

Max Hodel
Chief of Staff
Office of the Governor

August 3, 1991

663-92-0057

465-3600

Legal questions raised
by proposed declaration
of imminent disaster --
Aniak fuel shortage

Kathleen Strasbaugh
Assistant Attorney General

At the request of your office, we have reviewed a proposed disaster declaration for an imminent fuel emergency in the City of Aniak. As we understand it, Aniak has no money to pay for fuel for the winter, and if fuel is not placed on a barge on August 5, 1991, the city will be unable to obtain fuel other than by air, at a cost greatly exceeding that of barge transport.

In brief, we conclude that you may issue the declaration, but that you must use a different funding source for the loan to Aniak with which you intend to meet the emergency.

We concur with the reservations expressed in emergency services director Erv Martin's August 2, 1991, memorandum about the propriety of an emergency declaration in this situation. However, AS 26.23.900(1)(A) clearly includes an "imminent threat" of a "shortage of fuel". The inevitability of the shortage is apparently clear to the division of emergency services and we have no cause to question its judgment in that regard. Accordingly, we conclude that a declaration would probably not be unlawful in this situation.

However, the proposed financing mechanism, a loan from the Alaska Energy Authority's (AEA) Power Project Fund, is probably inappropriate. AS 26.23.050(b) provides:

Whenever, and to the extent that, money is needed to cope with a disaster, the first recourse shall be to money regularly appropriated to state and local agencies. The second recourse shall be to money available in the disaster relief fund . . . as the governor determines appropriate. If the money available from these sources is insufficient, and if the governor finds that other sources of money to cope with the disaster are not available or are insufficient, the governor may, notwithstanding the limitations imposed by AS 37.07.080(e)

(1) transfer and spend money appropriated for other purposes; or

(2) borrow money for a term not to exceed two years.

(Emphasis supplied).

When we spoke with the division of emergency services, the Office of Management and Budget, and the AEA we indicated that we would recommend the use of the disaster relief fund. In addition, we told AEA that, although we believe there is nothing in the current law and regulations governing the bulk fuel revolving loan fund that prohibits AEA from providing another loan, despite Aniak's failure to repay its prior loan, we understood that they had a strongly enforced policy of denying loans to communities in arrears on a prior loan, and we indicated we would take that into account in our advice.

Despite our preliminary advice that we would recommend use of the disaster relief out of caution, a closer reading of the statute and a review of a previous opinion of the office, 1979 Inf. Op. Att'y Gen. (June 12; J-66-767-79) (copy attached), compel us to conclude that we must be more emphatic. We conclude you must expend funds in the order prescribed in AS 26.23.050(b), which would preclude the proposed loan from the power project fund unless the disaster relief fund is first exhausted. (We assume here that the power project fund, the bulk fuel revolving loan fund, and the disaster relief fund are each in separate appropriations and cannot be transferred solely with the approval of the director of OMB under AS 37.07.080(e)).

As to the existence of "money regularly appropriated" under AS 26.23.050(b), we conclude that only \$50,000 is arguably available from the bulk fuel fund under AS 45.87.020(a). Further, 3 AAC 85.035(4) limits an applicant to a loan of \$50,000, including other loans for bulk fuel. This regulation suggests that Aniak would be ineligible for a loan from the fund because, if the disaster declaration is signed, they would be receiving at least \$150,000 in loans from another source, the disaster relief fund. (We were not able in the time allotted to consult with others more familiar with the regulations to determine if this interpretation is correct.) However, the governor may (but is not required to) suspend such regulatory impediments in the case of a disaster. AS 26.23.020(g)(1).

Another source of "money regularly appropriated" may be the fuel emergency fund created by AS 26.23.400. If money has been appropriated to this fund, it would seem to be the best source to meet this emergency.

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Assuming that no money has been appropriated to the fuel emergency fund, it would appear that at least \$150,000, and perhaps the entire \$200,000 requested, ought to be drawn from the disaster relief fund. We see no reason why the money should not be in the form of a loan. AS 26.23.300(b)(2). Further, administration by AEA seems a sensible plan. The loan document prepared by AEA is suitable to the purpose.

Accordingly, we recommend that the last paragraph of the division of emergency services' draft declaration be amended to read as follows:

FURTHER, the division of emergency services, Department of Military and Veterans Affairs, is authorized to loan funds from the disaster relief fund not to exceed \$150,000/\$200,000, to the City of Aniak, and payable over a term of three years. The Alaska Energy Authority is authorized to and charged with establishing, administering, and enforcing the terms of the loan.

In closing, we note that the limitations found at AS 26.23.050 on the expenditure of funds in an emergency are not subordinate to the authority granted the governor under AS 26.23.020. Under Alaska Constitution article IX, section 13, expenditures may only be made as authorized by law, and the legislature has imposed certain limitations on transfers of funds for emergencies.

The assistant attorney general named above will be available at the above number until 5:45 P.M. August 4, 1991, and at 272-4553 from 10:15 P.M., if you have any questions or need any further assistance.

cc: Douglas L. Blankenship
Deputy Attorney General