

ALASKA LEGISLATURE COMMITTEE FILES 2007-2008 SJUD 12543

# Unfounded “Concerns”

- Shippers bear all of the financial risks of project cost overruns
  - Negotiated rates – risk sharing may be included
  - Firm transportation
  - Rockies Express model

# Unfounded “Concerns”

- **Producers must have economic certainty**
  - **Supply/upstream – as certain as it gets**
  - **Pipeline/midstream – negotiated rates**
  - **Market/downstream – a normal business risk**

# Unfounded “Concerns”

- **Producers are the only ones qualified to construct the project**
  - **Producers do not normally construct or own onshore natural gas pipelines in the Lower 48**
  - **Pipeline companies execute large projects frequently and for a living – Rockies Express**
  - **North American pipeline companies are very familiar with applicable regulatory requirements**

# Unfounded “Concerns”

- Schedules with milestone dates drive up the project cost – “firm dates are bad”
  - Realistic schedules are a project necessity
  - Projects without schedules tend to go on indefinitely
  - Schedules can be (and are) adjusted as circumstances change – subject to evaluation of overall business financial impact

# Other Unfounded “Concerns” and issues

- Leading edge technology is required to reduce project costs
- Mega projects are “different
- AGIA requirement for a “detailed” project description is premature and costly
- Currently proposed schedule may be able to be shortened

# **Alaska Natural Gas Pipeline Project**

**Comments of  
Rick Harper  
*Adviser to the Legislature***

**Senate Judiciary Committee  
May 7, 2007**

- Proposed Alaska gas pipeline will serve well developed markets and connect to a mature downstream infrastructure
- The proposed pipeline will access substantial proven reserves and stimulate unprecedented gas focused exploration in Alaska
- Producers have an existing obligation to develop, market, and account for the proven and potential reserves under the leases
- A reasonable expectation of "profit" for the producers has been established
- Producers have an obligation to take into account the state's interest as a lessor
- Producers utilize a variety of economic and financial indicators – NPV is the predominant factor in decisions
- No commitment of supplies is required to certificate and build an interstate natural gas pipeline
- A natural gas pipeline is supported by commitments to ship on a firm basis
- The obligation to make firm "demand charges" begins when the pipeline is placed in service – i.e. when gas flows
- Natural gas pipelines are not generally considered high risk propositions
- Utilities, electric generators, marketers, industrials, producers routinely make FT commitments depending on circumstances
- Producers have the opportunity to own natural gas pipelines but typically avoid the investment
- Pipeline transportation costs [either firm or interruptible] are expenses associated with the marketers of product and are quantifiable

- An FT commitment does not constitute debt
- The expenses associated with natural gas transportations is one factor in determining production viability
- FT and other transportation related expenses facilitate the monetization of oil and gas assets
- FT is not a take or pay obligation
- Long term FT commitments represent real opportunity and are part of managing risk
- FT subscribers do not bear all the risk of project overruns
- FT is generally regarded as an obligation by industry but not as a "risk"

**SB**

**104**

**(FILE 4)**

# Alaska State Legislature

**Senator Hollis French, Chair**  
State Capitol, Room 417  
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**Committee Members:**  
Senator Charlie Huggins  
Senator Bill Wielechowski  
Senator Lesil McGuire  
Senator Gene Therriault

## Senate Judiciary Committee

### SB 104 - Natural Gas Pipeline Project

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# STATE OF ALASKA

SARAH PALIN, GOVERNOR

## DEPARTMENT OF LAW

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March 13, 2007

The Honorable Hollis French, Chair Senate Judiciary  
Alaska State Legislature  
State Capitol, Room 417  
Juneau, AK 99801-1182

The Honorable Jay Ramras, Chair House Judiciary  
Alaska State Legislature  
State Capitol, Room 118  
Juneau, AK 99801-1182

Re: AGIA Gas Production Tax Exemption

Dear Senator French and Representative Ramras:

I was recently asked in the Senate Judiciary committee about the extent to which the gas production tax exemption in article 3 of the Alaska Gasline Inducement Act (AGIA), SB 104 and HB 177, may provide fiscal certainty to parties that commit gas in the first binding open season of an AGIA project.

The current major North Slope producers have long maintained that they require some element of fiscal certainty before they commit their natural gas reserves to the gas pipeline. As you are aware, the previous administration attempted to offer the producers various concessions to provide the "fiscal certainty" they sought in a variety of ways through its proposed Stranded Gas Development Act (SGDA) contract. In my opinion these concessions went too far – both in terms of good public policy and the Alaska Constitution. I do not believe that a contractual lock-up of the state's fiscal system and other elements of state sovereignty for over three decades is either in the public's interest or supported by Art. IX, Sec. 1 of the Alaska Constitution.

The SGDA contract proposed by the Murkowski administration was extremely broad in its proposed contracting away of Alaska's sovereign powers of taxation. The operating assumption of the contract was exclusion from all state and local taxes unless specifically listed. For example, the SGDA contract would exempt North Slope producers from "any Tax on their oil and gas related business activity" subject to specific

exceptions under the contract, such as the capped tax under the fiscal stability cap and certain fixed payable taxes for items such as vessel taxes.

The proposed contract also contained other provisions antithetical to state sovereignty. These included restrictions on Regulatory Commission of Alaska authority over the project; requiring the state to arbitrate disputes that would otherwise be subject to state regulatory procedures or state judicial review; agreement that judgments against the state can be enforced in courts outside of Alaska; indemnification of tax payments made by the North Slope producers; and allowing offset of tax payments directly against state royalty revenues.

The AGIA, by contrast, is very narrowly focused. It takes a specific and limited approach to reducing the potential for production tax changes for parties that commit their gas to the pipeline licensed under the Act. Article 3 of the AGIA entitles parties that commit gas in the first binding open season to a production tax exemption. This exemption provides a financial cushion against increases in gas production taxes that may be adopted by future legislatures during the first 10 years of operation of the AGIA project and is a reasonable inducement for parties willing to commit gas to the licensed project early on.

Unlike the sweeping provisions in the proposed SGDA contract, the AGIA approach is consistent with the State's past practices and the Alaska Constitution. Several legal principles support this conclusion.

Art. IX, sec. 1 of the Alaska Constitution states: "the power of taxation shall never be surrendered. This power shall not be suspended or contracted away, *except as provided in this article.*"<sup>1</sup> If the sentence "[t]his power shall not be suspended or contracted away, *except as provided in this article*" ended at the comma (as originally proposed during the Alaska Constitutional Convention), there would no question that there is an absolute prohibition on the legislature's authority to provide some tax certainty.<sup>2</sup>

But the sentence does not end there. It contains the clause "*except as provided in this article.*" A basic tenet of statutory construction provides that "every word, sentence,

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<sup>1</sup> Emphasis added.

<sup>2</sup> In fact, the Constitutional Convention rejected the more prohibitive National Municipal League Model State Constitution that stated "[t]he power of taxation shall never be surrendered, suspended, or contracted away" for the current version, which adds the clause "*except as provided in this article.*" 3 Constitutional Studies, PAS Staff Paper 9, Vol. 3, State Finances (1955): Public Administrative Service (P AS) Staff Paper, State Finance, at 15-16.

or provision in a statute was intended for some useful purpose, has some force and effect."<sup>3</sup>

Article IX does not go on to describe specific circumstances under which the power of taxation may be subject to contract, but it does give the legislature broad powers to enact tax exemptions by general law in sec. 4.<sup>4</sup>

To give force and effect to the clause "*except as provided in this article,*" I believe that a court would read sections 1 and 4 together. Thus, the legislature has power to contract away taxing authority as described in sec. 1 through the use of the tax exemptions set out in sec. 4.

This interpretation is supported by the related statutory tenet that "statute[s] should be construed so that effect is given to all its provisions and no part is inoperative or superfluous, void or insignificant."<sup>5</sup> To give effect to the final clause of sec. 1, that the power of taxation shall not be suspended or contracted away "*except as provided in this article,*" art. IX must provide some authority. Article IX, sec. 4, provides authority for the legislature to set a tax exemption by contract. Without this authority, the clause "*except as provided in this article*" would have no meaning.

In fact, the legislature has on several occasions previously provided statutory tax exemptions that were described as having the force of contracts. For example, the Alaska Property Tax Act of 1949 authorized the tax commissioner to exempt new industries from license fees and excise or other taxes for up to 10 years. The 1949 Act "constituted "a contract between the [local] taxing unit, and the owner of the property."<sup>6</sup> Similarly, in 1957, the legislature provided for 10 year tax exemption certificates which, if granted, were deemed to be binding and in full force and effect upon the terms set forth for the period granted.<sup>7</sup> The 1968 Alaska Industrial Incentive Act provided for 10 year tax credits that were "considered a contract between the grantee and the state."<sup>8</sup> The 1957 and 1968 acts remained in effect until 1986.

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<sup>3</sup> *Alaska Transp. Comm'n v. Airpac, Inc.* 685 P.2d 1248, 1253 (Alaska 1984).

<sup>4</sup> Art. IX, sec. 4 describes tax exemptions for real and personal property of the state or its political subdivisions, property used exclusively for non-profit, religious, charitable, cemetery, or other educational purposes, and "other exemptions of like or different kind."

<sup>5</sup> *Homer Elec. Ass'n v. Towsley*, 841 P.2d 1042, 1045 (Alaska 1992).

<sup>6</sup> Ch. 10, SLA 1949.

<sup>7</sup> AS 43.25.010 and 040.

<sup>8</sup> AS 43.26.020 (Repealed § 63 ch 37 SLA 1986).

Like these models, AGIA limits itself to narrowly defined tax exemption. The AGIA not only follows the legislative models described above, but is more directly related to language of art. IX of the Constitution which gives the legislature broad powers to enact tax exemptions. Unlike the proposed SGDA contract, the AGIA stays within the bounds of art. IX and past practices by the legislature.


I recognize that differing opinions on this topic were expressed both within this Department and by legislative attorneys. This is not surprising given the complexity and unresolved nature of this issue. While I believe that the Alaska Constitution provides some limited mechanism for industrial incentives through binding tax exemptions, in my view former Attorney General Marquez's opinion on this topic, while thorough and well researched, reached too far in its conclusions that the SGDA contract would survive constitutional scrutiny. Rather, the most likely and defensible interpretation of Art. IX is that a legislature may agree to some binding tax treatment such as proposed in the AGIA, which is limited to exemptions, is limited in duration, and demonstrably serves an important public purpose.

This issue has not been addressed by an Alaska court. Thus, a party contemplating committing gas to the AGIA project will have to assess for themselves the likelihood that AGIA's production tax exemption would withstand a constitutional challenge. This issue may not be resolved before the first binding open season.

But, in my opinion, the provision would survive such scrutiny. Moreover, in the event that it did not, I have no doubt that future legislatures would honor the strong moral commitment that this legislation represents to parties who are willing to commit to the first binding open season.

I hope this clarifies my views on this subject. Please let me know if you have any additional questions.

Sincerely,

  
Tajis J. Colberg  
Attorney General

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## Cindy Smith

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**From:** infoweb@newshank.com  
**Sent:** Sunday, March 25, 2007 11:17 AM  
**To:** Cindy Smith  
**Subject:** Requested NewsBank Article

Paper: Juneau Empire (AK)  
Title: My turn: Framers share their intentions - Governor's oil pipeline contract runs contrary to Alaska's Constitution  
Author: VIC FISCHER and JACK COGHILL  
Date: July 24, 2006

Debate over the governor's oil tax and gas line contract proposals includes a verbal tug-of-war over what the framers of Alaska's Constitution intended. As delegates to the convention that wrote the constitution, we KNOW what was intended.

Alaska achieved statehood to control its resources after decades of Outside exploitation. No delegate would have considered turning over Alaska's oil and gas resources or strip the Legislature and voters of the right to control the state's tax system, as would happen if the governor, oil companies and their agents managed to stampede the Legislature into a deal that is neither good for Alaska nor will advance pipeline construction.

We have studied the governor's proposals, and we believe that they are a fabulous deal for Exxon, BP and ConocoPhillips.

But, it's a bad deal for Alaska.

It's a bad deal because the companies get excessive control over major Alaska oil and gas resources, they obtain tremendous fiscal benefits, and they provide little in return.

The deal violates Alaska's Constitution, and it provides only limited benefits to Alaska's people. It's bad, because it does not guarantee there will be a gas pipeline. And the deal may not deliver the billions of dollars that are being dangled before us, but it surely puts the state at great risk.

Alaska's Constitution states: The power of taxation shall never be surrendered. But giving up the power to tax oil and gas is exactly what Exxon, BP, and ConocoPhillips demand, and what Murkowski supports in the proposed gas line contract.

Here is why their contract approach fails the taxation provisions of the constitution:

1. Giving up the right to tax oil and gas is clearly a "surrender", and that is patently unconstitutional.
2. The constitution authorizes temporary tax exemptions. The governor's proposals are not "temporary."
3. Only tax exemptions are authorized, not whole new tax regimes.
4. A tax exemption can only be "granted by general law," however, the governor's proposed Stranded Gas Act amendments would result in special legislation, which is prohibited by the constitution.

Alaska's Constitution also directs the Legislature to provide for the utilization and development of the state's resources - including oil and gas - for the "maximum benefit" of Alaska's people.

Does the Governor's deal meet the "maximum-benefit" test?

No. Here are just a few of the horrendous aspects of the proposed contract:

1. There is no commitment to build a gas line. There are no timelines, no benchmarks, no

enforcement provisions, and no real penalties for nonperformance.

2. There's no commitment to provide gas for Southcentral and other parts of Alaska. While four take-out points are provided for, the contract states that "gas does not have to be sold in Alaska."
3. The state agrees to indemnify producers for a variety of obligations and losses not of the state's making, and agrees to subvert the initiative process.
4. The contract repeatedly surrenders state management, regulatory authority, court jurisdiction, and other aspects of state sovereignty to the producers.
5. The state gives up its jurisdiction over existing and future North Slope oil and gas fields, including Point Thompson.
6. Beyond all that, the state accepts PPT tax provisions that, with credits and deductions, will provide a heyday for oil company accountants and attorneys, assuring minimal state revenues, no matter how high oil prices may be or how much the companies earn.

No, Alaskans do not need to sacrifice the public interest and take tremendous fiscal risks in order to develop gas resources. Despite all the rhetoric, the governor's deal with the producers is not going to bring us a gas line in the foreseeable future. .

Legislators should reject the PPT tax proposal. They should during this session adopt a gross production tax for oil, separate from gas taxes. They should reject the contract and Stranded Gas Act amendments. And they should proceed toward a contract that assuredly builds a gas pipeline, deals with gas only, and preserves Alaska's sovereignty.

This is not a matter of politics. It's what's right for Alaska.

&#8226; Jack Coghill and Vic Fischer were elected delegates in Alaska's Constitutional Convention, 1955-56. They both served in the territorial House of Representatives and the Alaska State Senate. Coghill also was lieutenant governor for four years.

Author: VIC FISCHER and JACK COGHILL

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## Senator Hollis French

June 6, 2006

Dear Colleague,

Accompanying this letter is a legal memorandum that I've prepared which looks closely at the question of whether we can, consistent with our state constitution, provide the long term tax certainty requested by the Producers. The short answer is 'no.'

The danger in not confronting this central constitutional issue lies in the cost of delay. We must not take a course which is likely to lead to failure. Embarking on a gas line project which depends on a ruling in favor of tax certainty from our state supreme court is not wise. The overwhelming weight of constitutional history, past and present legal opinion, and established case law points to a ruling from our supreme court that hews to this general legislative truth: one legislature cannot bind the next.

The debate centers on our constitution's explicit prohibition against surrendering, suspending, or contracting away the power of taxation. I refer to this provision as the 'no surrender' clause. Many state constitutions have them. Our constitution does allow for exceptions to this rule, provided that the exceptions are done by 'general law.' The exact sentence reads: *Other exemptions of like or different kind may be granted by general law.* There are no other avenues for providing long term tax certainty. If it can't be done by 'general law,' then it can't be done at all.

Our courts have consistently defined 'general law' to mean 'statute.' Here is an example from the Alaska Supreme Court: "The basis for a home rule charter may be either a constitutional grant of authority, *a general law enacted by the state legislature*, or a combination of both." The obvious point to remember about laws enacted by any given state legislature is that they can be changed by the next one.

A statute enacting a contract does not solve the problem, if the contract provides long term tax certainty. Former Assistant Attorney General Jack Griffin put it this way: "To the extent the legislature may 'contract away' the taxing power, it may do so only by general law, which is to say that the 'contract' is subject to repeal or modification by any future legislature."

The policy behind the 'no surrender' clause came from overly generous long term tax exemptions granted by nineteenth century state legislatures to banks and railroads. When subsequent legislatures tried to alter these exemptions, the effected business interests went to court, claiming that their exemptions amounted to contracts, and that the proposed alteration was in violation of that contract. These cases resulted in rulings favorable to the businesses from the United States Supreme Court.

The reaction to these rulings was a series of state constitutional amendments designed to prevent the granting of these long term tax exemptions. Some nineteen states adopted 'no surrender' clauses. Alaska did so when its constitution was drafted in Fairbanks during the winter of 1955-56.

Since Statehood, there has not been a direct court challenge to a long term promise of tax certainty. The question is undecided by our supreme court. Yet there are many signals from our court, as well as from other states, that all point in one direction: statutory promises of long term tax exemptions do not survive in the face of a 'no surrender' clause. This line of thought was captured by our supreme court when it wrote, in a tax dispute between the oil industry and the state, "*the state could not, and did not, contract away its power as a sovereign to tax.*" While not a final statement of law on this subject, this sentence spells trouble for those seeking to bind the state to a promise of tax certainty for a decade or longer.

It is not just courts that view a long term tax freeze skeptically. The memorandum presents the opinions of former Attorney General Bruce Botelho, former assistant attorney general Jack Griffin, the director of the legislature's legal services division, Tam Cook, as well as Vic Fischer, one of the surviving drafters of our state constitution, who all express grave doubts about the legality of the long term tax promises desired by the Producers.

I hope that you and your staff will take the time to read the memorandum. I would be happy to discuss any point within it with anyone who is interested in the subject.

Sincerely,

A handwritten signature in black ink, appearing to read "Hollis French". The signature is stylized and somewhat cursive.

Hollis French



**Senator Hollis French**

**MEMORANDUM**

**Date:** June 6, 2006

**RE:** Alaska's 'No Surrender' Clause and the Proposed SGDA Contract

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**I. Introduction**

The purpose of this memorandum is to explore whether it is legal under our state constitution to lock up the rates of taxation on oil and gas for a period of years.

There are some who believe that this question must be put off for a court to decide. There are good reasons for waiting, if your object is to wait. The better path is to confront the legal issues and make an educated assessment of them now, and to act accordingly.

It is worth keeping two points in mind during the consideration of this paper. First, the Trans-Alaska Pipeline was built without a long term tax freeze, and second, it is only the Producers – ConocoPhillips, BP, and ExxonMobil – who require oil and gas tax certainty as a part of their application to build a gas pipeline. The other potential candidates to build the line – TransCanada and AGPA – have not made this requirement central to their proposals.

**II. The Constitutional Issue is Whether a Long Term Freeze of Tax Rates is Permissible Under 'General Law.'**

The issue of a long term freeze on tax rates is a question of constitutional law. Our state constitution, like many others, has a clause which restricts lawmakers' ability to grant tax exemptions. A brief history of these clauses is necessary to set them in context.

Tax exemptions granted to businesses by state governments are not a new economic phenomenon. Banks and railroads were frequent recipients of these incentives in the nineteenth century. The exemptions were usually put into effect for long periods of time.<sup>1</sup> The effect of these exemptions was to reduce the power of state governments to raise the necessary funds to pay for basic goods and services. This issue was discussed extensively in states across the country. This, for example, is from the constitutional history of the state of Georgia:

The drafters [of the 1877 Georgia Constitution] were concerned with the General Assembly's practice of granting tax immunity to corporations, especially railroads. They wanted to stop the practice so that there would be money in the treasury to benefit those who benefited the State.

During the convention, Mr. Toombs, one of the drafters said: "You have virtually taken away so much of the life of the state and given it to these corporations for their support. Without taxation and full control over the power of taxation, the state cannot support her militia, hold her courts of justice, defend the people, and *preserve the rights of society*. You cannot administer your laws or *legislate for the benefit of the people*, or do anything else connected with the government. When this power of taxation is gone and when you say that the legislature can give this power away to them, you then and there put yourself in the power of these corporations."<sup>2</sup>

Often the state government that granted the exemption would later try to modify it in order to begin to collect revenue from the now-established business. Early cases decided by the United States Supreme Court set out the rule that these tax exemptions amounted to contracts that were not subject to being tampered with.<sup>3</sup>

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<sup>1</sup>See Sterk & Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L. Rev. 1301, 1319 (1991) and Simpson, *Choosing Fairness over Fundamentals: How Bailey v. North Carolina Undermines the Constitutional Prohibition Against the State Contracting Away its Power of Taxation*, 77 N.C.L.Rev. 2217-2219 (1999).

<sup>2</sup> *Parrish v. Employees Retirement System*, 398 S.E.2d 353, 356 (Ga. 1990)(emphasis in the original).

<sup>3</sup> *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 166-7 (1812).

The reaction to this problem in many states was to adopt a constitutional amendment prohibiting the legislature from making long term tax exemptions in the first place.<sup>4</sup>

Our constitution's version of this provision says, "**The power of taxation shall never be surrendered. It shall not be suspended or contracted away, except as provided in this article.**"<sup>5</sup>

I'll refer to this as the "no surrender" clause.

Thus we can see that there is no executive or legislative power to contract away the state's taxing authority, "except as provided in this article."

All observers agree that the exceptions are found in one place, which is in the same article, Article IX, section 4. The exceptions read as follows:

**Exemptions.** The real and personal property of the State or its political subdivisions shall be exempt from taxation under conditions and exceptions which may be provided by law. All, or any portion of, property used exclusively for non-profit religious, charitable, cemetery, or educational purposes, as defined by law, shall be exempt from taxation. *Other exemptions of like or different kind may be granted by general law.* All valid existing exemptions shall be retained until otherwise provided by law.<sup>6</sup>

The third sentence, the one italicized here for emphasis, is the only potential legal authority for a long term tax deal. Period. There is no other source. If this sentence does not provide the legal basis for a tax freeze, then it does not exist in Alaska law.

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<sup>4</sup> Some nineteen states have a version of this amendment. See, e.g., Ariz. Const. art. IX, 1 ("The power of taxation shall never be surrendered, suspended, or contracted away."); Ga. Const. art. VII, 1(1) ("The state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void."); Me. Const. art. 9, 9 ("The Legislature shall never, in any manner, suspend or surrender the power of taxation."); Mont. Const. art. VIII, 2 ("The power of taxation shall never be surrendered, suspended, or contracted away."); N.C. Const. art. V, 2(1) ("The power of taxation ... shall never be surrendered, suspended, or contracted away.

<sup>5</sup> Alaska Const., art. IX, § 1.

<sup>6</sup> Alaska Const., art. IX, § 4 (emphasis supplied).

There are some tax exemptions that have been authorized by this part of the constitution. For example, this section has been used by the legislature to allow the extension of tax-exempt status to hospitals, and to allow for the senior citizen property tax exemption.<sup>7</sup> It has also been used to give municipalities the authority to grant additional tax exemptions under local ordinances.<sup>8</sup>

These 'general law' exemptions, set out in our statutes, may all be changed or eliminated by any future legislature. The proposed long term tax freeze is not of this nature, however. As proposed, the long term tax rates would be set into a contract, whose term would extend for a decade or more. Thus the relevant question is whether this is a 'general law' exception to the 'no surrender' clause.

**A. 'General law' means those laws that are passed by each successive legislature. One legislature cannot, consistent with the Alaska Constitution, stop another legislature from changing a statute.**

**1. A general law is a statute by definition and by case law.**

The foregoing raises the question: What is 'general law'?

'General law' can mean several things.<sup>9</sup> Basically, the term refers to the bulk of statutes that make up a jurisdiction's laws. Our state supreme court has used the term in this, its most universal sense, as follows: "The basis for a home rule charter may be either a constitutional grant of authority, a general law enacted by the state legislature, or a combination of both."<sup>10</sup>

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<sup>7</sup> See AS 29.45.030.

<sup>8</sup> See AS 29.45.050.

<sup>9</sup> "General Law: A law that affects the community at large. A general law as contradistinguished from one that is special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. A law, framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make themselves a class by themselves, is not a special or local law, but a general law. A law that relates to a subject of a general nature, or that affects all people of state, or all of a particular class." Black's Law Dictionary, sixth ed., p. 684.

<sup>10</sup> Chugach Elec. Ass'n v. Anchorage, 476 P.2d 115, 122 (Alaska 1970) (internal citations omitted).

In another case the court noted the difference between constitutional law and general law by way of defining the word "charity": "Recognizing that neither the constitution nor the general laws of this state defined the term, we resorted to the broad common law definition of 'charity.'"<sup>11</sup>

If nothing else, these two cases make it clear that a 'general law' is a statute, and not a constitutional amendment.

The term 'general law' probably first appeared in Alaska's legal history in 1884, when Congress put the territory of Alaska under the jurisdiction of a set of laws from Oregon: "In 1884, Congress enacted the Alaska Organic Act, establishing for the first time a civil government for the District of Alaska. The Organic Act, with unusual economy, enacted an entire criminal and civil code for Alaska by adopting the laws of Oregon ... Section 7 of the Act provided that: 'The general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this Act or the laws of the United States.'"<sup>12</sup>

These three references to the term 'general law' by our supreme court all point to the same basic definition: 'general law' means a statute. And statutes are subject to change.

**2. Our constitution uses the term 'general law' to mean 'statute.'**

Our state constitution uses the term 'general law' in three places.

For example, the phrase appears in the public education section of article VII: "The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions."<sup>13</sup> No case discussing this section has elaborated on the precise meaning of 'general law' in the context of public education.

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<sup>11</sup> Nome v. Catholic Bishop, 707 P.2d 870, 887 (Alaska 1985).

<sup>12</sup> Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32, 37-38 (Alaska 1988) (internal citations omitted).

<sup>13</sup> Alaska Const., art VII, § 1.

The term also appears in two sections dealing with paying state officials. The first is: "The compensation of the governor and the lieutenant governor shall be prescribed by law and shall not be diminished during their term of office, unless by general law applying to all salaried officers of the State."<sup>14</sup> The second is: "Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State."<sup>15</sup>

While the immediate reading of these two sections may suggest that there is a difference between most laws and general laws, and there certainly are legal theories about how those two terms are different<sup>16</sup>, the difference in terms may not

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<sup>14</sup> Alaska Const., art III, § 15.

<sup>15</sup> Alaska Const., art IV, § 13.

<sup>16</sup> This distinction received its most thorough examination in Alaska law in a case which asked whether teachers who have been fired from their jobs after an administrative hearing have the right to a new trial in superior court. The difficulty for the Supreme Court was that many different statutes could be brought to bear on the issue. Part of the case turned on the clash of "general" and "special" statutes. The Court looked to other states and to scholarly treatises for help:

The role of special statutes was treated by the Montana Supreme Court in *Teamsters Local 45 v. Montana Liquor Control Bd.*, 155 Mont. 300, 471 P.2d 541, 543 (1970). There the court said: 'Where one statute deals with a subject in general and comprehensive terms and another deals with a part of the same subject in a more minute and definite way, to the extent of any necessary repugnancy between them the special will prevail over the general.'

In addition, facially conflicting special statutes may simply establish exceptions to a general rule. Thus the Oregon Supreme Court has stated that where a 'later special or local statute is not irreconcilable with the general statute to the degree that both statutes cannot have coterminous operation, the general statute will not be repealed, but the special or local statute will exist as an exception to its terms.' *Andersen v. Heltzel*, 197 Or. 23, 251 P.2d 482, 483-84 (1952).

Matanuska-Susitna Borough v. Lum, 538 P.2d 994, 999-1000 (Alaska 1975)

While this distinction may have some interest for scholars and supreme court law clerks, its application to the tax question confronting the state appears to be minimal.

amount to any real significance, due to another constitutional provision. "As used in this constitution, the terms 'by law' and 'by the legislature,' or *variations of these terms*, are used interchangeably when related to law-making powers. Unless clearly inapplicable, the law-making powers assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI."<sup>17</sup>

After reviewing our constitution, and prior cases defining the term, it is clear that any Alaskan court reviewing a 'general law' exception to the power of taxation would decide that general laws are those proposed and passed by each successive legislature.

The conclusion to be drawn from this analysis is that any change in tax law that purported to extend beyond the duration of a legislature would not be deemed a 'general law' exception, and would be unconstitutional. Under this analysis, whether the tax exemption is for three, five, ten, or thirty years, doesn't matter. Our state constitution forbids the granting of a tax exemption that can't be tampered with by the next legislature. In other words, this legislature could decide that it was necessary to eliminate all production taxes for all oil companies operating in the state, and make the exemption last to the end of this year. But the same legislature could not make the law effective beyond the termination of its own life span, which comes to an end in January, 2007.

**B. Historical and Legal Analysis Shows that a Long Term Tax Freeze is Unconstitutional.**

**1. A drafter of the Alaska Constitution declares a long term tax freeze unconstitutional.**

This analysis comports with that of Vic Fischer, one of the few surviving drafters of our state constitution. In remarks delivered at a public hearing on the proposed gas line contract in Anchorage on June 3, 2006, the former state senator stated as follows:

Given the constitution's history, it is totally inconceivable that the framers of Alaska's constitution would have meant the ['no surrender' clause] to include surrender of its power of taxation over a petroleum industry that already exists and is so established that it provides 80-90% of general fund revenues. Industrial incentives of that scale and scope just didn't exist and would defy logic.'

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<sup>17</sup> Alaska Const., art XII, § 11 (emphasis supplied).

... An exemption under the ['no surrender' clause] may only be 'granted by general law.' ... Thus, even an action to exempt a new industry from taxes must be granted by general law. It can not be done through a contract authorized by the legislature and signed by the Governor, as contemplated under the Stranded Gas Act.<sup>18</sup>

**2. The Department of Law that first analyzed the SGDA declared a long term tax freeze unconstitutional.**

**a. Assistant Attorney General Jack Griffin testified that one Legislature can't bind the next.**

Before the Stranded Gas Development Act ("SGDA") was introduced to the Legislature in January, 1998, there were hearings to familiarize legislators with the provisions of the bill. Assistant Attorney General Jack Griffin, who is now an executive with ConocoPhillips, told the House Oil and Gas Committee at a November 12, 1997 hearing that while there is some constitutional ambiguity as to whether a future legislature would be bound by a long term tax promise, "the better view is that a future Legislature cannot be bound."<sup>19</sup> The presentation made by Mr. Griffin relied significantly on the definition of 'general law.'<sup>20</sup>

In a series of powerpoint slides, Mr. Griffin asked and answered the following question:

**Issue: May the legislature pass a general law that empowers the executive to enter a contract setting the tax obligations of a participant in a particular industry for a definite period, such that, under Article I, § 10 of the U.S. Constitution,<sup>21</sup> future legislatures cannot impair that contract, either by repeal or amendment of the**

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<sup>18</sup> Vic Fischer Testimony (Rev) submitted at June 3, 2006 Alaska Gas Pipeline Public Hearing, Anchorage, pp 4-5.

<sup>19</sup> Quoted in the November 19, 1997 edition of the Alaska Budget Report, p. 10 (used with permission).

<sup>20</sup> Jack Griffin, Presentation to the Alaska Legislature (1997) as referenced in Assistant Attorney General Alan Birnbaum's letter of June 1, 2006 in response to a records request for the Stranded Gas Development Act bill file.

<sup>21</sup> This is the federal 'Contracts Clause', which reads in relevant part "No State shall...pass any...Law impairing the Obligation of Contracts. ..." The state counterpart to this provision is found in Article I, section 15.

general law, or by imposition of additional tax obligations under a new law?

Answer: No. Article IX, Section 4 empowers the legislature to establish exemptions only by general law; although the legislature may allow the executive to reflect those exemptions in a "contract," that "contract," like the general law upon which it is based, will be subject to an implied condition that future legislatures may amend or repeal it.

Reason: A contract that prohibits future legislatures from amending or repealing tax exemptions or from imposing new taxes upon an individual or corporation, is a surrender of the taxing power that is prohibited by Article IX, Section 1 of the Alaska Constitution. *To the extent the legislature may "contract away" the taxing power, it may do so only by general law, which is to say that the "contract" is subject to repeal or modification by any future legislature.*<sup>22</sup>

This analysis is consistent with the plain language of the constitutional provisions that bear on this question.

- b. Attorney General Bruce Botelho's analysis strongly suggests that a long term tax freeze is unconstitutional.**

Two of Alaska's attorneys general have weighed in on this issue. The first, Bruce Botelho, issued a formal opinion in 1998 about the SGDA's long term tax provisions, in which he wrote that

There are a number of other important issues raised by this legislation. First, art. IX, sec. 1 of the Alaska Constitution provides that "the power of taxation shall never be surrendered." The bill raises the "surrender of the taxing power" question because it contemplates development of a long-term contract that reflects the fiscal terms applicable to the sponsors of a stranded gas project. The legislation itself, however, is not unconstitutional under art. IX, because it does not purport to bind future legislatures. Instead, it merely authorizes the commissioners of revenue and natural resources to develop appropriate contract terms. Authorization to

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<sup>22</sup> Jack Griffin, Presentation to the Alaska Legislature (1997), slides DOL\_005965-67 (emphasis supplied).

execute the contract will not be delegated to the executive branch until the legislature has had an opportunity to review the contract and ascertain whether its terms are in the public interest. Even if that authorization is given, the legislature may expressly provide that the contract's fiscal terms are binding only so long as no future legislature decides to exercise the taxing power in a different way. In other words, the "surrender of the taxing power" issue may never arise. A concrete analysis of the issue must be left to the day the legislature decides whether, and if so under what terms, it will allow execution of a contract at all.<sup>23</sup>

This passage is certainly less than a ringing endorsement of the SGDA's long term tax deal concept, particularly if the reader keeps in mind that this was written by the attorney general then employed by the governor who introduced the SGDA. Indeed, the reasoning is a bit curious. The attorney general is pointing out that since the SGDA itself does not bind future legislatures, it is not unconstitutional. It is difficult to avoid the conclusion that the opinion of the then-attorney general was that the SGDA *would* have been unconstitutional *if it had* purported to bind future legislatures. The attorney general simply punted the constitutional question to today, when the legislature is deciding "whether, and if so under what terms, it will allow execution of a contract at all."

**3. The Director of the Division of Legal and Research Services, as well as other attorneys in that Division, declare a long term tax freeze unconstitutional.**

When the SGDA was formally filed as a bill in 1998 it sparked renewed interest in the legality of setting tax rates in place through a long term contract. When asked about the apparent conflict between the state constitution and the possibility of a long term tax deal under the SGDA, Tam Cook, the Director of the Division of Legal and Research Services for the Legislative Affairs Agency, wrote in March 1998 that "[w]hile the state may certainly provide for a tax exemption, I do not think it is possible for the state to give up its power to repeal the exemption and impose the tax in the future. Any contract that has that effect will probably be void as against public policy."<sup>24</sup>

The view of the attorneys at Legal Services has not changed in the intervening years. In a May 18, 2006 memo, Don Bullock declared that "[i]n my

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<sup>23</sup> 1998 Alas. AG LEXIS 7 (May 29, 1998).

<sup>24</sup> Memorandum from Tamara Brandt Cook, March 11, 1998, p. 1.

opinion a contract provision limiting the level of a tax is more likely than not contrary to art IX, sec. 1 and is not within the exceptions in art. IX, sec. 4.”<sup>25</sup>

In a second memo, dated May 25, 2006, Mr. Bullock answered the question of whether locking up tax rates for a shorter term of years or the presence of a “reopener clause” in the contract would make a difference in his analysis. Mr. Bullock wrote that “[c]ontracting away is contracting away, regardless of the length of the contract and regardless of a provision that allows for revisiting the tax-related terms some time in the future.”

**C. Alaska Case Law Strongly Suggests that a Long Term Tax Freeze is Unconstitutional.**

There have not been any Alaskan cases involving this exact question decided by our Supreme Court. There are a few cases which raise the issue of the surrender or contracting away of the power of taxation in a tangential way. They are discussed below.

In *Atlantic Richfield Company v. State*<sup>26</sup> the issue was whether the state’s new form of “separate accounting” oil taxation was constitutional. One of the arguments advanced by the North Slope oil producers – ARCO, BP, and Exxon – was that the new tax amounted to a change in the terms of the leases that the state had entered into with the producers. The court found that the lease terms had not been impaired and noted that “the state could not, and did not, contract away its power as a sovereign to tax income earned in the state.”<sup>27</sup>

While the case did not hinge on this observation, the phrase used by the Court – that “the state could not, and did not, contract away its power as a sovereign to tax” -- is not helpful to those who wish to enter into a long term tax deal. It is also the clearest expression in any case of our Supreme Court’s view of this subject.

In *DeArmond v. State Dev. Corp.*<sup>28</sup> the Legislature had created a development corporation that was, among other things, exempted from any and all state taxes. The constitutionality of the law creating the corporation was

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<sup>25</sup> Memorandum from Don Bullock, May 18, 2006, p.1.

<sup>26</sup> 705 P.2d 418 (Alaska 1985).

<sup>27</sup> *Id.* at 438.

<sup>28</sup> 376 P.2d 717 (Alaska 1962).

challenged on several grounds. The court found the exemption from taxes allowable under the “[o]ther exemptions of a like or different kind may be granted by general law” clause.<sup>29</sup>

The reason that this ruling doesn’t offer much support for a long term tax promise is that the development corporation was a creation of general law. It was put into place through the passage of several statutes. Had the next Legislature wanted to eliminate the corporation, or its tax-free status, it was perfectly free to do so.

In *Alascom v. North Slope Borough*<sup>30</sup> the North Slope Borough discovered in an audit that Alascom had underpaid its property taxes for several years. When Alascom challenged the updated assessment, the case went to court. One issue was whether a two or six year statute of limitations should apply to the collection of overdue taxes. The North Slope Borough took the position that *any* statute of limitations was unconstitutional. They argued that “applying a statute of limitations to tax assessments and collection” would constitute an unconstitutional surrender or suspension of the taxing power.<sup>31</sup>

The Court disagreed, finding that a statute of limitations was one of the “different” tax exemptions envisioned by article IX, section 4.<sup>32</sup> Like the *DeArmond* case, this is an example of a general law exemption. The important point is that the Legislature did not give up the power to change the law.<sup>33</sup>

### **III. The Opinion of the Current Attorney General Overlooks the Plain Meaning of the Term ‘General Law.’**

A legal opinion on the subject of a long term tax freeze was issued on May 10, 2006, by Attorney General David Marquez. It should be noted that General Marquez admitted in his remarks to the group of legislators attending the Administration’s gas line contract presentations at Centennial Hall in Juneau that his analysis was not a balanced view of the question of the constitutionality of a

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<sup>29</sup> *Id.* at 725.

<sup>30</sup> 659 P.2d 1175 (Alaska 1983),

<sup>31</sup> *Id.* at 1179.

<sup>32</sup> *Id.*

<sup>33</sup> See *Department of Revenue v. Alaska Pulp Am.*, 674 P.2d 268, 272 (Alaska 1983)

long term tax deal, but rather was essentially a defense of the Administration's point of view.

Much of the legal analysis in General Marquez' memo consists of a noncontroversial recitation of federal law regarding the Contracts Clause<sup>34</sup> and a summary of how Alaska's constitutional convention drafted and debated the "no surrender" clause.<sup>35</sup>

Regarding the history of these sections, there is little doubt that the convention delegates intended to allow some exemptions from taxation. For example, Delegate Nerland said about article IX, section 4 that "this is the provision that allows for some exemption or inducement to industries or similar things." Furthermore, the official commentary to the "no surrender" clause stated that "[t]he power to tax is never to be surrendered, but under terms that may be established by the legislature, in may be suspended or temporarily contracted away. This could include industrial incentives, for example."<sup>36</sup>

The constitutional record suggests strongly that the focus of the delegates was on attracting *new* industries to Alaska. For example:

Section 1 is a rather routine statement that the power of taxation shall never be surrendered or contracted away. The reason for the division of thought there and the addition of the words "except as provided herein" is to remove doubt as to what we mean later down in the article by providing exceptions.....and then in the last paragraph of that section it provides that other exemptions may be provided by general law. **This would allow for, among other things, for a granting of tax incentives to new industries.**<sup>37</sup>

"The Committee felt that definitely the power of taxation should never be surrendered so we inserted a semi-colon, but **we did feel that there would possibly be occasion and good justification in the future for such things as allowing an industry-wide exemption to**

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<sup>34</sup> Memorandum on the Effect of Article IX, Sections 1 and 4 of the Alaska Constitution on Proposed Stranded Gas Development Act Contract Terms, at pp. 7-13.

<sup>35</sup> *Id.* at pp. 16-21.

<sup>36</sup> Commentary on the Article on Finance and Taxation (Dec. 16, 1955).

<sup>37</sup> Minutes of the Constitutional Convention at 1109 and 1100.

**encourage new industry to come in and that is the reason for the particular wording there. That is later provided for under Section 4.<sup>38</sup>**

General Marquez' memo overlooks this distinction, and pushes beyond the historical record when he argues that "the framers deliberately rejected putting parameters around what would constitute a temporary tax incentive"<sup>39</sup> and that "the committee chose not to adopt a specific durational limit for tax exemptions."<sup>40</sup> Those statements ignore the plain meaning of the term "general law" in article IX, section 4, and the time limits imposed by that term. The memo does not at any place discuss the meaning of the term "general law," despite implicitly acknowledging the fact that "general law" is the operative term.<sup>41</sup>

**A. Any court reviewing this issue would not fail to focus on the term 'general law.'**

A reviewing court will certainly begin its analysis with a review of the basic terms involved. It is necessary therefore to consider how that review will be conducted.

The basic process that the Alaska Supreme Court uses to interpret any constitutional provision is easily described. "We interpret the constitution and Alaska law according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."<sup>42</sup>

The procedure is set out with more detail as follows:

'Questions concerning the constitutionality of a statute are questions of law and are reviewed de novo.' We must first determine what the constitution actually means. The proper interpretation of a

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<sup>38</sup> Minutes of the Constitutional Convention at 2301.

<sup>39</sup> Memorandum on the Effect of Article IX, Sections 1 and 4 of the Alaska Constitution on Proposed Stranded Gas Development Act Contract Terms, at 19.

<sup>40</sup> *Id.* at 20.

<sup>41</sup> "Because sections 1 and 4 [in Article IX] were adopted simultaneously and the convention history links them together, section 1 can reasonably be read to refer to the legislature's power to authorize tax exemptions and other incentives by general law." *Id.* at 27.

<sup>42</sup> Sampson v. State, 31 P.3d 88, 91 (Alaska 2001)

constitutional provision is a question of law to which this court applies its independent judgment. We then examine the statute to see whether it conflicts with the constitutional requirement. 'Statutes should be construed if reasonably possible to avoid the conclusion that they are unconstitutional.'

The appropriate approach to interpreting language in the Alaska Constitution is well established. 'Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. The court should look to the plain meaning and purpose of the provision and the intent of the framers.'

Because of our concern for interpreting the constitution as the people ratified it, we generally are reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning. Rather, absent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision. Normally, such deference to the intent of the people requires 'adherence to the common understanding of words.'<sup>43</sup>

If the Supreme Court adheres to the common understanding of the words of the drafters, then it will focus on the term 'general law.' That focus will very likely force a conclusion that no one legislature can bind another and remain consistent with our constitution.

**B. The only post-constitutional example of a long term tax exemption was never tested in court.**

It must be noted that since Statehood, there has been one example of the legislature granting a type of tax exemptions that were given a period of effectiveness beyond the term implied by the words "general law."<sup>44</sup> The 1968

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<sup>43</sup> Hickel v. Cowper, 874 P.2d 922, 926 (Alaska 1994)(internal citations omitted).

<sup>44</sup> There were two instances of this type of legislation enacted by the Territorial Legislature. The first was the Alaska Property Tax Act of 1949 which exempted new industries from most taxes for a period of up to ten years. Ch. 10, SLA 1949. The other was the Alaska Industrial Incentive Act of 1957 which, though it used a more sophisticated methodology, amounted to the same general type of tax exemption, also offered for a period of up to ten years. Former AS 23.26.010. General Marquez uses both of these as supporting examples in his memo on pages 21-22. The obvious distinction is that they were enacted prior to the ratification of our state constitution, which contains the "no surrender" clause.

Alaska Industrial Incentive Tax Credits Act allowed for the granting of tax credits that could be used for a period of up to ten years.<sup>45</sup> There are no reported cases interpreting this act. While the act certainly stands as evidence that the Legislature is willing to adopt a long term tax promise, there is no evidence on either side that what the Legislature did in 1968 was constitutional.

**C. Adopting the phrase 'payment in lieu of taxes' does not alter the analysis.**

General Marquez notes in his memo the fact that the proposed SGDA contract "requires continuous payments in lieu of taxes, not a complete exemption from payment of taxes."<sup>46</sup> There is no argument presented as to why this would make a difference in a court's analysis of the constitutionality of the proposed contract. One might argue on behalf of the Administration that because the proposed contract provides for the payment of taxes (or, more accurately, for payments in lieu of taxes) then the power of taxation has not been "contracted away." The rebuttal to that argument is that the issue is not whether the state collects any monies from taxpayers under a contract, but rather whether the state has retained the *power* to tax. Setting tax rates in place for five, ten, or thirty years means that the state has "contracted away" the power of taxation for that period, something our constitution does not allow.

The argument might be made that a "payment in lieu of taxes," being a different legal creation from a straight tax, is somehow entitled to a different constitutional analysis. The exact difference between a 'tax' and a 'payment in lieu of a tax' has not been articulated by the Administration. No help is provided by the proposed contract either, for it does not provide a definition of 'payment in lieu of taxes.'<sup>47</sup>

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<sup>45</sup> Former AS 43.26 et seq., repealed in 1986.

<sup>46</sup> Memorandum on the Effect of Article IX, Sections 1 and 4 of the Alaska Constitution on Proposed Stranded Gas Development Act Contract Terms, at 23.

<sup>47</sup> The difference has eluded legal minds from other jurisdictions. The Supreme Court of New Hampshire noted that their state's department of revenue ("DRA") was unaware of a general definition for the term, abbreviated in this decision by the acronym "PILOT. "The statute does not provide a definition of PILOTs, however, and the DRA concedes that there "is no general definition for 'payment in lieu of taxes.'" Appeal of the City of Portsmouth (N.H. Bd. of Tax & Land Appeals), 151 N.H. 170, 172 (N.H. 2004)

**D. The four cases cited by the Attorney General do not support a long term tax freeze.**

**1. Three of the cases are clearly not on point.**

General Marquez does cite to four out-of-state court decisions as examples of “[r]elevant cases significant in upholding a fiscal certainty guarantee under a power of taxation clause.”<sup>48</sup> The memo does not supply any of the facts from these cases. The bulk of the cases do not hold up to close examination.

In the case of *In re Opinion of the Justices (Mass.)*<sup>49</sup> the Massachusetts Legislature sought an advisory opinion from their state Supreme Court on the legality of an urban redevelopment bill pending before the legislature. The legislature posed eleven questions to the court, the first of which asked whether it was constitutional, under the Massachusetts Constitution, to exempt from most taxation “projects...to be constructed in blighted, open areas, decadent areas, and substandard areas.” The exemption was for forty years.

The Massachusetts court had to balance the loss of tax revenue as well as the use and possible gain accruing to private interests from a completed private project against the public advantages of (1) the encouragement of prompt action unlikely to be undertaken by private enterprise in the foreseeable future; (2) stimulation of other facilities made available for public use and (3) removing doubts as to the future use of the area, “now largely vacant or occupied by an unsightly railroad freight yard.” The Court held that the exemption was constitutional, as long as each project exempted was found to have a public purpose.

The Attorney General should have pointed out in his memo that the Alaska Supreme Court does not supply advisory opinions. (He did acknowledge this fact in his remarks at Centennial Hall.)

More damaging to the attorney general’s position is the fact that the Massachusetts Constitution does not have a ‘no surrender’ provision similar to Alaska’s. The Attorney General also should have pointed out this obvious and critical difference in his memo.

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<sup>48</sup> Memorandum on the Effect of Article IX, Sections 1 and 4 of the Alaska Constitution on Proposed Stranded Gas Development Act Contract Terms, at 27, fn. 120.

<sup>49</sup> 168 N.E.2d 858 (1960).

The next case cited by General Marquez is a case titled *Valencia Energy Co. v. Arizona Dep't of Revenue*<sup>50</sup> in which a company known as Valencia Energy was under contract to deliver coal to power plants. In response to an inquiry, the company was told in a letter from an Arizona state tax analyst that its transportation charges were not subject to state tax. During a subsequent audit, the state Department of Revenue concluded that the analyst was in error and that taxes should be paid on the transportation charges. Valencia argued that the state was "estopped"<sup>51</sup> from collecting the taxes (meaning that the tax analyst's letter trumped the Department's audit). The state in turn asserted the "no surrender" provision in its constitution, meaning that to raise the analyst's letter over the Department's ruling would constitute a surrender of the state's taxing power.

The Arizona Supreme Court ruled that "[a]n estoppel from collecting revenue from a single taxpayer for a single event is not the kind of permanent capitulation with which the framers were concerned." The difference between this case and the situation facing our state is that the state of Arizona was trying to correct an error by one of its employees. General Marquez cites the case for this proposition: "power of taxation clauses do not preclude some contracting away of taxing authority."<sup>52</sup> It is entirely unclear where in the opinion that assertion is made.

Another case cited by General Marquez is *Gruen v. State Tax Commission*<sup>53</sup>, in which the Washington State Legislature passed a law providing for the payment of a bonus to veterans of World War II. The money for the veterans was to be raised through the sale of state bonds. The bonds were to be financed through an excise tax on cigarettes. A cigarette distributor sued the state, claiming that "the legislature, in effect, entered into a contract with the bond buyers that a tax would be levied upon the sale of cigarettes for the purpose of retiring the

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<sup>50</sup> 959 P.2d 1256 (Ariz. 1998).

<sup>51</sup> Estoppel, according to Black's Law Dictionary, means "that party is prevented by his own acts from claiming a right to the detriment of the other party who was entitled to rely on such conduct and has acted accordingly." Any parent is familiar with estoppel. Your child asks, "Can I go to the movies?" and you say, "No, you have homework." Your child says, "But Mom said I could, and I already told my friend I could go!" Your child is asserting that you and your spouse constitute a single 'party' and are estopped from denying the trip to the movies.

<sup>52</sup> Memorandum on the Effect of Article IX, Sections 1 and 4 of the Alaska Constitution on Proposed Stranded Gas Development Act Contract Terms, at 27, fn. 120.

<sup>53</sup> 211 P.2d 651 (Wash. 1949).

bonds and paying the interest, and that "contract" cannot be limited in any way or voided by subsequent legislatures."

The Washington Supreme Court handled the "no surrender" issue by breaking it into two parts: (1) did the Legislature "contract away" its taxing authority?<sup>54</sup> And (2) could the Legislature bind future legislatures through a long term bond issue?<sup>55</sup> With respect to the first question, the Court held that the State neither surrendered, suspended, nor contracted away its taxing authority through the bond sale.<sup>56</sup>

The Washington Court answered the second question in the affirmative, stating that the "legislature acted within its authority when it provided that the funds raised by the tax imposed on cigarettes...should be used to redeem the bonds."<sup>57</sup>

The reason this case offers no support for a long term tax deal is that the court held that the Washington legislature had not contracted away its power. Moreover, there are many examples of the same type of bonding arrangement being used here in Alaska.

## 2. The case which does support the Attorney General is easily distinguished.

The last case cited by General Marquez, and the only one that legitimately supported his position, is *Bailey v. State*.<sup>58</sup> The facts are as follows. Beginning in 1939, state employees in North Carolina enjoyed retirement accounts that were free of any state taxation. The tax exemption was altered in 1989 in response to a United States Supreme Court decision<sup>59</sup>. The alteration placed a \$4000 cap on the amount of annual benefits that would be exempt from state taxes.

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<sup>54</sup> *Id.* at 680.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 211 P.2d at 686.

<sup>58</sup> 500 S.E.2d 54 (N.C. 1998).

<sup>59</sup> The case was *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 109 S.Ct. 1500 (1989). In that case the Supreme Court held that "if a state taxes state and local government employees differently than it taxes federal employees, the state violates the

When State employees sued the state, the issue was whether the state employees had an enforceable contract right that had been impaired by the change in state law. In defending the suit, the State argued that the exemption was illegal from its inception, as it conflicted with their constitution's 'no surrender' provision.

The North Carolina Supreme Court held that the state could not in fairness change the benefits of its employees after fifty years of promises. "The state's action here in changing the taxability of vested retirement benefits is no different than if the State issued tax-free bonds, collected millions of dollars for their purchase, and then retrospectively repealed investors' tax-free interest and capital gain advantages."<sup>60</sup> The Court noted that the North Carolina state constitution expressly provided for exemptions from income taxes.<sup>61</sup> The Court's resort to basic notions of fairness, while laudable, has been criticized as undermining that state's 'no surrender' clause.<sup>62</sup>

There are obvious differences between the North Carolina case and the situation facing Alaska. The court in North Carolina was trying to avoid a result

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constitutional doctrine of intergovernmental tax immunity as well as federal statutory law." 500 S.E.2d at 59.

<sup>60</sup> *Id.* at 65.

<sup>61</sup> "Subsection (6) [of the North Carolina constitution] provides that, regarding income taxes, 'there shall be allowed....exemptions.'" *Id.* at 64.

<sup>62</sup> See Simpson, *Choosing Fairness over Fundamentals: How Bailey v. North Carolina Undermines the Constitutional Prohibition Against the State Contracting Away its Power of Taxation*, 77 N.C.L.Rev, 2244-45: "As a matter of fairness, the court was correct in preventing the state from reneging on its agreement to exempt state employee retirement benefits from state income taxation. The court, however, could have legitimately reached this 'fair' result without undermining the intent of Article V, section 2(1)[the 'no surrender' clause]. Instead of creating a convoluted constitutional interpretation, the court could have simply ruled that the state was estopped from questioning the constitutionality of the statutory tax exemption since the state had willingly accepted the benefits created by this statute for fifty years. This common-sense alternative to the court's action could have eliminated the need for the court to adopt its questionable constitutional interpretation of Article V, section 2(1) and thus, would have prevented the potentially troublesome impact of this interpretation on North Carolina public policy. In its rush to help state retirees in Bailey, the North Carolina Supreme Court may have inadvertently cleared the way for the return of the tax policy problems that plagued the state in the nineteenth century."

that would impose a fundamental unfairness to fifty years' worth of state employees. The case was essentially looking backwards.

Here, the issue is forward looking – that is, how should Alaska approach its rates of oil and gas taxation for the next fifty years? While *Bailey* offers some support for the Attorney General's position, the support is slender, and it is not likely to be relied upon by our Supreme Court. It is one thing to issue an opinion that avoids injustice, and quite another to knowingly enter into a tax regime that is forbidden by our constitution.

Furthermore, three other states that confronted the collision between tax free benefits and a 'no surrender' clause came to a conclusion opposite that of the *Bailey* court. These cases are discussed below.

**E. The Attorney General failed to mention several relevant cases.**

**1. Three states have ruled that their 'no surrender' clauses allow for changes to tax-free retirement benefits.**

General Marquez did not address several other cases involving the issue of long-term tax exemptions from jurisdictions that have 'no surrender' clauses in their state constitutions. To the extent that the state or any other litigant attempts to use *Bailey* as authority, our Supreme Court will undoubtedly refer to these three other cases, as they reach an opposite result. A full examination of the issue requires their consideration.

A suit brought by state employees in Montana, similar to the one brought in North Carolina, resulted in a ruling quite different from the North Carolina Supreme Court's ruling in *Bailey*. The Montana Supreme Court held that the "statute creating the tax exemption in question did not create a contractual right because the state constitution prohibited the state from surrendering or contracting away its power of taxation."<sup>63</sup> True, Montana's "no surrender" provision is worded more strongly than Alaska's: "The power of taxation shall never be surrendered, suspended, or contracted away."<sup>64</sup> Nevertheless, the analysis is essentially the same.

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<sup>63</sup> *Id.* at 2233 (citing *Sheehy v. Public Employees Retirement Division*, 864 P.2d 762, 765 (Mont. 1993)).

<sup>64</sup> Mont. Const. art. VIII, § 2.

In the same vein, the Supreme Court of Maine dismissed a lawsuit challenging the repeal of tax-exempt retirement benefits for state employees, holding that because the state constitution forbids the legislature from suspending the power of taxation, state employees who receive retirement benefits have no contractual entitlement to tax-exempt benefits.<sup>65</sup>

A third case dealing with tax-free retirement benefits was decided in conformity with the two cases referenced above. The court in *Parrish v. Employees Retirement System*<sup>66</sup> found that the Georgia 'no surrender' clause trumped the claims of state employees who argued that an alteration to their tax-free retirement benefits amounted to a violation of that state constitution's prohibition on impairments-of-contracts clause.

## **2. Arizona's Supreme Court upholds its state's 'no surrender' clause.**

Other tax cases are in agreement with this analysis. In *Switzer v. City of Phoenix*,<sup>67</sup> a 1959 case decided by the Supreme Court of Arizona, the court decided whether the issuance of a street and highway improvement bond amounted to a violation of that state constitution's 'no surrender' clause. The Court took note of and ruled in accordance with the Washington State court's ruling in *Gruen v. State Tax Commission*.<sup>68</sup> However, the Arizona court used a slightly different rationale in reaching its decision. After undertaking a thorough examination of that state's Constitutional Convention, the Arizona court noted that their convention delegates relied on excerpts from this letter from a national tax expert in structuring their state's 'no surrender' clause:

The right to impose taxes is a legislative power, inherent in organized government. In the absence of constitutional limitations, a legislature may enact such tax laws as it sees fit, subject only to the restrictions contained in the constitution of the United States. Everything over which the authority of the state reaches may be the subject of taxation, whether it be person, property, or occupation.

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<sup>65</sup> *Blair v. State Tax Assessor*, 485 A.2d 957, 960 (Me. 1984).

<sup>66</sup> 398 S.E.2d 353 354 (Ga. 1990).

<sup>67</sup> 341 P.2d 427 (Ariz. 1959).

<sup>68</sup> 211 P.2d 651 (Wash. 1949).

There are certain safeguards, however, that should be provided: *First; The legislature should be prohibited from contracting away the right to tax anything or person whatsoever, or from making any irrevocable grant of exemption.*<sup>69</sup>

The Arizona court ultimately ruled that issuing a bond is not a surrender of the taxing authority.<sup>70</sup>

**3. Minnesota refused to cede taxing authority under its 'no surrender' clause, even in the face of a contrary constitutional amendment.**

Like Alaska, the state of Minnesota depends upon mineral revenues for much of its tax base. Like Alaska, Minnesota also has a 'no surrender' clause in its state constitution. Like Alaska, resource development industries have tried to find a way to get tax certainty in order to further their financial objectives.

In 1963 the legislature, with subsequent approval of the state voters, enacted a constitutional amendment that fixed the tax rates on a mineral called taconite in place for some twenty-six years.<sup>71</sup> In reliance on that tax certainty, Reserve Mining Company spent \$350 million<sup>72</sup> and employed 3,300 workers to extract taconite.<sup>73</sup>

Despite the tax certainty amendment, the Minnesota legislature enacted by statute a 'tailings tax' on taconite in 1977, a tax which only applied to Reserve

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<sup>69</sup> 341 P.2d at 430 (emphasis in the original).

<sup>70</sup> *Id.* at 431.

<sup>71</sup> *Reserve Mining Company v. State of Minnesota*, 310 N.W.2d 487, 493 (Minn. 1981). The relevant portion of the amendment reads as follows:

Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite and semi-taconite, and facilities for the mining, production and beneficiation thereof shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid until November 4, 1989.

<sup>72</sup> \$350 million spent in 1964 has the value of over \$2 billion today. Westegg Inflation Calculator: <http://www.westegg.com/inflation/infl.cgi>, last accessed June 6, 2006.

<sup>73</sup> *Reserve Mining Company v. State of Minnesota*, 310 N.W.2d 487 (Minn. 1981).

Mining.<sup>74</sup> On the effective date of the act Reserve Mining brought suit to challenge the constitutionality of the new 'tailings tax.'

On the issue of the tax-certainty amendment, Reserve argued that the amendment amounted to a contract between the state and Reserve, and that tampering with the contract was in violation of both federal and state Contracts clauses.<sup>75</sup>

The Minnesota Supreme Court agreed that the constitutional amendment was a contract, but did not agree that there was any impairment of the contract. "Reserve would have us interpret the taconite amendment to mean that the legislature cannot impose any other taxes on taconite companies. We do not agree. In enacting the taconite amendment, the state did not contract away the legislature's right to tax. *It is precluded from doing so.* The amendment only accorded taconite producers favorable tax status by making taxation of taconite production subject to a statutory limit."<sup>76</sup>

While the court eventually ruled that the taconite tailings tax was subject to the fiscal limits imposed by the tax-certainty amendment,<sup>77</sup> this case stands as a cautionary fable to proponents of the long term *statutory* tax promise envisioned by the proposed gas line contract. The Minnesota court ruled that a constitutional amendment holding taxes in place was insufficient to overcome the state's 'no surrender' clause. Our supreme court will eventually review this Minnesota case, and it will draw an obvious legal conclusion: no statute fixing oil taxes in place can trump a constitutional 'no surrender' clause.

#### **IV. The Appropriate Approach to this Issue is to Amend the State Constitution.**

When Minnesota confronted the difficult issue of providing tax certainty under a state constitution that contains a 'no surrender' clause, the solution was an amendment to their constitution fixing the rate of taxation in place.

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<sup>74</sup> *Id.* at 489.

<sup>75</sup> *Id.* at 493.

<sup>76</sup> *Id.* (emphasis supplied). In a footnote to the highlighted sentence, the court cited to Minnesota's 'no surrender' clause: "The power of taxation shall never be surrendered, suspended, or contracted away." Minn. Const. art. X, § 1.

<sup>77</sup> *Id.* at 495.

The state of New York took a similar approach. During their 1938 constitutional convention, a 'no surrender' clause was adopted. The drafters recognized the limitations imposed by such a clause, however, and modified it by allowing for 'general law' exemptions, with the caveat that those 'general law' exemptions could be "altered or repealed" by a subsequent legislature. The only exception to the power to repeal was for property tax exemptions granted to religious, charitable, or educational groups.<sup>78</sup>

The state of New Jersey followed suit when their state constitution was revised in 1947. The drafters adopted 'general law' language similar to that of New York.<sup>79</sup> When the need later arose to allow for tax exemptions for urban renewal projects, the New Jersey constitution was modified to allow municipalities to grant general law exemptions that would last for a period not greater than five years.<sup>80</sup> The fact that New Jersey specifically amended their

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<sup>78</sup> See Sterk & Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L. Rev. 1301, 1319 fn. 108 (1991): "In 1938, the Constitutional Convention added to the state constitution article XVI, § 1, which provides in relevant part:

The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. . . .

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

<sup>79</sup>N.J. Const. art VII, § 1, P2:

Exemption from taxation may be granted only by general laws. Until otherwise provided by law all exemptions from taxation validly granted and now in existence shall be continued. Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit."

<sup>80</sup>N.J. Const. art VII, § 1, P6:

The Legislature may enact general laws under which municipalities may adopt ordinances granting exemptions or abatements from taxation on buildings and structures in areas declared in need of rehabilitation in accordance with statutory criteria, within such municipalities and to the

constitution to make their 'general law' exemptions last beyond the life of any given legislature gives additional support to the principle that 'general law' exemptions are easily altered.

The experience of Minnesota, New York, and New Jersey should not be overlooked. Absent clear authority in a state's constitution, the majority rule is that 'no surrender' clauses do not allow long term tax exemptions.

## **VI. Conclusion**

The 'no surrender' clause of the Alaska Constitution will not allow for long term tax exemptions. Put more formally, the power of taxation may not be contracted away for more than two years, consistent with Article IX, sections 1 and 4. Any 'general law' exemption must, by definition, only last during the life of any given legislature. Attempts to do otherwise will be struck down by our state Supreme Court.

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land comprising the premises upon which such buildings or structures are erected and which is necessary for the fair enjoyment thereof. Such exemptions shall be for limited periods of time as specified by law, but not in excess of 5 years.

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# LEGAL SERVICES

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## MEMORANDUM

May 26, 2006

**SUBJECT:** Contracting away is contracting away (CSSB 2001(FIN);  
Work Order No. 24-GS2094\F)

**TO:** Representative Les Gara

**FROM:** Donald M. Bullock Jr.  
Legislative Counsel

After you received the memorandum dated May 18, 2006, concerning whether the power of taxation may be suspended or contracted away, you asked whether the power may be contracted away for a number of years so long as the contract had a provision for reopening and amending any contract provision that relates to tax.

I stated in the May 18, 2006 that, "In my opinion a contract provision limiting the level of a tax is more likely than not contrary to art. IX, sec. 1 and is not within the exceptions in art. IX, sec. 4 [of the Alaska Constitution]." I did not qualify that statement by writing that contracting away the power of taxation for a shorter rather than longer period may be compatible with art. IX, secs. 1 and 4 and do not qualify that statement in this memorandum. Contracting away is contracting away, regardless of the length of the contract and regardless of a provision that allows for revisiting the tax-related terms some time in the future.

Since my memo to you on May 18, Dennis Bailey, legislative counsel, looked at this issue and found constitutional restrictions similar to ours in the State of New York.

The New York Court of Appeals discussed that state's constitutional prohibition against contracting away the taxing power in *Roosevelt Raceway v. Monaghan*.<sup>1</sup> A 1956 New York statute had reduced the state tax on a racetrack betting pool and allowed a racetrack to put part of the tax in a "construction account." After receiving the approval from the Harness Racing Commission for making capital improvements, a racetrack could withdraw money from the construction account for the cost of construction and for

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<sup>1</sup> 9 N.Y.2d 293; 174 N.E.2d 71; 213 N.Y.S.2d 729 (1961), *motion den* 9 NY2d 966, 218 NYS2d 48, 176 NE2d 502, *app dismd* 368 US 12, 7 L Ed 2d 75, 82 S Ct 123 (no substantial federal question).

federal income taxes paid on that amount. In 1959, the law was changed to bar reimbursement from the "construction account" for federal income taxes paid.<sup>2</sup>

Roosevelt Raceway insisted that the state was powerless to stop the reimbursement because ending the state's obligation represented an unconstitutional impairment of a contractual obligation under art I, sec. 10, of the United States Constitution. In response, the court of appeals wrote:

It is not entirely clear what Roosevelt claims to be the content of the contract which it asserts the State made with it.

But, if we accept this position for the purposes of the present litigation, involving solely reimbursement of Federal income taxes, the only contract which may be said to have been made is a contract for tax relief -- a promise by the State to keep the reduction enacted in the 1956 tax formula intact and unchanged until the track has been made whole, under that formula, out of revenues that would otherwise go to the State as taxes. Such a contract, if not indeed void in its inception -- and this is a question as to which we express no opinion -- is at all times revocable by the State. This was proclaimed and established, beyond the power of the Legislature to alter, by section 1 of article XVI of our present Constitution; in so many words, it declares:

"The power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law. \* \* \*

"Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, education or charitable purposes".

Just as the "reserved power" to amend corporate charters, found in section 1 of article X of our Constitution, "prevents the charter from becoming a contract between State and corporation protected from impairment by the [Federal] Constitution" so section 1 of article XVI of our Constitution "prevents" the 1956 legislative promise to reduce the harness track's taxes "from becoming a contract between State and corporation protected from impairment by the [Federal] Constitution." In other words, in view of the first sentence of section 1 of article XVI, the State may not be said to have breached any contract or agreement with Roosevelt to maintain its State tax at the level provided for in 1956 for the

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<sup>2</sup> 174 N.E.2d at 73-74 (citations omitted; bracketing in original).

Representative Les Gara

May 26, 2006

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reason that no one was empowered to enter into such an agreement on behalf of the State.

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In the present case, Roosevelt would not be aided even if we were to accept its concept of tax exemption. Section 1 of article XVI separately prohibits any attempt to contract away the power of taxation unless sanctioned by the people themselves. A contract for a pre-established limit on tax liability, whether it be considered as conferring "tax exemption" or "tax savings", or tax relief by any other label, is clearly barred by this sweeping prohibition. The 1959 Legislature was, therefore, free to increase the tax obligations of the harness tracks either by raising the rates of existing taxes or by imposing new taxes. There are limits on, as well as qualifications of, the power to tax, but these have not been disregarded. The asserted limit based on a contract with the State does not exist.<sup>3</sup>

This New York appellate decision based on a state constitutional provision prohibiting the contracting away of the power to tax would be helpful to an Alaska court interpreting art. IX, secs. 1 and 4 of the Alaska Constitution. I would expect a similar outcome by an Alaska court.

Finally, for your information, the full citation to *Ohio Life Ins. and Trust Co.* decision on page 3 of my memorandum to you dated May 18, 2006, is *Ohio Life Ins. and Trust Co. v. De Bolt*, 57 U.S. 416; 14 L. Ed. 997; 1850 U.S. LEXIS 1559; 16 HOW 416 (1854). The quotation discussed the prohibition against one legislature depriving a future legislature of the power to impose a tax the future legislature finds necessary, absent a constitutional provision providing for such a restriction.

If I may be of further assistance, please advise.

DMB:ljw  
06-253.ljw

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<sup>3</sup> 174 N.E.2d at 76-78 (citations omitted).

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## MEMORANDUM

May 18, 2006

**SUBJECT:** Contracting away the power of taxation  
(Work Order No. 24-LS1938)

**TO:** Representative Les Gara

**FROM:** Donald M. Bullock Jr.  
Legislative Counsel

With reference to the draft "Alaska Stranded Gas Fiscal Contract" under review by the legislature, you asked whether the power of taxation could be surrendered or contracted away and whether one legislature could bind a future legislature or an initiative from enacting different tax rules.

The questions you ask present issues under three specific sections of the state constitution -- art. IX, sec. 1, art. IX, sec. 4, and art. I, sec. 15. In my opinion a contract provision limiting the level of a tax is more likely than not contrary to art. IX, sec. 1 and is not within the exceptions in art. IX, sec. 4. However, if a tax-limiting provision were to be included in a contract and the provision was not voided based on art. IX, secs. 1 and 4, art. I, sec. 15 would prohibit the legislature or a future initiative from "impairing the obligation of [the] contract[]" by making a change in the tax.

### Article IX, sec. 1

Article IX, sec. 1, Constitution of the State of Alaska reads as follows:

**Taxing Power.** The power of taxation shall never be surrendered.  
This power shall not be suspended or contracted away, except as provided  
in this article.

This section has been discussed only twice by the Alaska Supreme Court and both discussions were published in 1983 decisions. In *Alascom, Inc. v. North Slope Borough*,<sup>1</sup> the North Slope Borough claimed that any statute of limitations applied to bar supplemental assessments would contravene art. IX, sec. 1. The Borough argued, "that applying a statute of limitations to tax assessments and collections would constitute an unconstitutional surrender or suspension of the taxing power." The court rejected this argument by writing:

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<sup>1</sup> 659 P.2d 1175 (Alaska 1983).

We believe that the response to the Borough's contention is provided by Article [IX], section 4, of the Alaska Constitution, the provision addressing exemptions from taxation. After setting forth specific exemptions this provision states that "other exemptions of like *or different* kind may be granted by general law" (emphasis supplied). In our view this constitutional grant of power to except encompasses the power to require that taxes be assessed and collected within a certain period of time or be forever barred.<sup>2</sup>

In other words, the legislature had enacted a statute limiting the period in which a borough could make assessments and such an enactment was consistent with art. IX, sec. 4. If property was not assessed within the limited period, the property was effectively exempt for the period in which the assessment was not timely made.

The second case discussing the art. IX sections is not helpful in analyzing the issues you raise. In *Cogan v. State, Dep't of Revenue*,<sup>3</sup> the court merely referred to art IX, secs. 1 and 4 as authority for deciding that paying taxes is an obligation of a person to the people and to the State should the legislature impose them.<sup>4</sup>

Attorney General Bruce Botelho discussed art. IX, sec. 1 in an opinion discussing the Alaska Stranded Gas Development Act, SCS CSHB 393(FIN) (1998). In that opinion, addressed to Governor Tony Knowles, the Attorney General wrote:

There are a number of other important issues raised by this legislation. First, art. IX, sec. 1, of the Alaska Constitution provides that "the power of taxation shall never be surrendered." The bill raises the "surrender of the taxing power" question because it contemplates development of a long-term contract that reflects the fiscal terms applicable to the sponsors of a stranded gas project. The legislation itself, however, is not unconstitutional under art. IX, because it does not purport to bind future legislatures. Instead, it merely authorizes the commissioners of revenue and natural resources to develop appropriate contract terms. Authorization to execute the contract will not be delegated to the executive branch until the legislature has had an opportunity to review the contract and ascertain whether its terms are in the public interest. Even if that authorization is given, the legislature may expressly provide that the contract's fiscal terms are binding only so long as no future legislature decides to exercise the taxing power in a different way. In other words, the "surrender of the taxing power" issue may never arise. A concrete analysis of the issue

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<sup>2</sup> 659 P.2d at 1179 (footnote omitted).

<sup>3</sup> 657 P.2d 396 (Alaska 1983).

<sup>4</sup> 657 P.2d at 398.

must be left to the day the legislature decides whether, and if so under what terms, it will allow execution of a contract at all.<sup>5</sup>

The Attorney General's opinion offers that the contracting away issue could be avoided by having the contract recognize that future legislatures may make changes to the tax. However, if the contract precludes future legislative action, the art. IX, sec. 1 prohibition against contracting away the taxation power would need to be resolved.

During my research, I found a short discussion relevant to the issue of surrendering the power to tax by contract. An 1862 decision of the California Supreme Court quoted an Ohio court case that discussed the surrender by contract of the taxing power. In *Fall v. The County of Sutter*,<sup>6</sup> the California Supreme Court wrote:

A series of cases arose under a general Banking Law of the State of Ohio, wherein it was claimed that the Legislature had authority to surrender by contract the taxing power on bank capital; and having the power, had so exercised it. The first is the case of the *Ohio Life Ins. and Trust Co. v. De Bolt* (16 How.) In this case Chief Justice Taney, in delivering the opinion of the Court, held as follows:

The powers of sovereignty confided to a legislative body are undoubtedly a *trust* committed to them, to be executed to the best of their judgment for the public good, and no one Legislature can by its own act disarm their successors of any of the powers or rights of sovereignty confided to the legislative body, *unless they are authorized to do so by the Constitution under which they are elected*. They cannot, therefore, by contract deprive a future Legislature of the power of imposing any tax they may deem necessary for the public service, or of exercising any other act of sovereignty confided to the legislative body, *unless the power to make such contract is conferred upon them by the Constitution of the State*; and in every controversy on this subject the question must depend upon the Constitution of the State, and the extent of the power thereby conferred on the legislative body." [Emphasis in original.]

**Article IX, sec. 4**

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<sup>5</sup> 1998 Alas. AG LEXIS 7 (May 29, 1998).

<sup>6</sup> 21 Cal. 237 (1862).