

May 5, 2015

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

Re: SCS CSHB 105(FIN) am S: Alaska
Industrial Development and Export
Authority
Our file: JU2015200326

Dear Governor Walker:

At the request of your legislative director, we have reviewed SCS CSHB 105(FIN) am S, relating to the Alaska Industrial Development and Export Authority (AIDEA) bonds, programs, loans, and liquefied natural gas project.

The bill does four main things. First, the bill amends ch. 26, SLA 2013 under which the AIDEA is pursuing the Interior Energy Project. Second, the bill creates new provisions restricting AIDEA from entering into contracts for gas supplies or gas reserves in certain instances. Third, the bill amends the dollar limitations in AIDEA's statutes regarding bonds it issues for projects. And fourth, the bill repeals several old bond authorizations that AIDEA has not used or did not use in full.

I. Description of bill sections.

A. Interior Energy Project sections.

Sections 1, 8, 9, 10, 13, and 14 of the bill concern the Interior Energy Project that AIDEA has been pursuing under ch. 26, SLA 2013. The Interior Energy Project is AIDEA's effort to bring natural gas to the Fairbanks area to lower the cost of energy and decrease air pollution.

Section 1 of the bill is an uncodified legislative intent section expressing two separate points about the bill's intent: (1) the removal of "North Slope" restriction on the gas source for the Interior Energy Project is meant to allow only for "geographic flexibility" and it is not meant to "expand the scope of the project" or to authorize activities beyond those needed to achieve the Interior Energy Project goals; and (2) that AIDEA use "an open and competitive process" to develop a liquefied natural gas (LNG) production capacity and affiliated infrastructure.

Section 8 of the bill amends the definition of “qualified energy development,” which is applicable to AIDEA’s sustainable energy transmission and supply development (SETS) program and fund. The financing authorized by ch. 26, SLA 2013 for the Interior Energy Project was to be from the SETS fund. Section 8 of the bill makes it possible for a pipeline with a diameter of 12 inches or less that transports natural gas to the Interior to meet the definition of a “qualified energy development” so as to qualify for SETS financing. Section 8 of the bill also defines “natural gas” as including propane or a mixture of propane and air.

Section 9 of the bill amends the provision of ch. 26, SLA 2013 that authorized AIDEA to provide up to \$275,000,000 in financing for an LNG plant and a natural gas distribution system to serve Interior Alaska. Section 9 removes the requirement that the LNG plant be located on the North Slope. Instead, sec. 9 provides that the LNG plant need only be located “in the state.” This section also adds the requirement that AIDEA’s board approve a project plan before providing the authorized financing. The project plan has to identify the source of the natural gas to be used, the estimated cost of the project, and the estimate price of the natural gas as supplied to the natural gas utilities in the Interior.

Section 10 of the bill adds a definition of “natural gas”, by amending ch. 26, SLA 2013, to include propane and a mixture of propane and air. While this definition does not fit perfectly with certain provisions of ch. 26, SLA 2013, the legislative intent is to allow AIDEA to consider financing propane systems in addition to a natural gas system is apparent.

Section 13 of the bill is a new uncodified provision that requires AIDEA to submit quarterly reports to the legislature on the Interior Energy Project. The quarterly reports are to include a description of progress, a financial accounting of expenditures, and the number of conversions to natural gas by customers in the Interior.

Section 14 of the bill repeals sec. 13 to terminate the quarterly reporting requirement as of June 30, 2025.

B. Restrictions on contracts for gas supplies and gas reserves.

Sections 5 and 6 of the bill amend AS 44.88.170 to restrict AIDEA from entering into a gas supply contract with a natural gas producer to provide natural gas to the Interior Alaska without first obtaining legislative approval. The restriction applies, unless the contract is for the benefit of a liquefaction or natural gas utility, that AIDEA or an AIDEA subsidiary owns and the gas supplied is for that utility to use in serving its customers in Interior Alaska.

Section 7 of the bill amends AS 44.88.690(a) to prohibit AIDEA from using the SETS fund to purchase or acquire gas reserves or a gas lease or become a working interest owner of a natural gas lease.

The bill does not explain the basis for the restrictions secs. 5, 6, and 7 impose on AIDEA. However, at a hearing in the House Resources Committee where these provisions were added to the bill, the legislator who sponsored the additions expressed concern about AIDEA using the

broadened scope of the Interior Energy Project as a basis to put itself into the position of controlling or brokering Cook Inlet gas supplies or reserves.

C. Dollar limits on bonds and loan participations.

Sections 2, 3, and 4 of the bill increase dollar limits AIDEA's statutes impose on financing it can provide.

Section 2 increases the dollar amount of bonds AIDEA can issue for a project without having to obtain local government approval of the project. Section 2 raises the dollar limit to \$10,000,000 from the pre-existing limit of \$6,000,000.

Section 3 increases the amount of bonds AIDEA can issue for a development finance project under AS 44.88.172 with legislative approval. The increase is from \$10,000,000 to \$25,000,000.

Section 4 increases the amount bonds AIDEA can issue for its loan participation program under AS 44.88.155. The increase raises the limit from \$20,000,000 to \$25,000,000.

D. Bond authorization repeals.

Sections 11 and 12 of the bill repeal several old bond authorizations that were extended to AIDEA but that were not used or not used in their entirety.

Section 11 repeals the remaining, unused portion of the bond authorization for cargo and air transport support facilities at Anchorage International Airport. AIDEA used a portion of this authority to construct a hangar but still had \$28,000,000 in unused bonding authority.

Section 12 repeals seven other bond authorizations that AIDEA has not used and that AIDEA reports it does not intend to use. The specific bond authorizations sec. 12 repeals are:

1. 1993 authorization, amended in 1996, to issue \$50,000,000 in bonds for bulk commodity port facilities located anywhere within Cook Inlet;
2. 1993 authorization to issue \$50,000,000 in bonds for a seafood processing facility in Anchorage;
3. 1995 authorization to issue \$20,000,000 in bonds to finance the Kodiak rocket launch complex and tracking station;
4. 1998 authorization to issue \$80,000,000 in bonds to expand and modify AIDEA's existing port facilities connected to the DeLong Mountain transportation system and to add new facilities to DeLong Mountain transportation system, which serve the Red Dog Mine in the Northwest Arctic Borough;

5. 1998 authorization to issue \$30,000,000 in bonds to finance improvements to the Nome port facilities;

6. 1998 authorization, amended in 2006, to issue \$25,000,000 in bonds to finance the development of Hatcher Pass in the Matanuska-Susitna Borough; and

7. 2004 authorization to issue \$20,000,000 in bonds to finance the development of a port and related facilities at Slate Creek and Cascade Point on Lynn Canal in Southeast Alaska.

II. Legal issues presented.

A. Intent language.

The legislative intent language of sec. 1 of the bill creates legal matters that should be noted. Since the legislature has chosen not to incorporate the provisions of sec. 1 into substantive provisions, but has left them as expressions of “intent,” sec. 1 will not have the force of law. At most, sec. 1 may serve as some guidance to AIDEA or to any court called upon to interpret the other provisions of the bill. Still, in the event of any inconsistency between the language of sec. 1 and the substantive provisions of the bill, the substantive provisions will control.

Paragraph (2) of sec. 1, which expresses the legislative intent that AIDEA use an open and competitive process in developing LNG production capacity, raises the possibility of a separation of powers problem. In 2011, the legislature amended the State Procurement Code to generally exempt AIDEA from it (AS 36.30.015(f)). AIDEA has separately adopted its own procurement regulations (3 AAC 100). The legislature’s expression of intent in paragraph (2) might be seen as conflicting with the autonomy substantive law gives AIDEA in procurement matters. Moreover, the legislature’s intent as to how AIDEA is to pursue the Interior Energy Project could be taken as interfering with the executive power reserved to the executive branch in art. III, sec. 1 of the Alaska Constitution.

Nevertheless, we see no significant legal issue presented by paragraph (2) of sec. 1 since the paragraph is couched as advisory language that would not override the executive’s power or any substantive law provisions applicable to AIDEA. Further, the executive can always choose to follow the legislature’s expression of intent as a matter of comity, which will eliminate any possible issue. We understand AIDEA expects to use an open solicitation process as it proceeds forward with obtaining additional LNG supplies for the Interior Energy Project.

B. Single subject rule.

A possible legal concern regarding the single subject rule arises because the bill includes provisions relating to some fairly distinctive topics. Article II, sec. 13 of the Alaska Constitution requires that every bill be confined to one subject, which must be expressed in its title. The Alaska Supreme Court has explained that to determine if a bill is confined to one subject, “[a]ll that is necessary is that [the] act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with

or related to each other, either logically or in popular understanding, as to be part of, or germane to, one general subject.” *Croft v. Parnell*, 236 P.3d 369, 373 (Alaska 2010) (quoting *Gellert v. State*, 522 P.2d 1120, 1123 (Alaska 1974)).

The separation of powers doctrine provides the legislature with primary responsibility for the conduct of legislative activities within the legislature. *Van Brunt v. State*, 653 P.2d 343, 346 (Alaska App. 1982). Courts therefore give the legislature a great deal of deference in determining whether legislation involves one subject. *Id.* The courts broadly construe what constitutes a single subject for purposes of art. II, sec. 13 of the Alaska Constitution. *Gellert v. State*, 522 P.2d at 1123. They will “disregard mere verbal inaccuracies, resolve doubts in favor of validity’ and strike down challenged proposals only when the violation is ‘substantial and plain.’” *Croft v. Parnell*, 236 P.3d at 373 (quoting *Gellert*, 522 P.2d at 1122).

The Alaska Supreme Court has upheld against single subject challenges bills with similarly broad general subjects. *See State v. First National Bank of Anchorage*, 660 P.2d 406, 415 (Alaska 1982) (general category of “land”); *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534 (Alaska 1978) (“state taxation” related to state and municipal taxation); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173 (Alaska 1985) (“transportation”); and *Gellert v. State*, 522 P.2d 1120 (Alaska 1974) (“water resources management” related to flood control and boat harbor projects).

Based upon these authorities, we believe that a court would find this bill satisfies the constitutional single subject rule. All of the provisions in the bill relate in some manner to AIDEA. Although it deals with the Interior Energy Project and modifications to other provisions of AIDEA’s programs that are separate from the Interior Energy Project, the bill at bottom concerns only one main topic, the Alaska Industrial Development and Export Authority. We therefore think a court would conclude the single subject rule is satisfied.

C. Equal Protection and Local and Special Act.

Equal protection (art. I, sec. 1, of the Alaska Constitution) and local and special act (art. II, sec. 19, of the Alaska Constitution) issues may arise regarding the Interior Energy Project since it is aimed at benefitting “Interior Alaska.” Other areas of the state will not be directly receiving the benefits of the project AIDEA is undertaking.

A court would use substantially the same analysis to review equal protection and local and special act issues. For local and special legislation issues, the Alaska Supreme Court follows an analysis that is substantially the same as that used when nonsuspect classifications are challenged on equal protection grounds. *Baxley v. State*, 958 P.2d 422, 430 (Alaska 1998).

Under this analysis, the court would examine “the legislative goals and means used to advance them [to] determine whether the legislation bears a ‘fair and substantial relationship’ to legitimate purposes.” *Baxley v. State*, 958 P.2d at 430 (quoting *State v. Lewis*, 559 P.2d 630, 643 (Alaska), *cert. denied*, 432 U.S. 901 (1977)). Under this minimum scrutiny, the state needs to show that the legislation was designed to achieve a legitimate government objective and that it has a substantial relationship between means and ends. *State v. Anthony*, 810 P.2d 155, 157

(Alaska 1991), *on rehearing*, 816 P.2d 1377 (Alaska 1991). The court will accept “incidental local or private advantages” and will also accept some unevenness in the application of the legislation. *Baxley v. State*, 958 P.2d at 430.

In authorizing AIDEA to finance the Interior Energy Project, the legislature was responding to the high cost of energy in Interior Alaska and attempting to craft a solution for an area of the state that had road access and a sufficient market to support the LNG trucking plan. Lowering the cost of energy for the state’s citizens is a legitimate government purpose and the bill unquestionably advances that purpose in a substantial way.

The fact that other areas of the state also suffer from high energy costs should not undercut the validity of the bill. The Alaska Supreme Court has recognized that the legislature may properly take an incremental approach to resolving problems. “A statute is not invalid merely because it might have gone further than it did A legislature need not eliminate all evils at the same time; it may attack a problem step-by-step, starting with the worst abuses.” *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1039-40 (Alaska), *cert. denied*, 493 U.S. 922 (1989). See also *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 554 (Alaska 1966) (quoting *Miller v. Wilson*, 236 U.S. 373, 383-84 (1915)) (the legislature “is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest”).

We believe that a court would find this bill meets minimum scrutiny analysis for both equal protection and as a local and special act.

III. Conclusion.

In conclusion, we see no significant legal problems presented by this bill.

Sincerely,

Craig W. Richards
Attorney General

CWR:JHJ:dm