March 17, 1999

The Honorable Tony Knowles, Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811

Re: CCS HB 100 - Supplemental and Other Appropriations
A.G. file no: 883-99-0003

Dear Governor Knowles:

At the request of your legislative director Pat Pourchot, we have reviewed CCS HB 100, an Act making capital, supplemental and other appropriations. This bill would, in sec. 22, provide a means to alleviate the impending cashflow problems of the state general fund. Under the authority of appropriations authorizing amounts from the constitutional budget reserve fund (art. IX, sec. 17 of the Alaska Constitution) (hereinafter "CBRF"), the balance of the CBRF has been used periodically during the fiscal year to provide cash to pay warrants upon presentment to the state treasury. For this reason, we have been asked to expedite the review of this bill before the date that the state would be unable to honor warrants.

Even though the CBRF is a separate dedicated fund established in the Alaska Constitution, we have advised that, under certain circumstances, surplus in the CBRF is available to alleviate cash flow problems of the general fund. For fiscal year 1996 we advised as follows concerning the use of the CBRF:

> This [CBRF] appropriation will also be useful in managing an anticipated cashflow shortfall that could develop early in the upcoming fiscal year. This CBRF appropriation fills the gap between general fund appropriations and available revenues received for the fiscal year. Expenditures can be greater in the first and second quarters of the fiscal year. Revenues accrue somewhat evenly throughout the fiscal year. It is often the case that general fund revenue is insufficient early in the fiscal year to cover all authorized expenditures under general fund appropriations. Rather than delay expenditures, the CBRF appropriation will serve as the revenue source for these appropriations. This should be done even if the anticipated revenues

> for the fiscal year are more than enough to cover the expenditures for the early quarters of the fiscal year. The date of certification for each obligation will be the factor for determining if general fund revenue is available or if CBRF money should be used.
>
> There also must be some rational method for preventing CBRF money from being used for a disproportionate share of expenditures.

1995 Inf. Op Att'y Gen. (June 15; 883-95-0113). The opinion goes on to acknowledge the development of a cash management plan by the Departments of Revenue and Administration and concludes that the plan contains specific safeguards to prevent overcharging the CBRF for cash management purposes. Because the legislature limited the CBRF appropriation to no more than $700,000,001, the use of the surplus of the CBRF had to be limited so as not to inadvertently exceed the spending authorization enacted by law. The enactment of sec. 22 of the bill will provide temporary relief and will permit the continued use of CBRF surplus to provide the cash necessary to honor warrants.

We have identified the following additional legal issues for your consideration during your review of the bill:

Page 1, line 9 - page 2, line 5: This appropriation does not fully fund the expenditures authorized for the Western Alaska Fisheries Disaster declared under the Alaska Disaster Act (AS 26.23). The means of financing the disaster response was determined by the development of a financing plan that was laid before the legislature as required by AS 26.23.025(c). The Twentieth Alaska State Legislature elected not to convene in special session to change the financing plan and, as a consequence, state law authorized the governor to implement the plan. AS 26.23.025(e). It now appears that a succeeding legislature intends to withhold payment for some of the legitimate expenses of meeting the disaster. This places the state in a difficult legal position because the legislative history of this bill records that the deficiency is aimed at certain capital grants made to entities that in some cases entered into binding commitments for the grant money. State disaster officials were authorized to make the grants and the grantees acted reasonably when they relied on the authority of the state grantor agency regarding the availability of the grants. To avoid litigation costs and hardship to the grantees, the legislature should recognize a moral obligation to fully fund the financing plan in which a previous legislature acquiesced. To do otherwise may make persons who provide goods and services in the course of responding to declared disasters reluctant to do business with the state. It is also probable that the state will suffer the expense and uncertainty of litigation over these actions.

In this connection, the condition set out on page 2, lines 2 -5 is possibly not valid. The condition purports to make the entire amount appropriated to fund the Western Alaska Fisheries Disaster dependent upon the enactment of a version of SB 101 that is intended to restrict the power of the governor to call a future disaster. This condition would in effect undo valid obligations that

were entered into under a properly authorized financing plan. To the extent that the condition purports to do this, it is probably invalid and unenforceable. All events relevant to the decision to declare the Western Alaska Fisheries Disaster have occurred. The amendments to the Disaster Act proposed in SB 101 are therefore not related to the financing of an item set out in the supplemental appropriation bill. In which case, the condition would violate the confinement requirement set out in art. II, sec. 13, of the Alaska Constitution which requires that appropriation bills must be "confined" to appropriations. The introduction of this condition adds nonappropriation material into the bill and is therefore invalid. As you have done in the past, and until the Alaska Supreme Court decides otherwise, you may veto this condition as a discrete item, or you may determine not to veto the item and ignore its provisions.

Page 2, line 9 - page 3, line 25: This is the appropriation that provides authorization to pay judgments and claims against the state. The Department of Law is the recipient of the appropriation because the attorney general is the representative of the state in the litigation. When the attorney general presents a claim or judgment for payment by the legislature, the attorney general is representing the matter to be a valid debt of the state. The legislature has taken extraordinary measures to set out each case as a separate appropriation. The legislative history reflects these measures were included so the Department of Law would be limited in its ability to reallocate amounts between the objects of expenditure identified with this appropriation. The intent of this action, which can be found in the record of the Senate Finance Committee, is to pointedly refuse to provide authorization to cover the attorney fee and cost award in *Bess v. Ulmer*. Senators expressed displeasure with the Alaska Supreme Court's decision in which it invalidated an amendment being proposed to the voters by the legislature. The amounts involved are small so it appears that the actions taken are nothing more than a gesture between coordinate branches of government. The courts are entitled to comity from the other branches of state government to further the exercise of judicial powers. Unlike the executive branch, the Alaska Supreme Court is constrained from entering into a public debate with the legislature about its decisions. While the action is nothing more than a gesture, it is a poor example of establishing the comity expected between equal branches of state government.

Page 3, lines 19 - 22: This item contains another expression of legislative displeasure with the Alaska Court System. The item covers a contract claim settled by the court administration. Rather than funding the settlement from the state general fund as was done for other similar settlements, an appropriation was made out of the operating budget of the court system to the Department of Law. The intent is make the court system "pay" for the settlement. This is a misguided notion because state money will be "paying" for the settlement. The notion that the court administration will suffer from deprivation of operating money is plainly wrong. It is the public who may suffer when the court must stop performing a function that it has planned in the current year budget. If this approach to disciplining the court system escalates, the legislature could usurp judicial power by taking away too much from the court's operating funds so that constitutionally mandated functions of the court are impaired. If that were to occur, the legislature might provoke a response from the court to reassert the balance between the branches of state government.

We recommend that the legislature again be requested to fund the judgment awarded in *Bess*. We also believe that you should consider a line item veto of sec. 4(c) of the bill. It should be up to the court whether it pays for the settlement out of existing appropriations or whether it will resubmit the item for enactment in another appropriation bill. The legislative and executive branches of state government should extend comity by aiding the jurisdiction of the court in whatever way possible in honoring judgments and claims. These are legitimate debts of the state owing to private citizens. The legislature's gestures are not hurting the justices or judges, only the people who are entitled to the recovery lawfully granted to them and the public who depend on the courts to adjudicate the law.

Page 5, lines 6 - 10: This proviso attached to an appropriation to the Pioneers' Homes is not binding. It is stated in a way that expresses the will, wish, or desire of the legislature that money be used according to a priority for certain purposes. However, the legislature knows how to make a binding condition and it apparently, purposefully, has not done so here.

Page 11, lines 4 - 14: Section 16(a) and (b) would appropriate $852,189 to the Department of Revenue, Child Support Enforcement Division (CSED) to offset an anticipated reduction in federal incentive payments. Indirect cost reimbursement is named as the source of $430,300 of the appropriation. This funding source is new to the budget process and it is unclear whether the receipts should be accounted for as general fund program receipts or some other form of trust or custodial receipt.

Page 14, line 4 - page 18, line 7: Section 20 contains a number of appropriations that purport to be unallocated reductions in amounts appropriated for agency operations for the fiscal year ending June 30, 1999. Unallocated reductions raise the legal issue of whether the action amounts to an improper delegation of the legislature's power of appropriation. This occurs when the legislature leaves the decision of which items to reduce entirely up to the governor. The effect of the reduction in this case is similar to a repeal of part of an existing appropriation. To this extent, the legislature is giving the governor lawmaking powers. The validity of an unconditional legislative delegation of the power of appropriation was litigated in *State v. Fairbanks North Star Borough*, 736 P.2d 1140 (Alaska 1987)(impoundment of appropriations authorized by Executive Budget Act). The Alaska Supreme Court decided that the appropriation power could be delegated to the governor only if there were adequate standards imposed by law for the exercise of the powers conferred. The provisions set out in sec. 20(s) of the bill appear to be the standards that will limit the exercise of the delegated power to reduce existing appropriations. If the reductions cannot be achieved through the actions mentioned in sec. 20(s), the reductions will not be effective, because to take any other action to achieve the reduction would be outside of the delegation granted by the legislature. It is possible that these standards are not specific enough to satisfy the delegation doctrine adopted by the court in *Fairbanks North Star Borough*. It is arguable that they are not because the ability to develop cost savings is left entirely to the governor. If the cost savings cannot be achieved, then the reduction cannot be implemented.

We regret the brevity of the legal analysis set out in this memorandum but, as mentioned above, this was necessary so that the provisions of sec. 20 of the bill could be quickly enacted to permit the state to continue to honor its valid obligations.

Sincerely,

Bruce M. Botelho
Attorney General

BMB:JLB:jf