Federal Civil Rights Act.

Government agencies should also be aware that, under state law, a property owner who has filed an application for a permit has a cause of action for damages to obtain relief from agency actions which were arbitrary, capricious, or made with the knowledge that the actions were in excess of lawful authority. *See* RCW 64.40. This state law also provides relief for failure to act within the time limits established by law.

A person challenging an action or ordinance generally must exhaust available administrative remedies before seeking court review and has the burden of proving that the action or ordinance violates the constitutional provision.

II. WARNING SIGNALS

The following warning signals are examples of situations which may raise constitutional issues. The warning signals are phrased as questions which agency staff can review regarding the potential impact of a regulatory action on specific property.

Agencies should use these warning signals as a checklist to determine whether a regulatory action may raise constitutional questions and require further review.

The fact that a warning signal may be present does not automatically mean that there has been a taking. It means only that there could be a constitutional issue and that agency staff should carefully review the proposed action with legal counsel. If property is subject to regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulatory restrictions.

1. Does the Regulation or Action Result in a Permanent Physical Occupation of Private Property?

   Regulation or action resulting in a permanent physical occupation of all or a portion of private property will generally constitute a taking. For example, a regulation which required landlords to allow the installation of cable television boxes in their apartments was found to constitute a taking. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

2. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

   Regulations requiring the dedication of property or granting an easement should be carefully reviewed. The dedication of property must be reasonable and proportional, specifically designed to prevent or compensate for adverse impacts of the proposed development. A court will also review whether the action in question substantially advances a legitimate state interest.

   For example, the United States Supreme Court determined in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), that compelling an owner of waterfront property to grant a public easement which does not substantially advance the public's interest in beach access constitutes a taking. Similarly, the Washington Court of Appeals determined in Unlimited v. Kitsap Cy., 50 Wn. App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988), that compelling the landowner to dedicate strips of property to allow commercial access to a public road from private property and to extend the road, constituted a taking. The Court held that the requirement of commercial access served no public purpose and that the acquisition of the land for an extension for which the County had no immediate plans to build was not necessitated by Unlimited's development. *See* The Luxembourg Group, Inc. v. Snohomish Cy., 76 Wn. App. 502 (1995) (cannot require developer to grant easement for land-locked property).

   On the other hand, state statutes require local governments to assure that adequate provisions have been made for the public health, safety and welfare before approving subdivisions. Miller v. Port Angeles, 38 Wn. App. 904, 909, 691 P.2d 229 (1984). The Court in Miller approved of the exaction of land to widen roads necessary to handle traffic generated by the proposed development.

3. Does the Regulation or Action Deprive the Owner of All Economically Viable Uses of the Property?

If a regulation or action prohibits all economically viable or beneficial uses of the land, it will likely constitute a taking. In this situation, the agency can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other preexisting limitations on the use of the property. *See* Lucas v. South Carolina Coastal Coun., 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).

Unlike the impact of a physical invasion or other limitation on the right to exclude others, it is important here to analyze the regulation's impact on the property as a whole, and not just on a portion of the property. It is also important to assess whether there is any profitable use of the remaining property available. *See* for instance Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986). The remaining use does not necessarily have to be the owner's planned use, a prior use, or the highest and best use of the property. One factor in this assessment is the extent of interference with a property owner's reasonable investment-backed development expectations.

Regulations or actions requiring that all of a particular parcel of land be left substantially in its natural state should be carefully reviewed. A prohibition of all economically viable uses of the property could be vulnerable to a takings challenge. In some situations, however, there may be preexisting limitations on the use of property which could insulate the government from takings liability. Limitations on the use of tidelands under the public trust doctrine probably constitute a preexisting limitation on use of property such as to insulate government from takings liability. *See* Orion Corp. v. Washington, 109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988).

4. Does the Regulatory Action Have a Severe Impact on the Landowner's Economic Interest?

A regulatory action, such as conditioning or denying a permit, which has a significant impact on the owner's economic interest, should be carefully reviewed. Courts will often compare the value of property before and after the impact of the challenged regulatory action. Although a reduction in property value alone may not be a taking, a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses. Another economic factor which courts will consider is the extent to which the challenged action impacts any development rights of the owner. As with warning signal 3, these economic factors are normally applied to the property as a whole.

5. Does the Regulation or Action Deny a Fundamental Attribute of Ownership?

Regulations or actions which deny the landowner a fundamental right of ownership, including the right to possess, exclude others, and dispose of all or a portion of the property are potential takings.

The United States Supreme Court has held that requiring public access along a stream bank as a condition to obtaining a development permit is a taking. Dolan v. Tigard, 512 U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994). The Washington Supreme Court has considered regulations which precluded houseboat moorage owners from terminating leases to regain possession as a taking. *See* Granat v. Keasler, 99 Wn.2d 564, 663 P.2d 830 (1983).

III. APPENDIX

Appendix A is a list some of the principal cases dealing with regulatory takings issues and a summary of the result in each case. These cases provide examples of how courts have resolved specific questions and may be helpful for assessing how courts might resolve analogous situations. There are, of course, a number of other cases which have discussed or resolved regulatory takings issues and some excellent law review articles on the subject.

Appendix A includes a brief summary of the recent United States Supreme Court decision in Dolan v. Tigard, 512 U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994). This opinion should be carefully read in light of other United States Supreme Court opinions on the subject: Lucas v. South Carolina Coastal Coun., 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), and Nollan v. California Coastal Comm'n, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). Also summarized are several State Supreme Court decisions issued since the last edition of this memorandum.

APPENDIX A

1. SUMMARIES OF RECENT SIGNIFICANT "TAKINGS" CASES

Dolan v. Tigard, 512 U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994)

The owner of an electrical and plumbing supply business applied to the city for a permit to expand the facility, located on a parcel adjacent to a stream. The city approved the permit with several conditions. First, the owners were to be prohibited from developing within the 100 year floodplain of the stream. Also, the owners would have to grant an easement for public access along the floodplain. The city also required provision for a bike path across the parcel to connect to the city's path system.

The Supreme Court first was careful to distinguish between quasi-legislative comprehensive land use regulation and the more restrictive requirements for imposing permit conditions in an adjudicative context, as in this case. The Court then proceeded to consider whether the permit conditions were reasonably related to a legitimate public purpose, the essential nexus test. The ban on development in the floodplain was found to be reasonably related to mitigating surface water runoff from the project. The Court, however, found no legitimate purpose in the required public easement across the floodplain, a requirement which deprived the owners of the fundamental right to exclude others.

The Court also found that the bike path could be a reasonable requirement to mitigate the impact of increased traffic due to the expansion of the business. However, the Court was troubled by the lack of evidence on the magnitude of any traffic impact. The Court decided that in addition to meeting the reasonable relationship test, the city must show the permit requirement to be roughly proportional to the expected impact. The case was remanded to make that determination.

Guimont v. Clarke, 121 Wn.2d 586, 854 P.2d 1 (1993)

In 1989 the Legislature adopted the Mobile Home Relocation Assistance Act. In essence, the Act required owners of mobile home parks to establish a fund to financially assist tenants in moving their homes should the owner decide to close the park or change the property to another use. The Act was challenged by park owners on regulatory takings and due process grounds. In its first takings case since the United States Supreme Court's decision in Lucas, the State Supreme Court reviewed its Presbytery analysis and found the fundamental legal tests to still be appropriate. The Court concluded that the first step in analyzing a facial takings claim, as here, was to determine whether the statute deprived the owner of all economic value or caused a physical invasion. The Court found neither to be the case here. Owners could still evict tenants and change the use of the property.

The Court did, however, find the Act to violate the due process clause. The potential financial impact of the relocation reimbursement requirements of the Act, the Court reasoned, would be unduly oppressive on park owners. While the Act legitimately addressed the problem of declining space for mobile homes, the park owners, the Court reasoned, were not more responsible for the problem than the general public.

Margola Assoc. v. Seattle, 121 Wn.2d 625, 854 P.2d 23 (1993)

Apartment house owners challenged a city ordinance which required owners of buildings with more than one housing unit to register with the city and pay an annual inspection fee. Owners who did not register could not evict a tenant. The Court found that the ordinance did not constitute a regulatory taking. The city had a legitimate interest in ensuring compliance with its housing code. No taking had occurred because the ordinance neither deprived the owners of all economic value nor amounted to a physical invasion. The Court observed that the restriction on eviction was not, in effect, a physical

invasion, because the owners voluntarily rented the units. The Court also found that the owners had not been deprived of due process. The small annual fee, one-half of one percent of the average rent, was not, in the Court's view, an undue burden on the owners.

Buechel v. Department of Ecology, 125 Wn.2d 196, 884 P.2d 910 (1994)

The owner of a small waterfront lot on Hood Canal sought a variance from the Shorelines Management Act (SMA) to construct a residence on the undersized lot. The county granted the variance, but the Department of Ecology denied it. While the State Supreme Court asked for briefing on regulatory takings issues, the case was decided only on whether the variance was properly denied. The Court upheld the denial.

While this case was not decided on takings grounds, two aspects of the decision indicate how the Court might react to a ripe takings claim. The Court held that the owner could not assert that the SMA diminished the value of his property because he had acquired it after adoption of the SMA and any adverse impact was presumably reflected in the purchase price. The Court also found that denial of the variance did not result in no remaining economic value to the property because it still could be used for recreational purposes similar to other small lots along Hood Canal.

Sparks v. Douglas Cy., 72 Wn. App. 55, 863 P 2d 142 (1993), *review granted*, 124 Wn.2d 1017 (1994)

A property owner applied to short plat his property. The county granted the application on the condition that a portion of the property be dedicated to widening adjacent roads. The owner appealed. The Court of Appeals held that an owner may be required to dedicate a portion of his property to prevent or compensate for the adverse impact of the proposed development if done in a specific and proportional fashion. In this case, the Court found that a takings had occurred because the required dedication was in excess of the minimal traffic impact, and the county had no immediate plans to widen the roads.

The State Supreme Court has accepted review of this case. It is anticipated that the Supreme Court will analyze the case under the "rough proportionality" test recently adopted by the United States Supreme Court in Dolan v. Tigard.

The Luxembourg Group, Inc. v. Snohomish Cy., 76 Wn. App. 502 (1995)

A developer applied to subdivide a large parcel into residential lots. As a condition to approval, the county required the developer to grant an easement to a land-locked property owner. The Court found that the required nexus between any adverse impact of the development and easement requirement did not exist. The Court reasoned that the interior parcel would be land-locked regardless of whether the developer's property was subdivided or not.

2. SUBSTANTIVE DUE PROCESS ANALYSIS

Our State Supreme Court's approach to due process in a land use regulation context was first developed in Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990), and refined in Guimont and Margola. These decisions emphasize that even if a regulation does not amount to a taking, it is subject to substantive due process requirements. In assessing whether a regulation has exceeded constitutional limitations, the Court considers three questions. First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably

necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner? If so, there may be a due process violation. The "unduly oppressive" inquiry involves balancing the public's interests against those of the regulated landowner.

Factors to be considered in analyzing whether a regulation is unduly oppressive include:

1. The nature of the harm sought to be avoided;

2. The availability and effectiveness of less drastic protective measures; and

3. The economic loss suffered by the property owner.

In assessing these three factors, the Court directed trial courts to the following considerations:

a. On the public's side—the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of less oppressive solutions.

b. On the owner's side—the amount and percentage of value loss, the extent of remaining uses, the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation, and how feasible it is for the owner to alter present or currently planned uses.

The Court has not established a specific mathematical test to determine whether there was a violation of substantive due process requirements. The remedy for a violation of substantive due process is invalidation of the regulation.

It should be noted that some other decisions have not utilized the "unduly oppressive" standard in evaluating substantive due process issues. Government agencies should review this issue with their legal counsel.

3. SUMMARIES OF OTHER SIGNIFICANT "TAKINGS" CASES (Arranged Alphabetically)

Buttnick v. Seattle, 105 Wn.2d 857, 719 P.2d 93 (1986)

A Seattle historic preservation ordinance required a building owner conducting repairs to replace a "parapet" in a manner approximating the original design. The building owner claimed that the property was unconstitutionally taken. The State Supreme Court ruled that the estimated cost of replacing the parapet would not be an undue hardship on the building owner, considering the market value and income producing potential of the building. The constitutional challenge to the historic preservation ordinance was, therefore, rejected.

Department of Natural Resources v. Thurston Cy., 92 Wn.2d 656, 601 P.2d 494 (1979).

Lake Lawrence, Inc., a lessee from the State, sought plat approval from Thurston County for a proposed residential development. The County denied preliminary plat approval on the basis that the proposed development would interfere with eagle perching and feeding areas. In response to a claim that

this was an unconstitutional taking of private property, the State Supreme Court held that it was not, primarily because the County had indicated that it would approve a less intensive development. (The County Commission had found no adverse impact from the development of 11 of the 22 lots proposed by the developer.) There was a strong public interest in protecting the eagles, and there had been no showing that all reasonably profitable uses of the property were foreclosed.

Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *opinion on remand*, 21 Cl. Ct. 153 (1990)

A mining company in 1972 purchased 1,560 acres of wetlands (formerly part of the Everglades, but now excluded by road, canal and levee) for the purpose of mining limestone. In 1980, the company applied to the U.S. Army Corps of Engineers for a "section 404" permit for the dredging and filling involved in the mining operation. The application covered only 98 acres, and the Court limited the case to that acreage. The Corps of Engineers denied the application, primarily for the purpose of protecting the wetlands. The courts indicated that actions under the Clean Water Act are not insulated from takings challenges. In this case, the denial of a permit by the Corps of Engineers reduced the property value by 95 percent, and eliminated all reasonably profitable uses, except perhaps holding the property for speculation (which was not deemed a reasonable use, given that nothing could be done with the property). Under these circumstances, the courts held that the United States had unconstitutionally taken the mining company's property, and required that the government compensate the company.

Granat v. Keasler, 99 Wn.2d 564, 663 P.2d 830 (1983)

A Seattle houseboat ordinance provided that the only reason that a houseboat moorage owner could evict a paying tenant would be for the purpose of using the moorage site for the owner's own non-commercial residence. When an owner appealed, the State Supreme Court, after reviewing its prior opinions on the subject, ruled that the Seattle ordinance was an unconstitutional taking of private property without just compensation. The Court's reasoning followed the reasoning of its earlier decision in Kennedy v. Seattle, 94 Wn.2d 376, 617 P.2d 713 (1980), where a similar ordinance was invalidated because it basically turned over perpetual occupancy rights of a person's property to another.

Hodel v. Irving, 481 U.S. 704 (1987)

Portions of Sioux Indian reservation land which had been "allotted" to individual tribal members had become fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing property held in this manner. In 1983, Congress passed legislation which provided that any undivided fractional interest which represented less than 2 percent of the tract's acreage and which earned less than $100 in the preceding year would revert to the tribe. No compensation was to be provided tribal members whose property was lost under the statute. The statute was challenged by tribal members. The United States Supreme Court noted that under the balancing test traditionally applied to "takings" challenges, it might very well have held the statute constitutional. In this case, however, the character of the government regulation was "extraordinary" in that it destroyed "one of the most essential" rights of ownership—the right to devise property, especially to one's family. The Court held that such a step was an unconstitutional taking, regardless of the public interest which might favor the legislation.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)

A New York State statute required landlords to allow the installation of cable television on their property. The owner of an apartment building in New York City challenged the statute, claiming an

unconstitutional taking of private property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building. The United States Supreme Court ruled that the statute was unconstitutional, concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owner's property, and that such an occupation is "qualitatively more severe" than a regulation on the use of property.

Lucas v. South Carolina Coastal Coun., 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)

Mr. Lucas bought two South Carolina beachfront lots intending to develop them. Before he initiated any development of the lots, the South Carolina Legislature enacted the Beachfront Management Act, which prevented development of the lots. The parties stipulated that the parcels had no remaining value. The United States Supreme Court held that a regulation which "denies all economically beneficial or productive use of land" is an unconstitutional taking unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitations on the use of property. The Court noted that such total takings will be "relatively rare" and the usual balancing approach for determining takings will apply in the majority of cases.

Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 565 P.2d 1162 (1977)

Maple Leaf Investors owned property along the Cedar River in an area subject to flood control regulations. These regulations prohibited construction for human habitation within the floodway channel; 70 percent of appellant's property lay within the floodway channel. On a challenge to the constitutionality of the flood control regulations, the Washington State Supreme Court examined the balance between the public interest in the regulations and the private interest in using the property without restriction. The Court found that the primary purpose of the regulations was not to put the property to public use, but to protect the public health and safety. The Court noted that the regulations prevented harm to persons who might otherwise live in the floodway, and also that structures built there might break loose and endanger life and property downstream. Further, since 30 percent of the property was still usable, there was no indication that the regulations prevented profitable use of the property. Finally, the Court noted that it was not the State which placed appellant's property in the path of floods. The Court upheld the constitutionality of the regulations.

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)

The Nollans sought a permit to replace a bungalow with a larger house on their California oceanfront property. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass along their beach. On appeal, the United States Supreme Court found this requirement to be a taking.

The Court reasoned that but for the permit requirement it clearly would have been an unconstitutional taking to have simply ordered the Nollans to give the public an easement. The question remained whether this was proper in the context of the Nollans' permit application.

A permit condition may be imposed, the Court noted, but it is only valid if it substantially advances legitimate state interests. The Court observed that if the Nollan's house would have blocked the public's view of the ocean from the street, a view easement would perhaps have been appropriate. But there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach. There was, therefore, no reasonable relationship, or "nexus", between

any public interest which might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement was an unconstitutional taking.

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)

Grand Central Station was declared a "landmark" under the City of New York's historic preservation ordinance. Penn Central, the owner, proposed to "preserve" the original station while building a 55-story building over it. The city denied the construction permit. In response to Penn Central's takings claim, the United States Supreme Court noted that there was a valid public purpose to the city ordinance and that, so far as the Court could ascertain, Penn Central could still make a reasonable return on its investment by retaining the Station as it was. Penn Central argued that the landmark ordinance would deny it the value of its "pre existing air rights" to build above the terminal. The Court noted that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights". Further, under the ordinance in question, these rights were transferable to other lots, so they might not be lost. The Court upheld the constitutionality of the ordinance.

Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990)

The State Supreme Court found that both the takings and due process clauses were implicated. The Court attempted to distinguish the two theories, and thereby provide an analytical framework for resolution of specific issues.

The Court first would consider whether a regulation safeguards the public interest in health, safety, the environment, or fiscal integrity of an area. If so, the regulation would not normally be a taking. The constitutional validity of such a regulation would then be analyzed by considering whether it violates substantive due process. The remedy for a violation of due process is normally invalidation of the ordinance.

On the other hand, if the regulation went beyond safeguarding those public interests and enhanced a publicly owned right in the property, or if it destroyed a fundamental attribute of ownership (the right to possess, to exclude others, and to dispose of property), then the regulation would be subject to analysis under the "takings" clause.

A taking analysis in a particular situation would first involve an assessment of whether the regulation substantially advances a legitimate state interest. If it did not, then there would be a taking. If the Court determined that the regulation substantially advanced a legitimate state interest, then it would be necessary to assess the extent of the economic impact on the property subject to the regulation. If the Court, after weighing and balancing the interests, found that there had been a taking, just compensation would be required.

Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992)
Sintra, Inc. v. Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992)

These related cases involved claims for damages arising from the City of Seattle's application of a provision in its housing preservation ordinance (HPO) to the development of plaintiffs' property. Each plaintiff wanted to develop and change the use of hotels which previously had been used for low-income housing. Seattle imposed a housing preservation assessment under the ordinance as a condition of development. While each application was pending, the King County Superior Court invalidated this provision of the ordinance on the basis that it was an unconstitutional tax. The State Supreme Court affirmed this decision.

Each plaintiff instituted a lawsuit seeking damages for the imposition of the HPO requirement on their proposed development. The lawsuits alleged both a violation of substantive due process and an unconstitutional taking. Plaintiffs sought both damages and an award of attorney's fees.

The superior court dismissed the claim for damages, but the State Supreme Court reversed. The Supreme Court ruled that even though the housing preservation ordinance served a legitimate public purpose, it violated substantive due process because it was unduly oppressive. The undue oppression arose from the fact that the HPO's burden of providing low-income housing fell entirely on regulated landowners. In order to recover damages for this violation, it would be necessary to prove that the City acted invidiously or irrationally in imposing the HPO condition on the plaintiffs. The cases were remanded for a determination of whether plaintiffs could make the required showing.

In Sintra, the case was also remanded for a determination of whether there had been a compensable taking of property. The Court felt that since the ordinance enhanced public interests under Presbytery, it was subject to a takings analysis. The Court felt that the plaintiff should have the opportunity to demonstrate whether there were any economically viable uses of the property even with the imposition of the HPO requirement.

Unlimited v. Kitsap Cy., 50 Wn. App. 723, 750 P.2d 651, *review denied*, 111 Wn.2d 1003, (1988)

A property owner, Unlimited, sought a planned unit development approval to construct a convenience store on part of its property. The County approved the application subject to two conditions which required Unlimited to (1) dedicate a 50-foot right-of-way to provide commercial access to the next door property, and (2) dedicate a strip of its property sufficient to extend a county arterial along the front of its property. Unlimited appealed these conditions. The Court of Appeals, relying upon the United States Supreme Court's decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), stated that a private property interest can be exacted without compensation only where "the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose". The Court ruled that providing commercial access to the adjacent private property served no public interest and that nothing in Unlimited's proposal caused the need to extend the arterial. Thus, the conditions imposed by the County were unconstitutional and the decision of the Court was reversed.

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STATE OF IDAHO ATTORNEY GENERAL'S ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO IDENTIFY POTENTIAL TAKINGS OF PRIVATE PROPERTY

During the 1994 Session, the Idaho State Legislature added Chapter 80 to Title 67 of the Idaho Code. This new chapter requires the Attorney General to develop an orderly, consistent internal management process for state agencies to evaluate the effects of proposed regulatory or administrative actions on private property. I.C. § 67-8003(1).

This is the Attorney General's recommended process and advisory memorandum. It is not a formal Attorney General's Opinion under I.C. § 67-1401(6), and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a "taking." Agencies shall use this process to identify those situations requiring further assessment by legal counsel. Appendix A contains a brief discussion of some of the important federal and state cases that set forth the elements of a "taking."

State agencies must use this procedure to evaluate the impact of proposed administrative or regulatory actions on private property. I.C. § 67-8003(1). Local governments are encouraged but not required to follow the same procedure. I.C. § 67-8003(2).

General Background Principles

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article I, § 14 of the Idaho State Constitution provides as follows:

> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Thus, under both the federal and state constitutions, private property may not be taken for public purposes without payment of just compensation.

Courts have recognized three situations in which a taking requiring just compensation may occur: (1) when a government action causes physical *occupancy* of property, (2) when a government action causes physical *invasion* of property, and (3) when government *regulation* effectively eliminates all economic value of private property. A "taking" can be permanent or temporary.

The most easily recognized type of "taking" occurs when government physically occupies private property. Clearly, when the government seeks to use private property for a public

building, a highway, a utility easement, or some other public purpose, it must compensate the property owner.

Physical invasions of property, as distinguished from physical occupancies, may also give rise to a "taking" where the invasions are of a recurring or substantial nature. Examples of physical invasions include, among others, flooding and water related intrusions and over flight or aviation easement intrusions.

Like physical occupations or invasions, a regulation that affects the value, use or transfer of property may also constitute a "taking" if it "goes too far." Although most land use regulation does not constitute a "taking" of property, the courts have recognized that when regulation divests an owner of the essential attributes of ownership, it amounts to a "taking" subject to compensation.

Regulatory actions are harder to evaluate for "takings," because government may properly regulate or limit the use of private property relying on its authority and responsibility to protect public health, safety and welfare. Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements generally without creating a compensatory "taking." Government may also limit the use of property through land use planning, zoning ordinances, setback requirements, and environmental regulations.

If a government regulation, however, destroys a fundamental property right -- such as the right to possess, exclude others from, or dispose of property -- it could constitute a compensable "taking." Similarly, if a regulation imposes substantial and significant limitations on property use, there could be a "taking." In assessing whether there has been such a limitation on property use as to constitute a "taking," the court will consider both the purpose of the regulatory action and the degree to which it limits the owner's property rights.

One important factor in evaluating each action is the degree to which the action interferes with a property owner's reasonable investment-backed development expectations. For instance, in determining whether a "taking" has occurred, a court might, among other things, weigh the regulation's impact on vested development rights against the government's interest in promulgating the regulation.

If a regulation prohibits all economically viable or beneficial uses of property, there may be liability for just compensation unless government can demonstrate that laws of nuisance or other pre-existing limitations on the use of the property prohibit the proposed uses.

If a court determines there has been a regulatory "taking" the government has the option of either paying just compensation or withdrawing the regulatory limitation. If the regulation is withdrawn, the government may still be liable to the property owner for a temporary "taking" of the property.

Attorney General's Recommended Process

1. State agencies must use this evaluation process whenever the agency contemplates action that affects privately owned property. Each agency must also use this process to assess the impacts of proposed regulations before the agency publishes the regulations for public comment. In Idaho, real property includes lands, possessory rights to land, ditch and water rights, mining claims (lode and placer), and free standing timber. I.C. §§ 55-101, 63-108. In addition, the right to continue to conduct a business may be a sufficient property interest to invoke the protections of the just compensation clause of the Idaho Constitution.

2. Agencies must incorporate this evaluation process into the agency's existing review process. It is not a substitute, however, for that existing review procedure. Since the extent of the assessment necessarily depends on the type of agency action and the specific nature of the impacts on private property, the agency may tailor the extent and form of the assessment to the type of action contemplated. For example, in some types of actions, the assessment might focus on a specific piece of property. In others, it may be useful to consider the potential impacts on types of property or geographic areas.

3. Each agency must review this advisory memorandum and recommended process with appropriate legal counsel to ensure that it reflects the specific agency mission. It should be distributed to all decision makers and key staff.

4. Each agency must use the following checklist to determine whether a proposed regulatory or administrative action should be reviewed by legal counsel. If there are any affirmative answers to any of the questions on the checklist, the proposed regulatory or administrative action must be reviewed in detail by staff and legal counsel. Since the Legislature has specifically found the process is protected by the attorney-client privilege, each agency can determine the extent of distribution and publication of reports developed as part of the recommended process. However, once, the report is provided to anyone outside the executive or legislative branch, the privilege has been waived.

Attorney General's Checklist Criteria

Agency staff must use the following questions in reviewing the potential impact of a regulatory or administrative action on specific property. While these questions also provide a framework for evaluating the impact proposed regulations may have generally, takings questions normally arise in the context of specific affected property. The public review process used for evaluating proposed regulations is another tool that the agency should use aggressively to safeguard rights of private property owners. If property is subject to regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulatory restrictions.

Although a question may be answered affirmatively, it does not mean that there has been a "taking." Rather, it means there could be a constitutional issue and that agency staff should carefully review the proposed action with legal counsel.

1. Does the Regulation or Action Result in a Permanent Temporary Physical Occupation of Private Property?

   Regulation or action resulting in a permanent or temporary physical occupation of all or a portion of private property will generally constitute a "taking." For example, a regulation that required landlords to allow the installation of cable television boxes in their apartments was found to constitute a "taking." *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

2. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

   Carefully review all regulations requiring the dedication of property or grant of an easement. The dedication of property must be reasonably and specifically designed to prevent or compensate for adverse impacts of the proposed development. Likewise, the magnitude of the burden placed on the proposed development should be reasonably related to the adverse impacts created by the development. A court also will consider whether the action in question substantially advances a legitimate state interest.

   For example, the United States Supreme Court determined in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), that compelling an owner of waterfront property to grant a public easement across his property that does not substantially advance the public's interest in beach access, constitutes a "taking." Likewise, the United States Supreme Court held that compelling a property owner to leave a *public* green way, as opposed to a private one, did not substantially advance protection of a floodplain, and was a "taking." Dolan v. City of Tigard, 114 U.S. 2309 (June 24, 1994).

3. Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?

   If a regulation prohibits all economically viable or beneficial uses of the land, it will likely constitute a "taking." In this situation, the agency can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other preexisting limitations on the use of the property. *See* Lucas v. South Carolina Coastal Coun., 112 S. Ct. 2886 (1992).

   Unlike 1. and 2. above, it is important to analyze the regulation's impact on the property as a whole, and not just the impact on a portion of the property. It is also important to

assess whether there is any profitable use of the remaining property available. *See* Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). The remaining use does not necessarily have to be the owner's planned use, a prior use or the highest and best use of the property. One factor in this assessment is the degree to which the regulatory action interferes with a property owner's reasonable investment-backed development expectations.

Carefully review regulations requiring that all of a particular parcel of land be left substantially in its natural state. A prohibition of all economically viable uses of the property is vulnerable to a takings challenge. In some situations, however, there may be pre-existing limitations on the use of property that could insulate the government from takings liability.

4. Does the Regulation Have a Significant Impact on the Landowner's Economic Interest?

Carefully review regulations that have a significant impact on the owner's economic interest. Courts will often compare the value of property before and after the impact of the challenged regulation. Although a reduction in property value alone may not be a "taking," a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses. Another economic factor courts will consider is the degree to which the challenged regulation impacts any development rights of the owner. As with 3. above, these economic factors are normally applied to the property as a whole.

5. Does the Regulation Deny a Fundamental Attribute of Ownership?

Regulations that deny the landowner a fundamental attribute of ownership -- including the right to possess, exclude others and dispose of all or a portion of the property -- are potential takings.

The United States Supreme Court recently held that requiring a public easement for recreational purposes where the harm to be prevented was to the flood plain was a "taking." In finding this to be a "taking," the Court stated:

> The city never demonstrated why a public green way, as opposed to a private one, was required in the interest of flood control. The difference to the petitioner, of course, is the loss of her ability to exclude others. . . [T]his right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

Dolan v. City of Tigard, 114 U.S. 2309 (June 24, 1994). The United States Supreme Court has also held that barring the inheritance (an essential attribute of ownership) of certain interests in land held by individual members of an Indian tribe constituted a "taking." Hodel v. Irving, 481 U.S. 704 (1987).

6. Does the Regulation Serve the Same Purpose that Would be Served by Directly Prohibiting the Use or Action; and Does the Condition Imposed Substantially Advance that Purpose?

A regulation may go too far and may result in a takings claim where it does not substantially advance a legitimate governmental purpose. Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987); Dolan v. City of Tigard, 114 U.S. 2309 (June 24, 1994).

In Nollan, the United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach. The Court found that since there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach, there was no "nexus" between any public interest that might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement was just as unconstitutional as it would be if imposed outside the permit context.

Likewise, regulatory actions that closely resemble, or have the effects of a physical invasion or occupation of property, are more likely to be found to be takings. The greater the deprivation of use, the greater the likelihood that a "taking" will be found.

APPENDIX A

Appendix A is a summary of some of the principal federal and state cases dealing with regulatory takings issues. These cases provide examples of how courts have resolved specific questions and may be helpful for assessing how courts might resolve analogous situations.

Appendix A also includes a copy of an earlier Attorney General Opinion that summarizes several eminent domain principles.

SUMMARIES OF SIGNIFICANT FEDERAL "TAKINGS" CASES

Dolan v. City of Tigard, 114 S.Ct. 2309 (June 24, 1994).

The city council conditioned Dolan's permit to expand her store and pave her parking lot upon her agreement to dedicate land for a public green way and a pedestrian/bicycle pathway. The expressed purpose for the public green way requirement was to protect the floodplain. The pedestrian/bicycle path was intended to relieve traffic congestion. The United States Supreme Court held that the city had to make "some sort of individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development" in order to justify the requirements and avoid a "takings" claim. In this case, the Court held that the city had not done so. It held that the public or private character of the green way would have no impact on the flood plain and that the city had not shown that Dolan's customers would use the pedestrian/bicycle path to relieve congestion.

Lucas v. South Carolina Coastal Coun., 112 S. Ct. 2886 (1992).

Lucas was a challenge to the 1988 South Carolina Beach Front Management Act. The stated purpose of this Act was to protect life and property by creating a storm barrier, providing habitat for endangered species and to serve as a tourism industry. To accomplish the stated purposes, the Act prohibited or severely limited development within certain critical areas of the state's beach-dune system.

Before the Act's passage, David Lucas bought two South Carolina beach front lots intending to develop them. As required by the Act, the South Carolina Coastal Council drew a "baseline" that prevented Mr. Lucas from developing his beach front property. Mr. Lucas sued the Council alleging its actions under the Act constituted a "taking" requiring compensation under the Fifth Amendment. The trial court agreed, awarding him $1,232,387.50. A divided South Carolina Supreme Court reversed, however, holding that the Act was within the scope of the nuisance exception.

The United States Supreme Court reversed. Justice Scalia's majority opinion held that a regulation which "denies all economically beneficial or productive use of land" will be a "taking" unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitations on the use of property. This opinion noted that such total takings will be "relatively rare" and the usual balancing approach for determining takings will apply in the majority of cases.

Hodel v. Irving, 481 U.S. 704 (1987).

Where the character of the government regulation destroys "one of the most essential" rights of ownership -- the right to devise property, especially to one's family -- this is an unconstitutional "taking" without just compensation.

In 1889, portions of Sioux Indian reservation land were "allotted" by Congress to individual tribal members (held in trust by the United States). Allotted parcels could be willed to the heirs of the original allottees. As time passed, the original 160-acre allotments became fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing property held in this manner. In 1983, Congress passed legislation that provided that any undivided fractional interest that represented less than 2 percent of the tract's acreage and which earned less than $100 in the preceding year would revert to the tribe. Under the statute, tribal members who lost property as a result of this action would receive no compensation. Tribal members challenged the statute. The United States Supreme Court held this was an unconstitutional "taking" for which compensation was required.

Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

The United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach.

James and Marilyn Nollan, the prospective purchasers of a beach front lot in California, sought a permit to tear down a bungalow on the property and replace it with a larger house. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass up and down their beach. On appeal, the United States Supreme Court held that such a permit condition is only valid if it substantially advances legitimate state interests. Since there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach, there was no "nexus" between any public interest that might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement was just as unconstitutional as it would be if imposed outside the permit context. (The Court noted that protecting views from the highway by limiting the size of the structure or banning fences may have been lawful.)

Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164 (1982).

The United States Supreme Court ruled that a statute that required landlords to allow the installation of cable television on their property was unconstitutional. The Court concluded that "a permanent physical occupation authorized by government is a 'taking' without regard to the public interest that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owner's property, and that such an occupation is "qualitatively more severe" than a regulation on the use of the property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building.

Penn Central Transp. Co. v. City of New York, 98 S.Ct. 2646 (1978).

The United States Supreme Court upheld the constitutionality of a New York City historic preservation ordinance under which the city had declared Grand Central Station a "landmark." In response to Penn Central's takings claim, the United States Supreme Court noted that there was a valid public purpose to the City ordinance, and that Penn Central could still make a reasonable return on its investment by retaining the Station as it was. Penn Central argued that the landmark ordinance would deny it the value of its "pre-existing air rights" to build above the terminal. The Court found that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights." Further, under the ordinance in question, these rights were transferable to other lots, so they might not be lost.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).

This is a Clean Water Act case. There have been several court decisions and the most recent one affirms the holding that in the absence of a public nuisance, economic impact alone may be determinative of whether a regulatory "taking" under the Fifth Amendment has occurred. If the regulation categorically prohibits *all* economically beneficial use of land, destroying its economic value for private ownership, and the use prohibited is not a public nuisance, this court held that regulation has the effect equivalent to permanent physical occupation, and there is, without more, a compensable "taking."

Factually, in 1972, a mining company purchased 1,560 acres of wetlands (formerly part of the Everglades, but now excluded by road, canal and levee) for the purposes of mining limestone. In 1980, the company applied to the U.S. Army Corps of Engineers for a "section 404" permit for the dredging and filling involved in the mining operation. The Corps of Engineers denied the application, primarily for the purpose of protecting the wetlands. While several courts had previously held that the United States had unconstitutionally taken the mining company's property, and required the government compensate the company, the Federal Circuit recently ruled that the evidence did not support a finding that the permit denial prohibited *all* economically beneficial use of the land or destroyed its value.

SIGNIFICANT IDAHO "TAKINGS" CONSTITUTIONAL PROVISION AND CASE LAW

Idaho Constitutional Provision

Article I, §14. Right of Eminent Domain

> The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.
>
> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Idaho Case Law

There are very few Idaho cases addressing the issue of whether there has been a "taking" subject to the protections of the state constitution. Those significant ones are summarized below.

Hayden Pines Water Co. v. Idaho Public Utilities, 122 Idaho 315, 834 P.2d 873 (Idaho 1992).

Without extensive discussion, the Idaho Supreme Court held that an Idaho Public Utilities Commission order requiring a water company to perform certain accounting functions (at an estimated cost of $15,000 per year) without considering those costs in the rate proceeding was an unconstitutional "taking."

Coeur D'Alene Garbage v. Coeur D'Alene, 114 Idaho 588, 759 P.2d 879 (Idaho 1988).

The just compensation clause of the Idaho State Constitution, Id. Const., art. 1, § 14, requires compensation be paid by a city where that city either by annexation or by contract prevents a company from continuing service to its customers. The Idaho Supreme Court held that a company has a property interest protected by the Idaho Constitution in continuing to conduct business. In this case, a garbage company already operating in the city and providing garbage service to customers lost the right to continue its business when the city entered into an exclusive garbage collection contract with another company, only permitting that company to operate within the annexed areas.

County of Ada v. Henry, 105 Idaho 263, 668 P.2d 994 (Idaho 1983).

The Idaho Supreme Court held that property owners had no "takings" claim where the owners were aware of zoning restrictions before they purchased the property, even though the zoning ordinance reduced their property's value.

Dawson Enterprises, Inc. v. Blaine County, 99 Idaho 506, 567 P.2d 1257 (Idaho 1977).

A zoning ordinance that deprives an owner of the highest and best use of his land is *not*, absent more, a taking. There are two methods for finding a zoning ordinance unconstitutional. First, it may be shown that it is not "substantially related to the public health, safety, or welfare." Second, it may be shown that the "zoning ordinance precludes the use of . . .property for *any* reasonable purpose."

State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (Idaho 1976).

The Idaho Supreme Court held that where statutory or regulatory provisions are reasonably related to an enactment's legitimate purpose, provisions regulating property uses are within the legitimate police powers of the state and are not a "taking" of private property without compensation. In this case, the court upheld the permit, bonding, and restoration requirements of the dredge and placer mining protection act. It found that they were reasonably related to the enactment's purpose in protecting state lands and watercourses from pollution and destruction and in preserving these resources for the enjoyment and benefit of all people.

Boise Redevelopment Agency v. Yick Kong Corporation, 94 Idaho 876, 499 P.2d 575 (Idaho 1972).

The Idaho Supreme Court held that the Idaho Constitution grants a power of eminent domain much broader than that granted in most other state constitutions. According to the Idaho Supreme Court, even completely private irrigation and mining businesses can use eminent domain. It held that the state, both through the power of eminent domain and the police powers, may protect the public from disease, crime, and "blight and ugliness."

Unity Light & Power Co. v. City of Burley.

Once a supplier of a service lawfully enters into an area to provide that service, annexation by a city does not authorize an ouster of that supplier from that area without condemnation.

Johnston v. Boise City, 87 Idaho 44, 390 P.2d 291 (Idaho 1964).

Where government exercises its authority under its police powers and the exercise is reasonable and not arbitrary, a harmful effect to private property resulting form that exercise alone is insufficient to justify an action for damages.

Rourk v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (Idaho 1964).

The Idaho Supreme Court held those height restrictions that limited use of private land adjacent to an airport to agricultural uses or to single family dwelling units was an unconstitutional "taking" if no compensation was provided. The Court held that a landowner's property right in the reasonable airspace above his land cannot be taken for public use without reasonable compensation.

Mabe v. State, 83 Idaho 222, 360 P.2d 799 (Idaho 1961).

The Idaho Supreme Court held that destroying or impairing a property owner's right to business access to his or her property constitutes a "taking" of property whether accompanied by actual occupation of or confiscation of the property.

Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (Idaho 1977).

In times of shortage, a call on water that allows water right holders with junior priority dates to use water while senior holders of beneficial use water rights are not allowed to use water is not a taking protected by the just compensation clause of the Idaho Constitution.

Anderson v. Cummings, 81 Idaho 327, 340 P.2d 1111 (Idaho 1959).

The Idaho Supreme Court recognized individual water rights are real property rights protected from "taking" without compensation.

Hughes v. State, 80 Idaho 286, 328 P.2d 397 (Idaho 1958).

The Idaho Supreme Court held that private property of all classifications is protected under Idaho's constitution just compensation clause.

Robinson v. H.& R.E. Local #782.

The Idaho Supreme Court held that the right to conduct a business is a property interest protected under Idaho's constitution just compensation clause.

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TESTIMONY IN SUPPORT
HB 154
MARCH 12, 1995

HB154addresses an issue that predates our State and Federal constitutions, the rights of the individual in the short term versus the best interests of society in the long term. Private property. To what extent can an individual make personal choices, and to what degree can government deny these choices.

In 1946 the State of Washington passed the first Forest Practices Act. In the act was a provision for the retention of a percentage of standing timber to be left in order to re-establish forest regeneration. The act was challenged by a man named Dexter as a "taking" of private property, and was argued in the U.S Supreme Court under "Dexter vs The State of Washington". The Court ruled in favor of the State, saying that it was proper for the State to require that Dexter defer his economic gain for the benefit of future generations. That since Dexter had the right to cut the remaining trees after forest regeneration had been established, no "taking" had occurred and the police powers of the State to assure a resource supply for future generations was a correct exercise of State authority.

Since Dexter and the end of the Second World War, there has been an explosion of local, State and Federal laws and regulations that restrict the rights of private property owners. From the standpoint of private property ownership, we have gone from Capitalism to Socialism. We can purchase property and pay taxes on it but most of the decisions regarding the use of private property are made by agents of the government. Physical takings by "eminent domain" have been replaced by "regulatory taking" as it is cheaper for the State, and does not require compensation. Some examples.

In the late eighties our company had purchased the timber rights on some private property near Cordova, Alaska. We had been working with the State by leaving standing timber near spawning streams for habitat enhancement, as we had been doing for many years. In 1990 the State revised the State Forest Practices act, requiring mandatory buffer zones of standing timber on all fish streams. Agents of the State marked a buffer zone along a creek where we were logging. We assessed the value of the timber that was taken and sent the state a bill which they refused to pay. After spending $70,000.00 on the "administrative review" process we decided that the "price of principle" was excessive, and dropped the issue. Our economic gain was not deferred, as was Dexters, but was taken - forever, and without compensation. We do not dispute the right of the State to exercise its police powers to take property for a perceived social need, however the State does have a Constitutional obligation to compensate the owner.

Corky Thompson is the owner of L Kanes store in Hoonah, Alaska. Part of her property contains a tank farm that holds an excess of 42,000 gallons of petroleum products that she sells as heating oil, gasoline, and diesel for the Hoonah fishing fleet. In the late eighties she had the property appraised, and it was valued in excess of a million dollars. To date she has been unable to sell her property because of the tank farm. Government regulations on petroleum products has turned an asset into a liability.

Of all the laws and regulations that have been passed over the last 40 years to restrict the use of private property, none has been more oppressive than the Endangered Species Act. The intent was noble, the execution disastrous, as it destroyed the livelihood of thousands of men and women in the fishing, timber and mining industries, caused untold hardship in small rural communities, wreaked businesses and devalued the assets of thousands of property owners. Even the threat of listing a species on the endangered list will be enough to cause chaos in industries and businesses that depend on natural resources. The threat of listing two questionable sub species of Goshhawk and Wolf on the Tongass National Forest, caused the Regional Forester to withdraw 600,000 acres of land and timber from an existing base of 1,700,000 acres of multiple use land in a National Forest that contains over 17 million acres of land and timber. This has already put loggers, roadbuilders and sawmillers that depend on public timber out of business. If the species are listed it will cost private landowners millions of dollars in lost assets, as the Endangered Species Act does not respect the rights of private property.

When I buy a piece of logging equipment then I get together with my shop foreman and the woods boss and we read the operations manual before we start using that piece of equipment. We read the instructions so that we will not cause damage to the machine. I recommend to our elected lawmakers that you start reading your instructions for using the machinery of government ,the Constitution of the State of Alaska. Laws and regulations that support and defend should be passed, laws that demean and avoid should be abolished or changed. The manual can only be changed by the manufacturer.

Keith Walker
Owner

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Representative Vic Kohring

Official Business

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

TO: Representative Ivan Ivan, Co-Chair
Representative Alan Austerman, Co-Chair
Community and Regional Affairs Committee

FROM: Representative Vic Kohring

DATE: February 7, 1995

SUBJ: Hearing Request

Please schedule HB 154, relating to regulatory takings, for a hearing at your earliest convenience. This bill would provide some relief for private citizens who have had their property "taken" through regulatory means.

This bill has further referrals to the Judiciary and Finance Committees.

ity, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President should be eligible to that of Vice President of the United States.[20]

ARTICLE XIII.

§ 1. Slavery abolished. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Enforcement. Congress shall have power to enforce this article by appropriate legislation.[21]

ARTICLE XIV.

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Apportionment of representatives in Congress. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

20. Proposed by Congress on December 9, 1803, and declared ratified on September 25, 1804.

21. Proposed by Congress on January 31, 1865, and declared ratified on December 18, 1865.

ARTICLE III.

Quartering of soldiers. No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.[11]

ARTICLE IV.

Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[12]

ARTICLE V.

Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[13]

ARTICLE VI.

Right to speedy trial, witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[14]

ARTICLE VII.

Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.[15]

ARTICLE VIII.

Bails, fines, punishments. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[16]

ARTICLE IX.

Reservation of rights of the people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[17]

---

13. Proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

14. Proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

Generally speaking, courts have interpreted this protection from imprisonment for debt to apply only to debts arising from private contracts. Thus, for example, it does not apply to wilful avoidance of fines and similar criminal penalties, nor does it apply to the defiance of court orders to pay child support or divorce settlements.

Section 18. Eminent Domain

> **Private property shall not be taken or damaged for public use without just compensation.**

Eminent domain is the inherent right of government to take private property for a public purpose. However, Alaska's constitution here requires the state government to compensate fairly the owners of property it condemns under the power of eminent domain (see also Article VIII, Section 18). The Alaska Supreme Court has stated: ". . . the policy behind the constitutional provision [is] that the condemnee should not pay a higher price for a public improvement than do other members of the public" (*State v. Hammer*, 550 P.2d 820, 1976). Every state constitution and the U.S. Constitution (fifth amendment) require just compensation to the owner of property condemned by the government.

The most common eminent domain action is the acquisition of rights-of-way for road and highway construction, although the power is occasionally exercised to acquire land for schools, public buildings, pipelines and utility transmission lines. There is substantial statutory law governing its use (e.g., AS 09.55). The state has delegated its power of eminent domain to municipalities, public corporations, and public and private utilities, but all are bound by this requirement to pay just compensation.

"Property" taken by the state is usually land, but the term has been held to apply to personal property and even intangible property. For example, the Alaska Supreme Court ruled that a lawyer could not be required to provide counsel to an indigent defendant without reasonable compensation, as "labor is property" (*DeLisio v. Alaska Superior Court*, 740 P.2d 437, 1987). However, the court two years later denied a claim by state workers that the executive branch's unilateral increase of the work week from 37.5 to 40.0 hours after an impasse in bargaining over a labor agreement constituted an unlawful taking of property under this section (*Alaska Public Employees v. Department of Administration*, 776 P.2d 1030, 1989).

The definition of a "taking" of private property is not always a straight-forward matter. The state may do something that indirectly diminishes the value of private property, and the owners may demand compensation for this so-called "inverse condemnation." Here the problem is that governments routinely adopt regulations in the interest of public health and safety that indirectly cost people money. Zoning ordinances and building codes, for example, burden property owners economically. Can the exercise of the government's police powers constitute a "taking" of private property that must be compensated? It can if the effect is confiscatory or unduly heavy. These issues were presented in a suit brought after the state had changed to one-way the flow of traffic on a frontage road in front of a business that depended on easy accessibility to vehicle traffic. The Alaska Supreme Court, noting that "the difference between a noncompensable exercise of the police power and a compensable taking is often one merely of degree," did not consider the flow of traffic in front of a business a property right that required compensation under this section (*B & G Meats, Incorporated v. State*, 601 P.2d 252, 1979).

"Damage" to property by the state is to be compensated as well as taking of property (approximately half of the state constitutions include damage in their requirement for eminent domain compensation). There has been little judicial interpretation of this term. The Alaska Supreme Court has said, however, that it includes the temporary loss of profits from a business that must be relocated because of an eminent domain action by the state (*State v. Hammer*, 550 P.2d 820, 1976).

The Alaska Supreme Court has defined "just compensation" to mean fair market value: "The law in Alaska is that 'fair market value', or the price a willing buyer would pay a willing seller for property, is the appropriate measure of 'just compensation'" (*State v. Alaska Continental Development Corporation*, 630 P.2d 977, 1980). The property owner is entitled to an appraisal of fair market value at the highest and best use of the property, but not to a valuation based on a speculative future use. Nor may the property owner assert a value based on the use to which the property will be put by the state: "It is a basic tenet of eminent domain law that just compensation is determined by what the owner has lost and not by what the condemnor has gained" (*Gackstetter v. State*, 616 P.2d 564, 1980).

HB

160

CS FOR HOUSE BILL NO. 160(CRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES NICHOLIA, B.Javis, Ivan

A BILL

FOR AN ACT ENTITLED

"An Act relating to a curriculum for Native language education; and providing for an effective date."

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

*** Section 1.** SHORT TITLE. This Act may be known as the Native Language Education Act.

*** Sec. 2.** FINDINGS. The legislature finds that

(1) Alaska's indigenous Native cultures and languages are unique, essential elements of Alaska's heritage;

(2) Alaska's indigenous Native languages are an integral part of Alaska Native people's culture and well-being;

(3) knowledge of one's indigenous language is important for the development of social skills and self-esteem; it further contributes to the development of the individual, and the ability to communicate;

(4) translations from a Native language into English result in the loss of

context and deprivation of the full range of social and cultural understanding necessary to function in the individual's environment;

(5) when Native children are proficient in their primary indigenous language, they are also more likely to develop a higher degree of proficiency in the English language;

(6) historically, Alaska Native children first learned their Native language in their homes and communities but with the passing of Native elders and with a current generation of parents who are not fluent in their Native language, younger generations are less knowledgeable about their language and culture;

(7) the loss of indigenous Native languages dates back to the late 1800's when mainstream American missionaries enforced federal policies that forbade the use of Native languages, punished children for speaking their own language, and urged parents to speak only English to their children;

(8) the continuation of "no Native language" policies in federal, territorial, and state school systems between 1910 and 1970 resulted in the loss of many Native languages;

(9) the fact that only two of the 20 Alaska Native languages are fluently spoken by children today is an indicator of the impending extinction of Native languages;

(10) unless action is taken, by the year 2055 only five of the 20 Alaska Native languages will be spoken by anyone, and soon thereafter the Native languages of Alaska may vanish.

* Sec. 3. AS 14.03.120(e) is amended to read:

(e) A district shall, by October 31 of each year, provide to the state board, and make available to the public, a report on the performance of each public school and public school students in the district. The report **shall** [MUST] be entitled "School District Report Card To The Public" and **shall** [MUST] be prepared on a form prescribed by the department. The report must include

(1) the percent of district students in the top and bottom quarter of standardized national achievement examinations; results under this paragraph shall be disclosed in a manner that does not reveal the individual identities of students;

(2) the percent of students who are not promoted to the next grade;

(3) student, parent, and community member comments on the school's performance;

(4) the annual percent change in enrollment and the percent of enrollment change due to student transfers into and out of the district;

(5) attendance, retention, and graduation rates;

(6) the ways in which meaningful parent involvement in school performance was achieved;

(7) a summary and evaluation of the environmental education curriculum described in AS 14.30.380;

(8) **if Native language education is provided, a summary and evaluation of the curriculum described in AS 14.30.420;**

(9) other indicators of school performance required by the state board; and

(10) [(9)] other indicators of school performance selected by the district.

* Sec. 4. AS 14.30 is amended by adding a new section to article 6 to read:

Sec. 14.30.420. NATIVE LANGUAGE EDUCATION. (a) A school board in a district in which a majority of the students are Alaska Natives shall establish a local Native language curriculum advisory board for each school in the district in which a majority of the students are Alaska Natives. If the local Native language curriculum advisory board recommends the establishment of a Native language education curriculum for a school, the school board may initiate and conduct a Native language education curriculum within grades K through 12 at that school. The program, if established, must include Native languages traditionally spoken in the community in which the school is located. Each school board conducting a program of Native language education shall implement the program as a part of regular classroom studies and shall utilize

(1) instructors who are certified under AS 14.20.020 or 14.20.025; and

(2) to the extent possible

(A) instructors and instructional materials available through the University of Alaska; and

(B) audio-visual, computer and satellite technology.

(b) In this section,

(1) "district" has the meaning given in AS 14.17.250;

(2) "Native" means a person of one-fourth degree or more Alaskan Indian, Eskimo, or Aleut blood.

* Sec. 5. This Act takes effect July 1, 1996.

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 160

Revision Date: March 22, 1995
Title: An Act relating to a curriculum for Native language education ; and providing for an effective date.
Sponsor: Rep. Nicholia
Requester: (H) CRA

Department Affected: Education
BRU: K-12 Support
Component: Foundation Program

COMPONENT SERIAL NO. 141

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	-0-	-0-	-0-	-0-	-0-	-0-
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 (FY95) impact: $ -0-

ANALYSIS: (Attach a separate page if necessary.) The department estimates the fiscal impact to range from $0 to $145.8 annually. Currently five school districts do not have an approved bilingual plan of service on file with the department. School districts that elect to provide Native language education may develop bilingual plans of service. Aluetians East and Pelican may apply for bilingual funding through the foundation program. The department has assumed that the two school districts will generate the minimum of one instructional unit each of bilingual funding.

Prepared by: Eddy Jeans
Phone: 465-8685
Division: School Finance
Date: March 22, 1995
Approved by Commissioner: Shirley Holloway
Agency: Education
Date: March 22, 1995

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distribution information call the Governor's Legislative Office

A standard reporting format will be developed to meet the reporting requirements of HB 160. This format will specify the information that must be reported and the form in which the information must appear. To develop this format a team will meet over a two day period to review alternatives and reach consensus on the reporting model.

Cost associated with redesigning and printing materials currently used by the department for implementing the report card legislation will be borne by the department.

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 160

Revision Date:

Department Affected: Education

Title: An Act relating to a curriculum for Native language education ; and providing for an effective date.

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Component: Foundation Program

Sponsor: Rep. Nicholia

Requester: (H) CRA

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OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8
MISCELLANEOUS						
TOTAL OPERATING	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8	0 to 145.8

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY95) impact: $ -0-

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Prepared by: Eddy Jeans Phone: 465-8685
Division: School Finance Date: March 15, 1995
Approved by Commissioner: Shirley Holloway
Agency: Education Date: March 15, 1995

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House District 36
Alatna
Allakaket
Anaktuvuk
Anvik
Arctic Village
Beaver
Bettles
Birch Creek
Canyon Village
Central
Chalkyitsik
Chicken
Chistochina
Chitina
Chuathbaluk
Circle
Circle Hot Springs
Coldfoot
Copper Center
Copperville
Crooked Creek
Dot Lake
Dry Creek
Eagle
Eagle Village
Evansville
Fort Yukon
Gakona
Galena
Grayling
Gulkana
Healy Lake
Holy Cross
Hughes
Huslia
Kaltag
Koyukuk
Lime Village
Livengood
Lake Minchumina
Lower Kalskag
Manley
Marshall
McCarthy
McGrath
Medfra
Mentasta
Minto
Nabesna
Nenana
Nikolai
Northway
Nulato
Pilot Station
Rampart
Red Devil
Ruby
Russian Mission
Shageluk
Slana
Sheetmute
Stevens Village
Stony River
Takotna
Tanacross
Tanana
Telida
Tetlin
Tok
Toluksak
Tyonek
Upper Kalskag
Venetie
Wiseman

Representative Irene K. Nicholia

State Capitol • Juneau, Alaska 99801
Phone: 465-4527 FAX. 465-2294

Resources
Community and Regional Affairs
International Trade and Tourism

House Bill 160

SPONSOR STATEMENT

There exists, in our State, the potential for a great tragedy. I am, of course, referring to the loss of at least fifteen of the twenty Alaska Native languages by the year 2055. Dr. Michael Krauss, professor of linguistics at the University of Alaska Fairbanks predicts that "short of a miracle or radical social change," this is precisely what will occur.

HB 160 mandates that school districts with a majority of Native students consider the potential for establishing Native language curriculum. This can be accomplished by a local Native curriculum advisory committee, specially delegated the authority to review the need for such curriculum. In those districts where it was determined that a Native language curriculum might be useful, the committee would make the appropriate recommendations to the district. The district would then have the opportunity of accepting or rejecting the recommendations of the committee. Under the authority of HB 160, Native language curriculum would be taught by certified or trained instructors. It also allows for the delivery of the language instruction by existing satellite equipment, or other technology including computer programs and audio distance delivery. The effective date for this Bill is July 1, 1996.

Unfortunately, the current threat to Native languages stems from anti-Native policies that have taken place in our past. American missionaries and educators, in an attempt to assimilate Alaska Natives into the Western/Anglo religion, language and culture, have brought Native languages to the point of extinction. Currently, there is a movement in this country to begin recognizing and appreciating the cultural diversity that exists among Americans. HB 160 would certainly be a positive step toward such an appreciation.

The urgency of this situation is evident: Without proper action on the part of the Legislature, the state may continue to lose its

cultural heritage and diversity. It is incumbent upon the State to adopt measures that would insure the preservation of our Native languages.

I strongly urge you to support this effort and pass HB 160.

House District 36
Alatna
Alcan
Allakaket
Aniak
Anvik
Arctic Village
Beaver
Bettles
Birch Creek
Canyon Village
Central
Chalkyitsik
Chicken
Chistochina
Chitina
Chuathbaluk
Circle
Circle Hot Springs
Coldfoot
Copper Center
Copperville
Crooked Creek
Dot Lake
Dry Creek
Eagle
Eagle Village
Evansville
Fort Yukon
Gakona
Galena
Grayling
Gulkana
Healy Lake
Holy Cross
Hughes
Huslia
Kaltag
Koyukuk
Lime Village
Livengood
Lake Minchumina
Lower Kalskag
Manley
Marshall
McCarthy
McGrath
Medfra
Mentasta
Minto
Nabesna
Nenana
Nikolai
Northway
Nulato
Pilot Station
Rampart
Red Devil
Ruby
Russian Mission
Shageluk
Slana
Sleetmute
Stevens Village
Stony River
Takotna
Tanacross
Tanana
Telida
Tetlin
Tok
Tuluksak
Tyonek
Upper Kalskag
Venetie
Wiseman

Representative Irene K. Nicholia

State Capitol • Juneau, Alaska 99801
Phone: 465-4527 FAX: 465-2294

Resources
Community and Regional Affairs
International Trade and Tourism

MEMORANDUM

TO: Representative Ivan Ivan, Co-Chairman
and Representative Alan Austerman, Co-Chairman
House Community and Regional Affairs Committee

FROM: Representative Irene Nicholia Irene

DATE: February 28, 1995

RE: Scheduling of House Bill 160

I would like to request a hearing of HB 160, "An Act relating to a curriculum for Native language education; and providing for an effective date," in the House Community and Regional Affairs Committee.

Attached please find a copy of the Sponsor statement and Sectional analysis for this bill.

Thank you for your timely consideration of HB 160.

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM March 1, 1995

SUBJECT: Sectional Summary of SB 160
(Work Order No. 9-LS0536/A)

TO: Representative Irene Nicholia

FROM: Michael F. Ford
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Short title.

Section 2. Findings.

Section 3. Requires that a school district that provides Native language education, must include a summary and evaluation of the program in the district's annual performance report.

Section 4. Allows a school board to establish a Native language education curriculum, if the curriculum is recommended by the local Native language education curriculum advisory board. Requires a school board in a district in which a majority of the students are Natives to establish a local Native language curriculum advisory board. Requires that a Native language program include Native languages spoken in the community in which the school is located, and that the program include certified instructors.

Section 5. Effective date.

MFF:glc:klb
95-181.glc

Alaska Federation of Natives, Inc.

March 15, 1995

Representative Irene Nicholia
Alaska State Legislature
State Capitol Building - Room 501
Juneau, Alaska 99801 -1182

Dear Representative Nicholia:

The Alaska Federation of Natives supports the two bills, HB160 and HB167 which relate to the curriculum for Native language education, culture, history in public schools. These bills would recognize the cultural diversity in districts where there is a significant Alaska Native population with the inclusion of language, culture and history curricula.

The loss of Native language skills and use continues to be a concern of the Alaska Native community. In some areas, there is grave concern about the extinction of the language. Native parents, community members, educators and students have been primary advocates for inclusion of language, culture and history in the curricula. Enclosed are a number of resolutions which were passed at the 1994 AFN Annual Convention which reflect that view.

Education is a high priority with Native people. In order to make changes and inroads to improve education for our children, the community must be involved. The involvement of parents, community and the educational community must be synchronized and connected. Alaska Natives have advocated the preservation and maintenance of Native languages for many years. A number of districts are making strides in language immersion programs with great success. We are involved in a plan which would make systemic change in the education of Native children with the National Science Foundation/Rural Systemic Initiative in a partnership between the University of Alaska Fairbanks and AFN. Elders are providing direction in this effort and continue to tell us that language and culture must be revitalized and included in the education of our children. We support your efforts in this area. Please let us know if we can be of further assistance.

Sincerely,

Julie Kitka
President

1577 "C" Street, Suite 100 ▫ Anchorage, Alaska 99501 ▫ Ph.(907) 274-3611 FAX (907) 276-7989

ALASKA FEDERATION OF NATIVES

1994 ANNUAL CONVENTION

RESOLUTION 94-38

TITLE: ALASKA NATIVE LANGUAGE AND CULTURE CLASS

WHEREAS: the knowledge of Alaska Native cultures must be preserved because it has been continuously declining among the Native people,

WHEREAS: most urban and rural schools that have offered bilingual classes as electives have not been effective due to a variey of reasons among students and teaching use methods,

WHEREAS: hands on, project-based techniques tend to be a more effective way of learning,

WHEREAS: this would give Native students a sense of belonging, cultural identity and the ability to pass on their language and history to future generations,

WHEREAS: this project-based class would also enhance the communication between Elders and the youth,

WHEREAS: students would have understanding, knowledge, and appreciation of their Native language and culture,

NOW, THEREFORE, BE IT RESOLVED by the delegates to the 1994 Annual Convention of the Alaska Federation of Natives that we encourage schools to include this ANLCC, which includes language, hunting, dancing, writing, Native stories, and other appropriate subjects in their curriculum,

BE IT FURTHER RESOLVED that school districts be requested to initiate changes that allow village schools to teach all forms of cultural activities.

SUBMITTED BY: Joint Elders/Youth Conference

COMMITTEE RECOMMENDATIONS: DO PASS

CONVENTION ACTION: PASSED

ALASKA FEDERATION OF NATIVES

1994 ANNUAL CONVENTION

RESOLUTION 94-50

TITLE: NATIVE EDUCATIONAL OPPORTUNITIES

WHEREAS: the educational opportunities for Natives is not nearly as great as for non-Natives, and

WHEREAS: most Native villages have limited teaching staff that are not always able to provide educational opportunities found in most schools, and

WHEREAS: there is a need to learn our Native ways, and

WHEREAS: the regular school teachers usually do not know the students' Native language and culture, and

WHEREAS: we need to protect and preserve our old ways, so our traditions will be with us today and tomorrow, rather than in our past and forgotten, and

WHEREAS: students of Alaska have been urging the Alaska school system to fit this into their curriculum, but little has been done to fulfill their needs, and

WHEREAS: most schools are in need of larger, more adequate staffs that can provide us with our Native heritage,

NOW, THEREFORE, BE IT RESOLVED by the delegates to the 1994 Annual Convention of the Alaska Federation of Natives that classes such as a Native Studies be stressed to be offered in the school system,

BE IT FURTHER RESOLVED, that the schools be provided with an appropriate staff, so students can learn about their ancestors and keep our traditions alive.

SUBMITTED BY: Joint Elders/Youth Conference

COMMITTEE RECOMMENDATIONS: DO PASS

CONVENTION ACTION: PASSED

FEDERATION OF NATIVES, INC. CORPORATE SEAL STATE OF ALASKA

Isaac Juneby
Box 107
Eagle, Alaska 99738
February 13, 1995

Representative Alan Austerman, Chairman
House Committee,Community and Regional Affairs
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Dear Representative Austerman:

I am writing to comment on HB 160 and HB 167,sponsored by Representative Nicholia. I am asking you as Chairman of the CRA to support the passage of these important bills I am proponent of Native Education and Culture programs in our schools.

Because, I have seen for many years that Native Languages do disappear and die, my wife and I have been involved for years that this does not happen to the Han Language. Both my wife and I have been involved with the Han Literacy Workshops put on by the Yukon College of Whitehorse and Council of Yukon Indians.

Let me explain why I think these two bills are important. First and foremost, I was one of of the unfortunates that couldn't speak my Native Language in School. It was a horrible experience to be scared and punished for not being able to speak my Native Language in school. I have been deprived of my identity and heritage.

This to me was a violation of the United States Code of Human Rights. Nobody should be punished for who and what they are. These 2 bills are what's needed for many of our children in the villages. The Cultural awareness, language, identity and self-esteem are knowledge that all Native Children should know in order to survive today's world.

I have difficult time with many of the rural schools teaching Russian, French, Spanish and German and ignoring the Native Languages. I believe if there were some respect for our people's culture, we wouldn't be having misunderstanding about one's heritage as we do now.

I know what can happen to any language if the interests are not there to enhance it's survival. We need to emphasize the importance of their existence. I am appealing to you and your Committee to make sure that some of our languages are not history, and having children read and

study in the schools, and saying that "There was once a Tribe of Athabascan Indians".I know that you will do everything in your Committee to make sure that this does not happen. I am asking for your support to see that these bills are passed in your Committee.

If you have any questions, callme at (907) 547-2281.

Sincerely,

Isaac Juneby

C/C

Representative Irene Nicholia
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Representative Ivan Ivan
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Representative Pete Kott
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Representative Al Vezey
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Representaive Kim Elton
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Representative Jerry Mackie
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Senator Georgianna Lincoln
Alaska State Senate
State Capital
Juneau, Alaska 99801-1182

IRENE L. SOLOMON-ARNOLD
P.O. BOX 543
TOK, ALASKA 99780
FEBRUARY 22, 1995

Representative Alan Austerman, Chairman
House Committee, Community and Regional Affairs
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Dear Representative Austerman:

I am writing this letter regarding the House Bills 160 and 167 which is sponsored by Representative Nicholia. I have great concern regarding the passages of these bills because I am directly involved in the Athabascan Language Teaching in Tok. I know from experience that there is no support for promoting Native Languages in our schools. I believe the passage of these bills will enhance and highlight the revival of our Native Languages in the public schools.

I began teaching my Language, Tanacross Athabascan, in Sept. 1992 when the Tok Indian Education Councils initiated the program into our local public school system. At that time I was employed as OSAP Youth Counselor at a local agency office when the this part time job became available I applied for it and was selected to began teaching. Since I was not knowledgeable in any teaching method I was fortunate enough in being sent to Yukon Native Language Centre in Whitehorse, Yukon Canada for training in the oral method of teaching. The reason this program is a success in this school is because of that training. I am going to receive a Teacher's Certificate from Yukon College in June of 1995 which is not a recognized certificate in Alaska but, I believe, these three years of training has been a plus for this language class.

Now the problem is this, in all the years of training for this certificate I have had no financial assistance from the Alaska Gateway School District, Tanana Chiefs Conference Education Department or the Alaska State Education system. All my training has been financed by Yukon Native Education Council Committee which includes my room, board and travel expenses for one week twice a year. If these two bills were recognized and passed this can be corrected for anyone who is seeking an education or a job as Native Language Teacher. Even though I am still struggling with the present school system to accept my Native Language

as part of the school curriculum I continue seeking ways to further my education in this field. I am the first and only graduate of Native Language Education in Associate of Applied Science Degree from the University of Alaska Fairbanks in May 1994. I find that teaching and preserving my language important enough to sacrifice a full time wages and benefits for a part time job with no benefits.

I hope this personal statement will get some positive response for the House Bills 160 and 167. If you need to contact me for further personal support I can be reached at (907) 883-2812 or (907) 883-5161.

Sincerely,

Irene L. Solomon-Arnold

Irene L. Solomon-Arnold

C/C
Representative Irene Nicholia
Alaska State House of Representative
State Capital
Juneau, Alaska 99801-1182

Senator Georgianna Lincoln
Alaska State Senate
State Capital
Juneau, Alaska 99801-1182

Representative Jerry Mackie
Alaska State House of Representative
State Capital
Juneau, Alaska 99801-1182

HB

167

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 167

Revision Date:

Department Affected: Education

Title: Alaska Native Language and Culture Programs

BRU: Education Program Support

Component: Basic Education and Instruction Improvement

Sponsor: Representative Nicholia

Requester: Representative Nicholia

COMPONENT SERIAL NO. 171

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	87.4	87.4	87.4	87.4	87.4	87.4
TRAVEL	10.0	10.0	10.0	10.0	10.0	10.0
CONTRACTUAL	257.3	257.3	257.3	257.3	257.3	257.3
SUPPLIES	.5	.5	.5	.5	.5	.5
EQUIPMENT	5.5	5.5	5.5	5.5	5.5	5.5
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	360.7	360.7	360.7	360.7	360.7	360.7
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	360.7	360.7	360.7	360.7	360.7	360.7
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	360.7	360.7	360.7	360.7	360.7	360.7

POSITIONS:

FULL-TIME	1					
PART-TIME	1					
TEMPORARY						

Estimate of current year (FY95) impact: $ 0.0

ANALYSIS: (Attach a separate page if necessary.)
House Bill 167 establishes an Alaska Native language and culture education program in a school that enrolls Native children. Enrollment in this program is voluntary. The legislation directs the department to provide technical assistance to school districts, schools, and post-secondary institutions for training in teaching methods, curriculum development, testing and testing mechanisms, and the development of materials for the Native education programs. Please see attached sheet for analysis.

Prepared by: Barbara Thompson
Phone: 465-8727
Division: Education Program Support
Date: March 21, 1995
Approved by Commissioner: Shirley Holloway, Ph.D
Agency: Education
Date:

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

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Personal Services:

1 Full-time Education Specialist II, Range 21: $70.7

Primary Responsibilities:

Provide technical assistance to school districts, schools, and post-secondary institutions for training Alaska Native education teachers and teachers' aides.

Facilitate in the development of curriculum, testing and testing mechanisms, and materials for Alaska Native education programs.

Administer contracts that provide workshops, sessions, and/or on-site training to assist school districts, schools, and post-secondary institutions in delivering an Alaska Native language and culture education program.

1 Half-time Administrative Clerk II, Range 8 (.5): $16.7

Primary Responsibilities:

Clerical support for Education Specialist in working with school districts, schools, post-secondary institutions to develop an Alaska Native language and culture education program.

Travel:

Department of Education technical assistance, facilitating training: $10.0

Contractual:

Professional service contracts: Contractual services to provide technical assistance, workshops, sessions, and/or on-site training with school districts, schools, and post-secondary institutions: $250.0

Phone, postage, photocopying: $5.3

Audioconferencing with school districts, schools, and post-secondary institutions: $2.0

Supplies:

Supplies associated with positions: $ 0.5

Equipment:

Equipment associated with positions: $ 5.5

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 167

Revision Date:
Dept. Affected: EDUCATION
Title: An Act relating to educational programs for Alaska Native languages, culture and history.
BRU: Executive Administration
Component: Teacher Certification

Sponsor: Representative Nicholia
Requester: Representative Nicholia
COMPONENT SERIAL NO. 1240

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES						
TRAVEL	2.0					
CONTRACTUAL	10.0					
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	12.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	12.0					
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	12.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY95) cost: $

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

HB167 would require the Department of Education to revise regulations and promulgate new regulations to accommodate the various categories under the recognized expert for the purpose of teacher certification. In addition, the legislation would require modifications to the existing computer system to track the certificates issued under the new category. New forms would need to be developed and printed. Additional costs include working with Alaska's institutions of higher education in developing approved teacher education programs to meet the requirements in the legislation.

Prepared by: Christine Niemi, Teacher Certification Administrator
Phone: 465-2857
Division: Administrative Services
Date: 3/20/95

Approved by Commissioner: Shirley Holloway
Date: 3/20/95
Agency: Department of Education

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House District 36
Alatna
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Anaktuvuk
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Beaver
Bettles
Birch Creek
Canyon Village
Central
Chalkyitsik
Chicken
Chistochina
Chitina
Chuathbaluk
Circle
Circle Hot Springs
Coldfoot
Copper Center
Copperville
Crooked Creek
Dot Lake
Dry Creek
Eagle
Eagle Village
Evansville
Fort Yukon
Gakona
Galena
Grayling
Gulkana
Healy Lake
Holy Cross
Hughes
Huslia
Kaltag
Koyukuk
Lime Village
Livengood
Lake Minchumina
Lower Kalskag
Manley
Marshall
McCarthy
McGrath
Medfra
Mentasta
Minto
Nabesna
Nenana
Nikolai
Northway
Nulato
Pilot Station
Rampart
Red Devil
Ruby
Russian Mission
Shageluk
Slana
Sleetmute
Stevens Village
Stony River
Takotna
Tanacross
Tanana
Telida
Tetlin
Tok
Tuluksak
Tyonek
Upper Kalskag
Venetie
Wiseman

Representative Irene K. Nicholia

State Capitol • Juneau, Alaska 99801
Phone: 465-4527 FAX: 465-2294

Resources
Community and Regional Affairs
International Trade and Tourism

House Bill 167

SPONSOR STATEMENT

House Bill 167 would move the Alaskan education system into the forefront of the nation's efforts to recognize diversity, to promote and preserve cultural heritage, and to insure access to the rich legacy of our American ancestors to all students. A comprehensive program for Alaska Native language and culture, such as is offered in HB 167, will encourage those educators and members of the concerned public, both Native and non-Native, to expand curricular offerings in ways that are directly relevant to their students. It will also greatly add to the vision of America as both a diverse and integrated nation.

This Bill *does not* mandate that school districts create specific programs for Native language and culture. Rather, it allows and authorizes districts to undertake the delicate and complicated tasks required to create concrete and effective cross-cultural curricula. Under the guidelines established by HB 167, districts are encouraged to *network* with other nonsectarian institutions to gain curricular depth in Alaska Native language and culture. Districts are also directed to establish and maintain effective, individualized communication with parents to forge *home-school* partnerships for Alaska Native curricular innovation. Part of this directive is the establishment of a parent committee similar to those made available in Chicago schools during their extensive restructuring. HB 167 also encourages districts to include children who are not Alaska Native in the new courses and activities when resources are available.

Reflecting the highly progressive and proactive policies of the State of Minnesota, this Bill also broadens the opportunities districts have to find and hire qualified instructors for their Alaska Native language and culture programs. This legislation demonstrates that the State of Alaska is concerned with creating richness and diversity within its school curricula, and

also that the State actively seeks to recognize and utilize the strengths of all of its people for the betterment of its children. Passage of House Bill 167 would signal the nation and the world that Alaska is ready to meet the goals of America 2000, and the global goals of inclusion, diversity, and cultural preservation.

I would strongly urge your support for House Bill 167.

House District 36
Alatna
Aleam
Allakaket
Aniak
Anvik
Arctic Village
Beaver
Bettles
Birch Creek
Canyon Village
Central
Chalkyitsik
Chicken
Chistochina
Chitina
Chuathbaluk
Circle
Circle Hot Springs
Coldfoot
Copper Center
Copperville
Crooked Creek
Dot Lake
Dry Creek
Eagle
Eagle Village
Evansville
Fort Yukon
Gakona
Galena
Grayling
Gulkana
Healy Lake
Holy Cross
Hughes
Huslia
Kaltag
Koyukuk
Lime Village
Livengood
Lake Minchumina
Lower Kalskag
Manley
Marshall
McCarthy
McGrath
Medfra
Mentasta
Minto
Nabesna
Nenana
Nikolai
Northway
Nulato
Pilot Station
Rampart
Red Devil
Ruby
Russian Mission
Shageluk
Slana
Sleetmute
Stevens Village
Stony River
Takotna
Tanacross
Tanana
Telida
Tetlin
Tok
Tuluksak
Tyonek
Upper Kalskag
Venetie
Wiseman

Representative Irene K. Nicholia

State Capitol • Juneau, Alaska 99801
Phone: 465-4527 FAX: 465-2294

Resources
Community and Regional Affairs
International Trade and Tourism

MEMORANDUM

TO: Representative Ivan Ivan, Co-Chairman
and Representative Alan Austerman, Co-Chairman
House Community and Regional Affairs Committee

FROM: Representative Irene Nicholia Irene

DATE: February 28, 1995

RE: Scheduling of House Bill 167

I would like to request a hearing of HB 167, "An Act relating to educational programs for Alaska Native languages, culture, and history, to teachers of Alaska Native languages and culture and history, and to Alaska Native Teachers," in the House Community and Regional Affairs Committee.

Attached please find a copy of the Sponsor statement and Sectional analysis for this bill.

Thank you for your timely consideration of HB 167.

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 27, 1995

SUBJECT: Sectional Summary of HB 167 (Educational programs for Alaska Native languages, culture, and history)

TO: Representative Irene Nicholia

FROM: Teresa B. Cramer
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 enacts new statutes related to Alaska Native Language and Culture Education Programs.

Sec. 14.03.210 describes what an Alaska Native language and culture education program consists of. Its purpose is to provide Alaska Native students with an understanding of their language, history, and cultural heritage. Subsection (b) sets out possible program components and permits school districts to enter into contracts with other nonsectarian schools for the provision of one or more of the components.

Sec. 14.03.220 requires that enrollmem in a program be voluntary. Under subsection (b), children who are not Alaska Natives may enroll if the enrollment is economically feasible.

Sec. 14.03.230 requires that these programs be held in regular schools and prohibits assigning students to schools in ways that result in segregation.

Sec. 14.03.240 requires that Alaska Native students participate fully and on an equal basis with their peers in courses that are predominantly nonverbal, including art, music, and physical education classes.

Sec. 14.03.250 sets out requirements for Alaska Native language and culture education teacher certificates.

Sec. 14.03.260 prohibits districts from replacing existing teachers with Alaska Native language and culture teachers. Under subsection (b), the commissioner of education may grant exemptions to the certification requirements of Sec. 14.03.250. Under subsection (c), Alaska Native language and culture teachers must be compensated under a salary schedule that is at least equivalent to the salary schedule for teachers holding standard teaching certificates. Under subsection (d), the district must give preference to and make affirmative efforts to employ persons who share the culture of the Alaska Native children who are

enrolled in the program. The school district is also required to involve parent committees in hiring procedures.

Sec. 14.03.270 provides for teachers' aides and community coordinators.

Sec. 14.03.280 directs that parents of children enrolled in a program be involved in the program to the maximum extent possible and requires parent committees where there are 10 or more Alaska Native children enrolled in the program. Under subsection (c), the parent committee adopts a resolution each year indicating whether it concurs or disagrees with the school board's education programs for Alaska Native children.

Sec. 14.03.290 sets out the duties of the state Board of Education and the Commissioner of Education. Under subsection (a), the Board of Education is directed to provide for the maximum involvement of parents, secondary students, teachers and teachers' aides in the programs, teachers who are Alaska Natives themselves, community groups, and people who are knowledgeable about Alaska Native education. Under subsections (b) and (c), the Commissioner of Education is directed to provide technical assistance and apply for federal money for Alaska Native education.

Sec. 14.03.400 defines "program" and school district" for the previous statutory sections.

Sec. 2 removes reference to the limited certificate for Alaska Native language and culture since it will be replaced with the certificate provided under Sec. 14.03.250 above.

Sec. 3 provides that a teacher who holds a certificate issued under Sec. 14.03.250 is considered a certificated teacher for purposes of teachers' retirement and is considered to hold a standard teaching certificate for purposes of acquiring tenure.

Sec. 4 directs that school districts in which there are at least 10 Alaska Native students actively recruit teacher applicants who are Alaska Natives.

TC:glc
95-172.glc

Isaac Juneby
Box 107
Eagle, Alaska 99738
February 13, 1995

Representative Alan Austerman, Chairman
House Committee,Community and Regional Affairs
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Dear Representative Austerman:

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study in the schools, and saying that "There was once a Tribe of Athabascan Indians".I know that you will do everything in your Committee to make sure that this does not happen. I am asking for your support to see that these bills are passed in your Committee.

If you have any questions, callme at (907) 547-2281.

Sincerely,

Isaac Juneby

C/C

Representative Irene Nicholia
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Representative Ivan Ivan
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

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Representative Jerry Mackie
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Senator Georgianna Lincoln
Alaska State Senate
State Capital
Juneau, Alaska 99801-1182

IRENE L. SOLOMON-ARNOLD
P.O. BOX 548
TOK, ALASKA 99780
FEBRUARY 22, 1995

Representative Alan Austerman, Chairman
House Committee, Community and Regional Affairs
Alaska State House of Representatives
State Capital
Juneau, Alaska 99801-1182

Dear Representative Austerman:

I am writing this letter regarding the House Bills 160 and 167 which is sponsored by Representative Nicholia. I have great concern regarding the passages of these bills because I am directly involved in the Athabascan Language Teaching in Tok. I know from experience that there is no support for promoting Native Languages in our schools. I believe the passage of these bills will enhance and highlight the revival of our Native Languages in the public schools.

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as part of the school curriculum I continue seeking ways to further my education in this field. I am the first and only graduate of Native Language Education in Associate of Applied Science Degree from the University of Alaska Fairbanks in May 1994. I find that teaching and preserving my language important enough to sacrifice a full time wages and benefits for a part time job with no benefits.

I hope this personal statement will get some positive response for the House Bills 160 and 167. If you need to contact me for further personal support I can be reached at (907) 883-2812 or (907) 883-5161.

Sincerely,

Irene L. Solomon-Arnold

Irene L. Solomon-Arnold

C/C
Representative Irene Nicholia
Alaska State House of Representative
State Capital
Juneau, Alaska 99801-1182

Senator Georgianna Lincoln
Alaska State Senate
State Capital
Juneau, Alaska 99801-1182

Representative Jerry Mackie
Alaska State House of Representative
State Capital
Juneau, Alaska 99801-1182

HB

176

CS FOR HOUSE BILL NO. 176(CRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE BUNDE

A BILL

FOR AN ACT ENTITLED

"An Act relating to errors in surveys of land and amending Alaska Rules of Civil Procedure 4 and 12."

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

* **Section 1.** MANIFESTLY DEFECTIVE SURVEYS. (a) An action in rem to determine and recognize boundaries of land within a subdivision within a municipality as they presently exist and to quiet title within the boundaries of the subdivision to the persons judicially found entitled to title under this section may be maintained if the platted description or field location of streets, tracts, and lots of or within a subdivision are manifestly defective due to a defective survey so as to create sufficient uncertainty as to affect the quiet enjoyment and property rights of the owners and an owner of land within the subdivision objects to the results of a resurvey and preliminary plat.

(b) An action under (a) of this section may only be maintained

(1) by

(A) the municipality the subdivision is located within; or

(B) a person granted permission by the court to bring the action; and

(2) if

(A) the municipality the subdivision is located within has

(i) by resolution supported an action under this section for the subdivision; and

(ii) established a special assessment district in the manner provided for capital improvements under AS 29.46.010 - 29.46.140 or under municipal ordinance; and

(B) a resurvey and preliminary plat has been completed by the assessment district and one or more property owners of or within the subdivision object to the results of the resurvey and filing of the preliminary plat.

(c) The complaint in an action under this section must include

(1) a statement of facts showing how this section is applicable;

(2) the current plat of the subdivision;

(3) a description of the entire real property sought to be affected by the action, including a description of all improvements to the real property and any existing boundary evidence along with a description of the location of all general topographic features;

(4) if the action is not brought by the municipality, a specification of the estate, title, and interest owned and in the actual possession of the person bringing the action in described parts of the entire real property affected by the defective survey;

(5) a specification of the estate, title, and interest in and owners of each separate part of the entire real property affected by the defective survey so far as they are known to the person bringing the action, and so far as they are capable of being discovered by reasonably diligent search by the person bringing the action;

(6) a specification of the street, public, or other areas offered, or that may be offered, for vacation in whole or in part for judicial equitable allocation to landowners for the mitigation of the losses inflicted upon the landowners by the defective survey;

(7) the preliminary plat undertaken by the assessment district of the entire real property affected by the defective survey, embodying the land boundaries contained within the legal boundary of the defective survey.

(d) In addition to other notice required by applicable court rule, notice shall be

published as provided in Alaska Rule of Civil Procedure 4(e), and a copy of the notice shall be posted in a conspicuous place on each separate parcel of the entire real property described in the complaint within 20 days after the first publication of the notice.

(e) An answer to the complaint must

(1) be served within 90 days after the first publication of the notice; the court for good cause shown may allow up to an additional 180 days to answer;

(2) specifically set out in detail the way in which the answering party's estate, right, title, or interest in or to, or lien on all or any part of the property is different from, or greater than, the interest of the party as it is described in the complaint;

(3) be confined to rights based on events occurring at the time of, or since the time of, the defective survey.

(f) A claim, right, or action that a party may have against a person based upon facts or events that occurred before the action under this section, remains unaffected by the action brought under this section and may be asserted at any time and in any manner permitted by law. However, a judgment in an action under this section is final as to the consequences, with respect to land boundaries, of the replat of the defective survey.

(g) A party to an action authorized by this section may record a notice of the pendency of the action in the form and at the place and with the effects specified in AS 09.45.940.

(h) The vacating of streets, public areas, and other areas in whole or in part by the voluntary action of a municipality, for the purpose of making it possible for the court to mitigate the hardships suffered by individuals because of the defective survey, can be accomplished by the offer of the municipality expressed in the complaint followed by the court's approval of it in the action authorized in this section, without other formalities. This provision is a special substitute for the provisions contained in AS 29.40.120 - 29.40.160.

(i) In an action under this section, judgment may not be given by default, but the court shall require proof of the facts alleged in the complaint and other pleadings.

(j) The judgment must

(1) determine the land boundaries of each parcel of land located within the entire area of real property sought to be affected by the action, whether owned publicly or privately after judicial equitable allocation of land voluntarily vacated by a municipality under

(h) of this section;

(2) determine the person or persons having estates, rights, titles, interests, and claims in and to each parcel, whether legal or equitable, present or future, vested or contingent, or whether they consist of mortgages or liens of any description;

(3) approve and direct the proper filing of a new plat covering the entire area of real property sought to be affected by the action, as a substitute for the plats previously filed, that were based upon the defective survey;

(4) to the extent reasonably practicable, attempt to minimize disruption to lines or boundaries of parcels or lots that are not found to be materially incorrect;

(5) give effect to the changes in land boundaries reflected by the resurvey and preliminary plat, mitigated so far as can equitably be done by allocating to contiguous lots parts of the land released by the municipality under (h) of this section.

(k) A judgment under this section

(1) is conclusive with respect to land boundaries on each person who, at the commencement of the action, had or claimed an estate, right, title, or interest in or to a part of the entire area of real property described in the complaint as intended to be affected by this action, and upon each person claiming under any such person by title subsequent to the commencement of the action;

(2) may not solely, by reason of the judgment or its effect, make a parcel or lot ineligible for a use or development for which it was eligible before the judgment.

(l) The court shall assess the cost of the action under this section and the replat to the assessment district.

(m) The person bringing the action shall record a certified copy of the judgment at the expense of the assessment district with the recorder for the recording district in which the land is situated.

(n) This section does not affect the right of a person harmed by a defective survey to recover damages for the defective survey or limit the liability of the person who performed the defective survey.

(o) The remedy provided by this section is cumulative and in addition to any other remedy provided by law for quieting or establishing title to real property or the boundaries of it.

(p) In this section, "defective survey"

(1) means that the original monumentation set by the surveyor of record to represent the property corners, or the distance and direction calls, on a plat of public record are sufficiently and manifestly erroneous so as to create gross uncertainty and ambiguity as to the

(A) position of property lines within a subdivision; or

(B) location of lots, streets, and tracts of a subdivision; and

(2) does not include Bureau of Land Management rectangular plats, United States surveys, and state rectangular plats.

*** Sec. 2.** An action under sec. 1 of this Act that is commenced before December 31, 1998, may proceed under the provisions of sec. 1 of this Act notwithstanding the repeal of that section under sec. 4 of this Act.

*** Sec. 3.** Section 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 4 relating to service of process, and Alaska Rule of Civil Procedure 12, relating to answers in civil actions.

*** Sec. 4.** Section 1 of this Act is repealed December 31, 1998.

9-LS0708\C
Luckhaupt
4/18/95

CS FOR HOUSE BILL NO. 176( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE BUNDE

A BILL

FOR AN ACT ENTITLED

"An Act relating to errors in surveys of land and amending Alaska Rules of Civil Procedure 4 and 12."

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

* Section 1. MANIFESTLY DEFECTIVE SURVEYS. (a) An action in rem to determine and recognize boundaries of and within a subdivision within a municipality as they presently exist and to quiet title within the boundaries of the subdivision to the persons judicially found entitled to title under this section may be maintained if the platted description or field location of streets, tracts, and lots of or within a subdivision are manifestly defective due to a defective survey so as to create sufficient uncertainty as to affect the quiet enjoyment and property rights of the owners and an owner of land within the subdivision objects to the results of a resurvey and preliminary plat.

(b) An action under (a) of this section may only be maintained

(1) by

(A) the municipality the subdivision is located within; or

(B) a person granted permission by the court to bring the action; and

(2) if

(A) the municipality the subdivision is located within has

(i) by resolution supported an action under this section for the subdivision; and

(ii) established a special assessment district in the manner provided for capital improvements under AS 29.46.010 - 29.46.140 or under municipal ordinance; and

(B) a resurvey and preliminary plat has been completed by the assessment district and one or more property owners of or within the subdivision object to the results of the resurvey and filing of the preliminary plat.

(c) The complaint in an action under this section must include

(1) a statement of facts showing how this section is applicable;

(2) the current plat of the subdivision;

(3) a description of the entire real property sought to be affected by the action, including a description of all improvements to the real property and any existing boundary evidence along with a description of the location of all general topographic features;

(4) if the action is not brought by the municipality, a specification of the estate, title, and interest owned and in the actual possession of the person bringing the action in described parts of the entire real property affected by the defective survey;

(5) a specification of the estate, title, and interest in and owners of each separate part of the entire real property affected by the defective survey so far as they are known to the person bringing the action, and so far as they are capable of being discovered by reasonably diligent search by the person bringing the action;

(6) a specification of the street, public, or other areas offered, or that may be offered, for vacation in whole or in part for judicial equitable allocation to landowners for the mitigation of the losses inflicted upon the landowners by the defective survey;

(7) the preliminary plat undertaken by the assessment district of the entire real property affected by the defective survey, embodying the land boundaries contained within the legal boundary of the defective survey.

(d) In addition to other notice required by applicable court rule, notice shall be

published as provided in Alaska Rule of Civil Procedure 4(e), and a copy of the notice shall be posted in a conspicuous place on each separate parcel of the entire real property described in the complaint within 20 days after the first publication of the notice.

(e) An answer to the complaint must

(1) be served within 90 days after the first publication of the notice; the court for good cause shown may allow up to an additional 180 days to answer;

(2) specifically set out in detail the way in which the answering party's estate, right, title, or interest in or to, or lien on all or any part of the property is different from, or greater than, the interest of the party as it is described in the complaint;

(3) be confined to rights based on events occurring at the time of, or since the time of, the defective survey.

(f) A claim, right, or action that a party may have against a person based upon facts or events that occurred before the action under this section, remains unaffected by the action brought under this section and may be asserted at any time and in any manner permitted by law. However, a judgment in an action under this section is final as to the consequences, with respect to land boundaries, of the replat of the defective survey.

(g) A party to an action authorized by this section may record a notice of the pendency of the action in the form and at the place and with the effects specified in AS 09.45.940.

(h) The vacating of streets, public areas, and other areas in whole or in part by the voluntary action of a municipality, for the purpose of making it possible for the court to mitigate the hardships suffered by individuals because of the defective survey, can be accomplished by the offer of the municipality expressed in the complaint followed by the court's approval of it in the action authorized in this section, without other formalities. This provision is a special substitute for the provisions contained in AS 29.40.120 - 29.40.160.

(i) In an action under this section, judgment may not be given by default, but the court shall require proof of the facts alleged in the complaint and other pleadings.

(j) The judgment must

(1) determine the land boundaries of each parcel of land located within the entire area of real property sought to be affected by the action, whether owned publicly or privately after judicial equitable allocation of land voluntarily vacated by a municipality under

(h) of this section;

(2) determine the person or persons having estates, rights, titles, interests, and claims in and to each parcel, whether legal or equitable, present or future, vested or contingent, or whether they consist of mortgages or liens of any description;

(3) approve and direct the proper filing of a new plat covering the entire area of real property sought to be affected by the action, as a substitute for the plats previously filed, that were based upon the defective survey;

(4) to the extent reasonably practicable, attempt to minimize disruption to lines or boundaries of parcels or lots that are not found to be materially incorrect;

(5) give effect to the changes in land boundaries reflected by the resurvey and preliminary plat, mitigated so far as can equitably be done by allocating to contiguous lots parts of the land released by the municipality under (h) of this section.

(k) A judgment under this section

(1) is conclusive with respect to land boundaries on each person who, at the commencement of the action, had or claimed an estate, right, title, or interest in or to a part of the entire area of real property described in the complaint as intended to be affected by this action, and upon each person claiming under any such person by title subsequent to the commencement of the action;

(2) may not solely, by reason of the judgment or its effect, make a parcel or lot ineligible for a use or development for which it was eligible before the judgment.

(l) The court shall assess the cost of the action under this section and the replat to the assessment district.

(m) The person bringing the action shall record a certified copy of the judgment at the expense of the assessment district with the recorder for the recording district in which the land is situated.

(n) This section does not affect the right of a person harmed by a defective survey to recover damages for the defective survey or limit the liability of the person who performed the defective survey.

(o) The remedy provided by this section is cumulative and in addition to any other remedy provided by law for quieting or establishing title to real property or the boundaries of it.

(p) In this section, "detective survey"

(1) means that the original monumentation set by the surveyor of record to represent the property corners, or the distance and direction calls, on a plat of public record are sufficiently and manifestly erroneous so as to create gross uncertainty and ambiguity as to the

(A) position of property lines within a subdivision; or

(B) location of lots, streets, and tracts of a subdivision; and

(2) does not include Bureau of Land Management rectangular plats, United States surveys, and state rectangular plats.

* Sec. 2. An action under sec. 1 of this Act that is commenced before December 31, 1998, may proceed under the provisions of sec. 1 of this Act notwithstanding the repeal of that section under sec. 4 of this Act.

* Sec. 3. Section 1 of this Act has the effect of amending Alaska Rule of Civil Procedure 4 relating to service of process, and Alaska Rule of Civil Procedure 12, relating to answers in civil actions.

* Sec. 4. Section 1 of this Act is repealed December 31, 1998.

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. CSHB176(CRA)

Revision Date: 11-Apr-95
Title: An Act relating to errors in surveys of land.
Sponsor: Representative Bunde
Requestor: CRA

Dept Affected: Natural Resources
BRU: Resource Development
Component: Land Development
Component Serial No. 431

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (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	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ None

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

There is no fiscal impact anticipated for the Department of Natural Resources associated with implementation of this legislation.

In Anchorage, two subdivisions, Rabbit Creek View and Rabbit Heights were done by the same surveyor 25 years ago, who has had his license revoked. Boundaries of the plat don't close by hundreds of feet. These problems have manifested themselves to the point where lending institutions and title companies are electing not to service the lot owners in the area. Surveyors have also not elected to perform surveys and road and drainage improvement is stopped due to the uncertainty in determining the position of right-of-ways.

Prepared by: Ron Swanson, Director
Division: Land
Phone : 762-2692
Date : 11-Apr-95
Approved by Commissioner:
Date: 4-11-95
Agency: Natural Resources

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HB 176

"An Act relating to errors in surveys of land."

When outside survey lines of a subdivision are "manifestly defective", the inside lines of some or all of the individual lots will be incorrect as well. When this occurs, no one in the subdivision is afforded clear title, creating difficulties in title transfer, mortgage insurance and financing. While it is true that a property owner can bring quiet title action against lots surrounding his or her own, it is not practical to solve multi-owner, multi-lot problems under a single quiet title action when the outside markers are so far off the mark.

SB 79 would allow a party to enjoin all property owners of record, (after proper petition to the court, resolution by a local government, and creation of a special assessment district,) to request a resurvey and replat of manifestly defective subdivision lines and subsequent changes in individual lots through Superior Court action.

The Municipality of Anchorage has requested this legislation to help correct two "manifestly defective" subdivision surveys containing 347 lots in the Anchorage area. Staked lot corners are not in the same position as shown on the plats, and in many cases, lot lines are 20 to 30 feet off from their noted position on the plats. The Municipality has exhausted all other aspects of law to correct this problem and finds that this legislation is the only practical solution to offer relief to assist property owners in correcting this defect. While the immediate reason for this legislation occurs in Anchorage, the changes would be available statewide for manifestly defective surveys.

SB 79 can only be utilized to resolve manifestly defective survey problems if specific circumstances with a boundary dispute cannot be resolved

with existing common law boundary resolution principles. SB 79 is crafted to allow for a vote of all the affected landowners to determine if a resurvey of the entire subdivision(s) should occur. A majority must concur to form a special assessment district; the Municipality must also pass a resolution supporting this action and formation of an assessment district. A complaint must be filed with the court with a statement of facts surrounding the survev area in question, i.e. persons with interest in the affected property, the type ot interest they have, facts about the problem and the proposed replat, including an as-built survey showing current improvements and landmarks, with existing boundary evidence. Also included could be a listing of all property or properties that may be offered to compensate landowners for mitigation of losses. A certified statement by a competent authority citing that a majority of the affected landowners voted for the replat and voted to set up an assessment district to fund the replat must also be submitted to the court.

The court may accept, modify, or direct the surveyor(s) to modify the proposed replat. The court assesses the special assessment district for the costs of the replat. Once the court has acted, the replat is recorded as the official record.

A subcommittee of the Alaska Society of Professional Land Surveyors (ASPLS) concluded that when a subdivision survey is "manifestly defective", it cannot be resolved on a piecemeal basis and unless all the land owners participate, it will never be resolved. A subcommittee of the ASPLS worked with the sponsor's office, the Municipality of Anchorage, the Department of Natural Resources and various affected entities to craft the language in SB 79.

REPRESENTATIVE CON BUNDE
CO-CHAIR HEALTH, EDUCATION
& SOCIAL SERVICES
VICE-CHAIR RULES

Alaska State Legislature
House of Representatives

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MEMORANDUM

DATE: April 7, 1995

TO: Representative Ivan Ivan
Co-Chair Community and Regional Affairs Committee

FROM: Rep. Con Bunde
Co-Chair House HESS

RE: HB 176

This memo is a request to calendar HB 176 for a Community and Regional Affairs Committee hearing at your earliest possible convenience.

HB 176 is attached and a packet will be available in the near future. If you have any questions please call Patti Swenson, ext 6824.

Thank you for your cooperation and help with this legislation.

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

DATE: April 13, 1995

TO: George Newsham, Assistant Municipal Attorney

Thru: Lee Browning, PE, Municipal Engineer

FROM: Tom Knox, PLS, Municipal Surveyor

SUBJECT: Senate Bill 79/House Bill 176

As you know, I have been working for several years on the Rabbit Creek Heights Subdivision and Rabbit Creek View Subdivision survey problems. The current companion bills are the result of that work. The type and magnitude of survey problems affecting the property owners within these two subdivisions illustrate the need for this particular legislation. I have included highlighted examples of some of the problems which randomly affect both subdivisions.

It has become necessary to provide a legal mechanism for a majority of consenting owners of property within the boundaries of a defective survey to be able to correct their survey and record an accurate description of their properties. This legislation provides a mechanism which identifies the funding source, binds the property owners to a solution and provides the legal authority to ensure equitability and quiet title to all the property owners.

I wholly support passage of a bill which would accomplish this need.

Encl.

cc: Jim Fero, Director of Public Works

April 14, 1995

HOUSE BILL #176 – SENATE BILL #72

The bill should be passed. It has been written in such a way that the land owners have to say their boundarys are in such a state that this is the only law that will work to fix the boundary problems. This bill is also written so that to use this law, there must be major errors in a large area.

I am one of the trustees on three lots in a subdivision that this law would apply to. I am also a Registered Professional Land Surveyor in the State of Alaska. I have worked on the committee that helped write this legislation. I believe that this legislation has a lot going for it. It is a win – win piece of legislation. The land owners affected have to vote to set up a special assessment district to pay for the problem and if they don't want to pay to fix the problem, they can vote down the special assessment district. This legislation also has a Sunset clause in it so that it can be revised or canceled. And the passing of this legislation will not do harm to anyone.

Under section 1 (2)(A)(ii) on the last draft that I have the special assessment district is established by AS 29.46.010 – 29.46.140 or under municipal ordinance. Up until this draft, the special assessment district was established by the land owners that may be affected. I would like to see that the land owners still remain in control of this special assessment district. They are the ones affected and they are also the ones that have to pay for it.

Yours truely

Bryan E. Cooper PLS

SENTEC
Surveying, Engineering and Planning
7801 E 36 th Ave, Suite A
Anchorage, Ak 99504

(907) 333-6881
Fax (907) 333-1085

April 17, 1995

Representative Con Bunde
State Capital
Juneau, AK 99801

Re: HB-176- An Act relating to errors in surveys of land

Dear Representative Bunde,

I am a registered Land Surveyor, located in Anchorage and wish to inform you that I support your bill. I was a member of the ASPLS committee formed to review and comment on the original version of the Bill. I am also the ASPLS legislative committee chair. This letter represents my own views and not necessarily those of ASPLS.

As surveyors we are well aware of the problems associated with defective surveys. In many cases the existing Laws and Regulations are sufficient to allow a problem survey or subdivision to be corrected. This bill is designed to assist in the situation where the implementation of existing Laws would create more problems than solutions. This bill is an improvement over the initial bill, as it is removed from the confusion of the Earth Slide relief Act and also this draft clearly out lines the steps and procedures necessary to implement the bill. There are several areas in this draft which still require clarification. The first is in regards to the recordation of the replat. It is assumed that the Court through a judgment will instruct the local platting authority to accept the plat and record it. Secondly there is some confusion over the definition of Municipality, as used in this bill

Thank you for the opportunity to speak to this bill.

If you have any other questions please contact me.

Sincerely

Mike Horne P.L.S