

STATE OF ALASKA

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June 16, 2000

The Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811

Re: HCS CSSB 192(FIN) am H -- Making and Amending Appropriations and Re-appropriations; and Making Appropriations under Art. IX, Sec. 17(c), Constitution of the State of Alaska, from the Constitutional Budget Reserve Fund
A.G. file no: 883-00-0095

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed HCS CSSB 192(FIN) am H, making and amending appropriations and reappropriations and making appropriations from the constitutional budget reserve fund.

General Comments

We note that expressions of intent, while few in this bill, are not binding and you may choose to follow them or to ignore them, although it has been routine to veto these expressions. However, as you know, there is litigation pending in the Alaska Supreme Court as to your veto authority of conditions in appropriations bills. *Alaska Legislative Council v. Knowles*, Supreme Ct. Nos. S-8842, S-8851. *Alaska Legislative Council v. Knowles* raises the issue of whether contingencies of appropriation items violate the confinement clause of art. II, sec. 13 of the Alaska Constitution ("Bills for appropriations shall be confined to appropriations."). Essentially, it has been the position of this office that a contingency is legal if it is closely related to the appropriation and is a legitimate qualification to an appropriation, as opposed to being legislation about an agency that is just "tacked-on" to an agency's appropriation.

Because this is a budget bill, we will not attempt to do a section-by-section analysis of this bill. Instead, we will discuss a few specific sections and items.

Legal and Other Significant Issues

Set out below are specific comments regarding sections in the bill that raise legal issues or are otherwise legally significant:

Section 1 of the Bill

Page 3, Department of Community and Economic Development (DCED): The DCED is appropriated a substantial amount, \$30,450,000 in federal funds, for capital energy projects. Additionally, we take note of the appropriation on line 30, of page 3, making a grant appropriation from the general fund to Arctic Power under AS 37.05.316 (grants to named recipient). As with similar appropriations made to Arctic Power in earlier years, notably 1995 in sec. 90 of SCS CSHB 268 (FIN) and in 1999 in sec. 13 of HCS CSSB 32 (FIN), the legal issue presented is whether the legislature is attempting to avoid using the procurement code in selecting Arctic Power to receive grant money. Of particular note this year, however, is that there is no purpose attached to the grant as to the use of the money. In last year's bill, the stated purpose of the grant to Arctic Power was for education efforts to open the Arctic National Wildlife Refuge (ANWR) for oil and gas development. We cautioned that when a private entity is delegated the responsibility to perform such a function, adequate safeguards to ensure that the public money is expended prudently for a public purpose should be established by the grantor state agency. That same advice applies here and care should be taken by the grantor state agency to ensure that the grantee's use of the money satisfies the public purpose clause.

Page 5, lines 13 - 14, and page 44, lines 17- 18, are inserts of intent language by the legislature stating its desire that these appropriation items (statewide electronic doorway and small business development program) be placed in the operating budget in future years. We have no legal concerns with this request. We note that it is not unusual to include capital with operating appropriations in the same bill. And, because the title of this bill is not specific to "capital" appropriations, it does not have descriptive title problems nor does it violate the confinement clause of art. II, sec. 13 of the Alaska Constitution.

Pages 6 - 12; the Department of Environmental Conservation is appropriated other money, \$3,342,300, for village safe water feasibility studies; federal funds (EPA) in the amount of \$23,716,969 for village safe water projects; and \$25,952,740 for village safe water projects that match the U.S. Department of Agriculture - Rural Development Agency, (U.S.D.A.-R.D.A.) funds. In each of the appropriations, the appropriations are further allocated to particular studies or projects. The amounts for the projects which are expressly set out as "allocations" are, according to AS 37.07.120(2), "a legislative guideline for expenditure by a state agency for a stated purpose within the total amount of an appropriation." Amounts can be moved or transferred between allocations without

violating the prohibition set out in AS 37.07.080(e). We note no legal problems with these appropriations.

There are also municipal water, sewer, and solid waste management matching grant projects - state appropriation of \$19,599,650.

Page 15, lines 32 - 33; page 16, lines 1-8: Contains a contingency that the appropriation for the Tudor Road combined support maintenance site clean-up (to Department of Military and Veterans Affairs) is

[c]ontingent upon the department entering into a Memorandum of Agreement with the Municipality of Anchorage to share the use of the Tudor Road Maintenance Site, \$200,000 is appropriated for the costs related to the transfer of this facility from the Department of Military and Veterans Affairs to the Department of Transportation and Public Facilities.

It is our understanding that this contingency was placed on the appropriation to force the Department of Transportation and Public Facilities to share the facility with Anchorage. As such, it is an attempt to micro-manage the executive branch with an arguably substantive requirement in an appropriation bill, thus violating the containment clause of art. II, sec. 13. It is not contingency language that we believe is legitimately related to the appropriation, and it therefore may be followed, ignored, or vetoed.

Page 18, lines 26 - 27: The legislature inserted intent language with respect to how the executive branch allocates a \$350,000 general fund appropriation to the Department of Public Safety for trooper law enforcement equipment (lines 24 - 25). The intent language reads: "It is the intent of the legislature that \$149,500 of this appropriation be used for the department's top priority and \$40,000 be used for breath alcohol analysis equipment." Again, it is our opinion that this is an improper attempt to allocate the use of the appropriation and micro-manage the discretionary powers of the executive branch. The language may be followed, ignored, or vetoed.

Pages 19 - 21: These are appropriations related to the Alaska Housing Finance Corporation (AHFC), and of particular note is the appropriation language for the Chugach View renovation, the Eyak Manor renovation, and the senior and statewide deferred maintenance and renovations. These appropriations are contingent on the passage of HB 281 or similar legislation (a bill authorizing the Alaska Housing Finance Corporation to issue bonds for the purpose of financing or facilitating the financing of public schools, facilities of the University of Alaska, and facilities for ports and harbors). SCS CSHB 281 (FIN) passed the legislature and is now ch. 130, SLA 2000; it will become law effective July 1, 2000. It continues to be our position that making an appropriation contingent on the passage of a substantive act may be violative of the

containment clause of art. II, sec. 13. Yet, while we express concern as to making an appropriation contingent on the passage of other legislation, we note that this contingency has been met and that you signed the bill into law.

Page 21, line 22 through page 44, line 5, contain appropriations to the Department of Transportation and Public Facilities, further allocated to projects throughout the state. The amounts for the projects which are expressly set out as "allocations" are, according to AS 37.07.120(2), "a legislative guideline for expenditure by a state agency for a stated purpose within the total amount of an appropriation." As stated above, amounts can be moved or transferred between allocations without violating the prohibition set out in AS 37.07.080(e).

And, page 45, line 4 through page 60, line 13, contain appropriations under the capital matching grant programs for municipalities and unincorporated communities (AS 37.06.010 - 37.06.090). All adequately satisfy public purpose requirements and we find no invalid conditions that warrant legal analysis.

Section 2 of the Bill

Section 2 of the bill begins on page 60, line 15, and sets out the funding by agency for the appropriations made in section 1 of the bill.

Section 3 of the Bill

Section 3 of the bill begins on page 65. Appropriation items of particular note in section 3 are as follows:

Sections 14 and 15, on page 67, line 28, through page 70, line 12, make appropriations for draws for the capital matching grant program individual accounts. Subsections 14(b) and 15(b) condition the appropriations on compliance "before July 1, 2001, with the requirements, other than deadlines, set out in As 37.06." As we advised in 1999, it may be that, rather than meaning to condition these appropriations, the legislature may merely be recognizing that deadlines imposed by law must be met in any case and the condition is a reminder that there are other requirements imposed by statute, AS 37.06, in order for the grant money to be released to the intended recipients. *See* 1999 Inf. Op. Att'y Gen. (June 28; 883-99-0061).

Section 18, page 70, subsec. (a) authorizes spending from the constitutional budget reserve fund (Alaska Const. art. IX, sec. 17), in amounts equal to the deposits in the budget reserve fund for fiscal year 2000 that were made from funds and accounts other than the operating general fund to repay appropriations from the budget reserve fund. This amount is appropriated from the budget reserve fund to the subfunds and accounts from which they were transferred. Subsection (b) provides that if the

unrestricted revenue available for appropriation in FY 2001 is insufficient to cover general fund appropriations, the amount necessary to balance revenue and general fund appropriations is appropriated to the general fund from the budget reserve fund. Under subsec. (c), \$125,000 is appropriated from the budget reserve fund to the Department of Revenue for the fiscal year ending June 30, 2001, for investment management fees. This part of the appropriation in sec. 18 is made contingent upon the passage of SB 312, or substantially similar legislation, relating to the special subaccount in the budget reserve fund. We again express concerns as to the legality of conditioning an appropriation on the passage of substantive legislation. However, we note that the contingency has been met. HCS SB 312 (FIN) am H passed the legislature and is now ch. 129, SLA 2000. We note no other legal concerns with this appropriation item. Section 19 appropriates \$3 million to Medicaid services for FY 2001. This is accomplished by first increasing the federal Temporary Assistance to Needy Families (TANF)-based funding appropriated to each of the specific programs identified in subsecs. (a) - (e), which provide services that may be paid for with federal TANF funding. Subsections (f) - (i) then reduce the general fund appropriations for each of those specified programs by an amount that equals \$3 million and reappropriates the general funds to Medicaid services for FY 2001. We note no legal problems with this appropriation.

Section 8, page 66, lines 18 - 29, of the bill provides that federal receipts, designated program receipts and receipts, of commercial fisheries test fishing operations that exceed the amounts appropriated by this Act are appropriated conditioned on compliance with the program review provisions of AS 37.07.080(h) (submission to Legislative Budget and Audit Committee). Subsection (b) provides that if federal receipts or other program receipts as defined in AS 37.05.146 exceed the estimates appropriated in this bill, state funds may be reduced by the excess if allowed under federal law. Finally, subsec. (c) provides that if federal receipts or other program receipts fall short of the estimates provided, then the appropriations are to be reduced by the amount of the shortfall in receipts.

Section 20, page 73, makes appropriations to the Department of Administration to cover current fiscal year shortfalls in the leasing budget, for retiree and long-term care plan costs, the unexpected Public Employees' Retirement Board election, the office of public advocacy (operating costs), and the public defender agency (operating costs). There are two separate appropriations to the office of public advocacy (subsecs. (f) and (h)), which are from two different funding sources -- the general fund and designated program receipts.

Section 36, page 80, lines 12 -29, are ratifies of departmental expenditures made in fiscal years 1998 and 1999 for the purpose of reversing the negative account balances in the Alaska state accounting system.

Sections 40 and 41 on pages 81 - 82 are appropriations to the Department of Environmental Conservation that are made contingent on the passage of substantive legislation, HB 418 and HB 304 (respectively), or a substantially similar bill. As noted earlier, conditioning an appropriation item on the passage of substantive legislation is, in our opinion, a violation of the confinement clause. But, again, we note that the conditions here have been met: SCS CSHB 418(FIN) am S (reengrossed) passed and is now ch. 101, SLA 2000, and SCS CSHB 304(FIN) passed and is now ch. 61, SLA 2000.

Section 47, pages 83 - 85, make miscellaneous lapse reappropriations. We note no legal or constitutional problems with this section of the bill.

Section 70, pages 97 - 98, appropriates a portion of the earnings on the money paid by Exxon to the state as restitution in the federal criminal case *United States v. Exxon Shipping Company and Exxon Corporation*, Case No. A90-015 CR. The use of these earnings, like the criminal restitution monies, is limited by the terms of the judgment in that case to restoration projects in the State of Alaska relating to the Exxon Valdez oil spill. Section 70 makes two appropriations. Subsection (b) appropriates \$50,000 to purchase land to be used for placement of a range light. The installation of this navigation safety aid will aid in the prevention of oil spills in Cook Inlet and will thus help to restore or enhance natural resources lost or diminished by the oil spill by preserving the habitat upon which those resources or services depend. The appropriation in subsec. (b) is consistent with the requirements of the criminal judgment.

Subsection (c) of sec. 70 appropriates the remaining unappropriated and unobligated earnings accrued on or before June 30, 2000, up to \$100,000, to the Department of Fish and Game to implement a project, in cooperation with the Alaska SeaLife Center and the Department of Environmental Conservation, to compile and organize scientific information pertaining to the North Pacific marine ecosystem that relates to the decline in Steller sea lions and Pacific herring. Although Steller sea lions are not classified by the Exxon Valdez Oil Spill Trustee Council as a species injured by the oil spill, that is not fatal to this appropriation. That is because the focus of the appropriation is on the coordination of scientific information pertaining to the North Pacific marine ecosystem that was extensively damaged by the oil spill. Given the complex interactions among species in the North Pacific, it is clear that information pertaining to that ecosystem will "relate" to our understanding of declines in Steller sea lions and Pacific herring. So long as the focus of the project is on the coordination of information relating to the ecosystem as a whole, it may incidentally "relate" to Steller sea lions without running afoul of the terms of the restitution order. We understand that the Department of Fish and Game intends to use the appropriation in subsection (c), in conjunction with the Department of Environmental Conservation, to coordinate the efforts of the Exxon Valdez Oil Spill Trustee Council, the Alaska SeaLife Center, and other entities in obtaining information related to the health of the North Pacific marine

ecosystem and its component species. This intended use is consistent with the terms of the appropriation and the restitution judgment.

The last issue that arises under sec. 70 is the lapse date for each appropriation. Section 72(c) makes it clear that subsec. (b) of section 70 lapses on June 30, 2001. No specific lapse date is provided for subsec. (c) of section 70 and it will lapse under the general lapse provisions of AS 37.25.020.

Sections 3 - 7, pages 65 - 66; secs. 9 - 13, pages 66 - 67; secs. 16 and 17, page 70; secs. 21 - 35, pages 74 - 80; and secs. 37, 38, 39, and 42 - 69, pages 74 - 97, make miscellaneous appropriations, reappropriations, and lapse extensions. We note no legal or constitutional problems with these sections of the bill. All adequately satisfy public purpose requirements and we find no invalid conditions that warrant legal analysis.

Finally, please be advised it is not always possible to identify or comment on all legal issues in an appropriations bill. However, we will assist the agencies throughout the year in interpreting and applying the provisions of this bill, as well as related legislation, to make sure that appropriations are implemented consistent with enabling statutes and valid legislative intent.

We note no other legal or constitutional problems with this bill.

Sincerely,

Bruce M. Botelho
Attorney General

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