



THE STATE  
*of* **ALASKA**  
GOVERNOR MICHAEL J. DUNLEAVY

**Department of Law**

CIVIL DIVISION

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July 3, 2019

The Honorable Michael J. Dunleavy  
Governor  
State of Alaska  
P.O. Box 110001  
Juneau, Alaska 99811-0001

Re: SB 19: Capital Budget; Supplemental  
(HCS CSSSSB 19(FIN) am H (brf sup  
maj fld H)  
Our file: 2019200553

Dear Governor Dunleavy:

At the request of your legislative director, we have reviewed HCS CSSSSB 19(FIN) am H (brf sup maj fld H), making appropriations, including capital appropriations, supplemental appropriations, reappropriations, and other appropriations; amending appropriations; and making appropriations to capitalize funds.

**I. General Comments**

We have reviewed all appropriations set out in this 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.

*Legislative Intent*

The fiscal year 2020 capital budget bill contains several expressions of legislative intent accompanying certain appropriation items and also includes some contingency provisions. Legislative intent language is located in sec. 1; page 4, lines 18 - 27; page 4, line 33, through page 5, line 4; page 7, lines 22 - 25; page 7, lines 27 - 32; page 8, lines 7 - 12; in sec. 4, on page 14, lines 18 - 31; in sec. 7, page 20, lines 2 - 8; in sec. 8, on page 21, lines 1 - 3; in sec. 14(c), on page 25, line 22, through page 26, line 11. We believe that most expressions of legislative intent are not binding on the executive branch because such expressions violate the confinement clause in art. II, sec. 13, of the Alaska

Constitution “[b]ills for appropriations shall be confined to appropriations.” The Alaska courts have used a five factor test to determine whether language added to an appropriations bill violates the confinement clause. Under this test (the *Hammond factors*), the qualifying language must (1) not administer the program of expenditures; (2) not enact law or amend existing law; (3) be the minimum necessary to explain the legislature’s intent regarding how the money appropriated is to be spent; (4) be germane, that is, appropriate, to an appropriations bill; and (5) not extend beyond the life of the appropriation.<sup>1</sup>

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, we recommend further consultation with this office so that we may advise as to the extent the 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 not be vetoed by the governor as a line item veto separate from the appropriation itself. On this point, the Alaska Supreme Court has ruled that expressions of intent do not constitute “items” subject to your veto power.<sup>2</sup>

### *Contingency Language*

The bill also contains contingencies in secs. 1, 7, and 30. The Alaska Supreme Court has also found that contingency language should be subject to the same analysis as legislative intent language.<sup>3</sup>

The contingency in sec. 1 is regarding a Department of Commerce, Community, and Economic Development appropriation for the Alaska Industrial Development and Export Authority. The appropriation would provide funding for utility gas storage tanks, and it is conditional upon the commercialization of the interior gas utility between January 1, 2020, and January 1, 2021.

The contingency in sec. 7 makes various appropriations contingent on enactment into law of several bills considered by the legislature in the regular session and the first special session.

There are six contingencies in sec. 30. The first contingency makes appropriations from the constitutional budget reserve fund in secs. 1 - 6 of the bill contingent on passing

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<sup>1</sup> *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

<sup>2</sup> *Knowles*, 21 P.3d at 371-375.

<sup>3</sup> *Knowles*, 21 P.3d at 378-384.

the appropriation in sec. 27(a). Section 27(a) calls for a transfer of funds from the budget reserve fund, which requires a three-fourths vote in favor of the transfer from both houses. The House was unable to meet this three-fourths vote requirement. This means that sec. 26(a) was not passed, so the appropriations from the constitutional budget reserve fund in secs. 1 - 6 of the bill will not occur. (See below.)

The second contingency, in sec. 30(b), makes the appropriation in sec. 14(a) contingent on the number of people convicted of a crime against the state and committed to the custody of the commissioner of corrections exceeding 5,130 on or before December 31, 2019. The third contingency makes the appropriation in sec. 14(b) contingent on that number exceeding 5,500 on or before March 31, 2020.

The remaining contingencies rely on the passage or failure of a version of SB 37, a bill to renew the vaccine assessment program which passed the legislature on May 6, 2019. The fourth contingency in sec. 30(d) makes the appropriation in sec. 19(b) contingent on the enactment into law of SB 37. Section 19(b) would appropriate the vaccine assessment program receipts to the vaccine assessment account under the statewide immunization program. Subsections (e) and (f) make the appropriations in secs. 24 and 34(g) in CCS SSHB 39, the FY 2020 operating budget, contingent on the *failure* of a version of SB 37 to be enacted into law. Section 24 of CCS SSHB 39 would appropriate to the Department of Health and Social Services from the vaccine assessment account the amount necessary to purchase vaccines through the statewide immunization program. Section 34(g) of CCS SSHB 39 would appropriate the vaccine assessment program receipts to the vaccine assessment account.

#### *Appropriating Future Revenues*

We note that the appropriations in secs. 15(b) and 18(a) attempt to appropriate state revenues (receipts) beyond the next fiscal year. The Attorney General advised in an opinion dated May 8, 2019, that similar appropriations that sought to “forward fund” education through the commitment of future state revenues were unconstitutional under article IX of the Alaska Constitution. The appropriations in secs. 15(b) and 18(a) suffer from this same legal infirmity and thus the portion of the appropriations that attempt to appropriate money beyond FY20 would be considered to be invalid appropriations by the Department of Law. We recommend using the line-item veto authority to strike these unlawful appropriations.

#### *Supplemental Appropriations and Funding Sources*

We note that there are a number of FY19 supplemental appropriations in this bill with a retroactivity provision providing that the appropriations are retroactive to FY19. Although this is not uncommon in an appropriation bill, this year a number of the appropriations may be unfunded. This is because under article IX, section 17(d) of the

Alaska Constitution, money in the general fund available for appropriation at the end of a fiscal year must be deposited into the constitutional budget reserve fund (“CBRF”) until the CBRF is repaid for prior appropriations from the CBRF. Historically, the legislature has included in an appropriations bill (typically either the operating budget or capital budget bill) an appropriation from the CBRF to reverse the constitutionally required deposit into the CBRF of money in the general fund subaccounts that are available for appropriation at the end of the fiscal year. This is commonly known as the “reverse sweep” provision. However, the legislature did not pass a reverse sweep provision in any appropriation bill. Accordingly, the repayment provision of article IX, section 17(d) will be applied.

The Alaska Supreme Court in *Hickel v. Cowper*<sup>4</sup> briefly addressed the CBRF repayment provision and stated that it applies to money “available for appropriation” as described more fully in that decision and in the general fund.<sup>5</sup> In particular, the Court stated that “monies which already have been validly committed by the legislature to some purpose should not be counted as available” while “monies from which the legislature can make an appropriation and which require a legislative appropriation before they can be expended” should be counted as available for appropriation.<sup>6</sup> The permanent fund earnings reserve account was identified as a fund outside of the general fund that need not be subject to the CBRF repayment provision.<sup>7</sup> There is no definition of the general fund in the Alaska Constitution. We are available to assist the Office of Management and Budget in examining particular funds and to advise on the application of the repayment provision. It is likely, based on the required deposit into the CBRF of funds “available for appropriation in the general fund” at the end of FY19, that certain agencies and departments will not receive all of the revenues anticipated in this bill.

## II. Sectional Analysis

Section 1, pages 2 - 9, would make appropriations for capital projects and grants from the general fund or other funds. Except as otherwise noted, these appropriations lapse under AS 37.25.020.

Section 2, pages 10 - 12, sets out the funding by agency for the appropriations made in sec. 1. Section 3, page 13, sets out the statewide funding for the appropriations made in sec. 1. Under sec. 33 of the bill, secs. 1 - 3 take effect on July 1, 2019, unless the

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<sup>4</sup> 874 P.2d 922 (Alaska 1994).

<sup>5</sup> *Id.* at n.32.

<sup>6</sup> *Id.* at 930-31.

<sup>7</sup> *Id.*

bill is signed into law after July 1, 2019, in which case secs. 1 - 3 take effect retroactively to July 1, 2019, under sec. 29(c).

Section 4, pages 14 - 15, would make appropriations for supplemental capital projects and grants from the general fund or other funds. Except as otherwise noted, these appropriations lapse under AS 37.25.020. Section 5, page 16, sets out the funding by agency for the appropriations made in sec. 4. Section 6, page 17, sets out the statewide funding for the appropriations made in sec. 4. Under sec. 29(a) of the bill, if secs. 4 - 6 take effect after May 15, 2019, the sections are retroactive to May 15, 2019. Otherwise, under sec. 31, secs. 4 - 6 take effect May 15, 2019.

Section 7, pages 18 - 20, would make appropriations for operating expenditures from the general fund or other funds and sets out the funding sources by agency. These appropriations are for the fiscal year beginning July 1, 2019, and ending June 30, 2020. The appropriations are to fund legislation assumed to have been enacted into law during the first regular session and first special session of the 31st legislature. If a measure is not enacted into law or not incorporated in a separate bill that is enacted into law, the appropriation must be reduced accordingly.<sup>8</sup>

Under sec. 29(c) of the bill, if sec. 7 takes effect after July 1, 2019, the sections are retroactive to July 1, 2019. Otherwise, under sec. 33, sec. 7 takes effect July 1, 2019.

Section 8, page 21, states the legislative intent that the Department of Transportation and Public Facilities begin work on the Juneau Access Improvements Project as soon as possible. As stated above, expressions of intent may generally be ignored or followed as a matter of comity. Also as stated, 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 under the *Hammond* factors.

Section 9 would appropriate \$3,000,000 from the general fund to the Department of Corrections for increased costs due to nursing shortages, medical fees, chronic diseases, and pharmaceuticals for the 2019 fiscal year. Under sec. 29(a) of the bill, if sec. 9 takes effect after May 15, 2019, the sections are retroactive to May 15, 2019. Otherwise, under sec. 31, sec. 9 takes effect May 15, 2019.

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<sup>8</sup> The legislation included: criminal bills HB 14 (assault; sex offenses) and HB 49 (crimes, sentencing), SB 10 to extend the Suicide Prevention Council, SB 41 to increase the number of superior court judges, SB 44 regarding telehealth and physician assistants, SB 61 regarding the fishermen's fund and vessel owner benefits, and SB 93 regarding medical provider incentives and loan repayment.

Section 10 would appropriate various federal and other program receipts. Section 11(1) would appropriate amounts received in settlement of insurance claims to the state insurance catastrophe reserve account under AS 37.05.289(a) or under sec. 11(2) to the appropriate state agency. Section 28(b) of the bill specifies that the appropriation under sec. 11(1) is for the capitalization of a fund and does not lapse. Section 28(a) of the bill specifies that the appropriation made in sec. 11(2) lapses under AS 37.25.020.

Section 12(a) and (b) would appropriate amounts received by the National Petroleum Reserve – Alaska special revenue fund under AS 37.05.530(a) to various municipalities and boroughs. Section 28(a) of the bill specifies that the appropriation made in sec. 12(b) lapses under AS 37.25.020. Under sec. 29(a) of the bill, if sec. 12(a) takes effect after May 15, 2019, the sections are retroactive to May 15, 2019. Otherwise, under sec. 31, sec. 12(a) takes effect May 15, 2019. Under sec. 29(c) of the bill, if sec. 12(b) takes effect after July 1, 2019, the subsection is retroactive to July 1, 2019. Otherwise, under sec. 33, sec. 12(b) takes effect July 1, 2019.

Section 13 would make appropriations to the Department of Commerce, Community, and Economic Development. Section 13(a) would reappropriate \$905,065 to replace the Alaska Railroad Corporation dock in Seward. Under sec. 28(a), this reappropriation is for a capital project and lapses under AS 37.25.020. Section 13(b) would reappropriate up to \$225,000 to pay as a grant to the Alaska Peace Officers Association Farthest North Chapter for the design of a shooting range at the Interior Public Safety Training Facility. Under sec. 29(b), if sec. 13(a) and (b) take effect after June 30, 2019, these sections are retroactive to June 30, 2019. Otherwise, sec. 13(a) and (b) take effect June 30, 2019.

Section 13(c) would appropriate \$200,000 from the Exxon Valdez oil spill restoration fund to pay as a grant under AS 37.05.316 to the Prince William Sound Science and Technology Institute for planning and construction of a research facility. Section 13(d) would appropriate \$4,000,000 from the AIDEA receipts to pay as a grant under AS 37.05.316 to the Northwest Arctic Borough for costs of school construction and major maintenance. Under sec. 28(c), grants awarded to named recipients under AS 37.05.316 are for capital projects and lapse under the statute unless designated for a specific fiscal year. Under sec. 29(c), if sec. 13(c) and (d) take effect after July 1, 2019, the subsections are retroactive to July 1, 2019. Otherwise, the subsections take effect July 1, 2019.

Section 14(a) and (b) would appropriate funds from the power cost equalization endowment fund (AS 42.45.070(a)) to the Department of Corrections for the costs of reopening the Palmer Correctional Center for the 2020 fiscal year. The appropriation in sec. 14(a) is for \$6,000,000 and the appropriation in sec. 14(b) is for \$10,669,100. As discussed above, these appropriations are subject to contingencies in sec. 30(a) and (b). Section 14(c) is an expression of legislative intent that the Department of Corrections

submit five reports to the leaders of both legislative bodies before the first day of the second regular session of the 31st legislature. The reports include offender profile reports, a report on the increase in prisoner population by offense category, a report on placement in residential centers or on electronic monitoring, and a report on persons under pretrial supervision. We have previously advised that if reporting requirements are not set out in the statute, the department may comply as a matter of comity. Section 14 would take effect July 1, 2019, under sec. 33, and under sec. 29(c) would be retroactive to July 1, 2019, if the section takes effect after July 1, 2019.

Section 15(a) would reappropriate \$49,766 to the Department of Education and Early Development for abandoned school site assessments. Under sec. 28(a), the reappropriation in sec. 15(a) is for a capital project and lapses under AS 37.25.020. Under sec. 29(b), if sec. 15(a) takes effect after June 30, 2019, this section is retroactive to June 30, 2019. Otherwise, under sec. 32, sec. 15(a) takes effect June 30, 2019. Section 15(b) would appropriate the proceeds from the sale of Department of Education and Early Development state-owned land in Sitka during the 2020, 2021, and 2022 fiscal years for maintenance and operations of Mt. Edgecombe boarding school during the 2020, 2021, 2022, and 2023 fiscal years. Section 15(b) would take effect July 1, 2019, under sec. 33, and under sec. 29(c) would be retroactive to July 1, 2019, if the section takes effect after July 1, 2019.

Section 16 would reappropriate \$34,577 to the Department of Natural Resources for the Flattop Mountain Trail clean up pilot project. Section 16 would take effect June 30, 2019, under sec. 32, and under sec. 29(b) would be retroactive to June 30, 2019 if the section takes effect after June 30, 2019.

Section 17(a) would reappropriate \$659,958 to the Department of Public Safety for Alaska state troopers law enforcement equipment replacement. Section 17(b) would reappropriate \$248,203 for Alaska wildlife troopers law enforcement equipment replacement. Section 17(c) would reappropriate \$289,493 for village public safety officer equipment replacement. Under sec. 28(a), the appropriations made under sec. 17 are for capital projects and lapse under AS 37.25.020. Section 17 would take effect June 30, 2019, under sec. 32, and under sec. 29(b) would be retroactive to June 30, 2019, if the section takes effect after June 30, 2019.

Section 18(a) would appropriate proceeds from the sale of the Alaska marine highway system assets during fiscal years 2020, 2021, and 2022 to the Alaska marine highway system vessel replacement fund. Section 18(a) would take effect July 1, 2019, under sec. 33, and under sec. 29(c) would be retroactive to July 1, 2019, if the section takes effect after July 1, 2019. Section 18(b) would reappropriate \$1,604,457 to the harbor facility grant fund for harbor facility matching grants. Section 18(b) would take effect June 30, 2019, under sec. 32, and under sec. 29(b) would be retroactive to June 30, 2019 if the section takes effect after June 30, 2019.

Section 19 is for fund capitalizations. Section 19(a) would appropriate up to \$25,000,000 of program receipts from the Alaska Gasline Development Corporation to the Alaska liquefied natural gas project fund. Section 19(b) would appropriate approximately \$12,500,000 of vaccine assessment program receipts to the vaccine assessment fund.

Section 20 transfers an estimated \$10,700,000 from the large passenger vessel gaming and gambling tax account under AS 43.35.220 to the general fund. Section 20 would take effect July 1, 2019, under sec. 33, and under sec. 29(c) would be retroactive to July 1, 2019, if the section takes effect after July 1, 2019.

Sections 21 through 23 would amend appropriations from previous session laws to expand previously funded projects or conform language to circumstance. Section 21 would add “and property” to an appropriation for Ahtna, Inc., landing completion project. Section 22 would add “and North” to the Kenai River South Beach dip net access project. Section 23 would eliminate text from the Alaska Marine Highway System and NOAA Moorage Facility project so it reads “Marine and Moorage Facility.” The appropriation amount would not be changed.

Section 24(a) would reappropriate approximately \$1,850,000 to the Office of the Governor for costs related to repairing, replacing, and improving elections voting systems, as well as other projects related to executive branch office buildings and facilities. Section 24(b) would reappropriate up to \$600,000 of five listed appropriations for the above projects as well as the U.S. Census complete count. Section 24(c) would reappropriate up to \$50,000 of the appropriations listed in (b) for capital costs related to redistricting. Section 24(d) would reduce the appropriations in (b) and (c) proportionally if the amount available for reappropriations totals less than \$650,000.

Section 25 would reappropriate unexpended and unobligated amounts from specified 2018 appropriations to the Alaska Legislature, Legislative Council, for projects related to renovation, repair, and improvements to legislative buildings and facilities. Appropriations in secs. 24 and 25 lapse under AS 37.25.020, per sec. 28(a).

Section 26(a) would make reappropriations from various accounts of approximately \$9,286,780 to the Alaska Housing Capital Corporation account. Section 26(b) would reappropriate funds remaining after the appropriation in sec. 13(b) to the Alaska Housing Capital Corporation. Section 26 is for the capitalization of a fund and does not lapse, under sec. 28(b).

Sections 21 - 26 would take effect June 30, 2019, under sec. 32, and apply retroactively to that date under sec. 29(b) if this Act takes effect later than June 30, 2019.



Section 27 contains provisions relating to the constitutional budget reserve fund (CBR). The CBR was established in art. IX, sec. 17, Constitution of the State of Alaska. Appropriations from the CBR require a three-fourths vote of the members of both houses. Section 27(a) and (c) were both intended to make appropriations from the CBR, but did not obtain the required three-fourths vote; without the necessary vote, these appropriations will not occur. Section 27(b) provides that the unrestricted interest earned on the investment of general fund balances in fiscal year 2020 is appropriated to the CBR in order to compensate the fund for any lost earnings caused by the use of the fund to permit expenditure of operating and capital appropriations in fiscal year 2020 in anticipation of receiving unrestricted general fund revenue.

### **III. 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,

KEVIN G. CLARKSON  
ATTORNEY GENERAL

By:

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