

May 12, 2015

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

Re: HCS CSSB 26(FIN) am H:
Fiscal Year 2016 Capital Budget
Our file: JU2015200327

Dear Governor Walker:

At the request of your legislative director, we have reviewed HCS CSSB 26(FIN) am H making and amending appropriations, including capital appropriations, supplemental appropriations, reappropriations, and other appropriations; making appropriations to capitalize funds.

Following is our legal review of the fiscal year 2016 capital budget bill.

I. General comments.

We have reviewed all appropriations set out in the bill and have several comments on general legal issues affecting the bill overall. Unless specifically noted, we found no legal issues with the appropriations in this bill.

A. Legislative intent and contingency language.

Unlike past years, we have not identified any legislative intent language in the capital budget bill, other than as identified below. There is one instance of the legislature including a contingency relating to a \$50,000 appropriation regarding a fuel tax surcharge (secs. 15 and 45). We believe that most expressions of legislative intent are not binding on the executive branch because such expressions violate the confinement clause of the

Alaska Constitution ("[b]ills for appropriations shall be confined to appropriations." (Article II, sec. 13).¹

B. Medicaid language.

For Medicaid services, in sec. 12, p. 33 lines 6 - 9, the legislature has expressed its intent that "[no] money appropriated in this appropriation may be expended" for certain medical assistance for persons eligible for Medicaid. Additionally, sec. 20, p. 37, lines 10 - 12, would add to prior legislation a new section which prohibits acceptance or expenditure of federal designated program receipts for the purpose of expansion of the state's Medicaid program. Likewise, section 40, p. 51, lines 2 - 6, would also prohibit acceptance or expenditure of funds for the expansion of Medicaid without "an acceptable reformation plan and appropriation approved by the legislature."

We note these conditions in this review, but refer you to the detailed analysis contained in our review of the same provisions in the fiscal year 2016 operating budget, (CCS HB 72(brf sup maj fld H).

C. Grants to tribal entities.

Several sections of the bill would make appropriations and grants to federally recognized tribes, village councils, and tribal entities, such as tribal agencies, organizations, or tribal nonprofit corporations under state law.

While theoretical limitations exist on the legislature's ability to appropriate money to tribes,² as a general rule, nothing prevents properly implemented appropriations to

¹ 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, we recommend further consultation with this office so that we may advise as to the extent such language may be enforceable.

As we have 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 *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) the Alaska Supreme Court ruled that expressions of intent do not constitute "items" subject to veto power.

² See, e.g., 1981 Inf. Op. Att'y Gen. 543, 544-545, 1981 WL 38636 (noting potential equal protection, public purpose, and local government constitutional issues associated with state revenue sharing with councils). The expenditure of state funds will sometimes

tribal entities, federally recognized tribes, or village councils. Our general comment regarding such grants is to remind state agencies that they must obtain a waiver of sovereign immunity from the tribal entity on a form that has been approved by this office before grant money can be dispersed to the entity. To the extent that the State of Alaska enters a contract or commercial transaction with a tribe or tribal entity, the contract or grant language should specify State of Alaska court jurisdiction or the State of Alaska might otherwise submit itself to tribal jurisdiction.³ The grantee must, as with all grantees that receive public funds, agree that the expenditure of the grant money will serve a public purpose.

Finally, some caution should be exercised about the specific entity to which the appropriation or grant money should be distributed. Care should be taken to make the appropriation or grant to the entity (e.g., tribe or tribal council) that under the tribe's law has the authority to bind the tribe and waive the tribe's sovereign immunity.⁴ The agency should consult with the Department of Law in facilitating these grants or appropriations.

D. Operating appropriations in capital budget bill.

There are numerous appropriations for operating expenses in the bill. Only a limited number of appropriations, listed in section 44(a), p. 60, lines 22 - 24, are specifically identified as being for capital projects.

Although the bill is purported to be the capital budget, not the operating budget, there does not appear to be a legal problem with including operating expenditures. The confinement clause of the Alaska Constitution demands that "[b]ills for appropriations shall be confined to appropriations." (Art. II, sec. 13). It does not make a distinction between appropriations for capital and operating expenses. The appropriations for operating expenditures generally list the fiscal years for which the appropriation is

be contingent on agreement by a tribe to anti-discrimination clauses and to waivers of sovereign immunity.

³ See, e.g., *Montana v. United States*, 450 U.S. 544, 565 (1981) (person who enters a consensual relationship with a tribe through commercial dealings or contracts may be subject to tribal jurisdiction).

⁴ A tribal council is the "elected lawmaking bod[y] of tribal governments." Cohen's Handbook of Federal Indian Law sec. 4.04[3][c], at 260 (Nell Jessup Newton ed., 2004 ed.). Note that the council or council members may also be able to assert sovereign immunity. *Id.* at 636 (immunity protects tribal officials acting within the scope of their authority).

intended. Although there may be political and practical consequences to the use of the capital budget to make operating appropriations, we do not see a legal issue.

E. Negative appropriations.

Another legal question presented by the bill is the inclusion of negative appropriations, which make appropriations to various departments for operating expenses. These negative appropriations have the effect of reducing the amounts appropriated in the operating budget bill.

We have previously advised that because AS 37.07.080(e) authorizes the transfer of money between allocations, so long as the unallocated reduction is for a specific amount, there is no constitutional problem with inclusion of the negative appropriations in a budget bill. *See* 1993 Inf. Op. Att'y Gen. (June 17; 883-93-0073); 1992 Inf. Op. Att'y Gen. (June 30; 883-92-0141). We see no need to modify that advice here.

F. Appropriations to Alaska Housing Capital Corporation account.

In sec. 41, p 51, the legislature reappropriates to the Alaska Housing Capital Corporation account the unexpended and unobligated balances of over 90 previous appropriations, totaling approximately \$40,000,000. Although the appropriations do not appear to be illegal, this does seem to be unusual, and the motives and intent behind this action may be worth some scrutiny. Please contact the Department of Law should you wish further information on this section.

II. Sectional analysis.

A. Sections 1 - 3 of the bill.

Section 1, p. 2 - 17, would make appropriations for capital projects and grants from the general fund or other funds. Except as otherwise noted, the appropriations lapse under AS 37.25.020. The appropriations made by sec. 1 take effect on July 1, 2015, under sec. 48 of the bill. Section 2, p. 18 - 20, sets out the funding by agency for the appropriations made in sec. 1. Section 3, p. 21 - 22, sets out the statewide funding for the appropriations made in sec. 1.

B. Sections 4 - 6 of the bill.

Section 4, p. 23, would make appropriations for supplemental capital projects and grants from the general fund or other funds for the purposes expressed in this section. These appropriations lapse under AS 37.25.020. Section 5, p. 24, sets out the funding by agency for the appropriations made in sec. 4. Section 6, p. 25, sets out the statewide

funding for the appropriations made in sec. 4. Under sec. 46, p. 61, the appropriations made by sec. 4 would take effect on April 19, 2015.

C. Sections 7 - 9 of the bill.

Section 7, p. 26 - 28, contains appropriation items for operating expenditures for the fiscal year ending June 30, 2015, from the general fund or other funds as set out in sec. 8. A department-wide, agency-wide, or branch-wide unallocated reduction set out in this section may be allocated among the appropriations made in this section to that department, agency, or branch. Most of these appropriations are negative appropriations. Under sec. 46, the appropriations made by sec. 7 would take effect on April 19, 2015.

Section 8, p. 29 - 30, sets out the funding by agency for the appropriations made in sec. 7.

Section 9, p. 31, sets out the statewide funding for the appropriations made in sec. 7.

D. Sections 10 - 17 of the bill.

Sections 10 - 17, p. 32 - 35, would make or amend various appropriations, as described below. Except as otherwise noted, the appropriations would take effect on July 1, 2015, under sec. 46.

Section 10, p. 32, would make several appropriations to the Department of Administration (DOA). Section 10(a) would appropriate \$3,000,000 from the general fund to DOA for the purpose of paying costs associated with the Alaska Correctional Officers Association settlement for fiscal year 2014. Section 10(b) would appropriate \$1,317,900 from the general fund to DOA for the purpose of paying for the single audit for the Department of Health and Social Services for the fiscal years ending June 30, 2015, June 30, 2016, and June 30, 2017. Section 10(c) would appropriate \$792,000 from the general fund to DOA for costs related to labor contract negotiations and arbitration support for the fiscal years ending June 30, 2015, and June 30, 2016. The intended purposes of these appropriations appear to be more in the nature of operating expenses than capital expenses, as discussed above.

Section 11, p. 32, would make several appropriations to the Department of Commerce, Community and Economic Development (DCCED). Section 11(a) would appropriate \$2,360,100 from the general fund to DCCED, Alcoholic Beverages Control Board, for costs associated with the regulation of marijuana for fiscal years ending June 30, 2015, and June 30, 2016. Section 11(b) would amend a prior appropriation to reappropriate the unexpended and unobligated balance of the prior appropriation that was

made to AIDEA sustainable energy transmission and supply development fund to advance an Alaska liquefied natural gas production plant and distribution system to serve interior Alaska.

Section 12, p. 32. The legislature also has attached the same abortion financing condition to appropriations in this bill as it attached to appropriations in the fiscal year 2016 operating budget bill prohibiting the expenditure of money appropriated to the Department of Health and Social Services on an abortion that is not a mandatory service under AS 47.07.030(a). We note that condition in this review, but refer you to the detailed analysis contained in our review of the same provision in the fiscal year 2016 operating budget, CCS HB 72(brf sup maj fld H).

Section 13, p. 33, would make several appropriations to the Department of Law. Section 13(a) would appropriate \$8,889,900 to the Department of Law from the general fund for the purpose of paying judgments and settlements against the state for the fiscal year ending June 30, 2015. Section 13(b) would appropriate the amount necessary after application of sec. 13(a) from the general fund to the Department of Law for the purpose of paying judgments against the state for the fiscal year ending June 30, 2015.

Section 14, p. 33, would make an appropriation of \$3,000,000 from the general fund to the Department of Natural Resources for fire suppression activities, for the fiscal year ending June 30, 2015.

Section 15, p. 33, would appropriate \$50,000 from the general fund to the Department of Revenue for costs associated with updating the tax revenue management system and tax forms and drafting regulations to implement a surcharge on refined motor fuels for the fiscal year ending June 30, 2015.

Section 16, p. 34, would make several appropriations to the Department of Transportation and Public Facilities (DOTPF). Section 16(a) would reappropriate to DOTPF for the EPA Class V injection well compliance and remediation project the unexpended and unobligated balance (estimated to be \$3,403,000) of a prior appropriation to DOTPF, Corps of Engineers, harbor program. Section 16(b) would reappropriate to DOTPF for the EPA Class V injection well compliance and remediation project the unexpended and unobligated balance, not to exceed \$2,000,000 of the \$3,447,682 estimated balance of a prior appropriation to DOTPF for Glenn highway rut repairs. Section 16(c) would reappropriate to DOTPF for terminal improvements and renovation at Ted Stevens Anchorage International Airport the unexpended and unobligated balance of a prior appropriation to DOTPF for Ted Stevens Anchorage International Airport roads, utilities and grounds upgrades. Section 16(d) would reappropriate \$2,513,100 to DOTPF for replacement of the Kalsin Bay maintenance station the unexpended and unobligated balance of five separate prior appropriations.

Section 16(e) would appropriate to DOTPF from the general fund the amount necessary, not to exceed \$5,000,000, for Dalton Highway disaster emergency repairs.

Section 17 would make an appropriation to the Office of the Governor, by amending a prior appropriation to allow the governor to allocate funds to the Department of Corrections.

E. Sections 18 - 24 of the bill.

Section 18, p. 35, (debt and other obligations) would amend a prior appropriation to reduce, from \$126,642,396 to \$121,217,970, the amount appropriated to the Department of Education and Early Development for state aid for costs of school construction under AS 14.11.100.

Section 19, p. 36, (ratifications of certain expenditures) would ratify certain departmental expenditures to reverse the negative account balances in the Alaska State Accounting System. The appropriations from which the expenditures were actually paid are amended by increasing those appropriations for the fiscal year ending June 30, 2015.

Section 20, p. 37, (federal and other program receipts) would amend sec. 26, ch. 16, SLA 2014, by adding a new subsection that states that federal designated program receipts under AS 47.07.060 for the proposed expansion of the state's Medicaid program may not be accepted or expended without an acceptable reformation plan and appropriation approved by the legislature. We note this condition in this review, but refer you to the detailed analysis contained in our review of the same provision in the fiscal year 2016 operating budget, (CCS HB 72(brf sup maj fld H).

Section 21, p. 37, (Alaska Housing Capital Corporation). Section 21(a) would reappropriate to the Alaska Housing Capital Corporation account the unexpended and unobligated balance, estimated to be \$750,000, of a prior appropriation to Department of Education and Early Development, Alaska Digital Teaching Initiative. Section 21(b) would reappropriate to the Alaska Housing Capital Corporation account the unexpended and unobligated balance, estimated to be \$875,000 of a prior appropriation made to Department of Public Safety, new Alaska Public Safety Information Network transitional contract support.

Section 22, p. 37, (federal and other program receipts). Section 27(a) states that federal receipts, designated program receipts, information services fund program receipts, Exxon Valdez oil spill trust receipts, receipts of the Alaska Housing Finance Corporation, receipts of the Alaska marine highway system fund, receipts of the University of Alaska, receipts of commercial fisheries test fishing operations, and the receipts of the Alaska

Aerospace Corporation that are received during the fiscal year ending June 30, 2016, and that exceed the amounts appropriated in the bill are appropriated conditioned on compliance with the program review provisions of AS 37.07.080(h). Section 22(b) states if the federal or other program receipts under AS 37.05.146 and AS 44.21.045(b) that are received during the fiscal year ending June 30, 2016, exceed the amounts appropriated in this bill, the appropriations from state funds shall be reduced to by the excess if the reductions are consistent with federal statutes. Section 22(c) states that if federal or other program receipts as defined in AS 37.05.146 and AS 44.21.045(b) fall short of the estimates appropriated by the bill, the affected appropriation is reduced by the amount of the shortfall.

Section 23, p. 38, (insurance claims) states that the amounts to be received in settlement of insurance claims for losses and the amounts to be received as recovery for losses are appropriated from the general fund to the state insurance catastrophe reserve account or the appropriate state agency to mitigate loss.

Section 24, p. 38, (National Petroleum Reserve - Alaska impact grant program) states that the amount received by the National Petroleum Reserve - Alaska special revenue fund, estimated to be \$3,502,626, is appropriated from that fund to the Department of Commerce, Community, and Economic Development (DCCED) for capital project grants to various municipalities under the National Petroleum Reserve - Alaska impact grant program.

Section 25, p. 39, (Alaska Aerospace Corporation). Section 25(a) - (d) would reappropriate to various agencies the unexpended and unobligated general fund balance (estimated to be \$22,000,000) of a prior appropriation made to Department of Military and Veterans' Affairs, Alaska Aerospace Corporation for construction of a new medium lift launch pad. Section 25(a) would reappropriate \$125,000 to DCCED for payment as a grant to Hope Community Resources for upgrades to housing. Section 25(b) would reappropriate \$3,000,000 to Alaska Housing Finance Corporation for the supplemental housing program. Section 25(c) would reappropriate \$250,000 to DCCED for payment as a grant to the Cold Climate Housing Research Center. Section 25(d) would reappropriate \$10,000,000 to DOTPF for Alaska marine highway system vessel overhaul and rehabilitation.

Section 26, p. 39, (commercial vessel passenger tax account) would reappropriate to the commercial vessel tax account (AS 43.52.230) the unexpended and unobligated balances, estimated to total \$1,906,475 of three different prior appropriations, including (1) Wasilla, airport train station improvements, estimated to be \$326,475; (2) DOTPF, cruise ship related projects, estimated to be \$830,000; and (3) DOTPF, improvements to pedestrian areas and access along Hazlet Drive in Valdez, estimated to be \$750,000.

Section 27, p. 40, would make appropriations to DCCED and reappropriate several prior appropriations to DCCED. Section 27(a) would reappropriate to the Alaska Energy Authority the unexpended and unobligated balance, not to exceed \$330,000 of the estimated balance \$12,500,000 of a prior appropriation to DCCED, AEA, Mount Spurr geothermal project development. Section 27(b) would reappropriate to renewable energy grant fund the unexpended and unobligated balance, not to exceed \$9,512,659 of the estimated balance of \$12,500,000 of a prior appropriation to DCCED, AEA, Mount Spurr geothermal development project. Section 27(c) would appropriate \$75,000 from the anatomical gift awareness fund (AS 13.50.160) to DCCED for payment as a grant to Life Alaska Donor Services. Section 27(d) would reappropriate to DCCED, Denali Commission, the unexpended and unobligated balance, estimated to be \$1,360,000 of a prior appropriation to DCCED, Denali Commission.

Section 28, p. 41, would make various reappropriations to the Department of Education and Early Development (DEED). Section 28(a) would reappropriate several prior appropriations to DEED back to DEED for payment as grants to (1) Petersburg School District for boiler repair; (2) Yukon Koyokuk School District for renovations; (3) Nome city School District for lighting replacement; and (4) Lower Kuskokwim School District for boiler replacement. Section 28(b) states that if the amount available for reappropriation is insufficient the appropriations shall be reduced in proportion to the shortfall.

Section 29, page 41, would make various appropriations and reappropriations to the Department of Environmental Conservation (DEC). Section 29(a) would reappropriate to the oil and gas hazardous substance release prevention account the unexpended and unobligated balances, not to exceed \$800,000 of the estimated total balance of \$3,201,258 of 33 separate prior appropriations. Section 29(b) states that the remaining balances of the prior appropriations listed in sec. 29(a) are reappropriated to DEC for Naknek sewer relocation and system upgrade.

Section 30, p. 45, would amend several prior appropriations to the Department of Health and Social Services to require funds to be spent for the completion of the Fairbanks virology laboratory, rather than its replacement.

Section 31, p. 46, would reappropriate to Department of Natural Resources (DNR) for unified permit automation and document management the unexpended and unobligated balance, estimated to be \$1,000,000 of a prior appropriation made to DNR, shale oil environmental data.

Section 32, p. 46, would reappropriate to the Department of Public Safety (DPS), for state trooper video equipment and storage, the unexpended and unobligated balances, estimated to be \$350,000, of two prior appropriations to DPS.

F. Sections 33 – 36 of the bill.

Sections 33 - 36 would make reappropriations or amend various appropriations related to projects in various house districts around the state. There are far fewer of these appropriations than in past years.

Section 33, p. 47, covers House Districts 12 - 28. Section 33(a) would amend a prior appropriation to allow funds previously allocated to Steller Secondary School computer lab wiring to be used for equipment as well. Section 33(b) would amend a prior appropriation to allow funds previously allocated to Begich Middle School track and field lighting to be used for additional upgrades as well. Section 33(c) would amend a previous appropriation to limit funds for DeBarr Road pedestrian improvements to the west side.

Section 34, p. 47, covers House Districts 29 - 31. Section 34(a) reappropriates to Department of Labor and Workforce Development (DLWD) for the refreshment of technology at Alaska Vocational Technical Center the unexpended and unobligated balance, estimated to be \$530,000, of a prior appropriation to DLWD for Third Avenue dormitory replacement.

Section 35, p. 48, covers House Districts 33 - 36. Section 35(a) would reappropriate to DCCED for payment as a grant to the Inter-Island Ferry Authority the unexpended and unobligated balance, not to exceed \$250,000 of an estimated \$500,000, of a prior appropriation to DOTPF for ferry facilities. Section 35(b) would reappropriate to DCCED for payment as a grant to the Inter-Island Ferry Authority the unexpended and unobligated balance, not to exceed \$500,000, of a prior appropriation to DOTPF for Kalifornsky Beach Road and bridge access pedestrian paths.

Section 36, p. 48, covers House Districts 38 - 39 and would reappropriate to DCCED for payment as a grant to the City of Akiak for the village police safety building the unexpended and unobligated balance, estimated to be \$400,000 of a prior appropriation to Akiak for the village police safety building.

G. Sections 37 – 48 of the bill.

Section 37, p. 48, makes several appropriations to the Office of the Governor. Section 37(a) would reappropriate to the governor's office for Arctic policy leadership and economic development projects the unexpended and unobligated balances, not to exceed \$900,000, of five prior appropriations to the governor's office. Section 37(b) would reappropriate to DCCED for payment as a grant to Arctic Power for Arctic energy issues the unexpended and unobligated general fund balances, not to exceed \$175,000, of four prior appropriations to the governor's office. Section 37(c) states that if the amount

available for reappropriation is less than \$1,075,000, then the reappropriations shall be reduced proportionally.

Section 38, p. 49, (reappropriation of legislative appropriations). Section 38(a) would reappropriate to the Legislative Council the unexpended and unobligated balance, estimated to be \$211,401 of a prior appropriation made to the legislature, Alaska Arctic Policy Commission. Section 38(b) would reappropriate to the Alaska Legislature, Legislative Council, for seismic retrofit and exterior restoration project for the capitol the unexpended and unobligated balance balances of seven prior appropriations to the Alaska Legislature.

Section 39, p. 50, (shared taxes and fees). This section would amend previous legislation regarding revenue sharing with local governments to remove aviation fuel tax as a revenue source.

Section 40, p. 51, (nongeneral fund receipts) states that Mental Health Trust Authority receipts, administration receipts, or federal designated program receipts for the proposed Medicaid expansion may not be accepted or expended without a an acceptable reformation plan. We note this condition in this review, but refer you to the detailed analysis contained in our review of the same provision in the fiscal year 2016 operating budget, (CCS HB 72(brf sup maj fld H).

Section 41, p. 51, makes more than 90 reappropriations to the Alaska Housing Capital Corporation account. We are unsure of the legislature's intention in moving funds from so many different sources to this particular account. We do note that under sec. 44, the legislature declares these appropriations to be for capitalization of a fund and therefore do not lapse.

Section 42, p. 60, repeals several statutory sections enacted in 2014.

Section 43, p. 60, extends the lapse time for an appropriation made in 2010 for Anchorage, 13th Avenue gateway element improvements until June 30, 2016.

Section 44, p. 60, provides lapse dates for the appropriations in the bill. Under section 44(a), the appropriations made in sections 16, 23(2), 24, 25(b), 25(d), 27(a), 27(d), 28, 29(b), 31, 32, 34(a), 37(a) and 38(b) are declared to be for capital projects and lapse under 37.25.020.⁵ Section 44(b) states that the appropriations in sections 21, 23(1),

⁵ AS 37.25.020 provides that an appropriation for a capital project is valid for the life of the project, and the unexpended balance shall be carried forward to subsequent fiscal years if substantial, ongoing work on the project has begun within five years of the effective date of the appropriation.

26, 27(b), 29(a), and 41 are for the capitalization of funds and do not lapse. Section 44(c) states that the unexpended and unobligated balances, estimated to be \$1,075,000, of the two appropriations made in 2013 will lapse into the general fund on April 19, 2015. Section 44(d) provides that a grant awarded to a named recipient under AS 37.05.316 is for a capital project and lapses under AS 37.05.316 unless otherwise designated.

Section 45, p. 61, provides that the appropriation made in sec. 15 (\$50,000 from the general fund to the Department of Revenue for costs associated with updating the tax revenue management system and tax forms and drafting regulations to implement a surcharge on refined motor fuels) is contingent on the enactment into law of a bill creating a surcharge on refined motor fuels.

Sections 46, 47, and 48 of the bill provide effective dates for its various provisions.

Conclusion.

Although we have identified no other constitutional or legal issues in the bill, please be advised that 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 the bill, as well as related legislation, to make certain that appropriations are implemented in a manner that is consistent with enabling statutes and valid legislative intent.

Sincerely,

Craig W. Richards
Attorney General

CWR:TAD:rjc