

June 28, 1999

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

Re: HCS CSSB 32(FIN) am H (reengrossed) --
Making and Amending Appropriations and
Re-Appropriations; Making and Amending
Appropriations under Art. IX, Sec. 17(c),
Constitution of the State of Alaska, from the
Constitutional Budget Reserve Fund
A.G. file no: 883-99-0061

Dear Governor Knowles:

At the request of your legislative director, Pat Pourchot, we have reviewed HCS CSSB 32(FIN) am H (reengrossed), making and amending appropriations and reappropriations and making and amending appropriations from the constitutional budget reserve fund. This bill passed during the first Special Session of the Twenty-First Legislature held immediately after the first regular session.

General Comments

We note that expressions of intent, while few in this bill, are not binding and you may choose to follow them or to ignore them, although it has been routine to veto these expressions. However, as you know, there is litigation pending as to your veto authority of conditions in appropriations bills. Please refer to our bill review on the operating budget, CCS HB 50, our file no. 883-99-0062, for a detailed discussion of that litigation and general comments on contingencies and conditions placed in appropriations bills.

Legal and Other Significant Issues

Set out below are specific comments regarding sections in the bill that raise legal issues or are otherwise significant:

Page 1, line 6 - 10: Section 1 of the bill makes an appropriation of a general fund match, along with federal receipts, to the Alaska clean water fund (AS 46.03.032) for the Alaska clean water loan program to meet federal matching requirements. Similarly, page 1, line 11 – page 2, line 2, sec. 2, appropriates a general fund match, along with federal receipts, to the Alaska drinking water fund (AS 46.03.036) for the Alaska drinking water loan fund to meet federal matching requirements.

Page 2, line 8 - 25: Section 3 of the bill makes appropriations from the Alaska Industrial Development and Export Authority revolving fund (AS 44.88.060) to the capital project matching grant program revolving funds established for municipalities in the Department of Administration (AS 37.06.010(b)) and for unincorporated communities in the Department of Community and Regional Affairs (AS 37.06.020(b)).¹ In subsection (c), an amount equal to the interest earned on the individual grant accounts is appropriated from the general fund to the respective funds. The interest is calculated using the average percentage interest received by other accounts in the state's general investment fund during fiscal year 1999. The interest-based appropriations under this subsection are allocated pro rata to the individual grant accounts based upon the balance of the account at the end of this fiscal year. We find no technical or legal problems with this section.

Page 2, line 25 - page 5, line 7: Sections 5 and 6 of the bill make appropriations for draws from the capital matching grant programs. Subsections 5(b) and 6(b) condition the appropriations on compliance “before July 1, 2000, 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, 1995). However, as opined in 1995, 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. *Id.*

Page 5, lines 8 - 19: Section 7 (a) of the bill provides that federal receipts, designated program receipts and receipts of commercial fisheries test fishing operations that exceed the amounts appropriated by this bill are appropriated conditioned on compliance with the program review provisions of AS 37.07.080(h) (submission to Legislative Budget and Audit Committee). Subsection (b) provides that if federal receipts or other program receipts as defined in AS 37.05.146 exceed the estimates appropriated in this bill, state funds may be reduced by the excess if allowed under federal law. Finally, subsection (c) provides that if federal receipts or other program receipts fall short of the estimates provided, then the appropriations are to be reduced by the amount of the shortfall in receipts.

¹ Under SCS CSHB 40(FIN) am S, the administration of the capital project matching grant programs, for municipalities as well as unincorporated communities, transfers to the new Department of Community and Economic Development.

Page 5, lines 20 - 23: Section 8 of the bill appropriates the balance of the rural electrification revolving loan fund (AS 42.45.020), on June 30, 1999, to the Department of Community and Regional Affairs (DCRA) for the electrical emergencies program. With the enactment of ch. 58, SLA 1999, creating the Department of Community and Economic Development (merging DCRA with the Department of Commerce and Economic Development), the duty to administer the electrical emergencies program transfers from DCRA to the new department; thus this appropriation will follow the program.

Page 5, line 24 - page 6, line 3: Section 9 of the bill appropriates the balance of the earnings reserve of the Alaska science and technology endowment (AS 37.17.020(a)), not to exceed \$6,000,000, for payment as a grant by the Alaska Science and Technology Foundation (ASTF) to the Alaska Aerospace Development Corporation (AADC) for the Kodiak launch complex and commercialization of the facility. The appropriation from ASTF to AADC is made contingent on the enactment of an amendment to AS 37.17.090(c) to permit the increase in such a grant to AADC for this project up to \$6 million. While we express the same concerns as to contingencies made in appropriations bill in our bill review of the operating budget, CCS HB 50, we note that the contingency here has been met and was supported by the ASTF. The legislature passed SCS HB 209(FIN), now ch. 38, SLA 1999, which amended AS 37.17.090(k) by authorizing an increase in the amount that the ASTF board may award as a grant to the AADC for the Kodiak launch facility and the Fairbanks satellite ground station space park from \$5 million to \$11 million. Therefore, this appropriation of \$6 million for the Kodiak launch complex falls within the statutory authorization under ch. 38, SLA 1999.

Page 6, lines 13 - 18: Section 12 of the bill reappropriates the unexpended and unobligated balance of the appropriation made in sec. 9, ch. 139, SLA 1998 (DNR appraisal of school trust lands - \$432,525) for the fiscal year ending June 30, 2000. The reappropriation will enable the Department of Natural Resources, in conjunction with the plaintiffs in *Kasayulie v. State*, 3 AN-97-3782 CI., to complete an appraisal of the value of the public school trust lands that were designated as general grant lands in 1978. *Kasayulie* is a case that includes allegations of breach of trust regarding former school trust lands. The appraisal of the school lands is anticipated to develop information that the superior court in *Kasayulie* will use to determine whether the state has fully compensated the trust for lands designated in 1978. We see no legal problems with this appropriation.

Page 6, lines 19 - 22: Section 13 of the bill makes a grant appropriation from the general fund to the Department of Community and Regional Affairs² to Arctic Power under

² With the passage of HB 40, now ch. 58, SLA 1999, merging the Department of Community and Regional Affairs with the Department of Commerce and Economic Development on July 1, 1999, this appropriation will be administered by the new Department of Community and Economic Development.

AS 37.05.316 (grants to named recipient) for education efforts to open the Arctic National Wildlife Refuge (ANWR) for oil and gas development. As with a similar appropriation made to Arctic Power for this purpose in 1995 in sec. 90 of SCS CSHB 268 (FIN), the legal issue presented is whether the legislature is attempting to avoid using the procurement code to obtain these services. The selection of Arctic Power to perform this service has been without competition or public involvement in the process as required by the state's procurement code (AS 36.30). When a private entity is delegated the responsibility for performing this function, there must be adequate safeguards to ensure that public money is expended prudently for a public purpose. The promotion of certain policies regarding ANWR oil development is a legitimate public purpose. Care should be taken by the grantor agency to avoid imprudent expenditure of the money because it will be ultimately responsible, along with the named recipient, Arctic Power.

Page 7, lines 21 - 31, page 8, lines 1 - 12: Section 16 of the bill attempts to appropriate a portion of the federal grant money that is included in the operating budget for the Department of Environmental Conservation (CCS HB 50, page 27, line 9: Section 43) and further appropriate specific amounts as interagency receipts to other departments. This section has several problems. One, it describes the sum of \$556,000 (which is a portion of the federal receipts appropriated in CCS HB 50) as being interagency receipts of the Department of Environmental Conservation. This money is not "interagency receipts" but is federal grant money. The funds do not constitute interagency receipts until they are received by a department and then transferred to another. Two, this section of the bill is an apparent attempt by the legislature to micromanage the Department of Environmental Conservation's budget and mandate particular interagency receipts. Due to the method by which the legislature chose to designate the exact amounts to be appropriated as interagency receipts from the \$556,000 in federal grant receipts, we do not believe there is a means to veto or reduce amounts noted to the individual departments without affecting the total appropriation amount of \$556,000. As stated earlier, the \$556,000 appropriated in sec. 16 of this bill is included in the \$1.7 million appropriated to DEC in the operating budget, CCS HB 50. We believe you could veto sec. 16 in its entirety and not lose any of the appropriated federal grant money because the \$556,000 is part of the \$1.7 million appropriation made in the operating budget to Department of Environmental Conservation. The Department of Environmental Conservation would still be free, once it receives the federal money under HB 50, to accommodate the will of the legislature with transfer of funds to other departments as interagency receipts, in an amount determined by DEC, if that is the choice of the executive branch. We understand that the amounts set out for the Department of Fish and Game and the Department of Natural Resources in this bill were specifically requested by these departments.

Page 8, lines 13 - 18: Sections 17 and 18 of the bill are appropriations of named recipient grants to non-profit organizations, Hope Community Resources and the Alaska Center for the Blind, for fire suppression sprinkler systems. Both of these organizations are current service-provider grantees of the Department of Health and Social Services. These grants would be administered under AS 37.05.316.

Page 8, lines 19 - 31, page 9, lines 1 - 3: Section 19 of the bill appropriates \$215,000 to the Department of Environmental Conservation to pay for a portion of the construction for a solid waste landfill near Cordova, Alaska. The money appropriated consists of interest and other income earned on money received and held by the state as restitution from Exxon as a result of its federal criminal plea in *United States of America v. Exxon Shipping Company and Exxon Corporation*, No. A90-015 CR. This income is subject to the same restrictions that apply to use of the other restitution money and must be used for restoration projects, within the State of Alaska, relating to the Exxon Valdez oil spill. The proposed project implements recommendations made in the Sound Waste Management Plan funded by the Exxon Valdez Trustee Council. Through construction of the solid waste landfill, marine pollution into Prince William Sound will be reduced by limiting the leaching of contamination into marine waters from the existing landfill, which is located adjacent to the tidelands near Cordova. This appropriation is, in our opinion, consistent with the terms of the Exxon Valdez oil spill settlement.

Page 9, lines 4 - 10: Section 20 of the bill provides supplemental appropriations from the general fund to the Department of Administration for increased operating costs for the current fiscal year for the Alaska Oil and Gas Conservation Commission and the Longevity Bonus grant program. Because the title of the bill includes operating budget and supplementals, this section does not have descriptive title problems. Nor does it violate the confinement clause of art. II, sec. 13 of the Alaska Constitution (bills for appropriations shall be confined to appropriations). It is not unusual to include capital with operating appropriations in the same bill.

Page 9, lines 11 - 22: Section 21 of the bill authorizes spending from the constitutional budget reserve fund (Alaska Const., art. IX, sec. 17), if the unrestricted state revenue available for appropriation in FY 2000 is insufficient to cover general fund appropriations, capping the amount at \$1,007,000,000. As we note in our bill review of the operating budget, CCS HB 50, the legislature enacted similar language in that bill, but with a different cap. The cap in sec. 35(b) of CCS HB 50 is \$1,010,000,000. Due to these inconsistencies, one appropriation should be vetoed.

Page 10, lines 12 - 18: Section 24 of the bill makes appropriations to the Department of Law and the Legislative Council for costs associated with the BP Amoco/ARCO merger.

Page 10, lines 19 - 22: Section 25 of the bill is a FY 99 supplemental for \$30,000 from the general fund to the Department of Law to cover costs of the Glacier Bay/Tongass submerged lands quiet title litigation for the current fiscal year ending June 30, 1999. Section 27 of the bill is also an appropriation related to the Glacier Bay litigation for FY 2000, and was requested by the Department of Law.

Page 10, lines 23 - 31, page 11, lines 1 - 4: Section 26 of the bill is an amendment to ch. 139, SLA 1998, which cures an oversight from the 1999 FY budget bill last year for excessive federal and other program receipts, and accomplishes the same purpose as sec. 7 of this bill for the upcoming fiscal year by authorizing the expenditure of such receipts under AS 37.05.146.

Page 11, lines 9 - 23: Section 28 of the bill appropriates the sum of \$2,077,700 to the Department of Commerce and Economic Development for tourism development. However, the appropriation is made contingent upon passage of a substantive act, CSSB 107(FIN), before June 30, 1999. It continues to be our position that making an appropriation contingent on the passage of a substantive act may be violative of the containment clause of art. II, sec. 13. There is also concern as to whether you may veto a contingency without affecting the appropriation. And, as noted in our bill review of the operating budget, CCS HB 50, there is a case currently pending in the state supreme court on the scope of the item veto in appropriations bills and we cannot give you a definitive answer as to whether a veto of the contingency language would be valid. Here, however, the contingency has been met, as CSSB 107(FIN) is now ch. 29, SLA 1999.

Pages 11 - 25: Sections 29 - 50 of the bill make miscellaneous reappropriations. We note no legal or constitutional problems with these sections of the bill. All adequately satisfy public purpose requirements and we find no invalid conditions that warrant legal analysis.³

Page 25, lines 12 - 21: Section 52 of the bill reappropriates unspent balances for repairs, renovations, equipment, and deferred maintenance for the Alaska Psychiatric Institute. The Department of Health and Social Services is still in the process of assessing the options for replacing the existing structure in Anchorage and the continued availability of the funds is necessary to continue pursuing replacement.

Page 27, lines 2 - 5: Section 55 of the bill extends the lapse date of the operating appropriations to the Department of Law appropriated to defend the challenge to tort reform case and two abortion cases until June 30, 2000.

Page 27, lines 16 - 31, page 28, lines 1 - 2: Section 58 of the bill makes several appropriations to the Department of Transportation and Public Facilities (DOTPF). One appropriation, in particular, is worthy of comment. Subsection (a) appropriates money for a road upgrade, conditioned upon compliance with subsection (b). Section 58(a) appropriates \$250,000 to upgrade Rockridge Road -- a road that leads to O'Malley Elementary School in Anchorage. The difficulty presented by this appropriation is that Rockridge Road is not a state highway and the legislature has conditioned the appropriation on the Municipality of Anchorage, the local school district, or a local road service area, or more than one of them, agreeing that the entity will be responsible for the road's maintenance. The condition placed on this appropriation to agree to maintain the road is substantive in nature and raises numerous legal concerns, including violation

³ We note that on page 50, lines 28-30, that the appropriation for emergency repairs to the Perseverance Trail reads "Perseverance Trail Emergency Repairs and Transfer of Ownership of Repaired Trail." We do not find this language to be a condition of the appropriation or a mandate upon the state; it is descriptive only.

of the confinement clause of art. II, sec. 13 of the Alaska Constitution, as well as legal liability issues for the entity assuming the responsibility for the road's maintenance. This condition is similar to the language included in the appropriation for the repairs of the Perseverance Trail and the requirement that the City and Borough of Juneau agree to maintain the trail. You vetoed the condition on that appropriation and a decision on that issue is pending in the Alaska Supreme Court. Thus, we cannot give you a definitive answer as to whether a veto of the condition would be upheld if challenged.

Sections 59 and 60 of the bill are related in their purpose and cross over with the operating budget bill, CCS HB 50. These sections relate to the regulatory cost charge programs of the Alaska Public Utilities Commission.⁴ Section 59 of this bill appropriates to the RCA up to \$500,000 of the left-over APUC regulatory cost charges in order for the RCA to implement the management information system required by ch. 25, SLA 1999. In CCS HB 50, section 3, the left-over regulatory cost charges of the APUC are included in the FY 2000 appropriation of \$4.7 million to the APUC (sec. 43 of CCS HB 50). Section 60 of this bill reconciles these two provisions by amending sec. 3 of CCS HB 50 so that the left-over amount included in that appropriation is "after the appropriation to the RCA for a management information system made by sec. 59 of the version of SB 32 that is enacted into law in 1999."⁵

Page 28, lines 18 - 20: Section 61 of the bill provides that the sum of \$321,900 is appropriated from statutory designated program receipts to the Alaska Oil and Gas Conservation Commission (AOGCC) for relocation of offices. While we do not have legal concerns as to use of the designated program receipts for relocation of offices under the enabling legislation (ch. 34, SLA 1999), we note that this provision is out of place in sec. 95 (b) as being for a capital appropriation. Moving of offices and related expenses are usually considered to be operating expenses and the use of designated program receipts in the enabling legislation provides for use of funds for operating expenses of the AOGCC. However, we believe the appropriation in sec. 61 is not invalidated by the apparent erroneous reference to its lapse date as being a capital appropriation in sec. 95.

Page 28, lines 25 -31, page 29, lines 1 - 14: Section 63 of the bill appropriates amounts received by the National Petroleum Reserve – Alaska special revenue fund (AS 37.05.530) to the Department of Community and Regional Affairs and also provides that a portion of the funds that lapse and are not deposited into the Alaska Permanent Fund and the public trust fund is reappropriated to the power cost equalization and rural electric capitalization fund (AS 42.45.100).

⁴ Ch. 25, SLA 1999, establishes the new Regulatory Commission of Alaska on July 1, 1999, and terminates the APUC as of the same date. Under that chapter, the appropriation for APUC transfers to the RCA.

⁵ In sec. 95 of the bill, the appropriation for the management information system made in sec. 59 is designated as a capital project, so the appropriation lapses under AS 37.25.020. This may be misplaced as a capital project unless the intent was to cover equipment purchases.

The portion reappropriated is conditioned on substantive legislation that amends the National Petroleum Reserve-Alaska special revenue fund (AS 37.05.053). As stated earlier, it is our position that conditioning an appropriation on the passage of a substantive bill may violate the confinement clause. Again, however, we note that a bill meeting the conditions of this section, HCS CSSB 157 (FIN) am H, has passed both houses of the legislature, but has yet to be transmitted to you for action. We understand that the Department of Community and Regional Affairs does not object to the bill. Our advice remains as previously stated that in the event you chose to veto the condition, we cannot give you a definitive answer whether the veto would be upheld by a court.

Page 31, lines 2 - 5: Section 69 of the bill appropriates the sum of \$2,450,000 from the general fund to the state bond committee for payment of additional principal and interest on all issued and outstanding state-guaranteed bonds. There is no designation as to where these funds are to be deposited. Further, we have been informed by the Department of Revenue that this appropriation is not currently needed to pay additional principal and interest on the designated bonds. However, it is our understanding that the Office of Management and Budget (OMB) believes it was the intent of the legislature that this money be placed in the Alaska debt retirement fund (AS 37.15.011). The stated purpose of that fund is consistent with the stated purpose of this appropriation. It is a designated fund that is invested by the Department of Revenue and the use of the balance is directed by the state bond committee (AS 37.15.012). Therefore, we believe it would be legally defensible to place the funds appropriated in this section in the Alaska debt retirement fund as suggested by OMB.

Page 31, lines 6 - 12: Section 70 of the bill appropriates funds for the costs to hold a special election relating to long-range fiscal planning and conditions it on the passage of a substantive bill requiring the election. The relevant bill passed (HB 1001); it is now ch. 1, FSSLA 1999.

Page 31, lines 20 - 27: Section 73 (a) of the bill is an appropriation from the general fund (\$250,000) and statutory designated program receipts (\$325,000) to cover costs associated with the Department of Law, governmental affairs, to investigate and prosecute the claims of state and municipal agencies against the Bank of America and certain affiliated banks for fiscal years ending June 30, 1999, and June 30, 2000. Section 73(b) is an appropriation for payment of judgment and claims and includes the judgment issued in *Bess v. Ulmer* (supreme court level), which was not funded by the legislature earlier in the session in the supplemental bill. The judgment issued by the superior court in *Bess v. Ulmer* was not submitted for the supplemental bill, but is included in the amount appropriated in (b) of this section.

Page 35, lines 11 - 18: Section 87 of this bill appropriates \$385,000 to the Department of Environmental Conservation (DEC) but is made contingent upon the enactment of a version of SB 128. HCS CSSB 128(FIN) passed and is now ch. 70, SLA 1999. Section 87(a) of the bill includes an appropriation of \$185,000 from the Oil and Hazardous Substance Release Prevention and Response Fund (AS 46.08.010(a)). The language of the appropriation does not

specify whether the money is to come from the response portion of the account or from the prevention portion of the account. However, based upon testimony on SB 128, it appears that the appropriate source is the prevention account because the appropriation was intended by the legislature to allow DEC to restore some of the storage tank program staff positions that were not funded in the operating budget (CCS HB 50) and to allow DEC to absorb the additional workload of implementing SB 128.

Page 51, lines 8 - 11: Section 100 of the bill includes intent language for trail development, safety, and education by the Department of Natural Resources (DNR). We note this section because of the contracting-out language included that applies to several of the appropriations made to DNR in section 100 (i.e., the intent that the department contract with appropriate entities to develop trails, safety, and education programs) while also intending to prohibit funds from being spent on additional staff in DNR to accomplish these purposes. This is an invalid attempt to specify the means by which the executive branch accomplishes and performs its duties and is invades the province of the executive branch. As discussed earlier in this review, intent language is not binding on the executive branch and you may ignore or chose to follow expressed intent.

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.

We note no other legal or constitutional problems with this bill.

Sincerely,

Bruce M. Botelho
Attorney General

BMB:MLV:jn