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June 30, 1992

Honorable Walter J. Hickel
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: CSSB 483(2d FIN) am -- supplemental
and special appropriations for
expenses of state government;
making
amending, and repealing
appropriations
Our file: 883-92-0141

Dear Governor Hickel:

At the request of your legislative office, we have reviewed CSSB 483(2d FIN) am, an Act making supplemental and special appropriations for the expenses of state government. The bill also makes, amends, and repeals other appropriations not relating to the expenses of state government. This bill is relatively "clean" compared to capital bills enacted for past fiscal years.

One provision in the bill has received some public attention. At the request of your Office of Management and Budget (OMB), the legislature inserted a provision that purports to require that municipalities match certain grant appropriations. Bill page 65, lines 8 - 13. It is well understood that the legislature cannot enact substantive law in an appropriation bill. Alaska Const. Art. II, sec. 13 (Bills for appropriations shall be confined to appropriations). However, in its statement of intent, the legislature directs OMB to develop criteria for the matching grant program. We understand that you are in favor of requiring a local match and intend to implement this statement of intent out of comity for the will of the legislature.

To ensure that the match requirements are enforceable, we recommend that OMB work jointly with the Department of Administration to develop the criteria in the form of administrative regulations. The Department of Administration has broad powers concerning the adoption of regulations for the financial management of the state. See AS 37.05.020. These

regulations should be adopted notwithstanding the prohibition set out in AS 37.05.318. The prohibition against the adoption of regulations to implement legislatively enacted grants is an attempt to take away the governor's power to administer appropriations. The legislature's role is to enact appropriations. It is the governor's role to execute the law, and he does this in part by deciding when and under what conditions state money will be spent in accordance with valid appropriations. The joint regulations to enforce a local match requirement is a rational approach to ensure that grant appropriations are spent for public purposes supported by local government. In effect, the regulations will be implementing the public purpose requirement of the Alaska Constitution. Alaska Const. Art. IX, Sec. 6. A statutory prohibition cannot override a constitutional duty.

Set out below are comments on additional legal issues you should consider before you take action on this bill.

Page 27, line 15: Sec.131(b)(2) of the bill makes appropriations for information systems to various state agencies subject to the program review provisions of AS 37.07.080(h). It is not clear how this review will proceed. The provisions of .080(h) are intended to apply to the unanticipated receipt of money for items of expenditure for which only estimated amounts are appropriated. Sec. 131(a) contains definite appropriations for definite projects. By inserting the program review condition, the legislature may be interjecting itself too far into executive decisions. So long as the Legislative Budget and Audit Committee involvement is limited to an oversight function, a legal issue will not be present.

Page 28, lines 13 - 27: Sec. 138(b) contains a lengthy statement of intent which purports to set priorities for expenditures from the storage tank assistance fund. Existing law delegates to the Board of Storage Tank Assistance the power to "rank requests for assistance." AS 46.03.360(e)(2). Another statute instructs the Department of Environmental Conservation to rank requests [for cleanup of petroleum from an underground storage tank] in order of priority, giving greatest priority to those tank systems that present the greatest threat or potential threat to human health. AS 46.03.420(a). Existing law also provides that persons denied assistance because of a lack of available money have a preference for assistance when money is next available. AS 46.03.420(d)(1). There are also regulations that establish a project priority ranking

procedure. 18 AAC 78.540. The priority criteria set out in regulation have only one element in common with the list of priorities indicated by the legislature in this bill. To the extent these priorities conflict with existing statutes or regulations, they are inoperative.

Page 30, lines 19 and 20: Sec. 151 appropriates \$12,000,000 from the corporate receipts of the Alaska Housing Finance Corporation (AHFC) to the housing assistance fund. This item raises a serious legal issue concerning the power of the legislature to appropriate from the assets of a public corporation of the state. Resolution of this question will turn on whether the corporate receipts are considered to be in the state treasury. A federal court considered the status of the Alaska Energy Authority (AEA) and determined that it was a state agency for the purposes of the eleventh amendment right of a state agency to be immune from suit. M-K Engineering Co. v. Alaska Power Authority, 662 F. Supp. 303 (D. Alaska 1986). The federal court was influenced by the substantial amount of financial support provided to the AEA in the form of direct appropriations. AHFC has also received substantial financial support from the state. It is possible that a court will decide that AHFC is so closely related to the executive branch of state government that the legislature may appropriate directly from its receipts.

Page 31, lines 12 and 13: The items set out here are for the nature conservancy and the Alaska National Wildlife Refuge (ANWR) effort. All appropriations set out in this part of the bill are capital projects. The term "capital project" is defined in AS 37.07.120(4) to mean an asset with an anticipated life exceeding one year. The amounts appropriated for the mental health settlement effort present a similar problem. It is hard to understand how an "effort" qualifies as an asset. This aside, there appears to be no legal defect with this appropriation other than a mislabeling problem. We presume that the legislature merely intended these appropriations to be for more than one year.

Page 40, lines 19 and 20: similar to the above, this item is an appropriation for "hatchery improvements and operations to prepare for transfer of facilities." Generally, a capital improvement is an asset; i.e., concrete and steel or its equivalent. The stated purpose for this appropriation includes "operations." Operating expenses will never qualify as a capital asset. Again, this appears to be a multi-year appropriation for mixed purposes. The

detailed budget papers supporting this item should be reviewed to determine the meaning of the stated purpose.

Page 44, lines 6 - 9: This provision appears to be a statement of intent that the central region federal highway program appropriation not be spent on the Bragaw Street extension or the northside corridor proposal. The provision is not stated as a condition to the appropriation but merely as a statement of the will, wish or desire of the legislature. As such, it may be honored out of comity, rather than in compliance with a legal duty to do so.

Page 50, lines 5 - 8: This provision states the intent of the legislature that an appropriation for the Dalton - Bettles Highway may be presented to the legislative budget and audit committee for "approval." We presume this statement is referring to the program review powers granted to the committee by AS 37.07.080(h). Under that section, the committee does not have approval power over appropriations. The committee may review and object, but it does not have the power to approve or disapprove as a precondition to the ability to spend.

Page 51, lines 21 - 25: This provision limits the ability to spend amounts from the northern region deferred maintenance appropriation for the Copper River Highway. The provision appears to be a binding condition of the appropriation which must be honored.

Page 69, lines 10 and 11: Two items are set out here which make grants to the City of Fairbanks for health care facilities. The problem is that each item purports to also appropriate interest earned on the amount appropriated. The grantee will expect either to draw interest on the unpaid part of the grant while the appropriation remains unexpended, or it will invest the grant after receipt. In the former case, there is no statutory authority to pay interest on unexpended grant appropriations. Therefore, it cannot be done. In the latter case, it is poor public policy to allow grantees to invest state funds rather than immediately applying them to the stated purpose of the grant. There would be no incentive to accomplish the purpose assigned by the legislature. It is also evident that the state treasury would lose the benefit of the interest income on amounts invested by the commissioner of revenue. The Alaska Constitution provides that the governor may "strike or reduce items in appropriation bills." Alaska Const. Art. II, sec. 15. You may wish to use your item veto to at

least strike the words "including interest" in each item. In support of this action we would argue that the words serve the same function as the specification of an appropriation amount.

Alternatively, it is possible that a court would consider the entire appropriation to be invalid because there is no specific amount set out for this appropriation. To be valid, each appropriation must have an amount, a source of revenue, and a stated purpose. See AS 24.08.030. An appropriation without an amount is valid if the purpose provides enough information so that the amount can be determined by mathematical formula. However, because of fluctuations in the market, there cannot be certainty for determining how much interest will be earned on the amount appropriated. You could cure this problem through surgical use of the item veto.

Page 74, lines 16 - 19: This provision contains a statement of intent that the proceeds of the sale of the M/V Stellar be used to purchase a replacement vessel. Absent an appropriation of those proceeds, they cannot be spent for any purpose. In any case, it is presumed that the vessel will be declared surplus and disposed under the authority granted to the Department of Administration. Proceeds of surplus property sales have customarily been deposited in the general fund. If the proceeds are appropriated as current year receipts, they usually are authorized for expenditure to support the surplus property sale function.

Page 78, line 10: The items which represent grants to named recipients continually pose legal problems. It is difficult for the Department of Law to determine the validity of each item because so little is known of the purpose for which a grant is made other than what is set out in the stated purpose in the bill. The main question raised by certain of these grants is whether they are intended for a public purpose. The state constitution provides that "no . . . appropriation of public money [may] be made . . . except for a public purpose. Alaska Const. Art. IX, sec. 6. The administering agency must, before it approves payment of money to a grantee determine, whether the purpose of the grant will directly benefit the public. It is permissible if a private interest is also indirectly benefited. However, it is not permissible for the reverse to occur; i.e., direct benefit to a private interest with only an indirect benefit to the public interest.

All of the grants set out between page 78, line 11 - page 81, line 7 should be carefully reviewed by the administering agency before money is expended. Certain of the items bear close scrutiny, including the following:

Page 79, line 11: "most worshipful prince grand lodge building renovations" - in the past, the legislature made grants to certain fraternal organizations for the construction of facilities, including the Alaska Native Brotherhood (ANB) and the Filipino Community. Those grants were done as pilot projects under special powers of the Department of Community and Regional Affairs. We were critical of those grants, so provisions were inserted in each grant agreement to guarantee that the facilities would directly benefit the public. It appears that the legislature intends to use the earlier grants as precedent for this grant.

Page 79, line 13, 15, page 80, line 13: These items are for grants for "debt retirement" for certain organization that are presumably performing some public service. The retirement of existing debt presents a serious legal issue under the public purpose doctrine. Generally, if the state expends money it must receive something in return or else, it is purely a donation. In effect, there must be consideration passing between the grantee and the grantor. If the state is paying off pre-existing debt, there is no consideration forthcoming from the grantee. The grantee was indebted before the state makes the grant. Therefore, the public receives nothing in return for the expenditure of public money.

Sections 156 - 193 of this bill relate to appropriations of amounts received for remedial and compensatory payments under the criminal plea agreement between the United States and Exxon Shipping Company. Our recommendations concerning those appropriations are set out in a separate letter in view of the attorney general's role as trustee of those amounts.

Very truly yours,

Charles E. Cole
Attorney General