June 20, 1991

Hon. Walter J. Hickel
Governor
P. O. Box A
Juneau, Alaska 99811

Re: CCS HB 75 -- making operating and loan program appropriations for FY 1992
Our File: 883-91-0100

Dear Governor Hickel:

At Lori Nottingham's request on your behalf, we have reviewed CCS HB 75, fiscal year (FY) 1992's budget bill, which finances most government operations. As in previous years, it is not the only appropriations bill. See, e.g. SCS CSHB 15(FIN) am S, making appropriations for operating, capital, special, supplemental, and miscellaneous expenses and reappropriating money from prior fiscal years. You submitted the original version of HB 75 under art. IX, sec. 6, Alaska Constitution, and AS 37.07.020.

The time allowed for this review has not permitted us to review each item in detail, examine supporting documents, or review the ways in which the bill has been changed since its introduction. Instead, we highlight the major legal issues raised by the bill and cite a few items as examples. We have likewise limited our citation of authority in this review and instead attach a comprehensive informal opinion of this office outlining the general legal considerations raised by most budget bills:, 1987 Inf. Op. Att'y Gen. (June 26; 883-87-0089). See also 1989 Inf. Op. Att'y Gen. (June 6; 883-89-0119). We draw your particular attention to the conclusions at pages 12-13 of

the 1987 opinion. We would be happy to assist you and your staff with particular items in the course of your own review, and the departments as they work with the bill during the coming fiscal year.

In this bill, the legislature continues its practice of sprinkling unenforceable intent language throughout the operating budget bill. See e.g. CCS HB 75 at 11, lines 24-26 (specifying that a nurse's aide be placed on a particular shift); at 12, lines 20-25 (indicating the legislature's intent that boards and commissions not use grant funds for shortfalls in personal services funding, but not appropriating in accordance with that intent.) Such language is usually unenforceable for a number of reasons.

First, to the extent such intent language purports to legislate a matter of general law, it violates the clause of art. II, sec. 13, Alaska Constitution, that confines appropriation bills to appropriations. See e.g. CCS HB 75 at 40, lines 13-22 (attempt to set out qualifications for grants for veterans' organizations without enacting a general law for that purpose) and at 53, lines 17-25, and 54, line 4 (attempt to amend procurement code or evade its requirements with respect to equipment fleet purchases).

Second, the legislature's use of intent language to administer, rather than merely authorize, the expenditure of money violates the separation of powers doctrine. The power to supervise and administer the government is committed to the executive branch. See inter alia, art. III, secs. 1, 16, 23, and 24, Alaska Constitution. Any effort to dictate the day-to-day operations of the executive or judicial branches in an appropriations bill is thus usually beyond the power of the legislature. See 1987 Inf. Op. Att'y Gen. at 9 (June 26; 883-87-0089). CCS HB 75 contains numerous examples of this; we list only a few: CCS HB 75 at 49, lines 9-11 (indicating the legislature's desire to have the court service officer job classification continued, and at the level of the previous fiscal year); CCS HB 75 at 55, lines 4-26 and 56 at line 1 (suggesting that DOTPF redo its six-year plan and create the office of chief engineer); CCS HB 75 at 16, lines 4-15 (asking the department of law to report to the legislature regarding training and support for staff supervising contracts with outside counsel and whether a procedures manual has been prepared); CCS HB 75 at 17, lines 16-18 (indicating that positions should be assigned to certain locations to insure an adequate collection effort); CCS HB 75 at 23, line 25 and 24 at lines 4-12 (indicating legislature's intent that the department of health and social services should spend $50,000 of an appropriation on a study, to develop a rate

schedule, to incorporate the findings of the report in the 1993 budget, and to report to the legislature on its findings by January 20, 1992); CCS HB 75 at 29 (requiring a report to the chairs of the legislature's finance committees regarding distribution of expansion money, and directing that previously named grantees be given equal consideration in the distribution of new money); CCS HB 75 at 48, lines 13-26, and 49, line 4 (suggesting where the Department of Public Safety should post troopers); CCS HB 75 at 75, lines 7-17 (suggesting the number of beds for certain correctional facilities and suggesting how long furloughs should be under AS 33.30.111); CCS HB 75 at 76, lines 22-25 and 77, lines 4-13 (attempting to set a standard of care for medical treatment by quoting from reported cases).

Other sections of the bill suggest that the executive branch spend at a certain level and then seek a supplemental appropriation. See e.g. CCS HB 75 at 14, lines 6-19, and at 45, lines 5-9. This should not be construed as approval for such a supplemental appropriation; agencies may not encumber or expend money not actually appropriated.

Language calling for compliance with a Supreme Court holding, but using the language "shall be appropriated" in reference to a calculation that the legislature directs the Department of Revenue to make (see CCS HB 75 at 49, line 23 through 50, line 18 at 74, lines 6-24, and at 75, line 20 through 76, line 15 is somewhat troublesome. The legislature's drafting manual indicates that the word "shall" is to be used to impose a duty, not in the mistaken, though common, sense of "in the future". 1991 Manual of Legislative Drafting at 51. However, the inclusion of the cited language in a statement of intent, and the requirement that the legislature be notified when the amount is calculated as a precondition to appropriation, suggests that the appropriation is not complete. While an appropriation that does not specify an amount is adequate if the amount can be readily ascertained, as it can here, the precondition raises questions about the legislature's intentions. The fact that an appropriation has been made from the dividend fund this year for the same purpose set out in the intent language (see e.g. CCS HB 75 at 49, line 22, last column) indicates that the cited language is a suggestion for the future, and the calculated amount should be included in next year's budget.

In contrast, we note that although the legislature claims that its appropriation for certain expenditures of the Department of Corrections does not constitute its approval of the settlement of the Cleary lawsuit concerning Alaska prison conditions, the department is clearly authorized to expend funds appropriated consistent with the settlement by the appropriation

itself. Approval of the settlement as a whole is not necessary if the appropriation authorizes the expenditure.

Much of the intent language referenced above, and other similarly worded clauses, can be disregarded or stricken. Some may be worth adhering to as salutary (see e.g. CCS HB 75 at 25 et seq., language encouraging the aggressive pursuit of third party payments by the state's grantees). It is up to you, of course, to decide as a policy matter what is salutary in effect. As to whether to strike or disregard, we do not believe it is necessary for you to go to the trouble of striking the language in most cases. However, we have observed a tendency in state managers to follow such language, a practice reinforced by a tendency of Legislative Budget and Audit to look for compliance with such conditions even where unenforceable. We make these observations to assist you in determining how to administer your decisions about what intent language to observe, and whether to strike language you intend to disregard.

Not all of the intent language in the bill may be disregarded. On rare occasions, the legislature imposes conditions that are germane to the appropriation at hand. Such conditions must be observed. In some cases, an amount is mentioned in intent language, but not in the body of the appropriation. See e.g. CCS HB 75 at 38, lines 10-15 and lines 17-19. Such amounts can be stricken without affecting the appropriation as a whole. 1987 Inf. Op. Att'y Gen. at 7 (June 26; 883-87-0089). Other passages of the bill indicate that an amount is "included" in an appropriation for a particular purpose. CCS HB 75 at 33, lines 5-9. Such items may likewise be regarded as nonbinding statements of intent. 1987 Inf. Op. Att'y Gen. at 11-12 (June 26; 883-87-0089). Alternatively, they may be treated as allocations, and used for other authorized purposes without affecting the appropriation as a whole. AS 37.07.080(e). However, if the language "is appropriated" is used, or the intent to make a particular appropriation is otherwise clear, then the total amount of the appropriation under which the "included" amount appears must be either spent as appropriated or reduced accordingly.

In language associated with several appropriations, the legislature has indicated an intent that increases in landing fees and lease rentals not be used as a funding source. See e.g. CCS HB 75 at 64, lines 21-23. This would appear to be an effort to avoid the effect of other laws concerning the collection of fees by state agencies. Given that this language is stated as intent language rather than as a condition of an appropriation, we believe that it may be disregarded. (Of course, any such fee or charge must be assessed in accordance with applicable laws and

regulations.)

Certain allocations within appropriations are shown in the bill as lapsing as of a particular date. For example, CCS HB 75 at 60, lines 16-18, purports to lapse an allocation within an appropriation effective August 31, 1992. Lapsing is the termination of the authority to spend, the time periods for which may be set by law. Article IX, sec. 13, Alaska Constitution. The constitution refers to appropriations. Allocations are referred to in AS 37.07.080(e) as mere guidelines for spending authority, which may be transferable between objects of expenditure within an appropriation, subject to the approval of the office of management and budget. Although we are not familiar with the background of these appropriations, we assume that the underlying appropriation lapses in the ordinary course on June 30, */ and interpret the cited language to allow the allocated portion of the underlying appropriation a later lapse date consistent with the construction season.

The discussion above regarding the inability of the legislature to administer as well as appropriate money should not lead you to conclude that you need not comply with such requirements where they are found in general law. For example, the legislature may require you to comply with the oversight review set out in AS 37.07.080(h) (see CCS HB 75 at 1-2, secs. 2 and 6), even though you will ultimately have the authority to expend the money if appropriated as in the cited sections.

Likewise, some restrictions on expenditures are valid, if they are germane to the appropriation and are within the minimum necessary to explain the appropriation. See e.g., ch. 116, SLA 1989, at 74-75, restricting personal services appropriation in accordance with 23.40.215(a), and ch. 129, SLA 1986, CCS HB 500 at sec. 20, to similar effect.

The legislature has attempted to condition the appropriations for the Department of Public Safety and the Department of Transportation and Public Facilities on the nonexpenditure of money for the opening of the Dalton Highway during a particular season. CCS HB 75 at 50, lines 23 through 51, line 6; CCS HB 75 at 52, lines 9-16. The language in both departments' appropriations reads as follows:

The appropriations made in this act to the [name of

---

*/ If the underlying appropriation has a longer lapse date than the allocation, it may be possible to transfer the allocation in accordance with AS 37.07.080(e).

> each department] are conditioned on no portion of these appropriations being expended for costs associated with the opening of the Dalton Highway to the general public north of Dietrich Camp at any time of the year or that portion of the Dalton Highway between the Yukon River and Dietrich Camp between September 2 and May 31.

The sponsors of this condition apparently did not have the votes for general legislation concerning limitations on public use of the Dalton Highway, and were only able to manage to insert language in the budgets of the departments. This is a form of logrolling, defined in Black's Law Dictionary as

> [a] legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and when procuring its passage by a combination of the minorities in favor of each of the measures into a majority will adopt them all.

Black's Law Dictionary (West 1976). This practice is intended to be curtailed in Alaska by the single subject rule and the confinement clause of art. II, sec. 13, Alaska Constitution, which provides:

> Every bill shall be confined to one subject unless it is an appropriations bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations . . .

Id. See 3 Proceedings of the Alaska Constitutional Convention at 1746-7.

The question presented by the bill's cited language is whether the condition it imposes is valid, germane to the appropriation, and the minimum necessary to set out the object of the expenditure. Because it is carefully phrased as a condition, the question is a closer one than those discussed above. Apparently the proponents of the language intend to file suit if the Dalton Highway is opened in the manner supposedly restricted by the language in question. For that reason, we address this issue in a confidential memorandum under separate cover.

We have not had much contact with the departments during the brief time we have had to review the bill, but we understand that the Department of Labor is generally concerned about whether its state employment and training programs extended by ch. 17, SLA 1991, will be funded by program receipts or the general fund. The answer would appear from CCS HB 75 at 89, lines 16-17 to be the general fund. The contributions made under

ch. 17, SLA 1991, would not be considered general fund program receipts under AS 37.05.146 (4)(H). See AS 23.30.130.

In closing, we must reiterate that because of the short time we have had to prepare this review, our failure to mention particular items does not mean they pose no problem. In this regard, we again commend to your attention the conclusion of our 1987 informal opinion, which lists the types of intent language frequently appearing in budget bills and indicating their relative effectiveness. We would be happy to assist you and your staff with particular items, and we encourage you to bring any questions to our attention.

The second part of this opinion will be delivered shortly.

Sincerely,

Charles E. Cole
Attorney General

CEC:JWB:KS:cl

cc: Shelby Stastny, Director
Office of Management and Budget
Office of the Governor

CEC:JWB:KS:cl