

May 7, 1991

The Honorable Jim Zawacki
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Re: Funding a privately owned public utility's water
cleanup. Our file: 661-91-0503

Dear Representative Zawacki:

You have requested a legal opinion concerning whether an appropriation of state funds to finance a treatment system for a private water system violates the "public purpose" requirement of the Alaska Constitution.

As set forth in your letter, the purpose of the proposed appropriation is to fund a filtration system for the McGahan Utilities' drinking water system to remove the contaminant tetrachloroethylene. The treatment system would bring the water system into compliance with state and federal drinking water regulations governing the contaminant and allow over 450 residents to safely use the water. For the reasons set forth below, we conclude that such an appropriation would not run afoul of the public purpose requirement.

Article IX, section 6 of the Alaska Constitution provides that all appropriations of public money be for a "public purpose."

Although the term "public purpose" has never explicitly been defined by the courts of Alaska, 1/ it is generally interpreted to encompass any expenditure which serves a governmental purpose. 1/ In order for an expenditure to serve a government purpose, the public must directly benefit. Payments of public money may be made to individuals, if the direct benefit of the payment inures to the

1/ DeArmond v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962) ("Public purpose represents a concept which is not capable of precise definition. . . . It is a concept which will change as changing conditions create public needs.")

2/ 71 Am. Jur. 2d State and Local Taxation § 42 (1973).

public rather than private individuals. The Alaska Supreme Court has found such a public purpose in a variety of situations. 1/

Likewise, an informal opinion of the attorney general found a public purpose in a proposed appropriation to expand a private recreational ski area. 1982 Inf. Op. Att'y Gen. (Mar. 8; J66-82-463). Another opinion dealt with a proposed grant by the City of Juneau of approximately \$3.2 million and a piece of property to a private corporation for construction of a seven story parking garage. 1983 Inf. Op. Att'y Gen. (July 27; 366-84-036).

The primary concern raised in the attorney general's opinion was that the corporation could earn a substantial profit on the public investment by charging prevailing commercial rates for parking. The opinion pointed out that the Alaska Supreme Court in Lien v. City of Ketchikan 1/ upheld a long-term lease of a public hospital to a nonprofit corporation in part because the lease required the corporation to establish fair and equitable rates "sufficient only to pay the costs of operation." The opinion also focused on the fact that the City of Juneau did not propose to retain ownership in the property or have control over operation of the parking garage or the rates to be charged.

Here, McGahan Utilities is a public utility whose rates are regulated by the Alaska Public Utilities Commission (APUC). Under APUC's rate scheme, the state's funding of the treatment system would be considered donated capital and would not be used as a basis to raise water rates. As a result, the benefits of non-

3/ Comtec, Inc. v. Mun. of Anchorage, 710 P.2d 1004 (Alaska 1985) (marketing of customer premises telephone equipment through Anchorage Telephone provides a public benefit); Lake Otis Clinic v. State, 650 P.2d 388 (Alaska 1982) (state aid to private hospitals fulfills a public purpose); Wright v. City of Palmer, 468 P.2d 326 (Alaska 1970) (bonds issued to encourage industrial development fulfill a public purpose); Walker v. Alaska State Mktg. Ass'n, 416 P.2d 245 (Alaska 1966) (Alaska State Mortgage Association, which promotes housing, fulfills a public purpose by promoting the general welfare); Suber v. Alaska State Bonding Comm., 414 P.2d 546 (Alaska 1966) (plan to provide mortgage relief to owners of homes destroyed by earthquake satisfies a public purpose); Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963) (purpose of hospital did not become nonpublic just because the city turned it over to a private organization); DeArmond v. Alaska State Dev. Corp., 376 P.2d 717 (Alaska 1962) (creation of development corporation to promote business growth fulfills a public purpose).

4/ 383 P.2d 721 (Alaska 1963).

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contaminated water would inure to its users without an increase in rates paid to the McGahan Utility. Thus, the Supreme Court's concerns, expressed in Lien v. City of Ketchikan, arguably are satisfied.

The appropriation should be direct to the Department of Environmental Conservation or some other executive department for the purpose of constructing the treatment system. The appropriation may not be made directly to McGahan Utilities. 1/ In order to ensure the benefits inure to the water system users and not the utility itself, it would be advisable to condition the assistance on provisions 1) prohibiting McGahan or its successors from putting the publicly funded improvements into the rate base, 2) requiring that McGahan's system be brought up to code so that the water can be efficiently treated, and 3) requiring that McGahan Utilities be in good standing with APUC to receive assistance from ADEC.

We appreciate the opportunity to advise on this matter.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: Breck C. Tostevin
Assistant Attorney General

5/ The doctrine of separation of powers prohibits the legislative branch from designating the contractor in the appropriation. See 1982 Inf. Op. Att'y Gen. (Mar. 8; J66-82-463).