

June 17, 1998

The Honorable Tony Knowles
Governor
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HCS CSSB 231(FIN) am H
(brf sup maj pfld S) -- Relating to
the FY 99 Capital Budget
A.G. file no: 883-98-0135

Dear Governor Knowles:

At the request of your Legislative Director, Pat Pourchot, we have reviewed HCS CSSB 231 (FIN) am H (brf sup maj pfld S), an Act making and amending capital, supplemental, and other appropriations. As the title indicates, this bill carries the capital improvement budget for the upcoming fiscal year and supplemental appropriations for the current fiscal year. Comments made in our review of the fiscal year 1999 operating budget bill (HB 325; our file no. 883-98-0127) concerning exercise of the line item veto in the wake of *Alaska Legislative Council v. Knowles*, are applicable to this bill as well and will not be repeated in this letter. Set out below are legal issues to consider in taking action on this bill.

Constitutional Budget Reserve Fund

Similar to SB 17, this bill has a serious legal issue concerning whether sec. 42 of the bill, approving amounts from the Constitutional Budget Reserve Fund (CBRF), was passed while the legislature was legally convened in regular session. According to the time recorded on vote tabulation sheets for other votes taken at or near the time of the vote on sec. 42, it is possible that the vote occurred after 12:01 a.m. on May 13. When the actual vote on sec. 42 was taken, the voting machine malfunctioned, thus causing the Senate to take a roll call vote. The vote on sec. 42 took place immediately before the vote taken on SB 17.¹ Recall that we concluded the evidence was inconclusive concerning when the vote was taken on SB 17. *See* our file no. 883-98-0079 (pre-enactment bill review of SB 17 am H). The House and Senate journals record the vote on sec. 42 as

¹ When the bill was under consideration in the Senate, sec. 42 was numbered as •sec. 43. After another section proposing to use the CBRF as a funding source for computer system upgrades was not approved, the sections of the bill were renumbered to read as presently stated in the bill.

having been taken before the expiration of the legislature. A videotape shows that the vote was taken after expiration of the legislature, but there is evidence that the clock depicted on the tape did not agree with the time displayed on the vote tally sheets. It is also possible that the vote on approval of sec. 42 was started before 12:01 a.m. and could be determined valid as an action that relates back to the start of the vote even though concluded seconds after the expiration of the final day of the regular session. Finally, the bill transmitted to you was certified as passed in accordance with the Alaska Constitution by the presiding officers of the House and Senate.

The Alaska Supreme Court has not yet decided a case on point concerning the validity of an action taken after 12:01 a.m. of the day after the final day of the regular session.² We predict that the court would consider evidence relevant to the question at hand other than the enrolled bill and the journals. This approach is broadly described as the •extrinsic evidence rule• which

accords to the enrolled bill a prima facie presumption of validity but permits attack by •clear, satisfactory, and convincing evidence• establishing that the constitutional requirements which the court deems mandatory have not been met.

1 Sutherland Statutory Construction • 15.06 (5th Ed.) (footnote omitted).

Other courts limit the field of evidence to the journal or other public records showing when a bill was passed by the legislature. In our opinion, clear, satisfactory, or convincing evidence is not available to show that sec. 42 was passed after expiration of the legislature and for this reason a court would find that it was validly approved by the legislature as provided in the Alaska Constitution.

² When presented with a similar question, the Alaska Supreme Court avoided the issue by finding that the method used for counting the 120 consecutive calendar days resulted in a session of 121 days in duration. *Alaska Christian Bible Inst. v. State*, 772 P.2d 1079, 1080-81 (Alaska 1989).

Another serious issue raised in this bill is the effect of the •not to exceed• amount set for the draw from the CBRF. According to sec. 42(b), the draw may not exceed \$700,000,001. If the price of oil stays at or near \$10 per barrel, it is certain that the amount necessary to balance revenue and appropriations will exceed the amount made available from the CBRF by this section. In that case, fully expending the fiscal year 1999 appropriations may cause a deficit. Options for preventing this may be limited and painful. The next legislature could be presented with a request for a supplemental appropriation from the CBRF or the existing legislature could be called to special session to amend the cap to cover any loss of revenue that was not anticipated. A third option would be to strictly control the rate of obligation of existing appropriations until it becomes clear whether oil prices will increase or remain at the present level. Finally, you could veto substantial amounts from the appropriation bills before you in order to balance revenue and expenditure authority.³

Set out below are other items that merit your consideration:

Page 3, lines 26 - 30: This item, for an appraisal of redesignated public school land, is a measure that was vetoed last session. The item would provide financing necessary to determine whether the dedication of state receipts authorized in AS 37.14.150 now equals or exceeds the value of the school land taken from trust status. Yet to be decided is whether the dedication of these receipts can continue if the dedication equals or exceeds the value of the former public school trust land.

Page 4, lines 5 - 9: This item is a grant appropriation through the Department of Health and Social Services to the Fairbanks Native Association. The purpose of the grant is to purchase a •facility for women and children.• This statement of purpose is extremely broad, making it difficult to determine whether the grant will be expended for a public purpose. The grantor agency should prepare a grant agreement that clearly describes the purpose of the facility.

Page 27, lines 6 - 10: Section 90 of the bill reappropriates an earlier fiscal year appropriation for legislative committees for upcoming fiscal year expenditures of other legislative committees. It caught our attention because the legislative council uses its statutory power to reallocate unused spending authority, rather than reappropriate existing balances of prior-year appropriations. The intended purpose for this reappropriation should be inquired into.

Page 33, lines 14 - 18: Section 117 of the bill redesignates a disaster loan made to the Matanuska-Susitna Borough as a grant. There is some question whether such an action is germane to an appropriation bill. In a light most favorable to the validity of the section, it may be possible to consider the change to be the equivalent of an appropriation of money to the borough. An additional problem is that the borough has further loaned out some of the amounts it received and a conversion of the balance owed could result in a windfall to the borough. We understand that the borough intends

³ On the point made in the final option, it is important to remember that nothing in the state constitution prohibits appropriating more revenue than is anticipated for the upcoming fiscal year. However, there would be a serious legal issue raised if, in using this excess authorization, more was spent than received. This kind of imbalance has occurred in the past and has been remedied in part by delaying expenditures under multi-year appropriations.

to convert any subloans to grants as well, in order to avoid any possibility that it could profit from the redesignation of the state disaster loan. Based on information supplied by the Department of Military and Veterans• Affairs, the uncommitted part of the loan amounts to \$115,000. You may wish to consider reducing the amount of the loan forgiveness to that total amount. You would do this by striking •the balance owed on the effective date of this section• and inserting \$115,000 in its place. If this item is indeed an appropriation, it is then subject to your power to strike or reduce it.

Page 33, line 31 - page 34, line 5: Section 119 of the bill makes a reappropriation of a prior-year appropriation for senior citizen housing. The recipient is the Alaska Evangelical Fellowship. This appropriation raises an issue under art. I, sec. 4, of the Alaska Constitution, which provides: •No law shall be made respecting an establishment of religion. . . .• The question for the grant administrator is whether the grantee will use the grant money to promote or give a preferred position based on the religious beliefs of the individual members or beneficiaries of the fellowship. *See Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963) (no establishment of religion where city leased hospital to church where services were dispensed without regard to race, color, or creed). If that would be the result, then the grant is for an invalid purpose and should not be implemented.

Page 34, line 26 - page 36, line 11: These items consist of several hundred thousand dollars• worth of grants to private non-profit corporations for presumably public purposes. It will be incumbent upon the grantor agencies to make certain that the grant agreement adequately specifies the public purpose for which the grant is made and contains sufficient provisions to safeguard the continued use of the assets purchased with grant money for a public purpose.

Page 42, lines 13 - 21: This a non-dollar item that encourages the Department of Environmental Conservation to administer the hazardous substance clean-up program with •understanding and reasonableness.• The item does not appear to have a binding effect on the operations of the agency -- but expresses a •nice• sentiment.

Page 42, lines 26 - 28: This item explains that a prior-year balance for administration expenses is assumed to be available to combine with the amount appropriated for fiscal year 1999 to reach a certain level of funding. We presume that the prior-year balance is available after the close of the fiscal year, because this item will not serve to amend a lapse date to the contrary.

Page 53, line 19: The item for •royalty oil price reopeners• seems misplaced in a section devoted to capital projects. It is difficult to comprehend how an amount to finance the cost of establishing royalty values for oil produced from state leases would qualify as an appropriation to acquire a state asset. Perhaps it is intended that this item be considered a multi-year appropriation.

Page 55, line 24: The allocation for •program formulation• within the Harbor Program BRU seems to be for an operating purpose and is out of place in a capital appropriation section.

Page 57, lines 12 - 20: This item is worded as a condition to a capital appropriation for the reconstruction of streets in Anchorage. The second part of the item appears to exceed the normal boundaries for a condition. It attempts to direct the department's execution of the project by setting out specifications in the bill. The confinement requirement of art. II, sec. 13, of the Alaska

Constitution would probably preclude the enforcement of this provision. This part of the item could be vetoed or ignored as a non-binding provision.

Page 87, lines 26 and 27: This item for •small business development programs• under the University of Alaska does not appear to be for a capital project, nor does the item set out on page 88, lines 4 and 5, •Student Housing Bond Retirement•.

Section 133 of the bill sets out the various capital projects to be financed using the proceeds of bonds issued by the Alaska Housing Finance Corporation (AHFC). The authorization for these bonds is provided in SB 360. It is arguable whether the legislature needed to appropriate bond proceeds for these projects in light of *Thomas v. Rosen*, 569 P.2d 793 (Alaska 1977). We advised that there should be specific appropriations because the bonds were not state general obligation bonds and therefore not subject to ratification by the voters as were the bonds in *Thomas*. Without the check of a ratification vote, the governor's veto power would be the sole limitation on the legislature's power of appropriation. After all, this is basically a scheme to use the credit of AHFC to raise revenue to pay for public projects. This revenue is available to the state and in that case should be appropriated before expenditure. We recommend that the Department of Revenue closely monitor the effects of using a public corporation as a conduit for this revenue-generating activity, in order to determine whether it is in the best interests of the state to finance capital projects in this manner. There may be greater benefits and accountability derived from using a revenue stream from AHFC to support the issuance of certificates of participation by state agencies.

Finally, the comments made in our review of the operating budget bill concerning the statement of objections to items stricken or reduced in that bill apply to similar actions taken on this bill as well. It is not always possible to identify all legal issues raised in a bill of this complexity in the time available for our review. However, we will assist the agencies throughout the year in interpreting and applying the provisions of the bill to make sure that appropriations are implemented consistent with enabling statutes and valid legislative intent.

Sincerely,

Bruce M. Botelho
Attorney General

BMB:JLB:jn