

STATE OF ALASKA

DEPARTMENT OF LAW

SARAH PALIN, GOVERNOR

P.O. Box 110300
Juneau, Alaska 99811-0300
Phone: (907) 465-3600
Fax: (907) 465-2075

May 8, 2009

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

Re: HCS CSSB 75 (FIN) – Capital,
Supplemental, and Other Appropriations
Our file: JU2009200422

Dear Governor Palin:

At the request of your legislative director, we have reviewed HCS CSSB 75(FIN), making and amending appropriations, including capital appropriations, supplemental appropriations, and appropriations to capitalize funds; and providing for an effective date. In short, this is our legal review of the fiscal year 2010 capital budget.

I. General Comments

We have reviewed all appropriations set out in this bill and have several general comments on the bill overall. As in prior years, the bill has numerous expressions of legislative intent and contingencies accompanying certain appropriation items. *See, e.g.*, p. 2, lines 27 - 29; p. 3 lines 23 - 27 and 30 - 31 (legislative intent); p. 83, lines 21 - 23 (contingency). As previously noted, this office historically has taken the position that such expressions of legislative intent are non-binding because they violate the confinement clause of the Alaska Constitution ("[b]ills for appropriations shall be confined to appropriations." art. II, sec. 13). In *Alaska State Legislature v. Hammond*, Judge (now Justice) Carpeneti adopted a five-factor test to determine whether such language violates the confinement clause:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the

language must be germane, that, appropriate, to an appropriations bill.

Memorandum of Decision at 44 - 45, No. 1JU-80-1163 (Alaska Super., May 25, 1983). Judge Carpeneti observed that this test could not “easily or mechanistically be applied” and that every section of challenged intent language “is a new case which must be examined separately.” *Id.* at 45. The Alaska Supreme Court subsequently adopted Judge Carpeneti’s test on a “non-exclusive” basis in the *Knowles II* decision. *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

The courts have had relatively few opportunities to consider whether certain instances of intent language violate the confinement clause. Judge Carpeneti determined that most (but not all) of the intent language at issue in *Hammond* was invalid under the confinement clause. *Hammond*, No. 1JU-80-1163 at 46-58. In *Knowles II*, the Court found certain contingency language invalid (21 P.3d at 379-81), and certain descriptive language non-binding (*Id.* at 383), but upheld the following language:

This appropriation is for new CRC beds, not owned or controlled by municipalities, to provide space in institutions for violent felons. All beds will meet department standards for Community residential Centers. Contracts will be competitively bid.

Id. at 381-82. The Court found that while portions of this language violated some of the *Hammond* factors, these violations were offset by the fact that the language did not amend existing law and it did not extend beyond the life of the appropriation. *Id.* Accordingly, we think it is possible to craft intent language that is permissible under the confinement clause. In our experience, however, most uses of intent language in the budget violate the confinement clause. Nevertheless, we cannot rule out the possibility that some uses of intent language could be found by a court to be enforceable.

In the past, we have advised that expressions of intent may generally be ignored or followed as a matter of comity. We continue to offer this advice, however, in the event your office or a recipient agency is disinclined to follow intent language as a matter of comity, and we have not specifically addressed such language herein, we recommend further consultation with this office so that we may advise as to the extent such language may be enforceable under the *Hammond* factors.

Finally, as we advised in our reviews of intent language in previous appropriations bills, an expression of legislative intent may no longer be vetoed by the governor as a line item veto separate from the appropriation itself. In *Knowles II*, 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. *Id.* at 377.

We will also set out our specific comments regarding appropriations of which you have raised questions as well as other appropriations that raise particular legal concerns, or are otherwise significant.

II. Sectional Analysis

A. Sections 1 - 2

Section 1 of the bill, pages 2 - 37, sets out the appropriations for capital projects and grants to various departments, the University of Alaska, and the court system. Section 2 of the bill sets out the funding by source and agency for each of the appropriations made in section 1. The appropriations have an effective date of June 30, 2009. See sec. 47. We will address only the most significant appropriations to the various departments and those for which have legal concerns.

1. Department of Administration

The appropriations to the Department of Administration in this section are \$175,000 for completion of the Alaska Public Offices Commission online system; \$2,500,000 for enterprise security projects and \$2,500,000 for facilities deferred maintenance (p. 2, lines 13 - 16). We have no comments on this section.

2. Department of Commerce and Economic Development

The appropriations to the Department of Commerce and Economic Development (DCCED) in this section include \$330,400 to the Alaska Energy Authority (AEA) for the Electrical Emergencies Program; \$25,000,000 to AEA for renewable energy project grants under AS 42.45.045; and \$25,500,000 to AEA for energy projects (p. 2, lines 20 – 31). The appropriation for renewable energy project grants includes language stating that it is the intent of the legislature that AEA award the grants to the projects listed as the top 25 on the renewable energy fund, round II prioritized project list dated March 23, 2009. We have previously noted our legal concerns generally as to language of intent in Section I of this bill review, however here this language of intent indicates the legislature's approval of AEA's recommendations for grant funding consistent with AS 42.45.045. We find no other issues with these appropriations.

The appropriations to DCCED in this section also include \$6,100,000 for community block grants, \$2,630,000 for community development and assistance, and \$17,500,000 for Kodiak Launch Complex infrastructure, and other smaller

appropriations. (p. 3, lines 1 - 9).

The appropriations to DCCED in this section include a single appropriation for a grant to a named recipient (AS 37.05.316) – an appropriation of \$120,000 for a grant to Arctic Power (p. 3, line 17). We find no legal concerns with this appropriation.

There are two appropriations for grants to municipalities (AS 37.05.315) made through DCCED, an appropriation of \$10,000,000 for a grant to Anchorage for Port of Anchorage expansion (p. 3, line 20) and an appropriation of \$2,000,000 for a grant to Kenai for the Kenai River bluff erosion project (p. 3, line 28). Both of these appropriations contain language of intent. We have already noted our legal concerns generally, as to language of intent, in Section I of this bill review. We have no additional legal concerns with these appropriations.

3. Department of Corrections

The appropriations to the Department of Corrections in this section are \$1,000,000 for annual facilities maintenance and repairs and \$6,000,000 for Goose Creek Correctional Center utility and energy costs for new construction. We see no problems with these appropriations.

4. Department of Education and Early Development

On pages 4 – 6, there are appropriations of \$42,443,481 to the major maintenance grant fund for maintenance, repairs, and improvements at various schools from the department's major maintenance grant list under AS 14.11.007, with allocations set out per project. This appropriation includes both rural and urban projects, although rural projects predominate. It follows the department's priority list and would fund the first 23 items on that list. Also included in this section is an appropriation of \$1,000,000 for deferred maintenance for the state boarding school, Mt. Edgecumbe (p. 4, line 16). We see no issues with these appropriations.

5. Department of Environmental Conservation/Department of Fish and Game

Capital appropriations to the Department of Environmental Conservation in this section include \$5,000,000 for statewide contaminated sites cleanup (page 6, line 23); \$23,189,386 for municipal water, sewage, and solid waste grants under AS 46.03.030 to various municipalities throughout the state, with allocations set out per project (pages 6 - 8); and \$66,666,598 for village safe water and wastewater projects in various communities throughout the state, with allocations set out per project (pages 8 - 14).

The Department of Fish and Game appropriations are listed on pages 14 - 15. Of note are appropriations of \$22,000,000 for the Pacific Coast Salmon Recovery Fund (p. 14, line 30) and \$3,100,000 for sport fish recreational boating access (p. 15, line 4).

We have no legal concerns with the appropriations in sec. 1 of the bill to these agencies.

6. Department of Health and Social Services

Capital appropriations to the Department of Health and Social Services (DHSS) are found on pages 15-16. Of particular note are appropriations of \$1,337,448 for health insurance portability and accountability act compliance (p. 15, line 20); \$4,500,000 for HIPAA updated electronic transaction standards (p. 15, line 24); \$1,146,589 for non-Pioneer Home deferred maintenance, renovation, repair, and equipment (p. 15, line 27); and \$1,115,750 for safety and support equipment for probation officers and front line workers (p. 16, line 13). We see no legal problems with the appropriations made in this section.

7. Department of Labor and Workforce Development

The appropriations to the Department of Labor and Workforce Development in this section are on page 16 and are \$600,000 for AVTEC deferred maintenance and training facility expansion (p. 16, line 20) and \$3,092,200 for Workers' Compensation.Net upgrade and rewrite (p. 16, line 24). We see no legal problems with the appropriations made in this section.

8. Department of Military and Veterans' Affairs

There are several capital appropriations made to the Department of Military and Veterans' Affairs in this section (pp. 16 - 17). Of particular note are appropriations of \$2,500,000 for Army Guard facilities projects; \$17,000,000 for compliance cleanup site restoration; and \$9,500,000 million for state homeland security grants (p. 17, line 10 - 11). We see no legal problems with the appropriations made in this section.

9. Department of Natural Resources/Department of Public Safety/Department of Revenue

Capital appropriations to the Department of Natural Resources are at pages 17-18. Capital appropriations to the Department of Public Safety are at pages 18-19 and include \$2,500,000 for marine fisheries patrol improvements. The Department of Revenue capital appropriations, which include appropriations to the Alaska Housing Finance

Corporation, are found at pages 19 - 21. We note no legal problems with these appropriations.

10. Department of Transportation and Public Facilities

Additional capital appropriations to Department of Transportation and Public Facilities are on pages 21 - 36, and include appropriations and allocations for Statewide Federal Programs (pp. 22 - 23), Airport Improvement Program (pp. pp. 23 - 29), and the Surface Transportation Program (pp. 29 - 36), with allocations set out per project. We see no legal problems with the appropriations made in this section.

11. University of Alaska

Capital appropriations to the University of Alaska are set out on pages 36-37, and include \$3,200,000 for maintaining existing facilities renewal and renovation annual requirement, \$10,000,000 for climate projects, and \$5,000,000 for energy projects. We have no legal concerns with these appropriations.

12. Alaska Court System

Capital appropriations to the court system are set out on page 37 and include \$9,900,000 appropriation for the Anchorage Campus Project (Phase 2), \$1,190,000 for court security projects, and \$1,344,300 for CourtView enhancements. We have no legal concerns with these appropriations.

Section 2 of the bill sets out the funding by agency for the appropriations made in sec. 1 of the bill and sec. 3 of the bill sets out the statewide funding for these appropriations.

B. Sections 4 - 6

Section 4 of the bill, pages 43 - 48, makes appropriations to the Department of Commerce, Community, and Economic Development, the Department of Natural Resources, and the Department of Transportation and Public Facilities to upgrade commercial passenger vessel services and watercraft infrastructure, enhance passenger safety, and support cruise ship visitor activities using funds from the commercial vessel passenger tax account. The capital appropriations and grants made in sec. 4 of the bill have an effective date of April 19, 2009. *See* sec. 46.

A total of \$57,302,000 is appropriated to Department of Commerce, Community, and Economic Development to disburse in the form of grants to named recipients under

AS 37.05.316 and grants to municipalities under AS 37.05.315 for capital projects for these purposes. We note that grant recipients under AS 37.05.315 and AS 37.05.316 must first submit a proposal that will then be subject to administrative review before the grant is finalized. A grant agreement must be executed before issuance of the grant. Two appropriations are made to the Department of Natural Resources: \$1,300,000 for bus parking/turnaround and facilities upgrades at Fort Abercrombie in Kodiak, and \$6,000,000 for state parks deferred maintenance and emergency repairs, with language of intent that the department will allocate this money to state park facilities that receive the highest proportion of commercial passenger vessel visitors. A total of \$21,180,500 is appropriated to Department of Transportation and Public Facilities for cruise ship-related infrastructure projects in various coastal Alaska communities.

Some of the appropriation items contained in sec. 4 of the bill may be subject to legal challenge as being in violation of spending restrictions imposed upon these tax proceeds under: 1) the Commerce Clause; 2) the Tonnage Clause; and, 3) 33 U.S.C. 5. We would be glad to work with you to go through these appropriations and the backup documents supporting them and, if requested, provide a supplemental bill review regarding the appropriations contained in sec. 4 of the bill.

As described in sec. 5 of the bill, page 49, the funding source for these capital projects is the commercial vessel passenger tax account in the general fund. The commercial vessel passenger tax account is made up of tax proceeds collected from passengers who travel in Alaska on a commercial passenger vessel for more than 72 hours. Section 6 of the bill sets out the statewide funding for the appropriations made in sec. 4. We note that the legislature is appropriating both existing receipts and projected receipts for fiscal year 2010. The office of management and budget (OMB) will allow departments to record the full amount of the appropriation. However, funds will be disbursed on a first come – first served basis as properly documented requests are received, and when all available moneys have been disbursed no more payments can be made until additional revenue is received. The legislature was aware that it was appropriating prospective receipts. It assumed that the timing will be such that sufficient receipts will precede requests for disbursements, and office of management and budget believes this likely will be the case.

Except as noted above, we find no legal issues in these appropriations.

C. Sections 7 - 9

Section 7 of the bill, pages 51 - 55, makes appropriations to the Department of Transportation and Public Facilities totaling \$247,975,400 for capital projects and grants associated with the American Recovery and Reinvestment Act of 2009. This section

includes \$9,500,000 for the airport improvement program; \$24,397,600 for the surface transportation program; \$46,250,000 for airport stimulus projects; \$158,743,900 for highway and bridge stimulus projects; and \$9,083,900 for transit stimulus projects, with allocations set out per project. The capital appropriations and grants made in sec. 7 of the bill have an effective date of April 19, 2009. *See* sec. 46.

As described in sec. 8 of the bill, page 56, the funding sources for these capital projects and grants are the federal stimulus funding (ARRA 2009) and federal receipts. Section 9 of the bill sets out the statewide funding for the appropriations made in sec. 7 of the bill. We find no legal issues in these appropriations.

D. Sections 10 - 12

Section 10 of the bill, pages 51 - 55, makes appropriations to the Department of Commerce, Community and Economic Development, the Department of Fish and Game, the Department of Transportation and Public Facilities, and the office of the governor various grants and projects totaling \$83,801,220. Of particular note is the appropriation of \$75,290,000 to the airport improvement program, with allocations set out per project. The appropriations made in this section lapse under AS 37.25.020,¹ except as otherwise noted. Sections 11 and 12 of the bill set out the funding by agency and the statewide funding for the appropriations made in sec. 10 of the bill. The capital appropriations and grants made in sec. 4 of the bill have an effective date of April 19, 2009. *See* sec. 46. We have no legal concerns with these appropriations.

III. Language Sections (Secs. 13 - 44)

The language sections (secs. 13 - 44), are set out on pp. 63 - 83 of the bill. These sections contain numerous reappropriations, contingencies, and expressions of intent from the legislature. We will discuss only those sections that have legal issues or are otherwise noteworthy.

Section 13 of the bill, page 63, appropriates federal and other statutorily designated program receipts, and provides for reductions and shortfall of receipts where

¹ AS 37.25.020 reads: "An appropriation made for a capital project is valid for the life of the project and the unexpended balance shall be carried forward to subsequent fiscal years. Between July 1 and August 31 of each fiscal year, a statement supporting the amount of the unexpended balance required to complete the projects for which the initial appropriation was made and the amount that may be lapsed shall be recorded with the Department of Administration."

necessary to provide for consistency with federal law and state law. We see no legal problems with this section.

Section 14 of the bill, page 63, provides for fund transfers to various departments and between funding sources. Section 14(a) appropriates income from the funds in the permanent fund that were deposited as a result of the *Amerada Hess* royalty litigation. Under AS 37.13.145(d), income from such funds is not available for distribution to the permanent fund dividend fund. Section 14(a) appropriates such income to the Alaska capital income fund (AS 37.05.565). Section 14(c) appropriates the \$15,000,000 dividend the Alaska Industrial Development and Export Authority will pay to the state in fiscal year 2010 into the Gasline Inducement Act reimbursement fund to be used for inducements for the natural gas pipeline project construction under AS 43.90.110(a)(1). Section 14(e) appropriates the \$25,000,000 Alaska Housing Finance Corporation Dividend to the renewable energy grant fund established under AS 42.45.045. We see no legal problems with sec. 14 of the bill.

Section 15 of the bill, page 64, provides that amounts to be received in settlement of insurance claims and amounts to be received as recovery for losses are appropriated from the general fund to the state insurance catastrophe reserve account (AS 37.05.289(a)) or to the appropriate state agency to mitigate the loss. We see no legal problems with this section.

Section 16 of the bill, pages 64 - 65, sets out the appropriations to municipalities under the National Petroleum Reserve – Alaska Impact Grant Program (AS 37.05.530; 42 U.S.C. 6508), which is administered through the Department of Commerce, Community, and Economic Development. We see no legal problems with this section.

Section 17 of the bill, pages 65 - 66, makes three appropriations for the Department of Commerce, Community, and Economic Development (DCCED) for grants under AS 37.05.315 and AS 37.05.316 as follows: (a) for promoting the donation program under AS 13.40.150; (b) for the international trade program partnership, and (c) for payment by the City of Delta Junction of the costs of the settlement agreement for litigation regarding the establishment of a private prison in the vicinity of the city, redesignating the balance owing on a previous loan as a grant. As we have opined in the past on this appropriation, it constitutes use of public funds to pay a preexisting debt. And this debt was created through a settlement of litigation in which the City of Delta Junction entered into a settlement agreement to pay a private entity the agreed upon amount. The State of Alaska was not a party to the court case. *See* 2002 Inf. Op. Att'y Gen. (June 28; 883-02-0058). And, there is no evidence that the debt was incurred due to public services being rendered. *Id.* (*See* discussion of Section 22 below that allows exception to preexisting debt). The language in Section 17(c) of this bill removes the

contingency that required formation of a borough in the area encompassing Delta Junction in order for the loan to be converted and redesignated as a municipal grant. The potential public purpose associated with the requirement that a new borough be formed, a condition we believed may survive scrutiny as a public purpose in 2004 for the loan to be converted to a grant, has thus been removed. Therefore, for the reasons expressed in our bill review letter of a similar attempt by the legislature in 2007 to remove the contingency language of borough formation and converting the loan to a municipal grant before a borough is formed, raises issues of public funds being used to pay a preexisting debt and thus run afoul of art. IX, sec. 6 of the Alaska Constitution. *See* 2007 Inf. Op. Att'y Gen. (June 13; 883-07-0071); *see also* 2003 Inf. Op. Att'y Gen. (June 10; 883-03-0045).

Section 18 of the bill, page 66, amends a previous appropriation to the Department of Environmental Conservation for a Tununak Flush Tank and Haul and Washeteria Project to an appropriation to Department of Environmental Conservation for Village Safe Water Study, Design, and Construction Projects.

Sections 19 - 35, pages 66 - 77, provide for reappropriations of the unexpended and unobligated balances of prior years' appropriations, for various projects. We note that on page 68, sec. 22(b) of the bill, the legislature is reappropriating the unexpended and unobligated money originally appropriated to the City of Craig for roof replacement of the Craig Elementary School (sec. 42(e), ch. 29, SLA 208), to DCCED for payment as municipal grant to the City of Craig for Craig Clinic debt relief for the fiscal year ending June 30, 2010. This appropriation constitutes use of public funds to pay a preexisting debt. As noted in our analysis of sec. 17(c) above, 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). Failure to confer a public benefit violates the public purpose doctrine set out in art. IX, sec. 6, of the Alaska Constitution. However, as long as the debt was originally incurred through the provision of a public service, and because this clinic is owned by a public entity (City of Craig), we believe this debt reimbursement will likely survive scrutiny as we have opined in the past on similar municipal public service debts. 2006 Inf. Op. Att'y Gen. (June 23; 883-06-0109). We have no particular other legal concerns as to any of these reappropriations.

Section 36 of the bill, pages 77 - 78, reappropriates a previous appropriation to the Department of Transportation and Public Facilities for a Kenai Peninsula Borough project and amends the scope of a previous appropriation for a Fairbanks project.

Section 37 of the bill, pages 78 - 79, provides for reappropriations to the Legislative Council of funds previously appropriated to the Legislative Council, Budget and Audit Committee and legislative operating budget. Subsections (a) and (b) appropriate up to \$2,900,000 for boiler replacement and heating rehabilitation;

\$2,600,000 for exterior and interior repair, renovation, and safety improvements; \$750,000 for addressing the effects of climate and environmental change on the state for fiscal years 2009 and 2010, and \$600,000 for information technology upgrades and electronic voting requirements. Subsection (c) appropriates the remaining balance of previous appropriations for the legislative operating budget and the Budget and Audit Committee to the Legislative Council for purchase, restoration, and display of historical art and artifacts in conjunction with statehood projects, energy-related issues, and necessary legislative capital projects. Subsection (d) reappropriates up to \$100,000 of a fiscal year 2009 reappropriation to the Legislative Council for the Legislative Outdoor Heritage Caucus for fiscal year 2010. Subsection (e) reappropriates the balance, estimated to be \$750,000, of a previous appropriation to the Legislative Council for the Alaska Conference on State and Federal Responsibility Related to Economic Impacts of ESA Listings to the Legislative Council for the same purpose and also for addressing the effects of climate and environmental change on the state for fiscal years 2009 and 2010.

Section 39 of the bill would establish the appropriation for the Coastal Impact Assistance Program (CIAP). CIAP is a federal program administered by the United States Department of the Interior, Minerals Management Service. Under the federal Outer Continental Shelf Lands Act, Minerals Management Service can only award CIAP funds to one state agency. For Alaska, that state agency is the Department of Natural Resources, Division of Coastal and Ocean Management. The state is expected to receive \$53,600,000 from the CIAP, but under this section of the bill, the Department of Natural Resources would only be authorized to receive \$25,200,000. The Minerals Management Service cannot distribute funds directly to the Department of Fish and Game and the Department of Commerce, Community, and Economic Development due to the federal limitation of awarding funds to only one state agency. Since the Department of Natural Resources has authorization to accept only \$25,200,000 of the \$53,600,000, the remaining CIAP funds could not be transferred to the state. The Department of Natural Resources would need to obtain increased authorization from the Legislative Budget and Audit Committee to receive the full amount of the expected federal CIAP award, at which point it could distribute funds to the other state agencies as per legislative intent.

Section 40 of the bill, pages 80 - 81, appropriates \$24,547,500 from federal economic stimulus funds received by the state under the American Recovery and Reinvestment Act of 2009 and \$2,727,500 from the general fund to the Department of Health and Social Services, health care services, for a statewide electronic health information exchange system. Section 44 of the bill makes this appropriation contingent on passage in this session of the legislature and enactment into law of a version of SB 133 relating to a statewide electronic health information exchange system.

Section 41 of the bill appropriates \$750,000 from the general fund to the Department of Fish and Game to supplement the appropriation of federal coastal impact assessment program funds for the Western Alaska Salmon Coalition's chum and sockeye genetic identification program.

Section 42 of the bill, pages 81 - 83, identifies fund source changes for previous allocations for projects of the Department of Transportation and Public Facilities, replacing a portion of undesignated federal receipts with federal stimulus funds received by the state under the American Recovery and Reinvestment Act of 2009. We see no legal problems with this section.

Section 43(a) of the bill provides for a draw from the statutory budget reserve if the balance of the general fund is insufficient to cover fiscal year 2009 general fund appropriations. The amount of the draw is the amount necessary to balance revenue and general fund appropriations. Section 43(b) provides for a draw from the Alaska Housing Capital Corporation if the balance of the general fund is insufficient to cover fiscal year 2009 general fund appropriations after the draw authorized by sec. 43(a) is made. The amount of the draw is the amount necessary to balance revenue and general fund appropriations. At this point, it does not appear that the draw authorized by this subsection will be necessary.

Section 43(c) of the bill appropriates from the constitutional budget reserve (CBR) the amount authorized by art. IX, sec. 17(b) of the Alaska Constitution. Section 17(b) permits appropriations by majority vote from the CBR when the amount available for appropriation in a fiscal year is less than the amount appropriated for the previous fiscal year. At this time, it is anticipated that the amount available for appropriation in fiscal year 2010 will be less than the amount appropriated in fiscal year 2009. This subsection appropriates the full amount available under sec. 17(b) which is "the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year." In other words, it is the amount that would bring the fiscal year 2010 appropriated amount up to the fiscal year 2009 appropriated amount.

In *Hickel v. Cowper*, the Alaska Supreme Court observed that the language "appropriations made in the previous calendar year for the previous fiscal year" was designed to eliminate the legislature's ability to increase the amount that could be withdrawn from the CBR by majority vote by adding appropriations to the supplement budget in the following calendar year. 874 P.2d 922, 936 (Alaska 1994). For purposes of the FY 2010 draw, however, the FY 2009 supplemental budget (HB 113) reduced the amount of general fund expenditures for FY 2009 because of declining oil revenues. Thus, a question is raised as to whether the fiscal year 2009 supplemental budget

reductions should be taken into account. In our view, the plain language of the constitution should control – the language “previous calendar year” bars consideration of the FY 2009 supplemental budget reductions.

We note that because the full amount available under art. IX, sec. 17(b) of the Alaska Constitution has been appropriated by sec. 43(c) it is possible that there will be excess funds in the general fund at the close of fiscal year 2010. Under art. IX, sec. 17(d) such excess funds would be swept back to the CBR unless otherwise appropriated or obligated.

We further note that on occasion the CBR is drawn upon for general fund cash flow purposes. Such funds are re-paid to the CBR with interest. *See* sec. 27(b), CCS HB 81 (brf sup maj pfld H). Section 43(c) can be used as authority for such a cash flow draw in fiscal year 2010 so long as the amount of the cash flow draw is less than the “amount calculated to be available for appropriation under art. IX, sec. 17(b)” of the Alaska Constitution. While the final calculation does not happen until after the close of fiscal year 2010, we understand that the office of management and budget performs interim calculations over the course of the fiscal year. Such interim calculations may be used to justify a draw on the CBR during the course of the fiscal year. We recommend that any draw made during the fiscal year based on such interim calculations be well within the amount calculated to avoid any chance of an excess draw.

Section 44 of the bill (page 83) describes a contingency for the appropriation contained in section 40, appropriating \$24,547,500 from federal economic stimulus funds received by the state under the American Recovery and Reinvestment Act of 2009 and \$2,727,500 from the general fund to the Department of Health and Social Services, health care services, for a statewide electronic health information exchange system. This appropriation is contingent on passage in this session of the legislature and enactment into law of a version of SB 133, relating to a statewide electronic health information exchange system.

Section 45 of the bill identifies the sections that are for the capitalization of funds and do not lapse and those that are for capital projects and lapse under AS 37.25.020.

Section 46 of the bill lists the provisions of the bill that have an effective date of April 19, 2009.

Section 47 of the bill lists those provisions of the bill that have an effective date of June 30, 2009.

Lastly, sec. 48 of the bill provides for an effective date for the bill (except as

provided for in sec. 46 and 47), of July 1, 2009.

IV. Conclusion

As we have stated in the past, 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 statues 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.

This bill presents no legal or other concerns.

Sincerely,

Richard A. Svobodny
Acting Attorney General

RAS:MLV:pvv