

June 27, 1991

Honorable Walter J. Hickel
Governor
State of Alaska
P O Box A
Juneau, Alaska 99811-0101

Re: SCS CSHB 15(FIN) am S --
Approp: Supplemental and
Special Appropriations
Our file: 883-91-0103

Dear Governor Hickel:

At the request of your legislative staff assistant, Lori Nottingham, we have reviewed SCS CSHB 15(FIN) am S, an Act making, amending, and repealing capital and operating appropriations, and making miscellaneous supplemental and special appropriations. This bill combines the capital budget, supplemental fiscal year 1992 appropriations, and reappropriations of appropriations made for earlier fiscal years.

The reappropriation part of this bill will present the most difficulties in applying the governor's veto powers. The governor and the legislature are currently litigating the manner in which former Governor Cowper vetoed items in the fiscal year 1991 reappropriations bill. Alaska State Legislature v. Cowper, 3AN 91-551 Civ. The heart of that dispute concerns the limitations on the governor's item veto as applied to the amendment, repeal, or reappropriation of existing appropriations.

Governor Cowper used the executive veto power to eliminate only the words of reappropriation while leaving intact words providing that an existing appropriation would be repealed. Although the litigation has not progressed far enough to be certain, it appears that the legislature is contending that the governor may not strike a part of a reappropriation provision. This is a convenient argument because, according to the legislature, a veto limited in that manner would leave the prior year's appropriation intact. This argument ignores the extraordinary power of the governor to amend the provisions of appropriations bills through the use of the item and reduction veto powers conferred by art. II, sec. 15 of the Alaska Constitution.

The recurring practice of considering and passing bills containing scores of reappropriations is a strong indication that excessive appropriations were made for certain projects. When an appropriation is enacted, the Department of Administration restricts sufficient money, credited to the funding source for the fiscal year in which the appropriation is made, to cover these appropriations. The restriction is an accounting measure which carries forward through the fiscal years until the appropriation lapses. These over-endowed appropriations serve as the justification for making future appropriations for other purposes. Legislators argue that they are not spending "new" money because they are eliminating or "using" spending authority from a previous fiscal year. In fact, the spending source is not the existing appropriation but rather the general fund. The projects financed by reappropriations are often located in the same election district in which the original project is situated. The process operates to protect allocations of spending authority that are parceled out through political accommodation to each election district of the state.

Several of the reappropriations in the bill are, in fact, reappropriations of reappropriations. This results in an evasion of the requirement of the Alaska Constitution that "unobligated appropriations outstanding at the end of a period specified by law shall be void." Alaska Const. art. IX, sec. 13. The framers of the constitution wanted to strictly limit the practice of long-lived appropriations. By requiring a lapse date, the state money restricted pursuant to an appropriation would eventually revert to an unrestricted status and would be generally available for appropriation by the legislature.

State law provides that the unexpended balance of a capital appropriation is valid for the life of the project. AS 37.25.020. By repeated reappropriations, the spending authority attributed to the first fiscal year for which the appropriation was made extends far beyond the completion date of the initial purpose and, by political accommodation, it does not become generally available by lapse into the general fund. However, we believe that the governor can foil this not so subtle attempt to dedicate state money by using his item and reduction veto powers. Similar to the vetoes exercised by former Governor Cowper, you may wish to exercise your veto powers to force the lapse of stale appropriations, so that presently restricted funds could be available for appropriation unfettered by past political accommodations.

In our opinion, when the legislature proposes to enact a reappropriation or amendment of an existing appropriation, the

executive veto power must be construed to apply to each item presented in the appropriation bill. If broadly construed, the veto power would break the seemingly unending chain of reappropriations so that public money does not become dedicated solely for purposes benefitting specific election districts of the state.

For any reappropriation, two items are before the governor for action: (1) the repeal of the unobligated part of the prior year existing appropriation, and (2) the proposed new object of expenditure. Because the governor's veto power extends to "items in appropriations bills," he must be able to strike or reduce either or both items before him. "Items in appropriations bills" are provisions that designate a specific purpose for which funds can be spent and specifies the amount that can be used for that purpose. AS 14.08.030; Sutherland Statutory Construction Sec. 16.08 (4th Ed.).

The legislature will argue that a reappropriation is merely a single item that is contingent upon the repeal of the earlier appropriation. However, the repeal and the reappropriation each contain the elements of an appropriation. Each has an identifiable amount, a purpose, and a funding source.

The words describing the repeal refer to the "unobligated and unexpended amount" and describe the original appropriation that contains the funding source and purpose, all of which are readily ascertainable within the text of the bill under review by the governor. To accept the legislature's argument means that the governor's veto power can be limited merely by purporting to join one or more items in a single section of the bill.

The legislature may not validly draft an appropriation bill so as to unduly and unreasonably preclude the exercise of the executive power of veto. Opinion to the Governor, 239 So.2d 1, 9 (Fla. 1970). In Legislature v. Cowper, the legislature contends that the governor may only strike a reappropriation section in its entirety. Under the legislature's theory of the case, the original appropriation would be left intact; the unexpended balance of the original appropriation would remain on the books even if the original purpose of the appropriation is satisfied, impossible to perform, or abandoned. The door is left open for attempts in the future to use the unexpended spending authority as the basis for another reappropriation. We believe that for each item presented to him in an appropriations bill, the governor may either strike or reduce the item. By proposing a repeal and reappropriation, the legislature is in effect saying that there is excess spending authority to cover a new object of expenditure. When that occurs, the governor must be allowed to take action in a manner that allows the original

appropriation to lapse (be stricken) or be reduced while striking or reducing the reappropriation which qualifies as a new appropriation. In each instance an appropriation is involved.

There are alternative ways in which the governor may reduce a reappropriation. For example, sec. 20 of the bill repeals the "unexpended and unobligated balance" of an appropriation for a health clinic and reappropriates that amount for costs "associated with the health clinic". By striking out the reappropriation wording, the wording repealing the unexpended and unobligated amount is left intact with the net effect of reducing the amount to be reappropriated from the original appropriation to zero. The governor could also strike out the words "the unexpended and unobligated balance" and insert in their place an amount less than the remaining balance. Alternatively the governor could merely insert an amount so that the item reads " \$ X.00 of the unexpended and unobligated balance is repealed". This technique would leave some spending authority with the original appropriation.

A more difficult example involves sections that add new objects of expenditure to existing appropriations. See e.g., secs. 16 - 19 of the bill. If the governor does not agree that all of the available spending authority remaining in an existing appropriation should be spent on the new purpose proposed in the bill, he cannot be foreclosed from using the reduction veto to provide that a lesser amount will be applied to the new purpose.

Any substantial amendment to an existing appropriation subjects the entire unexpended and unobligated balance to either being stricken or reduced by veto action. The governor could express this veto by striking out the words that define the amount available for reappropriation and inserting the dollar amount that he desires to be spent for the purposes set out in the section.

In addition to the issues concerning the pending lawsuit over the exercise of the executive veto power, the bill includes numerous items that may raise other legal issues for your consideration. We were not present during all of the legislative hearings on this bill, nor do we have access to other legislative history explaining the purpose of items contained in the bill. Set out below are comments on certain sections of the bill that may raise other legal issues that warrant your consideration. This is not an exhaustive list, because of the time and resources available for our review. Agencies charged with the responsibility for implementing these appropriations should freely consult with this office if they uncover facts that cause them to question the validity of an object of expenditure.

Page 2, lines 3 - 6: This appears to be a reappropriation of a DEC water and sewer grant for a municipal grant for the same purpose. The intent may be to avoid the matching fund requirement imposed for the DEC program. Matching requirements force grant recipients to invest their own money in a project and help to ensure that funds are providently spent.

Page 14, lines 9 and 10: This item appears to be a grant to a private religious organization. If the van will be used for a religious educational institution, the grant would violate art. VII, sec. 1 of the Alaska Constitution. It is also noted that the appropriation set for repeal is for the Lemon Creek Correctional Facility. This may raise a compliance issue under the Cleary decision.

Page 14, lines 16 - 18: This item is for a grant to purchase equipment for a private, nonprofit fish hatchery. Care must be taken to ascertain whether the grant will be used for a public purpose. As explained in other opinions, the benefits of the grant must flow directly to the public, not the private grantee. It is permissible for a private benefit to be conferred indirectly.

Page 22, lines 27 - 29: This item appropriates \$100,000 for the state match for the "Alaska space grant program." We are unaware whether such a program exists in law or whether that "program" has a matching requirement. It must be remembered that an appropriation bill cannot be used to establish grant programs. That action must be taken in a non-appropriations bill.

Page 29, lines 15 - page 22: This item appears to represent a forgiveness of a loan to the Cordova Electrical Cooperative. Without further information about the surrounding circumstances, we doubt whether this item is for a public purpose. The co-op is a private entity that is apparently obligated under the loan. If it is not giving consideration for the grant, there is a serious question concerning whether it is for a public purpose.

Page 30, lines 16 - 18: This item appropriates the balance of the mental health trust income account (approximately \$70,000,000) to an account in the general fund to be known as the mental health capital project account. This account is not established by law. It is doubtful whether an appropriation bill can create a permanent account. It may take a general law bill to accomplish that end. However, in the spirit of cooperation surrounding the proposed settlement of the mental health lands

dispute, we recommend that this item be left intact pending acceptance or rejection of the settlement by the Superior Court. If there is a legal defect it can be corrected at a later date.

Page 30, lines 19 - 24: This item makes an appropriation for a "national education effort" to gain approval for opening ANWR. Care must be taken to assure that this money is not spent for partisan political purposes. The temptation may be present to

use the money to lobby governmental institutions. It is very rare to find circumstances that qualify an expenditure for partisan political activities as being for a public purpose.

Page 31, lines 2 - 43: This item appropriates an amount to satisfy a claim by the former chairman of the APUC. The former chairman's name was withdrawn from consideration before he could be confirmed. The item stems from a dispute between the legislature and the governor over the power to withdraw, from the confirmation process, names of appointees forwarded by the preceding governor. The legislature contends that the governor must forward the appointments while the governor maintains that he may individually review them and substitute the names of other appointees. To our knowledge, this person has not made a claim for compensation. This item should be vetoed. If he makes a claim, an appropriation can be obtained after it determined whether he is entitled to recover.

Page 32, lines 14 - 19: This item appropriates \$150,000 for operations of the state reappropriations board for the 1991 and 1992 fiscal years. It also contains an appropriation of \$100,000 to the Alaska Legislative Council to participate on behalf of the legislature in "proceedings" related to the adoption of the 1991 redistricting plan. The appropriation is conditioned so that the appropriation to the office of the governor can be the only source of financing for these activities. We believe that you should strike section 159 in its entirety. The main purpose of the original request submitted by the administration was to finance the state's defense of the redistricting plan. This defense is estimated to cost approximately \$300,000 if fully funded. The main purpose of the appropriation is to limit the defense to one-half the amount necessary to carry out a competent defense. The condition is worded in a manner that would restrict the administration from using other sources of money that could be spent for this purpose. It should also be apparent that the State Reapportionment Board ceases to exist on July 1, 1991. It will have no role in the defense of the plan. For that reason, the

appropriation is technically inaccurate. Finally, doubt that the legislature would have standing to "participate" in proceedings related to the redistricting plan. Under the Alaska constitution, the legislature has no role in the redistricting process.

Page 38, lines 6 - 14: This item is a statement of intent that purports to outline the elements of a deep water port study for the southcentral region of the state. The statement cannot dictate the elements of the study; to accomplish that purpose, the legislature must enact a general law, because the Alaska Constitution limits appropriations bills exclusively to appropriations, not matters that change general law. Alaska Const. art. II, sec. 13.

Page 40, line 17 ; Page 73, line 10: These items are named-recipient grants to Friends of Kennicott for emergency stabilization of historic mine buildings situated in McCarthy. We do not know how Friends of Kennicott are organized or what their connection is to the mine property. We have heard unsubstantiated rumors that this organization stands to benefit from any improvements financed by the grants, because the federal government will then be induced to purchase the buildings for a park. If these appropriations survive, care must be taken by the administering agency to assure that the grants are spent for a public purpose. The test is an easy one; the public must be the direct beneficiary of the benefits provided by the grant. There is not a problem if private persons benefit in an indirect way. However, it would be a violation of the public purpose doctrine set out in art. IX, sec. 6 of the Alaska Constitution if the direct benefit flows to private persons and the public is only indirectly benefitted. The administering agency could prepare grant agreements that assure a fair return to the state from any proceeds of sale to the federal government. We will assist in any way possible to achieve this result.

Page 65, lines 10 - 18: These items are named recipient grants to rural education attendance areas (REAA's). It is unusual for an REAA to be considered a named-recipient. An REAA is a political subdivision of the state similar to a municipal special service area. These items, and a number of other grants set out later in the bill made to organized school districts, */ present some significant legal issues. There is no

*/ See, Page 93, lines 11 - 13 and 16; Page 94, lines 11 - 18; page 94, lines 4 - 14 and 16 - 17; page 95, lines 4 - 14, 16 and 17; page 96, lines 5 - 15; page 97, lines 4 - 11 and 13; page 98, lines 0 - 15; page 99, lines 4 - 9, 15 and 16; page 100, lines 4 - 15; page 101, lines 17 and 18; page 102, lines 3 - 15; page

uniform method for determining the needs of rural or municipal school districts for capital grants. Individual legislators may decide to provide grant financing for various reasons while other legislators may not. There is no apparent effort made to coordinate the needs of diverse school districts to achieve an average standard of financing for all school districts. Thus, these appropriations may result in inequality that will serve as the basis of a challenge by districts or students within those districts who contend that they are not receiving the same educational opportunities as students in other districts.

Page 67, lines 9 and 17: These items are grants to organizations for debt retirement purposes. This raises a significant legal question as to whether the expenditure would be for a public purpose. Generally, the state can finance the charitable activities of private organizations related to the performance of a public purpose. However, there must be some consideration given by the organization in return for the public financing. This consideration must be a direct benefit to the public interest. When the purpose of an expenditure is to retire a pre-existing debt, there is no new consideration passing to the state in return for the grant. The organization is doing nothing more than it was already obligated to do, i.e., pay its lawful debt. There may be a basis for distinguishing the item appearing at page 110, line 7 (Alaska Aviation Heritage Museum debt retirement); if the museum is a municipal agency, the public purpose doctrine is easier to satisfy.

Page 116, lines 7 - 9, 11- 13, and 15 - 17: These provisions are statements of intent that the Fairbanks North Star Borough not charge an overhead fee for the administration of certain municipal grants. Because they are statements of intent, the borough can decide to ignore them and charge an overhead fee for the cost of administration.

Page 119, line 12: This item is a \$1.2 million municipal grant to develop the mine site and design a coal fired power plant. If this is the same project described in an application for a Clean Coal III grant from the federal Department of Energy, the project is located on land owned by Arctic Slope Regional Corporation. The facts surrounding this project should be investigated to determine if the proposed expenditure would be for a public purpose.

103, lines 4 - 11; page 105 lines 4 - 17; page 106 lines 4- 9 and 18; page 107, lines 4 - 15; page 108, lines 3 - 5; page 116, lines 5 and 6; page 117, lines 10 - 16; page 118, lines 3 - 5.

Page 79, line 17: This item is a grant to the Ketchikan Filipino Community to remodel a building. If this item survives, care should be taken by the administering agency to prepare a grant agreement that assures there will be a direct public benefit forthcoming from the implementation of this grant.

If only the Filipino community is the direct beneficiary of the grant, there will be a significant legal issue present involving the public purpose doctrine. See also, Page 80, lines 16 and 17 for a similar grant to the Anchorage Korean Community. The grant agreement should insure that the facility is dedicated for use for public purposes. Restrictions should also be placed on eventual sale of the facility so that the public financing cannot be converted to private use.

Page 71, line 15 ; page 80, line 13: Grants to chambers of commerce appear to be in vogue this year. As a general rule, it is not physically impossible for a local chamber to perform a public purpose. However, they are private organizations with charters to benefit their members (private businesses). As mentioned earlier, the administering agency must exercise care in preparing grant agreements to assure that a direct public benefit results.

Page 94, lines 8 and 9: This provision purports to be a statement of intent that property owners not be required to provide matching money for a municipal grant for "district 8 limited road service area construction and maintenance." It is possible that a municipal ordinance requires property owners to share or entirely finance the cost of road construction and maintenance. We believe that this provision is merely a statement of intent equivalent to wishful thinking on the part of the legislature. It is not binding on the municipality. Additionally, there may be a local legislation problem with this type of a grant being directed to only limited road service areas situated in district 8. If this type of service area exists within other election districts of the municipality, what justifies special treatment? See also the item appearing on page 106, line 18 ("precincts 191 and 192 road / safety improvements"). The designation of grant money by election district and even precincts provides some evidence that the money is allocated based on partisan political considerations rather than areawide, or even regional, considerations.

Page 108, line 9 - page 109, line 6: This provision purports to appropriate \$5.5 million conditioned on the negotiation and execution of a development agreement with the Anchorage Economic Development Corporation and the Alaska Railroad. The purpose of the grant is for access, tidelands fill

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and utility upgrades for the ship creek basin redevelopment project. The condition requires that the development agreement provide for private investment equal to or exceeding the \$5.5 million grant. This condition may contain subject matter that is not germane to an appropriations bill. If you intend to veto this item, your staff should consult with this office to determine the consequences of a reduction veto or an attempt to strike the condition.

If you have additional questions concerning the provisions of this bill, please do not hesitate to ask.

Sincerely yours,

Charles E. Cole
Attorney General

CEC:JLB:jr

cc: Shelby Stastny, Director
OMB, Office of the Governor

Cheryl Frasca, Director
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