ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672
9069 SENATE STATE AFFAIRS

- Defines "reasonable opportunity", "customary trade", and "customary and traditional".

- Includes a "sunset" provision calling for a review of the operation of the law by the governor and the legislature and a return to the 1986 law if no action is taken by the legislature.

Effects of Changes in the Subsistence Law

This section examines key differences between the 1986 and 1992 laws, and how they have been implemented. It is organized in terms of the four areas of major difference between the laws -- who qualifies for subsistence, where subsistence uses can occur, providing for subsistence uses in regulation, and the operation of the subsistence preference. Each section discusses the differences between the laws and their implementation.

Who Qualifies for Subsistence

"Rural Provisions" Severed from the 1986 Statute

Subsistence Users Can No Longer Be Clearly Identified by the Boards.

- Pre-1990. Rural residency was a tool used by the joint board to clearly identify the relatively small proportion of Alaska residents who rely on customary and traditional subsistence fisheries and hunts. The joint board identified about 20% of state residents as rural residents, who are potential subsistence users; the other 80% of state residents were identified as non-rural residents who could hunt under general hunting regulations or fish under sport or personal use regulations.

- Post-1992. Without rural residency as a board management tool, large numbers of urban-based sport hunters or personal use fishers now pass as subsistence users. Without the concept of subsistence as a rural use, it is unclear who a subsistence user is and what it is based on. The "new" urban subsistence users potentially overwhelm accessible customary and traditional subsistence fisheries and hunts, to the detriment of subsistence-dependent rural villages and other established uses (commercial fisheries, sport fisheries, non-resident sport hunts, guided hunts). The boards have dealt with this by restricting subsistence hunting regulations, creating Tier II hunts, and creating nonsubsistence areas (described below).

Where Subsistence Uses Occur

"Nonsubsistence Area" Provisions

Subsistence Use Areas Potentially Expand to Include All Urban Areas.

- **Pre-1990.** The rural provision of the pre-1990 law was a tool used by the boards to clearly identify areas where customary and traditional subsistence uses occurred – subsistence occurred in areas "reasonably accessible" to rural communities, which in effect means subsistence use areas were rural areas.

- **Post-1992.** Without the rural provision as a management tool, the boards have been faced with the prospect of having to create subsistence hunts or subsistence fisheries wherever urban-based sport hunters or personal use fishers go, such as in urbanized areas like the Anchorage Bowl, Mat-Su Valley, Fairbanks North Star Borough, or the roaded Kenai Peninsula. The 1992 law attempted to address this effect with the "nonsubsistence area" concept, described below.

Nonsubsistence Area Provisions Were Used to Create Five Nonsubsistence Areas.

- **Pre-1990.** Because subsistence was a rural use near rural communities, the boards recognized only a few subsistence fisheries or hunts around urbanized areas (for instance, the Tyonek subsistence salmon fishery across Cook Inlet from Anchorage). In urbanized areas, most hunting was managed under general hunting regulations and most fishing was managed under sport, personal use, and/or commercial regulations.

- **Post-1992.** The joint board used the nonsubsistence area provisions in the 1992 law to create five nonsubsistence areas around urbanized population. At present, the nonsubsistence areas adopted by the joint board are similar to the nonrural areas identified before 1989 under the previous law. It is uncertain whether other areas might be identified as nonsubsistence areas by future joint board action. The statute provides no guidance on the number, relative size, or precise boundaries of nonsubsistence areas, leaving these matters up to the joint board. This lack of guidance raises several concerns. As evidenced by public proposals and board discussion, the nonsubsistence area provisions hold the potential for eliminating subsistence use patterns of rural villages, if they are applied in certain ways. Subsistence use areas of villages commonly overlap harvest areas used by urban-based residents. In the overlap area, subsistence uses can be eliminated if the urban-based users become a simple majority in the area. The nonsubsistence area provisions also allow for a "Swiss cheese" approach, where many small drainages or seemingly remote harvesting areas are designated nonsubsistence areas because the only written records of their use is by fly-in sport users. Implemented this way, village subsistence use areas can have small holes drilled in them, which are managed as exclusive use domains of sport users.

Providing for Subsistence Uses With Regulations

Effects on Hunting Regulations

Rural Subsistence Hunting Seasons and Bags Were Restricted.

- **Pre-1990.** Prior to 1990, the Board of Game was gradually implementing the subsistence statute, by identifying customary and traditional hunting practices of rural villages with the input from regional councils, and by gradually providing appropriate seasons, bags limits, and means-methods regulations. These local subsistence hunts were distinct from general hunting regulations of urban-based hunters. Residency was a tool used by the board to clearly identify local rural customary and traditional subsistence use patterns for rural residents (subsistence hunts) distinct from sport hunting patterns for urban-based residents (general hunts), and providing for them through appropriate seasons, bags, or means-methods. This was possible because rural hunts or fisheries were open to only a limited number of rural users.

- **Post-1992.** Without residency as a board management tool, the distinction between subsistence hunts and general sport hunts has been lost. The Board of Game has had to craft hunting regulations primarily with the urban-based majority hunters in mind. Most of the regulatory gains made by rural subsistence hunters were lost when subsistence hunts and general hunts were collapsed into a single category by the board in 1990. This resulted in more restrictive subsistence hunting seasons and bags which are open to all urban-based hunters (see Reductions in Subsistence Hunting Seasons and Bag Limits Following McDowell v Alaska, Division of Subsistence, Alaska Department of Fish and Game, October 1990). These restricted hunting regulations were readopted by the Board of Game in 1992 as providing "reasonable opportunity" to subsistence users (see next section). The hunt patterns which are appropriate for the majority urban-based hunters are typically inappropriate for the customary and traditional uses of rural families dependent on subsistence, which is one of the central problems the state subsistence statute was originally intended to solve.

Reasonable Opportunity

An Ambiguous Standard is Inserted in the Law.

- Pre-1990. The 1986 law required that the boards to adopt subsistence regulations that "provide a reasonable opportunity to satisfy the subsistence uses" (16.05.258(c)). There was a question about how to provide for customary and traditional uses with regulations. Did this include providing for a customary and traditional pattern of taking, such as customary and traditional seasons, means-methods, harvest levels, and reporting conventions? The boards were advised that regulations did not have to guarantee a take, but provide an "opportunity" for a subsistence use which was reasonable. The reasonableness of a regulation had to be demonstrated by some evidence concerning the customary and traditional pattern of use. The federal district court in Bobby supported this interpretation. In Morry the state court distinguished between "customary and traditional uses", which it held the state law required be provided for, and "methods of harvesting", which may be provided for in the discretion of the boards.

- Post-1992. The 1992 law requires that the boards "shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks and populations" (16.05.258(b)(1)(A)). The 1992 law provides a definition of reasonable opportunity: "for purposes of this section, 'reasonable opportunity' means an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking fish or game" [emphasis added] (16.05.258(f)). This definition may narrow what regulations must provide for -- a reasonable expectation of a take -- and omits the other characteristics of a customary and traditional pattern of taking and use. The definition contains an ambiguous "normalcy standard" for determining reasonable opportunity for taking for subsistence uses. Normalcy implies a normal curve drawn from a set of observations. But which set of hunters are used as the basis for determining normalcy -- rural-resident hunters or urban-resident hunters? Without a clear normalcy standard, the Board of Game has picked among widely differing types of averages. For instance, in deciding season length, the board has reasoned that because the "average hunter" (including urban hunters) spends a certain number of days afield, a season length somewhat longer than the average provides a reasonable opportunity for moose hunters; or, that because the "average" success rates for hunters (including urban hunters) is a certain percent, a set of seasons and area restrictions that provide for that success rate is reasonable.

Customary and Traditional

"Customary and Traditional" is Given Some Additional Definition in Statute.

- **Pre-1990.** The pre-1990 law used the terms "customary and traditional" to define a subsistence use of fish and game. The terms were not defined in statute. The boards used eight criteria, which were adopted in regulation, to identify customary and traditional patterns of use (5AAC 99.010).

- **Post-1992.** The 1992 law provides a definition of "customary and traditional" – "the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of fish or game" (AS 16.05.940(7)). The definition draws upon the first and fourth criteria in regulation (5AAC 99.010). It leaves the interpretation of terms like "long-term", "consistent", and "reliance" to the individual board, considering the facts pertaining to the specific stock, population, and area under consideration.

Customary Trade

"Customary Trade" is Distinguished from "Commercial Trade".

- **Pre-1990.** The pre-1990 law's definition of "subsistence uses" included "sharing" "barter," and "customary trade". This provision recognizes the common customary practice of harvesters supplying relatives and friends with subsistence food products through non-commercial channels. Customary trade was not defined in statute. The individual boards had authority to regulate sharing, barter, and customary trade, but with a few exceptions, they had not addressed the customary trade issue. This left the issue open to court interpretation.

- **Post-1992.** The 1992 law provides a definition of "customary trade" – "the limited noncommercial exchange, for minimal amounts of cash, as restricted by the appropriate board, of fish or game resources; the terms of this paragraph do not restrict money sales of furs and furbearers" (AS 16.05.940(8)). This definition better allows for distinguishing between customary trade and commercial trade of wild resources. The definition is worded so as to allow the sale of furs taken under subsistence regulations. The Board of Fisheries has used the definition to regulate the customary trade of limited amounts of herring roe on kelp in southeast Alaska, under the terms of a subsistence fishing permit.

Rural Public Involvement in Management

Participation by Rural Residents in the Regulatory Process Declines.

- **Pre-1990.** Before 1990, the state operated a system of regional advisory councils, made up of representatives of local fish and game advisory councils. The regional councils met requirements in ANILCA Section 805 for regional advisory councils in each subsistence region of Alaska. The councils provided a regional forum for discussing fish and game management issues, developing regional consensus on issues, and resolving disputes. Subsistence proposals from the regional councils were given special consideration in the regulatory system; the boards had to adopt proposals unless not supported by evidence or if contrary to conservation principles. There were substantial numbers of subsistence proposals each year from the rural public and the regional council and advisory committee system.

- **Post-1992.** The state's regional council system was disbanded in 1991. There has been declining participation in the state's regulatory process by rural residents dependent on subsistence, with very few subsistence proposals before the board each year. The decline results from a combination of factors -- no regional councils, the growing frustration by rural residents in the board's inability to craft area-specific subsistence hunting regulations, and the growing opportunity to participate in the federal subsistence system. The declining participation by rural subsistence users in the state's system reduces the state's ability to bring together different interests and to develop mutually acceptable solutions to fish and game issues.

Comanagement Initiatives

Development of Comanagement Arrangements Continues.

- **Pre-1990.** A number of comanagement arrangements were initiated between the state, federal, and subsistence groups to address subsistence issues related to specific stocks or populations. Examples include the Yukon-Kuskokwim Delta Goose Management Plan, the Kilbuck Caribou Cooperative Management Plan, the Kuskokwim River Salmon Management Group, and the Alaska and Inuvialuit Beluga Whale Committee. Solutions to fish and game management problems were developed through collaborative arrangements like these.

- **Post-1992.** Comanagement arrangements continue to be developed. Examples include the ones listed above and the Round Island subsistence walrus hunt co-management plan and the western arctic caribou initiative. Dual state and federal subsistence management, and declining participation by rural residents in the state's board process, complicate resource management, and may make these types of comanagement arrangements more necessary. Collaborative arrangements can provide effective additions to the existing fish and game advisory committee process.

Operation of the Subsistence Preference

Procedural Language

Explicit Steps for Implementing the Subsistence Preference are Put into Statute.

- **Pre-1990.** The 1986 law contained general steps about how the subsistence preference was to be applied (AS 16.05.258(c): "If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria: (1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood; (2) local residency; and (3) availability of alternative resources."

- **Post-1992.** The 1992 law provides more specific procedures for applying the subsistence preference (AS 16.05.258(b). Four steps are identified, which make more explicit the process in the 1986 law. The 1992 statute also modifies the three Tier II criteria: "(1) the customary and direct dependence on the fish stock or game population by the subsistence user for human consumption as a mainstay of livelihood; (2) the proximity of the domicile of the subsistence user to the stock or population; (3) the ability of the subsistence user to obtain food if the subsistence use is restricted or eliminated."

CORRECTION

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HAVE BEEN REFILMED TO
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Tier II Provisions

A Clear and Verifiable Tier II Subsistence Eligibility Criterion is Lost.

- **Pre-1990.** Residency was a tool which could be used by the boards to help identify the most dependent subsistence users at the Tier II level (when there is not enough fish or game to provide for all subsistence users) -- "local residency" was one of the three Tier II criteria, and served as the basis of verifiable Tier II questions.

- **Post-1992.** Residency was lost as a tool which could be used by the boards to help identify the most dependent subsistence users at the Tier II level. "Proximity of a subsistence user to the Tier II population" was one of the three Tier II criteria, but was ruled "unconstitutional" by the state supreme court in Kenaitze. The boards lost one of the few easily verifiable Tier II factors.

Popular General and Nonresident Hunts Were Eliminated, and Tier II Hunts Created.

- **Pre-1990.** Just prior to 1990, there were no Tier II subsistence hunts authorized by the board. Popular hunts like the Nelchina caribou hunt were managed with a subsistence hunt (open to certain rural residents) and a general (sport) hunt (open to residents and non-residents through a random draw), with an allocation of animals to each hunt.

- **Post-1992.** Because large numbers of urban-based hunters are now classified as subsistence users, certain subsistence hunts were oversubscribed. As stated above, this was dealt with in many hunts by reducing hunter efficiency through more restrictions on subsistence seasons and bags. But the Board of Game authorized 15 new Tier II hunts in 1990, including the Nelchina caribou hunt which previously was managed for multiple uses. The Tier II system, when applied to all Alaska residents, has created many special problems, including elimination of non-resident hunters, difficulties in verifying applicant responses, and declining public confidence in the Tier II process.

Conclusions

This report compares the implementation of the 1986 and 1992 subsistence laws in four major areas. It examines continuity and change in who qualifies for subsistence, where subsistence is allowed, what subsistence regulations are supposed to provide for, and how the subsistence preference operates.

- The greatest differences between implementation of the 1986 and 1992 laws result from the absence of the rural provisions in the 1992 law. Without the ability to narrow the pool of people who qualify for subsistence, the boards lack a major tool for managing and allocating fish and wildlife. The lack of the rural provision is at the root of several other problems with the law, which was originally designed around the rural provision.

- The boards have established "nonsubsistence" areas that are similar to the "nonrural" areas identified before 1990. However, public proposals and board discussions indicate that there is potential for the nonsubsistence provisions to be interpreted to allow for gerrymandering that could adversely impact small communities dependent on subsistence.

- The Board of Game substantially reduced subsistence hunting seasons and bag limits in many areas in 1990-91 in response to the McDowell decision. This addressed the over-harvest problems created by all urban hunters qualifying for subsistence hunts, but reduced rural residents' opportunities to take game legally for subsistence uses. After the 1992 law was passed, the board readopted most of these regulations with little substantive review. The boards have been reluctant to take up proposals that would require using the procedures set out in the 1992 law for identifying and providing for subsistence uses. Under the 1992 law, the distinction between subsistence hunts and general sport hunts has been lost.

- Reductions in subsistence hunting seasons and bag limits have been justified by the Board of Game under the ambiguous definition of "reasonable opportunity" in the 1992 law.

- After 1992 a number of popular general and nonresident hunts were replaced by highly unpopular Tier II subsistence hunts, because of the "all-Alaskan" policy. The Tier II system is widely viewed as unfair and unenforceable when applied to all Alaskans. The Tier II system is designed to provide hunting advantages for those most reliant upon subsistence when subsistence users exceed resource availability. But the effectiveness of the Tier II system to correctly identify those who are most reliant is being eroded by court decisions which prohibit the use of verifiable Tier II criteria linked to residency, proximity, or geography.

- Rural residents are participating less in the state's subsistence regulatory regime. This is due to the combined effects of cutbacks in state funding for the advisory committee system, the elimination of the state's regional council system, and the perception that the federal subsistence system is more responsive than the state system.

In conclusion, there appear to be two major types of problems with the 1992 subsistence law – those created primarily by the absence of the rural provisions, and those due to the lack of a clear standard for what the law is supposed to protect.

Because of these problems with the law, the Board of Game is not able to craft rules that allow rural people, who are most dependent upon subsistence, to legally pursue customary harvest methods and practices. While the 1992 law poses similar problems for the Board of Fisheries, it is not to the same extent because the Board of Fisheries are still able to distinguish subsistence uses and users based on gear types in most cases.

Current implementation of the law emphasizes providing some level of opportunity for successful taking. It downplays the need to provide regulations that are appropriate to the context within which harvest occurs, such as the seasonal pattern of game availability, seasonal needs for particular types of food, and community patterns of harvest and sharing. This leads to problems for both users and managers. Villagers do not want to be treated as criminals for feeding their families and following customary ways of life. And fish and wildlife management can only be successful in rural Alaska if people respect it and play a significant role in the system.

On balance, implementation of the 1992 law has had the effect of limiting subsistence hunting for rural residents compared with the way the 1986 law was being implemented prior to McDowell. The law in its present form does not allow the Board of Game to create regulations that protect the subsistence patterns which are such a valued part of the state's diverse cultures, economies, and ways of life.

Appendix A. Subsistence Management Chronology

1925: Alaska Game Law. Believed to provide for most subsistence hunting during territorial days, the law stated that "...any Indian or Eskimo, prospector, or traveler [can] take animals, birds, or game fishes during the closed season when he is in the need of food."

1960: Statehood. The federal government transferred authority for management of fish and game in Alaska to the new state government. Both the federal and the state government recognized subsistence fisheries.

1971: ANCSA. The Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal hunting and fishing rights. No law was enacted that protected subsistence, but the conference report stated Native subsistence and subsistence lands would be protected by the State of Alaska and the Department of Interior.

1978: State's First Subsistence Law. The state passes its first subsistence law which, once sustained yield has been ensured, requires that subsistence uses be allowed, with a priority if necessary (Ch. 151 SLA 1978). The law defines subsistence as "customary and traditional uses" of fish and game for specific purposes such as food.

1980: ANILCA Passed. Congress passes the Alaska National Interest Lands Conservation Act, creating 104 million acres of new national parks, preserves, and wildlife refuges (P.L. 96-487, December 2, 1980 [94 Stat. 2371]). Title VIII of that act mandates that the state maintain a subsistence hunting and fishing preference for rural residents, or forfeit management of these subsistence uses on public lands. If the state fails to protect subsistence as described in ANILCA, the act stipulates that the federal government will take over management of fish and wildlife on the two-thirds of the state that is federal land.

1982: State Law's Consistency With ANILCA is Established. The joint Boards of Fisheries and Game adopt a regulation specifying that customary and traditional uses are rural uses (5 AAC 99.010), and the Department of Interior certifies the state's consistency with ANILCA.

1982: Repeal Initiative. A statewide effort to repeal the subsistence initiative fails by a large margin at the polls (58.4% of Alaskan voters in favor).

1983: Subsistence Suit. Several Alaskans file suit against the state subsistence law. In McDowell v. State, they argue that the law denies subsistence privileges to some urban residents who have long depended on fish and wildlife resources, while granting those privileges to some rural residents who do not need it, and for that reason the law is unconstitutional.

1985: Madison Decision. The Alaska Supreme Court, in the Madison decision, rules that state regulations limiting subsistence to rural residents (enacted by the Joint Boards in 1982) are not consistent with the state's 1978 subsistence law. The Interior Department notifies the state that the Madison decision violates the provisions of ANILCA and threatens takeover of fish and wildlife on public lands unless the state comes up with a new subsistence law, incorporating the rural limitation.

1986: New Subsistence Law. The Alaska legislature enacts a new law limiting subsistence to rural residents (Ch. 52 SLA 1986; AS 16.05.90). Rural is defined as an area where the "...noncommercial, customary and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy..." In state superior court, the McDowell suit is amended to challenge the new subsistence law. The Kenaitze Indian tribe also files a suit in federal court under ANILCA to protest the classification by the Boards of the Kenai Peninsula as an urban area (Kenaitze Indian Tribe vs. State of Alaska, No. A86-367).

1987: Kenaitzes Initially Denied. A federal court judge rules against the Kenaitze Tribe, saying the state's subsistence law's definition of rural agrees with use of the word "rural" in federal subsistence law.

1987: McDowell Initially Denied. The state superior court holds that the 1986 subsistence law is constitutional.

1988: Kenaitze Decision Reversed. The ninth U.S. circuit court of appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA (Kenaitze Indian Tribe vs. State of Alaska, 860 F. 2nd 312, [9th Cir. 1988]). The court suggests that a definition of rural hinges on demographic characteristics. The U.S. Supreme court ultimately denies review.

1989: Kenaitze Negotiations. Under direction of the federal district court in a preliminary injunction, the state and the Kenaitze tribe agree to a one-year educational fishery, for plaintiffs in that case only, until a permanent subsistence solution can be found. The state initially believes that a simple amendment to ANILCA, which changes the federal definition of rural to match the state definition, is the best solution. However, that effort failed, and negotiations begin toward reaching a consensus position.

1989: McDowell Decision. On December 22, 1989, ruling in McDowell v. State, the Alaska Supreme Court found that the 1986 state subsistence law was unconstitutional because it excluded urban residents from subsistence activities. On January 5, 1990, the Alaska Supreme Court granted the state a stay in the McDowell decision until July 1, 1990.

April, 1990: Federal Government Moves to Assume Subsistence Management. On April 13, 1990, a Notice of Intent to propose regulations was published in the federal register. Temporary regulations establish a federal program that minimizes change to the state program, consistent with the federal government's ANILCA responsibilities. Temporary regulation were published on June 8, 1990.

May 1990: Legislature Debates Subsistence Options. Among options discussed by the legislature was a draft constitutional amendment submitted by Governor Cowper. After lengthy hearings in the final days of the session, the House amended the Governor's proposed amendment, then rejected it by a vote of 20-20 (27 votes needed). The amendment was never voted on by the Senate.

June 8, 1990: Governor Calls Special Session. Negotiations with several interest groups prior to the opening of the session failed to reach an agreement on a solution. On the opening day of the session, the Governor introduced a constitutional amendment that would have required, if approved by the voters at the next general election, a vote on the issue four years later. The amendment would have prevented federal management from occurring on July 1, and would have given groups time to either sue on the constitutionality of ANILCA Title VIII, or amend ANILCA. The governor's proposal was further amended by the Senate to require a vote in two years, and together with legislation creating a Subsistence Review Commission, passed the Senate in early July. However, on July 8, the House failed by one vote (26 in favor, 14 opposed) to obtain a 2/3 majority for a constitutional amendment.

June 1990: Cutler Decision on Severability. The Supreme Court remanded McDowell to the lower court for implementation of their order, and in an opinion dated June 20, with two subsequent clarifications, Judge Cutler found the unconstitutional portion of the state subsistence law to be severable from the rest of the law. This left the state with a subsistence priority law on the books, with its application to rural residents severed.

July 1, 1990: Federal Management Begins. The federal land management agencies initiated a program that assumed management of subsistence uses on federal public lands. This included creation of a five-member federal subsistence board, representing the BLM, NPS, BIA, USFS, and USFWS.

July 1990: New Subsistence Hunts. The Board of Game held an emergency meeting to promulgate hunting regulations for the 1990 fall hunts. Nonresidents were excluded from many hunts, and others were put n a Tier II, individual subsistence application basis.

October 1990: All Alaskans Eligible. At a joint Boards of Fisheries and Game, on October 26, 1990, the Department of Law reported to the Boards that, after the McDowell decision, all Alaskans must be considered potential subsistence users of the fish and game under state jurisdiction. The boards subsequently issued a policy statement that it was impossible, under the legal decisions, to identify subsistence users.

November 1990: New Subsistence Fisheries. The Board of Fisheries met and established new subsistence fisheries in both upper and lower Cook Inlet. A subsequent policy stated that subsistence fishing proposals, throughout the state, would be addressed only if subsistence needs were not being met, or if there was a conservation concern that was addressed by the proposal.

February 1991: Governor's Subsistence Advisory Council is Formed. Governor Hickel appointed an initial subsistence advisory group early in 1991 and reorganized it in November to add public members and remove the state commissioners; in all, the groups met for over a year. The ten-member group was charged with drafting a new subsistence statute that would comply with the state constitution.

Federal Subsistence Program Develops: 1991-92. Publication in the Spring of 1992 of an EIS on the Federal Subsistence Program in Alaska clarified the federal government's intent with regard to managing subsistence on federal lands (mandated by ANILCA). The federal subsistence board established a staff and regular meeting schedule and began accepting public proposals. Other elements of the program included federal regional subsistence advisory councils, and a process for identifying rural areas and customary and traditional uses. The program applied to wildlife and to fishing in non-navigable federal waters.

February 1992: Governor Introduces New Subsistence Legislation. Governor Hickel introduced a bill to the legislature that would establish a new subsistence statute. A key feature of the bill, which was based on the work of the subsistence advisory council, was a presumption that residents of small communities would automatically meet specified subsistence criteria, in mid-sized communities that presumption was "rebuttable", and urban residents must apply for subsistence qualification on an individual basis. Also, nonsubsistence areas were authorized, and implementation would require amending ANILCA. The legislature failed to take action on the bill. Other bills also were considered during the session, but not passed, including an AFN- sponsored bill that provided a rural preference and also a second-level preference for urban residents who could demonstrate community or individual dependence.

June 15-22 1992: Governor Convenes Special Session on Subsistence: 1992 Subsistence Law is Enacted. Governor Hickel presented the legislature with a version of the bill that had been introduced in the previous session. Other bills also are introduced, as are motions to place a consitutional amendment on the ballot. The legislature ultimately passed a subsistence bill that provided eligibility for all Alaskans, included a definition of "customary trade" and allowed the Boards to establish "nonsubsistence areas" in places where subsistence "is not part of the economy, culture, or way of life" of an area.

November 1992: Joint Boards of Fisheries and Game Establish Four Nonsubsistence Areas. Meeting jointly, the boards established nonsubsistence areas around Fairbanks, Anchorage-Matsu-Kenai, Juneau, and Ketchikan. These were areas where subsistence regulations would not be established. Subsistence regulations within these areas were repealed. They issued a call for proposals for other areas also. At a subsequent meeting the following March (1993), an area around Valdez also was designated as a nonsubsistence area. Eventual public proposals for additional areas included GMU 13, all roaded areas, and an area on the Upper Holitna Drainage.

Fall 1993: State Superior Court Finds Nonsubsistence Areas to be Unconstitutional. Judge Fabe, in State Superior Court, found in Kenaitze v. State that the nonsubsistence areas authorized by the 1992 state law were unconstitutional because they "effectively re-establish the rural/urban residency requirement struck down in McDowell" (Kenaitze Indian Tribe v. State of Alaska, 3AN-91-4560 Civil, Order, October 26, 1993). After the Alaska Supreme Court's subsequent denial of the state's motion for a stay, the Boards met in Spring 1994 and authorized the department to enact emergency regulations that would re-establish the previous subsistence regulations for the former nonsubsistence areas. The state also appealed the ruling to the State Supreme Court.

March 1994: U.S. District Court Validates Federal Subsistence Board Authority, Extends Federal Subsistence Management to Include Navigable Waters. Following preliminary rulings in Katy John, in late 1993, Judge Holland issued a final ruling that interpreted ANILCA as giving the federal government broad authority to manage subsistence on federal public lands, and extended jurisdiction to include navigable waters on federal lands. A parallel ruling in the case of State v. Babbitt found that creation of the federal subsistence regulatory board did not exceed the authority granted by ANILCA. These rulings were immediately appealed to the Ninth Circuit Court of Appeals by both the state and federal governments.

May 1994: Secretary of Interior Declares Intent to Manage Subsistence Fisheries Throughout the State. In a letter to the Governor that urged the state to act to come into compliance with ANILCA, Secretary Babbitt stated his intention to begin management of subsistence fisheries, "pursuant to the direction of the federal courts," if the state doesn't pass a constitutional amendment. The federal subsistence board was told to prepare a subsistence fisheries management plan.

January 1995: State Drops Babbitt Lawsuit. Governor Knowles directed the Attorney General to drop the state's appeal of the Babbitt case.

April 1995: U.S. Ninth Circuit Court of Appeals Decides Katy John Case. The court of appeals held that ANILCA's subsistence priority applies to waters in which the United States has reserved water rights. The court further held that the federal agencies that administer the subsistence priority are responsible for identifying those waters. Federal agencies continued development of a fisheries plan and began a process for identifying waters where the plan would apply.

May 1995: Alaska Supreme Court Decides Nonsubsistence Areas Are Constitutional and the Tier II Proximity Criteria is Not. The Alaska Supreme Court, in the case of Kenaitze v. State, determined that "...the Tier II proximity of the domicile factor violates the Alaska Constitution because it bars Alaska residents from participating in certain subsistence activities based on where they live." Also, the court decided that the nonsubsistence area provision in the 1992 state subsistence law is constitutional because "...it bars no Alaskan from participating in any fish or game user class." With this ruling, the previously designated nonsubsistence areas were automatically reinstated. The Kenaitze's challenge to the findings of the Joint Boards that resulted in the establishment of the Anchorage-MatSu-Kenai Peninsula nonsubsistence area was remanded back to the Superior Court. Briefing on remaining issues should be completed by late April, 1996.

August 1995: Alaska Supreme Court Disagrees with Federal Court on the Scope of the Federal Subsistence Law.
In the case of Totemoff v. State the Alaska Supreme Court made three significant findings: the federal subsistence law does not preempt nonconflicting state law; interpreted ANILCA as not protecting customary and traditional means and methods; and directly disagreed with the Ninth Circuit Court of Appeal's finding in State v. Babbitt (the Katie John case) that public lands include certain navigable waters. Because of the direct conflict with the federal court interpretation, the state filed a petition for review by the U.S. Supreme Court on December 5, 1995.

Appendix B. Text of the 1992 Subsistence Law

AN ACT

Relating to the taking of fish and game; and providing for an effective date.

---

* **Section 1.** FINDINGS, PURPOSE, AND INTENT. (a) The legislature finds that

(1) there are Alaskans, both Native and non-Native, who have a traditional, social, or cultural relationship to and dependence upon the wild renewable resources produced by Alaska's land and water; the harvest and use of fish and game for personal and group consumption is an integral part of those relationships;

(2) although customs, traditions, and beliefs vary, these Alaskans share ideals of respect for nature, the importance of using resources wisely, and the value and dignity of a way of life in which they use Alaska's fish and game for a substantial portion of their sustenance; this way of life is recognized as "subsistence";

(3) customary and traditional uses of Alaska's fish and game originated with Alaska Natives, and have been adopted and supplemented by many non-Native Alaskans as well; these uses, among others, are culturally, socially, spiritually, and nutritionally important and provide a sense of identity for many subsistence users;

(4) while Alaska's fish and game are generally still plentiful, these resources are not unlimited and cannot provide for every desired use, now or in the future; competition for and the level of effort on these resources have required the legislature and the Board of Fisheries and Board of Game to establish a preference for subsistence among the various beneficial uses of fish and game in the state; and

(5) in most areas of the state, a preference for subsistence can be provided without an overly burdensome intrusion upon other consumptive uses of fish and game.

(b) It is the purpose of this Act

(1) to develop and maintain healthy fish stocks and game populations through management based on the sustained yield principle; and

(2) to provide for a preference for subsistence uses over other consumptive uses of fish and game resources.

(c) It is the intent of the legislature that

(1) subsistence uses of Alaska's fish and game resources are given the highest preference, in order to accommodate and perpetuate those uses; and

(2) this Act not result in significant reallocations of fish and game in Alaska.

* Sec. 2. AS 16.05.258 is repealed and reenacted to read:

Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME. (a) Except in nonsubsistence areas, the Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks or populations, that are customarily and traditionally taken or used for subsistence. The commissioner shall provide recommendations to the boards concerning the stock and population identifications. The boards shall make identifications required under this subsection after receipt of the commissioner's recommendations.

(b) The appropriate board shall determine whether a portion of a fish stock or game population identified under (a) of this section can be harvested consistent with sustained yield. If a portion of a stock or population can be harvested consistent with sustained yield, the board shall determine the amount of the harvestable portion that is reasonably necessary for subsistence uses and

(1) if the harvestable portion of the stock or population is sufficient to provide for all consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

(B) shall adopt regulations that provide for other uses of those stocks or populations, subject to preferences among beneficial uses; and

(C) may adopt regulations to differentiate among uses.

(2) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses and some, but not all, other consumptive uses, the appropriate board

(A) shall adopt regulations that provide a reasonable opportunity for subsistence uses of those stocks or populations;

(B) may adopt regulations that provide for other consumptive uses of those stocks or populations; and

(C) shall adopt regulations to differentiate among consumptive uses that provide for a preference for the subsistence uses, if regulations are adopted under (B) of this paragraph;

(3) if the harvestable portion of the stock or population is sufficient to provide for subsistence uses, but no other consumptive uses, the appropriate board shall

(A) determine the portion of the stocks or populations that can be harvested consistent with sustained yield; and

(B) adopt regulations that eliminate other consumptive uses in order to provide a reasonable opportunity for subsistence uses; and

(4) if the harvestable portion of the stock or population is not sufficient to provide a reasonable opportunity for subsistence uses, the appropriate board shall

(A) adopt regulations eliminating consumptive uses other than subsistence uses;

(B) distinguish among subsistence users, through limitations based on

(i) the customary and direct dependence on the fish stock or game population by the subsistence user for human

consumption as a mainstay of livelihood;

(ii) the proximity of the domicile of the subsistence user to the stock or population; and

(iii) the ability of the subsistence user to obtain food if subsistence use is restricted or eliminated.

(c) The boards may not permit subsistence hunting or fishing in a nonsubsistence area. The boards, acting jointly, shall identify by regulation the boundaries of nonsubsistence areas. A nonsubsistence area is an area or community where dependence upon subsistence is not a principal characteristic of the economy, culture, and way of life of the area or community. In determining whether dependence upon subsistence is a principal characteristic of the economy, culture, and way of life of an area or community under this subsection, the boards shall jointly consider the relative importance of subsistence in the context of the totality of the following socio-economic characteristics of the area or community:

(1) the social and economic structure;

(2) the stability of the economy;

(3) the extent and the kinds of employment for wages, including full-time, part-time, temporary, and seasonal employment;

(4) the amount and distribution of cash income among those domiciled in the area or community;

(5) the cost and availability of goods and services to those domiciled in the area or community;

(6) the variety of fish and game species used by those domiciled in the area or community;

(7) the seasonal cycle of economic activity;

(8) the percentage of those domiciled in the area or community participating in hunting and fishing activities or using wild fish and game;

(9) the harvest levels of fish and game by those domiciled in the area or community;

(10) the cultural, social, and economic values associated with the taking and use of fish and game;

(11) the geographic locations where those domiciled in the area or community hunt and fish;

(12) the extent of sharing and exchange of fish and game by those domiciled in the area or community;

(13) additional similar factors the boards establish by regulation to be relevant to their determinations under this subsection.

(d) Fish stocks and game populations, or portions of fish stocks and game populations not identified under (a) of this section may be taken only under nonsubsistence regulations.

(e) Takings and uses of fish and game authorized under this section are subject to regulations regarding open and closed areas, seasons, methods and means, marking and identification requirements, quotas, bag limits, harvest levels, and sex, age, and size limitations. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30.

(f) For purposes of this section, "reasonable opportunity" means an opportunity, as determined by the appropriate board, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking fish or game.

* Sec. 3. AS 16.05.258 is repealed and reenacted to read:

Sec. 16.05.258. SUBSISTENCE USE AND ALLOCATION OF FISH AND GAME. (a) The Board of Fisheries and the Board of Game shall identify the fish stocks and game populations, or portions of stocks and populations, that are customarily and traditionally used for subsistence in each rural area identified by the boards.

(b) The boards shall determine

(1) what portion, if any, of the stocks and populations identified under (a) of this section can be harvested consistent with sustained yield; and

(2) how much of the harvestable portion is needed to provide a reasonable opportunity to satisfy the subsistence uses of those stocks and populations.

(c) The boards shall adopt subsistence fishing and subsistence hunting regulations for each stock and population for which a harvestable portion

determined to exist under (b)(1) of this section. If the harvestable portion is not sufficient to accommodate all consumptive uses of the stock or population, but is sufficient to accommodate subsistence uses of the stock or population, then nonwasteful subsistence uses shall be accorded a preference over other consumptive uses, and the regulations shall provide a reasonable opportunity to satisfy the subsistence uses. If the harvestable portion is sufficient to accommodate the subsistence uses of the stock or population, then the boards may provide for other consumptive uses of the remainder of the harvestable portion. If it is necessary to restrict subsistence fishing or subsistence hunting in order to assure sustained yield or continue subsistence uses, then the preference shall be limited, and the boards shall distinguish among subsistence users, by applying the following criteria:

(1) customary and direct dependence on the fish stock or game population as the mainstay of livelihood;

(2) local residency; and

(3) availability of alternative resources.

(d) The boards may adopt regulations consistent with this section that authorize taking for nonsubsistence uses a stock or population identified under (a) of this section.

(e) Fish stocks and game populations, including bison, or portions of fish stocks and game populations, not identified under (a) of this section may be taken only under nonsubsistence regulations.

(f) Takings authorized under this section are subject to reasonable regulation of seasons, catch or bag limits, and methods and means. Takings and uses of resources authorized under this section are subject to AS 16.05.831 and AS 16.30

* **Sec. 4.** AS 16.05.940 is amended by adding new paragraphs to read:

(36) "customary and traditional" means the noncommercial, long-term, and consistent taking of, use of, and reliance upon fish or game in a specific area and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game.

(37) "customary trade" means the limited noncommercial exchange, for minimal amounts of cash, as restricted by the appropriate board, of fish or game

resources; the terms of this paragraph do not restrict money sales of furs and furbearers.

* **Sec. 5.** AS 16.05.940(36) and 16.05.940(37) are repealed.

* **Sec. 6.** REGULATIONS. Notwithstanding the provisions of AS 16.05.258, as in effect on the day before the effective date of sec. 2 of this Act, the Board of Fisheries, Board of Game, and Department of Fish and Game shall adopt regulations necessary to implement the provisions of secs. 1, 2, and 4 of this Act.

* **Sec. 7.** TRANSITION. (a) It is the intent of the legislature that the Board of Fisheries and the Board of Game expeditiously adopt regulations necessary to implement secs. 1, 2, and 4 of this Act.

(b) Regulations adopted by the Board of Fisheries, Board of Game, or Department of Fish and Game after July 1, 1992, may not be inconsistent with the provisions of secs. 1, 2, and 4 of this Act.

(c) Regardless of whether regulations in effect on July 1, 1992, and adopted under the authority of AS 16.05.251, 16.05.255, or 16.05.258, as that statute read on the day before the effective date of sec. 2 of this Act, are inconsistent with the provisions of secs. 1, 2, or 4 of this Act, they may continue to be implemented and enforced until the effective date of sec. 2 of this Act.

* **Sec. 8.** TRANSITION. After January 1, 1995, the Board of Fisheries, Board of Game, and Department of Fish and Game may adopt regulations to implement AS 16.05.258, as amended by sec. 3 of this Act. Regulations adopted under this section may not take effect before the effective date of sec. 3 of this Act.

* **Sec. 9.** REVIEW. (a) The legislature acknowledges and recognizes that this Act deals with a subject of vital concern and that the subject merits review. Therefore, it is the intent of the legislature that the operation of this Act and the regulations adopted under this Act be fully reviewed by the governor no later than June 1, 1994.

(b) This review period is intended to allow for further research and to gain experience in implementing this Act and regulations adopted under secs. 6 and 7 of this Act. It is the intent of the legislature that the governor convene a representative group to provide recommendations to the governor before the end of the review period. It is the intent of the legislature that representatives of the legislature and persons with a history in the formulation

of subsistence legislation in this state participate in the group.

(c) It is the intent of the legislature that the review under this section occur with public input and participation.

(d) No later than September 1, 1994, the governor shall provide a report to the legislature on the results of the review and proposed recommendations for statutory amendments.

* **Sec. 10.** Sections 6 - 8 of this Act take effect immediately under AS 01.10.070(c).

* **Sec. 11.** Sections 1, 2, 4, and 9 of this Act take effect on the effective date of regulations first adopted under sec. 6 of this Act by the Board of Fisheries and the Board of Game.

* **Sec. 12.** Sections 3 and 5 of this Act take effect October 1, 1995.

AUTHENTICATION

The following officers of the Legislature certify that the attached enrolled bill, CCS HB 601, consisting of 8 pages, was passed in conformity with the requirements of the constitution and laws of the State of Alaska and the Uniform Rules of the Legislature.

Passed by the House June 22, 1992

Ben Grussendorf, Speaker of the House

ATTEST:

Kristin Gray, Chief Clerk of the House

Passed by the Senate June 22, 1992

R. I. Eliason, President of the Senate

ATTEST:

Nancy Quinto, Secretary of the Senate

ACTION BY GOVERNOR

Approved by the Governor _____ 19____

Walter J. Hickel, Governor of Alaska

HB

321

HOUSE SPECIAL COMMITTEE ON MILITARY AND VETERANS' AFFAIRS

TO: Senator Bert Sharp
Chair
Senate State Affairs Committee

FROM: Representative Pete Kott
Co-Chair
House Military and Veterans Affairs Committee

DATE: February 19, 1996

RE: CS HB 321(MVA)

I respectfully request that CS HB 321(MVA) be scheduled for a hearing before the Senate Labor and Commerce Committee. This bill was filed at the request of the Department and would place persons employed by DMVA, in response to an emergency, in the exempt service. Please find herewith the following:

(1) Sponsor Statement;
(2) Sectional Analysis;
(3) Background Material;
(4) Fiscal Note

It may be noted that the Sponsor Statement and the Sectional Analysis reference the original form of the bill. However, they remain entirely appropriate to the current version.

Should you have any questions, or if I can be of any assistance, please do not hesitate to contact me.

Alaska State Legislature
House

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

HB 321
SPONSOR STATEMENT

HB 321 is introduced to address a problem in the ability of the division of emergency services to provide adequate response to disaster emergencies.

In most major disaster emergencies, it is necessary for the division of emergency services to hire additional employees just for responding to the disaster. The number of temporary employees hired, and their classifications, is dependent on the unique nature of each disaster.

Current temporary hiring practices allow for immediate emergency hires, but the person hired cannot work longer than 30 days. Any hires desired longer than 30 days must be hired either as short-term or long-term non-permanent positions. Hiring into a non-permanent position takes anywhere from 2 to 45 days, depending on whether it is a short-term or long-term hire. There is no vehicle for hiring a person immediately who is able to continue past 30 days. Passage of HB 321 will establish a category of exempt position to fill that need.

It is anticipated that hiring exempt positions in response to disaster emergencies will only take place when there is an immediate need that cannot be met by the hiring of non-permanent positions, and when there is a likelihood that the need will exist for longer than 30 days. This authority is similar to that granted to the Department of Natural Resources in AS 39.25.110 (19), which authorizes exempt employees for "fire fighters employed by the Department of Natural Resources for a fire emergency."

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH 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 January 26, 1996

SUBJECT: Sectional Summary of CSHB 321(MLV). (Placing certain persons employed in response to a disaster in the exempt service)

TO: Representative Pete Kott
Attn: George Dozier

FROM: Teresa B. Cramer TBC
Legislative Counsel

You have requested a sectional summary of HB 321.

Section 1 places persons employed by the Department of Military and Veterans' Affairs to assist classified employees in response to a declared disaster in the exempt service.

TC:glc
96-052.glc

FISCAL NOTE

STATE OF ALASKA **BILL NO. CSHB321(MLV)**

1996 LEGISLATIVE SESSION

Revision Date: 14-Feb-96 Dept Affected: Military & Veterans Affairs

Title: An Act placing certain persons employed in response to a disaster in the exempt service. BRU: Alaska National Guard

Component: Commissioner's Office

Sponsor: House Sp Cmte Military & Veterans Affairs

Requestor: House Rules Component Serial No. 414

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY97	FY98	FY99	FY00	FY01	FY02
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 (FY96) 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 associated with implementation of this legislation.

Prepared by: Carol Carroll, Director Phone: 465-4730

Division: Administrative Services Date: 14-Feb-96

Approved by Commissioner:

Date: 14-Feb-96

Agency: Military & Veterans Affairs

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CS FOR HOUSE BILL NO. 321(MLV)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE SPECIAL COMMITTEE ON MILITARY AND VETERANS' AFFAIRS

Offered:
Referred:

Sponsor(s): HOUSE SPECIAL COMMITTEE ON MILITARY AND VETERANS' AFFAIRS

A BILL

FOR AN ACT ENTITLED

"An Act placing certain persons employed in response to a disaster in the exempt service."

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

• Section 1. AS 39.25.110 is amended by adding a new paragraph to read:

(30) persons employed by the Department of Military and Veterans' Affairs to assist classified employees in response to a declared disaster.

MEMORANDUM

STATE OF ALASKA
Department of Military and Veterans Affairs

TO: Pat Pourchot
Legislative Director
Office of the Governor

DATE: March 16, 1995

PHONE: 465-4730

FROM: Jake Lestenkof
Commissioner

SUBJECT: DMVA Legislative Proposals

I have reviewed the original legislative proposals forwarded by this department to you last December. While none of them can be considered priority policy issues for the Governor, two of them are important enough to our department to initiate some activity.

It is my understanding that you do not want to have the Governor introduce any measures unless they are significant policy issues. Nevertheless, I believe that, with your concurrence, I would be able to find some friendly legislators to introduce the measures which I believe are important to our department. If we can get bills at least introduced and heard in one or two committees, it will greatly enhance our ability to get them passed by the second session of this legislature, instead of waiting for two years to accomplish some legislative progress.

I seek your approval to approach specific legislators on the following issues:

1. Temporary Housing During Disasters:
This proposal will allow for the granting of funds directly to disaster victims of state disasters to allow them to make their own temporary housing arrangements. Currently state law does not allow this, and temporary housing is arranged by state personnel, increasing the administrative burden during a disaster and exposing the state to potential liabilities. Similar legislation almost passed the Legislature last session (HB421 died in Senate Rules).

2. Hiring of Exempt Employees During Disasters:
Our experience during the 1994 Fall Floods disaster has highlighted an administrative procedure for temporary hiring during emergencies which is burdensome and limits the department's effective and timely response. All temporary hires for emergency response activities must now go through the routine procedure for hiring non-permanent employees: if they are not hired

from a register, they are limited to a duration of only 120 days. "Emergency hires" are only allowed to stay on board for 30 days. Allowing temporary hires for emergency response to be established as exempt positions (similar to the hiring authority for DNR's fire suppression activities--see AS 39..25.110(19)) will allow temporary employees needed for emergency response to be hired quickly and retained as long as needed.

In addition to the two proposals described above, DMVA also submitted housekeeping bills for your consideration. I would like to forgo the action on these housekeeping changes until the 1996 session of this legislature.

I would welcome the opportunity to meet you to discuss the strategy to be used and legislators or committees to be approached in addressing the three proposals above.

cc:
Roger Schnell, Deputy Commissioner
Brig Gen Ken Taylor, Commander, Air National Guard
Col Mike McCourt, Chief of Staff, Army National Guard
Ervin Paul Martin, Director, Division of Emergency Services
John Fleming, Director, National Guard Youth Corps
Roger Patch, Director, Facilities Maintenance Division
Jeff Morrison, Director, Administrative Services Division

Alaska State Legislature
House

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

HB 321
SPONSOR STATEMENT

HB 321 is introduced to address a problem in the ability of the division of emergency services to provide adequate response to disaster emergencies.

In most major disaster emergencies, it is necessary for the division of emergency services to hire additional employees just for responding to the disaster. The number of temporary employees hired, and their classifications, is dependent on the unique nature of each disaster.

Current temporary hiring practices allow for immediate emergency hires, but the person hired cannot work longer than 30 days. Any hires desired longer than 30 days must be hired either as short-term or long-term non-permanent positions. Hiring into a non-permanent position takes anywhere from 2 to 45 days, depending on whether it is a short-term or long-term hire. There is no vehicle for hiring a person immediately who is able to continue past 30 days. Passage of HB 321 will establish a category of exempt position to fill that need.

It is anticipated that hiring exempt positions in response to disaster emergencies will only take place when there is an immediate need that cannot be met by the hiring of non-permanent positions, and when there is a likelihood that the need will exist for longer than 30 days. This authority is similar to that granted to the Department of Natural Resources in AS 39.25.110 (19), which authorizes exempt employees for "fire fighters employed by the Department of Natural Resources for a fire emergency."

HB

359

FISCAL NOTE

No. 1
Bill Version: HB 359
(H) Publish Date: 3/11/96

STATE OF ALASKA
1996 LEGISLATIVE SESSION

Revision Date:
Dept. Affected: Office of the Governor
Title: "An Act relating to appointment and confirmation process for members of certain boards, commissions, ..."
BRU: Executive Operations
Component: Executive Office
Sponsor: Representative Porter
Requester:
COMPONENT SERIAL NO. 6

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Michael A. Nizich, Director
Phone: 465-3876
Division: Division of Administrative Services
Date: 3/5/96

Approved by Commissioner: Jim Ayers, Chief of Staff
Office of the Governor
Date: 3/5/96

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Mail Stop 3101

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

MEMORANDUM March 15, 1996

SUBJECT: CSHB 359( ) ("K" version)

TO: Representative Brian Porter
Attn: Patrick Lounsbury

FROM: Terri Lauterbach
Legislative Counsel

As you have requested, this memorandum contains a description of the changes that would be made under sec. 14 of this bill.

In general, section 14 amends AS 39.05.080 by making a number of changes to the basic law governing the presentment and confirmation process for members of boards and commissions. These changes do not affect other positions for which confirmation may be required (department heads). More particularly, this section's changes may be described as follows:

Sec. 39.05.080 (lead-in language): Provides that any aspect of the general procedure in AS 39.05.080 may be modified by the legislature (by law) for any specific board or commission.

Sec. 39.05.080(1): The first sentence clarifies that a governor is not required to present names of persons appointed by a previous governor and that only a presentment during session satisfies the presentment requirement. In other words, "lame duck" appointments would not have to be presented by the next governor, and there would not be an issue in the future about whether a letter to the clerk or secretary during a legislative interim amounted to presentment. The second sentence of this paragraph requires the governor to present to the legislature within 30 days of its convening the names of persons appointed who have not previously been confirmed and the names of persons to be appointed to fill a position that will expire March 1 of that session. (Section 12 of the bill puts almost all terms on a March 1 basis.) The third sentence provides that an appointment made after 30 days of the session have passed, but while session is still in progress, must be presented within 5 calendar days.

Sec. 39.05.080(2) and (3): No change from current law except to clarify that the governor is the "appointing authority." Use of the term "appointing authority" has been obsolete for some time. This is just a technical change.

Sec. 39.05.080(4). The first new sentence in this paragraph provides that the duration of an appointment made during the legislature's interim ends when a new regular session convenes, but, under the second new sentence, the appointee can be reappointed and presented for confirmation during that session. This language has the effect of allowing a new governor to appoint new people in the place of "lame duck" interim appointees - or the new governor can reappoint the interim appointees. (When governors don't change, the governor will have the same choice as well). This means that an interim appointee will be removable without cause (by not being reappointed) when session begins, even if cause for dismissal would normally have to be given. The third new sentence clarifies that if an appointee begins service during an interim and is reappointed when the new session starts, those two periods of service will be considered to be service for one part of the term (rather than two parts) for purposes of laws that limit how many terms or parts of terms a person may serve consecutively. The fourth new sentence provides that an unpresented appointment made during the session expires at the end of the legislative session during which it should have been presented unless it expires sooner (such as when an appointment to fill the end of a term expires on March 1). The fifth sentence prohibits the same governor from reappointing an unpresented appointee after session adjourns but would allow a future governor to appoint that person.

I hope this clarifies the legal effects of section 14. If you have further questions about this section, please let me know.

TML:klb
96-196.klb

Enclosure

SENATE COMMITTEE REPORT

DATE: 4/12/96 DATE TURNED INTO OFFICE: 5/2/96

The State Affairs Committee considered CS FOR HOUSE BILL NO. 359(JUD) am

Relating to the appointment and confirmation process for certain boards and commissions;efd.

and recommends:

|X| be **replaced** with S CS CS HB 359 (L&C)

| | adopt **previous** ____ CS _____ (_____)

| | attached amendment(s)

| | adopt Letter of Intent by _____ Committee

| | further referral to the _____ Committee

Senate Bill:
|X| same title
| | new title

House Bill:
| | same title
| | technical change
| | new: SCR*_____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	NR	DNP	AM
	✓		✓		
	✓		✓		
CHAIR:	✓				

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
Office of Gov.	3/5	0	

| | | APPROPRIATION -- no fiscal note

*Include fiscal notes accompanying Governor's bill

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
HOUSE LABOR & COMMERCE COMMITTEE
HOUSE STATE AFFAIRS COMMITTEE
INTERNATIONAL TRADE & TOURISM COMMITTEE

MEMBER
FINANCE SUBCOMMITTEES
DEPARTMENT OF LAW
DEPARTMENT OF EDUCATION
COURTS

DISTRICT 20

SESSION
STATE CAPITOL ROOM 119
JUNEAU ALASKA 99801-1182
PHONE 907 465 4930
FAX 907 465 3014

INTERIM
716 W 4TH AVE SUITE 460
ANCHORAGE AK 99501-2133
PHONE 907 258 8197
FAX 907 258 3310

SPONSOR STATEMENT

Lamenting the appointment process for Boards and Commissions the Governor and legislature endured last year, HB 359 is designed to take the politics out of the presentment and appointment process.

Simply stated the Governor would present to the legislature within 30 days of convening the names of persons appointed who have not previously been confirmed and the names of persons to be appointed. An appointment made after 30 days of the session, but while session is still in progress, must be presented within 5 calendar days. Concurrently, the duration of an appointment made during the interim ends when a new regular session convenes, but can be reappointed and presented for confirmation during that session. For example, when governors change this feature allows the new governor to appoint new people or reappoint the interim appointees selected by the previous governor.

Alaska State Legislature

Representative Brian S. Porter

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

MEMBER
HOUSE LABOR & COMMERCE COMMITTEE
HOUSE STATE AFFAIRS COMMITTEE
LEGISLATIVE BUDGET & AUDIT COMMITTEE

MEMBER
FINANCE SUBCOMMITTEES
DEPARTMENT OF LAW
DEPARTMENT OF EDUCATION
COURTS

SESSION
STATE CAPITOL ROOM [illegible]
JUNEAU, ALASKA [illegible]
PHONE: [illegible]
FAX: [illegible]

INTERIM
[illegible] 4TH AVE., SUITE [illegible]
ANCHORAGE, AK [illegible]
PHONE: [illegible]
FAX: [illegible]

DISTRICT 20

Sectional Analysis CSHB 359 (Jud)

Section 1 Conforms Occupational Licensing boards to AS 39.05 in Section 14 of the bill.

Section 2 pertains to vacancies on boards with respect to AS 39.05

Section 3 directs the Board of Certified Direct Entry Midwives to conform to the changes made in AS 39.05.

Section 4 directs the State Board of Education to conform to the changes made in AS 39.05.

Section 5 directs the Professional Teachers Commission to conform to the changes made in AS 39.05.

Section 6 modifies Professional Teachers Commission vacancy requirements to conform with AS 39.05

Section 7 directs the Alaska Public Offices Commission to conform to the changes made in AS 39.05.

Section 8 directs the Board of Fisheries and Board of Game to conform to the changes made in AS 39.05.

Section 9 directs the Alaska Commercial Fisheries Entry Commission to conform to the changes made in AS 39.05.

Section 10 directs the Alaska Oil and Gas Conservation Commission to conform to the changes made in AS 39.05.

Section 11 directs the Alaska Royalty Oil and Gas Development Advisory Board to conform to the changes made in AS 39.05.

Section 12 is a new section defining March 1 as the date that the term of office or membership on a board or commission expires except as otherwise provided for by law.

Section 13 modifies the general law on vacancies in AS 39.05.060 so that is conforms to changes made in section 14 of the bill. Also clarifies that, in general confirmed members of boards and commissions serve at the pleasure of the governor even though terms are set by law, but allows the legislature to provide for a different result, such as removal only for cause, for specific boards and commissions.

Section 14 makes a number of changes to the basic law governing the presentment and confirmation process for members of boards and commissions. These changes do not affect other positions for which confirmation may be required (department heads)

See Legal Services Memo, Lauterbach - March 15, 1996

Section 15 directs the State Offices Compensation Commission to conform to the changes made in AS 39.05.

Section 16 directs the Alaska Historical Commission to conform to the changes made in AS 39.05.

Section 17 directs the Alaska Public Utilities Commission to conform to the changes made in AS 39.05.

Sections 18 & 19 makes technical changes in existing law in order to conform with AS 39.05.

Section 20 repeals laws that conflict with the changes made by this bill.

Section 21 sets up the March 1 cycle of terms of office by extending current terms to March 1 following when they would of otherwise would have expired.

Section 22 gives the bill a January 1, 1997, effective date.

HB

364

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 4/4/96 FURTHER:

DATE TURNED INTO OFFICE: 4/23/96

The State Affairs Committee considered CS FOR HOUSE BILL NO. 364(JUD) am

Relating to election crimes and interference with voting.

and recommends:

[ ] be **replaced** with _____ CS _____(_____)

[ ] adopt **previous** _____ CS _____(_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to the _____ Committee

Senate Bill:
[ ] same title
[ ] new title

House Bill:
[ ] same title
[ ] technical title
[ ] new: SCR#_____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*NR*	*DNP*	*AM*
Arlen D Lewan	✓				
Rod E Gilly	✓				
CHAIR: Bert Stamp	✓	*CHAIR:*			

NEW FISCAL NOTE(S):

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTE(S):*

Department	Date	Zero	Fiscal
Lt. Gov. - Elections	3/4	0	

[ ] **APPROPRIATION -- no fiscal note**

***Include fiscal notes accompanying Governor's bill**

Line 12 "on" should be "of"

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HB 364

Revision Date 3/5/96
Title An Act amending the definition of the offense o unlawful interference with voting
Sponsor Representative Bunde
Requester Representative Bunde

Dept Affected Office of the Governor
BRU Elective Operations
Component General and Primary

COMPONENT SERIAL NO. 22

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
PERSONAL SERVICES	0.0					
TRAVEL	0.0					
CONTRACTUAL	0.0					
SUPPLIES	0.0					
EQUIPMENT	0.0					
LAND & STRUCTURES	0.0					
GRANTS, CLAIMS	0.0					
MISCELLANEOUS	0.0					
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY96) cost: $ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

HB 364 does not have a fiscal impact on the Division of Elections.

Prepared by Dana LaTour
Division Division of Elections
Phone 465-5347
Date 3/4/96

Approved by
Commissioner Lt Governor Fran Ulmer
Agency Office of the Lt Governor
Date 3/4/96

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(Rev 11/95) 96fisnot xls/DBR

FISCAL NOTE

[redacted]

TATE OF ALASKA
'96 LEGISLATIVE SESSION

Bill Version: CSHB 364(JUD)
(H) Publish Date: 3/14/96

vision Date: 3/5/96
le: An Act amending the definition of the offense o
awful interference with voting
onsor: Representative Bunde
quester: Representative Bunde

Dept. Affected: Office of the Governor
BRU: Elective Operations
Component: General and Primary
COMPONENT SERIAL NO.: 22

penditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 100	FY 01	FY 02
RSONAL SERVICES	0 0					
AVEL	0 0					
NTRACTUAL	0 0					
PPLIES	0 0					
UIPMENT	0 0					
ND & STRUCTURES	0 0					
ANTS, CLAIMS	0 0					
SCELLANEOUS	0 0					
TAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
PITAL EXPENDITURES						
NGE IN REVENUES ( )						

D SOURCE (Thousands of Dollars)

Federal Receipts						
GF Match						
GF	0 0					
GF/Program Receipts						
GF/Mental Health						
AL	0.0	0.0	0.0	0.0	0.0	0.0

ate of any current year (FY96) cost: $ 0 0

TIONS

-TIME						
-TIME						
PORARY						

YSIS: (Attach a separate page if necessary)

364 does not have a fiscal impact on the Division of Elections.

d by: Dana LaTour
Division of Elections
Phone: 465-5347
Date: 3/4/96

d by
ssioner: Lt. Governor Fran Ulmer
Office of the Lt. Governor
Date: 3/4/96

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ITTEE COPY

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

Alaska State Legislature
House of Representatives

DURING SESSION:
STATE CAPITOL, ROOM 108
JUNEAU, ALASKA 99801-1182
1 (907) 465-4843

DURING INTERIM:
716 WEST 4th AVENUE
ANCHORAGE, ALASKA 99501-2133
1 (907) 258-8168

MEMORANDUM

DATE: April 8, 1996

TO: Senator Bert Sharp
Chair, Senate State Affairs Committee

FROM: Representative Con Bunde
Co-Chair House HESS

RE: CSHB 364 (JUD) am

HB 364 is currently in the Senate State Affairs Committee. This memo is a request for a committee hearing at your earliest possible convenience.

The purpose of HB 364 is to align our state election law regarding unlawful interference with voting in the first degree with the federal election law. Alaska statute defines the crime of unlawful interference with voting in the first degree by requiring proof that a person was paid to vote for or against a particular candidate, proposition or question. Whereas, federal election law only requires proof that a person first was offered a prohibited incentive and then voted.

HB 364 amends AS 15.56.030 (a) by removing the requirement to prove that an incentive to vote must be for a particular candidate, proposition or question. This proposed legislation only requires proof that a person first was offered a prohibited incentive and then voted. This change strengthens the prohibition against the use of some incentives for voting.

If you have any questions or concerns regarding the attached information please do not hesitate to contact my office. Thank you for your help with this matter.

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

Alaska State Legislature
House of Representatives

DURING SESSION:
STATE CAPITOL, ROOM 108
JUNEAU, ALASKA 99801-1182
1 (907) 465-4843

DURING INTERIM:
716 WEST 4th AVENUE
ANCHORAGE, ALASKA 99501-2133
1 (907) 258-8168

SPONSOR STATEMENT
CSHB 364(JUD)am

"An Act amending the definition of the offense of unlawful interference with voting in the first degree, a class C felony, to include conduct related to inducing a person to vote or to refrain from voting at an election and conduct related to acceptance of something offered or given to vote or to refrain from voting in an election"

As United States citizens we have the right to vote no matter who we are or where we live. In Alaska our election process covers such a vast area that many people must travel great distances to vote. Despite some inconveniences we have a civic duty to vote for or against the candidates, propositions and questions on our state ballot and nobody has the right to interfere with the voting process.

The impetus for HB 364 is Dansereau v.Ulmer, which deals in part with unlawful interference with voting in the first degree. This case occurred after the 1994 Gubernatorial election and has yet to be completely resolved. (The complete case is available in the committee packet.)

The purpose of HB 364 is to align our state election law regarding unlawful interference with voting in the first degree with the federal election law. Alaska statute defines the crime of unlawful interference with voting in the first degree by requiring proof that a person was paid to vote for or against a particular candidate, proposition or question. Whereas, federal election law only requires proof that a person first was offered a prohibited incentive and then voted.

HB 364 amends AS 15.56.030 (a) by removing the requirement to prove that an incentive to vote must be for a particular candidate, proposition or question. This proposed legislation only requires proof that a person first was offered a prohibited incentive and then voted. This change strengthens the prohibition against the use of some incentives for voting.

This proposed legislation is an important change to our election statutes. It clarifies that voters in Alaska can not be paid for their vote. I urge the support of all legislators.

NORTH SLOPE BOROUGH
OFFICE OF THE MAYOR
P.O. Box 69
Barrow, Alaska 99723

Phone: 907-852-2611 or
907-852-0200
Fax: 907-852-0337

GEORGE N. AHMAOGAK, SR.
MAYOR

MEMORANDUM

TO: Dennis Roper, Special Assistant, Government Affairs

FROM: Harold J. Curran, Acting Chief of Staff

DATE: April 16, 1996

SUBJ: COMMENTS ON CS FOR HB 364

CS for HB No. 364(JUD) am is significantly better then the original bill, that would among other things, make any person that drove a neighbor to the polls a felon.

Before the legislature tries to make the North Slope Borough's efforts to give its residents equal access to the voting booth illegal, please consider the following:

1. The State of Alaska is obligated under the Voting Rights Act to pre-clear changes to its election laws;

2. Giving a voter transportation to or from the polls is significantly easier in urban Alaska due to government subsidized roads and telephone systems;

3. The only way to give rural Alaskans, the overwhelming majority of whom subsist for extended periods of time at great distance from their limited road and phone systems, is to reimburse them for their cost of transportation to and from the polls,

4. The failure to give rural residents equal access to the polls is anti-democratic and is likely a denial of equal protection under the Alaska State Constitution;

5. Since the majority of rural residents are native, denial of equal access to the polls is a violation of the Voting Rights Act;

6. The proposed language set out below will cure these problems:

AS 15.56.030

(G) a voter's costs for transportation to or from the polls.

There is no need to scope the above language for rural Alaska because the minimal cost for urban voters to get to the polls will regulate the use of this exception to AS 15.56.030 (a)(2).[1]

Thank you for your time and consideration.

[1] This statutory cite is to CS for House Bill No. 364(JUD) am.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH 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 December 29, 1995

SUBJECT: House Bill 364, amending the definition of the offense of unlawful interference with voting in the first degree -- sectional analysis (Work Order No. 9-LS1305\A)

TO: Representative Con Bunde
ATTN: Patti Swenson

FROM: Jack Chenoweth
Legislative Counsel

This measure amends the definition of the offense of unlawful interference with voting in the first degree, an offense set out in the state's Election Code (AS 15). Two kinds of conduct are added to the definition of the offense. The amendment of AS 15.56.030(a)(2) adds the giving or offering of money or another valuable thing to a person with the intent to induce the person to vote or to refrain from voting at an election. The amendment of AS 15.56.030(a)(3) adds the solicitation, acceptance, or agreement to accept money or another valuable thing to vote or to refrain from voting at an election. (The conduct that would be proscribed would in addition to the existing statute that addresses the gift or offer, or the solicitation, acceptance, or agreement to accept, something of value to vote for or to refrain from voting for a candidate or an election proposition or question.)

The offense of unlawful interference with voting in the first degree is punishable as a class C felony. AS 15.56.030(c).

Development of the amendment was influenced by the decision of the Alaska Supreme Court in Dansereau v. Ulmer, 903 P.2d 555 (1995), at 561.

JBC:pl
95-250.plm

02/04/95 EFFECT CAS-FOR-VOTE INCENTIVE HAD ON NORTH SLOPE BOROUGH

	08-PRES 1988	1990	08-PRES 1992	1994	1994 minus
statewide turnout %	69.5	65.7	82.9	64.4	1990
Anaktuk Pass	22-010	22-010	37-010	37-010	
registered voters	313	242	224	243	
ballots counted	75	84	81	105	21
Barrow	22-020	22-020	37-020	37-020	
registered voters	1524	1545	1554	1684	
ballots counted	738	694	878	999	305
Browerville	22-025	22-025	37-025	37-025	
registered voters	284	226	212	308	
ballots counted	161	132	151	190	58
Nuiqsut	22-075	22-075	37-075	37-075	
registered voters	190	198	175	186	
ballots counted	99	105	121	115	10
Point Hope	22-080	22-080	37-080	37-080	
registered voters	257	276	282	316	
ballots counted	119	146	171	235	89
Point Lay	22-085	22-085	37-085	37-085	
registered voters	85	86	77	168	
ballots counted	58	50	48	100	50
Wainwright	22-100	22-100	37-100	37-100	
registered voters	207	209	224	241	
ballots counted	126	133	145	206	73
				total	606

registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.".

Redesignation:

This section, formerly part of Act Aug. 6, 1965, P. L. 89-110 was redesignated as part of Title I of such Act by Act June 22, 1970, P. L. 91-285, § 2, 84 Stat. 314.

CROSS REFERENCES

This section is referred to in 42 USCS § 1973j.

RESEARCH GUIDE

Federal Procedure L Ed:

Elections and Elective Franchise, Fed Proc, L Ed §§ 28:70, 71, 75, 77.

Am Jur:

16A Am Jur 2d, Constitutional Law § 655.

25 Am Jur 2d, Elections § 82.

Forms:

8 Federal Procedural Forms L Ed, Declaratory Judgments § 21:2.

8 Federal Procedural Forms L Ed, Elections and Elective Franchises § 25:32.

Law Review Articles:

Poll Tax: Its Impact on Racial Suffrage, 54 Ky L J 423.

INTERPRETIVE NOTES AND DECISIONS

In action instituted under 42 USCS § 1973h(b), state poll tax upheld over equal protection and Fifteenth Amendment claims, but overturned on due process grounds, notwithstanding revenue and other asserted arguments. United States v Texas (1966, WD Tex) 252 F Supp 234, aff'd 384 US 155, 16 L Ed 2d 434, 86 S Ct 1383.

§ 1973i. Prohibited acts

(a) Failure or refusal to permit casting or tabulation of vote. No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion. No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any persons to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e) [42 USCS §§ 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e)].

(c) False information in registering or voting; penalties. Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties. Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(e) Voting more than once. (1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 202 of this Act [42 USCS § 1973aa-1], to the extent two ballots are not cast for an election to the same candidacy or office.

(Aug. 6, 1965, P. L. 89-110, Title I, § 11, 79 Stat. 443; June 22, 1970, P. L. 91-285, § 2, 84 Stat. 314; Sept. 22, 1970, P. L. 91-405, Title II, § 204(e), 84

METRO

ANCHORAGE DAILY NEWS

SATURDAY, September 23, 1995

High court revives election challenge

By PETER S. GOODMAN
Daily News reporter

An Alaska Supreme Court ruling handed down Friday revived a legal challenge to the election of Gov. Tony Knowles, who claimed office last year by a margin of just 536 votes.

The ruling came in a lawsuit filed by former U.S. Attorney Wev Shea against the state on behalf of 10 voters. It alleged the election was rife with corruption and it asked the state to either invalidate the results and hold a new election or declare Knowles' Republican opponent, Jim Campbell, the winner.

Specifically, Shea charged that Doyon Ltd., the interior Native regional corporation, effectively bought votes when it sent postcards to its sharehold-

Please see Page B-2, SUIT

SUIT: Supreme Court ruling gives new life to lawsuit against election of Knowles

Continued from Page B-1

ers, announcing a $1,000 raffle that voters could enter by sending in their ballot stubs. The postcards noted prominently that Knowles had the backing of the Alaska Federation of Natives.

Shea claimed the North Slope Borough also bought votes when it offered to give up to 10 gallons of gasoline to anyone who made the trip to the polls. Shea asserted that the two promotions stole victory from Campbell, noting that Knowles' election was due in part to overwhelming support from Natives in rural Alaska.

Judge Karl Johnstone threw the suit out of Anchorage Superior Court in February, concluding that neither the postcards nor the free gas amounted to corruption. That prompted Shea to appeal.

In the ruling released Friday, the Supreme Court backed Johnstone on his finding that the gas offer didn't constitute vote-buying since voters could get in on it regardless of how they cast their ballots. While paying someone to vote a certain way is illegal under state law, simply paying someone to cast a ballot is not, the Supreme Court said.

But the court overturned Johnstone on the issue of the postcards. The cards were clearly intended to produce votes for Knowles, the court found. Furthermore, they may have affected the election outcome.

Though Shea didn't prove this in Superior Court, neither did the state disprove it, the court wrote. The high court could only guess what effect the raffle had on the election. So the Supreme Court sent the suit back to the lower court for further proceedings, reopening the possibility the election could be invalidated.

Shea sounded confident after reading the opinion Friday afternoon.

"There's going to be a new election," he said.

"I think his optimism is misplaced," countered assistant attorney general Jim Baldwin, who defended the case for the state.

"It's pretty good for us," he said. For Shea to win, he must prove that the postcards actually decided the election, Baldwin said. "That's a tremendous burden."

The opinion was written by Justice Robert Eastaugh. Justice Allen Compton penned the lone dissent.

Contestants argue that the three events constitute misconduct or corruption under AS 15.20.540 sufficient to change the results of the gubernatorial election.

A. *North Slope Borough's Gasoline Reimbursement Transportation Assistance Program*

During the 1994 election, the North Slope Borough (Borough) conducted a transportation assistance program allegedly designed to overcome the unique obstacles to voting participation posed by the Borough's vast and largely roadless geography.[4] The Borough informed residents before election day that it would reimburse each voter for up to ten gallons of gasoline used by the voter to reach the polls. After voting, a resident could take his or her ballot stub to tables set up by the Borough near the election booths and fill out a "voter assistance voucher." On the voucher the voter would "swear or affirm" to the amount of gasoline used to transport the voter to the polls. The voter could then redeem the voucher for the specified amount of gasoline at a local fuel station before July 1, 1995. The Borough allowed all voters, regardless of how far they had travelled to the polls, to participate in this program.

Contestants argue that this program violated federal and state criminal election laws. Contestants allege that the Borough impermissibly expanded the transportation assistance program beyond the limited use condoned in advance by the United States Department of Justice Election Crimes Branch and that volunteers witnessing voters' signatures on gasoline vouchers allowed nearly all voters to claim ten gallons, even though most voters had not used that much gasoline to reach the polls. Contestants further allege that the Borough instituted the transportation assistance program with the intent of helping Candidate Knowles win the election.

1. *The transportation assistance program is not illegal under Alaska law*

[6] Contestants allege that the Borough's transportation assistance program violates AS 15.56.030 and is therefore a "corrupt practice" as defined by law sufficient to change the results of the election" under AS 15.20.540(3).[5] Contestants characterize the Borough's program as a "gas for votes" program and argue that thousands of persons were paid the value of up to ten gallons of gasoline to vote.[6]

Although AS 15.56.030(a)(2) prohibits a person from paying another person to vote for a particular candidate, proposition, or question, no Alaska Statute prohibits a person from compensating another person for voting per se. *See* AS 15.56.030. Thus, assuming the Borough's program paid voters with fuel to vote in the election, regardless of the amount of fuel the voters used to reach the polls, the program would not be a corrupt practice as defined by Alaska law, unless the offers of payment were made with the intent "to induce the person to vote for or refrain from voting for a candidate at an election." AS 15.56.030(a)(2).

In stark contrast to federal election law, Alaska election law does not prohibit paying voters. *See* discussion *infra*. In this respect Alaska's statutory scheme is similar to the election laws of other states. For example,

5. AS 15.56.030 provides in pertinent part:
"(a) A person commits the crime of unlawful interference with voting in the first degree if the person
"(2) gives, promises to give, offers, or causes to be given or offered money or other valuable thing to a person with the intent to induce the person to vote for or refrain from voting for a candidate at an election or for an election proposition or question.
"(b) Violation of this section is a corrupt practice.
"(c) Unlawful interference in the first degree is a class C felony."

Contestants also allege that the program violates AS 15.56.020, which pertains to campaign misconduct in the second degree. However, Contestants have not alleged facts which would support this claim. Nor have they briefed this issue either before the superior court or this court. The argument is thus waived. *Wirum & Cash Architects v. Cash*, 832 P.2d 692, 713–14 (Alaska 1992).

6. The record establishes that the market price of ten gallons of gasoline in Barrow was approximately twenty-seven dollars on November 8, 1994.

under California law it is not unlawful to offer any form of consideration, including cash payment, to a person to vote, provided that the payment is not an inducement to or reward for voting for, or refraining from voting, for a particular person or measure.[7] California deleted language in the previous version of the statute dealing with voting, agreeing to vote, coming to the polls, or agreeing to come to the polls ... since [this language] could, conceivably, be used to punish someone for having rewarded a voter for doing what is his [or her] civic duty—namely coming to the polls and voting. Various bicentennial attempts to produce large turnouts this year may well be in violation of these subsections. What needs to be prohibited is rewarding a person for voting in a particular manner, something [the statute] continues to do.

Legislative Committee Comment 1976 Addition, former Cal.Elec.Code § 29631 (now § 18521).

Similarly, Washington State election law prohibits any person from "directly or indirectly offer[ing] a bribe, reward, or any thing of value to a voter in exchange for the voter's vote for or against any person or ballot measure, or authorizing] any person to do so ..." Wash.Rev.Code Ann. § 29.85.020 (West 1993). In contrast, Oregon election law prohibits a person from directly or indirectly "giving or promising to give money, employment or other thing of value" to a person with the intent to induce an individual to "register ... or ... vote." Or.Rev.Stat. § 260.665(1) & (2)(a) (1993). However, Oregon specifically excludes "[f]ree transportation to and from the polls for persons voting" from this prohibition. Or.Rev.Stat. § 260.665(4)(f) (1993).

[7] Although the language of AS 15.56.030(a)(2) is not as unequivocal as the language of California's law, which states that one may not offer compensation in exchange for "voting for any particular person," Cal.Elec.Code § 18521 (West 1996), it appears clear from a plain reading of AS 15.56.030(a)(2) that the prohibition against inducing a person to "vote for or refrain from voting ... for ... a candidate" under AS 15.56.030(a)(2) has an identical meaning. Thus, to show that the Borough's transportation assistance program violated AS 15.56.030(a)(2), Contestants must demonstrate that the Borough paid voters and did so with an intent to induce voters to vote for or refrain from voting for a particular candidate.

a. *Payment for voting*

Contestants argue that this case is analogous to *United States v. Garcia*, 719 F.2d 99 (5th Cir.1983), where the court held that 42 U.S.C. § 1973i(c) prohibits not only paying a voter in cash, but also offering any item of value, such as a welfare food voucher, in

7. Cal.Elec.Code § 18521 (West 1996) provides in relevant part:
"A person shall not directly or through any other person receive, agree or contract for, before, during or after an election, any money, gift, loan or other valuable consideration or office, place or employment for himself or any other person because he or any other person
"(a) Voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.
"(b) Remained away from the polls.
"(c) Refrained or agreed to refrain from voting.
"(d) Induced any other person to
"(1) Remain away from the polls.
"(2) Refrain from voting.
"(3) Vote or refrain from voting for any particular person or measure."
Section 18522 provides in relevant part:
"Neither a person nor a controlled committee shall directly or through any other person or controlled committee pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to
"(a) Induce any voter to
"(1) Refrain from voting at any election.
"(2) Vote or refrain from voting at an election for any particular person or measure.
"(3) Remain away from the polls at an election.
"(b) *Reward* any voter for having
"(1) Refrained from voting.
"(2) Voted for any particular person or measure.
"(3) Refrained from voting for any particular person or measure.
"(4) Remained away from the polls at an election.

exchange for a vote.[8] *Id.* at 101-02. The State and Borough argue that *Garcia* and similar cases[9] are inapposite. They argue that programs with the primary goal of assisting voters in reaching the polls have long been upheld against challenges that such assistance constitutes a payment to vote.

In *United States v. Lewis*, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe "efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.

> [T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.

Craig C. Donsanto, *Federal Prosecution of Election Offenses* 18 (5th ed. 1998).

The distinction between "facilitative" programs and "gift" programs seems based in part on historical factors which preceded the passage of most voting rights legislation. *See Day-Brite Lighting v. State of Missouri*, 342 U.S. 421, 424-25, 72 S.Ct. 405, 407-08, 96 L.Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8886 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have means of transportation to the polls in order to cast their ballots"). *See also Parsley v. Cassady*, 300 Ky. 603, 189 S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); *Watkins v. Holbrook*, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").

Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation. The State and Borough argue that the transportation program is a valid balancing of these two factors, while Contestants argue that the program is an invalid form of vote solicitation.

The North Slope Borough comprises 89,000 square miles and is inhabited by 5,760 people. The majority of these people are regularly involved in subsistence activities. The Borough's limited road system makes it difficult for residents in remote areas to reach voting facilities. In some cases, snowmobile or all-terrain vehicles are the only available modes of transportation. Fuel is especially expensive in the Borough, and because many residents do not participate fully in the cash economy, a fuel expenditure may be still more costly.

The Borough argues that many individuals who would like to vote will be deterred by the limited access to roads and the cost of transportation in the Borough. Thus, a transportation assistance program would clearly facilitate voting in the Borough. However, the Borough argues, the sorts of transportation programs already permitted in many other states, in which volunteers carpool or bus voters to voting stations, would not be feasible in the Borough because

8 42 U.S.C. § 1973i(c) provides in pertinent part: "Whoever knowingly or willfully ... pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years or both."

9 *See United States v. Sisson*, 747 F.2d 930, 934 (4th Cir.1984) (prospective voters offered welfare vouchers in exchange for voting for defendant); *United States v. Thompson*, 615 F.2d 329, 330-31 (5th Cir.1980), *cert. denied*, *Sabin v. United States*, 451 U.S. 906, 101 S.Ct. 1971, 87 L.Ed.2d 625 (1981) (defendant candidate for sheriff bought votes with liquor and cash and accompanied voters into booth to insure compliance).

of the limited road access and the distances involved.

> The Borough claims its program is "more feasible and much cheaper" because it allows individual voters to provide their own transportation to the polls and then be reimbursed for the cost of fuel used by the voter to reach the polls. When the Borough began developing this program, Special Counsel to the Mayor contacted the Election Crimes Branch of the United States Department of Justice to ascertain whether the program might violate 42 U.S.C. § 1973i(c). The Borough described its proposed program as follows: "[t]he plan is to offer up to 10 gallons of gasoline to each voter who requests it." The gasoline will help cover these individuals' travel costs between town and their hunting, fishing, whaling or other sites. Each voter will *swear or affirm* to their need for the fuel to cover transportation costs on the application for fuel." The Borough explained that the assistance would not be payment because (1) the Borough's sole purpose was to facilitate voters reaching the polls or the registrar's office; (2) the transportation norms in the contiguous United States do not apply because of the lack of roads; (3) the large amount of off-road travel in the region removes many citizens from access to registrars and voting polls; and (4) the lack of telephones or other methods of communication with subsistence or other sites located outside of Borough communities makes offering a "ride to the polls" impractical.
>
> The Election Crimes Branch responded with an informal opinion stating that "the outreach program as described in your letter in our opinion is clearly lawful under 42 U.S.C. § 1973i(c)." The Election Crimes Branch stated that its understanding was that the offer "would be made only to individual Native Americans[10] who are on active hunting status—or who are otherwise located in extremely remote areas of the North Slope Borough." Its response further stated that
>
> > [w]e assume for the purposes of this letter that these offers of gasoline will be made in a completely politically neutral manner; that they will not be connected in any way with specific candidates or political organizations; that they will be available to all individual Native Americans whose physical location satisfies the eligibility criteria describe[d] in your letter; ... and that the gas provided will not exceed that needed to transport the individual in question from his or her hunting camp to the nearest registration or polling site.
>
> Its response concluded, "[i]n sum, the gasoline offer describe[d] in your letter, and as amplified by the assumptions summarized above, is functionally similar to an offer of [a] ride to the polls in jurisdictions that have roads and geographically concise populations."

[8] Contestants argue that the Borough conducted the program "directly contrary to the advice and warnings" of the Election Crimes Branch by allowing participation by voters who did not meet the criteria set forth in the response, and by allowing many people to claim more gas than they actually used, resulting in a net pecuniary gain. Although Contestants presented no evidence that any particular voter actually received more fuel than necessary to reach the polls, they presented evidence that this was the likely result of the Borough's program. The 847 vouchers put into evidence by Contestants reveal that fewer than ten voters signed for less than ten gallons of gasoline. Contestants provided evidence suggesting that most Borough residents lived in communities no farther than twelve miles from the polls and thus lived too close to the polls to require ten gallons of gasoline for transportation on election day. Contestants also provided evidence that there may have been little significant subsistence activity on November 8 and further, that the Borough might not have taken adequate steps to ensure that voters did not receive more fuel than was necessary for transportation to the polls. Thus, construing the facts in the light most favorable to the nonmoving party, we hold that a factfinder could conclude that the Borough's program

10 The Borough's program as implemented was not limited to Native Americans, nor could it have been so limited consistent with the requirements of the Fourteenth Amendment to the United States Constitution or the Equal Rights Clause of article I, section 1 of the Constitution of Alaska.

paid voters to vote. *See Clabaugh v. Bottcher*, 645 P.2d 172, 175 n. 5 (Alaska 1976) (in ruling on a motion for summary judgment the court must draw all reasonable inferences in favor of the nonmoving party).

a. Intent to induce a person to vote for a candidate

As noted above, the Borough's program did not violate Alaska's election laws unless the payment to vote was made with the intent to induce a person to vote for or refrain from voting for a candidate. AS 15.56.030(a)(2). Contestants argue that the program is illegal because the Borough offered something of value in exchange for getting out the vote with the expectation that an increase in voter turnout meant an increase in votes for the Democratic candidate for governor, Tony Knowles. Contestants offered an affidavit in which Thomas Northcott affied that several months after the election, a Borough executive boasted about the high voter turnout in the area, and stated that the incentive behind the gas for votes program was to get Tony Knowles elected.

[9] In reviewing the summary judgments entered against the Contestants, the court must draw all reasonable inferences in favor of the Contestants. The parties do not dispute that AS 15.56.030(a)(2) prohibits giving money or other valuable thing with an intention to persuade a person to vote for a candidate. (Because offering to give money or another valuable thing can also violate AS 15.56.030(a)(2), we need not distinguish between the Borough's *offer* and its *delivery* of valuable vouchers to voters.) The averments in Northcott's affidavit would support a finding that the Borough, acting through its officials, intended the program to increase the number of votes cast for Candidate Knowles. Consequently, the question we must answer is whether AS 15.56.030(a)(2) prohibits a candidate-neutral program which gives or offers to give a thing of value in a manner that encourages persons who might otherwise not have voted to go to the polls and cast their votes for candidates for whom they were already inclined to vote.

[10, 11] We give the language of AS 15.56.030 its ordinary meaning when interpreting the statute because the language has not acquired a "peculiar meaning through statutory definition or previous judicial construction." *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1201 (Alaska 1989); *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983). As Alaska Statute 15.56.030(a)(2) prohibits offering a thing of value to a person "with the intent to induce the person to vote for" a candidate. The most common legal definition of "induce" is "to lead on; to influence, to prevail on, to move by persuasion or influence, to bring on or about, to effect, to cause." *See Commonwealth v. Mason*, 381 Pa. 309, 112 A.2d 174, 176 (1955) (defining "induce" as "to lead on; to influence; to prevail on; to move on by persuasion or influence ...; to bring on or about; to effect; to cause."); *People v. Drake*, 151 Cal.App.2d 28, 310 P.2d 997, 1003 (1957) (using same definition); *La Page v. United States*, 146 F.2d 536, 538 n. 2 (8th Cir.1945) (using same definition as *Drake*); *State v. Coos*, 139 Ariz. 406, 678 P.2d 987, 989 (1984) (the generally accepted meaning of "induce" is, "to lead on, to move by persuasion or influence"); Black's Law Dictionary 775 (6th ed. 1990) ("To bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on"); Webster's New Collegiate Dictionary 587 (1974) ("to lead on: move by persuasion or influence;" "to call forth or bring about by influence or stimulation"). These definitions connote an alteration of a person's previous inclination.

The terms "induce" and "inducement" appear to have been used most frequently in criminal law, especially in entrapment cases. This usage clearly indicates that inducement requires altering a person's disposition to act in a certain way. *See, e.g., State v. Hansen*, 69 Wash.App. 750, 850 P.2d 571, 579 n. 9 (1993), *reversed on other grounds, State v. Stegall*, 124 Wash.2d 719, 881 P.2d 979 (1994) ("inducement" such as might support entrapment defense, "is government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen will commit offense"); *United States v. Salmon*, 948 F.2d 776, 779 (D.C.Cir.1991) ("Inducement is government behavior that would 'cause[ ] an unpredisposed person to commit a crime.'") (citation omitted).

[12] In *Oregon Republican Party v. State of Oregon*, 78 Or.App. 601, 717 P.2d 1200, 1208, *remanded for dismissal as moot*, 301 Or. 437, 722 P.2d 1237 (1986), the court held that providing postage-paid envelopes which recipients could use to return requests for absentee ballots to the Republican Party's headquarters, did not constitute an inducement to vote under "O.R.S. 260.665(2)(a). That statute prohibits inducing a person to register to vote. The court reasoned that because "[i]nducement implies the promise of an advantage as a result of performing the desired act," the advantage offered must have an independent value to the voter. *Id.* Without an independent value in exchange for the performance of the act, the thing offered did not induce the act of registering, but rather facilitated registration. *Id.* Applying the Oregon court's definition of inducement to this case, to prevail here Contestants must show that something of independent value—gasoline—was offered to encourage voters to cast their ballots for a candidate they would not otherwise have selected. It is insufficient that something of value was offered in exchange for inducing voting per se, because under Alaska law it is legal to compensate a person for voting per se.

Unless improperly influenced, voters will cast their ballots in accordance with their own criteria. No doubt voters are influenced by such legitimate criteria as their own socio-economic status and community values. Thus, residents of any given community may naturally tend to favor a particular candidate. Persons whose votes are facilitated by candidate-neutral transportation assistance programs will likely vote for the same candidates they would have favored if they had reached the polls without assistance. Potential voters who could benefit from transportation assistance may share beliefs or values which tend to favor a particular candidate. It is not surprising that some candidates or organizations employ transportation assistance programs to target persons of a particular socio-economic status or party registration, just as other candidates or organizations may employ other programs, such as absentee ballot assistance, hoping to maximize participation of voters thought more likely to favor those candidates. *See Oregon Republican Party*, 717 P.2d at 1208 (discussing Republican Party mailing of absentee ballots with postage pre-paid envelope).

When voting, a person must choose one candidate over others. Thus, if the phrase "intent to induce to vote for or refrain from voting for a candidate," in AS 15.56.030 is not read to require an intent to persuade voters to choose candidates for whom they would not otherwise have voted, that statute would have to be construed as prohibiting payments for voting per se. As discussed previously, such a reading of the statute would conflict with its plain language.

[13] There are many policy arguments for and against the "commercialization" of votes. *See, e.g., Day-Brite Lighting*, 342 U.S. at 428, 72 S.Ct. at 409 (Jackson, J., dissenting) (disagreeing with upholding state statutes which require employers to give employees two hours paid leave in order to vote and disapproving of "state-imposed pay-for-voting system[s]"); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 Va. L.Rev. 1455 (1994) (discussing dangers to the polity, especially to economically disadvantaged subsets, of vote-buying schemes and contrasting these schemes with voting incentive programs). These policy arguments have already been resolved in Alaska. The election practice statutes enacted by the Alaska Legislature do not proscribe voter incentive programs which involve compensation for voting, even if the sponsor of a program intends and expects that the program will benefit a particular candidate; they only prohibit payments intended to induce, i.e., influence or persuade, persons to vote in a different manner than they would have otherwise. It is not for the courts to second-guess this permissible legislative choice.

[14-16] Applying that choice to the record before us, we find no evidence which would permit a reasonable inference that the persons responsible for the Borough's trans-

portation assistance program intended to induce voters to vote in a particular manner. Most significantly, there was no evidence the program as conducted was not candidate-neutral. Evidence that persons responsible for the program, by encouraging eligible citizens to vote, intended that the program would result in a net gain of votes for Candidate Knowles would be insufficient to prove a violation of AS 15.56.030(a)(2).[11] As written, the statute does not prohibit 'payment' to induce persons to vote who would not otherwise vote, so long as they are not induced to vote in a particular manner. If a program is candidate-neutral in fact, we must presume voters, in the sanctity of the voting booth, will vote as they would have had they made their ways to the polls without assistance or inducement.[11]

2. *The alleged violation of federal election law is not grounds for contest under AS 15.20.540*

Contestants assert that they can challenge the election under AS 15.20.540 because the Borough's program violated federal law.

Although a candidate-neutral program which offers compensation to encourage voting per se does not violate Alaska law, it appears to violate federal election law. *See* 42 U.S.C. § 1973i(c), *supra* note 8. That does not necessarily mean, however, that a given federal violation is ground for an Alaskan election contest.

The State and the Borough argue that the Alaska and federal election statutes do not make the violation of a federal criminal election statute a basis for invalidating an election. The State notes that election contests based on the acts of third parties must show that the third party committed a "corrupt practice" as "defined by law." AS 15.20.540(3). The State argues that the Alaska Legislature has expressly defined specific acts as "corrupt practices," because it included the phrase "violation of this section is a corrupt practice" in particular election statutes. *See, e.g.*, AS 15.56.010(b); AS 15.56.030(b); AS 15.56.035(b). The State reasons that given the legislature's careful attention to this classification, it clearly did not designate the violation of federal criminal election law as a corrupt practice.

Contestants do not respond to these assertions. It would be inconsistent for the legislature not to prohibit candidate-neutral payments made to encourage voting, *see supra*, discussion of AS 15.56.030(a)(2), yet to regard such payments as a "corrupt practice" sufficient to set aside an election, whether or not they violated federal law. It is also unlikely the legislature would have considered acts violating federal election law, but not Alaska's election statutes, to be "corrupt practices as defined by law," given that the federal election statutes do not use that phrase. The absence of that phrase or some close equivalent in the federal election statutes tends to confirm that the Alaska Legislature did not intend that AS 15.20.540(3) election contests could be based on acts that violated federal, but not Alaska, election statutes.

[17, 18] We hold that an alleged violation of a federal election statute by a third party is not an independent ground for an election contest under AS 15.20.540(3). A violation of 42 U.S.C. § 1973i(c) by a person other than an election official can be ground for an election contest under AS 15.20.540(3) only if the violation is also a "corrupt practice" as defined by Alaska election law.[12]

11. The record reflects three other programs that offered potentially valuable consideration to persons who voted in the 1994 election. A private travel agent in Fairbanks gave $40 air fare discounts to 120-25 customers presenting a 1994 ballot stub on November 8 or 9, 1994. The Anchorage Chamber of Commerce offered a drawing for various prizes, including two round trip tickets, to persons submitting their ballot stubs; approximately 4,415 people entered that drawing. The Municipality of Anchorage People Mover bus system accepted an unknown number of riders' ballot stubs the day after the election in exchange for trips of any length, all day. There is no indication in the record that any of those programs was not candidate-neutral.

12. Contestants also argue that there was election "malconduct" by State election officials under AS 15.20.540(1) because the Borough's program violated federal law and State officials approved that program. Having reviewed the record, we are persuaded that there is no genuine fact dispute, and that no State election official condoned or approved the program as it was actually conducted by the Borough. The trial court did not err in entering summary judgment against Contestants on this claim.

B. *Postcard Mailed to Doyon Shareholders*

The Tanana Chiefs Conference, Doyon, Limited and the Fairbanks Native Association (TCC/Doyon/FNA) mailed a postcard to Doyon shareholders before the election. One side of the postcard offered to persons who submitted an entry on the 1994 ballot stub, or similarly-sized piece of paper, an opportunity to participate in a drawing for one thousand dollars in cash. Participants had to submit entries to their tribal counsel office by noon the day after the election. Neither TCC, Doyon, nor FNA endorsed any candidate for governor in the November 8 general election. However, the other side of the postcard encouraged Native Alaskans to vote. This side stated that "it is *very important*" to vote and that "one vote does make a difference." It asked people to encourage their friends and relatives to vote in the general election. The following statement was centered on this side of the postcard: "At this year's Alaska Federation of Natives convention, Native delegates from across Alaska overwhelmingly endorsed Tony Knowles for governor." Contestants argue that the postcard and the drawing it advertised violated Alaska election law.

1. *Absence of language required by statute*

Contestants argue that the postcard violates Alaska election law because it did not bear the words "paid for by," as required by AS 15.56.010.[13] The State argues that the postcard satisfies the purpose of AS 15.56.010 and that its distribution should thus not be considered a "corrupt practice" under AS 15.20.540.

Because the postcard was distributed by persons other than election officials, Contestants must demonstrate that its distribution was a "corrupt practice," not simply "malconduct." AS 15.20.540(1) & (3).

[19] We first consider the significance of the omission of the information required by AS 15.56.010. This court has held that the term "malconduct" as used in AS 15.20.540 means a "significant deviation from statutorily or constitutionally prescribed norms." *Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978) (citing *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972)). Although *Hammond v. Hickel* involved claims of official malconduct rather than third-party corruption, given our prior holding that election statutes will be liberally construed to uphold the will of the electorate, *Carr v. Thomas*, 586 P.2d 622, 626 n. 11 (Alaska 1978), we choose to apply *Hammond*'s requirement of a significant deviation from statutory norms to all grounds for an election contest under AS 15.20.540.

[20] In this case, assuming the language of the postcard was "intended to influence the election of a candidate," no significant statutory deviation occurred. AS 15.56.010(a)(2). The statute presumably requires that the postcard bear the words "paid for by" and the sponsor's name and return address.[14] However, the postcard identified its source, and also identified the Alaska Federation of Natives (AFN) as a supporter of Candidate Knowles. Thus, the apparent purpose of AS 15.56.010—to promote an informed electorate and to allow

13. AS 15.56.010(a)(2) provides that "[a] person commits the crime of campaign misconduct in the first degree if the person":

> knowingly prints or publishes an advertisement, billboard, placard, poster, handbill, paid for television or radio announcement or other communication intended to influence the election of a candidate or outcome of a ballot proposition or question without the words "paid for by" followed by the name and address of the candidate, group or individual paying for the advertising or communication....

14. The State argues that AS 15.56.010 does not apply to the postcard because the postcard does not encourage voting for any particular candidate and because AS 15.56.010 does not apply to mailings from corporations to their investors. It is unnecessary for us to address those two arguments because we hold that distributing the postcard in violation of AS 15.56.010 was not a "corrupt practice" under AS 15.20.540.

Given our resolution of this issue, we do not find it necessary to consider whether, in light of *McIntyre v. Ohio Elections Commission*, — U.S. —, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (holding that an Ohio statute prohibiting distribution of anonymous campaign literature violated the First Amendment), AS 15.56.010 is valid. No party argues that it is not.

WWS
WEVLEY WILLIAM SHEA
ATTORNEY

329 F STREET
SUITE 222
ANCHORAGE, ALASKA 99501

907-274-0020
FAX 274-3004

11 January 1996

1994 Alaska Gubernatorial Election
Status Letter - Public Interest Litigation

Dansereau v. Ulmer
903 P.2d 555 (Alaska 1995)

Dear Senator Bert Sharp:

Enclosed for your review is the published Supreme Court Decision *Dansereau v. Ulmer*, 903 P.2d 555 (Alaska 1995). On page 560 of the Decision, the Alaska Supreme Court states:

> In stark contrast to federal election law, **Alaska election law does not prohibit paying voters.**

The Alaska Supreme Court remanded to the Superior Court for further determination the effect upon the 1994 gubernatorial election of mailing a postcard to approximately 7,000 Doyon, Ltd. shareholders. The postcard endorsed Tony Knowles for Governor and gave those submitting "ballots" in the raffle a chance to win $1,000.00.

After remand to the Trial Court, the Public Interest Litigants on November 7, 1995 entered into a Settlement Agreement. The Settlement Agreement states in paragraph 1.4:

> The Court found that state law prohibits a pecuniary inducement to vote only if there is intent to induce a vote for a particular candidate.... The Lieutenant Governor, after reviewing the Court's decision, has determined that it is in the best interests of the State to have state law conform. **The administration intends to make federal and state election law consistent by proposing that the state election code adopt the more stringent federal standard.** Plaintiffs intend to endorse and support this legislative initiative.

Paragraph 2.1.(a) confirms Governor Knowles' intent to have state law conform with federal election standards:

> Plaintiffs have been advised that the **Knowles administration intends to introduce a bill on the first day of the second session of the Nineteenth Alaska State Legislature to implement the election franchise protections of the Federal Voting**

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Rights Act, 42 U.S.C. 1973i(c). Plaintiffs support the introduction of this legislation and will join the Knowles administration in seeking speedy passage.

Monday, 8 January 1996 was the first day of the new legislative session. Tuesday, 9 January, I received a telephone message from the State which confirmed that Governor Knowles, via a transmittal letter to the House and Senate of the Alaska Legislature, forwarded his proposed Amendment to ensure that Alaska law complies with federal election law as required by the Settlement Agreement. My discussions with House Speaker Gail Phillips and Senate President Drue Pearce indicate that both houses of the Alaska Legislature intend to move forward with Governor Knowles' recommended changes to comply with federal election law.

I would like to personally thank you for your input and support regarding this unique and complex litigation. Each of the ten (10) individual voters who stepped forward and assumed responsibility as plaintiffs in this litigation deserves a tremendous "thank you" from all Alaskans. In addition, I would like to again personally thank Bob Motznik, President of Motznik Computer Services, for his continuous support on virtually a daily basis. He executed six (6) affidavits on behalf of the Public Interest Litigants. His commitment was outstanding.

Finally, I cannot put into words my sincere appreciation for the support and assistance of the Honorable Gordon D. Schaber, former Dean and presently University Counselor and Distinguished Professor of Law, McGeorge School of Law, University of the Pacific, Sacramento, California, for his input, recommendations and continuous support of this public interest litigation.

Dean Schaber stated in his recent affidavit submitted to the Trial Court supporting the uniqueness of this public interest litigation:

> 18. Mr. Shea's commitment to public service and the obligation he assumed on behalf of the plaintiffs, Public Interest Litigants, should be unquestioned.
>
> 19. I discussed the circumstances surrounding the settlement of this case with Mr. Shea over the past few weeks. In addition I have reviewed the Settlement Agreement he executed on behalf of the plaintiffs on November 7, 1995 with the Attorney General for the State of Alaska, Bruce M. Botelho, and counsel for Governor Knowles and Lieutenant Governor Frank Ulmer in their individual capacities.
>
> 20. The Alaska Supreme Court's opinion in this case is one of the leading election contest decisions in the Nation.
>
> 21. Mr. Shea on behalf of the plaintiffs and all Alaskans has accomplished a great deal. I personally recognize his total commitment to the best interests and well-being of all Alaskans in reaching the settlement on November 7, 1995, in this very important public interest litigation.

Dean Schaber's statements regarding the importance of this litigation and the result achieved by the ten Alaska voters are very meaningful due to his very extensive professional and political background. Dean Schaber was the Dean of McGeorge School of Law from 1957 to 1990. He has been a member of the Central Committee of the California Democratic Party for years. In John F. Kennedy's 1960 successful campaign for President, Dean Schaber was his Presidential Campaign Chairman for Northern California. In 1965 Dean Schaber was appointed Presiding Judge of the Sacramento Superior Court, Sacramento, California. In 1970 the California Trial Lawyer's Association named Dean Schaber the "1969 California Trial Judge of the Year."

Dean Schaber is synonymous with McGeorge School of Law as a result of his 30-plus years as a leader in education. Dean Schaber is one of the most respected professionals and political figures in California. He is one of the most respected deans of any law school in the Nation. Dean Schaber's commitment to this unique litigation illustrates the very important role assumed by the ten voters, Public Interest Litigants, who stepped forward to represent all Alaskans.

It has been a privilege and a pleasure to represent each of the Alaska voters in this complex litigation addressing our most fundamental democratic right, the right to vote in elections free of undue influence and corrupt practices. The only remaining item is the award of attorney fees and costs to the Public Interest Litigants pursuant to the Settlement Agreement. The briefing is completed and the final hearing is scheduled before Presiding Judge Karl S. Johnstone on February 1, 1996 at 9:00 a.m.

As in the past, please do not hesitate to contact me if you have questions or if I may be of assistance.

Best Wishes,

WWS

Wevley William Shea

WWS:mfa

Enclosures: *Dansereau v. Ulmer*,
903 P.2d 555 (Alaska 1995)

PERT & PLEASE
CALL ME IF I MAY
BE OF ASSISTANCE——
TO TESTIFY OR ANY
OTHER MATTER ON THE
NEW LEGISLATURE!
ALL THE BEST IN 1996!
WWS WEVLEY WM. SHEA

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Dana DANSEREAU; Gregory J. Gursey; Samuel Haywood; Kathy Haywood; C.E. Jenkins; Kim Ryan; James Weymouth; Rita T. Weymouth; T.J. Northcott; David D. Kyzer, M.D.; and Jane and John Does 1-10, Appellants,

v.

Fran ULMER, Lieutenant Governor, State of Alaska, and David Koivuniemi, Acting Director of the Alaska Division of Elections, Appellees.

No. S-6894.

Supreme Court of Alaska.

Sept. 22, 1995.

Ten voters (contestants), challenging validity of gubernatorial election, moved for summary judgment and state cross-moved for summary judgment. The Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., granted state's motion for summary judgment. Contestants appealed. The Supreme Court, Eastaugh, J., held that: (1) Borough transportation assistance program was not a corrupt practice constituting crime of unlawful interference with voting in the first degree; (2) genuine issue of material fact precluded summary judgment in favor of state on claim that distribution of postcards to voters offering opportunity to participate in cash drawing was corrupt practice in violation of election laws; (3) state failed to meet its burden that distribution of postcards did not alter outcome of election; and (4) state's operation of absentee voting station did not constitute election misconduct.

Affirmed in part, reversed in part and remanded.

Compton, J., filed opinion dissenting in part.

1. Elections ⇐1

Right to vote encompasses right to express one's opinion and is way to declare one's full membership in political community, and thus is fundamental to our concept of democratic government.

2. Elections ⇐291

Because public has an important interest in stability and finality of election results, every reasonable presumption is indulged in favor of validity of an election; however, if party challenging an election proves that misconduct occurred and that it could have changed result of election, Supreme Court may vitiate election or determine which candidate was elected. AS 15.20.540.

3. Elections ⇐291

Contestants challenging an election on basis that misconduct occurred have dual burden of showing that there was both significant deviation from statutory direction, and that deviation was of magnitude sufficient to change result of election. AS 15.20.540.

4. Appeal and Error ⇐863

When reviewing grant of summary judgment, Supreme Court must determine whether any genuine issue of material fact exists and whether moving party is entitled to judgment as matter of law.

5. Appeal and Error ⇐934(1)

If superior court's order granting summary judgment does not set out court's reasoning, Supreme Court presumes that superior court ruled in favor of movant on all issues.

6. Elections ⇐285(3), 305(.5, 3)

Contestants challenging results of gubernatorial election did not allege facts which would support claim of campaign misconduct in second degree nor did they brief issue either before Superior Court or Supreme Court, and thus claim was waived. AS 15.56.020.

7. Elections ⇐197

In order to show that Borough's transportation assistance program, in which Borough would reimburse each voter for up to ten gallons of gasoline used by voter to reach polls, was an unlawful interference with voting, election contestants had to demonstrate that Borough paid voters and did so with an intent to induce voters to vote for or refrain

from voting for particular candidate. AS 15.56.030, 15.56.030(a)(2).

8. Elections ⇐197

In action challenging results of gubernatorial election on basis that Borough's transportation assistance program, in which Borough would reimburse each voter for up to ten gallons of gasoline used by voter to reach polls, factfinder could have concluded that Borough's program paid voters to vote where, although voters were required to swear or affirm to their need for fuel to cover transportation costs on application for fuel, of 847 vouchers put into evidence, fewer than 10 voters signed for less for ten gallons of gasoline, and evidence suggested that most Borough residents lived in communities no farther than 12 miles from polls, and thus lived too close to polls to require ten gallons of gasoline for transportation on election day. AS 15.56.030.

9. Appeal and Error ⇐934(1)

In reviewing grant of summary judgment, court must draw all reasonable inferences in favor of nonmoving party.

10. Elections ⇐319

When interpreting statute defining unlawful interference with voting in the first degree, Supreme Court gives language its ordinary meaning because language has not acquired peculiar meaning through statutory definition or previous judicial construction. AS 15.56.030.

11. Elections ⇐319

For purposes of statute prohibiting offering thing of value to person with intent to induce person to vote for candidate, term "induce" implies promise of an advantage as a result of performing desire to act, and advantage offered must have an independent value to voter. AS 15.56.030(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

12. Elections ⇐197

In order for voters to prevail on challenge to gubernatorial election on basis that Borough's transportation assistance program in which Borough reimbursed each voter for up to ten gallons of gasoline used by voter to reach polls constituted unlawful interference with voting in the first degree, they must show that gasoline was offered to encourage voters to cast their ballots for candidate they would not otherwise have selected; it would be insufficient that something of value was offered in exchange for inducing voting per se since under Alaska law it is legal to compensate person for voting per se. AS 15.56.030(a)(2).

13. Elections ⇐319

Alaska's election practice statute do not proscribe voter incentive programs which involve compensation for voting, even if sponsor of program intends and expects that program will benefit particular candidate; they only prohibit payments intended to induce persons to vote in different manner than they would have otherwise. AS 15.56.030.

14. Elections ⇐291

In action challenging Borough's transportation assistance program, in which Borough would reimburse each voter for up to ten gallons of gasoline used by voter to reach polls, on basis that it constituted unlawful interference with voting in the first degree, there was no evidence which would permit reasonable inference that persons responsible for transportation assistance program intended to induce voters to vote in particular manner nor that program as conducted was not candidate-neutral. AS 15.56.030(a)(2).

15. Elections ⇐319

Statute defining unlawful interference with voting in the first degree does not prohibit payment to induce persons to vote who would not otherwise vote, so long as they are not induced to vote in particular manner, and thus evidence that persons responsible for transportation assistance program intended that program would result in net gain of votes for particular candidate would be insufficient to prove violation of statute. AS 15.56.030(a)(2).

16. Elections ⇐291

If transportation assistance program is candidate-neutral in fact, Supreme Court must presume voters, in sanctity of voting booth, will vote as they would have had they

made their ways to polls without assistance or inducement. AS 15.56.030(a)(2).

17. Elections ⇐271

Alleged violation of federal election statute by third party is not an independent ground for an election contest under Alaska law; rather, violation of federal election statute by person other than an election official can be ground for an election contest under Alaska law only if violation is also "corrupt practice" as defined by Alaska election law. Voting Rights Act of 1965, § 2(c), as amended, 42 U.S.C.A. § 1973i(c); AS 15.20.540(3).

18. Elections ⇐271

There was no election "malconduct" by state election officials associated with Borough's transportation assistance program, in which Borough would reimburse each voter for up to ten gallons of gasoline used by voter to reach polls, where no state election official condoned or approved program as it was actually conducted by Borough. AS 15.20.540(1).

19. Elections ⇐271

Requirement of significant deviation from statutory norms applies to all grounds for election contest under Alaska law. AS 15.20.540.

20. Elections ⇐271

Distribution of postcards to voters offering them opportunity to participate in drawing for $1,000 and stating that source of postcards endorsed particular gubernatorial candidate did not significantly frustrate purposes of statute defining campaign misconduct in the first degree, to promote informed electorate and to allow voters to evaluate solicitations they received, by its failure to indicate on postcard who paid for it, and thus did not constitute a "corrupt practice" sufficient to change results of election for purposes of establishing ground to contest election results where postcard identified its source, and identified source as supporter of particular candidate. AS 15.20.540(3), 15.56.010(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

21. Elections ⇐227(1)

Even assuming statutory deviation was sufficient to support misdemeanor charge of violating statute defining campaign misconduct in the first degree, technical failure to comply strictly with that statute, which prohibits publishing communication intended to influence election of candidate or outcome of ballot without words "paid for by," is not sufficient to invalidate ballots where purpose of statute has been satisfied. AS 15.56.010.

22. Appeal and Error ⇐761

Supreme Court has discretion to reach an issue which has been inarticulately briefed by one party, especially where Supreme Court, trial court, and opposing party have all been adequately notified that matter is at issue on appeal.

23. Elections ⇐285(3), 305(4)

Voters contesting gubernatorial election results adequately raised question of whether mailing of postcards offering voters opportunity to participate in drawing for $1,000 violated statute prohibiting giving, or promising to give money to person with intent to induce person to vote for or refrain from voting for candidate where voters' complaint and statement of points on appeal raised question of whether postcard violated statute, voters argued postcard offered something of value, in opposing state's cross-motion for summary judgment, voters argued that postcard demonstrated an intent to encourage people to vote for particular candidate, and state presented its position on issue in its brief and memoranda before Supreme Court and Superior Court. AS 15.56.030(a)(2).

24. Judgment ⇐181(15.1)

Genuine issue of material fact as to whether postcard sent by third parties to voters offering them opportunity to participate in drawing for $1,000 violated statute prohibiting the offering of something of value to person with intent to induce person to vote for particular candidate precluded summary judgment in favor of state in action contesting gubernatorial election results where drawing offer was accompanied by non-neutral message endorsing particular gubernatorial candidate and state failed to demonstrate that there was no intention to induce voters

to vote for particular candidate. AS 15.56.030(a)(2).

25. Judgment ⇐185(2)

In action by voters against state challenging gubernatorial election results on basis that postcard sent to voters violated election laws, state, as cross-movant seeking summary judgment, had initial burden of making prima facie showing that postcard mailing did not affect election. AS 15.56.030(a)(2).

26. Elections ⇐291

State did not make prima facie showing that challenged postcard mailing to voters did not affect election outcome where it simply showed that fewer voters in targeted district participated in prior election than in challenged election without showing that turnouts in two elections could be compared directly or that no other independent circumstances may have depressed turnout in prior election, it offered no evidence about how many targeted voters were registered in district or how many targeted voters voted in either election in that or any other district, and voters who contested election offered evidence that two elections could not be compared. AS 15.56.030(a)(2).

27. Elections ⇐216.1

State's good-faith operation of absentee voting station did not constitute misconduct for purposes of contesting election results despite fact that state had previously decided to close station, but on day before election changed that decision, and fact that voters had long wait in line prior to voting, where after deciding to close voting station, state trained employers in area to assist voters in registering and distributing absentee ballot applications, there were no allegations that voters were unable to obtain, complete, or return absentee ballots prior to election, decision to reverse original course and open voting station was made after receiving numerous phone calls requesting that it be open, and there were no allegations that an earlier decision to open station would have alleviated long lines on election day. AS 15.56.030(a)(2).

Wevley William Shea, Anchorage, for Appellants.

James L. Baldwin and Lauri J. Adams, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Appellees.

Avrum M. Gross, Gross & Burke, P.C., Juneau, for Amicus Curiae North Slope Borough.

Before MOORE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

OPINION

EASTAUGH, Justice.

I. *INTRODUCTION*

Dana Dansereau and nine other voters (Contestants) challenged the validity of the November 8, 1994 gubernatorial election in which Tony Knowles was elected to the office of Governor of Alaska.[1] The superior court granted summary judgment to the State of Alaska, thereby dismissing all of Contestants' claims. We affirm in part and reverse in part.

II. *FACTS AND PROCEEDINGS*

Contestants challenged the election by filing suit in December 1994, alleging that: misconduct by the State and corrupt acts by third parties had occurred and that those acts were sufficient to change the result of

1. The Contestants included as defendants: the State of Alaska; John B. "Jack" Coghill, former Lieutenant Governor; and Joseph L. Swanson, the Director of the Alaska Division of Elections under Governor Walter J. Hickel (collectively "State"). In accordance with Alaska Civil Rule 25(d), the current Lieutenant Governor and the Acting Director of the Division of Elections, Fran Ulmer and David Koivumieni respectively, were substituted as defendants.

A recount requested by gubernatorial Candidate James O. Campbell was completed on December 3, 1994; it determined that Tony Knowles was elected by a margin of 536 votes. Candidate Campbell is not one of the Contestants. Although given an opportunity to do so, Contestants never moved for a preliminary injunction, and conceded that Candidate Knowles was capable of governing the State until there could be a new election.

the gubernatorial election. Contestants requested that the State conduct a new election for governor or declare James O. Campbell Governor of Alaska.

Contestants moved for summary judgment in mid-December 1994. The State cross-moved. The superior court granted the State's motion for summary judgment on February 8 and 9, 1995. This appeal followed. On appeal the North Slope Borough submitted an *amicus curiae* brief.

Contestants advance three main arguments. First, they argue that a North Slope Borough voter assistance program, which offered to reimburse rural voters for the gasoline they used to transport themselves to the polls, violated state and federal election laws. Second, they argue that a postcard sent to Doyon, Limited (Doyon) shareholders violated federal and state election laws, because it offered entry in a $1,000 cash prize drawing to those who submitted a ballot stub, or similarly sized piece of paper, and stated that the Alaska Federation of Natives (AFN) overwhelmingly endorsed Tony Knowles for governor. Finally, Contestants assert that the State committed election malconduct in its operation of the Prudhoe Bay voting station.[2]

II. *DISCUSSION*

[1] The right to vote encompasses the right to express one's opinion and is a way to declare one's full membership in the political community. Thus, it is fundamental to our concept of democratic government. Moreover, a true democracy must seek to make each citizen's vote as meaningful as every other vote to ensure the equality of all people under the law.

[2–5] Alaska Statute 15.20.540[3] is the statutory mechanism through which voters can challenge, under prescribed conditions, election results which they believe denigrated their right to vote. Because the public has an important interest in the stability and finality of election results, *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968), we have held that "every reasonable presumption will be indulged in favor of the validity of an election." *Turkington v. City of Kachemak*, 380 P.2d 593, 595 (Alaska 1963). However, if the party challenging an election proves that misconduct occurred and that it could have changed the result of the election, we may vitiate the election or determine which candidate was elected. *Boucher v. Bomhoff*, 495 P.2d 77, 80 n. 5, 82 (Alaska 1972). Under AS 15.20.540, Contestants have the "dual burden" of showing that there was both a significant deviation from statutory direction, and that the deviation was of a magnitude sufficient to change the result of the election. *Id.* at 80. We here review the summary judgment dismissing the Contestants' lawsuit.[4]

2. Contestants also argue that the State committed election malconduct by "disenfranchising" voters through its treatment of absentee ballots and residency disputes in the state Senate race for District J in Anchorage. All but forty of the disputed District J votes were counted in the race for governor. Contestants offer no evidence that substantiates a challenge to the determination regarding the forty ballots, nor do they offer any evidence that the alleged malconduct regarding these forty ballots would have been sufficient to change the outcome of the gubernatorial election.

Because the gubernatorial election is the only race challenged by Contestants, we need not consider any alleged malconduct which did not affect the gubernatorial election.

3. AS 15.20.540 provides:

Grounds for election contest. A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds: (1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; (3) any corrupt practice as defined by law sufficient to change the results of the election.

4. When reviewing a grant of summary judgment, we must determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Wright v. State*, 82 P.2d 718, 720 (Alaska 1992). If the superior court's order granting summary judgment does not set out the court's reasoning, we presume that the superior court ruled in favor of the movant on all issues. *Saddler v. Alaska Marine Lines, Inc.*, 856 P.2d 784, 787 (Alaska 1993).

Contestants argue that the three events constitute malconduct or corruption under AS 15.20.540 sufficient to change the results of the gubernatorial election.

A. *North Slope Borough's Gasoline Reimbursement Transportation Assistance Program*

During the 1994 election, the North Slope Borough (Borough) conducted a transportation assistance program allegedly designed to overcome the unique obstacles to voting participation posed by the Borough's vast and largely roadless geography. The Borough informed residents before election day that it would reimburse each voter for up to ten gallons of gasoline used by the voter to reach the polls. After voting, a resident could take his or her ballot stub to tables set up by the Borough near the election booths and fill out a "voter assistance voucher." On the voucher the voter would "swear or affirm" to the amount of gasoline used to transport the voter to the polls. The voter could then redeem the voucher for the specified amount of gasoline at a local fuel station before July 1, 1995. The Borough allowed all voters, regardless of how far they had travelled to the polls, to participate in this program.

Contestants argue that this program violated federal and state criminal election laws. Contestants allege that the Borough impermissibly expanded the transportation assistance program beyond the limited use condoned in advance by the United States Department of Justice Election Crimes Branch and that: volunteers witnessing voters' signatures on gasoline vouchers allowed nearly all voters to claim ten gallons, even though most voters had not used that much gasoline to reach the polls. Contestants further allege that the Borough instituted the transportation assistance program with the intent of helping Candidate Knowles win the election.

1. *The transportation assistance program is not illegal under Alaska law*

[6] Contestants allege that the Borough's transportation assistance program violates AS 15.56.030 and is therefore a "corrupt practice as defined by law sufficient to change the results of the election" under AS 15.20.540(3).[5] Contestants characterize the Borough's program as a "gas for votes" program and argue that thousands of persons were paid the value of up to ten gallons of gasoline to vote.[6]

Although AS 15.56.030(a)(2) prohibits a person from paying another person to vote for a particular candidate, proposition, or question, no Alaska Statute prohibits a person from compensating another person for voting per se. *See* AS 15.56.030. Thus, assuming the Borough's program paid voters with fuel to vote in the election, regardless of the amount of fuel the voters used to reach the polls, the program would not be a corrupt practice as defined by Alaska law, unless the offers of payment were made with the intent "to induce the person to vote for or refrain from voting for a candidate at an election." AS 15.56.030(a)(2).

In stark contrast to federal election law, Alaska election law does not prohibit paying voters. *See* discussion *infra*. In this respect, Alaska's statutory scheme is similar to the election laws of other states. For example,

3. AS 15.56.030 provides in pertinent part:
(a) A person commits the crime of unlawful interference with voting in the first degree if the person
....
(2) gives, promises to give, offers, or causes to be given or offered money or other valuable thing to a person with the intent to induce the person to vote for or refrain from voting for a candidate at an election or for an election proposition or question ...
....
(b) Violation of this section is a corrupt practice.
(c) Unlawful interference in the first degree is a class C felony.

Contestants also allege that the program violates AS 15.56.020, which pertains to campaign misconduct in the second degree. However, Contestants have not alleged facts which would support this claim. Nor have they briefed this issue either before the superior court or this court. The argument is thus waived. *Wilson & Cash Architects v. Cash*, 837 P.2d 692, 713–14 (Alaska 1992).

6. The record establishes that the market price of ten gallons of gasoline in Barrow was approximately twenty-seven dollars on November 8, 1994.

under California law it is not unlawful to offer any form of consideration, including cash payment, to a person to vote, provided that the payment is not an inducement to or reward for voting for, or refraining from voting, for a particular person or measure.[7] California deleted language in the previous version of the statute

> dealing with voting, agreeing to vote, coming to the polls, or agreeing to come to the polls ... since [this language] could, conceivably, be used to punish someone for having rewarded a voter for doing what is his [or her] civic duty—namely coming to the polls and voting. Various bicentennial attempts to produce large turnouts this year may well be in violation of these subsections. What needs to be prohibited is rewarding a person for voting in a particular manner, something [the statute] continues to do.

Legislative Committee Comment 1975 Addition, former Cal.Elec.Code § 29621 (now § 18521).

Similarly, Washington State election law prohibits any person from "directly or indirectly offer[ing] a bribe, reward, or any thing of value to a voter in exchange for the voter's vote for or against any person or ballot measure, or authoriz[ing] any person to do so...." Wash.Rev.Code Ann. § 29.85.060 (West 1993). In contrast, Oregon election law prohibits a person from directly or indirectly "giving or promising to give money, employment or other thing of value" to a person with the intent to induce an individual to register or vote. Or.Rev.Stat. § 260.665(1) & (2)(a) (1993). However, Oregon specifically excludes "[f]ree transportation to and from the polls for persons voting" from this prohibition. Or.Rev.Stat. § 260.665(4)(f) (1993).

[7] Although the language of AS 15.56.030(a)(2) is not as unequivocal as the language of California's law, which states that one may not offer compensation in exchange for "voting for any particular person," Cal.Elec.Code § 18521 (West 1995), it appears clear from a plain reading of AS 15.56.030(a)(2) that the prohibition against inducing a person to "vote for or refrain from voting for a candidate" under AS 15.56.030(a)(2) has an identical meaning. Thus, to show that the Borough's transportation assistance program violated AS 15.56.030(a)(2), Contestants must demonstrate that the Borough paid voters and did so with an intent to induce voters to vote for or refrain from voting for a particular candidate.

a. *Payment for voting*

Contestants argue that this case is analogous to *United States v. Garcia*, 719 F.2d 99 (5th Cir.1983), where the court held that 42 U.S.C. § 1973i(c) prohibits not only paying a voter in cash, but also offering any item of value, such as a welfare food voucher, in

7. Cal.Elec.Code § 18521 (West 1995) provides in relevant part:

> A person shall not directly or through any other person receive, agree, or contract for, before, during or after an election, any money, gift, loan, or other valuable consideration, office, place or employment for himself or any other person because he or any other person
> (a) Voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure.
> (b) Remained away from the polls.
> (c) Refrained or agreed to refrain from voting.
> (d) Induced any other person to:
> (1) Remain away from the polls.
> (2) Refrain from voting.
> (3) Vote or refrain from voting for any particular person or measure.

Section 18522 provides in relevant part:

> Neither a person nor a controlled committee shall directly or through any other person or controlled committee pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to:
> (a) Induce any voter to:
> (1) Refrain from voting at any election.
> (2) Vote or refrain from voting at an election for any particular person or measure.
> (3) Remain away from the polls at an election.
> (b) Reward any voter for having:
> (1) Refrained from voting.
> (2) Voted for any particular person or measure.
> (3) Refrained from voting for any particular person or measure.
> (4) Remained away from the polls at an election.

exchange for a vote.[8] *Id.* at 101-02. The State and Borough argue that *Garcia* and similar cases[9] are inapposite. They argue that programs with the primary goal of assisting voters in reaching the polls have long been upheld against challenges that such assistance constitutes a payment to vote.

In *United States v. Lewin*, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe "efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.

> [T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.

Craig C. Donsanto, *Federal Prosecution of Election Offenses* 18 (5th ed. 1988).

The distinction between "facilitative" programs and "gift" programs seems based in part on historical factors which preceded the passage of most voting rights legislation. *See Day-Brite Lighting v. State of Missouri*, 342 U.S. 421, 424-25, 72 S.Ct. 405, 407-08, 96 L.Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8986 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have means of transportation to the polls in order to cast their ballots"). *See also Parsley v. Cassady*, 300 Ky. 603, 189 S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); *Watkins v. Holbrook*, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").

Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation. The State and Borough argue that the transportation program is a valid balancing of these two factors, while Contestants argue that the program is an invalid form of vote solicitation.

The North Slope Borough comprises 89,000 square miles and is inhabited by 5,760 people. The majority of these people are regularly involved in subsistence activities. The Borough's limited road system makes it difficult for residents in remote areas to reach voting facilities. In some cases, snowmobile or all-terrain vehicles are the only available modes of transportation. Fuel is especially expensive in the Borough, and because many residents do not participate fully in the cash economy, a fuel expenditure may be still more costly.

The Borough argues that many individuals who would like to vote will be deterred by the limited access to roads and the cost of transportation in the Borough. Thus, a transportation assistance program would clearly facilitate voting in the Borough. However, the Borough argues, the sorts of transportation programs already permitted in many other states, in which volunteers car-pool or bus voters to voting stations, would not be feasible in the Borough because

8. 42 U.S.C. § 1973i(c) provides in pertinent part: Whoever knowingly or willfully ... pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years or both....

9. *See United States v. Saenz*, 747 F.2d 930, 934 (5th Cir.1984) (prospective voters offered welfare vouchers in exchange for voting for defendant); *United States v. Thompson*, 615 F.2d 329, 330-31 (5th Cir.1980), *cert. denied, Solis v. United States*, 473 U.S. 906, 105 S.Ct. 3531, 87 L.Ed.2d 655 (1985) (defendant candidate for sheriff bought votes with liquor and cash and accompanied voters into booth to insure compliance).

of the limited road access and the distances involved.

The Borough claims its program is "more feasible and much cheaper" because it allows individual voters to provide their own transportation to the polls and then be reimbursed for the cost of fuel used by the voter to reach the polls. When the Borough began developing this program, Special Counsel to the Mayor contacted the Election Crimes Branch of the United States Department of Justice to ascertain whether the program might violate 42 U.S.C. § 1973i(c). The Borough described its proposed program as follows: "[t]he plan is to offer up to 10 gallons of gasoline to each voter who requests it. The gasoline will help cover these individuals' travel costs between town and their hunting, fishing, whaling or other sites. Each voter will *swear or affirm* to their need for the fuel to cover transportation costs on the application for fuel." The Borough explained that the assistance would not be payment because (1) the Borough's sole purpose was to facilitate voters reaching the polls or the registrar's office; (2) the transportation norms in the contiguous United States do not apply because of the lack of roads; (3) the large amount of off-road travel in the region removes many citizens from access to registrars and voting polls; and (4) the lack of telephones or other methods of communication with subsistence or other sites located outside of Borough communities makes offering a "ride to the polls" impractical.

The Election Crimes Branch responded with an informal opinion stating that "the outreach program as described in your letter in our opinion is clearly lawful under 42 U.S.C. § 1973i(c)." The Election Crimes Branch stated that its understanding was that the offer "would be made only to individual Native Americans [10] who are on active hunting status—or who are otherwise located in extremely remote areas of the North Slope Borough." Its response further stated that

> [w]e assume for the purposes of this letter that these offers of gasoline will be made in a completely politically neutral manner; that they will not be connected in any way with specific candidates or political organizations; that they will be available to all individual Native Americans whose physical location satisfies the eligibility criteria describe[d] in your letter; . . . and that the gas provided will not exceed that needed to transport the individual in question from his or her hunting camp to the nearest registration or polling site.

Its response concluded, "[i]n sum, the gasoline offer describe[d] in your letter, and as amplified by the assumptions summarized above, is functionally similar to an offer of [a] ride to the polls in jurisdictions that have roads and geographically concise populations."

[8] Contestants argue that the Borough conducted the program "directly contrary to the advice and warnings" of the Election Crimes Branch by allowing participation by voters who did not meet the criteria set forth in the response, and by allowing many people to claim more gas than they actually used, resulting in a net pecuniary gain. Although Contestants presented no evidence that any particular voter actually received more fuel than necessary to reach the polls, they presented evidence that this was the likely result of the Borough's program. The 847 vouchers put into evidence by Contestants reveal that fewer than ten voters signed for less than ten gallons of gasoline. Contestants provided evidence suggesting that most Borough residents lived in communities no farther than twelve miles from the polls and thus lived too close to the polls to require ten gallons of gasoline for transportation on election day. Contestants also provided evidence that there may have been little significant subsistence activity on November 8 and further, that the Borough might not have taken adequate steps to ensure that voters did not receive more fuel than was necessary for transportation to the polls. Thus, construing the facts in the light most favorable to the nonmoving party, we hold that a factfinder could conclude that the Borough's program

10. The Borough's program as implemented was not limited to Native Americans, nor could it have been so limited consistent with the requirements of the Fourteenth Amendment to the United States Constitution or the Equal Rights Clause of article I, section 1 of the Constitution of Alaska.

paid voters to vote. *See Clabaugh v. Bottcher*, 545 P.2d 172, 175 n. 5 (Alaska 1976) (in ruling on a motion for summary judgment the court must draw all reasonable inferences in favor of the nonmoving party).

b. *Intent to induce a person to vote for a candidate*

As noted above, the Borough's program did not violate Alaska's election laws unless the payment to vote was made with the intent to induce a person to vote for or refrain from voting for a candidate. AS 15.56.030(a)(2). Contestants argue that the program is illegal because the Borough offered something of value in exchange for getting out the vote with the expectation that an increase in voter turnout meant an increase in votes for the Democratic candidate for governor, Tony Knowles. Contestants offered an affidavit in which Thomas Northcott affied that several months after the election, a Borough executive boasted about the high voter turnout in the area, and stated that the incentive behind the gas for votes program was to get Tony Knowles elected.

[9] In reviewing the summary judgments entered against the Contestants, the court must draw all reasonable inferences in favor of the Contestants. The parties do not dispute that AS 15.56.030(a)(2) prohibits giving money or other valuable thing with an intention to persuade a person to vote for a candidate. (Because offering to give money or an other valuable thing can also violate AS 15.56.030(a)(2), we need not distinguish between the Borough's *offer* and its *delivery* of valuable vouchers to voters.) The averments in Northcott's affidavit would support a finding that the Borough, acting through its officials, intended the program to increase the number of votes cast for Candidate Knowles. Consequently, the question we must answer is whether AS 15.56.030(a)(2) prohibits a candidate-neutral program which gives or offers to give a thing of value in a manner that encourages persons who might otherwise not have voted to go to the polls and cast their votes for candidates for whom they were already inclined to vote.

[10, 11] We give the language of AS 15.56.030 its ordinary meaning when interpreting the statute because the language has not acquired a peculiar meaning through statutory definition or previous judicial construction. *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1201 (Alaska 1989); *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983). Alaska Statute 15.56.030(a)(2) prohibits offering a thing of value to a person "with the intent to induce the person to vote for" a candidate. The most common legal definition of "induce" is "to lead on, to influence, to prevail on, to move by persuasion or influence, to bring on or about, to effect, to cause." *See Commonwealth v. Mason*, 381 Pa. 309, 112 A.2d 174, 176 (1955) (defining "induce" as "to lead on; to influence; to prevail on; to move on by persuasion or influence ...; to bring on or about; to effect; to cause."); *People v. Drake*, 151 Cal.App.2d 28, 310 P.2d 997, 1003 (1957) (using same definition); *La Page v. United States*, 146 F.2d 536, 538 n. 2 (8th Cir.1945) (using same definition as *Drake*); *State v. Cook*, 139 Ariz. 406, 678 P.2d 987, 989 (1984) (the generally accepted meaning of "induce" is, "to lead on; to move by persuasion or influence"); Black's Law Dictionary 775 (6th ed. 1990) ("To bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on"); Webster's New Collegiate Dictionary 587 (1974) ("to lead on: move by persuasion or influence;" "to call forth or bring about by influence or stimulation"). These definitions connote an alteration of a person's previous inclination.

The terms "induce" and "inducement" appear to have been used most frequently in criminal law, especially in entrapment cases. This usage clearly indicates that inducement requires altering a person's disposition to act in a certain way. *See, e.g., State v. Hansen*, 69 Wash.App. 750, 850 P.2d 571, 579 n. 9 (1993), *reversed on other grounds, State v. Stegall*, 124 Wash.2d 719, 881 P.2d 979 (1994) ("inducement" such as might support entrapment defense, "is government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen will commit offense"); *United States v. Salmon*, 948 F.2d 776, 779 (D.C.Cir.1991) ("Inducement is government behavior that would

'cause[ ] an unpredisposed person to commit a crime.' ") (citation omitted).

[12] In *Oregon Republican Party v. State of Oregon*, 78 Or.App. 601, 717 P.2d 1206, 1208, *remanded for dismissal as moot*, 301 Or. 437, 722 P.2d 1237 (1986), the court held that providing postage-paid envelopes which recipients could use to return requests for absentee ballots to the Republican Party's headquarters, did not constitute an inducement to vote under O.R.S. 260.665(2)(a). That statute prohibits inducing a person to register to vote. The court reasoned that because "[i]nducement implies the promise of an advantage as a result of performing the desired act," the advantage offered must have an independent value to the voter. *Id.* Without an independent value in exchange for the performance of the act, the thing offered did not induce the act of registering, but rather facilitated registration. *Id.* Applying the Oregon court's definition of inducement to this case, to prevail here Contestants must show that something of independent value—gasoline—was offered to encourage voters to cast their ballots for a candidate they would not otherwise have selected. It is insufficient that something of value was offered in exchange for inducing voting per se, because under Alaska law it is legal to compensate a person for voting per se.

Unless improperly influenced, voters will cast their ballots in accordance with their own criteria. No doubt voters are influenced by such legitimate criteria as their own socio-economic status and community values. Thus, residents of any given community may naturally tend to favor a particular candidate. Persons whose votes are facilitated by candidate-neutral transportation assistance programs will likely vote for the same candidates they would have favored if they had reached the polls without assistance. Potential voters who could benefit from transportation assistance may share beliefs or values which tend to favor a particular candidate. It is not surprising that some candidates or organizations employ transportation assistance programs to target persons of a particular socio-economic status or party registration, just as other candidates or organizations may employ other programs, such as absentee ballot assistance, hoping to maximize participation of voters thought more likely to favor those candidates. *See Oregon Republican Party*, 717 P.2d at 1208 (discussing Republican Party mailing of absentee ballots with postage pre-paid envelope).

When voting, a person must choose one candidate over others. Thus, if the phrase "intent to induce to vote for or refrain from voting for a candidate" in AS 15.56.030 is not read to require an intent to persuade voters to choose candidates for whom they would not otherwise have voted, that statute would have to be construed as prohibiting payments for voting per se. As discussed previously, such a reading of the statute would conflict with its plain language.

[13] There are many policy arguments for and against the "commercialization" of votes. *See, e.g., Day-Brite Lighting*, 342 U.S. at 428, 72 S.Ct. at 409 (Jackson, J., dissenting) (disagreeing with upholding state statutes which require employers to give employees two hours paid leave in order to vote and disapproving of "state-imposed pay-for-voting system[s]"); Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 Va. L.Rev. 1455 (1994) (discussing dangers to the polity, especially to economically disadvantaged subsets, of vote-buying schemes and contrasting these schemes with voting incentive programs). These policy arguments have already been resolved in Alaska. The election practice statutes enacted by the Alaska Legislature do not proscribe voter incentive programs which involve compensation for voting, even if the sponsor of a program intends and expects that the program will benefit a particular candidate; they only prohibit payments intended to induce, i.e., influence or persuade, persons to vote in a different manner than they would have otherwise. It is not for the courts to second-guess this permissible legislative choice.

[14–16] Applying that choice to the record before us, we find no evidence which would permit a reasonable inference that the persons responsible for the Borough's trans-

portation assistance program intended to induce voters to vote in a particular manner. Most significantly, there was no evidence the program as conducted was not candidate-neutral. Evidence that persons responsible for the program, by encouraging eligible citizens to vote, intended that the program would result in a net gain of votes for Candidate Knowles would be insufficient to prove a violation of AS 15.56.030(a)(2). As written, the statute does not prohibit payment to induce persons to vote who would not otherwise vote, so long as they are not induced to vote in a particular manner. If a program is candidate-neutral in fact, we must presume voters, in the sanctity of the voting booth, will vote as they would have had they made their ways to the poll without assistance or inducement.[11]

2. *The alleged violation of federal election law is not grounds for contest under AS 15.20.540*

Contestants assert that they can challenge the election under AS 15.20.540 because the Borough's program violated federal law.

Although a candidate-neutral program which offers compensation to encourage voting per se does not violate Alaska law, it appears to violate federal election law. *See* 42 U.S.C. § 1973i(c), *supra* note 8. That does not necessarily mean, however, that a given federal violation is ground for an Alaskan election contest.

The State and the Borough argue that the Alaska and federal election statutes do not make the violation of a federal criminal election statute a basis for invalidating an election. The State notes that election contests based on the acts of third parties must show that the third party committed a "corrupt practice" as "defined by law." AS 15.20.540(3). The State argues that the Alaska Legislature has expressly defined specific acts as "corrupt practices," because it included the phrase 'violation of this section is a corrupt practice" in particular election statutes. *See, e.g.*, AS 15.56.010(b); AS 15.56.030(b); AS 15.56.035(b). The State reasons that given the legislature's careful attention to this classification, it clearly did not designate the violation of federal criminal election law as a corrupt practice.

Contestants do not respond to these assertions. It would be inconsistent for the legislature not to prohibit candidate-neutral payments made to encourage voting, *see supra*, discussion of AS 15.56.030(a)(2), yet to regard such payments as a "corrupt practice" sufficient to set aside an election, whether or not they violated federal law. It is also unlikely the legislature would have considered acts violating federal election law, but not Alaska's election statutes, to be "corrupt practices as defined by law," given that the federal election statutes do not use that phrase. The absence of that phrase or some close equivalent in the federal election statutes tends to confirm that the Alaska Legislature did not intend that AS 15.20.540(3) election contests could be based on acts that violated federal, but not Alaska, election statutes.

[17, 18] We hold that an alleged violation of a federal election statute by a third party is not an independent ground for an election contest under AS 15.20.540(3). A violation of 42 U.S.C. § 1973i(c) by a person other than an election official can be ground for an election contest under AS 15.20.540(3) only if the violation is also a "corrupt practice" as defined by Alaska election law.[12]

11. The record reflects three other programs that offered potentially valuable consideration to persons who voted in the 1994 election. A private travel agent in Fairbanks gave $40 air fare discounts to 120-25 customers presenting a 1994 ballot stub on November 8 or 9, 1994. The Anchorage Chamber of Commerce offered a drawing for various prizes, including two round trip tickets, to persons submitting their ballot stubs; approximately 4,415 people entered that drawing. The Municipality of Anchorage People Mover bus system accepted an unknown number of riders' ballot stubs the day after the election in exchange for trips of any length, all day. There is no indication in the record that any of those programs was not candidate-neutral.

12. Contestants also argue that there was election "malconduct" by State election officials under AS 15.20.540(1) because the Borough's program violated federal law and State officials approved that program. Having reviewed the record, we are persuaded that there is no genuine fact dispute, and that no State election official condoned or approved the program as it was actually conducted by the Borough. The trial court did not err in entering summary judgment against Contestants on this claim.

B. *Postcard Mailed to Doyon Shareholders*

The Tanana Chiefs Conference, Doyon, Limited and the Fairbanks Native Association (TCC/Doyon/FNA) mailed a postcard to Doyon shareholders before the election. One side of the postcard offered to persons who submitted an entry on the 1994 ballot stub, or similarly-sized piece of paper, an opportunity to participate in a drawing for one thousand dollars in cash. Participants had to submit entries to their tribal counsel office by noon the day after the election. Neither TCC, Doyon, nor FNA endorsed any candidate for governor in the November 8 general election. However, the other side of the postcard encouraged Native Alaskans to vote. This side stated that "It is *very important*" to vote and that "one vote does make a difference." It asked people to encourage their friends and relatives to vote in the general election. The following statement was centered on this side of the postcard: "At this year's Alaska Federation of Natives convention, Native delegates from across Alaska overwhelmingly endorsed Tony Knowles for governor." Contestants argue that the postcard and the drawing it advertised violated Alaska election law.

1. *Absence of language required by statute*

Contestants argue that the postcard violates Alaska election law because it did not bear the words "paid for by," as required by AS 15.56.010.[13] The State argues that the postcard satisfies the purpose of AS 15.56.010 and that its distribution should thus not be considered a "corrupt practice" under AS 15.20.540.

Because the postcard was distributed by persons other than election officials, Contestants must demonstrate that its distribution was a "corrupt practice," not simply "malconduct." AS 15.20.540(1) & (3).

[19] We first consider the significance of the omission of the information required by AS 15.56.010. This court has held that the term "malconduct" as used in AS 15.20.540 means a "significant deviation from statutorily or constitutionally prescribed norms." *Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978) (citing *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972)). Although *Hammond v. Hickel* involved claims of official malconduct rather than third-party corruption, given our prior holding that election statutes will be liberally construed to uphold the will of the electorate, *Carr v. Thomas*, 586 P.2d 622, 626 n. 11 (Alaska 1978), we choose to apply *Hammond*'s requirement of a significant deviation from statutory norms to all grounds for an election contest under AS 15.20.540.

[20] In this case, assuming the language of the postcard was "intended to influence the election of a candidate," no significant statutory deviation occurred. AS 15.56.010(a)(2). The statute presumably requires that the postcard bear the words "paid for by" and the sponsor's name and return address.[14] However, the postcard identified its source, and also identified the Alaska Federation of Natives (AFN) as a supporter of Candidate Knowles. Thus, the apparent purpose of AS 15.56.010—to promote an informed electorate and to allow

13. AS 15.56.010(a)(2) provides that "[a] person commits the crime of campaign misconduct in the first degree if the person":

> knowingly prints or publishes an advertisement, billboard, placard, poster, handbill, paid-for television or radio announcement or other communication intended to influence the election of a candidate or outcome of a ballot proposition or question without the words "paid for by" followed by the name and address of the candidate, group or individual paying for the advertising or communication....

14. The State argues that AS 15.56.010 does not apply to the postcard because the postcard does not encourage voting for any particular candidate and because AS 15.56.010 does not apply to mailings from corporations to their investors. It is unnecessary for us to address those two arguments because we hold that distributing the postcard in violation of AS 15.56.010 was not a "corrupt practice" under AS 15.20.540.

Given our resolution of this issue, we do not find it necessary to consider whether, in light of *McIntyre v. Ohio Elections Commission*, — U.S. —, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (holding that an Ohio statute prohibiting distribution of anonymous campaign literature violated the First Amendment), AS 15.56.010 is valid. No party argues that it is not.

voters to evaluate the solicitations they receive—was substantially met. *Cf. Messerli v. State*, 626 P.2d 81, 87 (Alaska 1980) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.") (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 792 n. 32, 98 S.Ct. 1407, 1424 n. 32, 55 L.Ed.2d 707 (1978)).

[21] Since distribution of the postcard did not significantly frustrate the purposes of AS 15.56.010, it cannot be said that the deviation from that statute was a "corrupt practice ... sufficient to change the results of the election" for the purposes of AS 15.20.540. Even assuming the deviation was sufficient to support a misdemeanor charge of violating AS 15.56.010, we hold that a technical failure to comply strictly with that statute is not sufficient to invalidate ballots where the purpose of the statute has been satisfied. *See Carr*, 586 P.2d at 625–26 (citing the "well-established policy which favors upholding of elections when technical errors ... do not affect the result of an election," and recognizing that courts are reluctant to permit a wholesale disfranchisement of qualified voters where a reasonable construction of the statute can avoid such a result). Consequently the failure to indicate on the postcard who paid for it is not ground for an election contest under AS 15.20.540(3) in this case.

2. *Legality of postcard mailing*

[22, 23] We must next consider whether mailing the postcards was a corrupt practice on the theory that the postcards offered something of value and were distributed with an intent to influence the way voters cast their ballots, in violation of AS 15.56.030.[15] In response the State asserts that the drawing cannot have violated AS 15.56.030 because not only was participation in the drawing not contingent on a vote for Candidate Knowles, but drawing participants were not required to vote at all. The State reasons that because it was not necessary to vote to enter the drawing, entry in the drawing cannot be construed as a payment in exchange for the participant's vote. The trial court held that distributing the postcard "did not constitute a corrupt practice," and granted partial summary judgment to the State on that issue.

Insofar as is pertinent here, AS 15.56.030(a)(2) is violated when a person "[1] offers ... [2] money or other valuable thing [3] to a person [4] with the intent to induce the person to vote for or refrain from voting for a candidate...."

[24] By prominently mentioning the AFN's endorsement of Candidate Knowles, the postcard potentially encouraged recipients to vote for a particular candidate. This facially non-neutral message is evidence of an intent to induce persons to vote for a person they might not otherwise have favored. This non-neutral message distinguishes it from the North Slope Borough's transportation assistance program. The drawing offer conse-

15. The dissenting opinion suggests that we should refuse to reach this issue, on the theory Contestants have not squarely argued in their brief that the mailing of the postcard was a corrupt practice under AS 15.56.030(a)(2).

This court has discretion to reach an issue which has been inarticulately briefed by one party, especially where we, the trial court, and the opposing party have all been adequately notified that the matter is at issue on appeal. *Ratcliff v. Security Nat'l Bank*, 670 P.2d 1139, 1141 n. 4 (Alaska 1983).

Contestants' complaint and statement of points on appeal raise the question of whether the Doyon postcard violated AS 15.56.030. Contestants repeatedly invoke § .030; they twice quote § .030(a)(2) in their opening appellate brief. Contestants squarely argued that in the context of 42 U.S.C. § 1973i(c) the postcard offered something of value. In their memorandum opposing the State's cross-motion for summary judgment, Contestants argued that the postcard demonstrated an intent to encourage people to vote for a particular candidate. These are the two issues critical to determining whether distributing the postcard was a corrupt practice in violation of AS 15.56.030(a)(2). The State presented its position on § .030(a)(2) in its brief and memoranda before this court and the superior court.

While such a relatively oblique discussion of an issue might not always be sufficient under the facts of this case we find that Contestants adequately raised the question of whether mailing the postcards violated AS 15.56.030(a)(2). We would be remiss in failing to reach this issue, especially considering that if we do not, persons may needlessly violate the statute and jeopardize future elections.

quently comes closer to offering a thing of value, a chance to win one thousand dollars, to encourage a vote for a particular candidate.[16]

We hold that the drawing offer potentially violated AS 15.56.030(a)(2), because it was accompanied by a non-neutral message. Given that message and the State's failure to demonstrate that there was no intention to induce voters to vote for a particular candidate, the trial court could not say as a matter of law that the mailing did not violate AS 15.56.030(a)(2).[17] The issue consequently could not be resolved on summary judgment.

3. *Effect of postcard on election*

We next consider whether the State was entitled to summary judgment on the alternative theory that the postcard did not affect the outcome of the election. *See Wright v. State*, 824 P.2d 718, 720 (Alaska 1992) (holding that "this court is not bound by the reasoning articulated by the trial court and can affirm a grant of summary judgment on alternative grounds"). The trial court did not reach this issue, having held as a matter of law that the postcard did not constitute a corrupt practice. We conclude that the record does not permit us to uphold the summary judgment on this alternative ground.

Assuming the TCC/Doyon/FNA drawing solicitation violated AS 15.56.030, to prevail at trial Contestants would have to show that the violation was of a magnitude "sufficient to change the results of the election." *See* AS 15.20.540(3); *Boucher*, 495 P.2d at 80.

Contestants moved for summary judgment, and argued in support that mailing the postcards to "thousands of individuals is sufficient to permeate the entire election with misconduct...." Contestants did not then or later offer any evidence that the mailing affected the outcome of the election.

In opposing Contestants' motion for summary judgment and cross-moving for summary judgment, the State offered evidence that fewer voters, and a lower percentage of the registered voters, cast ballots in House District 36, the Rural Interior District, in the 1994 general election than in the 1992 general election. The State offered the affidavit of a State labor economist who affied that "[t]he Alaska Native population of House District 36 includes American Indians in the Doyon Alaska Native Regional Corporation (ANRC) region of the interior, as well as Eskimos of the Calista ANRC Region." The economist identified other House Districts with other regional corporations. The State also offered the affidavit of TCC's general counsel. He affied that TCC is a "consortium of Interior Native villages and associations, and [is] the sponsoring regional organization under the Alaska Native Claims Settlement Act" for Doyon, whose shareholders and their descendants are Native members of the TCC member villages and associations. From this evidence, the State argued in support of its cross-motion that "District 36 includes the Doyon region of the Interior" and that many

16. Although the actual value of a chance to win one thousand dollars is potentially small, depending upon the number of drawing entrants, the perceived value of the chance to win a one thousand dollar drawing may be considerably higher in the eyes of potential participants. No party has argued that a chance to win one thousand dollars does not constitute an "other valuable thing" under AS 15.56.030(a)(2). *Cf. Naron v. Prestage*, 469 So.2d 83 (Miss.1985) (approving a candidate's cash drawing offer sent to registered voters). Given the State's failure to assert the existence of a genuine issue of material fact in response to Contestants' assertion (in the context of 42 U.S.C. § 1973i(c)) that the postcard offered something of value, we find the dissenting words of Chief Justice Patterson in *Naron* persuasive:

> In my opinion, the offer of a chance to win cash by pursuing the citizen's duty to vote is little different from an offer to pay cash, in whatever amount, for a citizen to vote. The hope of winning something for little, if any, cash outlay has great popular appeal as is established by the growing popularity of state lotteries for greater tax revenues.

469 So.2d at 88. There is no genuine dispute regarding the value of the offer the postcards transmitted in this case. We do not find it necessary to decide here whether an offer of participation in a cash-prize drawing is always an offer of an "other valuable thing" under AS 15.56.030(a)(2).

17. Contestants also allege that the postcard violated 42 U.S.C. § 1973i(c). As discussed in part A2, *supra*, violation of a federal election statute is not an independent ground for an election contest under AS 15.20.540(3).

of the voters participating in the drawing voted in District 36. It argued that this information established that the drawing did not affect the election outcome.

Contestants have produced no evidence that the drawing solicitation influenced enough votes to change the outcome of the election. They simply assert that if the votes of all postcard recipients were awarded to Candidate Campbell, the result of the election would be changed. Although Contestants asserted in their opening appellate brief that the number of voters who received postcards can be determined exactly, so far as the record reveals, Contestants never conducted the discovery or analysis necessary to count the postcard recipients who voted and the record permits no inference about how many postcard recipients or drawing participants voted. Contestants candidly stated during oral argument before us that the record contains no evidence about how many people participated in the drawing. No evidence in the record permits an inference that the drawing actually affected the ballot cast by even one person who received a postcard. Likewise, no evidence in the record permits an inference about how many, if any, ballots were cast for Candidate Knowles or any other candidate as a result of the postcard mailing.

The Contestants' failure to produce any such evidence, however, is not necessarily determinative of this issue, because we must here decide whether summary judgment should have been granted to the State over the Contestants' arguments that there were genuine fact disputes about the effect of the postcard on the election.

[25] In accordance with the principles now governing summary judgment in Alaska, the State, as the cross-movant seeking summary judgment, had the initial burden of making a prima facie showing that the postcard mailing did not affect the election. *See Yurioff v. American Honda Motor Co.*, 803 P.2d 386, 389 (Alaska 1990); *Bauman v. State, Dep't of Family and Youth Servs.*, 763 P.2d 1097, 1099 (Alaska 1989) ("[T]he proponent of a summary judgment motion has the initial burden of establishing the absence of genuine issues of material fact and his or her right to judgment as a matter of law."). *See also* Alaska R.Civ.P. 56.

[26] The facts submitted by the State in support of its cross-motion were relevant, and would, if unexplained and unrebutted, tend to support an inference the mailing did not increase the voter turnout, and therefore did not affect the election results. Nonetheless, the facts produced by the State did not amount to a prima facie showing that the alleged violation did not affect the election outcome. Simply showing that fewer District 36 voters participated in the general election in 1994 than in 1992 was insufficient because the State offered no evidence that turnouts in the two elections could be compared directly or that no other, independent circumstances may have depressed the District 36 turnout in 1994 or increased it in 1992. It offered no evidence about how many Doyon shareholders were registered voters in District 36, or how many Doyon shareholders voted in either election in that or any other district. Furthermore, the figures offered by the State indicated that the percentage of District 36 registered voters who voted in 1992 was *lower* than the statewide average that year, but that the percentage turnout there in 1994 was higher than the 1994 statewide average, a phenomenon that may undercut the State's assertion that the postcard did not influence the turnout in that district. The State's own evidence did not require a conclusion that the postcard did not influence the election outcome.

Moreover, the State's showing was not unrebutted. Contestants offered an affidavit executed by a person identified on Contestants' witness list as an expert in Alaska elections. He affied that the 1994 voter turnout should be compared to the turnout in 1990, since both were non-presidential election years. That opinion was sufficient to cast into doubt any direct comparison of voter participation in 1992 and 1994.

In a statement of genuine issues, Contestants asserted that mailing the postcards was a "corrupt practice" and that "corrupt practices" of TCC, FNA, and Doyon "injected extensive bias into the results of the 1994 governors [sic] election." They asserted the

cash drawing introduced sufficient corrupt practices into the election through extensive bias that "it could and probably would change the result of the election if eliminated." They also asserted that the corrupt practices "have introduced extensive bias into the 1994 governors [sic] election that requires a new election for the governor of Alaska."

We have stated that "every reasonable presumption will be indulged in favor of the validity of an election." *Turkington v. City of Kachemak*, 380 P.2d 593, 595 (Alaska 1963). *See also Hammond* 588 P.2d at 260 (although malconduct may have impeached integrity of election process and placed true outcome "in doubt," malconduct not sufficient grounds for new election where more concrete standards do not indicate that the votes affected are sufficient to change the result of the election); *Bouchier*, 495 P.2d at 86 n. 20 ("The presumption of validity given to elections and the diffidence with which the court attacks the results thereof places a heavy burden on the trial judge."); *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968) (election contestant must strictly observe contest procedures because public policy demands that election results have stability and finality).

Given our conclusion that it was error to grant summary judgment to the State on the issue of whether the postcard violated AS 15.56.030, we could affirm this portion of the summary judgment only if we could conclude that the State made out a prima facie showing that any violation was not of sufficient magnitude to affect the election result. Because the State, as the movant, did not make that showing, it did not establish that it was entitled to judgment as a matter of law and did not establish the absence of any genuine issue of material fact. It was not entitled to summary judgment on this issue, and we cannot affirm the judgment on this alternative ground on the basis of the record before us.

C. *Prudhoe Bay Absentee Voting Station*

The State decided in August 1994 to close the Prudhoe Bay absentee voting station, citing a decrease in transient population which no longer justified the cost of sending election workers to Prudhoe Bay and renting space to operate the absentee voting station. The State requested preclearance from the United States Department of Justice Civil Rights Division before it closed the absentee voting station. The Department of Justice replied that it had no objections to the closure. The State notified the oil extraction employers in the area that the station would be closed and trained these employers to assist voters in registering and distributing absentee ballot applications.

The day before the November 8 election, the Director of Elections decided to open the Prudhoe Bay absentee voting station after receiving several phone calls requesting that it be opened. The Director of Elections sent two election workers to the voting station on election day. The Division originally intended that the voting station would operate on November 8 until 5:00 p.m., but at 4:30 p.m., after consulting with the Division of Elections, the on-site election workers decided to extend the voting station's hours until 8:00 p.m. to accommodate voters who had been waiting in a two to three hour waiting line. Approximately seventy-five people voted at the voting station between 5:00 p.m. and 8:00 p.m., and the wait was reduced significantly by 7:30 p.m. A total of 308 people voted at the station.

Contestants argue that the Division of Elections' last minute decision to open the station "created a two to three hour waiting period," raising a question of "how many Prudhoe Bay workers wanted to vote but did not vote or could not vote due to the unreasonable wait imposed by the State." Contestants offer no evidence that voters *could not* vote because of the long wait, but do provide affidavits of two Prudhoe Bay workers who affied that they *did not* vote because they were unwilling to endure the hours-long waiting period. The State argues that the Director of Elections is given the authority to designate and supervise voting stations and that the Director properly exercised this discretion both in deciding to close the Prudhoe Bay station and in directing the station's operation on election day.

[27] We have never held that an "unreasonable" wait at an absentee voting station, in itself, can be considered election malconduct. Nor do Contestants cite any cases to support this proposition. Moreover, it does not appear that the wait at the absentee voting station resulted from a lack of training or from the fact that the Director of Elections' decision to reopen the absentee voting station was made at the "last minute," or that it was otherwise "unreasonable."

The Director of Elections was not required to reopen the absentee voting station at Prudhoe Bay. AS 15.20.045(b).[18] As noted above, the State had decided to close the Prudhoe Bay voting station before the August primary and had trained Prudhoe Bay employers to assist voters in registering and distributing absentee ballot applications. The affidavit of Mark Humphrey, submitted by Contestants, provides evidence that voters at Prudhoe Bay were aware that the Director of Elections had previously decided not to operate the Prudhoe Bay absentee voting station. Contestants do not allege that any voter was unable to obtain, complete, or return absentee ballots by mail before the election. The State made considerable efforts to insure that Prudhoe Bay voters were aware well before election day that they would need to vote by mail.

The State offered evidence that decisions of the Division of Elections to reverse its original course and open the absentee voting station, and then to extend the station's hours, were made in good faith and were intended to accommodate, and in fact did accommodate, voters who would not have been able to vote because they had failed to return absentee ballots by mail. AS 15.20.081. Contestants have offered no facts creating a genuine fact dispute about those matters.

Furthermore, although the decision to open the station was made only the day before the election, Contestants do not allege that an earlier decision would have alleviated the wait on election day. Nor is there any evidence that the election workers were inadequately trained or unable to perform their duties. To the contrary, one of the employers which had requested that the absentee voting station be opened wrote to the Division of Elections commending the election workers. The letter noted the hard work of the Division staff, and thanked the Division for setting up the voting station on such short notice. The employer stated that "everyone I spoke with was happy they were able to vote."

In the context of an absentee voting station and under the facts presented by both parties, the good-faith operation of the Prudhoe Bay station is not malconduct even though voters had a long wait. *See Hammond v. Zickel*, 588 P.2d at 259 ("evidence of an election official's good faith may preclude a finding of malconduct under certain circumstances") (citing *Turkington*, 380 P.2d at 595).

IV. *CONCLUSION*

We hold that the Borough's transportation assistance program did not violate AS 15.56.030(a)(2). We further hold that it was error to grant summary judgment to the State on Contestants' claim that the distribution of the postcard to Doyon shareholders was a corrupt practice under Alaska's election laws. We decline to affirm the summary judgment on that claim on an alternative theory that the postcard did not alter the outcome of the election since the State failed to meet its burden of proof on this issue. Finally, we hold that the State's operation of the Prudhoe Bay voting station did not constitute election malconduct.

We consequently REVERSE that portion of the summary judgment dismissing Contestants' claim regarding the postcard sent to Doyon shareholders. This issue is remanded for further proceedings not inconsistent with this opinion. We AFFIRM that portion of

18. AS 15.20.045(b) provides:

> The director may designate by regulation adopted under the Administrative Procedure Act (AS 44.62) locations at which absentee voting stations will be operated on election day and on other dates and at times to be designated by the director. The director shall supply absentee voting stations with ballots for all election districts in the state and shall designate absentee voting officials to serve at absentee voting stations.

the summary judgment dismissing all other claims asserted by Contestants.

COMPTON, Justice, dissenting in part.

I dissent from section III.B.2 of the court's opinion. In that section the court reverses the trial court's grant of summary judgment in the State's favor on the issue of whether the TCC/Doyon/AFN postcard mailing violated AS 15.56.030(a)(2), even though Contestants never argued this issue on appeal. I would hold that the issue of whether the postcard mailing violated AS 15.56.030(a)(2) should not be considered, because Contestants failed to raise it.

In their brief, Contestants assert generally that "[t]he mailing [of the postcard] itself constitutes federal criminal violations under 18 U.S.C. section 597, [and] 42 U.S.C. section 1973i(c). Additionally, it is a corrupt practice as defined in A.S. 15.20.540, A.S. 15.56.010, and A.S. 15.56.030." Contestants then assert specifically a violation of AS 15.56.010, which requires the words "paid for by" on any communication intended to influence an election. Following this, Contestants focus entirely on 42 U.S.C. § 1973i(c), the so-called federal "cash for vote" prohibition. They cite federal cases and *Federal Prosecution of Election Offenses* (5th ed. 1988), which analyzes section 1973i(c).

Contestants never assert that the cash drawing announced in the postcard violates AS 15.56.030(a)(2), nor do they assert that the alleged federal law violation is a violation of AS 15.56.030(a)(2). Their general assertion, offered without elaboration, that "[t]he mailing ... is a corrupt practice as defined in ... A.S. 15.56.030" is the sum total of their argument on this issue. We require more than this under the waiver rule. *See, e.g., Wirum & Cash Architects v. Cash*, 837 P.2d 692, 713–14 (Alaska 1992) ("Where a point is not given more than a cursory statement in the argument portion of a brief, the point will not be considered on appeal.").

The court notes, as one justification for addressing the purported violation of AS 15.56.030(a)(2), that the State "presented its position" on the issue. Op. at n. 15. While it is true that in its argument the State cites to AS 15.56.030(a)(2)—something Contestants never do—it only does so as p[illegible] of its larger argument that the postcard mailing did not violate the "corrupt practice" provision of AS 15.20.540(3). Furthermore, the focus of the waiver rule is on whether the *proponent* of a point has raised and adequately briefed it. The State's reference to AS 15.56.030(a)(2) did not relieve Contestants of their responsibility under the waiver rule to raise and brief the purported violation of that provision if they wished the court to consider it.

The other justification the court offers for addressing the AS 15.56.030(a)(2) issue is that, by doing so, it may prevent persons from "needlessly violat[ing] the statute and jeopardiz[ing] future elections." Op. at n. 15. Yet, on the "two issues critical to determining whether distributing the postcard was a corrupt practice," *id.*, the court (1) declines to decide whether a cash-prize drawing is always an offer of a "valuable thing;" and (2) remands the case for a determination of whether AFN intended to influence voters to vote for a particular candidate. Op. at 569–70 and n. 16. The court announces no new principle of law, nor does it resolve any of the key legal issues arising under AS 15.56.030(a)(2); it simply holds that the trial court erred in granting summary judgment in the State's favor on the AS 15.56.030(a)(2) issue. The court therefore does not accomplish what it sets out to do: In the future, a party contemplating a cash-prize drawing scheme will still not know whether such a scheme is permitted under AS 15.56.030(a)(2), and may therefore "needlessly violate the statute."

I might be persuaded that a "public interest" exception to the waiver rule should be adopted, were the court to propose one. It may well be that litigants should not be deprived of review of issues relating to strong public policy, affecting the citizens of the state as a whole, simply because the issues have not been adequately raised by counsel. On the other hand, in this case the court has embraced once again the rule that "every reasonable presumption will be indulged in favor of the validity of an election," citing *Turrington v. City of Kachemak*, 380 P.2d 593, 595 (Alaska 1963). If we are to indulge every reasonable presumption in fa-

vor of the validity of the election, the failure of the Contestants to raise the AS 15.56.030(a)(2) issue must constitute a waiver of that issue.

The court's resolution of the AS 15.56.030(a)(2) issue is troublesome for reasons other than that it cannot be said fairly that the issue was raised by Contestants. First, the court provides virtually no guidance to the superior court on how to address the issue on remand. For example, the court does not declare whether the intent to induce is to be determined by applying an objective or a subjective standard.

Second, the court holds that "there is no genuine dispute regarding the value of the offer the postcards transmitted in this case." Op. at n. 16, without any evidence in the record that the cash drawing at issue is a valuable thing to the target voting group. The court rests its holding on the assumption that: "[a]lthough the actual value of a chance to win one thousand dollars is potentially small, depending upon the number of drawing entrants, the perceived value of the chance to win a one thousand dollar drawing may be considerably higher in the eyes of potential participants." *Id.* In deciding previous election contests, we have relied on expert testimony or other evidence, rather than mere conjecture, to determine whether election laws were violated. *See, e.g., Boucher v. Bomhoff*, 495 P.2d 77, 81 (Alaska 1972) (voiding vote on constitutional convention referendum; decision based in part on expert testimony that the misleading ballot language biased voters). Today the court strays from this practice, and bases its holding that the drawing offered a valuable thing on nothing more than its own sense of what the drawing participants may have perceived.

After holding that there can be no genuine dispute that the cash drawing in the present case was an offer of a valuable thing, the court states, as previously noted, that it need not decide whether a cash drawing is *always* an offer of a valuable thing. Op. at n. 16. If the court is not prepared to say that a cash drawing is always an offer of a valuable thing, how can it say, without supporting evidence, that the cash drawing in this case is an offer of a valuable thing? If a cash drawing is not *always* an offer of a valuable thing, then the question must be factual. If so, its resolution should be left to the trial court.

This is the mischief played when courts take it upon themselves to address issues to which the litigants have paid scant, if any, attention. When there are no criteria to guide a court in addressing an issue not raised by the litigants, "the decision whether a litigant gets a new trial becomes wholly arbitrary." *Clark v. Greater Anchorage, Inc.*, 780 P.2d 1031, 1039 (Alaska 1989) (Compton, J., dissenting in part).

Contestants have not raised a claim that the postcard mailing violated AS 15.56.030(a)(2). Their sweeping assertion that the mailing constituted a corrupt practice under AS 15.56.030 does not ever address subsection (a)(2). They have failed utterly to argue that the cash drawing was "money or [an]other valuable thing" offered "with the intent to induce the [voter] to vote for or refrain from voting for a candidate." Because they have failed to argue this point, the court should not consider it. I would affirm the judgment of the superior court.