

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

*P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075*

June 11, 2004

The Honorable Frank H. Murkowski
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: FCCS SB 283(Corrected) -- making, amending, and repealing appropriations, including capital appropriations, supplemental appropriations, reappropriations, and appropriations to capitalize funds; making appropriations under article IX, section 17(c), the constitutional budget reserve fund
Our file: 883-04-0037

Dear Governor Murkowski:

At the request of your legislative director, we have reviewed FCCS SB 283(Corrected). This bill is primarily the capital budget for the fiscal year beginning July 1, 2004, and it includes a large number of reappropriation items, some supplemental items for the current fiscal year, some appropriations to capitalize funds, appropriations from the constitutional budget reserve fund (Alaska Const. art. IX, sec. 17(c)), and some other appropriation items.

We have only one overall comment on the bill. That is to note that expression of legislative intent accompanying an appropriation item, continue to be non-binding - you may choose to follow an expression of intent or to ignore it. However, please be advised that expressions of intent may not be vetoed by you as a line item veto separate from the appropriation itself. *In Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001), the Alaska Supreme Court ruled that expressions of intent do not constitute "items" subject to your veto power under art. II, sec. 15 of the Alaska Constitution.

The legislature may use "minimum necessary" language to explain what purpose the legislature intends to permit for the appropriation. *Alaska Legislative Council*, 21 P.2d at 377 (explains who, 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 clause¹ by improperly conditioning an appropriation.²

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

I. Sectional Analysis

Section 1 of the bill, pages 1 - 50, set out the capital appropriations for capital projects and grants for fiscal year 2005, for the executive branch departments and the court system. The appropriations have an effective date of July 1, 2004, as provided for in sec. 68.

Items of interest in sec. 1 include:

Section 1 of the bill, page 3, line 3 - page 15, line 14, sets out the appropriations for grants to municipalities (AS 37.05.315); on page 15, line 15 - 26, for grants to unincorporated communities (AS 37.05.317); and page 15, line 27 - page 18, line 19, for grants to named recipients (AS 37.05.316). With respect to the appropriations for grants to named recipients, many are made to private entities, generally nonprofit corporations and associations. We know little about the purpose of each grant, beyond the few-word description accompany the grant appropriation. Therefore, we cannot say whether each grant is made for a public purpose as required by art. IX, sec. 6 of the Alaska Constitution.³ But, we advise that under AS 37.05.316, it is the duty of each department through which a named recipient grant is to be administered to determine if the public purpose requirement is met. AS 37.05.316 directs departments (1) to notify the named recipient of the availability of the grant and to request a proposal for the services or goods from the recipient that satisfies the purposes of the appropriation; and (2) to execute a grant agreement within 60 days after the effective date of the appropriation unless the department determines that an award of the grant would not be in the public interest. Further, if

¹ Article II, sec. 13 of the Alaska Constitution reads in relevant part: “[b]ills for appropriations shall be confined to appropriations.”

² Improper conditioning is: (1) using qualifying language that is more than minimally necessary; (2) trying to administer the program of expenditure; (3) enacting law or amending existing law; (4) extending the intent language beyond the life of the appropriation; or (5) the intent is not germane to an appropriations bill. *Alaska Legislative Council*, 21 P.3d at 377 - 79 (these five criteria are referred to as “the Hammond factors” and were first presented in the superior court decision in *Alaska State Legislature v. Hammond*, Case No. 1JU-80-1163 (Alaska Super. Ct. May 25, 1983).

³ Article 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.”

a named recipient grant is for a public works project, the grantee must comply with the hiring preferences under AS 36.10.150 - 36.10.175.

Sections 2 and 3 of the bill, found on pages 51 - 56, provide summaries and totals by funding source and agency as to the appropriations made in sec. 1 of the bill. Except already discussed above, and as may be discussed in the analysis of other sections of the bill, we note no significant legal issues with respect to the appropriations set out in secs. 1 - 3 of the bill.

Section 10 of the bill, found on page 61, line 29 - page 62, line 10, is similar to a provision that appeared in last year's capital budget bill (sec. 61, ch. 82, SLA 2003) as well as in the capital budget bill in 2002 (sec. 54, ch. 1, SSSLA 2002), and was vetoed each time. Section 10 of the bill appropriates \$1,200,000 from federal receipts from the Jobs and Growth Tax Reconciliation Act of 2003 (42 U.S.C.A. 801; P.L. 108-27, 2003 HR 2) to the Department of Community and Economic Development for a no-interest loan to the City of Delta Junction to pay the costs of the settlement agreement for litigation regarding the establishment of a private prison in the vicinity of the city.⁴ As in last year's capital budget bill, the loan would be contingent upon the city agreeing to repay the loan in annual \$50,000 increments from the amounts received by the city as municipal assistance under AS 29.60.⁵ However, if a borough is formed that includes the City of Delta Junction, subsection (c) would convert any balance owing on the loan into a municipal grant under AS 37.05.315, with the same purpose - to pay costs of settlement agreement - as of the date of borough incorporation.

We expressed our opinion in the bill reviews the last two years, and reassert that opinion again, that this appropriation likely violates the public purpose provision of the Alaska Constitution. *See* 2002 Inf. Op. Att'y Gen. (833-02-0058; June 28) (appropriation clearly for a preexisting debt; debt was agreed to by the city in settlement of litigation, *Allvest, Inc. v. City of Delta Junction*, Case No. 4FA-99-2173 CI.; state not a party to lawsuit and did not have oversight responsibility of settlement; settlement debt was secured by city's revenue anticipation notes). We opined earlier, and reassert here, that use of state money to pay a litigation - based settlement in which the state was not a party and where the city pledged its own revenue anticipation notes to pay the settlement,⁶ raises significant legal concerns as to whether this

⁴ In previous year's bills, the amount of money appropriated for this same purpose was \$1,000,000 in general funds in 2002, and \$500,000 in general funds in 2003.

⁵ We note that given the practice of vetoing municipal revenue sharing (AS 29.60 funds) from the operating budget last year, and no appropriation for municipal revenue sharing included in this bill or the FY'05 operating budget, CSHB 375, the City of Delta Junction would not have the funds this section anticipates for repayment of the loan.

⁶ The revenue anticipation notes were authorized by City of Delta Junction, Resolution 2001-12 (April 14, 2001), and the settlement agreement from the lawsuit was attached thereto. We are unaware of whether the city used any of the revenue anticipation notes towards payment of the settlement.

expenditure is for a public purpose as required under art. IX, sec. 6 of the Alaska Constitution. We also noted other possible legal problems with this appropriation in the 2002 bill review letter. *Id.* Finally, although the legislature has designated a federal source of funds to pay this year's appropriation,⁷ we adhere to our consistently expressed view that this appropriation may not satisfy the constitutional requirement that it be for a public purpose. It remains the general rule that retirement of a preexisting debt confers no benefit on the public. *See* 1995 Inf. Op. Att'y Gen. (June 15; 883-96-0113).

Section 13 of the bill, page 63, lines 2 - 20, is a \$180,000 appropriation to the Regulation Commission of Alaska (RCA) for outside legal counsel (hired with the Attorney General's approval), to defend RCA's TAPS rates decision.

Section 16 of the bill, page 64, line 29 - page 65, line 15, appropriates \$100,000 of the unappropriated and unobligated balance of the income accrued on or before June 30, 2004, 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*, No. A90-015 CR. The use 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. \$100,000 is appropriated to the Department of Law to restore, replace or enhance resources or services lost or diminished by the oil spill through analysis of continuing injury from the oil spill and the development of restoration options. We have no legal concerns with this appropriation and the appropriation in sec. 16 of the bill is consistent with the requirements of the criminal judgment.

Section 17 of the bill, found on page 65, line 16 - page 66, line 5, amends appropriations made in 2001, 2002, and 2003,⁸ all dealing with federal or program receipts as defined in AS 37.05.146 (program receipts and non-general fund receipts) and AS 44.21.045(b) (information services fund; political subdivisions). The amendment concerns a change from a mandatory reduction to a permissive reduction as follows: If federal or other program receipts as defined in AS 37.05.146 and in AS 44.21.045(b) exceed the estimates appropriated by this Act, the appropriations from state funds for the affected program "may be" reduced by the excess if the reductions are consistent with applicable federal statutes. Assuming that this change to a permissive reduction is not inconsistent with applicable federal statutes, we find no legal problems with this change in the appropriation language.

⁷ 42 U.S.C. 801(d) requires that the State use the funds provided to "(A) provide essential government services; or (B) cover the costs to the State of complying with any Federal intergovernmental mandate (as defined in section 658(5) of Title 2) to the extent that the mandate applies to the State, and the Federal Government has not provided funds to cover the costs." P.L. 108-27, 2003 HR 2. This is not a matter subject to use of funds under (B), and is doubtful it qualifies as an "essential government purpose."

⁸ Section 6(b), ch. 82, SLA 2003; Section 18(b), ch. 1, SSSLA 2002; Section 12(b), ch. 61, SLA 2001; and Section 13(b), ch. 60, SLA 2001.

Section 19 of the bill, page 66, line 20 - page 67, line 3, makes several appropriations to the office of the governor. Subsections (a) and (b) appropriate \$180,000 and \$100,000 respectively, for costs associated with conducting the primary and general elections for fiscal year ending June 30, 2003, and to fund the federal Help America Vote Act for improving accessibility to voting locations for fiscal year ending June 30, 2004. Subsection (c) appropriates \$15,000 to the division of elections to cover costs of independent counsel incurred in the current fiscal year ending June 30, 2004. And, subsection (d) is an appropriation of \$188,000 from revenue generated by the dive fishery management assessment collected in the fiscal year ending June 30, 2002, to the Department of Fish and Game for further Southeast Alaska commercial dive fisheries for the fiscal years 2005, 2006, and 2007.

Section 20 of the bill, page 67, line 4 - page 78, line 17, makes numerous appropriations to the Department of Health and Social Services (DHSS). Of particular note is subsec. (dd), page 78, lines 13 - 17, which appropriates to DHSS \$1,000,000 "for costs associated with fulfilling the obligation of the State of Alaska related to the demolition and asbestos abatement of the old Alaska Psychiatric Institute" ("Old API Facility"). The State of Alaska owns the Old API Facility, while Providence Health Systems - Washington dba Providence Alaska Medical Center ("Providence") owns the underlying land. Under a License for Land Use (MHT License No. 9200172) that was transferred to Providence when it purchased the underlying land from the Alaska Mental Health Trust, the State of Alaska is required to demolish the Old API Facility or implement another resolution that is mutually acceptable to Providence and the State of Alaska. The appropriation made under sec. 20(dd) of the bill is the "first installment" to address this obligation. We see no legal problems with this appropriation.

Section 22(c) of the bill, found on page 79, lines 1 - 4, appropriates \$1,500,000 from receipts from the Exxon Valdez Oil Spill Trustee Council to the Department of Law for studies and analysis of oil remaining in the environment and injury resulting from the Exxon Valdez oil spill. These monies have been unanimously approved by the Trustee Council, in accordance with the terms of the Memorandum of Agreement and Consent Decree in *United States v. State of Alaska*, No. A91-081 CV, for use by state and federal agencies for the purposes described. The appropriation is consistent with law.

Section 24 of the bill, page 80, line 5 - page 82, line 12, makes several appropriations to the Department of Natural Resources (DNR). Of note is subsec. (d) Page 80, lines 18 - 21, which appropriates \$90,000 from Agricultural Revolving Loan Fund (ARLF) to the DNR, division of agriculture. This appropriation relates to a recent federal law that provides federal benchmarks and certification for organic foods in order to provide purity and quality assurance to customers. In 2000, the United States Department of Agriculture (USDA) developed and approved federal regulations implementing the new law. In 2003, the State of Alaska adopted statutes that anticipated the new federal regulations. Chapter 64, SLA 2003, effective as of September 9, 2003, allows the Department of Natural Resources to either establish its own certification program, subject to USDA approval, or become a "certifying agent" utilizing the federal program. See AS 03.58.015. The Department of Natural Resources, Division of Agriculture, has begun work on becoming a "certifying agent." Currently, the State and in-state producers rely primarily on certifying agents from the State of Washington. Product containing

a State of Alaska organic certification is expected to fare well in the growing marketplace for organic foods. The legislature has been using ARLF monies to support division of agriculture functions for several years and this appropriation may be in line with those previous appropriations, although more specifics in how the money is to be used.⁹ We find no legal problems with this appropriation.

Section 24(h) and (i) of the bill, page 80, line 29 - page 81, line 3, appropriates \$2,000,000 and \$650,000 respectively, from federal or other receipts to the Department of Natural Resources for land acquisition on Northern Afognak Island for the Perenosa Bay Project. The Perenosa Bay Project includes those parcels of land on Afognak Island known as AJV Surface Estate (Waterfall), Shuyak Inc. Surface Estate (Waterfall), Shuyak Inc. Surface Estate (Delphin Point), Uganik Natives Inc. Surface Estate (Waterfall), Uganik Natives Inc. Surface Estate (Delphin Point), AJV Surface Estate (East Discoverer Bay), AJV Surface Estate (Delphin Point), AJV Surface Estate (Murphy Island), AJV Timber Rights (Pauls and Laura Lake), and Ouzinkie Surface Estate (Discoverer Bay headwaters). This appropriation is consistent with statutory law.

Sections 24(l) and (m) 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*, 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. Sections 24(l) and (m) of the bill amend prior legislation appropriating funds for the land valuation effort, so that the funding will be available through the fiscal year ending June 30, 2006. We see no legal problems with these appropriations.

Section 24(n) of the bill, page 81, lines 26 - 30, is an appropriation of \$500,000 in federal unrestricted receipt expenditure authorization for matching funds to the division of agriculture. This appropriation relates to the BSE (mad cow) disease through Canadian and United States border closures of the importation of ruminants. Some local producers have come to rely on the purchase and transportation of ruminants directly from or through Canada. Reopening the borders is strictly a federal issue; and some predict the closures may last for up to eight years. The USDA State Emergency Board on April 6, 2004, the governor on April 26, 2004, and the board of agriculture and conservation on April 30, 2004 declared a statewide disaster because of the border closures. The money provided herein will allow the state to help offset the high cost of water or air transport of live animals from the lower 48 states directly into Alaska and also provide assistance in building local breeding of replacement animals. Expenditure of the money may be dependent on whether the USDA will provide assistance and whether that assistance requires a match. We find no legal problems with this appropriation.

⁹ AS 03.10.040(b) provides, "Money in the fund may be used by the legislature to make appropriations for costs of administering this chapter and for operations of the Board of Agriculture and Conservation."

Section 27 of the bill, found on page 83, line 30 - page 84, line 23, amends the fiscal year 2004 appropriation for monetary terms of collective bargaining agreements under AS 23.40 covering executive branch employees to add the monetary terms of two collective bargaining units that apparently reached agreement or ratified agreements after the Legislature's adoption of the budget.

Section 30, subsection (5) on page 88, and subsection (36) on page 90, appear to be duplicate appropriations of \$2,000,000 for the University of Alaska Transportation Research Center. However, according to the back-up information provided with respect to these two appropriations, they are intended as separate, distinct appropriations, each with its own purpose: subsec. (5) establishes an Intelligent Transportation Systems (ITS) Research program at the University of Alaska to focus on identifying and addressing unique highway transportation challenges in Alaska's arctic and subarctic environment, and subsec. (36) provides startup funding for the University of Alaska Transportation Research Center. We bring this to your attention so that you are aware they are not duplicate appropriations.

Section 30 of the bill, at page 91, lines 2 - 3, identifies the Alaska Industrial Development and Export Authority dividend as a funding source for \$1,759,900 of the amounts appropriated under sec. 30 of the bill. This amount represents the previously unappropriated portion of the fiscal year 2004 Alaska Industrial Development and Export Authority dividend under AS 44.88.088. Section 66 of the bill makes the appropriations under sec. 30, effective as of May 11, 2004, and thereby effectively appropriates the Alaska Industrial Development and Export Authority fiscal year 2004 dividend. We see no legal problems with these appropriations.

Subsection 59(b) of the bill, page 115, lines 6 - 8, appropriates a sum for adjustments to the University of Alaska's salary and benefits for both union and non-union employees and officials. Subsection 59(c) of the bill indicates that the sum includes sums for the monetary terms of four collective bargaining units, constituting approval under AS 23.40.215(a). Subsection (c) is a duplicate of sec. 30(b) of CCS HB 375, the operating budget. In this bill, the subsection is within a section covering the University's appropriations. In CCS HB 375, it is an add-on in to an appropriation section related to executive branch collective bargaining agreements. Your office of management and budget recommends that sec. 59(c) of this bill be retained, and that sec. 30(b) of HB 375 be vetoed to avoid confusion. We agree and likewise recommend that you retain sec. 59(c) of this bill.

Section 61 of the bill, found on page 116, line 1 - page 117, line 5, authorizes spending from the constitutional budget reserve fund (Alaska Const. art. IX, sec. 17) for FY 2004 and FY 2005. Subsection (a) provides that deposits for fiscal year 2003 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 funding if unrestricted state revenue available for appropriation for fiscal year 2004 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 the sum of \$125,000

from the budget reserve fund to the Department of Revenue for fiscal year ending June 30, 2004, for investment management fees. Subsection (d) is identical in substance as subsection (a), except it concerns fiscal year 2004. And, subsecs. (e) and (f) are identical in substance as subsecs. (b) and (c), except they are made applicable to fiscal year 2005. The appropriations from the constitutional budget reserve fund as set for this section are made subject to and contingent upon, the provisions of sec. 63 of the bill per subsecs. (a) and (d) (discussed below).

Section 63 of the bill, found on page 120, lines 1 - 6, makes the validity of a number of appropriations in the bill (including the appropriations from the constitutional budget reserve fund in sec. 61), contingent on the passage of a bill increasing the base student allocation for the foundation formula. The bill referred to is HB 233, which will be before you for action. One of these sections (sec. 58 of the bill) appropriates the money necessary to finance the foundation formula at the new allocation of \$4,576 per student. The contingency in sec. 63 of the bill does not limit your power to strike or reduce amounts set out in sec. 58 of the bill. Even though the foundation formula would be amended to provide for an increased student allocation, if the enabling appropriation is not sufficient to pay the increased amount, there must be a pro rata reduction in the amount provided to school districts. AS 14.17.400(b).

Section 64 of the bill, lists the appropriations (by section) given specific retroactive dates. Section 65 specifies the lapse dates for appropriations made in the bill. And, secs. 66 - 68 of the bill, provide for effective dates for each of the sections in the bill. We find no legal problems with these sections.

II. Conclusion

Finally, please be advised that it is not always possible to identify or comment on all potential 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.

Sincerely

Gregg D. Renkes
Attorney General

GDR:MV:rca