

STATE OF ALASKA

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June 22, 2005

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

Re: HCS 2d CSSB 46(FIN) am H(brf sup
maj pfld H) -- fiscal year 2006 capital
budget
Our file: 883-05-0104

Dear Governor Murkowski:

At the request of your legislative office, we have reviewed HCS 2d CSSB 46(FIN) am H(brf sup maj pfld H), making and amending appropriations, including capital appropriations, supplemental appropriations, reappropriations, and appropriations to capitalize funds; and making appropriations under art. IX, sec. 17(c) of the Alaska Constitution, from the constitutional budget reserve fund. In short, the fiscal year 2006 capital budget.

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 nonbinding 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.¹ The legislature may use "minimum necessary" language to explain what purpose the legislature intends to permit for the appropriation. *Legislative Council II*, 21 P.3d at 377 (explain how, when, or on what the money is to be spent). We

¹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371-75 (Alaska 2001) (*Legislative Council II*) (expressions of legislative intent do not constitute "items" subject to governor's veto power under art. II, sec. 15 of the Alaska Constitution).

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).²

There is also the question of what you are to do when the legislature attaches a possibly unconstitutional condition to an appropriation. There are two cases that discuss conditions on appropriations. One is *O'Callaghan v. Coghill*, 888 P.2d 1302, 1303-04 (Alaska 1995) *overruled on other grounds by O'Callaghan v. State, Director of Elections*, 6 P.3d 728, 730 (Alaska 2000), in which the court ruled that the attorney general could not take legal action based on his or her determination that a law was unconstitutional without a court ruling confirming that determination unless the provision was clearly unconstitutional. But, in *Legislative Council v. Knowles*, 988 P.2d 604 (Alaska 1999) (*Legislative Council I*), the court ruled that, under art. III, sec. 16 of the Alaska Constitution, the governor may not sue the legislature even for a declaration of law: the otherwise logical avenue to pursue a dispute about the validity of a contested condition to an appropriation.

When conditions on appropriations are clearly unconstitutional, then the court in *Legislative Council II*, 21 P.3d 367, stated that you and your successors may announce an intent to ignore them without falling afoul of the *O'Callaghan* principle. Other conditions may not be so plainly illegal. And, the court indicated that the legality of conditions must generally be decided on a case-by-case basis. There would be two choices if unconstitutionality was a concern: either announce an intent to ignore the condition, or sue some party (other than the legislature) to obtain a determination of constitutionality. This latter course seems highly undesirable. Another route to litigation would be an *ex rel* suit in which the attorney general or some other state official sues another department head for a declaration as to the validity of the condition. However, we note that measures would need to be taken to ensure that the suit is adversarial in nature. The preferable course would seem to be announcing an intent to ignore the condition after the attorney general reviews and rules upon the question of validity.

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

² 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*, No. 1JU-80-1163 (Alaska Super., May 25, 1983).

Sectional Analysis

Section 1 of the bill, pages 2 - 90, sets out the capital appropriations for fiscal year 2006, for the executive branch departments and the court system. The appropriations have an effective date of July 1, 2005, as provided for in sec. 65(b) of the bill.

Section 1, page 3, line 33 through page 13, line 8, sets out the appropriations for named recipient grants (AS 37.05.316). We note one appropriation that is a pre-existing debt. On page 9, lines 20 - 22, is an appropriation of \$250,000 to the Inter-Island Ferry Authority for debt reimbursement. It is a general rule that the retirement of a pre-existing debt confers no benefit on the public. *See* 1995 Inf. Op. Att'y Gen. (June 15; 883-95-0113). And, failure to confer a public benefit violates the public purpose doctrine set out in art. IX, sec. 6 of the Alaska Constitution.³ *Id.* When the purpose of an expenditure is to retire a pre-existing debt, there is no new consideration passing to the public. However, due to the fact the Inter-Island Ferry provides a public service in its operations and its continued operation is in the public interest, we believe this appropriation would pass scrutiny in satisfying the requirement of art. IX, sec. 6 of the Alaska Constitution.

Section 1, page 13, line 9 through page 42, line 11, sets out grants to municipalities (AS 37.05.315). One particular grant to the City of Valdez (page 22, lines 7 - 15), is conditioned as follows: (1) completion of property conveyance for the land and buildings from the State to the City of Valdez, and (2) a signed agreement stipulating that the City of Valdez agrees to indemnify the state for asbestos issues and any environmental contamination associated with the land or building in exchange for funding the demolition.

This level of detail concerning implementation of the appropriation raises potential separation of powers issues. However, because the provisions express the intent of the Department of Administration (DOA), Department of Commerce, Community, and Economic Development (DCCED), and Department of Natural Resources (DNR) with respect to implementing appropriate risk management decisions concerning transfer of the land and building from State ownership and demolition of the building by the City of Valdez, as a matter of comity, these provisions could be appropriately implemented by the state. The expression of legislative intent on lines 13 - 15 is nonbinding.

Grants to unincorporated communities (AS 37.05.317) are set out on page 42, lines 12 - 25.

We note two appropriations for the Alaska Land Mobile Radio Infrastructure.

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, not shall the public credit be used, except for a public purpose."

One is to DOA on page 2, lines 10 - 12 (\$6,405,000) and the other is to the Department of Military and Veterans Affairs, page 58, lines 18 - 21 (\$2,744,000). We do not know if these are in any way duplicative, as their purposes vary slightly as to the infrastructure needs. The appropriation to DOA is for "Infrastructure Upgrades," and the appropriation to the Department of Military and Veterans Affairs is for "Continued Core Infrastructure Construction." However, we wanted to bring these to your attention.

Section 1 also appropriates money in the form of grants for a number of specific school projects (page 43, line 17 through page 45, line 26). And, more grants for school projects are set out in sec. 52(e) and (h) (page 132, lines 8 - 26; page 133, lines 4 - 7) (appropriations from debt retirement funds for grants to several Kenai Peninsula Borough School District projects, and Fairbanks North Star Borough School District projects) and in sec. 60 (page 140, line 20 through page 142, line 22) (appropriation from the general fund to the major maintenance grant fund under AS 14.11 for several specific school repair projects). Several of these appropriations are made to DCCED for grants under AS 37.05.315 (grants to municipalities) and AS 37.05.316 (grants to named recipients), rather than to the Department of Education and Early Development (DEED) under AS 14.11, thus making it difficult for DEED to monitor. Further, the majority of the appropriations to DCCED are for projects that are not among the priorities for construction and major repair under the priority list maintained under AS 14.11.102(b) and AS 14.11.014(a) and (b). The appropriations to DEED are all among the priorities adopted under AS 14.11.

Making appropriations outside of the priority system developed under AS 14.11 could be problematic under *Kasayulie v. State*, No. 3AN-97-3782 CI (Alaska Super., Sept. 1, 1999) (Order Granting Preliminary Motion for Partial Summary Judgment), a case involving equal protection and Title VI of the Civil Rights Act of 1964 claims alleging that there is discrimination in the method used to finance construction and maintenance of school facilities in rural school districts. The superior court ruled that there is a fundamental right to equal treatment in the method of financing construction and maintenance of schools. *Id.*; see 2005 Inf. Op. Att'y Gen. (May 27; 883-05-0107) (discussing school bond debt reimbursement provisions of CCS SB 73). However, we note that many of the projects funded via DCCED are in rural districts, so we do not anticipate that these appropriations will have much impact in the defense of *Kasayulie*.

Section 1, page 67, lines 17 - 31, is a \$700,000 appropriation for the Chitina Personal Use Dip Net Fishery Access Area. There is conditional language, lines 20 - 22, providing that the funds shall be made available only at such time as the State enters into an agreement with Chitina Native Corporation (CNC) and AHTNA Native Corporation (AHTNA) for a concession area management agreement. This is a valid condition. There is also legislative intent that this appropriation is to be used to provide funding for infrastructure for a public - private concession program as outlined in the agreement with

CNC and AHTNA, and that any future appropriations are dependent upon program receipts. Relevant to this appropriation, we understand that the Department of Transportation and Public Facilities (DOT&PF) has been granted authority to utilize the appropriated funds to provide, over a five-year period, access and facilities in support of the Chitina Personal Use Dip Net Fishery and related activities. DOT&PF is further given specific authority to make grants to CNC and AHTNA.

At the time this bill was passed, CNC, AHTNA, and the State were negotiating an agreement regarding public access to the Copper River over CNC and AHTNA land in the O'Brien Creek area, which is a popular public access point for the Chitina Personal Use Dip Net Fishery. The agreement was to provide for public parking, camping, and boat launching on state and native corporation lands in the O'Brien Creek area, with CNC and AHTNA to provide sanitation facilities, garbage removal, and general oversight of these services.

Negotiations have since stalled. Thus, the funds cannot be used at the present time, as no agreement has been reached as to concession area management. However, given the ongoing public access issues surrounding the Chitina Public Use Dip Net Fishery, there is a reasonable likelihood that negotiations will resume, and the funding will be necessary to support an agreement relating to future fishing season.

Sections 2 and 3 of the bill (pages 91 - 96) provides summaries and totals by funding source and agency as to the appropriations made in sec. 1 of the bill. Except as already discussed in the analysis of other sections of the bill, we note no significant legal issues with respect to the appropriations in secs. 1 - 3.

Section 4 of the bill (pages 97 - 99) sets out appropriations and allocations for certain DOT&PF projects. We find no legal problems with these appropriations.

Section 5 of the bill (page 100) sets out the funding source for the DOT&PF projects in sec. 4.

Section 16(b) of the bill (page 105, lines 6 - 9) appropriates funds from the DEED CIP fund equity account to the Yukon-Koyukok School District to fund the operations of the Alyeska Central School for fiscal year 2005 and fiscal year 2006.

Section 25(b) - (d) of the bill (page 109, line 28 through page 110, line 15) appropriates a portion of the unappropriated and unobligated balance of the income accrued 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 and extends the lapse date for a prior appropriation of income on criminal restitution money. 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 25(b) appropriates \$75,000 of the criminal restitution money 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. Section 25(d) extends, until June 30, 2006, the lapse date on an appropriation of criminal restitution monies for the same purpose from last year. The appropriation in sec. 25(b) and the lapse date extension in sec. 25(d) are consistent with the requirements of the criminal judgment. In addition, sec. 25(c) extends, until June 30, 2006, the lapse date of an appropriation last year of \$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 were 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 lapse date extension for this appropriation is consistent with law.

Section 30(a) of the bill (page 111, lines 24 - 31) amends 2004 appropriations from the school and debt retirement funds for state aid for school construction.

Section 42(e) of the bill (page 122, lines 26 - 30) reappropriates funds through the Department of Environmental Conservation for the municipal grant to the City of Wasilla for continued work on a septage facility expansion project already underway. The reappropriated money is for a valid public use, presents no constitutional or other legal problem, and raises no other issues.

Section 46(a) of the bill (page 124, line 30 through page 125, line 6) reappropriates funds for Naknek school projects carried from 1998, 2001, and 2003 appropriation bills.

Section 52(d) of the bill (page 131, lines 13 - 16) appropriates a grant of \$250,000, under AS 37.05.316, to Arctic Winter Games Team Alaska for games-related expenses. The source of this appropriation is the Alaska debt retirement fund (AS 37.15.011). We have two legal concerns with this appropriation. One, this appropriation is inconsistent with the enumerated purposes for which appropriations may be made from the Alaska debt retirement fund under AS 37.15.011(b). AS 37.15.011(b) reads in relevant part:

Money in the fund may be appropriated

- (1) for the purposes set out in AS 37.15.012 [continuing debt service];
- (2) to reimburse municipalities for obligations authorized under AS 14.11.100;

- (3) to finance the acquisition of state facilities through lease-purchase agreements; and
- (4) if an unobligated balance remains, to finance the design and construction of capital projects.

Two, this appropriation has been given an extended lapse date of June 30, 2010, in section 64(d) (page 144, line 7 - 8), but does not fund a capital project; it is to fund operating costs which are normally subject to annual appropriation. Therefore, there may be issues as to grant administration which we expect will arise and we can assist with those if this appropriation is approved by you. Our more serious legal concern however, is that the purpose for which the appropriation is being made is not authorized under AS 37.15.011, thus we wanted you to be aware of the funding discrepancy in this appropriation. While improper funding sources can be a basis for veto, we are unaware of authority requiring you to veto an appropriation on that basis. And, because this is a multi-year appropriation, the issue of the funding source could be addressed as a reappropriation in future legislation.

Sections 58 and 62 of the bill (page 136, line 8 through page 137, line 19; page 143, lines 15 - 23) appropriates for the fiscal year 2005 and fiscal year 2006 earnings from the amounts deposited into the Amerada Hess settlement sub-account in the permanent fund for a variety of public works projects. Historically, the earnings from the *Amerada Hess* settlement have always been deposited into the sub-account. AS 37.13.145(d). The use of these earnings for public works projects is permissible. In order to access these earnings, sec. 62 requires passage of a bill amending AS 37.13.145(d). CSHB 187(FIN)(efd fld) passed and is awaiting transmittal to the governor. Section 63 also provides for the necessary retroactivity in order to access the fiscal year 2005 earnings.

Section 59 of the bill (page 137, line 20 through page 140, line 19) appropriates \$18,426,923 to reduce political subdivisions' increased liability to the public employees' retirement system (PERS) resulting from fiscal year 2006 employer contribution rate increases. The appropriation is made directly to DOA. Section 59(a) states the intent of the legislature to reduce the employer costs, but explains that the appropriation may not fully eliminate the increased costs, and that the appropriation is a one-time appropriation, not intended to recur for fiscal year 2007. Section 59(b) sets out specific amounts that the department shall allocate to each political subdivision's PERS account, based on the rate increases estimated by the department as of September 29, 2004.

Section 61 of the bill (page 142, line 23 through page 143, line 14) authorizes spending from the constitutional budget reserve fund (Alaska Const., art. IX, sec. 17). Section 61(a) provides that deposits in the fund for fiscal year 2005 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. Section 61(b) authorizes spending from the fund if the unrestricted state revenue available for appropriation for fiscal year 2006 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. Section 61(c) appropriates \$167,000 from the budget reserve fund to the Department of Revenue for fiscal year ending June 30, 2006, for investment management fees for the budget reserve fund.

Section 63 of the bill provides for certain provisions of the act to be retroactive: secs. 18, 26(a), 58(a), and 58(b).

Section 64(a) provides that appropriations made by secs. 9(1), 18, 19, and 58(a) are for the capitalization of funds and do not lapse. Section 64(b) lists those sections with appropriations that are designated as capital projects and lapse under AS 37.25.020. Section 64(c) lists those appropriations that lapse on June 30, 2007, and sec. 64(d) lists those appropriations that lapse on June 30, 2010.

Section 65(a) - (d), sets out the effective dates for various sections of the Act, and sec. 65(e), with the exception of specified effective dates listed in sec. 65(a) - (d), provides for an effective date of June 30, 2005.

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,

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By:

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