

June 10, 2003

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

Re: HCS CSSB 100(FIN) am H(brf sup maj
fld H) -- making capital appropriations,
supplemental appropriations, and
reappropriations; capitalizing funds; making
other appropriations; and providing for an
effective date
Our file No. 883-03-0045

Dear Governor Murkowski:

At the request of your legislative office, we have reviewed HCS CSSB 100(FIN) am H(brf sup maj fld H). This bill is primarily the capital budget for the fiscal year beginning July 1, 2003. However, it also includes a large number of reappropriation items, some supplemental appropriations for the current fiscal year, some appropriations capitalizing funds, and some other appropriation items.

We have only one overall comment on the bill. That is to note once again that expressions of legislative intent accompanying an appropriation item, while few in this bill (only four in the 71-page section 1), continue to be non-binding -- you may choose to follow an expression of intent or to ignore it. However, please be advised that expressions of intent may no longer be vetoed by you as a line item veto separate from the appropriation itself. In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001), 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.

Turning to specific bill sections, we start by noting that several of the appropriations in sec. 1 of the bill raise legal questions. First, among the grants to municipalities from the Department of Community and Economic Development (DCED) are grants for school-related purposes (to the Matanuska Susitna Borough at page 9,

lines 7-14, and to the Municipality of Anchorage, at page 11, line 14 - page 12, line 10). School construction and improvements should be provided exclusively under AS 14.11, under which capital projects across the state are reviewed and can be prioritized. By using the municipal grant process, as was done here, money is provided to a local district outside of the usual process. This may possibly lead to a claim of unequal treatment by those entities that did not receive school-related grants from DCED.

The grants to named recipients (page 12, line 21 to page 16, line 19), under AS 37.05.316, are, as usual, made overwhelmingly to private entities, generally non-profit corporations or associations. Because we know little about the purpose of each grant, beyond the few-word description accompanying the grant, we cannot say whether each grant is made for a public purpose, as required by art. IX, sec. 6 of the Alaska Constitution.

We advise, however, that under AS 37.05.316, it is the duty of each department through which a named-recipient grant is administered to determine if the public purpose requirement is met. AS 37.05.316 directs departments (1) to notify the named recipient of the availability of the grant and to request a proposal for the services or goods from the recipient that satisfies the purpose of the appropriation; and (2) to execute a grant agreement within 60 days after the effective date of the appropriation unless the department determines that an award of the grant would not be in the public interest. Further, if a named recipient grant is for a public works project, the grantee must comply with the hiring preferences under AS 36.10.150 - 36.10.175.

Page 54, lines 32-33, is a \$500,000 general fund appropriation to the University of Alaska for the Alaska Geospacial Information Coalition. We understand that this proposal was discussed with the Department of Natural Resources (DNR) just before the change of administrations. We informally advised DNR that there were competitive bidding issues with the proposal, because specific private firms were attempting to receive public money and an exclusive right to sell geospacial information produced. The University, which will benefit from the project, has a different opinion as to whether such issues are present. We believe that the project warrants further legal review, if in fact its purpose is similar to the proposal we reviewed earlier.

Section 8 of the bill provides that the sum of \$18,175,900 that is anticipated to be declared as a dividend by the Alaska Industrial Development and Export Authority (AIDEA) board for appropriation in the fiscal year ending June 30, 2004, is appropriated

in sec. 1 of the bill.¹ Section 1, however, appropriates only \$18,169,000 from the AIDEA dividend, leaving \$6,900 of anticipated AIDEA dividend still available for appropriation. AIDEA dividends are not transferred from that public corporation unless appropriated. Corporate receipts are available for appropriation only to the extent that the receipts are appropriated by the legislature. Absent some other authorization for transfer, the unappropriated balance of the dividend does not lapse into the general fund but stays in the accounts of AIDEA.

The appropriations of AIDEA dividend amounts in secs. 1 and 8 of the bill are contingent upon HB 203 becoming effective to amend the AIDEA dividend statute (AS 44.88.088). Without these amendments becoming effective, the AIDEA board will be unable to declare any AIDEA dividend for payment to the state in fiscal year 2004. The legislature passed HB 203 and transmitted it for your consideration. A more detailed description of that legislation is contained in our bill review letter for HB 203, file number 883-03-0057.

Section 9 of the bill makes appropriations to DCED for grants under AS 37.06.010 to municipalities and for grants under AS 37.06.020 to unincorporated communities. Subsection (c) conditions these appropriations on compliance "before July 1, 2004, with the requirements, other than deadlines, set out in AS 37.06." The legislature cannot amend general law by insertion of a condition in an appropriations bill. See 1995 Inf. Op. Att'y Gen. (883-95-0113; June 15). However, as that 1995 opinion observes, it may be that the legislature is merely recognizing that deadlines imposed by law must be met in any case and the condition is referring to other requirements imposed by AS 37.06.

¹ Section 1 of the bill appropriates the AIDEA dividend to a number of different items. \$2,500,000 is appropriated to the Department of Community and Economic Development for grants to communities, including \$1,000,000 to the City of Valdez for "Harboview" facility demolition and asbestos removal (page 5, line 32 – page 6, line 3), and \$1,500,000 to the Ketchikan Gateway Borough for the Ketchikan Shipyard (page 7, lines 28 – 29). \$1,272,600 is appropriated to the Department of Environmental Conservation for the Valdez sewer treatment plant ocean outfall line (page 19, lines 28 – 30). \$777,200 is appropriated to the Department of Health and Social Services towards the construction of the Nome youth detention facility (page 28, lines 31 – 33). And \$13,619,200 is appropriated to the Department of Transportation and Public Facilities for various projects, including \$4,000,000 for community access roads (page 36, lines 9 – 10), \$5,000,000 for industrial development roads (page 36, lines 11 – 12), \$1,000,000 for North Slope oilfield connector roads and the Colville River bridge (page 36, lines 13 – 16), and \$3,619,200 for the federal-aid highway state match (page 37, lines 11 – 12).

Section 11 of the bill, appropriating funds from the National Petroleum Reserve - Alaska (NPR-A) special revenue fund to DCED for capital project grants under the NPR-A impact program, and providing for the lapse of some of these funds, is rather inartfully worded. However, we understand that Legislative Finance has records that clearly reflect legislative intent.

The State of Alaska is entitled by federal law (42 U.S.C. 6508) to 50 percent of the revenues the federal government receives from oil and gas development in the NPR-A. However, federal law also requires that communities impacted by NPR-A development be given a priority when the money is allocated. As of now, DCED has entered into grant agreements with impacted communities, to be paid from the special revenue fund, in the amount of \$25,011,457. The appropriation in subsection (a), of funds received by the special revenue fund by August 31, 2003, and passed on to DCED, is necessary to allow the funding of all of these grants.

There are no further current requests for grants. Therefore, the legislature included subsection (b), which is intended to provide that money received by the state no later than August 31, 2003, in excess of the \$25,011,457 needed to pay existing grants, lapses into the NPR-A special revenue fund (AS 37.05.530). The state has satisfied the federal priority requirement, and therefore in our opinion the lapse is permissible.

Subsections (l) and (m) of sec. 22 of the bill make appropriations to the incorporated community of Venetie, for the purpose of meeting community financial obligations. As a general rule, preexisting debt or financial obligations raise the question of whether the appropriation is for a public purpose, as required by art. IX, sec. 6 of the Alaska Constitution. Here, however, there is no indication that the financial obligation arose for any reason other than the community performing its responsibilities. If so, this is probably sufficient to satisfy art. IX, sec. 6 of the Alaska Constitution.

Section 29 of the bill amends sec. 19(c), ch. 61, SLA 2001, which appropriated earnings on the money paid by Exxon to the state as restitution in the federal criminal case *United States v. Exxon Shipping Company and Exxon Corporation*, No. A90-015 CR. The uses of these earnings, like the criminal restitution monies, are limited by the terms of the judgment in that case to restoration projects in the State of Alaska relating to the *Exxon Valdez* oil spill. Section 29 of the bill appropriates \$350,000 from the income accrued during the fiscal year ending June 30, 2001, to DCED for payment as a grant to the City of Kenai for restoration of the banks of the Kenai River and development of recreational access to the Kenai River through construction of boat launch and pullout facilities at 1591 Boat Launch Road in Kenai. The money was originally appropriated to DNR in 2001 for a similar purpose, though in a different location on the Kenai River. DNR was unable to go forward with that project because of concerns identified by

community groups. Each of the purposes described in sec. 29 is consistent with the requirements of the criminal judgment. The appropriation in sec. 29 lapses under the general lapse provisions of AS 37.25.020.

Section 40 of the bill makes an appropriation of \$500,000 from the general fund to DCED for a grant to Arctic Power under AS 37.05.316 (grants to named recipient) for education efforts to open the Arctic National Wildlife Refuge (ANWR) for oil and gas development. It also makes a similar appropriation, not to extend \$300,000, from other available funds, and extends the lapse date of a similar appropriation made earlier this year. These appropriations, as we have previously noted (*see, e.g.*, 2001 Inf. Op. A.G. (883-01-0035; June 27)), raise the issue of whether the legislature is attempting to avoid using the procurement code to obtain these services. We will not repeat that discussion here, but will simply repeat our earlier statement that care should be taken by DCED to avoid imprudent expenditure of the money because it will be ultimately responsible, along with the named recipient, Arctic Power.

Section 53 of the bill reappropriates unexpended "authorized receipts" from the Alaska Mental Health Trust Authority. Authorized receipts are monies that the legislature has authorized an agency to receive from the Trust Authority, which manages the mental health trust fund. A statute setting out responsibilities of the legislature under a 1994 settlement agreement provides that appropriations for the state's mental health program shall be "in a separate appropriation bill limited to appropriations for the state's integrated comprehensive mental health program." AS 37.14.005. This year, that separate appropriation bill is HB 76. It is unusual, therefore, that sec. 53 of this bill, includes mental health appropriations. The legislature complied with AS 37.14.005, however, by passing HB 76, which is a separate appropriation bill that is limited to appropriations for the state's mental health program. In our judgment, then, these two additional appropriations in this bill do not represent a violation of any statute or a breach of the settlement agreement.

Section 57 of the bill appropriates from the general fund to DCED \$1,000,000 for payment as a grant under AS 37.05.316 to the Copper Valley Electric Association, Inc., for cogeneration projects, and \$213,276 as a grant under the same statute to the Kodiak Electric Association, Inc. for the Nyman combined cycle cogeneration plant. We understand that these grants are for payment or retirement of preexisting debt. A payment for retirement of a preexisting debt to which the state is not a party confers no benefit on the public, and failure to confer a public benefit violates the public purpose doctrine set out in art. IX, sec. 6 of the Alaska Constitution. When the purpose of an expenditure is to pay or retire an existing debt, there is no new consideration passing to the public. *See* 2002 Inf. Op. Att'y. Gen. (June 28; 883-02-0058). However, this appropriation could be considered a method of freeing up other resources of the

recipients for public utility purposes, and for that reason the appropriation may state a public purpose. *See* 1995 Inf. Op. Att'y Gen. (June 15; 883-96-0113).

Section 61 of the bill is similar to a provision that appeared in last year's capital budget bill (sec. 54, ch. 1, SSSLA 2002), and was vetoed by the previous governor. Section 61 appropriates \$500,000 from the general fund to DCED for a no-interest loan to the City of Delta Junction to pay the costs of the settlement agreement for litigation regarding the establishment of a private prison in the vicinity of the city.² The loan would be contingent upon the city agreeing to repay it in annual \$50,000 increments from the amounts received by the city as municipal assistance under AS 29.60. However, if a borough is formed that includes Delta Junction, subsection (c) would convert any balance owing on the loan into a grant as of the date of borough incorporation.

We expressed our opinion last year in our review of the bill that became ch. 1, SSSLA 2002, that sec. 54 likely violated the public purpose provision of the constitution. *See* 2002 Inf. Op. Att'y Gen. (883-02-0058; June 28). We also noted other possible legal problems with the section. Although the legislature this year, in subsec. (a) of sec. 61, has included findings attempting to show that the proposed appropriation is for a public purpose, we adhere to the view we expressed last year.³

Finally, 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 statutes and valid legislative intent.

Sincerely,

Gregg D. Renkes
Attorney General

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² In last year's bill the loan would have been \$1,000,000.

³ We would also note that, given your publicly expressed intent to veto municipal revenue sharing from the operating budget for fiscal year 2004, the City of Delta Junction would not have the funds this section anticipates for the repayment of the loan.