November 12, 2003

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

Re: CCS SSHB 75 – Fiscal Year 2004 operating budget
Our file: 883-03-0044

Dear Governor Murkowski:

At the request of your legislative director, we have reviewed CCS SSHB 75, the operating budget bill for fiscal year 2003 (beginning on July 1, 2003, and ending on June 30, 2004). We have relatively few comments on this bill, with those that we have largely focusing on the provisions included by the legislature relating to legislative intent and abortion funding.

We traditionally begin our review each year of the operating budget bill with a discussion of the expressions of legislative intent that are set out in the bill. Until recently there was a question as to whether the governor could veto these expressions, although the non-binding nature of the expressions has never been in doubt. In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001),[1] the Alaska Supreme Court strictly construed the executive veto power by holding that it applies only to amounts set out in the bill. You may not veto text set out in the bill because these provisions do not constitute "items" subject to your veto power with regard to appropriation bills found in art. II, sec. 15 of the Alaska Constitution: ([the governor] "may, by veto, strike or reduce items in appropriations bills"). However, the *Legislative Council II* opinion clearly did not indicate that the expressions of intent are binding. Indeed, in another section of the opinion, it indicated that they are not. *Id.* at 382 (certain language vetoed by the governor "can permissibly be characterized as *merely* expressing the legislature's intent"; emphasis added).

[1] Hereinafter *Legislative Council II*. The first *Legislative Council* case involved the validity of a legislative override of a gubernatorial veto. *Legislative Council v. Knowles*, 988 P.2d 604 (Alaska 1999) (hereinafter *Legislative Council I*).

Two of the intent statements in this bill, because of their wording, warrant specific comment. The first is the intent statement accompanying the Department of Administration appropriation for Legal and Advocacy Services on page 4, lines 18-26:

> It is the intent of the Legislature to reduce the cap of contract attorneys in the Department of Administration, Office of Public Advocacy and Public Defenders Agency from $1,000,000 for a two-year contract to $500,000 per two-year contract. Contracts for OPA and PDA services should not be amended, but shall be renegotiated to meet the new caps. At the beginning of FY2005, new caps for contract legal services shall be established to insure greater accountability in the Office of Public Advocacy and in the Public Defenders Agency. It is the intent of the Legislature to request Legislative Budget and Audit to audit and examine the Office of Public Advocacy and the Public Defenders Agency. The Legislature may also recommend a salary analysis.

The second and third sentences do not contain "intent" lead-in language, and hence might be seen as an attempt to enact binding substantive law. However, if read in this manner, this language would violate the confinement clause of the Alaska Constitution (that portion of art. II, sec. 13 providing that "[b]ills for appropriations shall be confined to appropriations"; *i.e.*, may not enact substantive law). *See Legislative Council II.* We therefore think that the two sentences must be read simply as part of an overall expression of legislative intent, notwithstanding their lack of "intent" lead-in language.

The first paragraph of the intent statement accompanying the allocation to the Department of Education and Early Development (DEED) for the foundation program, on page 10, lines 15-24, contains a statement that the Local Boundary Commission and the DEED report certain findings to the legislature by a specified date. It is somewhat unusual for an intent statement to mention a report due on a certain date. Again, though, because this is merely an intent statement, there is no binding requirement that this report be done.

Turning to other matters, we note that the first paragraph of the bill, on page 2 at lines 4 - 6, includes the following qualifying language: "A department-wide, agency-wide, or branch-wide unallocated reduction set out in this section may be allocated among the appropriations made in this section to the department, agency, or branch."[2] In 1999 Inf. Op. Att'y Gen. 167 (June 28; 883-99-0062), our review of the fiscal year operating budget, we discussed unallocated reductions that purported to affect more than

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[2] The same language is set out in sec. 2 of the bill, on page 39, lines 8-11, the budget for new legislation, except that here the language applies to an unallocated increase as well as an unallocated reduction.

one appropriation. We noted that this approach raised constitutional questions, but did not recommend any vetoes because of these possible questions. We adhere to our prior discussion and advice.

Two parts of sec. 1 of this bill attempt to limit the expenditure of money appropriated to the Department of Health and Social Services for abortions. These appear at p. 18, lines 9 - 15, applicable to medical assistance appropriations, and at p. 21, lines 16 - 19, applicable to the commissioner's office appropriation.

These provisions specifically state that no money appropriated may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The text set out in the bill further addresses the medical assistance appropriations by declaring that the money appropriated may only be expended for the mandatory and optional Medicaid services approved in the state plan. It further declares that this is not a statement of intent nor mere description, but a statement of purpose.

Like virtually identical language that appeared in last year's operating budget bill, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions, even though the department is under a court order to operate its Medicaid program in a constitutional manner by providing payment for them. That order has been upheld by the Alaska Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. *State of Alaska, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.2d 904 (Alaska 2001). Thus, the Department of Health and Social Services ("DHSS") is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while DHSS is ostensibly without the funds available to pay for services to operate the program legally. A veto of these two provisions is not available under the analysis of *Legislative Council II* that is discussed above.

Two years ago the plaintiffs in the *Planned Parenthood* case asked the superior court to clarify how similar budget restrictions impacted its judgment. The superior court, three days after the supreme court affirmed the judgment, issued an opinion ordering the Department of Health and Social Services not to comply with the restrictions. To date, therefore, we have obeyed the superior court's order and we must advise you to continue to obey it; *i.e.*, to continue to pay for these medically necessary abortions, until such time, if any, as a court reverses the order that is now in effect.

Section 20(a)(4), on page 64 of the bill, appropriates to the fish and game fund (AS 16.05.100) "receipts from the sale of Chitina dip net fishing permits" under AS 16.05.340(a)(22). You should be aware that CSHB 210(RES)(efd fld S) ("HB 210"), which passed the legislature and was recently transmitted to you, repeals the fee for

Chitina dip net fishing permits. Therefore, if HB 210 is enacted, this portion of the fish and game fund appropriation will be unavailable.

Section 27(d) of the bill appropriates to the public school trust fund (AS 37.14.110) an amount equal to 0.5 percent of the funds that lapse into the National Petroleum Reserve – Alaska special revenue fund (AS 37.05.530) from that fund. This appropriation is required to help satisfy the state's obligation to compensate the public school trust for trust lands redesignated as general grant lands in 1978 (Chapter 182, SLA 1978). Matters related to compensating the public school trust for trust lands are currently pending in litigation captioned *Kasayulie v. State*, 3AN 97-3782 Civil.

In sec. 29 of the bill the legislature funds the monetary terms of collective bargaining agreements under AS 23.40.215. Subsection (b) lists the ten bargaining units that signed tentative agreements with the state within 60 days of the beginning of the legislative session, under AS 23.40.215(b). Subsequently the two remaining bargaining units, the Marine Engineers Beneficial Association (MEBA) and the International Organization of Masters, Mates, and Pilots (M,M&P), reached tentative agreements with the state. The executive branch submitted the monetary terms of these agreements to the legislature later on in the session. The legislature added the amount necessary to implement the monetary terms for these two units to the budget during the course of conference committee deliberations, and the legislature appropriated the necessary amount. The appropriation is fully documented in the record. The legislature's act of appropriation of a sum to Marine Highways Operations (in sec. 1 of the bill, page 35, line 28) that includes the MEBA and M,M&P monetary terms under AS 23.40.215(a) constitutes approval of the terms, even though the collective bargaining units are not specifically mentioned in sec. 29.[3]

Paragraphs (6) to (9) of sec. 32(o) of the bill contain appropriations from the general fund to designated recipients for payment of debt service on outstanding debt authorized by ch. 115, SLA 2002, specifically, $532,114 to Kodiak Electric Association, Inc. for Nyman Combined Cycle Cogeneration Plant; $959,376 to Cordova Electric Cooperative for Power Creek Hydropower Station; $304,307 to Copper Valley Electric Association, Inc. for cogeneration projects; and $696,764 to Metlakatla Power and Light for utility plant and capital additions. The payment or 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. 9 of the Alaska Constitution. When the purpose of an expenditure is to pay or retire the existing debt,

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[3] In *University of Alaska Classified Employees Association v. University of Alaska*, 988 P.2d 105 (Alaska 1999), the Alaska Supreme Court looked at the budget documents behind the University's broad budget categories to determine that the legislature had not funded the monetary terms of its collective bargaining agreements. Here, the legislature clearly included the requested amount.

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).

Finally, we have discussed with the director of the Office of Management and Budget the necessity to state reasons for the vetoes to make to this and other appropriation bills. Under art. II, sec. 15 of the Alaska Constitution, you must return the vetoed bill to the house of origin "with a statement of [your] objections." This statement of objections must meet a standard of "minimum of coherence," according to the Alaska Supreme Court in *Legislative Council II,* 21 P.3d at 376. The objection must make comprehensible reference to the provision being vetoed. However, a court will not evaluate the reasoning underlying the objection out of respect for the power of the executive branch, a coordinate branch of state government. *Id.* This means that while the governor must state an objection to an item or class of items, the court will not weigh the objections to determine if they are valid.

We find no other constitutional or legal problems with the bill.

Sincerely,

Gregg D. Renkes
Attorney General

GDR:JG