MEMORANDUM

State of Alaska
Department of Law

TO: Hon. Harold C. Heinze, Comm'r
Dep't of Natural Resources

DATE: March 12, 1992

FILE NO.: 663-92-0382

TEL. NO.: 465-3600

SUBJECT: Legal status of soil and water conservation districts

Marie Sansone

FROM: Marie Sansone
Assistant Attorney General
Natural Resource Section

You have requested advice concerning the legal status of the soil and water conservation districts for various administrative purposes, including receiving and expending state and federal funds, procurement, personnel matters, taxation, and liability. It is our opinion that the districts are state agencies for these purposes, and that the statutes and regulations which apply to state agencies with respect to these matters also apply to the districts.

BACKGROUND

The soil and water conservation districts (districts) have their origins in the Soil Conservation District Law of 1947. Secs. 47-4-1 to 47-4-5, ACLA 1949. That law established "as a body corporate and politic" the Soil Conservation District of Alaska, comprising the area of the Territory. Id., sec. 47-4-3. The Board of Administration appointed the Alaska Soil Conservation Board, a territorial agency, consisting of three farmers interested in the conservation of land resources. Id., sec. 47-4-4. The Soil Conservation Board was the governing body of the District, with specified powers relating to surveys and investigations; the assistance of settlers, land occupiers, and governmental agencies; soil conservation and erosion control; construction and maintenance of erosion control structures; development of comprehensive soil conservation plans; and the acceptance of contributions. Id., sec. 47-4-4. This board was also authorized to create sub-districts, to fix their boundaries, and

> to supervise the election of, prescribe the duties of, and install a governing body of 5 land occupiers to be known as District Supervisors for each subdistrict created; and to delegate to the District Supervisors such of the district's powers, as set out in this section, as the Board deems

necessary to accomplish the purposes of this Act within the sub-district boundaries.

Id., sec. 47-4-5.

With the state organization Act of 1959, the Alaska Soil Conservation Board was abolished and all its functions transferred to the Department of Natural Resources (department). Secs. 16, 27, ch. 64, SLA 1959. In 1960, the legislature created the Alaska Soil Conservation Board, composed of three farmers selected from the major farming areas of the state and appointed by the governor. The new board's duties were strictly advisory in nature: "At the request of the commissioner of natural resources, the board shall meet and shall advise him in the exercise of his powers, duties, and functions." Sec. 1, ch. 82, SLA 1960. The powers which had been held by the predecessor board were vested in the commissioner, id., sec. 2, including the power to create sub-districts and to delegate to the district supervisors for each sub-district "such of the district's powers, as set out in this section, as the Commissioner deems necessary to accomplish the purposes of this Act within the sub-district boundaries." Id., sec. 3(9).

In 1983, the legislature repealed AS 41.10.020, which had provided for the Soil Conservation District of Alaska. Sec. 14, ch. 69, SLA 1983. The purpose of AS 41.10 was expanded to include matters relating to the conservation of water resources. Sec. 1, ch. 69, SLA 1983; AS 41.10.030. The Alaska Soil Conservation Board was renamed the Alaska Soil and Water Conservation Board, and expanded to five members and the commissioner, who serves ex officio, but without a vote. Sec. 2, ch. 69, SLA 1983; AS 41.10.040. The board's advisory role with respect to certain matters was clarified. See sec. 9, ch. 69, SLA 1983; AS 41.10.100(b). Minor amendments were made to AS 41.10.130, which provides for soil and water conservation districts, previously called sub-districts. A new subsection was added providing that the area of the state not located within a district is governed by the Alaska Soil and Water Conservation Board. See sec. 12, ch. 69, SLA 1983; AS 41.10.130.

AS 41.10.130 currently states:

> Creation and boundaries of soil and water conservation districts. (a) The commissioner of natural resources may, on the recommendations of the board, create soil and water conservation districts in the state upon petition signed by 25 or more land users setting out the proposed boundaries of the proposed district. The commissioner shall fix a time for and give notice

of a public hearing based on the petition at a convenient location or locations within the boundaries of the proposed district. The commissioner may fix the boundaries of the district created, supervise the election of, prescribe the duties of, and install a governing body of five land users to be known as district supervisors for each district created, and delegate to the district supervisors powers as the commissioner considers necessary to accomplish the purposes of this chapter within the district boundaries.

(b) The area of the state that is not located within a district organization under (a) of this section shall be governed by the board.

Thus, under AS 41.10.130(a), the boards of supervisors (district supervisors) of the districts have only those powers delegated to them by the commissioner. The commissioner may delegate to the boards only those powers that he has under AS 41.10.110 and that he considers necessary to accomplish the purposes of AS 41.10 within the district. See AS 41.10.130(a); City of Cordova v. Medicaid Rate Comm'n, 789 P.2d 346, 351-53 (Alaska 1990).

Under AS 41.10.110,

The commissioner of natural resources has the power to

(1) conduct land capability surveys and investigations of potential agricultural areas and of soil conservation and erosion control, including necessary preventative and control measures, in the state; to publish the results of these surveys and investigations and to disseminate information concerning the results of the surveys and investigations to prospective settlers and the general public;

(2) make technical guidance and other assistance available to settlers of new land to assure the development of the land in a manner that will permit it to be used in accordance with its capabilities and treated in accordance with its needs;

(3) carry out measures for soil conservation and erosion control within the state, including

engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land, with the consent and cooperation of the land user or agency having jurisdiction of the land;

(4) cooperate with, furnish assistance to, and enter into agreements with, a user of land or agency within the state;

(5) construct, improve, and maintain soil erosion control and conservation structures as are necessary and practical for carrying out the purposes of this chapter;

(6) develop comprehensive plans for the conservation of soil and control of soil erosion within the state, cropping programs, tillage practices and changes in land use, and publish plans and information and bring them to the attention of users of land within the state;

(7) accept contributions in money, services, materials, or equipment from the United States or its agencies, from an agency of the state, and from any other source, for use in carrying out the purposes of this chapter.

As can be seen from AS 41.10.110, while many of the commissioner's powers are carried out at the local level, the scope of the soil and water conservation program is statewide in nature.

No discussion of the legal status of the districts was found in the legislative history of AS 41.10. However, in hearings on the 1983 amendments, Sig Restad, who had worked on soil conservation matters for the department since 1962, testified that the amendments would promote a unified approach to soil and water conservation throughout the state. He characterized the districts' work as "unified statewide conservation activity." Senate Resources Committee Tape No. 24 (Apr. 8, 1983).

Agency records pertaining to the districts do not shed much light on the status question. Department Order 120, dated August 2, 1985, a memorandum from former commissioner Esther C. Wunnicke to the department's deputy commissioners, division directors, and special assistants, stated:

> The Alaska Soil and Water Conservation District Board (ASWCB) and the nine local Soil and Water Conservation Districts (SWCD's) are organized under

the Department of Natural Resources, pursuant to the state's soil and water conservation law (AS 41.10), for the purposes of guiding settlement and conserving soil and water resources.

No orders delegating authority to the districts have been found.

According to the department, the districts receive a relatively small amount of money from the department (e.g., $ 1,125 per year); however, they receive a considerable amount of staff time (e.g., worth $ 50,000 - 100,000). The Department of Environmental Conservation has granted money to the districts. The districts directly receive federal funds, and the federal Soil Conservation Service also contributes staff time. At present, the districts maintain their own bank accounts.

The local cooperators (land users) in each district nominate and elect from among themselves a board of supervisors, the governing body of a district. If nominations are not received, the board of supervisors appoints a local cooperator to serve. In an ethics opinion, the members of the boards of supervisors were found to be public officers within an executive branch agency for purposes of the Executive Branch Ethics Act, AS 39.52. 1992 Inf. Op. Att'y Gen. (Feb. 3; 663-92-0301).

The ethics opinion, along with the department's interest in provided an expanded role for the districts, has raised questions concerning the legal status of the districts for various administrative purposes.

DISCUSSION

To determine the legal status of an administrative entity, it is necessary "to balance an entity's autonomy against the state's retained control." Alaska Commercial Fishing & Agricultural Bank v. O/S Alaska Coast, 715 P.2d 707, 711 (Alaska 1986) (CFAB). In CFAB, the Alaska Supreme Court ruled that an entity may be considered a state agency for one purpose and not for another. Each circumstance requires an "independent analysis." Id. at 799 n.5.

In a recent memorandum of advice, we listed a number of factors, derived from CFAB, that must be weighed in determining whether or not an entity is a state agency for a particular purpose. See 1992 Inf. Op. Att'y Gen. 3-4 (Jan. 23; 663-92-0131). The factors that support finding an entity a state agency include:

(1) Whether the entity is expressly placed within a principal department of state government;

(2) Whether the head of a department is a member of its governing body;

(3) Whether there is potential for a state official to influence or oversee the activities of the entity;

(4) Whether the governor appoints its members;

(5) Whether the entity has to report to a state agency, the governor, or the legislature;

(6) Whether the entity is audited by state officials;

(7) Whether the legislature has to approve the final dissolution of the entity;

(8) Whether funds received by the entity are deposited into an account held by the state Department of Revenue;

(9) Whether copies of minutes must be sent to the governor;

(11) Whether the legislature funds the entity;

(12) Whether the entity was created to pursue a governmental task or public purpose;

(13) Whether the State Personnel Act covers the entity's employees;

(14) Whether a state department has the "final say" over an entity's policies, programs, and procedures;

(15) Whether title to the entity's property remains with a state department;

(16) Whether a state department has to perform important tasks for the entity;

(17) Whether the source of the entity's powers can be traced to a state statute;

The following factors, on the other hand, support a determination that an entity is not a state agency:

(1) Whether there is clear legislative history that the entity is considered private;

(2) Whether the entity has a high degree of autonomy from the state;

(3) Whether the entity reports to its members, not directly to the state;

(4) Whether the entity's employees are statutorily excluded from the definitions of state employees and employees of a public organization;

(5) Whether the entity can enter into contracts;

(6) Whether an entity can sue and be sued;

(7) Whether the entity can adopt administrative rules;

(8) Whether the entity can formulate its own policy;

(9) Whether the entity can accept grants and loans from the government;

(10) Whether the entity holds title to property in its own name;

(11) Whether the entity can manage its own assets; and

(12) Whether any of the statutes applicable to state government expressly exclude the entity from their requirements.

See id.; see also 715 P.2d at 710-11. Corporate status is a neutral factor which neither precludes nor mandates finding an entity to be a state agency. 715 P.2d at 711.

Applying these factors to the districts leads to the conclusion that they are state agencies for purposes of receiving and spending funds, procurement, personnel matters, taxation, and liability.

The factors that support finding the districts to be state agencies include the following: The commissioner, who has the power to create the districts, establish their boundaries, supervise the election of and install their governing bodies, prescribe the duties of the governing bodies, and delegate power to the governing bodies, can effectively control the activities of the districts. The state funds the districts, and the department provides support staff. The districts are created to pursue the public purpose of soil and water conservation. The commissioner, through the delegation of authority, has the "final say" over the districts' policies, programs, and procedures. The districts answer to the commissioner. The source of the districts' powers

derives from delegation by the commissioner, which in turn derives from AS 46.13.110 and AS 46.13.130. The legislative history indicates that the districts play an essential role in the statewide soil and water conservation program. Legally, the districts do not have a high degree of autonomy from the state. None of the statutes discussed below relating to the receipt and expenditure of funds, procurement, or personnel exclude the districts from their requirements.

These factors must be weighed against the fact that the boards of supervisors are elected from the local cooperators, rather than appointed by the commissioner or the governor. The department's administrative practices indicate that the districts have been given considerable latitude in conducting their activities. Also of significance is the fact that the federal soil conservation program is geared toward local entities. See, e.g., 16 U.S.C.A. § 590h(b) (Supp. 1991). However, when balancing these factors against those discussed above, the scales tip heavily in favor of finding the districts state agencies.

A. Receiving and Expending State Program Receipts and Federal Funds

In general, the statutory requirements for receiving and expending state program receipts and federal funds are found in Title 37. In particular, AS 37.05, the Fiscal Procedures Act; AS 37.07, the Executive Budget Act; AS 37.10, relating to public funds; and AS 37.25, miscellaneous provisions, are applicable.

With respect to federal funds, the Fiscal Procedures Act provides:

> Federal funds received by an agency shall be deposited in the state treasury and disbursed in the same manner as other state money. Federal funds are subject to the fiscal controls imposed by this chapter, except where federal laws or regulations prevent the funds from being deposited, appropriated, allocated, accounted for, or expended as provided by this chapter and other laws not inconsistant with this chapter.

AS 37.05.050. Similarly, the Executive Budget Act states, "If a section or part of a section of this chapter is in conflict with federal requirements for a program for which federal grant-in-aid funds are available, the section or part, to the extent of the conflict, is inoperative." AS 37.07.110.

Administrative procedures for the transfer of funds between or within state agencies, such as Reciprocal Services Agreements (RSAs) and the allocation of funds, are used by agencies within the state accounting system. For the time being, to maintain public accountability, the department may wish to transfer funds to the districts by grants, setting appropriate terms and conditions. As the districts are brought in line with state fiscal and accounting procedures, the RSA mechanism or an allocation of funds may be more appropriate.

B. Procurement

With certain exceptions enumerated in AS 36.30.850(b), the State Procurement Code, AS 36.30, "applies to every expenditure of state funds, irrespective of their sources, including federal assistance except as otherwise specified in AS 36.30.890, by the state, acting through an agency, under a contract . . . ." AS 36.30.850(b). AS 36.30.890 states:

> If a procurement involves the expenditure of federal funds or federal assistance and there is a conflict between a provision of this chapter or a regulation adopted under a provision of this chapter and a federal statute, regulation, policy or requirement, the federal statute, regulation, policy or requirement, shall prevail.

The Procurement Code defines the word "agency" to include a department, board, or "other administrative unit of the executive branch of state government." See AS 36.30.990(1). Because the districts are organized under the department, they are administrative units of the executive branch subject to the Procurement Code.

C. Personnel

The statutes relating to state personnel are found in Title 39. It appears, at least initially, that the districts will have to comply with state personnel rules unless they are able to contract for services under the State Procurement Code. The implications of either option should be more fully explored with the department's personnel officer and the Division of Labor Relations in the Department of Administration.

D. Taxation

Article X, section 2, of the Alaska Constitution allows the state to delegate its taxing power to boroughs and cities only. No other local entities may impose a tax. State v. Alex, 646 P.2d 203, 211-13 (Alaska 1982); Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1120 (Alaska 1978). The soil and water conservation districts, therefore, may not impose a tax to raise funds to support their activities.

E. Liability

1. Claims against the State

AS 09.50.250 authorizes causes of action against the state for contract, quasi-contract, and tort claims. This statute also provides the state with certain statutory immunities, including immunity under the "discretionary function exception" to tort liability and immunity from claims arising out of assault, battery, libel, slander, misrepresentation, deceit, or interference with contract rights.

Under AS 09.50.250, certain claims must be brought administratively. First, AS 44.77 establishes an administrative claims procedure for reimbursement for money spent or for compensation for labor or supplies furnished to or for the state based on a contract. Second, protests concerning the award of a contract under the State Procurement Code are governed by AS 36.30.560 -- 36.30.695.

2. Personal Liability of State Officers

The Alaska Supreme Court has created a common law immunity for public officers called "official immunity" or "executive immunity." Aspen Exploration Corp. v. Sheffield, 739 P.2d 150 (Alaska 1987). Official immunity applies to administrative officials; that is, members of the executive branch of government or members of bodies which do not strictly belong to any of the three traditional branches of government. Id. at 153 n.7. Thus, the members of the boards of supervisors are shielded from personal liability by the doctrine of official immunity.

The court has outlined the parameters of official immunity in several cases. Aspen concerns immunity for alleged violations of common law rights (which would include certain torts). Breck v. Ulmer, 745 P.2d 66 (Alaska 1987), cert. denied, 485 U.S. 1023 (1988), controls the scope of immunity for alleged

violations of statutory rights. State v. Haley, 687 P.2d 305 (Alaska 1984), and Walt v. State, 751 P.2d 1345 (Alaska 1988), discuss immunity for alleged violations of constitutional rights. Immunity for libel was the subject of McCutcheon v. State, 746 P.2d 461, 468-69 (Alaska 1987).

In general, the doctrine of official immunity applies if the official's actions are within the scope of his or her authority and are discretionary in nature. "Discretionary" acts require personal deliberation, decision, and judgment; while ministerial acts consist of obedience of orders or the performance of a duty in which the officer is left with no choice of his or her own. Aspen, 739 P.2d at 155. With qualified immunity, a public official is immune from personal liability if, in performing a discretionary act, he or she acted in good faith and without corrupt or malicious motive. Under Aspen, the members of the boards of supervisors would most likely enjoy qualified immunity. 1/ They are not shielded from liability for negligence in performing ministerial acts or acts outside the scope of their authority. See 739 P.2d at 160.

F. Recommendations

AS 41.10 presently provides little guidance on the role of the soil and water conservation districts, essentially leaving the matter to the commissioner's discretion. Whether the statute should be clarified or changed will undoubtedly be a topic of discussion at the annual meeting of the districts in March. We would be happy to advise you on the legal aspects of any suggested changes. It may be helpful to use the list of factors presented above at pages 6-7 in your discussions of proposed changes, together with any other factors that are particular to soil and conservation matters. Among other considerations, the federal requirements for participation in federal soil and water conservation programs should be taken into account.

1/ The difference between absolute immunity and qualified immunity is discussed at length in Aspen. Absolute immunity shields an official from suit as well as damages; qualified immunity extends only to damages. When an official is entitled to absolute immunity, his or her motive is irrelevant. For most government functions, qualified immunity, which protects an official from liability for discretionary acts performed in good faith and within the scope of his or her statutory authority, affords adequate protection. See 739 P.2d at 158-62.

The delegations of authority to the boards of supervisors are of immediate concern. Given the uncertainty regarding the nature and status of the delegation orders, any existing orders should be rescinded and new orders issued. The new orders will clarify the powers and duties of the districts and the boards of supervisors, and may effectively resolve present concerns over the role of the districts short of a legislative solution.

MS:bga

cc: Sharon Barton, DNR, Director

Kirsten Sikora, DNR, Administrative Aide