

# STATE OF ALASKA

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June 28, 2002

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

Re: HCS CSSB 2006(FIN) am H -- making and amending appropriations and reappropriations and making appropriations under art. IX, sec. 17(c), Constitution of the State of Alaska, from the constitutional budget reserve fund  
Our file No. 883-02-0058

Dear Governor Knowles:

At the request of your legislative office, we have reviewed HCS CSSB 2006(FIN) am H, making and amending appropriations and reappropriations and making and amending appropriations from the constitutional budget reserve fund.

### **General Comments**

We have several comments on the bill overall. First, we note that expressions of legislative intent accompanying an appropriation item, while of limited number in this bill, are non-binding on the executive branch; you may choose to follow the intent language accompanying an appropriation item or ignore it. However, please be advised that expressions of intent may no longer be vetoed by you as a line item veto separate

from the appropriation itself.<sup>1</sup> The legislature may use “minimum necessary” language to explain what purpose the legislature intends to permit for the appropriation. *Alaska Legislative Council*, 21 P.3d at 377 (explain how, when, or on what the money is to be spent). We will discuss particular expressions of intent that need analysis as to whether they violate the confinement clause by improperly conditioning an appropriation (*i.e.*, using qualifying language that is more than minimally necessary; trying to administer the program of expenditure; enacting law or amending existing law; extending the intent language beyond the life of the appropriation; or the intent is not germane to an appropriations bill).<sup>2</sup>

We will also set out our specific comments regarding sections in the bill that raise other particular legal issues or are otherwise significant.

### **Sectional Analysis**

Section 1 of the bill, pages 1 - 88, set out the capital appropriations for fiscal year 2003, for the executive branch departments and the court system. The appropriations have an effective date of July 1, 2002 as provided for in section 102 of the bill.

Section 1, page 4, line 5 - page 20, line 1, sets out the appropriations for grants to municipalities (AS 37.05.315); on page 20, line 2 - page 26, line 26, the named recipient grants (AS 37.05.315); and on page 20, line 27 - page 27, line 17, the grants to unincorporated communities (AS 37.05.317).

Section 1, page 28, line 24 - page 38, line 9, are appropriations to the Department of Environmental Conservation to fund various projects including the Village Safe Water Feasibility Studies, Village Safe Water Projects, and Municipal Water, Sewer, and Solid Waste Matching Grant Projects.

On page 40, line 4 - 6, is an appropriation of \$10,250,000 to the governor's office for the Pacific Coastal Salmon Recovery Fund/Pacific Salmon Treaty.

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<sup>1</sup> *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001) (expressions of legislative intent do not constitute "items" subject to governor's veto power under art. II, sec. 15 of the Alaska Constitution).

<sup>2</sup> These five criteria are referred to as “the *Hammond* factors” in *Alaska Legislative Council v. Knowles*. 21 P.3d at 377-79. These five factors used to analyze whether intent language violates the confinement clause were first presented in the superior court decision in *Alaska State Legislature v. Hammond*, Case No. 1JU-80-1163 (Alaska Super., May 25, 1983).

Page 46, line 7 - page 48, line 6, sets out the appropriations for Alaska Housing Finance Corporation (AHFC) projects. The legislature includes intent language beginning at page 46, line 7, stating its intent that AHFC issue bonds to finance the projects, in an amount not to exceed \$60,250,000, for a term to maturity of not less than fiscal year 2012 in accordance with appropriations of the bond proceeds. Further, the legislature applies AS 18.56.110 - 18.56.190 to the bonds, except that debt service is not to begin earlier than July 1, 2003. We believe this intent language satisfies the *Hammond* factors and is not contrary to the confinement clause (art. II, sec. 13 of the Alaska Constitution).

On page 48, line 8 - page 71, line 15, are the appropriations and allocations to the Department of Transportation and Public Facilities.

Sections 2 and 3 of the bill, found on pages 89 - 94, provide summaries and totals by funding source and agency as to the appropriations made in section 1 of the bill. Except as may be discussed in the analysis of other sections of the bill, we note no significant legal issues with respect to the appropriations in sections 1 - 3.

In section 6, page 95, lines 12 - 17 of the bill, the legislature states that \$20,149,500 is anticipated to be declared available by the Alaska Industrial Development and Export Authority (AIDEA) for appropriation as the fiscal year 2003 dividend from the unrestricted balance in AIDEA's revolving fund and it is appropriated in sections 1 - 7 of the bill. A problem arises affecting this appropriation, as well as CSSHB 403 (the operating appropriation bill), because the legislature has overallocated the \$20,149,500 AIDEA dividend by using it as the source for funding for a total of \$21,149,500 of spending authorizations. The legislature in the two appropriation bills has left a \$1,000,000 funding shortfall for authorized expenditures. In CSSB 2006(FIN) am H, the legislature uses the AIDEA dividend as the funding source for \$20,149,500 of capital appropriations. In section 6 of the bill, the legislature appropriates the entire \$20,149,500 AIDEA dividend under sections 1 and 7 of the bill. Under section 1 of the bill, the AIDEA dividend is the funding source for \$5,149,500 appropriated to the Department of Transportation and Public Facilities (*see, e.g.*, page 92, line 5). Under section 7(a) of this bill, the AIDEA dividend is the funding source for \$13,100,000 appropriated to the municipal capital project matching grant fund (AS 37.06.010(b)) and is additionally the funding source for \$1,900,000 appropriated to the unincorporated community capital project matching grant fund (AS 37.06.020(b)). In the operating budget bill, CSSHB 403, the legislature uses the AIDEA dividend as the funding source for \$1,000,000 appropriated to the Department of Fish and Game for the Subsistence Division (*see* page 49, line 20, and page 58, lines 32 - 33, of CSSHB 403). In combination, the legislature in these two appropriation bills authorizes the expenditure of \$1,000,000 more than the total amount available from the AIDEA dividend-funding source.

Curing this legislative overallocation of the AIDEA dividend will require either reducing by a total of \$1,000,000 the amount of authorized expenditures that use the AIDEA dividend as a funding source or identifying a valid alternative funding source for the \$1,000,000 shortfall. AIDEA could not increase its dividend to meet the funding shortfall. Under the statutory AIDEA dividend program (AS 44.88.088), AIDEA is to provide to the state a dividend of between 25 percent and 50 percent of AIDEA's net income for the base fiscal year. The AIDEA board already has declared the maximum allowed dividend for fiscal year 2003 (50 percent of AIDEA's net income) in the amount of \$20,149,500.

Section 8, page 96, line 3 - page 98, line 31 of the bill, makes appropriations for draws from the capital matching grant programs (Municipalities - AS 37.06.010) and Unincorporated Communities - AS 37.06.020). These appropriations are conditioned on compliance "before July 1, 2003, with the requirements, other than deadlines, set out in AS 37.06." The legislature cannot amend general law by insertion of a condition in an appropriation bill. However, as opined by this office in 1995,<sup>3</sup> it may be that the legislature is merely recognizing that deadlines imposed by law must be met in any case and the condition is referring to other requirements imposed by AS 37.06. *Id.*

Section 18, page 103, lines 8 - 22 of the bill, provides that federal receipts, designated program receipts, and receipts of commercial fisheries test fishing operations, receipts of the University of Alaska, corporate receipts of the Alaska Aerospace Development Corporation, and program receipts of the Alaska Science and Technology Foundation that exceed the amounts appropriated by this bill 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, subsection (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 19, page 103, line 23 - page 105, line 23 of the bill, sets out legislative intent and makes appropriations to various agencies in furtherance of establishing homeland security measures in light of the tragic events of September 11, 2001.

Section 23, page 107, lines 9 - 20 of the bill, redesignates as grants the balance owed on June 30, 2002, by the Middle Kuskokwim Electric Cooperative to the power project fund on two loans from the power project fund for electrical service extension,

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<sup>3</sup> See 1995 Inf. Op. Att'y Gen. (June 15; 883-95-0113).

powerhouse expansion, and power plant and distribution system construction. The balance owed as of June 30, 2002, for these two loans is approximately \$498,285. 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 Middle Kuskokwim Electric Cooperative. *See* 1998 Inf. Op. Att'y Gen. at 3 (June 17; 883-98-0135).

Section 30, page 108, line 26 - page 109, line 12 of the bill, is an appropriation of \$18,250,000 in federal receipts that the state receives for the implementation of the Pacific Salmon Treaty of 1999. The money is appropriated to the Office of the Governor for salmon habitat restoration, research, and construction of facilities east of Cape Suckling. The legislature further provides in subsection (a) that, of this amount, the sum of \$11,000,000 shall be used for projects reviewed by "selected by the stakeholders' panel to provide economic opportunities for salmon fishermen east of Cape Suckling, including \$650,000 for the Joint Legislative Salmon Industry Task Force to conduct statewide town hall meetings in conjunction with the United Fishermen of Alaska." This delegation to the stakeholders' panel raises concerns as to violations of the delegation doctrine by delegating fiscal and public policy to a non-governmental group. The stakeholders' panel is not created by statute nor covered by any statutory guidelines, nor is it subject to the Alaska Administrative Procedure Act. It is an informal panel selected by the state and not a formal body that is part of the Pacific Salmon Treaty of 1999 process. Due to its informal creation, care should be taken by the Office of the Governor that the expenditure of the money resulting from reviews of the panel complies with the public purpose provisions of the state constitution as well as any restrictions placed on the use of the money provided by federal law and the Pacific Salmon Treaty.

Section 33, page 110, lines 18 - 23 of the bill appropriates money received by the state as its rebate share from the Trans-Alaska Pipeline Liability Fund, and the earnings on that money, to the Alaska Energy Authority to be expended on remediation of bulk fuel facilities in conformance with federal requirements. This appropriation is identical in amount and substantially similar in scope to an appropriation in last year's budget. While the appropriation and purpose are legally permissible, there will be no further rebates from the Trans-Alaska Pipeline Liability Fund this year or in future years and thus the appropriation is meaningless.

Section 39(a), page 114, lines 7 - 14 of the bill, amends an appropriation from fiscal year 2001 (sec. 89, ch. 61, SLA 2001) by clarifying that money received by the commercial passenger vessel environmental compliance fund can be used to pay for costs incurred by the Department of Environmental Conservation in fiscal years 2001 and 2002 for the regulation of cruise ships under the 2001 Cruise Ship Environmental Oversight Legislation. The language of the appropriation indicates that it may be used to pay for oversight under the memorandum of understanding, and that memorandum, in turn,

references oversight activities under the commercial passenger vessel environmental compliance program.

Section 42, page 115, lines 31 - page 116, line 1 of the bill, makes an appropriation for a coastal impact assistance program. The appropriation is not set to take effect until January 1, 2003. There is an issue as to whether grants could be made under the program before the effective date of the appropriation. We do not perceive a problem with entering into grant agreements with qualified recipients before the grantor agency can expend the appropriation since the appropriation has a definite effective date. It is also possible to authorize the grantee to perform according to the terms of the agreement so long as it is clear that there will be no reimbursement until after January 1, 2003, or for activities that occurred before the notice to proceed.

Sections 47 (b) and (c), page 117, line 27 - page 118, line 9 of the bill, relate to efforts by the Department of Natural Resources to value public school trust land. The trial court in *Kasayulie v. State*, Case No. 3AN-97-3782, found that the state breached the public school trust when public school trust lands were legislatively designated general grant lands in 1978. This litigation also involves matters related to construction and maintenance of school facilities in rural Alaska. The trial court ordered that a valuation of all public school trust lands be completed before the trial court would address the appropriate remedy in either the public school trust or rural school facilities sides of the case. The Department of Natural Resources determined that appropriations previously made available were inadequate to complete the valuation effort.

Section 47(c) of the bill appropriates additional money to complete the public school trust land valuation effort for fiscal years 2002, 2003, and 2004. Section 47(b) of the bill amends prior legislation reappropriating funds for the land valuation effort, so that the funding will be available through the fiscal year ending June 30, 2004. The bill makes these appropriations from the public school trust fund (AS 37.14.110), a funding source that the trial court in *Kasayulie v. State* found appropriate for the public school trust land valuation effort. We see no legal problems with these appropriations.

Section 54, page 121, line 26 - page 55, line 23 of the bill, is an appropriation of \$1,000,000 from the general fund to the Department of Community and Economic Development for a no-interest loan to the City of Delta Junction to pay costs of a settlement agreement from litigation regarding the establishment of a private prison at Fort Greeley. Under section 54(b), the appropriation is contingent upon an agreement by the City of Delta Junction to repay the no-interest loan in annual payments of \$50,000 from state-funded receipts paid to the city as municipal assistance under AS 29.60. Under section 54(c) of the bill, any balance remaining on the loan provided for in section 54(b) will convert to a grant under AS 37.05.315 provided a borough forms in the area that encompasses the City of Delta Junction before the loan is repaid in full. The

appropriation made in section 54 of the bill poses several legal problems. This appropriation is clearly for a preexisting debt - a debt that was voluntarily agreed to by the City of Delta Junction when it entered into the settlement agreement<sup>4</sup> in *Allvest, Inc. and Delta Corrections Group v. City of Delta Junction*, Case No. 4FA-99-2173 CI. The State of Alaska was not a party to this lawsuit and had no involvement or oversight of the resulting settlement. Under the settlement agreement, Delta Junction agreed to pay the plaintiffs (who are private entities) over \$1,000,000.<sup>5</sup> The settlement agreement was secured with a series of revenue anticipation notes issued by the City of Delta Junction.<sup>6</sup> The revenue anticipation notes are deemed enforceable in accordance with their terms. The appropriation made in section 54(b) of the bill would result in the use of public money from the state's general fund to pay a substantial portion of the city's debt under the settlement agreement. Use of state money to pay a litigation-based settlement, in which the state was not a party, raises significant legal questions as to whether the expenditure would be for a public purpose. The retirement of a preexisting debt confers no benefit on the public. *See* 1995 Inf. Op. Att'y Gen. (June 15; 883-96-0113). And, failure to confer a public benefit violates the public purpose doctrine set out in art. IX, section 6 of the Alaska Constitution.<sup>7</sup> *Id.* When the purpose of an expenditure is to retire a preexisting debt, there is no new consideration passing to the public. It is also troublesome that state money is being sought to pay for a debt for which revenue anticipation notes were issued by the City of Delta Junction to secure the same debt. Additionally, the contingency provided for in section 54(c) - which allows the loan to be converted to a grant if a borough forms in the area - goes beyond this appropriation bill and, as such, it may run afoul of the confinement clause in art. II, sec. 13 of the Alaska Constitution.<sup>8</sup> There is also concern the contingency, that a borough be formed in the area so that it "encompasses the City of Delta Junction," may constitute a local or special act under art. II, sec. 19 of the Alaska Constitution. *See Walters v. Cease*, 394 P.2d 670

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<sup>4</sup> *See* City of Delta Junction, Resolution 2001-12 (April 14, 2001).

<sup>5</sup> Under the settlement agreement attached to the city's resolution, it appears that the City of Delta Junction agreed to be responsible for paying plaintiffs up to \$2,500,000.

<sup>6</sup> \$2,000,000 was acknowledged to be contingently secured and the full faith and credit of the city given for payment of those obligations; \$1,500,000 was a non-recourse instrument, not secured with the full faith and credit of the city.

<sup>7</sup> Art. IX, sec. 6 of the Alaska Constitution reads: "No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."

<sup>8</sup> Art. II, sec. 13, of the Alaska Constitution reads in relevant part: "Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations."

(Alaska 1964) (mandatory borough act, ch. 52, SLA 1963, constituted local and special legislation and was void).

Section 56, page 122, line 24 - page 123, line 12 of the bill, appropriates 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 uses of these earnings, like the criminal restitution monies, are 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 56 of the bill makes a single appropriation. Subsection (b) appropriates the remaining unappropriated and unobligated earnings accrued during the fiscal year ending June 30, 2002, not to exceed \$350,000, to the Department of Natural Resources to develop access to recreational facilities at the Kasilof River State Recreation Site. The appropriation in subsection (b) is consistent with the requirements of the criminal judgment noted above.

It is important to note that the appropriation in section 56 is only for income accrued during the current fiscal year and thus the income accrued before this fiscal year must remain in the *Exxon Valdez* oil spill restoration fund. In addition, although the appropriation specifically states that it is subject to an appropriation made in section 1 of HCS CSSB 2006(FIN) am H, we have been unable to locate such an appropriation. The appropriation in section 56 lapses under the general lapse provisions of AS 37.25.020.

Section 85, page 137, line 5 - 25 of the bill, amends an appropriation made in the fiscal year 2001 budget bill (sec. 2, ch. 135, SLA 2000). The original appropriation in fiscal year 2000 was for \$120,000 for a risk assessment for Cook Inlet and was funded from the Alyeska Settlement Fund. Although the purpose was laudable, it could not be legally funded from that source. This amendment corrects that problem by changing the source to the *Exxon Valdez* oil spill restoration fund that may legally be used for this purpose. The amended appropriation also focuses more narrowly on the specific purpose for which the money was used, a Cook Inlet Pipeline Risk Assessment Forum. Finally, the amendment reduces the amount of the appropriation to reflect the costs actually incurred, \$12,085.

Section 86 (a), page 137, lines 26 - 30 of the bill, is a contingent repealer of an appropriation made in the operating budget bill (CCS HB 403), subject to CCSHB 403 being enacted into law. Subsection (b) is an amendment to an appropriation in CCSHB 403 that is also contingent on the enactment of the operating budget bill. Therefore, the appropriations noted in these sections should be carefully compared with the operating budget to ensure the correct amount is noted by the affected agencies.

Section 92, page 139, line 27 - page 140, line 6 of the bill, which amends section 26 of the operating budget (CCSHB 403) appropriating \$14,883,770 from the



power cost equalization (PCE) endowment fund to the power cost equalization and rural electric capitalization fund, is contingent on enactment of section 26 of the operating budget. If section 26 of the operating budget is vetoed, section 92 will have no effect and there will be no appropriation into the power cost equalization and rural electric capitalization fund for PCE payments.

There is an issue as to what should be the fiscal year attributed to the balance of the reappropriation items set out in this bill. Substantially all of the provisions are given a June 30 effective date in section 99 of the bill. In our opinion, if the bill is signed into law before the end of fiscal year 2002, these items should be booked as fiscal year 2002 appropriations and, if they are for operating purposes, will have a lapse date of June 30, 2003. As a consequence of this interpretation, the fiscal year 2002 unobligated balance identified for reappropriation will not lapse according to law.

To the extent that fiscal year 2002 agency receipts are appropriated as a source for a fiscal year 2003 appropriation, we believe that the above-noted accounting procedure proposed is probably valid. Finance would reserve the fiscal year 2002 receipts in anticipation of the 2003 appropriation and carry forward into the succeeding fiscal year the reserved balance. We have not identified any limitation on the legislature's power to establish a source for an appropriation so long as the receipts accrue within the time span of the existence of the Twenty-second Legislature.

It is problematic that certain of these appropriations take effect at the beginning of fiscal year 2003. However, the legislature was aware of the availability of additional receipts before the beginning of the new fiscal year and was also aware that the true amount of the surplus would not be known until the close out for fiscal year 2002, which occurs on August 31 after the beginning of fiscal year 2003. This practice may frustrate the intent of art. IX, sec. 17(d) of the Alaska Constitution. It could be argued that the director's reservation is similar to the restrictions found in *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994) to be an improper attempt to define "amount available for appropriation" provided in art. IX, sec. 17(d) too restrictively. However, in this instance, the prior year receipts are not available because they are appropriated by the legislature.

Section 94, page 140, lines 12 - 27 of the bill, authorizes spending from the constitutional budget reserve fund (Alaska Const., art. IX, sec. 17). Subsection (a) provides that deposits in the fund for fiscal year 2002 that were made from subfunds and accounts other than the operating general fund to repay appropriations from the budget reserve fund are appropriated from the budget reserve fund to the subfunds and accounts from which they were transferred. Subsection (b) authorizes spending from the fund if the unrestricted state revenue available for appropriation for fiscal year 2003 is insufficient to cover general fund appropriations, with an amount necessary to balance revenue and general fund appropriations to the general fund from the budget reserve

fund. Subsection (c) appropriates \$125,000 from the budget reserve fund to the Department of Revenue for fiscal year ending June 30, 2003, for investment management fees for the budget reserve fund.

Section 95 of the bill provides for certain provisions of the act to be retroactive: Sections 35(d), 42(b) and (c), section 50(d)(1) and (d)(2), section 85(c), as well as section 1, ch. 5, SLA 2002 (CSHB 334 (FIN) - grant to Arctic Power under AS 37.05.316).

Finally, please be advised it is not always possible to identify or comment on all legal issues in a bill of this complexity. 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. Additionally, we will assist as needed regarding the numerous retroactive provisions, effective dates, and lapse dates that will have to be carefully regarded by the agencies in implementing this legislation.

Sincerely,

Bruce M. Botelho  
Attorney General

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