MINUTES

SENATE COMMITTEE ON LOCAL GOVERNMENT

August 18, 1993
Room 521-S -- Statehouse

Members Present

Senator Mark Parkinson, Chairperson
Senator Marian K. Reynolds, Vice-Chairperson
Senator Paul Feleciano, Jr.
Senator U. L. "Rip" Gooch
Senator Mark V. Parkinson
Senator Pat Ranson
Senator Alfred Ramirez
Senator Carolyn Tillotson

Staff Present

Mike Heim, Kansas Legislative Research Department
Theresa Kiernan, Revisor of Statutes Office
Shirley Higgins, Committee Secretary

Conferees

Murray Nolte, President, Kansas Association of Counties
John Divine, Salina City Commissioner
Mary Bolton, Rice County Commissioner
Jerry Fear, Oberlin City Administrator
John Torbert, Kansas Association of Counties
Chris McKenzie, League of Kansas Municipalities
Bruce McDowell, Advisory Commission on Intergovernmental Relations

Morning Session

State Mandates

The meeting was called to order in Room 521-S by Senator Mark Parkinson, Chairperson, at 9:10 a.m. on August 18, 1993.

Senator Parkinson noted that the issue of the effect of state mandates on cities and counties has been considered important enough to be the subject of an interim meeting when more time is available for a substantive discussion and recalled that there had been considerable discussion of a constitutional amendment at the end of the last session to either restrict mandates or require compensation for any mandates which is something that has been considered and adopted by other states. He pointed out that Representative Nancy Brown, Chairperson of the House Local Government Committee, was present. He asked Mike Heim to give an overview.

Mr. Heim passed out an article regarding state mandates to local governments published by the National League of Cities, a copy of H.B. 2193, and a copy of H.C.R. 5018. (See Attachments 1, 2 and 3.) He noted that this topic has been discussed before. There was a study by the now defunct State Division of Planning and Research, which was a division within the Department of Administration, in the late 1970s. They published a report about state mandates, and periodically since then there has been some interest in this state in terms of trying to deal with the issue of state mandates on local units of government. Last session there were a couple of pieces of legislation introduced, which he had passed out, that dealt with the issue. Primarily, what is usually discussed is some type of constitutional amendment that restricts legislative power in this area in terms of mandating local units of government to do something without providing a source of funding. They are worded in different ways, but in some cases they have had an escape hatch for local governments that they do not have to follow the mandate if they do not get the funding or a funding source. There have been a number of states that have pursued this issue, and some have come up with constitutional amendments. Questions to keep in mind are: Should the Legislature restrict its power in this area? Why is it a good idea? The issue really involves restricting state legislative power. The wording of the particular proposals is important. Clear language is needed to prevent subsequent litigation.

Mr. Heim noted that Bruce McDowell with the Advisory Commission on Intergovernmental Relations (ACIR) was scheduled in the afternoon. This is an advisory group that is funded by the federal government and is made up of federal, state, and local officials as well as members of the public. It has been in existence for about 35 years. Much of the focus of ACIR has been on how to make government at all levels more efficient, more accountable to the public, and as "Intergovernmental Relations" indicates, they attempt to smooth the relationship between local governments and state government. ACIR has done studies on state mandates and various other topics.

Murray Nolte, President, Kansas Association of Counties, introduced other panel members joining him at this meeting to discuss the negative impact of mandates on local units of government and possible solutions to the problems involved. These other members were John Divine, Salina City Commissioner; Mary Bolton, Rice County Commissioner; and Jerry Fear, Oberlin City Administrator. Also testifying were Chris McKenzie, League of Kansas Municipalities, and John Torbert, Kansas Association of Counties.

Mr. Nolte is also a member of the Johnson County Board of Commissioners and stated he wished to discuss three mandates specifically that impacted Johnson County. (See Attachment 4.) He added that he feels county commissioners recognize that most mandates are in the best interest of the citizens of his county, however, the problems lie with the cost. Mental health reform is a good example of an area where all have gained as citizens remain in their own community, many being mainstreamed back into communities and being able to hold jobs there instead of being warehoused in state institutions. The benefit to the state from this standpoint is that the cost to be in a state institution is in the vicinity of $80,000 a year. For those 400 to 500 people who have come back into the community and are being served by community support service organizations for mental

health, the cost ranges from less than $1,000 per year for those whose counseling is at a minimum and up to $25,000 per year for those who require more intensive counseling. Also, Johnson County's community correction program has been recognized as one of the county's most outstanding programs. They deal with approximately 800 offenders who would be in state institutions if they were not provided for in community corrections. Many of these have provided 10,000 community service hours, and more than 90 percent of them have been employed. Total taxes paid on wages by this group in 1993 are $816,807 which is money that is coming back into the community. Mr. Nolte feels it is important too that these are people that are staying with their families, and in many cases, supporting their families, keeping them off welfare. The state does pay the full operating cost of this program, but the county provides the facilities and support programs. Mr. Nolte acknowledged the benefits of mandates, but expressed the hope that new mandates come with a means of funding them, relieving the financial burdens they create at present.

John Divine, Salina City Commissioner, followed with comments on specific problems the City of Salina has with state mandates. (See Attachment 5.) He examined the problem Salina has in shifting tax dollars to meet the needs that the city has as a whole. Salina is limited as to where it can generate its revenue to property tax, sales tax, and fees. As in all communities, Salina is having to raise fees as an impact of mandates. This is passed on to the citizens which can be critical for those on fixed incomes. Tax lids limit what can be collected, therefore, local needs cannot be met because of the lack of funds available after meeting the requirements of mandates. Elected officials want to keep the infrastructure strong, but when the funds or the ability to raise the funds to meet the community's needs are not available, they are left in an uncomfortable, tough position. Without the ability to the raise the funds to meet the community needs, the extra burdens resulting from state mandates restrict what local officials can do to meet the community's needs, causing a great deal of frustration to the officials.

Mary Bolton, Rice County Commissioner, presented her view from the perspective of a small, rural county. (See Attachment 6.) She stressed the negative impact of mandates on small counties whose budgets are being drained by the burden of the cost of complying with the mandates.

Jerry Fear, Oberlin City Administrator, testified next, stressing the financial burdens placed on local units of government when faced with raising funds to administer unfunded mandates. (See Attachment 7.) He stated he wished to echo what John Divine had said as to the issue of mandates in Kansas being exacerbated by the tax lid law.

Senator Parkinson questioned Mr. Fear as to the requirements of the animal breeders act to which Mr. Fear referred in his testimony. Mr. Fear responded that it passed six or seven years ago in response to news stories about puppy mills. It involved lighting, heating, cooling, and other requirements in breeding kennels. Cities with dog pounds were included, but the bill really had nothing to do with dog pounds. The language was added in the Ways and Means Committee. The City of Oberlin was billed $200 for state registration, having no prior knowledge that it was required to do so.

Senator Ranson asked if there was an attempt to correct action regarding dog pounds. The Chair noted that an attempt had been made. Mr. Fear added that some House members felt there were some city pound facilities that were not adequate. Senator Ramirez stated that the puppy mill issue is still very volatile. There is pressure from the public to do something.

Senator Ramirez added that classification is another issue that concerns him. It is something that the people voted for, however, the Legislature gets blamed for the results. Also he

has not supported tax lids for local units of government. He asked Mr. Divine if his area supports an earnings tax. Mr. Divine answered that the people of the local community should decide such an issue.

Senator Gooch began a discussion regarding problems the City of Salina faces in maintaining the expense of infrastructure. Senator Gooch said that more is being spent by cities on outer development than maintaining the inner city. This is a problem he feels should be addressed by the cities themselves. Mr. Divine agreed with this philosophy, however, he feels that others using Salina's facilities should be included in that maintenance. Senator Gooch continued his discussion with asking Ms. Bolton and Mr. Divine their opinion regarding the thought that part of the taxes collected by car dealerships in larger cities go to the location of ownership. Ms. Bolton and Mr. Divine both felt that this type of division of taxes would be received favorably by small county communities surrounding bigger city car dealerships. With this, Senator Gooch pointed out that these are examples of the difficulty the Legislature has in making both city and county local governments satisfied. The Chairperson commented that mandates are in some ways a regressive form of taxation. He added that the question arises that, if all state mandates are financed by the state, will the local factor do just the minimum required knowing that the state will eventually pay. Mr. Divine responded that this is a legitimate concern. As to the City of Salina, Mr. Divine feels Salina would not hold off in regard to immediate local needs. As to highways, they do hold off on those that are not funded, and most would hold off on projects that would be funded by someone else the next year. If they were told they would not have to comply with a mandate until the state has funds, they would probably hold off.

Senator Feleciano asked how to change the adversarial position between counties and the state which was started by federal mandates. He said that it is necessary for counties and the state to work together to stop unfunded mandates coming from Washington before they come to the state and local governments. Mr. Fear commented that he feels there has been a stronger effort by state and local governments to work together towards this end. Representative Brown said that federal mandate costs at the state level, and this, in turn, takes away the flexibility and control by local governments. Ms. Bolton felt that a problem occurs in the attitude of the state bureaucracy towards small counties in that the bureaucracy does not trust small counties with funds that are mandated so they end up in an adversarial position where they should be acting as partners.

Mr. Divine stood to recommend that in-depth impact studies be made before mandating. This would give the Legislature an understanding of where local governments stand. Senator Ranson noted that 16 states do not allow mandates without funding and informed the Committee that staff has the statutory language from some of these states. Senator Feleciano stated he was in agreement with the concept of funded mandates only.

At this time, the Chairperson thanked the four-member panel for coming and called for a short break.

The meeting resumed with the testimony of John Torbert, Kansas Association of Counties, regarding H.C.R. 5018. (See Attachment 8)

The Chairperson reminded the Committee that a copy of "State Mandates" prepared by the National League of Cities, which speaks on the issue of unfunded mandates on local governments, had been mailed to each Committee member and is worthy of their attention. (See Attachment 9.)

With regard to the research project done by KAC as mentioned in Mr. Torbert's testimony, Senator Reynolds asked if the other states in the study have a tax lid law. Mr. Torbert answered that this information was not included in their study, but there may be some sort of tax control in these states.

The Chairperson asked Mr. Torbert what is on the horizon in terms of potential new state mandates. Mr. Torbert replied that his organization is still struggling with the ones in effect at present, but there will, no doubt, be others. Senator Ranson named three other potential mandate areas: the Clean Air Act, the Motor Voter Act, and the health care program. The Chairperson expressed his thoughts that since the Legislature really does not know what is ahead yet, why should a limit be placed on legislation so that the Legislature could never mandate locally when there possibly may be a case where a local mandate could be necessary. Mr. Torbert explained to the Chairperson that there is a provision that allows that his proposed amendment can be overlooked and local mandates can be made if absolutely necessary. Basically, Mr. Torbert said that his proposed amendment at least raises the discussion level and brings out the impact a mandate will have. The Chairperson asked Mr. Torbert if exempting mandates from the tax lid would be a solution. Mr. Torbert answered that this would supply only a portion of the solution to the problem.

The Chairperson commented that if mandates were funded by state taxes, some counties would pay a disproportionate amount of funding. Mr. Torbert said that this is a policy issue that always has to be looked at with regard to state funding. Every tax issue involves redistribution, and the pluses and minuses will have to be considered by the Legislature.

Chris McKenzie, the League of Kansas Municipalities, followed with further testimony in support of H.C.R. 5018. (See Attachment 10.) Mr. McKenzie said that federal mandates are going to have a dramatic negative effect on local governments, therefore, state and local governments need to work together in stopping unfunded federal mandates.

With regard to Mr. McKenzie's written testimony, Senator Feleciano questioned item (2) on page 2 as to the decision by the Kansas Department of Human Resources' deeming it unnecessary to develop rules and regulations before complying with the OSHA regulation regarding bloodborne pathogen control. Staff agreed to research the action of the Department of Human Resources.

Senator Feleciano also stated he was in agreement with Mr. Divine's opinion that impact studies would bring about improvements in the mandating process. Also, he feels the Legislature should carry the message to Washington about its concern regarding the lack of local control and the increasing central power located in Washington.

The Chairperson asked the Committee to consider if it would like to hear another speaker on the subject of mandates later in the interim or during the next session. If so, Professor Janet Kelly of Bowling Green University in Ohio would be willing to testify and is an excellent source of information.

Senator Feleciano said he would like some feedback from some of the state agencies. Senator Ranson asked where H.C.R. 5018 was at this time. The Chairperson said there were hearings before the House Local Government Committee, and the bill remains in Committee.

Afternoon Session

The Committee reconvened at 1:40 p.m. Mr. Heim introduced Bruce McDowell, Director of Policy Research with the Advisory Commission on Intergovernmental Relations (ACIR) in Washington, D.C.

Mr. McDowell informed the Committee that 25 states have state ACIRs, but it keeps changing all the time. Last year three were lost and two were gained. These state agencies have problems getting funding. In some cases, such as in Michigan and Iowa, they were sunsetted. The national ACIR, which was established in 1959, has been around continuously since that time and has tried to promote state ACIRs because each state has specific needs. As a national ACIR, it is felt that recommendations cannot be made that will fit each state. There needs to be a counterpart of the national ACIR to make sure that the kinds of intergovernmental solutions proposed get tailor made to each state. The key thing is that local government is completely the responsibility of the states as established by the state constitutions. There are 50 very different state-local government systems, and the federal government tries to deal with all of them as a "one size fits all." One of the biggest problems with mandates when they come down from the federal level is that they very often are "one size fits all."

Mr. McDowell said he was happy to have Senator Bud Burke as a member of the national ACIR and noted that he attended the June meeting this year. Ross Doyen had previously been a member for many years so there has been strong Kansas participation from time to time. At the June meeting, discussion was begun as to what the new work program should be. The first issue that came up was mandates, and 25 minutes of 30 minutes speaking time was devoted to mandates. The mayors were very vocal on this subject. The Mayor of Philadelphia brought up two things which were of major concern to him. One of them was the federal Motor Voter Act which requires every polling place must be handicap accessible. Philadelphia rents more than half of its polling places, and the majority of them are not handicapped accessible. They are rented for only two days a year, and the city cannot afford to make them handicapped accessible. Therefore, Philadelphia must completely retool its voting places. The second example regards street repair. Many of Philadelphia's streets are in need of repair, but the repairs are not affordable because of the federal Americans with Disabilities Act which requires that repaving cannot be made unless proper handicapped accessible curbing is installed, and the city cannot afford new curbing. Therefore, the city is simply not repaving the streets.

Another Mayor, Victor Ash, from Knoxville, Tennessee, also talked about the mandate that the handicapped be accommodated in the city's bus fleet. They now have a deadline from the federal government for meeting that requirement, and they cannot afford to upgrade all of their buses so their solution is to cut back their bus schedules.

These three examples came up spontaneously in the June meeting. As soon as the subject of mandates is brought up, a real outpouring of problems begin that Mr. McDowell is certain were not anticipated when the mandates were passed. The effect of state mandates on local governments is the same. Local governments get a double shot, and this is probably the reason that the mayors are the first to speak up when the subject of mandates is brought up. Also, from previous discussions Mr. McDowell has witnessed, it is known that county officials feel just as strongly about the issue of mandates as do the mayors.

Therefore, the top work problem for the next two or three years for the federal ACIR will be state and federal mandates. Their first report on mandates was on state mandates because it became an issue in the states before it became an issue in the federal government. It was an issue all through the 1970s, and a number of states took action in three primary categories: (1) reimbursement, the California approach; (2) fiscal notes, which is still the most widely used technique; and (3) no pay, no comply, which is in response to having local revenues cut. Massachusetts has the toughest no pay, no comply law. It has a small agency within the state government that makes sure the requirement is implemented rather than trying to rely on the courts. This is not statutory but rather a constitutional tax amendment. Constitutional amendments are actually the only effective methods because others have too many loopholes, therefore, Kansas is on the right track in the proposal it is considering.

Mr. McDowell feels that tying it to the fiscal status of the local governments makes a lot of sense as the issue is dealt with. As the Committee studies the issues involved, it should keep in mind that this is not a simple issue and, therefore, there is not a simple solution. For example, the problem with no pay, no comply is that the electorate wants stronger requirements and better compliance. The bottom line is there will be more and more regulations, and if enacted or not enacted at the state level, the federal government is going to try to enact them. The problem with trying to deal with mandates just at the state level is that it is limited. The study of mandates did indicate that several of them came from the federal government, although it was not a complete list. He feels that a complete list would show an even larger number of mandates coming from the federal government. If a state reform on mandates is chosen, it will not be effective with regard to federal mandates so it is only a partial solution. He urged that the state mandate issue be examined simultaneously with the federal mandate issue.

The first report done by ACIR was on the state mandates issue in 1978, and it was updated three years ago, pulling out how seven different states had handled mandates. Each handled it differently. He offered to send copies of this study to Committee members if they so desired or if they had not seen it.

Mr. McDowell explained what had happened in California where the reimbursement approach was used. The cost of the mandate is paid and the bill is sent to the state. The state then pays it the following year out of appropriations, but it has never been fully appropriated so the local governments in California are getting back ten cents on the dollar. The fund is prorated out across the state, and local governments are not receiving what they were originally led to believe to expect.

With regard to fiscal notes, this is not usually an effective technique. It usually comes much too late in the process. It certainly does at the federal level where no data base is available before it comes out of committee, and there is a maximum of ten days to compile the estimated cost to state and local governments without a data base before it goes to the floor. Florida has the best method. It has an interactive computer with the state ACIR to a sample of cities and counties. A quick response can be obtained from a representative sample which is a more accurate estimating technique than at the federal level. However, it is still late in the process. When a committee has reported a bill out, all of the political deals have been struck. A serious approach to fiscal notes would be to move it up to the subcommittee level where nothing can be reported out unless it has tested alternatives in an effort to come up with the least cost alternative in relation to who is going to have to eventually pay and then determine if they can afford it. Mr. McDowell noted that this illustrates his earlier statement that he is doubtful that there is a simple solution to a complex problem. The more the issue of mandates is studied, the more complex it gets.

Mr. McDowell gave a "definition" of mandate which has become an issue as mandates are studied. He had distributed copies of some excerpts from the U.S. Advisory Commission on Intergovernmental Relations report on *Federal Statutory Preemption of State and Local Authority*. (See Attachment 11.) What was found is that, in terms of statutory preemptions, more than half of actions of Congress to preempt state and local government authority were in the decades of the 1970s and 1980s as shown on the bar graph found on the back of the second sheet of the handout. Also indicated is that, if nothing changes in the rate shown in the first two years of the 1990s, the 1990s will be the all time winner in the rate of laws that Congress passes which substitute federal policy for state and local policy. This substitution is "preemption." As soon as ACIR made this definition, the lawyers responded that preemptions are prohibitions and mandates are orders to do something. The state should also be prepared to meet this definitional hot water. As an example, he indicated that the federal mandate which disturbs the states most is Medicaid which in recent years has been using up all of the state budgetary resources which had been planned for something else. Medicaid is not a mandate but rather is a voluntary grant program requirement with a matching requirement, and participation is not required. This is not real politics, but that is the way lawyers view it. He feels the safest definition of preemptions is ACIR's, which essentially is "A substitution of the policy of one government for a policy of another."

Congress is passing larger and larger shares of the state and local budgets. The serious aspect is that a mandate has a higher priority than anything a state puts in its budget by discretion, and that ripples on down to the local government level.

Therefore, we have various bodies that are not responsible, at least on paper, for adopting a budget by means of mandates that are not funded. If the mandates were funded, it would not be the same issue. Then, it would be an issue of whether a subordinate government has authority to make decisions but not a question of budget. So there are two dimensions to mandates -- the autonomy of mandated government and the budgetary impact.

Mr. McDowell called attention to the next page following the previously discussed bar graph. He indicated he feels this gives a valid picture of where the revenues are raised. As indicated by the chart, the higher percentage of employees are required at the local level than the percentage of revenues raised. As shown, it is a system that is not designed to work without a substantial transfer of funds and grants. The federal and state grants are what kept the system working in the 1950s, 1960s, and 1970s as more and more of these programs were intergovernmentalized. In the 1980s, the big change was that the money began to slow down in many programs, but the mandates did not. This gets more and more serious as time goes by. It is time to do something. It is serious enough now to have raised it to a major political level. In addition to the discussion of ACIR in June, there was a press conference by the Local Governments Association in Washington about a week ago. At the Governor's Association meeting in Tulsa two days ago, a considerable amount of the afternoon was devoted to this issue and testimony from county and municipal representatives was heard. The Local Governments Association has announced October 27 as National Unfunded Mandates Day. Another important date is September 7 which is the unveiling of the Vice-President's National Performance Review. It is Mr. McDowell's understanding that the subject of mandates is going to be a hot issue in that report.

Mr. McDowell called attention to another publication entitled *Federal Regulation of State and Local Governments: The Mixed Record of the 1980s.* This is an update on a report done by ACIR about a decade ago called *Regulatory Federalism*, which was the first major government report that noted this rapid change in the way the federal government was operating, moving from the use of grants to enacting mandates and regulations. The Executive Summary includes ACIR's findings.

Following the Executive Summary is a list from the Mandates Monitor put out by the National Conference of State Legislatures showing the massive build up of political attention to the issue. There are 23 mandating bills in Congress at present, most are on either fiscal notes or, if you do not fund it, you do not have to comply. The goal of ACIR is to get a congressional hearing on that whole set of bills.

The attachment also contains two subjects, "Governing Principles" and "Action Agenda," which are the draft materials set up by the coalition of state and local organizations that will go after environmental mandate reform, but likely will be broader than that. It is called environmental because it came out of an advisory committee of local governments that the Environmental Protection Agency (EPA) set up in order to work with local governments to discover what evolving problems were. One of the first things local governments asked for was a list of mandates with which they are required to comply. EPA could not furnish a list. The group asked that such a list be prepared, and it took six lawyers and four months to get the list; however, the list is not yet satisfactory enough to be published. In other words, the bottom line is EPA does not know for what local governments are responsible. Another request made by the advisory committee of local governments was that when the list of regulations is published, it be put in ordinary English which does not require an attorney to interpret. Regulations need to get a lot more user friendly. Also, they should get less numerous and there should be financial help. In other words, it needs to be a partnership. Mr. McDowell feels there is a growing realization at EPA that we are all in this together due to this action of the advisory committee.

The next page in Mr. McDowell's handout is a copy of a newspaper article from the *Washington Post*. The article indicates that two states have passed resolutions that would call their members of Congress back to the state to talk about this issue. As the article indicates, many other states are thinking about doing the same thing. The article makes the point that up until the 17th Amendment in 1913, the Legislature elected the Senators to go to Washington which made them directly accountable to the state and would, thus, avoid uses of federal power for such things as mandates. Senator Ranson noted that a resolution was passed last session by the Kansas Legislature and sent to Congress as an approach to calling attention to the problem, but it was not acknowledged. Mr. McDowell felt that the resolution should be passed every year for a while in hopes of response and action. ACIR has been attempting to get action since 1978 and has not gotten very far on it except that reports they write give others ammunition that ends up coming back to Washington. However, a solution to the problem has yet to be found, therefore, a search for a new approach must continue. Getting Congress to actually hold hearings would be one possible new approach. A few others were developed by the coalition of state and local governments; however, Mr. McDowell informed the Committee that after the first few meetings of the coalition, some of the member groups decided to approach the issue as a separate entity. Mr. McDowell fears that if state and local governments do not speak with one voice, it will not be heard by Congress. He feels if all groups spoke together, Congress could not ignore them. ACIR cannot join the coalition because it does not lobby.

Mr. McDowell confirmed for Senator Feleciano that ACIR, as an advisory commission, is not allowed to lobby the U.S. Congress. ACIR can testify and is an information source and a forum for discussion of an issue. The commission does adopt policies. Senator Feleciano asked Mr. McDowell if ACIR could act as a "clearing house" to gather all of the forces to which he alluded in his testimony. Mr. McDowell said that ACIR has been trying to facilitate the putting together of a coalition of state and local governments. Senator Feleciano inquired if, once that those groups come together, ACIR could speak on their behalf to the U.S. Congress. Mr. McDowell answered that ACIR could speak only from their own adopted policy, and he hopes that their own policy would be

the policy of the coalition. If this were the case, ACIR could be a natural reinforcer and a facilitator, but not a lobbyist quite the same as the other lobbyists would be since ACIR is a federal agency. ACIR must remain neutral, providing information rather than lobbying, in order to bring the groups involved in the coalition together.

Mr. McDowell continued his testimony with noting the other megatrend in government is from an authoritative government to a participative or negotiative government. Federal agencies have the authority to negotiate regulations if they desire. This method is usually quicker and more effective because the agency has found the best solution. This could be the trend to take off in the 1990s if local governments push for it. He referred to the last section of his handout, "High Performance Public Works: A New Federal Infrastructure Investment Strategy for America," in his recommendation that an affordability study be done on mandates and a deal be negotiated for financing them before the Legislature passes them. At present the amount to finance mandates has been open ended with no specific amount because nobody knows what the cost will be. The cost is not known until it reaches the local government level. Someone in the federal government needs to get a cumulative total or the message will fall on deaf ears in Congress. He suggested that perhaps a budget for mandated costs should be drafted to obtain some kind of discipline. Also, a study should be made before mandating. The study should include such factors as geography, population, and climate, to determine the expense involved for one area as opposed to another one. A mandate could be very costly in one area of the country but involve hardly any cost in another area as can be seen in EPA mandates.

Senator Ranson raised the question as to if U.S. Congressmen will want to give up their powers. Mr. McDowell has some positive feelings in this regard due to the fact that in previous years there had been no mandate relief bills in Congress, however, as of three years ago, a new congressman has been working on this issue and there has been a growing sensitivity to this subject.

Bill Wolff of Legislative Research addressed the question raised by Senator Feleciano regarding the rules and regulations question during testimony given by Chris McKenzie of the League of Kansas Municipalities. Mr. Wolff explained that an agency cannot arbitrarily pull out a rule and regulation from the *Federal Register* and use it without going through the process as Mr. McKenzie had indicated had happened. Agencies can adopt federal regulations, however, because state regulations often are based on federal regulations. In order for a state agency to make a federal regulation its own, it must first publish it and hold a meeting to adopt the regulation. If an agency does not go through this process and attempts to enforce the federal regulation, it would find itself in court to explain how it has that authority.

Senator Reynolds asked Dr. Wolff for suggestions as to how to make agencies comply. Dr. Wolff suggested that the Legislature be specific in its directions to agencies and that the agencies be held accountable to the Legislature.

The meeting was adjourned.

Prepared by Mike Heim

Approved by Committee on:

November 29, 1993
(date)

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League . /
Kansas . . . .
#1

Research Report on America's Cities

STATE MANDATES

Fiscal Notes, Reimbursement, and Anti-Mandate Strategies

One of a series of Research Reports on major empirical studies of conditions and policies in America's municipalities.

NATIONAL LEAGUE OF CITIES

Attach. 1
Senate Loc. Gov't.
8-18-93

Chapter 5
Reimbursement Provisions

The reimbursement provisions, exclusions, and processes of the states are described in this chapter. Some state reimbursement processes are working well; others are not working at all. Even with constitutional reimbursement, there are opportunities for state legislatures to bypass the reimbursement requirement. This suggests that localities considering reimbursement initiatives should design the best features of existing programs into their proposals, and that they should have a realistic expectation of the mandate-stopping ability of any statutory or constitutional plan.

Reimbursement in the States

Fourteen states have some kind of state mandate reimbursement requirement. Three states have statutory reimbursement, eleven have constitutional reimbursement requirements. The constitutional requirements are accompanied by statutory implementation language that details the process of reimbursement, the exclusions, and any appeals options available to local governments. The difference between constitutional and statutory reimbursement appears to be minimal because of the necessity of implementation language. Voters pass a constitutional mandates reimbursement act based upon its intent and leave the details to the legislature. In constructing the details, the legislatures appear to have as much flexibility in the interpretation of constitutional reimbursement as they do in the enactment of statutory reimbursement. The experience of the fourteen states shows the extent of legislative discretion in the mandate reimbursement decision.

California

California was one of the first states to react to the cost of state mandates to local governments. The state enacted statutory reimbursement of a sort in 1972, calling it the Property Tax Relief Bill. In compensation for the state cap on local property taxes, the state would reimburse localities for sales and use taxes and pay the full cost of any new program or increased level of service it mandated. The statutory intent to fund mandates may have slowed the legislature's mandating activities, but it did not provide the kind of formal reimbursement process that would be created six years later. In fact, a review of the bill introduced and considered by the California legislature during the 1973-74 session reveals the use of "disclaimers" that contend that the bill under consideration was not subject to the statutory reimbursement. The typical form of the disclaimer was "not withstanding any provision to the contrary" – a phrase that runs common to statutory reimbursement plans. When used, the legislature essentially acknowledges that the legislation to follow violates the intent of reimbursement but asserts its right to exempt itself from any self-imposed restrictions on its lawmaking ability. California local governments learned that statutory reimbursement was a poor solution to their mandates problem. The property tax cap was not waived, but the reimbursements could be.

In 1979 the voters approved Proposition 4, which added a constitutional reimbursement provision for state mandates. California's constitutional reimbursement took effect in 1980. Article XIIIB, Section 6 of the California Constitution provides:

> Whenever the Legislature or any state agency mandates a new program or level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the cost of such program or increased level off service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:
>
> (a) Legislative mandates requested by the local agency affected;
>
> (b) Legislation defining a new crime or changing an existing definition of a crime; or
>
> (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

As with every constitutional change affecting legislative behavior, the passage of the amendment required the legislature to pass implementation language. Reading California's constitutional amendment hardly leaves it clear to the local government how the process will work and how to proceed in the event an unfunded mandate is enacted. This implementation language is critical to a viable reimbursement process and the irony is, according to some states that have struggled with implementation language, that the matter again is left to the state's legislature. By construing the constitutional amendment in a way that binds

them to refrain from mandating or provide reimbursement, they can give local governments a clear recourse to an unfunded mandate. By construing the amendment in its narrowest possible form and creating administrative roadblocks at every stage of the reimbursement process, a legislature can ensure that the cost of local recourse will be high enough to offset the cost of most mandates. The way to create a barrier to reimbursement is to designate a group under the control of the legislature to determine whether or not a mandate exists and to determine the appropriate level of reimbursement, and force the local governments to litigate if they are not satisfied with the reimbursement decision. The way to facilitate reimbursement is to create a nonpartisan commission to hear appeals from local governments and, upon successful appeal, give the state the option of paying or the localities the option of not complying.

California quickly discovered that the effect, intended or not, of their implementation language was a system inadequate to the task of fair and timely reimbursement and unparalleled congestion of the judiciary system. The 1985 reform was designed to accommodate, if not facilitate, the intent of the reimbursement amendment. Before 1985, an existing legislative agency, the Board of Control, was authorized to decide claims regarding mandate reimbursement. On January 1, 1985, the California Commission on State Mandates was created and given the authority to hear and decide local claims requesting reimbursement from the state for mandated costs. The Commission also can hear claims that reimbursement has been insufficient. It is a quasi-judicial body composed of five members: the state controller, state treasurer, director for the Department of Finance, director of the Office of Planning and Research, and a public representative with expertise in public finance who is appointed by the governor and approved by the state senate.

The Commission may find any increased cost a mandate and recommend appropriate reimbursement, with seven exceptions:

(a) the locality or school district requested the statute that imposed costs;

(b) the statute affirmed existing law as determined by the courts;

(c) the statute implemented federal law;

(d) the locality or school district has the authority to levy charges, fees or assessments sufficient to cover the cost of the mandate;

(e) the statute provides for offsetting savings that result in not net increased cost;

(f) the statute imposed duties that were approved by the voters in a statewide election; or

(g) the statute created, eliminated or changed a crime or infraction.

These exceptions are the disclaimers that now accompany California mandates. To avoid reimbursement, the legislature may include one or more of the disclaimers in the mandate bill. In 1987, the California legislature enacted 270 bills with disclaimers. Some had more than one disclaimer. Most of the statutes created, eliminated, or modified crimes or infractions (165) and a fair number of them were enacted at local request (45). The next

most common disclaimer of 1987 was the self-financing authority exemption. The intent of the constitutional amendment was to reduce local property taxes by eliminating the upward pressure on them from state mandates. When the mandate could be financed through another means, typically a user fee, then there is no requirement that the state reimburse the cost of the mandate. General disclaimers were used 14 times. A general disclaimer simply indicates that the legislature disclaimed a duty to reimburse but declined to say upon what grounds. Disclaimers of this type are often appealed to the Commission and are the most frequently overturned of all other types of disclaimers.

When a locality or school district believes it has incurred a cost exceeding $200 because of a reimbursable mandate (they are not constrained to accept the legislature's word that the mandate is not reimbursable), it files a claim with the Commission by November 30 of the fiscal year in which the cost will be incurred and by November 30 of the following year furnishes the actual costs incurred and request reimbursement. In subsequent fiscal years, the amount of the reimbursement is included in the governor's budget and the appropriations bill. If the appropriated amount is not sufficient to cover the reimbursable claims, the state may prorate the claims in proportion to the amount of the claim. Each year the approved claims are itemized in a report submitted to the legislature.

In 1987, a typical year, 270 statutes were enacted with disclaimers. Two statutes were enacted containing appropriations for reimbursement. Six contained no appropriations and no disclaimers and were reimbursed. Fifteen contained language that specifically prohibited reimbursement from the State Mandates Claim Fund. One directed reimbursement from the Claims Fund. Seventy-one were not considered to be mandates by the General Counsel to the legislature but were considered mandates by the Commission. The irony of the bulk of mandates not being so designated is that no fiscal notes were prepared and the California legislature enacted those bills without any consideration to their cost – costs that they ultimately might pay.

In summary, California local governments are not protected against increased costs from state initiated priorities, but against property tax increases required by state mandates. In 1987, localities received forty-three mandates that the state expected the localities to raise revenue to pay for, though not from the property tax. Of the mandates with disclaimers and the unintentional mandates enacted in 1987, it is uncertain how many localities chose to appeal the cost to the Commission or how the Commission ruled in all of those cases. What is known is that the volume of new mandates and the number of appeals places a strain upon the Commission's time and resources. However, California localities seem to be confident in the Commission's ability to act fairly, if not quickly. The localities do note that a number of laws pertaining to local governments are permissive, or allow the locality to choose to offer the service or improve the program. If the locality so chooses, then a number of requirements apply. These requirements are conditions of aid, not mandates, and therefore are not reimbursable. The difficulty, at the local level, is resisting the new standard if it is recommended by the legislature based on the perceived need to serve the constituency affected by the change. In a sense, California localities choose to place unfunded mandates

upon themselves as they try to serve their constituencies, but the stimulus for many of these mandates originates with the state.

Florida

In 1978, the Florida legislature enacted a statute requiring a fiscal note bill to precede any general law affecting the program or service functions of local governments and requiring the state to provide a means for financing the mandate. Additionally, the legislature would be required to finance any changes in the ways in which property taxes were assessed and any changes in the local authority to levy taxes. It was as strong a fiscal note and reimbursement statute as existed at the time.

Unfortunately, for Florida local governments, the 1978 statute was effectively meaningless. One legislature cannot bind the hand of another, according to Florida law, and so future legislatures simply ignored the requirement as they added new unfunded mandate. From the period 1981-1989, Florida's local governments received an average of 150 mandates per year. The citizens of Florida became increasingly sensitive to high and rising property taxes, and the localities were only moderately successful in deflecting the blame for high taxes away from themselves and to the legislature. Additionally, the state is exceedingly restrictive to the local revenue system, limiting the sources of local revenue and the rates.

In 1988, Florida localities faced the kind of "focusing event" that is often so critical in effecting change. In that year, both houses of the state legislature passed joint resolutions restricting the passage of unfunded mandates, but their failure to agree on a compromise bill killed the effort late in the session. In that same session, the legislature enacted Chapter 88-382, expanding the category of persons eligible to receive pension benefits from local governments. The approximate cost of the new bill was $50 million per year and it was to be borne by localities. From the local perspective, it appeared that many legislatures were only sensitive to the mandates problem until the state budget was threatened by funding a new program.

The Florida League of Cities began a petition drive to place a constitutional amendment prohibiting unfunded mandates on the November, 1990 ballot. The petition language was strongly worded – the legislature could not enact any law for which local compliance cost local money – and it had its intended effect. The League agreed to end its petition drive only when the legislature agreed to pass a resolution to amend the state constitution ending unfunded mandates. Faced with the choice of a more moderately worded amendment or the threat of a very strongly worded voter initiated bill, the Legislature took the safer alternative. The resolution (see box, page 46) passed the House by a margin of 101 to 13 and the Senate by 38 to 1.

The future of the law for Florida's local governments is unclear. The legislature can pass implementation language that can either support or undermine the intent of the bill. The first try at implementation was vetoed by the governor in 1991 for two major reasons. First,

Florida Mandate Resolution

ARTICLE VII
FINANCE AND TAXATION

Section 18. Laws requiring counties and municipalities to spend funds or limiting their ability to raise revenue or receive state tax revenue.

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditures by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure s approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments, or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.

(b) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989.

(c) Except upon approval of each house of the legislature by two-thirds of the membership, the legislatures may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the percentage of a state tax shared with counties and municipalities as an aggregate on February 1, 1989. The provisions of this subsection shall not apply to enhancements enacted after February 1, 1989, to state tax sources, or during a fiscal emergency as declared in a written joint proclamation of the house of representatives, or where the legislature provides additional state-shared revenues which are anticipated to be sufficient to replace the anticipated aggregate loss of state shared revenues resulting from the reduction of the percentage of the state tax shared with counties and municipalities; which source of replacement revenues shall be subject to the same requirements for repeal or modification as provided herein for a state shared tax source existing on February 1, 1989.

(d) Laws adopted to require funding of pension benefits existing on the effective date of this section, criminal laws, election laws, the general appropriations act, special appropriations acts, laws re-authorizing but not expanding then existing statutory authority, laws having insignificant fiscal impacts, and laws creating, modifying, or repealing noncriminal infractions, are exempt from the requirements of this section.

(e) the legislature may enact laws to assist in the implementation and enforcement of this section.

BE IT FURTHER RESOLVED that in accordance with the requirements of section 101.161, Florida Statutes, the title and substance of the amendment proposed herein shall appear on the ballot as follows:

LAWS AFFECTING LOCAL GOVERNMENT EXPENDITURES OR ABILITY TO RAISE REVENUE OR RECEIVE STATE TAX REVENUE

Excuses counties and municipalities from complying with general laws requiring them to spend funds unless: the law fulfills an important state interest; and it is enacted by two-thirds vote, or funding or funding sources are provided or certain other conditions are met. Prohibits general laws that have certain negative consequences for counties and municipalities unless enacted by two-thirds vote. Exempts certain categories of laws from these requirements.

the Florida legislature defined an insignificant fiscal impact as $1.4 million. Second, the implementation language shifted the onus for a challenge from the state to the local governments. If the state enacts an unfunded mandate the local government may refuse to comply, according to the constitutional amendment. If the state attempts to force compliance, it must initiate the challenge. The 1991 implementing legislation provided that the locality must undertake a judicial challenge if the state enacts a mandate with which it does not intend to comply. The impact of the change was that the locality would have had to weigh the cost of the legal challenge against the cost of the mandate in order to make a compliance decision, undermining the noncompliance provision in the constitutional amendment. New implementation legislation is underway in the Florida legislature, but the debate still centers on these two core issues.

The strength of the Florida initiative is that it protects localities from the cumulative impact of a tide of unfunded mandates, while it leaves open the possibility that a circumstance could arise that requires statewide local compliance with some standard. In other words, it accepts that some mandates are justified. Whether or not the forthcoming implementation legislation will uphold the intent of the amendment remains to be seen. But one change has already occurred because of the amendment. In 1989 the Legislature enacted 333 unfunded mandates to Florida local governments. Since the amendment, no unfunded mandates have been passed.

Hawaii

The Hawaii experience is not tremendously useful as an instructional model for other states because Hawaii has only one municipality – Honolulu – and county governments with limited functional scope. Most functions are handled at the state level or directed by the state in partnership with the counties. A constitutional ammendment passed in 1978, however, requires the state to share in the cost of any increased level of service it required of a political subdivision. The effectiveness of the amendment has varied with the type of program to which it applied. The state share for some activities has been substantial, while the share for others has been minimal. The issue for Hawaii counties is the portion of the cost that the state will choose to bear. They report that their attempts at lobbying for increased state cost sharing have typically been ineffective.

Illinois

The Illinois statutory reimbursement provision was modeled on the ACIR model mandate reimbursement legislation. It defines state mandates as "any state initiated statutory or executive action that requires a local government to establish, expand, or modify its activities in such a way as to necessitate additional expenditures from local revenues, excluding any order issued by a court other than any order enforcing such statutory or executive action."

The statute goes on to provide that funding for increased cost service mandates shall be reimbursed at not less than 50 percent and not more than 100 percent, lost revenue mandates shall be reimbursed at 100 percent, and the full increased cost of personnel, pension, and retirement mandates shall be reimbursed at 100 percent. There are five specific exclusions to reimbursement in the statute. The first is based on local request for a mandate. The second excludes reimbursement if existing staff and procedures can be used to carry out the new mandate at no increased cost. The third precludes reimbursement when there are offsetting cost savings. The fourth excludes mandates that impose a cost wholly or largely recovered from federal state or other external aid. The fifth excludes mandates that cost less than $100 to any local government and less than $50,000 in the aggregate. In addition, the Illinois General Assembly can exempt the state from reimbursement by a three-fifths majority vote. If no reimbursement is made and a mandate neither meets the exclusion criteria nor is passed by a three-fifths majority, localities are under no obligation to comply with it.

During the year following its adoption (1981), the State Mandates Act resulted in a reduction of state mandates passed, Illinois state and local officials agreed. But this deterrent effect diminished in subsequent years. Since 1981, the General Assembly has passed fifty-seven unfunded mandates with a total estimated annual cost to local governments of $148 million. Of this total, the General Assembly has voted to exempt itself from the funding requirement on twenty-five occasions, resulting in an estimated annual cost to local governments of over $107 million. Of the remaining thirty-two mandates, estimated to cost $41 million, the General Assembly appropriated only $200,000 for one mandate, even though all are technically covered. In one instance, school districts sued the state, and the Illinois Appellate Court ruled that the local governments did not have to carry out the mandate in the absence of state money. The General Assembly then approved by three-fifths vote an amendment to exempt this mandate from the reimbursement law, thereby requiring local governments to implement it.[1]

The appeals process does not work in Illinois. There is little evidence that a locality appealing the mandate will be reimbursed for it and as a result most localities have not tried the appeals process since the first few years. Another test case that soon followed further expanded the state's discretion and limited the localities' recourse. In the Nurses' Pay Act (83-913), the General Assembly enacted a mandate and exempted it from reimbursement in these terms: "[T]he General Assembly hereby finds and declares that this mandatory act does not require reimbursement by the State under the State Mandates Act." The First District Appellate court ruled that there was a difference between an exemption and an exclusion. The General Assembly could not exempt itself from a reimbursable mandate. The only ways to avoid reimbursement are to claim one of the statutory exclusions, pass it by the extraordinary majority, or add a paragraph to the Mandates Act stating that the new law is exempt. Adding

1 *Legislative Mandates*, General Accounting Office, Washington, D.C., 1988.

the paragraph does not require an extraordinary majority and provides the easiest circumvention to the statutory reimbursement requirement. By 1989 there were seven such exemptions to the Mandates Act, each considered very costly by Illinois localities. Among them are changes in homestead exemptions and local pension systems. Local officials in Illinois charge that while the legislature finds most mandates not subject to the reimbursement provisions, it would likely enact more mandates in the absence of a reimbursement requirement. They believe reimbursement, combined with a strong local lobbying effort, stops many mandates in committee. Once the mandate goes to a floor vote, the reimbursement provision doesn't inhibit enactment of unfunded mandates.

Louisiana

Effective January 1, 1992, any state law, executive order, rule, or regulation requiring additional expenditure by a local government can only become effective if (1) the local government voluntarily complies, (2) the state provides reimbursement, (3) the state permits local government to raise new revenues to fund the mandate or (4) the legislature enacts the mandate by a super majority of two-thirds. The constitutional amendment passed by a margin of 58 percent to 42 percent. Exclusions to the reimbursement requirement are school district mandates, existing mandates, mandates requested by individual localities, police and fire benefits, changes to the criminal code, and federal standards.

While the new reimbursement provision has not yet had the test of a new legislative session, its weakest point seems to be the state's ability to enact an unfunded mandate so long as the locality is enabled to raise revenue to pay for it. Like the California reimbursement provision, that exclusion only protects the property tax rates of the localities; it does not mean that the responsibility of paying for state priorities will rest with the state. Moreover, depending upon how the exclusion is interpreted, it may be possible for the state to permit a new mil levy for the mandates, as in Montana. If so, the local property tax still funds state mandates, it just does not do so to the detriment of the locality's state controlled general fund property tax rates.

Maine

Maine's statutory reimbursement provision, enacted in 1989, took effect for the fiscal year beginning July 1991. The statute requires the state to provide full funding for all mandates enacted (Title 30A, Sec 5684). Since the Maine legislature has not met since enactment of the reimbursement statute, the statute's effect on mandates is uncertain. Maine localities previously had received approximately thirty-two unfunded mandates per legislative session. Local officials cite a weak fiscal note statute as part of the reason for the volume of unfunded mandates.

The fiscal note statute (Title 3, section 163-A) states that "the statement of cost shall be made within the limits of information provided to the office designated by the Legislative Council as having responsibility for financial analysis. The statements shall be furnished to the appropriate committee for the information of its members and for inclusion in bills which receive an ought to pass report when reported to the committee." The statute fails to designate who is to provide the information necessary for the fiscal note. Therefore, each new mandate is given to the appropriate committee with the notation that information is not available to estimate cost. The two positions for fiscal note preparers have not been funded, so there is no one to sample localities or gather relevant data.

Though reimbursement was enacted, these positions remain unfunded, so local governments are not optimistic about their chances for reimbursement if no cost estimating will be done in advance of mandate enactment. They are further pessimistic about the prospects for reimbursement, as there has been discussion in the legislature of repealing the statute in light of the current state budget difficulties in Maine. Constitutional reimbursement continues to be a critical imperative of the Maine Municipal League.

Massachusetts

The state mandate statute in Massachusetts was a part of the Citizens Tax Revolt, known as Proposition 2½. It was enacted in 1980, after the Massachusetts House and Senate had rejected its primary elements, including the portion dealing with state mandates. In effect, the rule provides that any state law or agency rule that imposes a cost on local government is only binding upon the locality if the Commonwealth provides reimbursement. The locality may voluntarily comply with the mandate if it so chooses, but it may not decide to fail to comply if reimbursement is not made. The locality must petition the Superior Court to be exempted from the unfunded mandate. Proposition 2½ also created the Division of Local Mandates (DLM), a division within the state auditor's office. The DLM is charged with reviewing each law or rule that a locality believes is creating a cost. The DLM determines whether a cost exists and the extent of the cost to the locality. Their assessment forms the basis for the reimbursement. In 1984 the DLM was also charged with the periodic review of existing mandates under the Sunset Review Law. When an existing mandate has a significant financial impact, the DLM may recommend continuing it, amending it, or repealing it.

Massachusetts' DLM is considered one of the best institutionalized cost assessment systems in the nation – best in the sense that such a high degree of accuracy is expected since reimbursement follows estimation and best in that the Division is seen by both states and localities as a highly skilled, professional group with no political agenda. The analysts for the DLM stay very busy. The Massachusetts legislature continues to enact program and service mandates without the up-front funding that the statute requires. The difference is that localities see the DLM as a part of their solution rather than their problem.

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The DLM uses a computer tracking system linked to the legislature to access legislation under consideration. Their legal staff identifies laws that have costs to localities and forwards them to the research staff. The research staff has a routine for cost estimating that involves stratified sampling of forty cities and towns, chosen to be representative of the state's municipalities. As information is gathered from surveys to address a particular mandate, it is incorporated into a statewide database from which future mandate costs can be more accurately estimated. After the cost estimate is complete, the DLM legislative staff contacts the relevant legislative committees and state agencies to inform them of their findings. Since Proposition 2½ requires up-front funding, the committee or agency either incorporates funding into the law or rule, or kills it to avoid reimbursement.

In fact, as already mentioned, the legislature or the agency does not always provide for funding or kill the bill. The process breaks down when DLM's recommendations for reimbursement are ignored. This seems to happen most frequently when the mandates do not come to the attention of the affected localities before they are passed. After a mandate is passed, the localities approach DLM with their increased cost data and request cost documentation. The documentation process, which is as painstaking and methodical as the initial cost survey process, results in an estimate that will serve as evidence of state imposed cost when the locality petitions for exemption to the court. If the court finds that a mandate has occurred without reciprocal funding, it can exempt the locality from compliance until the state fully funds the mandate. If the court so rules, the legislature must approve funds for all affected localities, not just for the locality that initiated the court case.

The most serious problem with the Massachusetts system, according to local governments, is that the legislature may choose to pay for state mandates by reducing the amount of state shared revenue available to local governments. There is no requirement that shared revenues remain constant over time. In years of state budget prosperity, mandates are likely to be funded from general revenues. But the fiscal stress of recent years has seen "raids" on state shared revenues to pay for state-imposed laws or rules. Mandates can also arise as conditions of aid for the receipt of state shared revenue as well as other kinds of state revenue. For example, a mandate that required free transportation of private school children was imposed as a condition of aid for the disbursement of state funds to provide transportation of public school children. To the DLM staff these mandates are more than simple conditions of aid – they are "irresistible conditions."[2]

As fiscal conditions worsen for Massachusetts, local governments fear that the use of disclaimers will begin to erode a process that protects localities from the cost of state initiatives. As in all states with statutory reimbursement, the Massachusetts legislature needs only to explicitly state that a new law is not subject to the existing law requiring reimburse-

2 Lunceford, Emily D., "Massachusetts Mandate Statute and Its Application" in Fix and Kenyon, Eds., *Coping with Mandates: What Are the Alternatives?*, Urban Institute Press, 1990.

1-12

ment to exempt itself from mandate costs. At present, the legislature has not availed itself of this option, a fact that credits state-local relations in Massachusetts. Observers note that the fact that the voters overwhelmingly supported the anti-mandate portion of Proposition 2½ may be important in understanding legislative compliance and their continued resistance to using the standard loophole to statutory reimbursement — the explicit exemption. While the Massachusetts legislature clearly did not wish to obligate itself to fund its mandates, it has, by and large, done so. Legislative compliance, some charge, is not so much commitment to principle as fear that the voters may act to hold them to a higher standard of reimbursement than the one they have imposed upon themselves.

Michigan

Michigan voters passed a tax limitation amendment, called the Headlee amendment, in the November 1978 general election. Headlee was primarily intended to limit the growth of the state budget to approximately 10 percent per year. It also included a provision to ensure that state revenue shared with localities remain a fixed percentage of the state budget. The mandated cost provision of the Headlee amendment was not really intended to address the controversy over unfunded mandates, but to prevent the state legislature from evading their responsibility under the amendment to keep spending down to 10 percent growth by shifting responsibility for state programs down to the local level. As such, it was not seen at the time as a pro-local provision as much as an anti-state spending provision. Nonetheless, the language of Headlee seems to require the state to reimburse any increased local costs arising from state action.

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of local government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of local government unless a state appropriation is made and disbursed to pay the unit of local government for any necessary increased costs.

Because the Headlee amendment included a limitation on the rate of growth of local property taxes, the reimbursement provision was seen as necessary to offset the adverse impact on local government. Localities would be required to roll back property taxes when the state equalized valuation of property in the locality exceeded a certain rate of growth. Additionally, all tax levies not authorized by the state under the amendment would have to be approved by the voters in the locality. In return, the state would guarantee that the fiscal 1979 proportion of state revenue going to local governments (41.6 percent) would remain stable and that no new duties would be imposed upon localities unless the state appropriated funds to cover their increased costs.

The Local Government Claims Review Board was created within the Department of Management and Budget to facilitate reimbursement. Local governments that suffer increased costs because of state service or activity requirements may file a claim with the department not more than ninety days after the close of the local government's fiscal year. The department reviews the request and determines whether it is allowable and how much should be reimbursed. Disallowed claims include federal mandates, offsetting savings, costs recoverable from external aid, and nonsubstantive changes in existing service or activity requirements. Reimbursement for any mandate may be waived by a two-thirds majority in both houses of the legislature or through the declaration of an emergency. If localities contend that reimbursement was not made or not adequately made, they can appeal to the Local Government Claims Review Board. The Board has nine members, four of whom are local government representatives. They hear disputed claims and decide by majority vote whether a claim should be paid. If they decide in favor of a claim, the legislature must approve the payment by concurrent resolution.

The reimbursement process has never been used in Michigan. The enabling legislation requires the legislature to adopt joint rules to identify mandates that are eligible for reimbursement. No rules have been adopted, so no legislation is ever identified as a mandate. Without such identification the Department of Management and Budget cannot review claims and the Local Government Claims Review Board cannot hear disputes. The Local Government Claims Review Board has met only once, in June 1985, and determined that until joint rules are passed in both houses of the legislature there can be no review and appeals process under Michigan law. The legislature continues to enact unfunded mandates without any statutory constraint in the absence of identification rules for state mandates to Michigan localities. Michigan counties have three pending legal challenges to the Headlee amendment and are anxious for a ruling. On the other hand, the counties are sure an appeal will follow any ruling and do not anticipate any major changes in the near future.

Missouri

Missouri's voters approved a constitutional limitation on local government taxes and fees on November 4, 1980. The amendment provided that:

> Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of the county or other political subdivision.

> If the assessed value of property subject to the tax increases more than the general price level of the previous year, the localities must roll back the increase in reduced tax levels.

Section 21, approved on the same ballot, provides, "The state is hereby prohibited from reducing the state financed portion of the costs of any existing activity or service required of counties or other political subdivisions. A new activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased cost."

Although the provision has been quite effective in stopping unfunded legislative mandates, Missouri localities report that new mandates come from state agencies that either stop or reduce funding for programs and services but require the same or increased level of local activity. The localities also contend that reimbursement is sometimes insufficient, attributable to the fiscal note process. Missouri's Office of Fiscal Affairs typically forwards the fiscal note to the state agency affected by the rule or law for cost estimates. If the agency favors the rule, the cost estimates are low; if the agency opposes it, the cost estimates are high. While it is not a politicized process, thanks to the influence of the legislature, it is (more accurately) a bureaucratized process that sometimes operates to the detriment of both the legislature and the local governments.

Montana

The Montana reimbursement plan is unique. The Drake amendment, passed in 1979, prohibits the Montana legislature from enacting mandates unless they provide for payment. Since 1979, the legislature has never failed to provide for payment for any mandate. It simply authorizes the local government to create a separate mil levy to pay for the mandate. The legislature, however, does not mandate with any frequency. Years sometimes pass between mandates, according to both the municipal and county associations. But both associations expressed concern for the future. A new state imposed property tax freeze may inhibit the state from authorizing a local levy to pay for new mandates. The question, according to local officials, is whether the state will appropriate money of its own or require the localities to absorb the cost of new mandates within their existing levies.

New Mexico

In 1984, the voters of New Mexico passed a constitutional amendment requiring the state to pay for mandates by a margin of 220,101 to 64,884. The amendment permits the localities to disregard mandates for which reimbursement is not provided.

> Any state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new finding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed.

One of the strongest features of New Mexico's reimbursement provision is that it covers agency rules and regulatory mandates. One of the weakest features is that the determination of a mandate and the reimbursable cost is left to the district court that hears the challenge. New Mexico localities would prefer the agency involved with the new mandate do the cost estimates with local input. The courts are expensive and ill equipped to render precise cost estimates. On the whole, New Mexico localities are pleased by the results of the 1984 initiative. Only one unfunded mandate has been enacted in recent years, and it was not costly.

Rhode Island

Rhode Island's statutory reimbursement provision defines a mandate as " any state initiated statutory or executive action that requires a local government to establish, expand, or modify its activities in such a way as to necessitate additional expenditures from local revenue sources where the expenditures are not otherwise reimbursed in whole of in part." Further, the statute does what no other has done regarding federal mandates: It acknowledges that the state may exceed minimum standards imposed by the federal government, and that when the state does so, the action may appropriately be considered a state mandate or a partial state mandate. If the federal standard is discretionary and the state makes it mandatory, a state mandate exists. Where the federal standard is exceeded by state standard, the portion of the standard exceeded by the state is reimbursable. Finally, any state augmented federal mandate that costs less than $500 is not reimbursable.

There are further exclusions to Rhode Island's general reimbursement provision. They are: mandates on holding of local elections, due process, conduct and notification of public meetings, administrative and judicial review of local actions, protection from local malfeasance, and requirements on local financial administration (including the levy, assessment and collection of taxes). Mandates not subject to these or the federal requirements exemptions are reimbursed in the fiscal year following the review of their costs.

The Office of Municipal Affairs of the Department of Administrations, a legislative office, is responsible for administering the reimbursement program. Rhode Island does not have counties. The office reviews each adopted law for a mandate, identifies reimbursable costs, makes the rules governing municipal reimbursement requests, and forwards the reimbursement requests to the State Budget Office to be appropriated in the next state budget.

Between 1986 and 1990, the total statewide reimbursement for eligible mandates was $225,000, only a fraction of the cost of imposed mandates. However, much of the mandating activity has come in the field of personnel and pension mandates on local employees, and constitutes an adjustment of existing mandates rather than enactment of new mandates. These adjustments are costly to Rhode Island municipalities. Further, the municipalities do not appear to avail themselves of the reimbursement process for mandates that may be reimbursable. In 1990, only one-third of affected municipalities formally requested reimbursement. Municipal officials suggest that the reason may be that those mandates that are the most burdensome are not reimbursable, and those whose costs are more easily absorbed by the localities may be reimbursable.

While reimbursement may not be working perfectly in Rhode Island, the fiscal note process has been very effective in reducing the number of new mandates. The Office of Municipal Affairs is responsible for the preparation of a fiscal note on each law and agency rule within ten legislative days from the day of the request. These notes must show the impact on each of Rhode Island's thirty-nine municipalities and may not describe costs by words; a dollar estimate is mandatory. The results are reliable estimates produced in cooperation with the municipalities that are taken very seriously in legislative debate. Additionally, an annual report of legislative and agency mandating activity, including these cost estimates, is published by the Department of Administration each year.

Tennessee

Article II of the Tennessee constitution provides that "no law of general application shall impose increased expenditure requirements on cities and counties unless the General Assembly shall provide that the state share in the cost". Curiously, this is one of the weakest constitutional reimbursement requirements, and yet it is one of the most effective in preventing new unfunded state mandates. The provision is weak in that it only requires the state to share in the cost, not absorb it, and in that it is limited only to general laws, not agency rules. Further, it defines a mandate as an increased expenditure. That definition has been seen to limit effective reimbursement as laws requiring more intense use of existing local resources are excluded from consideration.

Tennessee's constitutional provision works because it is backed by a strong administrative process and effective lobbying by Tennessee's local government associations. The Office of Fiscal Review, a legislative office, attaches a fiscal note to every bill that has a local cost. The city and county associations work together to ensure that the legislature is aware of the cost and to facilitate an equitable cost sharing arrangement with the state. While the cost estimates may sometimes be politicized and the subsequent sharing arrangement less than equitable, Tennessee's localities are generally accepting of the process and its outcomes. That acceptance has been bolstered by increases in state-shared taxes that have been perceived by both state and local officials as compensation for mandates.

Tennessee localities report that the psychological impact of the constitutional provision and the strength of their coalition have been more effective in stopping unfunded mandates than the reimbursement provision. However, the Tennessee reimbursement requirement excludes all agency rules. Local officials contend that state and federal regulatory policy has been fiscally burdensome in the past and predict that it will become more burdensome in the future. They also acknowledge that the constitutional provision is not adequate to protect them should the state's fiscal conditions worsen and the legislature seek to shift service responsibilities to the localities without adequate compensation.

Washington

Initiative 62, passed by Washington voters in November 1980, was a statement by the citizens of the state against government in general, and state government in particular. Its statement of intent asserts:

> (1) The continuing increases in our state tax burden and the corresponding growth of state government is contrary to the interest of the people of the state of Washington.
>
> (2) It is necessary to limit the rate of growth of state government while assuring adequate funding of essential services, including basic education as defined by the legislature.
>
> (3) It is therefore the intent of this chapter to:
>
> > (a) Establish a limit which will assure that the growth rate of state tax revenue does not exceed the growth rate of state personal income;
> >
> > (b) Assure that local governments are provided funds adequate to render those services deemed essential their citizens;
> >
> > (c) Assure that the state does not impose, on any taxing district, responsibility for new programs or increased levels of service under existing programs unless the costs are paid by the state;
> >
> > (d) Provide for adjustment of the limit when costs of a program are transferred between the state and another political entity; and
> >
> > (e) Establish a procedure for exceeding this limit in emergency situations.

Surprisingly, the mood of Washingtonians was decidedly anti-state government without extending to anti-local government. Both state and local officials attribute this, at least in part, to the regional heritage of strong government at the local level and minimal scope of local services – corresponding to the preferences of local residents. In that spirit, the initiative further provided that state government should not transfer programs to the local level unless it was prepared to have the state budget reduced by the amount appropriated for that program. And finally, Initiative 62 required that the proportion of state revenue shared with localities should not be reduced beyond the 1980 level unless the state budget itself is decreased or unless an emergency exists. A two-thirds vote of the legislature is required to declare a fiscal emergency that would suspend any provision of Initiative 62.

Since 1980, state-imposed mandates have been offset by state-shared revenues to the extent that there has been no net cost to localities for mandates. In 1989, some changes to Initiative 62, all favoring localities, were made. The taxing authority of the localities was increased, and the formula for state revenue shared with localities was increased as well. Washington localities report that the revenue from the state exceeds the cost of mandates by many times.

Summary and Conclusions

Reimbursement requirements are not a guaranteed cure for the mandates problem. While local governments in some states have had positive results from their reimbursement programs, others report that unfunded mandates persist. One of the more common complaints from localities in states with reimbursement programs is that circumvention of the intent of the constitutional amendment or loopholes in the statutes create the impression that the state legislature is not acting in good faith. As is the case with the effectiveness of fiscal note requirements, it appears that the context of state-local relations is more important to understanding the end result of reimbursement legislation than the provision of the legislation itself. Table 9 summarizes the features of reimbursement provisions in the states and the local assessment of their effectiveness.

Local governments in California, Missouri, Rhode Island, and Tennessee find that their reimbursement provisions are not equal to the task of stopping unfunded mandates, but generally work toward inhibiting them. California has, arguably, the strongest reimbursement program. Its limitation is that only mandates that would adversely affect local property taxes are reimbursed. Those that may be funded by other local revenues are not subject to reimbursement. The Illinois and Michigan programs are strong on paper but weak in practice. Local governments in both those states point to lack of legislative will to be bound by reimbursement provisions as the impediment to their programs. Hawaii and Montana find that the reimbursement is adequate as far as it goes. In Montana, the legislature permits the local governments to raise property taxes to pay for the mandates. In Hawaii, the state's participation in cost sharing arrangements varies with the type and expense of the mandate enacted. Florida, Louisiana, and Maine are still unknowns. The Florida amendment is

Table 9
Selected Features of State Mandate Reimbursement Requirements, 1991.

State	Source	Local Assessment of Effectiveness	Estimated Unfunded Mandates per Session
California	Constitutional	Moderate; is no barrier to locally funded state initiatives, but not circumvented	43
Florida	Constitutional	Unknown; implementation language not yet enacted	?
Hawaii	Constitutional	Variable;state share of program cost determined at state's discretion	2
Illinois	Statutory	Poor; most mandates designated as not subject to reimbursement provision	17
Louisiana	Constitutional	Unknown; amendment passed in 1991, no implementation language	?
Maine	Statutory	Unknown; amendment to take effect next legislative session	?
Michigan	Constitutional	Very poor; no mandates reimbursed since reimbursement enacted	25
Missouri	Constitutional	Poor; administrative mandates exempt and cost sometimes underestimated	1
Montana	Constitutional	State permits localities to raise tax rates to pay for mandates	2
New Mexico	Constitutional	Good; state has only enacted one mandate and it was inexpensive	0
Rhode Island	Statutory	Moderate; most expensive mandated programs often excluded	7
Tennessee	Constitutional	Moderate; primarily important for its psychological value, is a good bargaining position for localities	3
Washington	Statutory	Good; state shared revenue exceeds total mandate costs	0

strong. With equally strong implementation language it could emerge as the reimbursement model for the nation. Louisiana's amendment may be weakened by legislative interpretation of providing for payment for mandates as permitting the localities to raise taxes to pay for them. Finally, the two states in which the local governments consider reimbursement to be working the most effectively are not the states that have the strongest reimbursement provisions. But they are states with strong local lobbying coalitions and generally good state-local relations. Strategies to improve local responses to unfunded mandates, both new and existing, will be the focus of the next chapter.

22

United States General Accounting Office

GAO

Report to the Honorable
Dave Durenberger, U.S. Senate

September 1988

LEGISLATIVE MANDATES

State Experiences Offer Insights for Federal Action

GAO/HRD-88-75

1-22

States Requiring Local Cost Estimates and Mandate Reimbursement

State	Requires: Estimate of local cost burden	Requires: Mandate reimbursement	Legislature considered a reimbursement requirement
Alabama	X		
Alaska			X
Arizona	X		X
Arkansas	X		
California	X	X	
Colorado	X	X	
Connecticut	X		X
Delaware	X		
Florida	X	X	
Georgia	X		X
Hawaii		X	
Idaho	X		X
Illinois	X	X	
Indiana	X		X
Iowa	X		
Kansas	X		
Kentucky	X		
Louisiana	X		X
Maine			X
Maryland	X		
Massachusetts		X	
Michigan	X	X	
Minnesota			X
Mississippi			
Missouri	X	X	
Montana	X	X	
Nebraska	X		X
Nevada	X		
New Hampshire	X	X	
New Jersey	X		X
New Mexico	X	X	
New York	X		X
North Carolina	X		
North Dakota	X		
Ohio	X		
Oklahoma			X
Oregon	X		
Pennsylvania	X		X

(continued)

State	Requires		Legislature considered a reimbursement requirement
	Estimate of local cost burden	Mandate reimbursement	
Rhode Island	X	X	
South Carolina	X		
South Dakota	X		
Tennessee	X	X	
Texas	X		X
Utah	X		X
Vermont	X		X
Virginia	X		
Washington	X	X	
West Virginia	X		
Wisconsin	X		X
Wyoming			
Totals	**42**	**14**	**18**

Types of Mandates Excluded From State Reimbursement in Six States

In six of the seven states reviewed, we found certain types of mandates that are formally excluded from state reimbursement. This appendix details the general and specific types of mandates excluded from reimbursement by each state.

General Exclusions

The following types of mandates generally are excluded from reimbursement by most states we reviewed:

- Federal,
- Court,
- Voter-approved, and
- Local government-requested.

Specific Exclusions

In addition to the general exclusions allowed by most states, each state has specified that certain types of mandates are not state-reimbursable. The principal exclusions are as follows:

California

- Cost-savings mandates,
- Self-financing mandates,
- Mandates enacted prior to January 1, 1975, and executive orders or regulations initially implementing legislation enacted prior to January 1, 1975,
- Mandates defining a new crime or changing an existing definition of crime, and
- Mandates applicable to both public and private sectors (based on recent California Supreme Court decision).

Florida

- Mandates affecting schools or other special districts, and
- Mandates applicable to specific local governments.

Illinois

- Mandates with no net cost increases,
- Cost-savings mandates,
- Mandates with costs recoverable through federal, state, or external aid,
- Mandates costing less than $1,000 per local government or less than $50,000 for all local governments,
- Local government organization and structure mandates, and
- Due process mandates.

Massachusetts	• Retirement and group insurance mandates, • Mandates affecting county and regional jurisdictions, • Criminal laws or civil violations, and • Penalties imposed by a state agency on a municipality due to violation of a law that resulted in hazard to the public.
Michigan	• Mandates applicable to a larger class of persons or corporations, such as the private sector, and not exclusively to local governments (public sector), • Mandates increasing salaries of circuit and probate court judges, • Mandates benefiting or protecting public employees of local governments, and • Due process mandates.
Tennessee	• Mandates applicable to specific local governments.
Colorado	• No specific exclusions listed.

Specific Definitions of Mandate Reimbursement Requirements in Seven States

The definitions of mandate reimbursement requirements vary by state. This appendix contains the specific definitions of mandate reimbursement requirements in the seven states we reviewed.

California

Article XIII B, section 6, California Constitution: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

Colorado

Section 29-1-304, Session Laws of Colorado 1981: "(1) Every action by the general assembly which mandates a new program or the expansion of an existing program subsequent to July 1, 1981, upon a unit of local government shall either: (a) Provide sufficient state general fund appropriations to meet the cost thereof; (b) Provide for a local source of revenue to meet the cost thereof . . . ."

Florida

Florida statute 11.076 of 1978: "(1) Any general law, enacted by the Legislature after July 1, 1978, which requires a municipality or county to perform an activity or to provide a service or facility, ... which will require the expenditure of additional funds, ... must provide a means to finance such activity, service, or facility . . . . (2) This act shall not apply to any general law under which the required expenditure of additional local funds is incidental to the main purpose of the law."

Illinois

Chapter 85, sections 2201-2210, Illinois Revised Statutes: ". . . . any State-initiated statutory or executive action that requires a local government to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues, excluding any order issued by a court other than any order enforcing such statutory or executive action. State mandates may be reimbursable or nonreimbursable as provided in this Act. However, where the General Assembly enacts legislation to comply with a federal mandate, the State shall be

1-27

exempt from the requirement of reimbursing for the cost of the mandated program . . . ."

Massachusetts

Chapter 29, section 27C, Massachusetts General Laws: ". . . . (a) Any law, rule or regulation taking effect on or after January first, nineteen hundred and eighty-one imposing any direct service or cost obligation upon any city or town shall be effective in any city or town only if such law is accepted by vote or by the appropriation of money for such purposes, ... unless the general court, at the same session in which such law is enacted, provides, by general law and by appropriation, for the assumption by the commonwealth of such cost, exclusive of incidental local administration expenses and unless the general court provides by appropriation in each successive year for such assumption . . . ."

Michigan

Article IX, section 29, Michigan Constitution: "The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs . . . ."

Tennessee

Article 2, section 24, Tennessee Constitution: ". . . . No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost . . . ."

Administration of Mandate Reimbursement Programs

The administration of mandate reimbursement programs varies by state. This appendix details program administration in California, Massachusetts, and Tennessee.

California

With a few exceptions, the state constitution requires the state to reimburse local government for all mandated costs arising from legislation or regulations that provide for a new program or an increased level of service in an existing program. Local agencies may obtain reimbursement for mandated costs in one of two ways:

1. The legislation initially imposing the mandated activity may contain an appropriation for reimbursement, and local agencies may file reimbursement claims with the State Controller to obtain a share of these funds.

2. If the legislation does not contain an appropriation, the local agency may file a "test claim" with the state's quasijudicial Commission on State Mandates (CSM). The test claim is the first claim that alleges the existence of mandated costs eligible for reimbursement. This claim initiates a fact-finding process that culminates in a decision by CSM. CSM holds several hearings to determine (1) the merits of the test claim, (2) the costs and types of localities eligible for reimbursement, and (3) the estimated amount of reimbursement. If CSM determines that a particular statute or regulation contains a reimbursable mandate, it requests an appropriation from the legislature to reimburse localities for costs incurred since the mandate became operative. If the legislature appropriates funding, the Controller notifies localities of the available funds and gives them guidelines for preparing reimbursement claims. Localities actually do not receive reimbursement until approximately 2 years after the initial test claim is filed.

Whether a mandate is funded through the appropriation or test claim processes, local agencies must annually file detailed reimbursement claims with the Controller for each approved mandate. Reimbursements to local agencies cover the prior year's actual costs and the estimated costs for the current year. These payments may be for total or incremental costs depending on the guidelines certified by CSM.

In 1985, two laws were enacted to reduce reimbursement delays for mandates funded through the appropriation and test claim processes. Under one law, reimbursement for certain ongoing mandates is provided on a block grant basis, with the amount of the grant equal to the average

amount of reimbursement received during a 3-year base period. This amount is automatically disbursed to local agencies, who will no longer have to file reimbursement claims with the Controller. Under the second law, mandates approved for funding by CSM can be reimbursed from a newly created mandate claims fund, if the mandate's first-year statewide costs are less than $500,000. The amount of this new revolving claims fund is $10 million. Reimbursements from this fund can be made only after local agencies have gone through the test claim process. However, CSM will no longer have to seek funding approval from the legislature.

Massachusetts

The mandate reimbursement requirement was enacted by statute in 1980 through a voter tax relief initiative. Any law, rule, or regulation taking effect on or after January 1, 1981, is subject to the reimbursement requirement. The Division of Local Mandates (DLM), created within the State Auditor's Office in 1983, is the key administering agency of the reimbursement requirement. It has the authority to determine which statutes qualify for reimbursement by meeting the mandate criteria detailed in the reimbursement provision. DLM reviews a state program at the request of a city, town, or state legislator to determine within 60 days whether part or all of it originated after January 1981, when the reimbursement requirement became effective. If so, the requirement stipulates that the state must appropriate money for the mandate at the same session in which the law was enacted and in each successive year. The requirement also directs the state to pay cities and towns up-front and in full for the costs associated with mandates. The local governments need not comply with a mandate unless and until there is a state appropriation for the mandated provisions. They must, however, petition the courts to permit noncompliance.

DLM makes the final determination as to what qualifies as a mandate; however, the power of appropriation lies with the legislature. Thus, all legislative appropriations concerning mandates are based on DLM determinations. DLM determines reimbursable amounts through either an estimation or a claims process and alerts the state to its obligation through mandate determination reports. The reports are sent to affected local governments, appropriate state agencies, and state legislators. DLM's mandate determinations may be admitted as cost evidence in court should a city or town resort to legal action to recover its costs. In addition to DLM, the state's office of Administration and Finance (A&F) has been directed on three occasions to distribute reimbursable funds to

affected cities and towns. A&F's role was written into legislative appropriation language for three separate mandates. Both DLM and A&F have required affected communities to itemize estimated and/or certify actual costs incurred in carrying out each mandated program prior to checks being drawn from the mandate appropriation.

Tennessee

The state constitution specifies that no laws of general application shall impose increased expenditure requirements on local governments unless the state shares in the costs. The state does not have a specific unit that administers the mandate reimbursement program. Local governments are reimbursed for state-mandated costs through either appropriations or state-shared taxes. For reimbursements provided through appropriations, the state agency that oversees the mandated activity is responsible for reimbursing local governments. Reimbursements are allocated to local governments on a formula basis. For reimbursements provided through state-shared taxes, the first $1,000,000 increase over the previous year in state-shared taxes must be made available to municipalities and counties to cover the state's share of mandated costs. However, localities would receive these state-shared taxes regardless of any new mandates imposed by the state. Thus, the state does not provide new funding for mandates when they require local governments to use state-shared taxes as reimbursement for mandated costs. Since state-shared taxes also are allocated on a formula basis, there is no relationship between the cost of mandates and the amount received from shared taxes. Local governments are not required to file reimbursement claims, as allocations are based on formulas.

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3-2

CONSTITUTIONAL
RESOLUTION

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND NINETY-TWO

S.P. 42 - L.D. 66

RESOLUTION, Proposing an Amendment to the Constitution of Maine to Provide State Funding of any Mandate Imposed on Municipalities

Constitutional amendment. RESOLVED: Two thirds of each branch of the Legislature concurring, that the following amendment to the Constitution of Maine be proposed:

Constitution, Art. IX, §21 is enacted to read:

Section 21. State mandates. For the purpose of more fairly apportioning the cost of government and providing local property tax relief, the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues unless the State provides annually 90% of the funding for these expenditures from State funds not previously appropriated to that local unit of government. Legislation implementing this section or requiring a specific expenditure as an exception to this requirement may be enacted upon the votes of 2/3 of all members elected to each House. This section must be liberally construed.

; and be it further

Constitutional referendum procedure; form of question; effective date. Resolved: That the city aldermen, town selectmen and plantation assessors of this State shall notify the inhabitants of their respective cities, towns and plantations to meet, in the manner prescribed by law for holding a general election, at the next general election in the month of November following the passage of this resolution, to vote upon the ratification of the amendment proposed in this resolution by voting upon the following question:

2

Session of 1993

HOUSE BILL No. 2193

By Representative Lawrence

2-2

AN ACT concerning cities and counties; relating to certain enactments of the legislature and imposing certain limitations thereon.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Except as provided by subsection (e), no city or county shall be bound by any law, or rules and regulations adopted pursuant thereto, requiring such city or county to spend funds or to take an action requiring the expenditure of funds unless: (1) Funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; (2) the legislature authorizes or has authorized a city or county to enact a funding source, not available for such city or county on July 1, 1993, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure, by a simple majority vote of the governing body of such city or county; or (3) the law either is required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by cities or counties for compliance.

(b) Except as provided by subsection (e), the legislature may not enact, amend, or repeal any law if the anticipated effect of doing so would be to reduce the authority that cities or counties have to raise revenues in the aggregate, as such authority exists on July 1, 1993.

(c) Except as provided by subsection (e), the legislature may not enact, amend, or repeal any law if the anticipated effect of doing so would be to reduce the percentage of a state tax shared with cities and counties as an aggregate on July 1, 1993. The provisions of this subsection shall not apply to enhancements enacted after July 1, 1993, to state tax sources, during a fiscal emergency declared in a written joint proclamation issued by the president of the senate and the speaker of the house of representatives, or where the legislature provides additional state-shared revenues which are anticipated to be sufficient to replace the anticipated aggregate loss of state-shared revenues resulting from the reduction of the percentage of the state tax shared with cities and counties, which source of replacement revenues shall be subject to the same requirements for

Attach. 2 Senate Local Gov. 8-18-93

amendment or repeal as provided herein for a state-shared tax source existing on July 1, 1993.

(d) Laws enacted to require funding of pension benefits existing on the effective date of this section, criminal laws, election laws, the general appropriations act, special appropriations acts, laws reauthorizing but not expanding then-existing statutory authority, laws having insignificant fiscal impact, and laws creating, modifying, or repealing noncriminal infractions, are exempt from the requirements of this section.

(e) Laws enacted by the legislature which are subject to home rule by the city or county affected by such laws are exempt from the requirements of this section.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

2-2

#3

Session of 1993

House Concurrent Resolution No. 5018

By Committee on Local Government

2-18

A PROPOSITION to amend article 2 of the constitution of the state of Kansas by adding a new section thereto, requiring an election prior to the enforcement of certain enactments of the legislature.

Be it resolved by the Legislature of the State of Kansas, two-thirds of the members elected (or appointed) and qualified to the House of Representatives and two-thirds of the members elected (or appointed) and qualified to the Senate concurring therein:

Section 1. The following proposition to amend the constitution of the state of Kansas shall be submitted to the qualified electors of the state for their approval or rejection: Article 2 of the constitution of the state of Kansas is hereby amended by adding a new section to read as follows:

"**§ 31. Laws requiring local governmental units to spend funds or limiting their ability to raise revenue or receive state tax revenue.** (a) Any law or rule and regulation requiring the use of a local governmental unit's personnel, facilities or equipment or requiring the expenditure of a local governmental unit's funds to provide a new service, program or which imposes any direct service or cost obligation upon a local governmental unit under penalty of civil or criminal sanction shall be binding upon such local governmental unit only if the state legislature provides, by appropriation, reimbursement for any such cost as certified by such local governmental unit, and unless the state legislature provides, by appropriation, reimbursement in each successive year for any such cost as certified by such local governmental unit.

(b) A law or rule and regulation granting or increasing exemptions from, or otherwise limiting, local property taxation shall be binding upon a local governmental unit only if the state legislature, at the same session in which the law is enacted and in each successive year thereafter, provides, by appropriation, for payment by the state to each local governmental unit for any loss of taxes resulting from such exemption or limit as certified by such local governmental unit.

(c) Any funds appropriated by the state as provided in sub-

Attach. 3

Senate Loc. Gov. 8-18-93

section (a) or (b) shall be in addition to, and shall not supplant, any other state financial assistance for local governmental units in existence on July 1, 1993. Local governmental units also shall receive any additional state financial assistance as may be generated by any expansion of the state tax base, using the formulas in place on July 1, 1993.

(d) Subject to the other provisions in this section, failure by the legislature to appropriate sufficient funds to fully reimburse a local governmental unit as provided for in subsection (a) or (b) shall authorize such local governmental unit not to comply with such unfunded mandate or mandates until such time as full state reimbursement is received.

(e) The legislature may enact exemptions from the provisions of this section if such legislation is approved by not less than two-thirds of the members elected (or appointed) and qualified to the house of representatives and two-thirds of the members elected (or appointed) and qualified to the senate.

(f) For the purpose of this section:

(1) "Local governmental unit" means any city or county or any instrumentality thereof.

(2) "Civil or criminal sanction" includes, but is not limited to, ouster, mandamus, civil fines, criminal fines and imprisonment."

Sec. 2. The following statement shall be printed on the ballot with the amendment as a whole:

"*Explanatory statement.* The proposed amendment would require the legislature to provide funding to cities and counties whenever a law or rule and regulation requires or results in the expenditure of money by cities or counties. The proposed amendment would require continued funding or reimbursement for the costs incurred by cities and counties in providing services or programs mandated by the state. If sufficient funding is not provided by the legislature to pay the costs incurred by cities and counties in providing services or programs mandated by the state, cities and counties would not be required to comply with such mandate. The proposed amendment authorizes exemptions from the provisions of the section upon a two-thirds vote of the members of the house of representatives and a two-thirds vote of the members of the senate.

"A vote for this proposition would limit the legislature's ability to enact laws which would cause a city or county to spend money or raise revenue unless certain conditions are met.

"A vote against this proposition would continue the legisla-

ture's power to enact laws affecting cities and counties."

Sec. 3. This resolution, if approved by two-thirds of the members elected (or appointed) and qualified to the House of Representatives and two-thirds of the members elected (or appointed) and qualified to the Senate, shall be entered on the journals, together with the yeas and nays. The secretary of state shall cause this resolution to be published as provided by law and shall cause the proposed amendment to be submitted to the electors of the state at the general election in the year 1994 unless a special election is called at a sooner date by concurrent resolution of the legislature, in which case it shall be submitted to the electors of the state at the special election.

#1

August 18, 1993

PRESENTATION ON MANDATES

TO THE

SENATE LOCAL GOVERNMENT COMMITTEE

Murray L. Nolte
County Commissioner, Johnson County Board of County Commissioners
President, Kansas Association of Counties

Chairman Parkinson and Members of the Committee:

I am Murray Nolte, a member of the Johnson County Board of County Commissioners and President of the Kansas Association of Counties. I would like to specifically address three mandates which have impacted our taxpayers in Johnson County.

Reappraisal -- The first mandate is reappraisal. Although we may disagree with specific parts of reappraisal, I think that we can all agree that it was necessary. The study shows that the annual cost to the County of reappraisal in 1992 was $1.9 million. However, revenue received from the State did not even cover 15 percent of Johnson County's costs. Expenditures related to reappraisal are exclusive of appraisal costs which occurred before reappraisal and continue today. The reappraisal costs equate to 7/10ths of one mill in property taxes and are more than the combined budgets of the County Clerk, County Treasurer and Register of Deeds.

District Courts -- A second mandate that impacts our County substantially is the District Court. In the study you will see that this cost was $1.9 million in 1992. The share of the docket fees received by the County only covers 15 percent of the cost of operations. The State, however, receives enough in docket fees and fines to cover the

Attach. 4
Senate Local Gov.
8-18-93

County's $1.9 million cost of providing all non-salary expenses. The impact of the $1.9 million cost to the County taxpayer equates to more than 7/10ths of one mill in property taxes.

Americans with Disabilities Act --The last mandate that needs mentioning is the Americans with Disabilities Act. Although the Act began as a Federal effort, it has subsequently been embraced by the State of Kansas. The KAC study shows that Johnson County's 1992 cost of the ADA was $35,000. However, this was only the first year of a three year program to make facilities in the County accessible to those with disabilities. The full three-year cost to the County of the Americans with Disabilities Act will actually be $1.1 million.

Conclusion -- These are just three of the mandates analyzed by the KAC study. There are many more which affect counties such as Mental Health Reform, requirements of the Clean Water Act, and the skyrocketing cost of prisoner care. I hope that you will carefully study the report on mandates prepared by the Kansas Association of Counties (KAC). Mandates have always been difficult to quantify, but their impact has been readily felt by counties. The report presented by KAC does an excellent job of measuring the impact of a number of mandates to help us better understand what county commissions have been wrestling with each year as they prepare their budgets.

Comments To Senate Local Government Committee
Aug. 18, 1993
by John Divine: Commissioner City of Salina

#1

A. Revenue losses

1. Reclassification
   a. Assessed valuation for Salina dropped 1% this last year.
   b. The 1992 classification amendment decreased it by 7%.
   c. Only good growth in Salina (6%) kept us from losing more than 22,000 in revenues by maintaining our current mill levy.
2. Restrictions
   a. Tax lid - Continues to be a problem for many tax districts.
      i. 1994 Saline County Budget - tax lid mill not let them respond to jail costs and flooding damage.
      ii. Tax lid flies in the face of home rule.
      iii. "Iron clad" tax lid will hamper local governments ability meet state and federal mandates as well as local citizen service request.
   b. Income and earnings taxes - local governments prohibited from using them. Asking for statutory authority.
      i. Many governments have used the full authority available under the local sales tax option.
      ii. Many citizens find the property tax so objectionable, I believe they would rather see a local income or earnings tax.
      iii. An income or earnings tax can provide the significant sums of money needed to meet mandates.
   c. Uncontrolled Costs - Workers Compensation, Health Insurance, etc.
      i. Average annual increases of 20-25% are playing havoc with local government budgets.
      ii. Ask the state to continue working on bringing reason to W.C. law. We have all been made aware of recent abuses. Action is needed.
      iii. Cannot wait on federal action on health insurance, while the federal government is fiddling, local government and local businesses are burning from the searing costs of health insurance.
3. Effect of increasing federal/state mandates last 6 years
   a. Salina experience with mandates
      i. Water - $7.8 million - 47% increase
      ii. Sewer - $23 million cost - 125% rate increase
      iii. Solid Waste - Estimate $2-3 million - 150% rate increase
      iv. Minimum wage - $150,000 year change
      v. ADA - $300,000 estimate
   b. Revenue Shrinkage - 1989 Reclassification
      i. Change in motor vehicle tax $250,000 year loss
      ii. 1992 Classification $22,000 year
      iii. Federal revenue sharing $450,000 year
   c. Local citizens have expectations of their government also.
      i. The squeeze from unfunded mandates and revenue losses make it difficult to meet their priorities.
      ii. Local officials are elected to meet local concerns.
      iii. Increasingly we are the change agents for state and federal policies.
      iv. We can and will carry out those responsibilities, but with the responsibility - give us the authority and flexibility we need to carry out those responsibilities.

Senate Local Gov.
8-18-93
Attach. 5

#6

BOARD O
COMMISSIO
COURTHOUSE
(316) 257-2232
or
(316) 257-3039

Rice County

LYONS, KANSAS 67554

August 18, 1993

TO: Senator Mark Parkinson
Chairman
Senate Local Government Committee

I am Mary Bolton, Chairman of Rice County Commission, and I appreciate the opportunity to appear before you today.

Mandates have been defined, discussed, analyzed and initiated - - - and this hearing today is a continuation of all of those processes. I do not perceive mandates as "personal" directives sent to harass Commissioners and other local government officials, but a mandate does mean to me being a partner with the state or federal government in levying property tax to fund a certain program, without being an equal partner in the decision to fund or administer that particular function.

Rice County is a small rural county, with a declining population of 10,600 residents. Since the 1990 census figures are available we are also defined as losing per capita income and our school districts now qualify for a number of federal aid programs not previously available or needed. Obviously this also translates into declining valuation of real estate for personal residences. Our county is also experiencing a continuing downward trend in our oil and gas valuation. Our 1993 total valuation of $71,000,000 is now 33% less than it was ten years ago.

Since all of you constantly analyze these kinds of trends and tax dollars, you know that we struggle to provide vital local services which continually cost more. We have for years used the 1% local option sales tax to provide a level of financing for roads and bridges we deemed absolutely necessary to maintain the economy of our county and of course with the weather conditions we have experienced this year, it is not enough.

With this background information, it is easy to realize the impact of all the mandates we are dealing with right now, most notable of which is the EPA standards for solid waste disposals. The dollars we have dedicated for this project in 1994 equals three mills of property tax and that will not meet the entire cost.

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8-18-93
Attach. 6

Of significant importance in the near future will be the fallout from the new sentencing guidelines. We can expect an increase in the numbers of inmates in our local jails and their sentences will be longer than in the past. As a part of that overall increase in expenses will be the potential for health care for those inmates which could be a major budget demand, ranging from minor dental care to a heart transplant. Counties could be exact duplicates of the uninsured persons who have no health insurance to meet health care needs.

Educational requirements are continuing to escalate for EMT's, law enforcement personnel, emergency preparedness staff and drivers license renewal staff. Costs for one day of out-of-town training can range from $150.00 to $300.00. Multiply that a number of times and it soon equals one mill of property tax dollars.

An accurate cost study must be done before debate commences for any new programs or before new requirements are set forth.

I would ask for your thoughtful consideration of our request. Thank you for your attention.

We truly want to be PARTNERS for better more cost-efficient government.

Sincerely

Mary Bolton

Mary Bolton, Chairman

#7

Senate Local Government Committee

August 18, 1993

My name is Jerry J. Fear. I am the city administrator of Oberlin, Kansas, a 3rd Class City of 2,200 persons in Northwestern Kansas.

First, I would like to go on record to thank the Kansas State Senate for your support during the last session for exempting state mandates from the Tax Lid Law. I feel that perhaps we are carrying coals to Newcastle here today. We really do appreciate your invitation and concern.

Our assessed valuation is just over $5,300,000. Every mil of property tax therefor produces $5,300 in revenue. We have just estimated our expected cost for testing under the Phase II/V Monitoring requirements of the Safe Drinking Water Act. We expect the cost to be at least $10,000 per year. And for what purpose?

There are no established standards for these new substances, and no scientific proof that they are harmful at the levels being tested for. And what would we do if they are present. We have no possibility of removing them without spending millions and millions of dollars, which our citizens would never approve.

Of course, it won't be a mil levy that pays for this. Because of the tax lid law, it will be an increase in water rates. I would point out that one of the fundamental strategies of the conservation movement is that raising the cost of a resource, reduces the use thereof. Double the price of gasoline and we'll only use half as much. Double the price of drinking water and we'll stop watering our yards.

This mandate happens to be a federal one, requiring the state to administer it. And I know that the Legislature feels that such federal mandates have caused a large part in the budget difficulties of the state, which they no doubt have. It should not be difficult for members of the Legislature to understand how their actions impact local budgets. But stuff happens.

My favorite example is the action of the Legislature three sessions ago to include cities of the 2nd and 3rd classes under the provisions of the Animal Breeders Act. Since this action came out of a Senate/House Ways and Means Committee, we presume that the purpose was to raise revenue for the inspection division of the Department of Agriculture.

Complying with this regulation, which has absolutely nothing to do with the animal control programs of cities, would have cost our community a minimum of $10,000, probably more. Again, that is close to two mils. And in this case, the cost would have to come from the general fund. Under the current tax lid law, we could not have raised the mil levy to pay for it, without voter approval. Our citizens would not consider this a

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priority and approve spending their money for this purpose. Compliance would, therefor have come at the expense of some other locally defined priority.

There are 626 cities that were affected. If all had similar costs, over six million dollars of local revenue would have been taken away from other priorities, and to what end? At the last accounting, only about 10% of these cities had licensed a pound. At $200 per license, that generated about $12,000 in revenue, which would not cover the travel cost to perform the two inspections per year required.

Again, I have to give the Senate credit for trying to correct this farce in the next session, but the House wouldn't bring it to a vote, so it is still on the books. Thank goodness 90% of the cities have found some way to circumvent it.

I could go on listing dozens of mandates that have been imposed by Congress, the Legislature and administrative agencies at the federal and state levels, and show how they impact small communities. But, as I said before, I know you understand.

There is a major difference between us. You have the legal power and authority to raise revenue to pay for federal mandates, if you have the political will to do so. You also have the legal power and authority to fully fund state mandated goals and priorities, if you have the political courage to do so.

You have taken from local units of government the authority to raise revenue through the tax lid law, while at the same time, requiring local governments to expend increasing amounts of these fixed revenues for priorities that you have neither the will or courage to pay for directly.

Having the ability to mandate, is like having a credit card. It encourages impulse buying. Decisions are often made on the basis of what's nice, not what's necessary. Idealistic impulses can escape the test of practicality and affordability. The real costs of compliance can be fragmented and buried from public view.

Unfunded mandates are, in reality, a tax on local governments.

And with the tax lid law, you are squeezing the life out of local government.

The issue of unfunded mandates is probably the most important single issue facing local governments. There is resistance building throughout the country. October 14, is National Mandate Day. Local governments are becoming increasingly vocal in informing the public about the costs of mandates. Voters are becoming more aware of the local tax impact of mandates.

I am here today to ask that you consider local government relief, by supporting House Concurrent Resolution No. 5018 and eventual tax lid exemptions for unfunded state mandates.

KANSAS ASSOCIATION OF COUNTIES

"Service to County Government"

1275 S.W. Topeka Blvd.
Topeka, Kansas 66612-1852
(913) 233-2271
FAX (913) 233-4830

August 18, 1993

Testimony

For: Senate Local Government Committee

By: John T. Torbert, CAE
Executive Director

Subject: House Concurrent Resolution 5018 (Mandates)

The Kansas Association of Counties, at their annual platform discussion which was held last November, unanimously adopted the following statement of position on mandates:

> "Out of a sense of fiscal fair play and truth in taxation, a constitutional amendment is needed to give local governments relief from mandates. Such an amendment would specify that any new law or regulation that required additional expenditures by local government, either in terms of human or monetary resources, should be fully funded by the state."

In our opinion, this will be the most important piece of legislation that you will deal with this year. It will return accountability and fairness to the property tax structure.

In the current intergovernmental system, counties are often asked to administer state policy. As you know, we are the only system of local government that covers the entire state. We readily accept this role and realize that it is one of the reasons that counties were created in the first place. The problem comes when the state either has policy initiatives that it wants to see developed or, it has a mandate forced on to it by the federal government and it doesn't have the money or want to raise the taxes to pay for that initiative or mandate. When that happens, the urge to pass that cost on to local level, and thus the property taxpayer, can become overwhelming. It provides the legislature with what can be the best of both worlds - being able to take credit for good programs while not having to find the dollars to pay for them.

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Attach. 8

The idea of state government taking on the issue of unfunded mandates is not new or untested. There are at least 14 states that have some sort of mandate reimbursement program. In some states, the provisions are statutory. In others, they are part of the constitution. We believe that because of the gravity of the issue, the mandate provisions need to be incorporated into the constitution.

This proposal is experience based. As part of a general research project that KAC has conducted on the issue of mandates, we surveyed those states that already have either legislation or a constitutional amendment on the books. We then asked them what worked and what didn't. Based on those answers, we tried to fashion an approach that accomplished two goals: 1) Provided cities and counties protection from unfunded mandates and, 2) Provided the legislature with the necessary "safety valve" protection to deal with emergencies or unforeseen circumstances. This amendment clearly does both. And, it does so without the necessity and cost of a new state bureaucracy to oversee the process. Be mindful too that this amendment would not have any impact on mandates that are already in place. It only affects those actions which would take place after this amendment is added to the constitution.

In the past, the legislature has usually approached the issue of unfunded mandates by exempting that activity out from under the tax lid. Prime examples are the exemptions for payment of out-district tuition costs and costs relating to the detention of juveniles. These exemptions do allow us the ability to raise taxes to pay for these costs. The local tax lid bill that passed the senate this year but failed to win final approval did provide an additional tax lid exemption for the costs of compliance with state and federal mandates. That misses the basic point though. That is, when the state or federal government wants to do something, they should have the political wherewithal to also figure out how to either raise revenue or cut other spending to pay for it.

Chris McKenzie, executive director of the League, will explain the actual working mechanics of the amendment in his testimony. I would like to close by emphasizing the fact that in requesting this constitutional amendment, neither KAC or the League intend it to be punitive. We view it as a very positive way of reestablishing an equitable state and local partnership.

Thank you.

ISSUES & OPTIONS
National League of Cities
MANDATES: KEEPING CITIZENS AWARE
Vol. I, No. 6

ISSUE:
State Mandates to Local Governments

by
Janet M. Kelly

Of all the issues that engage local government officials and state legislators, none are more contentious than state mandates. Mandates go to the heart of what governing is all about—autonomy and money. Local officials recognize the need for the policies that ensure basic and equal protection for all citizens of the state, and are willing to enter into a partnership with the state to implement those policies. In return, they generally ask for two things. The first is the ability to implement the policy consistent with local needs and conditions, and the second is either financial assistance from the state or local fiscal flexibility to fund the requirement themselves.

The decreasing financial assistance from states to localities combined with the increasing number of restrictions on sources or rates of local revenue places additional burdens on already fiscally stressed local governments. Unfunded mandates have also strained the intergovernmental relationship, making innovative partnership approaches to providing services and paying for them simultaneously more necessary and more difficult.

Two traditional approaches to unfunded mandates have been fiscal noting (the procedure by which mandate costs are estimated prior to the enactment of the mandate) and state reimbursement for the cost of implementing a new mandate. National studies sponsored by the National League of Cities (NLC) and a growing number of state league studies challenge the assumption that fiscal notes inform mandate decisions and that reimbursement requirements constitute solutions for unfunded mandates. Understanding why neither of those statements are accurate has tremendous ramifications for local governments struggling with the mandate problem.

Moreover, recent reports from NLC and the state leagues offer new answers to questions like "what exactly is a mandate?" and "what are the impacts of unfunded mandates on localities?" The answers transcend simple conventional wisdom and have implications for action. This article will describe what is known about mandates and review those implications.

> *"Cities throughout the nation have been forced to find additional revenues to fund these federal and state requirements, during a time when revenues are declining."*
>
> *Bill Souder, Mayor*
> *Hurst, Texas.*

What Is a Mandate, Anyway?

The way each state chooses to answer this question determines its range of available alternatives. For that reason, the most expansive and complete definition of mandates is always preferable. The two criteria used in states today are based on either cost or penalty. Cost-based definitions begin with some variation of the theme "any state statute or rule requiring a local expenditure of funds or restricting local revenue rates or bases...." Most states employ a cost-based definition like that offered in a 1978 US Advisory Commission on Intergovernmental Relations (ACIR) report on state mandates, largely because the report was the only reference available to the states in their early attempts at mandate legislation. The report defined a mandate as any "state constitutional, statutory, or administrative regulation that either limits or places additional expenditure requirements on local governments."[1]

The problem with a cost-based definition is that it necessarily reduces important arguments about mandates to money. When the definition is cost-based, discussions will center on whether or not the mandate has a cost and what that cost will be. This is especially troublesome as many mandates require localities to use their existing resources differently or more intensively. When, for example, local employees are required to make more detailed reports of their activity in order to satisfy a state mandate, it is difficult to argue that the mandate costs some definable portion of the worker's salary. And even if the fiscal note preparer acknowledges that some cost will be incurred, it would be almost impossible to determine that cost with any accuracy. Because of the proliferation of these kinds of mandates, local governments bear very high cumulative costs but very low marginal costs. A cost-based definition might not recognize the burden of these mandates at all.

A better approach is a penalty-based definition. Rather than ask "will it cost money?" a penalty-based definition asks "must I comply?" The latter is much easier to answer decisively than the former.

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Attach. 9.

In recognition of the limitations of a cost-based definition of mandates, the US ACIR offered a penalty-based definition in its subsequent work on state mandates published in 1990. A mandate arises when "statutes, constitutional provisions, court decisions, or administrative regulations or orders that demand action from 'subordinate' governments under pain of civil or criminal sanctions."[2] Now the appropriate test for the mandate is whether the locality can legally resist it.

The ease with which a mandate can be discerned is an important advantage of this definition. Some state legislatures contend that if a law impacts the private sector as well as local governments, it cannot be considered a mandate. A penalty-based definition settles that argument in short order. The only disadvantage is that a definition based on penalty tends to reveal the volume of existing mandates, some of which are not important to the local government. However, there is a strong argument to be made that if you aggregate all the "little" mandates their cost would approach if not exceed the cost of the few "big" mandates.

Where Do Mandates Come From?

Most fiscal note and reimbursement measures apply to mandates enacted by the state legislatures, but the legislatures typically are not the source of most mandates. That does not diminish the value of a strong fiscal note or reimbursement requirement, but it does suggest that it will have limited effectiveness. The table on the pages below demonstrates not only the variety of ways that mandates can be imposed, but some of the more common descriptions applied to state mandates.

What is Being Mandated?

Many perceive that state mandates are programmatic. Programmatic mandates establish a program or establish quantity or quality standards for a program. They set standards and goals for local administrators of state policy or programs. In fact, very few mandates constitute goals for programs and service. The vast majority of mandates set forth the means by which localities are supposed to achieve state goals. Procedural mandates are the most vexing to local officials, probably because they tell localities not what to do, but how to do it. They are also among the most difficult mandates to resist because they are often imposed by an administrative agency and not subject to the debate of the political process.

Examples of procedural mandates include state mandated number, salaries, and working hours of employees in a particular local government office. Local officials

Mandate Type	Meaning	Example
Active	Requires the recipient unit to do something	Mandatory training for local law enforcement officers
Restrictive	Prevents the recipient unit from doing something	State prohibition of imposition of a local sales or use tax
Traditional	Not in law, but custom (presumed enforceable)	Providing free office space for state agencies
Direct Order	Locality is subject to penalty for non-compliance	Expansion of benefits for certain local government employees
Condition of Aid*	In order to receive a benefit, must comply	Transportation of public school children free of charge
Programmatic	Require provision of a program, its quantity or quality	Locally administered food stamp program requirements
Procedural	Set forth how a unit implements a program	Staffing and training of voting place workers

* Because conditions of aid may be resisted without penalty, they would not be considered a mandate under a penalty-based definition.

complain about state control of the day to day administrative operations of local government, claiming that the legislature might legitimately require the office in question to meet certain service standards but not micro-manage its personnel decisions. About 90% of all mandates are estimated to be procedural.

Pseudo-Cures for Mandates

A 1992 NLC study[3] done in conjunction with the state leagues evaluated the remedies for unfunded state mandates often recommended by national reports on mandates and championed by local government groups on the presumption of their effectiveness, reimbursement requirements and fiscal noting. The review of reimbursement in the states revealed that reimbursement requirements for mandates are not necessarily effective. As a group, states with reimbursement requirements see as many mandates per legislative session as states with no mandate legislation at all. The critical factor in reimbursement effectiveness, whether statutory or constitutional, is legislative willingness to be bound by it. The lesson from the 16 states with reimbursement is that when there is a legislative will to mandate without reimbursement, a way will ultimately present itself.

States with reimbursement provisions have discovered that the existence of a reimbursement requirement is no guarantee that reimbursement will occur. Rather than rail against a legislature whose interest clearly is to avoid reimbursement than to facilitate it, some state leagues and local government coalitions bargain with their legislatures on a new mandate. To avoid sometimes bitter debate over reimbursement levels or whether or not reimbursement will occur, they negotiate for alternative funding mechanisms and flexible timetables. Sometimes negotiators prefer to amend an existing mandate rather than deal with the problems of fully funding a new mandate. Often it is recognized that avoiding a public debate has benefits for localities as well as the legislature, not the least of which may be a good-faith negotiating position for the next mandate.

The 1992 study also found that fiscal noting is not working well in the 25 states which have the requirement. While it would seem that a requirement to estimate mandate cost prior to enactment would be relatively uniform across states, peculiarities in states' fiscal note requirements and poor fiscal note processes result in quite a bit of variation. Evidence of this variation includes notes in which the preparer is not named, dollar estimates are not required, and even the impact of the mandate is estimated to the wrong level of government. Fifteen of the 25 states report that the fiscal noting process in their states has been bypassed at some time.

Mandate Type	Meaning	Example
Vertical	Applies to one program or activity	Procedures for resolving tax assessment disputes
Horizontal	Applies to many or all programs or activities	No department head may hire members of his/her immediate family
Legislative	Enacted by state legislature	Most programmatic mandates fall into this category
Executive	Enacted by Governor	Rare, but can happen when a rule is needed and legislature not in session
Judicial	Imposed by the courts	The Garcia decision - compensatory time may not be substituted for hours worked beyond normal
Administrative or Regulatory	Imposed by agencies empowered to make rules	Clean air, water and landfill regulations. They are often "passed through" from federal to state to local
Constitutional	Contained in state constitutions	Limits on local government debt

State Mandates: Fiscal Notes, Reimbursement, and Anti-Mandate Strategies, p.3

Eight states reported that fiscal note requirements are routinely ignored by their legislatures. The states that have no systematic approach to mandate cost estimation tend to produce lower quality notes than those which use some form of sampling. The majority of states with fiscal note requirements believe that the process results in notes of questionable accuracy at least some of the time. Eleven of the 25 states reported that cost estimates were typically inaccurate.

A number of state municipal leagues, recognizing the deficiencies of current fiscal noting processes have offered to help by establishing and administering cost estimation networks, where participating localities volunteer to provide a cost estimate for introduced mandates. These networks constitute a new partnership between states and local governments and may help to relieve old feelings of local powerlessness in the face of new mandates.

"The elected leaders of America's cities and counties wonder where it will all end. Some members of Congress agree the problem is serious and say they, too, are concerned. Yet the unfunded environmental mandates keep coming."

Office of the Mayor
Anchorage, Alaska

So What?

Is this whole issue, as some contend, really all about money? Well, yes and no. Money spent on compliance with state mandates is money that cannot be spent on local priorities. So cost is a central issue, but it is opportunity cost of the mandate that chafes—the preclusion of spending the money on programs or services valued by the local constituency. If local priorities were equivalent to state priorities, money spent on compliance with mandates would not be contested. In fact, localities willingly accept administrative responsibility for programs and services when there is popular support for them at the local level. So the mandates issue is more accurately about different priorities and the foregone opportunities they create.

However, the fiscal implications are enormous. There is the loss of local tax dollars that might have been applied to other more pressing and popular uses. There are mandates that limit the ways in which localities raise revenue, putting some potentially lucrative and relatively pain free taxes off limits. These revenue exclusions and exemptions have the effect of forcing more intensive use of the much hated property tax. One ironic by-product of revenue exclusion mandates is that the local constituency sometimes appeals to the state legislator for property tax relief, in effect asking the cause of the problem for a solution. Irony can turn to outrage when state legislatures freeze, roll back, or limit the growth of local property taxes without providing the local governments with alternative revenue sources or mandate relief.

Another serious and often ignored fiscal consequence of mandates is that of loss of flexibility. Since we know that most mandates are procedural—telling the locality not what to do, but how to do it—it should not come as a surprise that state legislatures or agencies are not the best judge of how to run the business of local government. Some local governments call this "mandated inefficiency"—the preclusion by state law or rule from taking the most efficient path toward the service or program goal. Not surprising, the administrative routines mandated for a city of 500,000 may not be as workable for a city of 500. Even seemingly innocuous procedural mandates have their consequences. One state law requires a social service agency to keep a copy of certain records. A copy is defined by statute in such a way as to prevent the use of computer records or microfiche, alternatives far less expensive than the maintenance of paper copies.

Finally, and most critically, the biggest "so what" of state mandates is the loss of responsiveness in local government toward its citizens. Local governments have consistently been shown to be more responsive to citizen preferences for taxes and services than the state or federal government. Poll respondents are far more likely to say that their local government is more responsive to their needs and is more open to their input than state or federal government. Mayors and council persons often point out that they see their constituents on the street, dine with them, worship with them, educate their children with them, and hear about problems daily. Governing, for these elected officials, is about the ability to respond to constituent demands or at least to engage constituents with conflicting goals in negotiation and compromise. When mandates preclude the use of local resources toward the essential function of government, local government loses the trust and the confidence of its people.

All that having been said, it is critical to note that mandates are a necessary part of intergovernmental relations. State governments have an obligation to take measures that equalize localities. No locality should have the right to pollute the environment, deny adequate education to children, deny benefits to eligible residents, deny due process and voting rights to citizens, or operate a justice system that is not in conformance with other localities in the state. Mandates are a necessary means by which to achieve these goals and are both the right and the obligation of state legislatures. However, the proliferation of procedural mandates and mandates restricting local ability to generate revenue suggests that this necessary and proper activity of state legislatures is not what is being achieved. That localities bristle under an ever expanding load of

rules and requirements whose cost tend to rise over time is obvious. What is rarely understood by local officials is that, according to some admittedly tentative research, the state legislatures that most closely regulate the day-to-day administrative activities of local government believe that they are making localities more efficient. Again, the implication is a call for better information about state mandates and a dialogue between state and local leaders.

It's the Policy, Stupid

One of the more startling conclusions from interviews with state leagues throughout the nation is that mandate cost neither drives the legislature's decision nor the localities' response. Local anti-mandate coalitions seem to choose the mandates they will resist based on what they perceive as policy shortcomings and argue the policy embodied in the mandates as vigorously as the cost. They ask the state for a compelling reason why the requirement is necessary statewide, whether it is clear that the mandate is the proper policy response to the problem, and why both funding and implementation should take place at the local level. Anecdotal evidence suggests that state municipal leagues that choose to contest a mandate on its merits as well as its cost may be more successful at stopping unfunded mandates than those which use only cost as the issue. Putting a stop to the separation of ends from means, of the goal of the mandate policy from its implementation cost, may provide a new opportunity for dialogue on how policy responsibility and policy costs may be shared equitably.

Endnotes

[1]US Advisory Commission on Intergovernmental Relations, *State Mandating of Local Expenditures*, Commission Report A-67, July 1978, Washington, DC, pp. 6-7.

[2]US Advisory Commission on Intergovernmental Relations, *Mandates: Cases in State-Local Relations*, Commission Report M-173, September 1990, Washington, DC, p. 2.

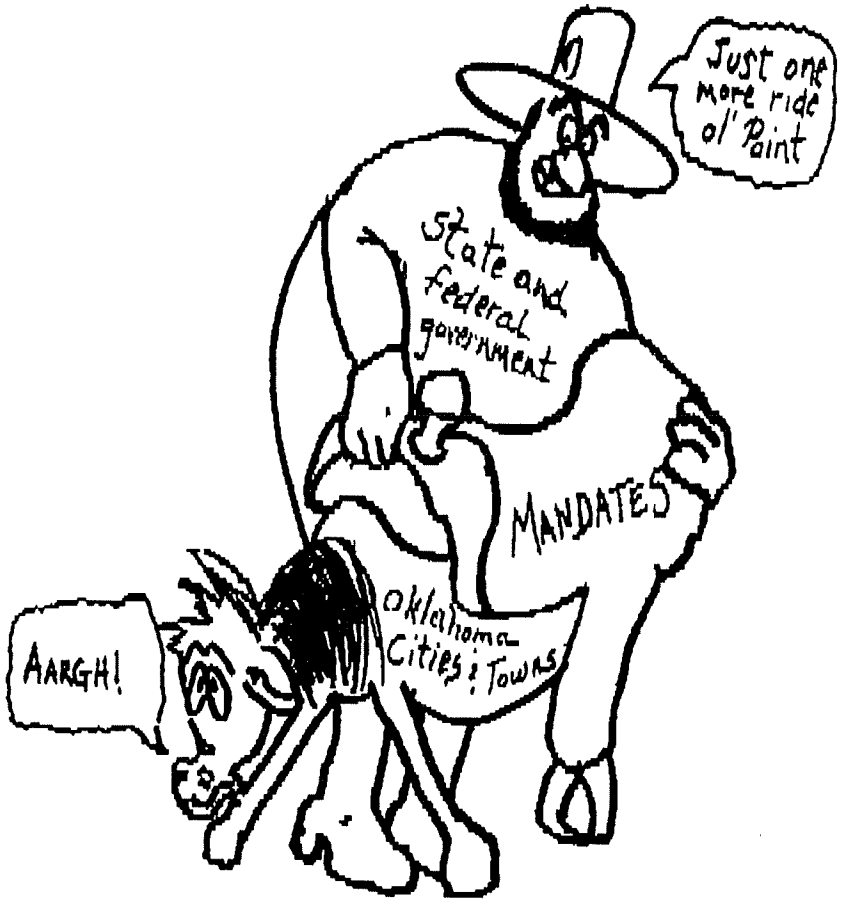
[3]Kelly, Janet M., *State Mandates: Fiscal Notes, Reimbursement, and Anti-Mandate Strategies*, National League of Cities, 1992.

Cities Keeping Citizens Aware of Federal and State Mandates

In September 1992, NLC asked local government officials to submit descriptions of methods used by their community to increase citizens' awareness of the costs and impacts of unfunded mandates. More than 80 responses were received. The respondents represent a broad spectrum of local governments across the United States.

The survey forms revealed that local governments are undertaking a variety of activities to increase citizen awareness of both federal and state mandates. These activities range from articles and programs on local media (radio, television, and newspapers) to providing information on the cost of unfunded mandates on utility bills.

The chart on the following pages provides a summary of the responses received.



"Where does it stop?! We are being ruled, regulated and mandated into oblivion."

Larry Hall
City Manager
Cleveland, Oklahoma

9-5

#10

THE LEAGUE OF KANSAS MUNICIPALITIES

Municipal Legislative Testimony

AN INSTRUMENTALITY OF KANSAS CITIES 112 S.W. 7TH TOPEKA, KS 66603-3896 (913) 354-9565 FAX (913) 354-4186

TO: Senate Local Government Committee

FROM: Chris McKenzie, Executive Director

DATE: August 18, 1993

RE: Support for House Concurrent Resolution No. 5018

I. INTRODUCTION

I appreciate the opportunity to appear today to discuss the merits of HCR 5018. I believe it is accurate to say that the question of unfunded state and federal mandates has become **the** policy issue of most interest to the city officials of Kansas. While the problem of unfunded federal mandates has now grown to astronomical proportions, I will share with you information today which demonstrates the same trend can now be seen in the evolution of state-local relations--a trend which we find alarming for both cities and counties and the local taxpayers who pay for these services.

In October, 1992 at the League's Annual Convention in Wichita the following policy statement was adopted by the League's Convention of Voting Delegates:

> **"We oppose the imposition of additional state-mandated functions or activities on local governments. State-mandated programs without state funding is contrary to the spirit of constitutional home rule. Any function or activity deemed of sufficient state-wide concern or priority to justify its required local performance should be fully financed by the state on a continuing basis."**

This policy statement really goes to the heart of the argument against unfunded mandates: i.e., absent a compelling policy reason, elected officials at the federal or state levels of government should not deprive elected officials at the local level of the ability to set local spending priorities. The ability to set spending priorities is the essence of governmental decisionmaking, and mandates detract from local elected officials' ability to do so. Mandates also lead to greater centralization of government decisionmaking--a trend that has worried political thinkers in this country since at least the time of the Founders.

We believe HCR 5018 represents a **reasonable** and sincere effort to respond to the fundamental question of intergovernmental relations raised by the issue of unfunded mandates described above. It would not prohibit unfunded mandates, but it would require that a more stringent process be followed before any new mandates without funding are adopted. In effect it would put in place greater procedural due process before local taxes or user fees are incrased by state legislators and, in some cases, unelected administrative appointees of state government.

As mentioned earlier by Commissioner Divine, part of the problem of unfunded mandates is driven by state restrictions on local revenue options **and** the now apparent retreat by the state of Kansas from sharing its sales tax revenues with cities and counties. As you know, state government prohibits cities and counties from levying certain types of taxes (e.g., income, earnings, motor fuel, etc.). During the last two sessions the legislature has sent an unmistakable signal to local officials: i.e., state resources are tight and the legislature will dedicate what little growth might take place in the so-

Senate Loc. Gov.
8-18-93 Attach. 10

called "demand-transfers" for revenue sharing and reducing property taxes to other purposes deemed more important by the state. Cities and counties expect to share in the downturns in state sales tax receipts. Diverting anticipated growth to other purposes, however, says that state government should grow at the expense of local governments. Moreover, it represents a breach in the covenant with cities and counties that has existed since the onset of these programs.

II. EXAMPLES OF UNFUNDED STATE MANDATES

Since the 1991 legislative session a number of unfunded mandates have been adopted by either the Kansas legislature or the administrative agencies of state government. Some examples are as follows:

(1) Animal Shelter Regulations. The 1991 legislature passed legislation (SB 443) which made the state's animal shelter licensing regulations applicable to cities of the second and third class. (See K.S.A. 47-1704). As a result, these cities were faced with upgrading their animal shelter facilities at considerable cost or closing them. Cities followed both courses of action, resulting in increased local property taxes in cities that chose to comply and reductions in the control of animals in cities that chose to not comply. Compliance costs ranged anywhere from $6,000 to $18,000 per city. In many of these cities that is the equivalent of one or more mills of property taxes. I will leave it to your imagination what now happens to stray animals in those cities that discontinued their animal shelters.

(2) Infection Control Regulations. In May, 1992 the Kansas Department of Human Resources notified cities of the need to comply with a **federal** OSHA regulation concerning bloodborne pathogen control". This mandate required cities and counties to vaccinate their employees who came into contact with human blood at $125 - $150 per vaccination, purchase expensive infection control supplies and equipment, and develop infection control plans. Both Junction City and Pittsburg estimate they were required to spend $10,000 to comply with this mandate which came with little, if any, notice. In fact, no formal regulatory process preceded this mandate, yet local elected officials were required to levy hundreds of thousands (if not millions) of dollars of property taxes to pay for it.

(3) Victims Rights Amendment. The 1992 legislature submitted to the voters and the voters approved an amendment to the state constitution guaranteeing victims of crime certain rights in the judicial process. While the 1993 legislature passed HB 2459 limiting the reach of the amendment in municipal court to only the most significant offenses either municipal taxpayers or users of municipal court through a court fee will have to shoulder the cost of implementation of this mandate. The source of funding for compliance is local property taxes, fines and fees.

(4) Fire Protection. The Kansas Department of Human Resources has advised the city and county fire departments of the state that it has adopted by reference Regulation 1500 of the National Fire Protection Association (NFPA)--a private association. NFPA 1500 not only requires the purchase of certain protective fire gear (Comanche County recently spent $15,000 to replace certain gear to meet the standard), but it appears to set a standard for civil liability that cities and counties have to meet or face significant damage awards in court suits. The costs of compliance with this mandate comes from the property tax and other local revenue sources.

(5) Collection of State Levied Fees. In recent years cities have been mandated to collect certain fees for state government to avoid increases in state taxes to fund such programs. Today we are collecting the state water plan fee on the sale of water, the fee in municipal court for the law enforcement training center, a fee on the sale of municipal water to finance the regulation by the state of water quality, and a fee on solid waste at the landfill. While the 1993 legislature enacted HB 2428

over the Governor's veto, exempting municipal and state construction and demolition waste from the solid waste surcharge, cities and counties are required to collect the fee on the balance of the waste. The purpose of the fee is to finance additional staff in the Department of Health and Environment. The source of funding for these fees and the administrative costs associated with the collection of them is the property tax, user fees and other local revenues.

(6) Underground Utlity Damage Prevention Act. This 1993 legislation requires the owners of underground facilities, including cities and counties which own gas lines, electric lines, and lines connecting traffic signals, street lights, and communications facilities (e.g., coaxial cable), to belong to the state underground facility notification center (at an annual fee) and to mark any underground facilities which the city owns that may be covered by the act when notification from the center is received that digging will occur in the area. The city's or county's membership fee for the notification center is $10 per 1,000 population, with a minimum fee of $200. Municipalities are charged $.40 per incoming locate call received in excess of 100 calls per year. Emergency calls on weekends or after hours are $2.00 each plus $.50 for each additional attempt to notify the municipality. The source of funding for this expense is the property tax, user fees on excavators, and user fees on utility consumers.

These are but a few of the growing number of mandates facing municipal governing bodies every year--and each one costs property taxes, user fees and other revenues to finance. Unfunded and underfunded state mandates increase the local property tax--increases that can not be avoided by local governing bodies. In some states the cities and counties call this a problem of the legislature **PASSING THE BUCK, BUT NOT PASSING THE BUCKS.**

III. THE MECHANICS OF THE AMENDMENT

The purpose of HCR 5018 is not to completely prohibit unfunded state mandates. Rather, the purpose is to require more careful legislative deliberation on any mandate proposal to ensure that careful consideration is given to the fiscal and policy impact of each proposal. I am going to walk you through each paragraph of the amendment and explain the basic principles at work and the implications of each section.

--Paragraph (a). This paragraph contains the major provisions of the amendment. It would prohibit the enactment of any law **or** administrative rule/regulation which requires a city of county to use its personnel, facilities or equipment or requiring the expenditure of a local governmental unit's funds to provide a **new** service or program or which imposes a direct service or cost obligation on a city or county. This paragraph also defines what a mandate is by saying it is something that a city or county is required to do **under penalty of civil or criminal sanction**. In other words, something that the legislature simply authorizes cities or counties to do would not be included. Further, legislation which requires something to be done, but for which their is no civil or criminal sanction, would not be considered a mandate. It includes only those things we are **required** to do in the strictest sense of the word. This paragraph also requires reimbursement (not advance funding) for the cost of such mandates in each year in which the mandate applies. The cost of compliance with the mandate would be certified to the state by the city or county.

Paragraph (b). This part addresses the subject of lost revenue due to tax exemptions and restrictions on local taxing authority. It simply would require the state to reimburse cities and counties for lost property tax authority as a result of property tax exemptions and limitations on their taxing ability such as property tax lids. In effect, it would require improvements to the Local Ad Valorem Tax

Reduction Fund (or something equivalent to it) to compensate cities and counties for the loss of tax base and taxing authority.

Paragraph (c). This paragraph makes it clear that funding provided for new mandates shall not be in lieu of existing state aide to cities and counties. In other words, it prevents redirecting existing state aid to finance new mandates. If this is allowed, it will not stem the tide of rising local property taxes caused by state mandates. The last sentence also provides that the natural growth in state aid to cities and counties that results from the expansion of the tax base could not be dedicated to paying the cost of new mandates. Such growth, according to the terms of the amendment, would continue to be sent to local units to defray the costs of existing programs and mandates.

Paragraph (d). This paragraph recognizes the logical result of nonfunding of any new mandates: that cities and counties may choose not to comply with such unfunded mandates.

Paragraph (e). This paragraph provides a valuable release valve for unfunded state mandates which the legislature deems to be of paramount importance. By a two-thirds vote the legislature could enact an unfunded mandate. We are well aware that the super majority vote requirement of this provision would apply to mandates that we support; e.g., the 1993 KPERS bill.

Paragraph (f). This paragraph contains some necessary definitions for "local governmental unit" and "civil or criminal sanction". Please note that the latter definition includes ouster from office and mandamus (an order from a court to do something).

IV. CONCLUSION

The League of Kansas Municipalities strongly supports legislative approval of HCR 5018. It would provide additional, and much needed, procedural safeguards before any new state mandate is adopted. We understand there will be some significant concerns about its impact, and we look forward to discussing the issues it raises with you today and in the future. We strongly believe it is an issue which deserves legislative attention.

RESEARCH / INFORMATION BULLETIN

League of Kansas Municipalities / 112 West Seventh Street / Topeka, Kansas 66603 / 913-354-9565

Vol. XIV, No. 591
May 27, 1992 (Revised)

STATE OF KANSAS EXTENDS OSHA STANDARDS ON BLOODBORNE PATHOGEN TO LOCAL GOVERNMENTS

The Occupational Safety and Health Administration (OSHA) has adopted final regulations intended to help protect employees from the risk of occupational exposure to bloodborne pathogens. Those regulations were printed on December 6, 1991 in Volume 56, No. 235 of the Federal Register. While OSHA regulations are not directly applicable to local governments, they can be made applicable by action of the Kansas Department of Human Resources (DHR) and, as explained below, DHR has so acted. The OSHA regulations require employers to take steps to protect employees at risk of exposure to the hepatitis B virus, the human immunodeficiency virus (HIV) and other bloodborne pathogens (disease-causing agents carried in blood and body fluids). Generally, any public safety or health care employee is "at risk" under the regulations. Among the requirements are: development of an "exposure control plan"; provision of personal protection equipment; certain record keeping; training; and the provision of hepatitis B vaccinations to employees who desire them.

DHR has broad authority under K.S.A. 1991 Supp. 44-636 to enter the workplace and inspect for "the methods of protection from danger to employees and sanitary conditions ... ." While neither the Kansas statutes nor state administrative regulations make any OSHA standards applicable to local governments, DHR has taken the position that local governments must adhere to the OSHA bloodborne pathogen standards. It is the position of DHR that its authority to order employers, including local governments, to take steps for the safety and protection of employees enables it to require such compliance. Violations of DHR orders can result in civil penalties.

WHAT MUST LOCAL GOVERNMENTS DO TO IMPLEMENT THE FEDERAL BLOODBORNE PATHOGEN REGULATIONS?

The OSHA standards contain a number of requirements intended to minimize exposure by using a combination of "engineering and work practice controls", personal protective equipment, training, medical treatment, vaccinations, signs and labels and other provisions, as summarized below.

1. Exposure Control Plan

The first step for compliance is to develop a written Exposure Control Plan designed to eliminate or minimize employee exposure. This plan should (1) identify which employees are at risk of occupational exposure to bloodborne pathogens, and (2) establish controls to protect those employees. At-risk employees encompass more than health-care workers, taking in any employee where exposure might occur on a regular basis. So, in addition to EMS and other health care employees, cities should consider law enforcement officers, firefighters, lifeguards and handlers of regulated waste as "at risk" of occupational exposure.

"Occupational exposure" means reasonably anticipated skin, eye, mucous membrane or parenteral contact with blood or other potentially infectious material that result from the performance of a job.

"Potentially infectious material" means all conceivable exposures to various human body fluids, tissues and organs, and to HIV or hepatitis-infected cells, tissues, cultures or mediums.

2. Information and Training of At Risk Employees

Employers must provide information and training annually to employees at risk of exposure to bloodborne pathogens. The training or educational program must include making accessible a copy of the regulatory text of the federal standard and explanation of its contents, general discussion on bloodborne diseases and their transmission, exposure control plan, engineering and work practice controls, personal protective equipment, hepatitis B vaccine, response to emergencies involving blood, how to handle exposure incidents, the post-exposure evaluation and follow-up program. New employees are to be provided training at the time of their commencing work.

3. Protective Equipment

Employers must provide and require at risk employees to use appropriate personal protective equipment (i.e. gloves, gowns, masks and mouthpieces). This equipment must be provided at the employer's cost. All cleaning, disposal and repair of the equipment also must be at the employer's cost.

4. Medical Treatment and Inoculations

Employers must make available to all employees having occupational exposure the hepatitis B vaccine. The vaccine is to be provided at the employer's expense. Employers must provide follow-up medical treatment and counseling for employees occupationally exposed to bloodborne pathogens. Such treatment could include blood testing and monitoring of the employee's health after exposure.

5. Record Keeping

Employers must establish and maintain a record keeping system which will document confidential medical records of employees with occupational exposure and records of training provided to at risk employees. Records must be kept for the duration of employment plus 30 years. Training records must also be kept for three years from the date of the training.

6. Engineering and Work Practice Controls

Employers must develop and maintain effective systems that enable at risk employees:

- to wash their hands;
- to remove and dispose of or store contaminated equipment; and
- to minimize splashing, spraying and aerosolizing blood and other potentially infectious materials.

Employers must also develop and maintain effective systems to prevent employees from actions that increase the risk of occupational exposure. Those systems should address behaviors such as:

- shearing, bending, breaking, recapping or resheathing used needles by hand;
- eating, drinking, smoking or applying cosmetics or lip balm in work areas in which there is a likelihood of exposure;
- handling contact lenses in work areas with a potential for exposure;
- handling sharp objects at the scene of an accident without protective gloves, etc.; and
- searching the body or effects of arrested persons.

Employers must affix warning labels to containers of regulated waste.

WHEN MUST THE OSHA STANDARDS BE IMPLEMENTED?

The OSHA regulations establish a series of deadlines for private sector employers for the implementation of the standards, at least two of which have already passed. Although DHR has decided to apply the OSHA regulations to state and local governments, it has not yet established deadlines for compliance. The Secretary of DHR, however, urges that local governments implement programs immediately.

DHR has scheduled the following seminars to provide information to local governments regarding the bloodborne pathogen standards:

June 18 - Pittsburg	-	Memorial Auditorium 503 N. Pine
June 19 - Chanute	-	Lecture Hall in Stoltz Hall Neosho County Community College
July 7 - Hutchinson	-	Community College
July 8 - Wichita	-	211 Hubbard Hall Wichita State University
July 14 - Garden City	-	Academic Lecture Hall Community College
July 15 - Colby	-	Room 108, Student Union Colby Community College
July 16 - Salina	-	Room 201, Science Hall Kansas Wesleyan University
July 21 - Topeka	-	Henderson Learning Center Room 100, Washburn University
July 23 - Kansas City	-	Room 2705, Allied Health Bldg. Kansas City, Kansas Community College

Questions regarding the standards or their implementation can be addressed to Duane Guy, Safety Program Manager at the Division of Labor Management Relations and Employment Standards, Kansas Department of Human Resources, 401 Topeka Blvd., Topeka, KS 66603, telephone (913) 296-4386. To obtain information from OSHA, contact James F. Foster, OSHA U.S. Dept. of Labor, Office of Public Affairs, Room N-3647, 200 Constitution Avenue N.W., Washington, D.C., telephone (202) 523-8151.

#1

A COMMISSION REPORT

Federal Statutory Preemption of State and Local Authority:

History, Inventory, and Issues

U.S. Advisory Commission on
Intergovernmental Relations

A-121
September 1992

Senate Local Gov.
8-18-93
Attach. 11

EXECUTIVE SUMMARY

Preemption refers to the authority of the Congress under the supremacy clause of the U.S. Constitution to enact statutes that displace or replace state and/or local laws and powers. The Congress' power to preempt, however, is limited to the fields of authority delegated to it (e.g., bankruptcy) by the people of the states through the U.S. Constitution.

Preemption may entail (1) federal displacement of state and/or local law so as to prohibit state or local governments from exercising particular powers (e.g., a prohibition of state or local regulation of an economic activity deregulated by the Congress), (2) federal replacement of a state and/or local law or regulation by a federal law or regulation, or (3) federal enactment of a requirement that state and/or local governments comply with a federal standard.

Preemption is sometimes stated explicitly in a federal statute. Often, however, there is no explicit statement of preemption; consequently, the federal courts and administrative agencies infer preemption based on their own interpretations of congressional intent.

This report finds that:

- The pace and breadth of federal preemptions of state and local authority have increased significantly since the late 1960s. Of the approximately 439 significant preemption statutes enacted by the Congress since 1789, more than 53 percent (233) have been enacted only since 1969.
- Many public officials are unaware of the extent of federal preemption.
- The state officials surveyed acknowledged the need for federal preemptions, but objected to or expressed concern about some of their features.
- The U.S. Supreme Court has given the Congress broad discretion to exercise its preemption powers.
- The federal courts often imply federal preemption where there is no explicit statutory statement.
- Some federal preemptions provide substantial latitude to state and local governments in the means of compliance.

There are three broad categories of federal preemption statutes—dual sovereignty, partial federal preemption, and total federal preemption.

Dual Sovereignty. There are three types of dual sovereignty:

(1) State powers not subject to preemption—including the power of states to levy taxes and to enter into nonpolitical interstate compacts;

(2) Direct and positive conflict between state and federal laws—a state law is valid unless there is a conflict with a federal law on the same subject (e.g., *Civil Rights Act of 1964*); and

(3) Administrative or judicial rulings precluding preemption—for example, the *Voting Rights Act of 1965* and its amendments provide for either an administrative ruling by the U.S. Attorney General or a declaratory judgement by the U.S. District Court for the District of Columbia that any proposed change in the election system of a covered state or local government will not abridge the voting rights of citizens protected by the act.

Partial Preemption. Under partial federal preemption, the Congress or federal administrative agencies may establish minimum national standards for a function or service and authorize the states to exercise primary regulatory responsibility, provided that state standards are at least as high and are enforced. Partial preemption permits a state to tailor regulatory programs to meet special needs and conditions. Partial preemption has become more commonplace since 1965 and has had a greater impact on federal-state relations than total federal preemption. There are three types of partial federal preemption:

(1) Standard—a state law supersedes a corresponding federal law if standards are equal to or higher than the national standards (e.g., *Water Quality Act of 1985* and *Clean Water Act of 1977*);

(2) Combined—the *Occupational Safety and Health Act of 1970* combines partial federal preemption with traditional dual sovereignty regulation authority; and

(3) State transfer of regulatory authority—the *Wholesome Meat Act* grants the Secretary of Agriculture authority to transfer responsibility to a state that has enacted an inspection law consistent with federal standards.

Total Preemption. Under total preemption, the federal government assumes complete regulatory authority. Ten types of total preemption were found:

(1) No need for state and/or local assistance—bankruptcy;

(2) *No state economic regulation allowed*—deregulation of the airline and bus industries;

(3) *State and local assistance needed*—state and local assistance to the Nuclear Regulatory Commission in protecting public health and safety in the event of an accident at a nuclear generating plant, and state enforcement of the federal ban on the use of products containing lead in public water systems;

(4) *State activities exception*—the *National Traffic and Motor Vehicle Safety Act of 1966* allows a state or local government to establish safety requirements for equipment for its own use;

(5) *Limited regulatory turnbacks*—several statutes authorize turnback of responsibility to the states (e.g., *Hazardous and Solid Waste Act Amendments of 1984* and *Atomic Energy Act of 1946*);

(6) *Federal mandating of state law enactment*—the *Equal Employment Opportunity Act of 1972* and similar acts mandate that states comply with federal laws by enacting state laws under threat of civil or criminal penalties;

(7) *Federal promotion of interstate compacts*—the *Low-Level Radioactive Waste Policy Act of 1980* encourages formation of compacts to provide for availability of disposal capacity;

(8) *Gubernatorial petition for preemption removal*—the governor of New York may petition the Secretary of Transportation for removal of a limitation on the collection of bridge tolls on Staten Island;

(9) *State veto of a federal administrative decision*—a governor or state legislature may veto a site selected by the Secretary of Energy to construct a high-level radioactive waste facility (the Congress may override the veto);

(10) *Contingent total preemption*—the *Voting Rights Act of 1965* and its amendments contain provisions that are not applied to a state or local government unless certain conditions are met.

To assess the impact of federal preemption and perceptions regarding the desirability of various approaches, ACIR surveyed state elected officials, agency heads, and the 26 state ACIRs. There was a consensus that there is too much federal preemption and that the Congress delegates too much authority to federal administrators. Nevertheless, many respondents acknowledge the need for federal preemption under certain circumstances.

In general, state officials rated highly (1) standard partial preemption, (2) a federal statutory provision stipulating that a state law is valid unless there is a direct and positive conflict with a federal law, and (3) congressional permission for states to act where no federal standard is in effect.

Federal preemption, according to state officials, does not often solve problems in their states originating in other states. Furthermore, preemption often prevents states from pursuing policies they prefer. The suggestion for a code of restrictions in each federal preemption statute received strong positive ratings. In addition, there was nearly unanimous agreement that each preemption statute should contain a sunset provision.

ACIR also included five questions about federal preemption in its 1992 national public opinion poll.

75 percent of the respondents favored federal preemption of the listing of health risks on the labels of food products.

50 percent of the respondents favored federal regulation of interstate banking.

37 percent of the public favored federal regulation of companies that sell life, fire, property, casualty, and automobile insurance.

20 percent of the respondents favored federal regulation of the location and building of low-income housing in local communities.

The report also examines factors that seem to be encouraging the rise of preemption, including: (1) the general trend of increased federal regulation; (2) the loosening of constitutional restraints on congressional power; (3) the Congress' constitutional obligations to protect rights nationwide; (4) the reduced fiscal capability of the federal government, resulting in a turn to regulation to accomplish objectives; (5) the opening of new fields of federal regulation in recent decades; (6) the proliferation of interest groups in Washington; (7) public concern about America's competitive position in the world economy; (8) small-state concerns about the adverse impacts of big-state regulation; (9) bipartisan support for preemptions of different types; and (10) the popularity of many preemptions, such as health, safety, and environmental protection.

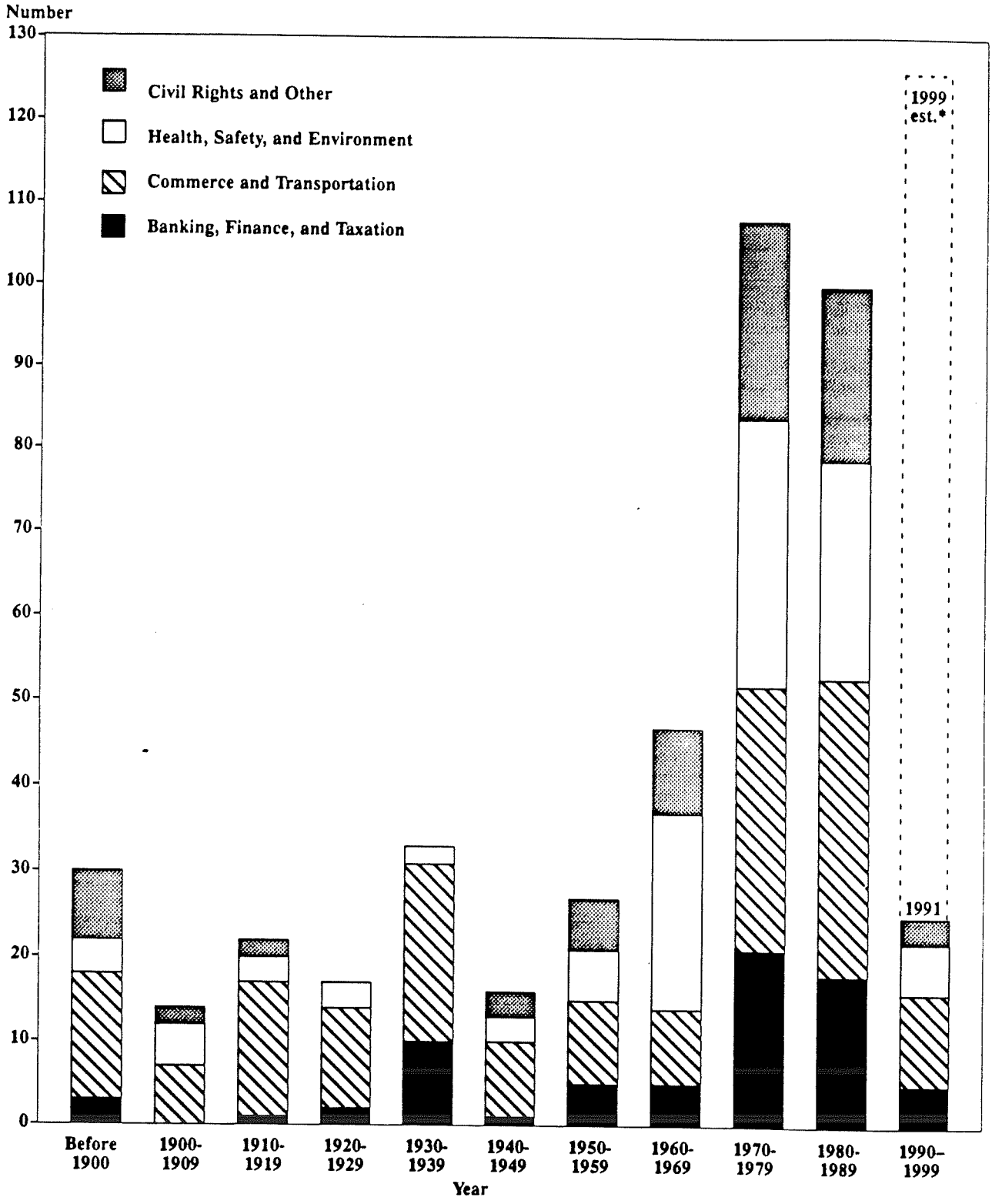
The report concludes by examining salient issues of preemption, including; (1) the large scope of preemption today; (2) the clarity of statutory preemption language; (3) preemption by evolution through administrative and judicial interpretation; (4) congressional delegation of preemption authority to administrative agencies; (5) setting minimum versus maximum federal standards; (6) flexibility for state and local governments; (7) the extent to which the diverse forms of preemption are well matched to particular issues; (8) the lack of evaluation of preemption statutes; (9) the question of whether preemptions should be subject to sunset rules; and (10) the balance between the supremacy clause and the Tenth Amendment.

ACIR has recommended limitations on federal preemption. In 1984, in *Regulatory Federalism: Policy, Process, Impact and Reform*, the Commission issued five principles to guide the Congress in the exercise of those powers. In 1987, in "Federal Preemption of State and Local Authority" (*Intergovernmental Perspective*, Winter 1988), the Commission found that "federal preemption, while a necessary feature in the design of a federal system, ought to be minimized and used only as necessary to secure the effective implementation of national policy adopted pursuant to the Constitution." The Commission also found that "preemption is properly a legislative decision, within appropriate constitutional constraints, and ought not to be exercised by administrative or judicial officers without prior legislative authorization and direction." With this report, the Commission reaffirms its earlier recommendations (see Findings and Recommendations, page 1).

Figure 1

Number of Federal Preemption Statutes Enacted Per Decade: 1790-1991

(by date of enactment and purpose)



* The 1990-1991 rate was multiplied by 5 to estimate how many preemptions might be enacted during 1990-1999.

Source: Appendix A, p. 45.

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RELATIVE RESPONSIBILITIES
OF U.S. GOVERNMENTS
(Percent of Total)

Level of Government	Revenues Raised (1989)	Employees: 1986 (Proxy for Services Provided)
Federal	67%	18%
State	20%	24%
Local	13%	58%
TOTAL	100%	100%

A COMMISSION REPORT

Federal Regulation of State and Local Governments:

The Mixed Record of the 1980s

U.S. Advisory Commission on
Intergovernmental Relations

A-126
July 1993

12-6

Executive Summary

The 1960s and 1970s inaugurated a new era of regulatory federalism. A decade ago, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) issued a report—*Regulatory Federalism: Policy, Process, Impact and Reform*—showing that mandates and regulations had begun to rival grants and subsidies as federal tools for influencing the behavior of state and local governments. In less than two decades, the Congress enacted dozens of statutes that utilized the new regulatory techniques.

Many of the new requirements addressed longstanding social problems. Most also enjoyed broad support from the general public and from state and local officials. As the number of requirements proliferated, however, questions began to be raised about the appropriateness, costs, complexity, effectiveness, and efficiency of intergovernmental regulations.

By 1981, efforts were under way in all three branches of the federal government to address the problems posed by regulation. For example, in *National League of Cities* v. *Usery*, the Supreme Court signaled a willingness to restore the Tenth Amendment as a check on federal actions. The Congress enacted the *Paperwork Reduction Act*, the *Regulatory Flexibility Act*, and the *State and Local Cost Estimate Act*. President Ronald Reagan established a Task Force on Regulatory Relief and issued three executive orders designed to institutionalize presidential control over the regulatory process, to restrain the issuance of costly mandates, and to require that agencies consider the federalism implications of their regulatory actions.

How did the mechanisms work? Overall, early optimistic evaluations were premature. By 1990, as shown in this report—*Federal Regulation of State and Local Governments: The Mixed Record of the 1980s*—the regulatory reform initiatives of the 1980s had failed to reduce existing requirements or restrict new regulations significantly.

ACIR's basic findings include the following:

Administrative rules and regulations affecting state and local governments continued to increase during the 1980s. An effort was made to secure regulatory relief through administrative reforms, and there were some successes. Nevertheless, analyzing data on federal regulatory activity for 18 of the 36 mandates included in its earlier *Regulatory Federalism* report, ACIR found that overall regulation continued to rise. Some of the most marked increases came in the *Clean Air Act*, *Fair Labor Standards Act*, and *Occupational Safety and Health Act*. Clear reductions in regulation seem to have been achieved in only 5 of the 18 programs examined.

Weaknesses in the design and implementation of Executive Order 12612 on Federalism have prevented the federalism assessment process from achieving its potential. The order, enacted in 1987, outlines principles and procedures designed to guide executive branch decisionmaking on issues that have federalism implications. The process has not been fully or consistently implemented, and it has not produced the intended changes.

The Congress continued to enact regulations. Between 1981 and 1990, the Congress enacted 27 statutes that imposed new regulations on states and localities or significantly expanded programs. (The record for the 1970s was 22 such statutes.) Some regulations were costly (e.g., *Safe Drinking Water Act Amendments of 1986* and *Asbestos Hazard Emergency Response Act of 1986*). Other mandates have been noted more for their intrusiveness than for their expense (e.g., requiring states to allow longer and heavier trucks on their highways and to raise the minimum drinking age).

Although several regulatory relief measures were enacted in the 1980s, these deregulation initiatives were more than counterbalanced by new requirements. The Congress also attached new conditions to existing grant programs, particularly Medicaid, Aid to Families with Dependent Children, and local government costs for federal water projects.

The federal government has little systematic data concerning the cumulative financial costs of the regulations it imposes on state and local governments. Since 1983, the best available information has been the Congressional Budget Office (CBO) estimates of the intergovernmental fiscal effects of proposed federal legislation. These estimates are approximate and generally conservative due to the inherent difficulties in estimating mandates and to flaws in the statute. Basically, new regulations enacted between 1983 and 1990 imposed cumulative, estimated costs of between $8.9 and $12.7 billion on states and localities, depending on the definition of mandates that is used.

By virtue of the Supreme Court's opinion in Garcia v. San Antonio Metropolitan Transit Authority, *reversing* National League of Cities v. Usery, *states are virtually powerless to challenge federal action in the courts on Tenth Amendment grounds.* Cases following *Garcia* raised further questions about the relationship between the federal government and the state and local governments. Federal courts also became involved regularly in telling states and local governments what they must do, not just what they must not do. For example, courts have been active especially in overseeing state and local management of public institutions, such as prisons and mental hospitals.

Despite the mixed record of the federal courts in dealing with federalism issues, the State and Local Legal Center has developed an impressive win-loss record in presenting the legal arguments of state and local governments before the Supreme Court.

The Commission recommends that: (1) the federal government institute a moratorium on mandates for at least two years and conduct a review of mandating to restore balance, partnership, and state and local self-government in the federal system; (2) the Supreme Court reexamine the constitutionality of mandating as a principle; (3) those responsible for administering and utilizing the congressional fiscal notes process, the *Paperwork Reduction Act*, the *Regulatory Flexibility Act*, and the Federalism Executive Order redouble their efforts to take fullest advantage of these mechanisms, and that state and local governments identify and press for consideration of significant state-local effects in pending legislation and regulations.

11-7

Total Bills 114

Mandate Relief Bills 23

Mandates 91

1993 Hall of the States Mandate Monitor

Shaded areas indicate recent changes or additions to the Monitor.

Program Area	Bill/Reg. Number	Sponsor	Co-Spon	Brief Title	Explanation & Programs Affected	Bill Status
					standard would immediately receive, without limitation on their uses, any funds than currently being withheld under this provision of law. For any state that continues to fail to pass the required standard, funds would be returned after being withheld for 3 years. In such cases, however, funds would be designated exclusively for drunk driving programs as approved by the Secretary of Transportation for uses including prevention, education, enforcement and prosecution.	
OTHER 1						
	HR 1083	*Gallegly*	*39*		*To prohibit federal financial assistance to localities whose officials refuse to cooperate in the arrest and deportation of an alien unlawfully present in the United States.*	*2/24/93 Government Operations*
MANDATE RELIEF 23						
	HR 140	*Condit*	*56*	*Federal Mandate Relief Act of 1993*	*No state or local government shall be required to comply with federal requirements unless all funds necessary to pay the direct costs are provided by the federal government. This shall apply only to requirements which take effect on or after the date of the enactment of this legislation.*	*1/5/93 Government Operations*
	HR 369	*Snowe*	*7*		*No state or local government shall be obliged to take any action required by federal law unless such expenses are funded by the federal government. This shall apply only to requirements which take effect on or after the date of the enactment of this legislation.*	*1/5/93 Government Operations*
	HR 410	*Stump*	*18*	*Intergovernmental Mandate Relief Act of 1993*	*States and local governments shall be reimbursed for any additional direct costs of complying with mandates likely to cost all state and local governments more than $25 million in any fiscal year. The provisions for reimbursement can be waived with 3/5 vote in both houses.*	*1/5/93 1. Government Operations 2. Rules 3. Judiciary*
	HR 799	*Snowe*	*87*		*To amend Title 23, U.S. Code, to repeal a penalty for noncompliance by states with a program requiring the use of safety belts and motorcycle helmets.*	*2/3/93 Public Works & Transportation*
	HR 830	*Ewing*	*115*		*Repeals ban on judicial review for agency compliance with the Regulatory Flexibility Act.*	*2/5/93 Judiciary*
	HR 896	*Clinger*	*34*	*The Mandate and Community Assistance Reform Act*	*Addresses the reporting of federal-state responsibilities; strengthens cost estimation requirements for legislation and regulations.*	*2/16/93 1. Government Operations 2. Rules*
	HR 894	*Holley*	*20*		*To require the Congressional Budget Office to prepare estimates of the cost incurred by state and local governments in carrying out or*	*2/16/93 Rules*

Total Bills 114

Mandate Relief Bills 23

Mandates 91

1993 Hall of the States Mandate Monitor

Shaded areas indicate recent changes or additions to the Monitor.

Program Area	Bill/Reg. Number	Sponsor	Co-Spon	Brief Title	Explanation & Programs Affected	Bill Status
					complying with new legislation; to amend the Rules of the House of Representatives to require the inclusion of such estimates in committee reports on bills and joint resolutions; to amend the Rules of the House of Representatives to ensure that federal laws requiring activities by such governments shall not apply unless all amounts necessary to pay the direct costs of the activities are provided by the federal government.	
	HR 1006	Shays	18		Amends the Congressional Budget Act of 1974 to expand the requirement that legislation be accompanied by cost estimates of its impact on state and local governments.	2/18/93 Rules
	HR 1088	Baker	10		To require analysis and estimates of the likely impact of federal legislation and regulations upon the private sector and state and local governments. (Same as S 81)	2/24/93 1. Government Operations 2. Rules
	HR 1295	Moran	103	Fiscal Accountability and Impact Reform Act	Requires the Congressional Budget Office to conduct an impact assessment on legislation that is reported out of committee for action on the House floor. This legislation would also require agencies prior to the implementation of any rule or any other major federal action affecting the economy to perform an assessment of the economic impact of the proposed rule or action and seek public comment on the assessment. Requires that whenever there is more than one option, an agency must adopt the option with the least adverse economic impact or provide a statement of reasons why the agency's failure to do so is consistent with the purposes of the legislation.	3/11/93 1. Government Operations 2. Rules
	HR 1612	Sarpalius	9		To amend Title 23, U.S. Code, to repeal provisions establishing a national maximum speed limit.	3/30/93 Public Works & Transportation
	HR 1939	Roberts	0	The Fair Speed Limit Act of 1993	To provide a fair and reasonable national standard for the setting of speed limits.	4/1/93 Public Works & Transportation
	HR 2327	Thomas	11		To clarify the application of federal pre-emption of state and local laws and to preserve state and local legislative prerogatives.	5/27/93 Government Operations
	HCRes 61	Dreier	19		Expresses the sense of Congress that unfunded mandates should be rescinded unless they are accompanied by sufficient funds to pay for them.	2/24/93 Government Operations
	S 13	Hatch	2	Regulatory Accountability Act of 1993	Places a 3 year cap on the overall costs of regulation. Under this cap, in order for a new regulation to go into effect, the agency would be required to offset any new costs by equal regulatory savings achieved through revoking or revising existing regulations, streamlining the paperwork burden, or by any other regulatory offsets. After a regulation has undergone this offsetting process, it may then be promulgated. During this time, agencies promulgating new rules would be required to study the entire cost of compliance and outline effective	1/21/93 Governmental Affairs

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Total Bills 114

Mandate Relief Bills 23

Mandates 91

1993 Hall of the States Mandate Monitor

Shaded areas indicate recent changes or additions to the Monitor.

Program Area	Bill/Reg. Number	Sponsor	Co-Spon	Brief Title	Explanation & Programs Affected	Bill Status
					alternative approaches. This act would sunset in 3 years. After 3 years, the effects of this process on different areas of the economy, including state and local governments, will be evaluated.	
	S 81	Nickles	14	Economic and Employment Act of 1993	Requires federal legislation and regulations to be accompanied by economic and employment impact statements assessing their impact on the private sector and state and local gov'ts. (Same as HR 1088)	1/21/93 Governmental Affairs
	S 295	Durenberger	24		To amend Title 23, U.S. Code, to remove the penalties for states that do not have in effect safety belt and motorcycle helmet traffic safety programs.	2/3/93 Environment & Public Works
	S 401	Campbell	2	Motorcycle Safety Program Act of 1993	To amend Title 23, U.S. Code, to DELAY the effective date for penalties for states that do not have in effect motorcycle helmet safety programs.	2/18/93 Environment & Public Works
	S 480	Levin	1	Pre-emption Clarification and Information Act of 1993	Provides that not federal statute shall pre-empt any state and local law unless such pre-emption is specifically stated or there is a conflict which cannot be reconciled. Requires Congressional Research Service (CRS), at the end of each Congress, to compile a report on laws passed in which statutory pre-emption is explicit and on all federal cases in which pre-emption of state or local authority has been an issue.	3/2/93 Governmental Affairs
	S 490	Hatch	0	Regulatory Flexibility Amendments	To amend the Regulatory Flexibility Act to force agencies to fully and accurately consider the impact of their rules on smaller businesses, local governments and small entities.	3/3/93 Judiciary
	S 583	Moseley-Braun	5		A bill to require CBO analysis of each bill or joint resolution reported in the Senate or the House to determine the impact of any federal mandates in the bill or resolution.	3/11/93 1. Budget 2. Governmental Affairs
	S 648	Gregg	14	Federal Mandates Relief Act of 1993	To provide federal payments for federal mandates imposed upon state and local governments. Also contains cost estimation requirements and a pay-or-excuse mechanism.	3/24/93 Governmental Affairs
	S 993	Kempthorne	9	Community Regulatory Relief Act	Requires that any federal law that creates a federal mandate shall apply to a state or local government if the federal government pays all of the compliance costs of that mandate.	5/20/93 Governmental Affairs

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GOVERNING PRINCIPLES

COALITION FOR ENVIRONMENTAL MANDATE REFORM

Governing Principles

Unfunded and underfunded federal environmental mandates exact a tremendous financial cost on state and local governments and taxpayers. State and local governments recognize that the cumulative burden of unfunded mandates, coupled with their increasing costs for compliance, risk the loss of public support for comprehensive environmental protection. Strengthening environmental protection with limited financial resources will be achieved only through federal, state and local partnership building. The Coalition for Environmental Mandate Reform supports performance and science-based environmental policies and programs which improve environmental conditions by reducing risks to human beings, plant and animal species, and ecological systems.

The Coalition asks Congress and the Federal Administration to enact environmental laws, policies and regulations that reflect the following principles:

PRINCIPLE 1. SCIENCE: Environmental legislation and resulting regulation should be formulated on a well founded, objective, unbiased peer-reviewed science base. Specifically:

- The scientific process shall be utilized in the formation of environmental legislation. This scientific process should consist of five steps:

  - perception of a problem,

  - funding for investigation,

  - scientific investigation,

  - release of scientific results for peer review, and,

  - communication to public officials and general public.

- Should immediate threats to environmental or public health appear to occur, temporary measures should be authorized and implemented pending completion of scientific review and verification.

- Federal, state and local governments should utilize scientifically objective, unbiased assessment as a tool in determining environmental policies.

- The broader impacts of ecological management practices should be considered before individual mandates are imposed.

PRINCIPLE 2. FUNDING: **The impact of environmental mandates on state and local governments must be thoroughly understood prior to formation and passage of legislation and regulations. This means:**

- Federal government should determine the cost to state and local governments for environmental compliance.
- The ability of state and local governments to pay for unfunded and underfunded environmental mandates must be considered by the federal government in the formation of environmental policies.
- Federal, state and local governments should agree on a funding formula to ensure the ability to comply with environmental mandates.

PRINCIPLE 3. FLEXIBILITY: **The federal government must recognize that environmental protection can be achieved through various methods. Specifically:**

- Government should be committed to environmental solutions that are shown to be the least costly and most effective.
- Consideration of local environmental conditions should be incorporated in the development of environmental legislation, regulation and other policies.
- State and local governments should be permitted to develop alternative approaches to the current "command and control" system and other mandated solutions for environmental compliance. These alternatives should include pollution prevention and market-based incentive measures.
- Barriers that affect the ability of state and local governments to comply with environmental mandates should be considered in the development of environmental policies.
- State and local governments should be encouraged to use a regional approach, where problems and conditions are similar, to address environmental mandates or other issues.
- Basic national environmental standards should be set by the federal government. More stringent standards could subsequently be enacted by state and local governments.

PRINCIPLE 4. PARTNERSHIPS AND COORDINATION: **All levels of government must work together to ensure the public heath and environment are protected. Greater emphasis should be given toward building partnerships between federal, state and local governments. Specifically:**

- Greater emphasis should be given toward building partnerships between federal, state

and local governments

- The need to more equitably balance national, state and local environmental goals and interests should be recognized.

- The unique nature of local communities as regulators and regulates must be recognized in the passage of unfunded mandates.

- State and local governments should be afforded greater participation in the environmental rulemaking process.

- Authority and responsibility should be consolidated within administrative and congressional committees dealing with environmental issues.

- Cross-media analysis of environmental regulations should be conducted when applicable.

- Consistency between environmental rules is frequently lacking. One mandate should not conflict with another.

- Policy stability and financial sustainability should be considered in the development of the environmental regulatory process.

- State and local governments should be afforded realistic timetables in the implementation and management of environmental mandates.

- Increased inter- and intra-agency coordination is needed at the federal level to accurately assess the impact of regulation on state and local government.

- The environmental permitting process should be streamlined.

PRINCIPLE 5. PRIORITIZATION: **Government's limited financial resources must be allocated to address the worst environmental problems first. Given this:**

- The federal government should prioritize national environmental issues and mandates; state and local governments should be given the opportunity to prioritize state and local environmental issues and mandates.

- Quality-of-life issues should be given consideration when evaluating the required level of environmental compliance.

- Federal, state and local governments should utilize risk assessment and comparative risk tools in determining environmental priorities.

- The cumulative impact on state and local governments must be considered when environmental rules and regulations are developed by the federal government.

- Cost/benefit analyses should be more fully utilized in the environmental rulemaking process.

- The focus of federal environmental legislation should be shifted to emphasize attainment of desired outcomes rather than compliance with uniform practices.

PRINCIPLE 6. TECHNICAL ASSISTANCE/INFORMATION: **State and local governments need additional information to identify the various environmental mandates, and to evaluate the success of programs formed to comply with them. The coalition believes:**

- The federal government should establish a single, comprehensive, multi-agency data base to assess existing environmental conditions and assist state and local governments with questions regarding environmental compliance.

- Efforts should be made to catalog all environmental mandates affecting state and local governments.

- Attainment of benchmarks, rather than frequency of enforcement, should be used to measure the success of an environmental regulation or mandate.

- A standardized methodology should be used to determine cost impacts to state and local governments resulting from environmental regulations.

- Evaluation of all mandates shall be performed to insure efficient use of funding to achieve environmental improvements.

Principle 7. PUBLIC EDUCATION/COMMUNICATION: **Strong public support for financing environmental protection is needed. In order to develop this support, the public must understand the financial, environmental and communal impacts resulting from the passage of environmental mandates.**

- The public has to become an active partner in the implementation and establishment of environmental standards within local communities.

- Unbiased, objective evaluation of the existing environmental mandates have to be performed to document environmental improvement to the public.

- The federal, state and local governments should encourage citizen participation in all segments of environmental policy setting.

Final
07/07/93

ACTION AGENDA

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COALITION FOR ENVIRONMENTAL MANDATE REFORM
ACTION AGENDA

All of the founding organizations agree to work cooperatively to accomplish the following action items:

DATA/RESEARCH BASE

- The Coalition should develop a standard methodology for the documentation of state and local regulatory costs and encourage the completion of these studies.
- The Coalition should promote the use of risk assessment studies.
- The Coalition should promote the use of regulatory flexibility analysis as stipulated in the Regulatory Flexibility Act of 1980.
- The Coalition should ask for the development of a Standard Natural Resource Inventory of existing national environmental factors providing information necessary to complete a catalogued G.I.S. type of natural resource inventory.
- The Coalition should call for a comprehensive list of U.S. EPA environmental mandates.
- The Coalition should call for the commitment of more national resources to science-based research and development.
- The Coalition should collect and publish case studies which illustrate the local dilemmas caused by unfunded and underfunded federal mandates.
- The Coalition should develop a centralized cost database.
- The Coalition should collect information on the ways state and local governments raise money and are constrained in their efforts to raise money.

EDUCATION

- The Coalition should provide technical support to document their own environmental costs. These local studies should be collectively used to better estimate national costs.
- The public should be informed and educated to understand that increases in state and local taxes and fees are frequently the result of actions taken by federal elected officials.
- The Coalition should work for better access to informational data-bases.
- Education for decision makers should focus on environmental protection as a direct cost.
- The Coalition should develop public education about risk, cost/benefit and comparative risk.
- The Coalition should work to sensitize technical associations regarding the concerns of local governments.
- The Coalition should convene a summit to examine the relationship between the federal-state-local governments; reviewing cost estimates, loans and state matching fund requirements as relating to the incidence of regulatory funding burdens and the ability to pay by those who are required to pay.

LEGISLATIVE

- Congressional hearings should be held on pending mandate relief bills.
- A targeted consciousness-raising campaign about unfunded mandates should be aimed at Congress.
- A legislative action alert system should be developed for Coalition members.
- The Coalition should develop a nationally-based network with Washington DC sources of information, which allows a locally based response from district constituents of specific members of Congress.
- The Coalition should evaluate all major environmental reauthorization bills relating to fiscal impact with regards to unfunded mandate burdens and propose equitable funding responsibilities.
- The Coalition should identify a list of key players within Congress, the Executive Branch, and regulatory agencies, that will assist the Coalition with our principles.
- The Coalition should develop an effective mechanism for a collective comprehensive strategy for national lobbying efforts.
- The Coalition should support implementation of the Regulatory Flexibility Act of 1980.

REGULATORY

- The Coalition should identify existing pilot project information results and develop new pilot projects with the U.S. EPA and other agencies, such as the U.S. Army Corps of Engineers, Dept. of Interior, U.S. Fish and Wildlife, etc., which demonstrate alternative compliance approaches local flexibility and local priority setting.
- The Coalition should endorse the development of a single, intra-agency/inter-agency cross media (air, land, water, etc.) environmental database which would include charting of environmental regulations.
- The Coalition should promote the use of market-based environmental protection incentives.
- The Coalition should participate in informal discussions/work groups with U.S. EPA in the development of new regulations.
- At a minimum the Coalition should comment on all regulations that contain environmental mandates for state and local governments.
- The Coalition should develop an action alert system for regulatory advocacy.

An Explanation

Federal Lawmakers Summoned To Justify Unfunded Mandates

July 5, 1993

By William Claiborne
Washington Post Staff Writer

Some U.S. senators and representatives soon will be called on the carpet—literally—by their home state legislatures to justify a principle that goes to the heart of the federal-state relationship: the growing number of unfunded federal mandates that are severely straining state budgets.

Two states, Alabama and South Dakota, have passed laws summoning lawmakers from Washington to joint sessions of their legislatures to explain why they have imposed costly federal regulations on the state governments without providing funds to implement them. Similar bills are being considered in at least 14 other states.

Those bills and many other "mandate consultation acts" being introduced across the country are challenging Congress's increasing propensity to use its budget leverage to force states to fulfill national goals.

States' advocates say that the federal social agenda is driving state spending priorities and bankrupting local budgets as the mandates are passed down through the state, county and municipal levels. The cost of implementing a growing list of rules that regulate federal programs ranging from environmental protection to Medicaid is especially ruinous to state budgets, they say.

While states cannot force their congressional delegations to appear before joint sessions of their legislatures, it seems unlikely that the annual "invitations" could be ignored without considerable political cost.

"It won't change anything, obviously, but it definitely will increase public awareness of one of the biggest causes of budgetary distress out there," said John E. Berthoud, director of tax and fiscal policy for the American Legislative Exchange Council, a Washington-based state public policy group.

"Unfunded mandates are an insidious way for governments at one level to pass onto governments at a lower level responsibility for the funding of programs. Governments at the higher level can take credit for instituting the program, but lower levels of government have to produce the funding," Berthoud added.

Andrew J. Cowin, a Heritage Foundation expert in regulatory affairs, noted that before the 17th Amendment of 1913, U.S. senators were elected by state legislatures and, consequently, were directly accountable to them in an arrangement designed to avoid such uses of federal power as unfunded mandates.

"Given the huge burdens that federal mandates place on the states today, state legislatures would do well to demand formal and public reports from their two U.S. senators on the effects of Washington policies on the states," Cowin said.

Alabama state Rep. Perry O. Hooper Jr. (R), who introduced the first Mandate Consultation Act, said the purpose is not to embarrass senators and representatives but rather to make them aware that while they are basking in the glow of favorable publicity for having enacted worthwhile social legislation, the cost of regulating it is being quietly passed down to state governments.

"All these programs look good, but there's no free lunch. Somebody's got to pay for it, and the easiest thing to do is just pass it down to us," said Hooper.

BY PETER HOEY FOR THE WASHINGTON POST

Alabama, the first state to enact mandate consultations, has not formally summoned any U.S. lawmakers yet, although state legislative leaders have talked with congressional representatives, who indicated a willingness to cooperate, state officials said.

States that have introduced similar legislation or are considering it include Arizona, Delaware, Florida, Georgia, Louisiana, Massachusetts, Michigan, Nebraska, New Jersey, New York, Oregon, Pennsylvania, West Virginia and Wisconsin.

The Heritage Foundation, a conservative think tank, estimates that during the 1990s, state and local governments will spend more than $200 billion to comply with current federal wastewater mandates alone. For some cities, the cost is so high that they may have to reduce spending on essential services to afford the mandates, the foundation said.

An oft-cited example is Columbus, Ohio, a city of 633,000 that is faced with costs of $1 billion to comply with the Clean Water Act and the Safe Drinking Water Act. The Columbus Health Commission estimated that compliance will cost each household an additional $685 each year throughout the 1990s.

Similarly, New York officials estimated that mandates requiring the retrofitting of elevators in subways to accommodate the handicapped will cost more than $1.3 billion—with no help from the federal government.

One of the leaders in the fight against unfunded mandates has been Michigan Gov. John Engler (R). Officials there estimate that one-third of the state government's revenue growth—$95.3 million—will be consumed by the cost of Medicaid mandates. It also is estimated that Medicaid mandates will grow at an annual rate of 49.1 percent through 1995, while the state's general fund will grow by only about 5.5 percent.

Lawrence W. Reed, president of the Mackinac Center for Public Policy, a conservative think tank in Midland, Mich., said of the mandates and states' relationship with their federal legislators: "You have to hold their feet to the fire in a very public way and say, 'Okay, explain why you voted for this.' "

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A COMMISSION REPORT

DRAFT

FOR REVIEW AND COMMENT

HIGH PERFORMANCE PUBLIC WORKS:

A New Federal Infrastructure Investment Strategy for America

U.S. Advisory Commission
on Intergovernmental Relations
Washington, DC 20575

July 1993

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Statement of Principles and Guidelines, Federal Infrastructure Task Force IV

MAKING FEDERAL REGULATION OF INFRASTRUCTURE MORE EFFECTIVE, EFFICIENT, AND EQUITABLE

I. OBJECTIVE

The purpose of this statement of principles and guidelines is to help establish a more accountable, equitable, effective, and efficient approach to federal regulation of infrastructure. These improvements should be based on a stronger and more equal intergovernmental partnership.

Establishing this new approach is necessary because, in many cases, state and local governments are co-regulators in partnership with the federal government, as well as regulated parties themselves. Much of the success in meeting the federal regulatory objectives depends on a strong state and local partnership.

II. FINDINGS

Federal regulations affecting state and local governments have increased dramatically in recent years, with important implications for the nation's infrastructure programs. Although the goals and accomplishments of many regulations are salutary, these federal regulations and mandates—both singly and in combination—are generating serious problems for state and local governments. Such problems can negatively affect the construction and maintenance of the nation's infrastructure in both direct and indirect ways. In particular:

- Certain federal mandates impose heavy fiscal burdens on state and local governments, and the combined costs of all federal mandates have been growing faster than federal aid. Such mandated costs are projected to continue growing at a rate that will threaten other important policy objectives unless remedial actions are taken. For example, the Environmental Protection Agency estimates that local government spending on environmental projects will need to increase by over 50 percent between now and the year 2000 just to meet the costs of existing and pending regulations. In some localities, user fees for environmental systems are expected to double or quadruple during this time period.
- Costs of this magnitude threaten to distort local budgets and priorities, squeezing resources for other vital public services like education, law enforcement, and public health.
- Federal regulations and mandates can have non-fiscal effects which are as important as their financial impacts. These include lengthy delays in the construction, maintenance, or expansion of public facilities, the prescription of inefficient and inflexible procedures that are poorly adapted to local circumstances, the blurring of public accountability, and unnecessary conflict with the institutional and representational responsibilities of state and local governments.
- Such consequences reflect weaknesses in the federal regulatory and policymaking processes, which too often fail to recognize the cumulative effects of mandates, support overly ambitious goals without providing adequate administrative and financial resources, fail to establish clear priorities or define appropriate performance standards, and lack responsiveness to differing local needs and preferences.
- These problems ultimately undermine the federal government's ability to achieve its regulatory goals, and they perpetuate a system that, by routinely promising more than it can deliver, invites public cynicism and disaffection.
- Policies and measures undertaken to ameliorate such problems have shown some signs of effectiveness in certain instances, but have been ineffective overall.

III. PRINCIPLES FOR INTERGOVERNMENTAL REGULATION

In order to minimize regulatory problems while still accomplishing regulatory objectives, Congress and the federal agencies should adhere to the following principles when enacting or promulgating new regulations or revising existing statutes and rules:

1. Effective regulation in an intergovernmental framework requires mutual cooperation and genuine partnership among the federal, state, and local governments.

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2. Limited resources at all levels of government require that Congress and the federal agencies clearly define their regulatory objectives, establish appropriate standards of performance, and seek the most efficient and scientifically sound methods of achieving their regulatory goals.

3. Congress should design, and agencies should administer, regulatory programs in ways that promote effective, flexible implementation and continuous improvement in achieving required outcomes. Among other things, this requires recognizing differences in state and local institutional structures, resources, conditions, and servicing responsibilities, and opportunities to offer incentives and use market mechanisms to help achieve required outcomes.

4. Citizens have a right be treated fairly and equitably in the regulatory process. Protecting this right requires careful balancing between uniform protection of fundamental rights, deference to local democratic processes, public participation and accountability in the regulatory process, and freedom from unreasonable regulatory burdens.

IV. GUIDELINES FOR IMPLEMENTING INTERGOVERNMENTAL REGULATORY PRINCIPLES

1. **Intergovernmental Partnership:** Accomplishing federal regulatory objectives frequently requires active cooperation from state and local governments. To achieve such cooperation, federal regulators should recognize that states and localities have independent constitutional responsibilities, possess widely varying fiscal and institutional resources, confront different problems and conditions, and are accountable to their own citizens and democratic processes.

Within this institutional framework, inflexible and burdensome mandates are counterproductive. They invite unnecessary conflict rather than cooperative problem solving, and they impose uniform, ill-fitting solutions on communities where adaptations to varying local conditions are needed.

To avoid such problems, we recommend that the following guidelines be applied whenever regulations are enacted or promulgated:

- Proposed regulations should be limited to cases of demonstrated need and widely recognized national purposes. Congress and regulatory agencies should be expected to clearly document the existence of a significant market failure or a problem of national scope that state or local governments are unable or unwilling to address through independent action or voluntary cooperation.
- If a need for regulatory intervention has been documented, Congress and federal agencies should give serious consideration to a full range of regulatory options and select the least burdensome mechanism capable of achieving the objective. In addition, Congress should refrain from enacting rigid and inflexible provisions that direct the rulemaking process. Federal agencies should not regulate more prescriptively than required by law.
- As an integral part of considering such regulatory options, Congress and federal agencies should actively consult with prospective state and local implementors to elicit their perspectives on feasible procedures and requirements and to build a foundation for effective cooperation. Consultation periods should be long enough to generate well considered and documented responses.
- In order to further promote effective implementation, Congress and federal agencies should conduct and regularly update a detailed, systematic inventory of all regulatory demands and costs placed on state and local governments. Such cumulative requirements, as well as the existing responsibilities and services of state and local governments, should be taken into account when considering additional regulatory requirements.
- An effective intergovernmental partnership also requires that Congress and federal agencies support the development and adequate funding of applied demonstration and compliance assistance programs, to promote education, training, technical assistance, and information sharing among all partners in the regulatory implementation process.

2. **Efficiency:** Because society's resources are limited, the benefits of public regulation must be optimized by employing resources as efficiently as possible. To help accomplish this objective, we recommend that Congress and regulatory agencies consider the following procedures:

- Both the need for and the specific standards included in environmental, health, and safety legislation and regulations should be based upon—and, when appropriate, revised in response to—the generally accepted findings of well established, peer reviewed science. If existing scientific knowledge is inadequate, regulatory agencies should promote research which will remedy such deficiencies before issuing permanent standards or requirements.
- Agencies should make greater use of risk analysis to help them evaluate competing threats to public health and safety, and exposures to financial liabilities, and should select the most serious problems for priority attention.
- Once problems are prioritized, federal regulators and policymakers should be required to consider a full range of regulatory alternatives. In particular, Congress and federal agencies should give special consideration to innovative and potentially more cost-effective regulatory approaches, such as greater use of market incentives, tiered standards for jurisdictions of different sizes, and expanded use of properly designed performance standards (with quantifiable measures of outcomes) in place of rigid technical requirements. The

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search for alternatives should be made in consultation with affected parties.

- Once regulatory options have been identified, agencies should subject these alternatives to careful economic analysis in order to assure that direct and indirect costs, as well as benefits, are fully considered when selecting the most efficient alternative.

3. Effectiveness: Ambitious regulatory goals and standards are of little consequence if they cannot be effectively implemented and sustained. Experience shows that when regulations are too complex, they generate confusion, delays, and noncompliance. When regulations are too expensive, they generate opposition and circumvention. When they are unnecessary or inappropriate, they generate conflict, cynicism, and avoidance. Consequently, effective regulatory programs must be designed from the start with a recognition of which units and levels of government will be implementing the standards, what resources they have available, and what legitimate alternative demands are competing for those resources. To help accomplish such recognition, it is recommended that:

- Congress and federal agencies engage in early, active and full consultation with state and local governments, independent technical and professional organizations, and other appropriate entities which will be involved in or responsible for implementing federal rules. One particularly promising method of doing this is to make greater use of negotiated rulemaking, which brings together implementing agencies and affected parties to negotiate the text of a proposed rule. Experience has shown that this process tends to generate more practical rules, greater commitment and acceptance, a wider range of technical options, and less subsequent litigation and delay.
- The federal agencies and Congress should provide maximum regulatory flexibility to state and local partners, and other regulated entities, using performance-based goals to allow for variations in the severity of regulatory problems, wide differences in jurisdictional capabilities, the use of innovation, and experimentation with alternative compliance strategies. Legislatively, Congress can often provide additional flexibility in federally funded infrastructure programs by replacing narrow categorical programs with broad, performance-based assistance such as the surface transportation block grant. Administratively, federal agencies should fully comply with the *Regulatory Flexibility Act*, which requires that federal agencies give special attention to the needs and resources of small communities and other small entities when formulating regulatory standards and procedures.
- Finally, effective implementation does not occur in a vacuum. Procedures and requirements that appear to be feasible in isolation may be unworkable within the framework of competing regulations and total responsibilities. For example, environmental and infrastructure problems typically have multimedia, multimodal, multiagency, and multigovernmental dimensions. Accordingly, Congress and federal agencies should recognize and be accountable for the full range of regulatory responsibilities that are imposed on state and local governments, so that federal goals can be prioritized and feasible standards and procedures can be devised.

4. Fairness, Equity, and Accountability: Variation and flexibility are not appropriate policies in all instances. All citizens, regardless of where they reside, are guaranteed equal protection under the law. Fundamental standards of human health and safety do not vary from one locale to another. Nor can local actions be permitted which impose negative consequences on citizens in neighboring jurisdictions.

At the same time, equality and fairness must be balanced with other Constitutionally protected values, such as freedom, privacy, and local democratic processes. Moreover, common standards can often be achieved through cooperative and parallel actions, without the need for a uniform rule. Finally, federal policymakers should recognize that excessive uniformity and unreasonable regulatory burdens can give rise to perverse, unfair or inequitable results. For example, the costs and benefits of uniform requirements may vary enormously from one jurisdiction to another, and the threats to health or safety may vary just as widely.

To balance these competing values and objectives, Congress and the federal agencies should:

- restrict the issuance of uniform requirements and standards to the minimum level necessary to assure the protection of basic rights.
- assure that regulatory burdens and responsibilities are fairly distributed in terms of region, jurisdiction, and the ability to pay.
- write regulations in plain, non-legalistic language that can be readily understood by affected parties, and make these regulations easily available to the affected parties.
- carefully monitor and oversee the performance of existing rules and regulations on a predictable and routine basis, in order to promote public accountability, evaluate accomplishments, assure effective implementation, assess evolving needs and priorities, and promote continuous improvement.
- consider the ability of local governments, taxpayers, and the various classes of infrastructure users, to pay for federal mandates.

V. RECOMMENDED IMPLEMENTATION STEPS

To help implement these principles and guidelines, we recommend that the following practices and procedures be considered or adopted by Congress or Executive agencies, as appropriate:

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A. Best Current Practices: Several policies and procedures already exist which are intended to promote the principles and guidelines outlined above. These include The Executive Order on Federalism, the *Regulatory Flexibility Act*, and the *Negotiated Rulemaking Act*. While some federal agencies have made a dedicated effort to implement these procedures, others have demonstrated less commitment. Consequently, we recommend that all federal agencies examine the following procedures as examples of best available practices for implementing these regulatory relief and analysis procedures.

- **Department of Housing and Urban Development:** Guidance for implementation of Executive Order 12612, on Federalism.
- **Environmental Protection Agency:** Guidelines for implementing the *Regulatory Flexibility Act*.
- **Administrative Conference of the United States:** Recommended procedures for Negotiated Rulemaking.

In addition, we recommend that other federal agencies consider, for possible adaptation, the Environmental Protection Agency's efforts to enhance intergovernmental regulatory performance and consultation with state and local governments, through such techniques as:

- creation of a State and Local Capacity Task Force, a Small Communities Coordinator, a Small Community and Local Government intra-agency management cluster, and support for the State Pollution Prevention Roundtable;
- development of "user friendly" program guides, enhanced technical assistance programs, the use of testing laboratories and demonstrations to reduce risks associated with innovative technologies and solutions to compliance problems, and streamlined permit processes.

We also commend the National Conference of State Legislatures for improving awareness of federal regulatory developments through creation of *The Mandate Monitor*, and we recommend comparable actions be taken by other associations of state and local government officials to enhance their input into the regulatory process.

Finally, with respect to improving the efficiency and effectiveness of federal regulatory programs, we recommend consideration of performance-based strategic planning processes such as those at DOT and the Department of Energy.

B. Strengthening Existing Mechanisms: Although we believe it is helpful to promote wider adoption of the best available practices for implementing existing regulatory relief, consultation, and analysis procedures, many of these tools have inherent weaknesses that limit their effectiveness. As outlined in research studies conducted by the General Accounting Office and the Advisory Commission on Intergovernmental Relations, these weaknesses include limited agency compliance, inconsistent implementation, and limited impacts on final rules and regulations.

To help overcome these limitations, we recommend adoption of the following changes and amendments in regulatory relief and analysis mechanisms:

- **E.O. 12612 and the *Regulatory Flexibility Act*.** The President and Congress, respectively, should strengthen these mechanisms by revising their language to clarify when assessments must be prepared and by placing the ultimate decision about using them in the hands of OMB, rather than with the specific regulating agency. In addition, these mechanisms should be incorporated into agency guidance documents in plain English and with enough elaboration to provide practical assistance in applying them.
- **Negotiated Rulemaking:** *The Negotiated Rulemaking Act of 1990* and the *Administrative Dispute Resolution Act* are promising techniques which merit reauthorization by Congress. In addition, the use of negotiated rulemaking should be expanded by amending the act to (1) create a presumption in favor of using negotiated rulemaking in those cases that meet selective criteria for suitability;[1] and (2) allow regulated entities or other affected parties to formally request that an agency consider utilizing negotiated rulemaking.
- ***The State and Local Cost Estimate Act*:** This act requires the Congressional Budget Office to prepare cost estimates of certain federal legislation likely to have significant fiscal impacts on state and local governments. However, such estimates are often prepared too late in the legislative process, and are not required at all for certain categories of legislation. We recommend that Congress strengthen this act by requiring preparation of cost estimates for alternative provisions of bills with major fiscal impacts prior to subcommittee markup, including estimates for currently excluded forms of legislation such as tax and appropriations bills. We further recommend that Congress authorize the preparation of an annually revised, comprehensive inventory and cost estimate of major intergovernmental regulatory programs and statutes.
- ***The Federal Advisory Committees Act*:** *The Federal Advisory Committees Act* (FACA) establishes stringent procedures for agencies to follow when gathering advice about regulatory and other mat-

[1] For example, the criteria developed by the Environmental Protection Agency would restrict negotiated rulemaking to cases in which a limited number of issues and parties are involved, the parties share a degree of common ground, their fundamental values are not challenged by the rulemaking, and they are willing to negotiate in good faith. In addition, relevant statutes must be able to accommodate a variety of options, and it is helpful to confront a rulemaking deadline or other action-forcing mechanism. See EPA, Program Evaluation Division, "An Assessment of EPA's Negotiated Rulemaking Activities," December 1987, p. 2.

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ters from external parties. Historically, FACA has been interpreted by many federal agencies in ways that impede full and early consultation with state and local officials when developing or revising regulations. We recommend that federal agencies provide better training and information to agency personnel to avoid misunderstandings of FACA's requirements, and to emphasize non-FACA forms of fact-finding, listening to affected parties, and conferencing such as those used extensively by DOT. Exemptions, such as the one for EPA's state co-regulators, should be clearly set forth. We recommend that Congress consider amending FACA to broaden this exemption to include organizations of state and local officials when engaged in consultations with agencies over rules in which their members will be partners in implementation.

- **Environmental and Other Statutes:** Concepts of federal program flexibility and holistic decisionmaking have been expanded by EPA, in its use of economic incentives in regulatory programs, and by DOT, in its various transportation programs. We recommend that such innovative solutions and flexible approaches to regulatory compliance be continued and enhanced. Full advantage should be taken of existing opportunities for encouraging "holistic" decisionmaking, as in the consideration of pollution prevention programs and in decisionmaking with long time horizons. We further recommend that federal agencies carefully examine their enabling statutes to find opportunities for more efficient and fully effective approaches to writing and implementing regulations. Finally, we recommend that Congress authorize such flexibility when devising or reauthorizing infrastructure-related statutes.

C. **Fundamental Reforms:** Finally, we recommend that Congress and federal agencies devote further research and give serious consideration to more fundamental changes in the regulatory process. These changes are designed to alter the basic rulemaking process in ways that would enhance priority setting in regulatory decisionmaking, encourage long-term decisionmaking and innovation, foster economically beneficial technology change, and restrict current incentives to use regulations as devices for shifting costs from the federal budget to third parties.

In the **near term**, potential changes that should be explored include:

- **Performance and Market-Based Regulatory Approaches:** These regulatory approaches increase the range of choices available to regulated parties for compliance. This, in turn, can speed compliance, reduce compliance costs, and encourage the development and use of innovative technologies. We recommend that Congress and federal agencies actively search for opportunities to promote such flexible approaches when enacting and implementing regulatory programs. EPA, for example, has more than 15 years of experience with this approach and a Regulatory Innovations Branch dedicated to it.
- **Zero-Based Regulatory Review:** We recommend that federal agencies consider implementing a zero-based regulatory review process. This would entail a comprehensive review of all rules required to implement specific regulatory programs and could be undertaken as part of an ongoing exercise in total quality management. In consultation with state and local governments and other interested parties, agencies would review basic regulatory principles, requirements, and options from the ground up, in order to streamline, update, improve, and make procedures and requirements user friendly. One potential model to explore is the current review of highway safety programs.
- **Regulatory Demonstration and Assessment Partnerships:** This proposal would establish intergovernmental regulatory laboratories and demonstration projects in order to promote the development and testing of appropriate regulatory standards, innovative technology, techniques of holistic outcomes assessment, and alternative implementation approaches prior to the promulgation of universal rules and regulations.
- **Sunsetting Interim Guidance Documents:** Federal agencies often issue guidance documents to provide interim or supplemental guidance to parties implementing or subject to regulatory programs. Because such guidance often carries the practical force of law without the formal safeguards of the rulemaking process, we recommend that federal agencies apply fixed sunset provisions to such guidance documents, and accelerate the issuance of formal regulations through appropriate consultation or negotiation processes.

In the longer term, we recommend serious exploration of the following additional opportunities for innovation:

- **A Federal Regulatory Budget:** The purpose of a federal regulatory budget would be to apply the priority-setting discipline of a financial budgeting process to the imposition of additional regulations by the federal government. Such a process would establish an annual limit on total compliance costs that could be imposed on regulated entities. Federal agencies would not be authorized to require compliance activities that exceeded budgeted amounts without triggering some form of reconciliation provision, special implementation procedures, or supplemental funding provision. Such constraints would establish new incentives for Congress and the federal agencies to promote more efficient regulatory approaches and clearer regulatory priorities. We recommend that the President establish or designate a high level committee, task force, or com-

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mission to study the merits and feasibility of establishing a regulatory budget procedure.

- **An Intergovernmental Regulatory Expenditure System:** An intergovernmental regulatory expenditure system would combine elements of regulatory budgeting with features of the intergovernmental aid system. Each state and local jurisdiction would be allocated a regulatory expenditure limit based on its ability-to-pay (which might be established by estimates of relative tax capacities, tax efforts, and expenditure demands of the type prepared by the Advisory Commission on Intergovernmental Relations). Each jurisdiction would be required to implement all federal mandates up to but not beyond its expenditure limit. If mandated expenditures exceeded a jurisdiction's regulatory limit, new flexibility would be introduced into the regulatory requirements. For example, such a jurisdiction might be entitled to establish its own set of regulatory priorities within the limits of its financial allocation. This could include the use of approaches which, while making progress toward full compliance, would schedule that progress in affordable annual increments. Alternatively, excess co. might be charged to the federal government.

  We recommend that Congress and the President direct the Advisory Commission on Intergovernmental Relations or some other appropriate intergovernmental entity to conduct a detailed study of the design and feasibility of such a program.

- **Federal Mandate Relief:** Several bills have been introduced in both houses of Congress to provide relief to state and local governments from the steadily mounting burdens of federally imposed costs. Some would make the federal government responsible for reimbursing all incremental costs attributable to new federal regulations and mandates. Others would call for estimating all the federally induced costs and developing plans to share costs, reduce costs, or abolish mandates. We call on Congress to hold hearings on these pending bills and to consider establishing or designating a high level intergovernmental commission to study and make recommendations regarding the merits and feasibility of such legislation.

IMPROVING ENVIRONMENTAL DECISIONMAKING FOR PUBLIC WORKS

I. OBJECTIVE

More effective, efficient, and predictable environmental decisionmaking processes need to be applied throughout the nation's infrastructure programs. Practical and consistent steps need to be taken by both environmental protection agencies and infrastructure agencies, working together, so that the goals of each can be achieved to the greatest extent possible with less cost and less delay.

More specifically, opportunities should be sought and action taken to (1) fully integrate and simplify the process of applying for and deciding on environmental protection permits and other environmental approvals needed to authorize public works projects, (2) reduce the time and cost involved in this decisionmaking, and (3) more fully integrate the consideration of environmental quality needs and requirements into the infrastructure programs.

II. FINDINGS

The findings of the 1992 ACIR study, *Intergovernmental Decisionmaking for Environmental Protection and Public Works* (Report A-122), are sound. As necessary environmental protection statutes and requirements have been enacted and promulgated over the past two decades, one by one, they have:

1) created a set of complex decisionmaking processes with many separate, often sequential, and sometimes duplicative steps taken by many different agencies;

2) stretched out the process of making infrastructure and environmental decisions, limited the flexibility available to find problem-related and performance-based means of reaching environmental and infrastructure goals, and sometimes lacked a sound scientific basis;

3) increased the unpredictability of the planning and decisionmaking processes, sometimes causing steps in the process to be repeated;

4) led to inefficient uses of limited resources;

5) created unaffordable, unachievable, inefficient, and sometimes ineffective environmental processes and compliance requirements for non-federal parties (especially small local governments); and

6) created tensions within and among federal, state, and local environmental and development agencies.

This chain of events is counterproductive to the achievement of both environmental protection goals and infrastructure goals.

Steps are needed to overcome these unintended results of the efforts to foster greater environmental sensitivity, improved protection from environmental pollution and health hazards, and the transformation of development programs into programs that are compatible with nature.

III. PRINCIPLES

The processes for reviewing, coordinating, and approving environmental permits for infrastructure should be guided by the following five principles:

1. A high quality environment and continued economic development both are legitimate, high priority national goals. These goals are compatible with each other if pursued within a "sustainable development" framework.
2. A single, integrated, multimedia, government-wide environmental quality ethic based on Title I of NEPA should be an integral part of all development programs—federal, state, and local.
3. Environmental analysis and compliance processes should be better integrated with each other.
4. Environmental permits and approvals for public works should be based on sound, peer-reviewed science, and should be evaluated using performance measures of environmental outcomes. They also should be based on priorities for reducing environmental risks most effectively and efficiently, considering their true costs to society, their affordability, and the need to set achievable priorities for compliance.
5. Achieving consistency between environmental goals and development goals, and ensuring the affordability of these goals, should be based on a process that provides for wide-ranging public involvement, interagency and intergovernmental cooperation, and coordinated political action.

These principles are elaborated on below.

Legitimate and Compatible Goals. Defusing the tension between environmental protection and development programs depends upon seeing both sets of goals as having legitimacy, and seeking compatibility between them. This compatibility should not be seen as a simple compromise, but as an opportunity to find new ways to achieve both sets of goals at once. The President's Council on Sustainable Development should play an important role in identifying and promoting this opportunity.

Environmental Ethic. Many of the difficulties in receiving environmental approvals for public works projects have occurred as a result of inadequate consideration of environmental factors in the earliest stages of planning and designing public works. Thus, environmental problems sometimes come as a surprise late in the process of seeking approval to proceed, when permits or other types of approval are applied for. This can create the need to replan and redesign projects—activities that take considerable additional time and incur additional costs. To avoid this problem, each infrastructure agency should institutionalize a single, integrated environmental quality ethic throughout its entire leadership and professional staff so that environmental quality factors will be routinely and actively pursued throughout the agency's analytical and decisionmaking processes, and passed on to the state and local governments whom they assist, regulate, or work with as co-regulators.

Integrated Environmental Processes. Many infrastructure projects must undergo general environmental analysis within the framework of the *National Environmental Policy Act* (NEPA) as well as other federal, state, and local environmental requirements, including more specific types of analysis and review related directly to individual environmental permits and approvals that must be obtained. Currently, these are quite different, and frequently separate, processes. Time and money could be saved in many cases if these separate processes were better integrated to avoid procedural and substantive duplications, and conflicting approaches and decisions by multiple agencies. Joint and concurrent environmental reviews should be the goal. This integration should be established within and among all federal agencies in accordance with CEQ regulations (40 CFR 1502.25).

Performance-Based Evaluation of Environmental Outcomes. Environmental compliance too often is judged largely, or even primarily, as a matter of legal compliance with specified activities or "end of the pipe" specifications. This type of compliance may be unnecessarily costly and adversarial, and does not always yield significant improvements in the environment. Provisions for flexibility in complying with environmental goals offer opportunities for comparable, or even superior, improvements in the environment for the same or less cost. Such opportunities should be identified and pursued.

Costs of Compliance. Promising to achieve more than can be reasonably accomplished in any given time period creates frustration and a loss of confidence in government. Yet, the amount of infrastructure work that ne to be done to clean up the environment, prevent pollution, and avoid damage to the nation's ecological resources is prodigious, and the full costs of compliance often must be and should be included in the costs of infrastructure projects. Available technical, financial, and other resources to pursue these projects are limited. Therefore, compliance with environmental goals in infrastructure programs should be pursued through prioritization that makes best use of available resources in reducing environmental risks as quickly as possible over a period of years.

Public Involvement. All public works and environmental decisions should be made with active involvement of citizens and other affected parties. NEPA requires that all federal agencies provide opportunities for such involvement.

Public involvement should be institutionalized in all environmental and infrastructure programs as a process of two-way communication in which there is mutual education of the public and the government at every stage of the planning and decisionmaking process. This "close to the customer" approach should be designed to restore confidence in government and provide support for well justified and achievable goals.

The need for making reasoned choices and justifying supportable choices should be communicated to the public in terms that can be readily understood and responded to constructively.

Governmental Partnerships. Multiple federal agencies frequently regulate a single infrastructure project. In addition, state and local governments may be co-regulators with the federal government, as well as regulated entities. It is essential, therefore, for all of these governmental units to be working within similar principles and guidelines. Otherwise, unnecessary confusion, tensions, delays, and conflicts are likely. Common principles and guidelines, frequent consultations, and a spirit of cooperation and partnership among these entities should be developed.

IV. GUIDELINES

To put these principles into action, at least the following ten types of guidelines are needed:

1. Integrate and improve the effectiveness, efficiency, and timeliness of the environmental planning and decisionmaking processes;
2. Institutionalize the integrated environmental decisionmaking process and environmental quality ethic in each federal agency;
3. Provide better coordinated, more complete, and higher quality information to support improved environmental analysis, planning, and decisionmaking;
4. Strategically manage agency resources to support integrated environmental decisionmaking;
5. More fully develop and apply sound, peer-reviewed science in support of integrated environmental decisionmaking;
6. Enhance public involvement programs;
7. Forge stronger federal interagency linkages among environmental and infrastructure agencies;

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8. Develop, facilitate, and strengthen intergovernmental partnerships for environmental decisionmaking and infrastructure;
9. Improve training for environmental decisionmaking in the federal, state, and local governments; and
10. Revise environmental legislation and regulations to more fully support integrated environmental decisionmaking.

These guidelines are elaborated on below.

Integrate and Improve the Environmental Decisionmaking Process. In accordance with the principles set forth above, top priority should be given to (a) integrating the many elements of the environmental decisionmaking processes with each other to promote efficient and effective concurrent reviews by all the responsible agencies, (b) balancing environmental requirements with development, infrastructure, and jobs goals, (c) bringing environmental requirements into line with good, peer-reviewed science and performance monitoring oriented toward desired environmental outcomes, and (d) providing the flexibility needed to get maximum performance for the investment of available resources.

To achieve these goals, the first step is to inventory, document, and compare the existing environmental decisionmaking processes. Some are broad analytical processes that seek public involvement in preparing a comprehensive assessment of societal and physical circumstances, while others are more narrowly focused on specific, single-factor, legal requirements. Levels of detail in these two types of process differ, as do provisions for timing, public disclosure, and the factors to be considered. The preparation of flow charts for each of these processes should be undertaken to facilitate comparisons among them.

The second step should be to identify and pursue opportunities for integrating appropriate processes with one another. For example:

- CEQ, or its successor agency, should continue its seminars on NEPA integration and follow-up by issuing guidance to integrate environmental analysis and compliance processes.
- The coordinated, multi-media permit process for major projects being developed by the state of New Jersey should be evaluated as a potential model for other states and the federal government.
- The recommendation of EPA's Science Advisory Board that ecological regions be managed as a whole, perhaps using regional organizations, should be pursued.
- Risk-based models for comparing and managing clusters of environmental regulations, so that the worst risks would be dealt with first, should be given a high priority.
- The Arkansas model of NEPA integration should be considered by other states. In Arkansas, the in-house, multidisciplinary planning staff of the State Highway and Transportation Department works closely with the engineering staff from the beginning of the design stage to include environmental considerations, prepare environmental impact statements, and avoid most conflicts with federal environmental regulations.
- The FHWA and FAA NEPA integration model should be considered for use by other federal agencies. Both of these agencies use NEPA as the umbrella for all environmental requirements to be considered concurrently at the planning, design, and implementation stages.
- Alternative dispute resolution techniques for facilitating environmental decisions and avoiding litigation should be used frequently.
- Special permit processes should be used for cases where innovative technologies for improving the environment are proposed to be applied. Such innovations often cannot be tried under standard permit requirements because of the uncertainties introduced by the innovative technology. Closer monitoring and other special conditions might allow these innovative projects to proceed.
- Federal interagency memoranda of understanding such as the one signed on May 1, 1992 by the Secretary of Transportation, the Administrator of EPA, and the Assistant Secretary of the Army for Civil Works, to facilitate the consideration of Section 404 permits for transportation projects, should be used as models for developing other memoranda of understanding on issues for which infrastructure and environmental protection agencies have common needs and interests.

Institutionalize the Environmental Ethic. Lessons learned from these demonstrations and individual examples of process integration should be applied broadly to institutionalize and infuse the environmental ethic into infrastructure agencies and to make the integrated environmental decisionmaking process more effective, efficient, timely, and predictable. These lessons should be published in clear and understandable language, with practical guidelines for implementation.

Provide Better Information to Support Integrated Environmental Decisionmaking. Access to baseline information on natural and cultural resources, similar to that provided for geological resources by the U.S. Geological Survey, can save time and costs in completing required NEPA analyses and documentation as well as in satisfying other environmental permit and approval processes. Ongoing programs, such as the National Wetlands Inventory and the Soil Conservation Service's Soil Survey have proven extremely useful for these purposes. Proposed initiatives for a Bureau of Environmental Statistics within a Department of Environment that could come about from the elevation of EPA, and a National Biological Survey under the Department of the Interior, hold the potential for contributing significantly to more effective and efficient environmental analyses and compliance decisions.

The federal government, in cooperation with state and local governments, should continue to initiate, complete, and maintain national inventories of all of the natural and cultural resources required to be considered in the environmental decisionmaking process. User-oriented procedures should be developed and made widely available to transform these data into a sound and objective basis for required analyses and decisions at both the program and project-specific levels affecting ecosystems of various sizes.

Strategically Manage Resources for Environmental Decisionmaking. Innovative management practices that prove successful should be identified and transferred into widespread usage. For example, strategic use of permit processing personnel to put their time where it will do the most good has shown promise in the Corps of Engineers and the state of New York.

- In the Corps, the practice of issuing "general permits" for large areas in which specific permits that are consistent can be issued automatically saves a great deal of processing time and energy.
- In the New York case, a recent study found that the bulk of the time of the environmental compliance staff was being spent on the review and processing of relatively routine permit applications, while too little time was left for projects of major significance and for participating in preapplication environmental analyses where preventive advice could expedite later permit processing. It was found that breaking out of routine permit processing systems that required a thorough review of every application on a first come, first served basis could make more effective use of scarce resources and make the jobs of staff more interesting and productive.

Some environmental review staffs also have been expanded with financing from permit processing fees. Legislation and training funds may be needed to authorize some management improvements.

More Fully Develop and Apply Environmental Science. Not enough is known about such subjects as how to manage large ecological systems, how to measure and communicate relative environmental risks, and how to estimate the environmental outcomes of specific regulatory practices. Research should be done to provide needed answers.

Enhance Public Involvement Programs. Many federal programs in addition to NEPA provide for public involvement or citizen participation. One of the most recent to require enhanced public involvement is the *Intermodal Surface Transportation Efficiency Act of 1991*.

Many state and local governments also have active programs of this nature. Often, they have been established, in part, to satisfy federal requirements.

In 1979, the Advisory Commission on Intergovernmental Relations completed a comprehensive study of citizen participation in which it identified 45 different types of involvement being used by governments. Many other surveys, handbooks, training courses, and other sources of help are available on this topic to provide guidance.

Forge Interagency Links. Federal agencies can and do learn from each other when they are in contact. Greater frequency of contact among federal infrastructure and environmental agencies should be arranged to facilitate improved environmental decisionmaking processes, sharing of baseline data, and exchanges of information about advances in developing and applying improved environmental science. Sharing the results of pilot studies and demonstrations also should be facilitated through these contacts. In addition, interchanging personnel among federal agencies and with state and local governments can have attitudinal as well as technical benefits. Personnel exchanges are authorized by the *Intergovernmental Personnel Act of 1970*, and Rural Development Councils in many states may offer convenient mechanisms for arranging personnel exchanges in rural areas.

Develop and Facilitate Intergovernmental Partnerships. Some federal and federally required environmental analyses are prepared by state and local governments, and most federal regulation of the environment is applied by state and local governments. Additional opportunities for developing these intergovernmental partnerships—most notably the potential state responsibility for issuing Section 404 permits—should be sought out and developed where the capacity exists at state and local levels to perform these responsibilities responsibly.

Advantages include administration of requirements by officials who are closer to and more familiar with local conditions, and who are better able to supply and respond to other relevant information in the community. State and local governments also may be more able to combine diverse permit and approval decisions in an integrated review process as is being demonstrated now in New Jersey.

Where state and local governments need help in complying with federal requirements, that help should be supplied through the intergovernmental partnership. The federal government has a responsibility under the *Regulatory Flexibility Act* to give special recognition to the problems of small governments in responding to federal requirements. The establishment of a small-community coordinator in EPA, and a local government/small community dialogue group to advise EPA on these special needs, has been helpful to both the federal and non-federal partners. This EPA example should be considered for adoption by other federal agencies.

Provide Environmental Training. The improved decisionmaking processes, more fully developed data bases, and new environmental science called for by this task force are significant departures from much current practice. If they are to be successfully implemented, many federal officials—from top management to operational practitioners—will need to be trained in new concepts and new methods of operating. The new guidelines will not be self-implementing. Adequate training for all those who need it should be supplied.

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Revise Legislation and Regulations. Although some of the integration of processes recommended here, and the development of better baseline data, can be accomplished under existing legislation, it should be recognized that the full implementation of these principles and guidelines will not be possible without revising present legislation and the regulations related thereto. Pilot projects and special demonstrations should be used to set the stage for needed legislative revisions. For example, the pending *Government Performance and Results Act of 1993* may provide a convenient vehicle for testing outcome-based evaluations of the performance of environmental programs on a pilot project basis. That act also would provide for broader application of the pilot project findings at a later time. Opportunities to enact legislation that would more fully integrate environmental decisionmaking processes should be sought.

V. RECOMMENDED IMPLEMENTATION STEPS

1. Establish an Integrated Environmental Ethic and Decisionmaking Process. The following actions should be taken to establish an integrated environmental ethic and decisionmaking process applicable to all federal agencies that administer infrastructure programs directly, provide financial assistance for infrastructure, or regulate infrastructure:

- The President should revise and expand Executive Order 12088 (Environmental Compliance), or issue a new executive order, to establish governmentwide policies to integrate environmental decisionmaking based on (a) outcome-based performance standards, (b) improved science, and (c) risk-based priorities for compliance. The executive order should direct all federal infrastructure agencies to establish, and actively nurture, a strong environmental ethic within their programs, and should give CEQ, or its successor agency, responsibility for overseeing implementation of the governmentwide policies. The President also should convene a White House Summit on Environmental Integration to help focus attention on the importance of this governmentwide initiative.
- CEQ, or its successor agency, should develop additional governmentwide guidance, in consultation with other federal environmental and infrastructure agencies and affected state and local governments, to assist in implementing the President's environmental integration policies. CEQ also should develop legislative proposals needed to facilitate the implementation of the President's policies, and a clearinghouse of best practices that can be used to implement the additional guidance. This guidance should advise federal agencies on the appropriate use of innovative management practices such as alternative dispute resolution techniques and the optimal allocation of environmental analysis and compliance review staffs in operating the integrated process.
- OMB should revise its legislative review, regulatory review, and budget submission procedures to support the President's environmental integration policies.
- The Congress should revise all environmental statutes to bring them clearly within the purview of NEPA integration policies and to establish early integration, of reviews, performance-based compliance, efficiency, affordability, timeliness, and predictability as goals of the environmental decisionmaking process.
- Each federal infrastructure and environmental agency should review its environmental review and decisionmaking regulations and processes to incorporate and affirmatively support the principles of integration.

2. Pursue Pilot Projects. When the "Government Performance and Results Act of 1993" is enacted, EPA, CEQ, or a consortium of federal environmental agencies should apply to OMB for a pilot project to begin developing outcome-based performance evaluation measures of environmental programs.

3. Improve the Knowledge-Base for Environmental Decisionmaking. All of the federal environmental agencies should work through the Federal Geographic Data Committee (FGDC) to accelerate development and coordination of a comprehensive nationwide data base to support improved environmental decisionmaking by federal, state, and local governments.

The recommendations of EPA's Science Advisory Board should be used as the basis for an expanded program of environmental research based on improved risk assessments and concepts of ecological and/or watershed management. Other federal, state, and local environmental agencies should be consulted in expanding this research program. The resources of the Office of Science and Technology Policy, the National Science Foundation, federal laboratories, EPA's interagency research committee, the Department of Defense Strategic Environmental Research Program, and the National Academy of Sciences/National Research Council should be used to buttress this essential activity.

4. Provide Environmental Training. CEQ, or its successor agency, should be directed to continue its NEPA integration seminars and workshops, and to work with the Office of Personnel Management, the Federal Executive Institute, EPA, the other environmental and infrastructure agencies, and universities to increase training opportunities in support of environmental integration policies and guidelines. Provisions of the *Intergovernmental Personnel Act* should be used to encourage personnel exchanges among federal agencies and between the federal government and the state and local governments.

Statement of Principles and Guidelines, Federal Infrastructure Task Force VI

IMPROVING THE FINANCING OF INFRASTRUCTURE

I. OBJECTIVE

The purpose of this statement of principles and guidelines is to improve the effectiveness, efficiency, and equity of infrastructure financing. The approach taken is to establish financial planning and the selection of appropriate sources of funds and financing mechanisms as an integral part of infrastructure planning and decisionmaking, spanning the entire process from goal-setting to implementation. Financial planning should not be brought in just at the end of the process, as an afterthought or simply as an element of the implementation process, accepting all the goals, programs, and projects that may have been developed without consideration of their financial consequences.

II. FINDINGS

1. Rising Requirements for Funds. Very often, grand visions of infrastructure are framed, social policies are adopted, programs are developed, general requirements are mandated, and it is assumed that the necessary financing will come from somewhere. That assumption frequently no longer rings true. The costs of infrastructure programs (designed to accommodate growth and provide adequate maintenance of existing facilities and equipment) and unfunded federal mandates (to protect the environment, accommodate the handicapped, and alleviate overcrowding in correctional facilities and other public institutions, for example) have accumulated faster than revenues have grown, sending infrastructure agencies, and the governments to which they belong, in search of additional funds.

2. Heavy State and Local Government Responsibility for Funding. State and local governments traditionally have been responsible for building, owning, operating, maintaining, and financing most public works. As federal aid has declined in recent years, and unfunded federal mandates have increased, the financial responsibilities of state and local governments have increased even more. The traditional funding sources and mechanisms—including the general fund (containing revenues from such sources as property, sales, and income taxes), general obligation bonds, revenue bonds, dedicated taxes such as the gasoline tax, and intergovernmental grants—often come up short.

3. The Search for Alternative Sources of Funds. During the 1980s, and even in the early 1990s, there has been increasing interest in using non-traditional mechanisms for raising funds to pay for infrastructure. For example:

- The U.S. Department of Transportation joined that search in a major way in the 1980s through its Rice Center studies.
- The U.S. Environmental Protection Agency has prepared a major new inventory of alternative financing techniques, *Alternative Financing Mechanisms for Environmental Programs* (1992).
- Cost sharing and dedicated infrastructure trust funds became a regular part of the U.S. Army Corps of Engineers' financial planning in 1986.
- State and local governments are negotiating more frequently with developers to fund essential infrastructure.
- Alternative pricing policies for western water are being examined.
- The access of state and local governments to the debt capital markets has been affected significantly as the federal tax-exempt status of their bonds was relaxed in 1981, then tightened significantly in 1986, and is now being reconsidered under the persistent prodding of the Rebuild America Coalition, the Anthony Commission, and others.
- The mixing of federal gas tax dollars with private toll road funds—illegal for many years—was authorized in 1991.
- In 1993, a special federal study commission recommended a series of innovative federal actions to attract pension fund investments into infrastructure.

One of the strongest forces driving this search for additional infrastructure funds is rapid growth of unfunded federal mandates. These mandates are imposed by federal laws, court decisions, and administrative regulations, with little or no thought given to their costs. Many of these mandates are for environmental protection. Others are for the purpose of benefitting Americans with disabilities, reducing the crowding of prisoners incarcerated by

the criminal justice system, and ensuring fair wages and working conditions for infrastructure workers. The cumulative costs of these mandates are high and growing, but they have not been systematically estimated or provided for with planned funding. They have begun to displace other important state and local priorities without weighing the relative merits of competing priorities. Legally speaking, all mandates are of the highest priority but, scientifically speaking, EPA's Science Advisory Board has observed that not all mandates are of equal urgency or necessity.

4. Inefficient Uses of Funds. Some features of infrastructure programs, built in by the political process, have resulted in inefficient uses of scarce funds. For example, funding that is available only for capital improvements, in times when adequate maintenance funding is not available, has resulted in too much construction and reconstruction, and too frequent replacement of capital equipment, incurring greater costs than would have been incurred if routine maintenance had been performed as needed.

Other inefficiencies have been introduced when money has been borrowed for public works at interest rates above the most favorable ones available. The use of Structured Municipal Bonds is one innovative financial tool, for example, that can make best-rate capital readily available to the widest range of state, local, and private infrastructure developers without increasing federal taxes, expenditures, or liabilities, and without disrupting the administrative practices of its infrastructure funding agencies. Structured Municipal Bonds apply securitization to the market for tax exempt municipal bonds by structuring pools of loans into securities purchased and traded in a global market by institutional investors. Federally sponsored securitization is increasing for a number of purposes, and could be applied to Structured Municipal Bonds to leverage limited federal infrastructure grants that capitalize state revolving loan funds and bond banks.

The method of revenue collection itself also can lead to an inefficient use of funds. For example, the current system of fuel taxes and highway tolls favors vehicles with high weight-to-axle ratios, increasing road wear and maintenance costs. In the case of toll roads, frequent stops to pay small fees may result in traffic delays that represent a private cost and add to air pollution. On the other hand, new technologies can change the equation. New collection devices are being introduced that can calibrate use, permit congestion pricing, and make tolls a very efficient way of exacting user charges.

5. Inequities of Funding. Responsibilities for funding infrastructure frequently fall unequally and inequitably on individuals and governments. For example, when general taxes pay for infrastructure services that are not used to the same extent by everyone, it is generally agreed that some users pay too much, while others pay too little. An example is unmetered public water. If payment for a service that is essential to the general public's health and safety is beyond the means of certain parties, then the case can be made for subsidized or even free service. Again, public health and safety may dictate that individuals who cannot pay for water may receive basic service at reduced rates or even free until they (or others on their behalf) can pay.

At the governmental level, examples of inequity arise frequently in the distribution of intergovernmental aid and in the imposition of intergovernmental mandates. Although it is generally agreed that aid should be distributed in relation to needs and ability to pay, many current funding formulas do not follow these two principles very closely, and mandates seldom consider these principles at all. Numerous examples of unequal impacts of environmental costs have been presented to EPA.

III. PRINCIPLES AND GUIDELINES FOR FUNDING INFRASTRUCTURE

In order to improve the funding of infrastructure programs, three principles should be followed:

- A financial planning process should be established and applied consistently to all federal programs affecting infrastructure either directly, through federal aid, or by regulation.
- A standard set of criteria for evaluating the effectiveness, equity, and efficiency of infrastructure funding sources and mechanisms should be established and applied consistently throughout the federal government as part of the financial planning process.
- Mechanisms for funding infrastructure should be chosen after a thorough evaluation of alternatives is performed using the standard criteria.

These three basic principles are elaborated on below and supported with preliminary guidelines.

The Financial Planning Process

The ability to put together a practical package of diverse funding mechanisms may be the key to finding the resources needed to support established infrastructure objectives. For each infrastructure program being proposed, mandated, budgeted, or reevaluated, a financial feasibility/affordability analysis should be prepared. The purposes of this analysis should be to gauge the financial feasibility and relative effectiveness of alternative infrastructure proposals from the viewpoint of all the parties responsible for funding the improvement and its subsequent operation and maintenance, and to identify the most affordable options. Preparing this analysis at an early stage in the review of legislative and rulemaking proposals can be an effective means of holding costs down. Risk estimates based on worst-case scenarios may have to be tempered by assessments of costs and resulting improvements in performance.

The requirement for financial feasibility analysis should apply equally to judicial, legislative, and executive decisions affecting the demand for infrastructure. If funds cannot be raised without jeopardizing the fiscal health of the responsible parties, programs and mandates should be redesigned or stretched out to make them feasible.

The May 1992 report of EPA's Environmental Financial Advisory Board (EFAB) entitled *Narrowing the Gap:*

Environmental Finance for the 1990s provides a blueprint for the kind of financial feasibility that all federal infrastructure agencies should consider. Clear estimates of the financing needs are the first step, to be followed by an evaluation of potential funding sources and mechanisms, and the differing capacities to pay possessed by the governments and agencies responsible for implementing infrastructure proposals. It is likely that a package of several revenue sources will be needed to meet identified needs.

A multi-year time frame is particularly important for infrastructure planning. In part, this is because bringing capital projects into existence requires extensive engineering and involves long construction periods. In addition, there often are long lags involved in acquiring various permits and completing public hearing and approval processes. But it is also because of the large amount of investment that a typical infrastructure project involves and the long periods of time over which it will provide benefits.

Criteria for Evaluating Alternative Funding Mechanisms

Generally, sources of funds can be judged by three criteria:

Equity: The attribute of raising revenues from those who benefit from the expenditure in proportion to their benefit or the costs they impose on society, with due regard to shared benefits and consistent with prevailing notions of ability to pay.

Efficiency: The attribute of raising the needed funds at a minimum administrative and transaction cost and avoiding unintended distortions in the programs and financial markets.

Effectiveness: The attribute of raising funds in a sufficient amount and timely fashion when needed to meet the costs. In other words, a source of funds may in theory be equitable and efficient, but unless it yields sufficient funds in a dependable fashion when they are needed and has the elasticity needed to respond to changing demands, it is not effective. Legal restrictions, political acceptability, interjurisdictional economic competition, and in the case of borrowing, financial market acceptability, all may limit the effectiveness of various sources of funds.

Guidelines for Applying the Benefit Principle. In general, those who benefit from infrastructure services should be asked to pay for them. User fees, dedicated taxes, trust funds, and special districts are commonly used to apply this principle. This works well when most of the benefits are identifiable, measurable, and direct, and when the beneficiaries can be billed conveniently at the point of use or where they live.

However, when many of these benefits are widely dispersed, indirect, or difficult to measure, general taxes may be the only efficient means of funding. In addition, when some people needing services do not have the ability to pay, or have only limited ability to pay, general taxes also may be the most equitable means of funding.

A special case of responsibility to pay for infrastructure occurs when identifiable parties cause pollution or impose other infrastructure costs on society. In this case, the polluter or imposer of the cost should pay the costs they impose on society to the extent that those costs can be clearly identified and measured.

Selecting Funding Mechanisms

Selection among alternative sources of funding should be guided by the criteria of effectiveness, equity, and efficiency. The application of these criteria is seldom clear cut nor are the outcomes of analysis unambiguous; people and governments can disagree over the level and distribution of benefits of programs and projects and how their costs should be apportioned and revenues collected. Nonetheless, there is an overriding need to analyze financing implications and options at the very outset of the infrastructure investment analysis process (see Task Force I Statement), not as an afterthought. Only in this way can the benefits and costs be compared, and the concepts of equity, effectiveness, and efficiency of funding options be recognized.

Another tier of concern has to do with the selection of the source of funds and traditional versus non-traditional financing techniques. Governments have many alternatives in the selection of specific revenue sources and in the choices of facility operations and revenue collections. Much of the innovation that has occurred in the financing of infrastructure has been to establish new entities in the public sector or to enlist the private sector in the development, financing, construction, and/or operation of capital facilities formerly provided by the public sector.

There also are several intergovernmental concerns involved in transfers, mandates and tax policy relationships. In our federal system, governments that own and operate infrastructure may find themselves in receipt of financial assistance (the fiscal carrot) or under mandate (the stick) when it comes to providing services. Furthermore, federal tax policy, and federal securities laws and regulations, have pervasive effects on the cost and availability of financing techniques used by state and local governments.

The Principal Choices. There are four major choices when selecting among potential mechanisms for funding infrastructure:

Current Revenues
Borrowing (pledging future revenues)
Intergovernmental Assistance
Private-Sector Options.

It is important to recognize that all expenditures including those on capital items will ultimately need to be paid from revenues in somebody's budget, either today or in the future. Thus, the selection of sources of funds breaks down into a decision to either finance improvements from revenues currently collected by governments or others on their behalf, or by promising to use future revenues to pay debt service or lease payments.

Deciding from what sources infrastructure will be funded is vital not only in deciding on the relative merits of

one resource over another, but also in the practical affairs of designing a financing plan. It is important at the outset to understand the distinctions between (1) own-source revenues which governments raise themselves and over which they have some degree of control, and (2) intergovernmental payments which are funded by others and over which the recipients may have little or no control. Intergovernmental assistance is decided upon by the assisting government, and its use may carry numerous conditions that limit its flexibility.

Alternatively, governments may elect to borrow or contract for the provision of infrastructure and related services with the private sector. In every case, again, revenues to pay for the facility and services will need to be raised sooner or later, by one governmental level or another, or by private parties. When raised either through taxes or charges, these revenues will most likely represent a cost in foregone opportunities to spend funds on other things. It is important, therefore, at the outset of infrastructure policy and planning processes to focus on sound criteria for selecting the appropriate sources of funding.

Traditional versus Non-Traditional Funding Mechanisms to Consider. Governments have typically relied on a limited number of traditional revenue sources such as the property tax (at the local level) and various forms of sales taxes (general and selective) and income taxes (usually at the state level). In addition, governments have commonly financed utilities (water, sewer, waste disposal) through user charges based on consumption and/or availability of service. Increasing pressure on raising sufficient funds through traditional mechanisms, greater acceptance of the benefit principle, and technological advances have all combined to increase the use of non-traditional sources of revenues. These include developer exactions, special taxing districts, and innovative user charges, such as congestion fees and differential waste disposal fees. As technology for recording usage and levying requisite charges (such as in highway user charges) improves, other opportunities will present themselves to better attune charges to benefits.

Both traditional and non-traditional mechanisms should be considered to fill any funding gaps. The advantage of traditional funding mechanisms is that they are already in place and known—administratively, politically, and in terms of predictable productivity. However, they may be at their limits of effective use, economically, politically or legally. If that is the case, the non-traditional mechanisms may offer the only alternatives available for generating additional revenues. Experimentation with alternative funding mechanisms should be encouraged.

In any event, whether traditional or non-traditional mechanisms are used, there are limitations beyond which spending of any unit cannot go, no matter what sources or mechanisms are enlisted in the effort. The non-traditional sources, at least up to now, have accounted for less than 20 percent of infrastructure budgets.

Pay-as-You-Go Versus Borrowing. When making choices between using current revenues or deferring their collection until the future through borrowing or lease-purchase arrangements, there is the added dimension of timing of benefits and payments. The arguments between the advisability of borrowing versus using current revenues (pay-as-you-go) are well understood, but are especially pertinent in the case of infrastructure financing. Whereas reliance on current revenues saves on interest costs and conserves borrowing capacity, it frequently is not an effective option because it provides insufficient funds to pay the large costs of an infrastructure project. Perhaps more important is the desirability of aligning costs to the benefits received over time. Capital improvements produce their benefits over the span of many years, and it is logical that those who benefit from services over time should pay for them as they are used, especially when the users may vary from year to year.

State and local governments rely heavily on the capital markets to finance their infrastructure needs. While the realities of the federal budget place limits upon the encouragement that can be provided for such borrowings through tax preferences and securities regulation, there is an overriding obligation to make such access as economical and efficient as possible and to focus on the public benefits of the expenditures to be financed, as opposed to the particular legal form of the borrower or its obligation. Where, for example, there may be incidental or derivative benefits to private parties as a result of financing arrangements, these should not unduly inhibit the use of tax-exempt borrowing for facilities that benefit the general public. To the extent possible, broad program objectives should be set and the states and localities should have freedom from detailed restrictions in accomplishing them as best they can.

Guidelines for Determining Who Should Pay. When governments, as distinct from identifiable private parties, pay for infrastructure, the question is which governments should raise the revenues from their own sources. Local benefits should be paid for locally; regional or metropolitan benefits should be paid for at that level (generally through a special district); statewide benefits should be paid for by the state; and national benefits should be paid for by the federal government. Often, however, a single facility serves more than one clientele, as when a single highway accommodates local, regional, and long-distance trips. In such cases, costs should be shared.

When one government mandates another government to provide infrastructure, it may have responsibility to pay part or all of the costs. When the mandating government is simply regulating services that would be provided in any event, the need is not so compelling. But when the mandate is to meet a national need or involves substantial spillovers, then the need for assistance is compelling.

The key to determining who should pay, and how much, is a careful analysis of who benefits (both directly and indirectly), over what period of time, in what proportions they benefit, and how able they are to pay in proportion to their benefits (or to the costs they impose on others). Governments, like private parties, have differing abilities to pay that should be considered when costs are mandated on them, and when intergovernmental grants are distributed. Representative revenue capacity, tax ef-

fort, and expenditure needs (such as prepared by the U.S. Advisory Commission on Intergovernmental Relations) should be consulted when considering the ability of governments to pay a fair share of infrastructure costs. Governmental analyses also can be strengthened significantly by reference to the publications and evaluations of the credit rating agencies and municipal credit analysts who provide helpful guidance on the feasibility and reliability of various financing mechanisms, as well as the credit worthiness of governments that wish to employ them.

IV. INITIAL IMPLEMENTATION STEPS

The following five initial steps should be taken immediately to start establishing comprehensive financial planning and management processes in all of the federal government's infrastructure agencies:

- Issue governmentwide principles and guidelines for comprehensive financial planning in infrastructure agencies.
- Consider establishing financial advisory boards in each of the federal infrastructure agencies, using EPA's EFAB model.
- Remove legislative barriers.
- Fill knowledge gaps that impede sound financial planning.
- Build agency capacities to perform financial planning.
- Use private financial services.

Each of these initial steps is elaborated on below.

Issue Principles and Guidelines. The President should issue a single set of governmentwide financial planning and management principles, and establish a process for more fully developing, issuing, and overseeing guidelines that would require each federal infrastructure agency to continuously and comprehensively evaluate and improve the funding of its infrastructure objectives. These guidelines should show clearly how the President's principles should be applied to directly administered federal infrastructure programs, as well as federally assisted and federally regulated infrastructure programs.

Oversight responsibilities located in the Executive Office of the President should be exercised in consultation and cooperation with the federal infrastructure agencies. OMB should be given responsibility for compiling estimates of the cumulative federal, state, and local funding requirements resulting from federal infrastructure programs, policies, and mandates. There should be a re-examination of multi-year planning and budgeting at the federal level and the implementation of capital budgeting and advance funding concepts in the case of physical infrastructure spending.

Establish Financial Advisory Boards. The Environmental Financial Advisory Board (EFAB) in EPA has put EPA much more closely in touch with the financial realities, capacities, and opportunities faced by its state, local, and private partners, and has developed many significant insights into the means by which environmental funding might be improved. EFAB, with its balanced representation and strong track record, provides a sound model for other federal agencies to consider in helping to strengthen their own approaches to ensuring more effective, equitable, and efficient funding of their infrastructure responsibilities. The Waterways Users Board, attached to the Army Corps of Engineers, provides another model.

Remove Legislative Barriers. Federal tax and securities laws, as well as state laws, limit access to revenue sources and innovative financing mechanisms. As these barriers are encountered, consideration should be given to appropriate remedial legislation.

Fill Knowledge Gaps. The background materials identified and distributed to support the deliberations of this task force should be published and made available much more widely. In addition, an ongoing clearinghouse capable of continuing a similar service should be established. This service should include cataloguing, evaluating, and promoting the use of innovative funding mechanisms such as revolving loan funds, structured municipal bonds, and new types of infrastructure securities.

INTERNET and other means of timely information exchanges among federal infrastructure agencies and others should be established.

The creation of new knowledge also should be pursued. For example, better cost-estimating methodologies are needed to enable consideration of future funding needs of federal mandates. Better tracking of program performance, benefits, and costs also would be of invaluable assistance to financial planners. Pilot studies, under the "Government Performance and Results Act of 1993", should be used to begin creating such new knowledge.

Provide Training and Technical Assistance. For the most part, the type of financial planning being recommended by this task force is not now being done in the federal government or elsewhere. Thus, as new principles, guidelines, and knowledge are developed, and begin to be used, there will be a growing need to familiarize increasing numbers of people with them. To meet this need, both formal training and a variety of technical assistance opportunities should be offered. The various federal infrastructure agencies, in cooperation with each other and with OPM, should develop and offer appropriate courses, manuals, personnel exchanges, and other such opportunities.

Partnerships with established training institutions should be explored. For example, the Federal Executive Institute frequently develops special courses for agencies, and the *Intergovernmental Personnel Act* allows state and local officials to enroll in federal training courses. That same act also encourages intergovernmental personnel exchanges. Another type of opportunity is illustrated by the Western Infrastructure Leadership Institute led by the University of New Mexico and the University of Arizona.

Use Private Financial Services. Many private firms are highly skilled in techniques of financial analysis and planning, financial deal-making, and the creation of new financial instruments. Public bodies should use outside advisors to explore potential financing mechanisms to

achieve portions of their financial planning. Proposals for innovative financing mechanisms, as well as advice on ways to make the mechanics and techniques of the planning process itself more effective and efficient, are useful services that are needed and should be provided by experts who specialize in these concerns.

Innovate and Experiment with Financing Mechanisms. The arena of public capital finance is vigorous and dynamic. Experience has already been gained with financing mechanisms that pool and stretch resources by making municipal debt more attractive to existing investors and enabling it to attract new investors. Revolving loan funds, bond banks and pools, credit enhancements, and various forms of swaps and derivatives are devices to reshape and make more attractive the future cash flows that debt obligations represent. Proposals for securitizing streams of funds including those on grants and the establishment of new financial institutions in which there is a federal interest, and the development of infrastructure securities that are attractive to individual investors or, at the other end of the scale, to public pension systems are all examples of innovation. Some of these represent greater collaboration with the private sector as well. As has been noted above, financing infrastructure represents a broad scale of policy concerns and revenue-raising entities and techniques. Innovation is to be encouraged as is the testing of the efficiency, effectiveness, and equity of new and novel techniques in particular applications.