

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

August 26, 2020

SUBJECT: Legal review of most recent RPLs
(Work Order No. 32-LS0081)

TO: Representative Chris Tuck
Attn: Ken Alper

FROM: Megan A. Wallace
Director



You asked for a legal review of the latest round of RPLs submitted to the Legislative Budget and Audit Committee (LB&A) by the governor.

1) National Endowment for the Arts CARES Act – RPL#05-2021-0075

The purpose of this RPL is consistent with the underlying appropriation sought to be increased. The underlying appropriation includes federal funding so there is authority to increase the appropriation with additional federal receipts through the RPL process. There are no legal issues with this request.

2) Amendments to State of Alaska COVID-19 Small Business Relief – RPL #08-2020-0184

This RPL seeks to amend the eligibility requirements of the small business relief program approved by LB&A on May 11, 2020, through approval of RPL #08-2020-0251. After a lawsuit was filed challenging the legality of the former RPL,¹ the legislature ratified the original small business relief program RPL through passage and enactment into law of ch. 32, SLA 2020. The governor has submitted this new RPL related to the "unobligated amount previously authorized: \$249,784,591" and seeks legislative approval to remove "the restrictions for secondary income sources and for businesses that have received funding or have an approved application for SBA's PPP or EIDL loan program." This RPL only requests a change to eligibility criteria for the small business relief program and does not seek to increase the appropriation amounts for the small business relief program previously authorized.

¹ See *Forrer v. State of Alaska, et al.*, Superior Court Case No. 1JU-20-00644CI.

AS 37.07.080(h) provides:

(h) The increase of an appropriation item based on additional federal or other program receipts not specifically appropriated by the full legislature may be expended in accordance with the following procedures:

(1) the governor shall submit a revised program to the Legislative Budget and Audit Committee for review;

(2) 45 days shall elapse before commencement of expenditures under the revised program unless the Legislative Budget and Audit Committee earlier recommends that the state take part in the federally or otherwise funded activity;

(3) should the Legislative Budget and Audit Committee recommend within the 45-day period that the state not initiate the additional activity, the governor shall again review the revised program and if the governor determines to authorize the expenditure, the governor shall provide the Legislative Budget and Audit Committee with a statement of the governor's reasons before commencement of expenditures under the revised program.

This statute exclusively allows for "[t]he increase of an appropriation item based on additional federal or other program receipts" in accordance with the enumerated procedures. The statute does not allow LB&A to approve or alter substantive program requirements previously approved by the full legislature. In addition, the statute does not provide a mechanism for LB&A to modify or amend an RPL after it is approved or grant LB&A the authority to pass a motion allowing the executive branch greater flexibility for submitting RPLs than is provided by law. Consequently, it is my opinion that the RPL process is not the appropriate venue for the governor to seek legislative approval of the additional revisions to the small business relief program that are being requested in RPL #08-2021-0184.²

Because the legislature ratified the original small business relief program RPL by law, in its entirety, including the original eligibility criteria, the eligibility criteria is arguably substantive law. Substantive law may not be modified through an amended or new RPL

² The Department of Law previously seemed to recognize the limitation of AS 37.07.080(h), arguing in the *Forrer* case that "although the underlying authority to operate the program and the scope of the program may be part of the discussion, the Committee's focus is on the expenditure and appropriation authority." See State's Opposition to Plaintiff's Motion for Preliminary Junction and Cross-Motion for Summary Judgment, *Forrer v. State of Alaska, et al.*, No. 1JU-20-644CI at page 23.

or through an LB&A motion. Rather, substantive law, such as the eligibility criteria, may only be changed by law, which requires action by the full legislature.³

This, however, is not the first time that the governor has sought to change or alter the requirements of the small business relief program after it was ratified and approved by the full legislature.⁴ The small business relief program already has a tortured history, and the power of the Department of Commerce, Community, and Economic Development (DCCED) to modify the small business relief program criteria has recently been litigated, at least at the superior court level. The governor did not submit an RPL the first time the eligibility requirements of the small business relief program were changed, so it remains unclear why the governor chose to submit this new RPL for the changes that are currently being proposed.

Based on the orders issued by Alaska Superior Court Judge Pallenberg on July 10, 2020, and August 7, 2020, any further challenge to DCCED's authority to modify the small business relief criteria is not likely to be immediately successful. It is also plausible based on Judge Pallenberg's recent rulings that if further appealed, the Alaska Supreme Court might ultimately find that DCCED may modify the program criteria where nothing in law provides otherwise.⁵ In the July 10th order, Judge Pallenberg denied the plaintiff's request to enjoin DCCED from administering the small business relief grant program under modified criteria.⁶ Although the order was limited to the ruling on the injunction, Judge Pallenberg indicated that DCCED likely had a reasonable basis for determining that the RPL allowed DCCED to create a limited exception to the eligibility criteria.⁷

³ In ratifying RPL No. 08-2020-0251, the legislature made a policy decision to not substantively change or alter the program as proposed by the governor, including eligibility criteria.

⁴ See June 17, 2020, DCCED Press Release available at <https://www.commerce.alaska.gov/web/portals/0/pub/06-17-20PR20-017CARESActFundingForAlaskaBusinessesToBeExpanded.pdf> (announcing "Small Alaska businesses that received \$5,000 or less in Paycheck Protection Program (PPP) or Economic Injury Disaster Loan (EIDL) funds and 501(c)(6) nonprofit organizations will become eligible for the State's grant program; as long as they were based, licensed, and located in Alaska when the public health disaster emergency was declared on March 11, 2020 and have 50 or fewer full-time equivalent employees.").

⁵ See Order Denying Motion for Preliminary Injunction, *Forrer v. State of Alaska, et al.*, No. 1JU-20-644CI (Alaska Sup. Ct. July 10, 2020); Corrected Order Granting Summary Judgment *Forrer v. State of Alaska, et al.*, No. 1JU-20-644CI (Alaska Sup. Ct. August 7, 2020).

⁶ *Id.*

⁷ *Id.* at 20.

Judge Pallenberg later granted the State's Motion for Summary Judgment, without issuing a written order.⁸ Based on these superior court orders, if further appealed, the Alaska Supreme Court might find that the original RPL, as ratified by the legislature, provided DCCED with enough flexibility to relax the eligibility criteria in a manner consistent with the goals of the small business relief grant program. Alternatively, the Alaska Supreme Court could rule that the eligibility criteria may only be changed by law by the full legislature and that LB&A is without authority to approve this new RPL making additional changes to the eligibility criteria of the small business relief program.⁹

3) Division of Geological and Geophysical Surveys – RPL #10-2021-5047

The purpose of this RPL is consistent with the underlying appropriation sought to be increased. The underlying appropriation appears to include federal funding so there is authority to increase the appropriation with additional federal receipts through the RPL process. There are no legal issues with this request.

4) Department of Natural Resources – RPLs #10-2021-5315, 10-2021-5316, 10-2021-5317, and 10-2021-5318

These RPLs seek to increase capital appropriations made in fiscal year 2020 to allow for expenditure of federal receipts to be received in fiscal year 2021. These RPLs are being submitted because, while requested by the governor, the legislature did not include funding for these programs as part of the fiscal year 2021 operating and capital bill passed by the full legislature.¹⁰ Each of these requests are for programs regularly funded by the legislature through capital appropriations. While AS 37.07.080(h) does not expressly preclude the governor from seeking an increase to an appropriation made in a previous fiscal year, caution is warranted. In each of these RPLs the governor acknowledges that a capital budget request was made to the legislature for the fiscal year 2021 funding, but that the legislature did not include such funding in its fiscal year 2021 budget. AS 37.07.080(h) only allows an increase to an appropriation "based on *additional* federal or other program receipts not specifically appropriated by the full

⁸ Corrected Order Granting Summary Judgment *Forrer v. State of Alaska, et al.*, No. 1JU-20-644CI (Alaska Sup. Ct. August 7, 2020).

⁹ Interestingly, with respect to the RPL itself, while the governor does not request an increased appropriation amount, the governor cites DCCED, executive administration, commissioner's office, as the appropriation authority. *See* sec. 1, page 4, line 25, ch. 8, SLA 2020. When this RPL was originally approved by LB&A, the governor cited DCCED, investments, as the appropriation authority. That appropriation also did not have any federal funds attached to it. It is unclear the reason for the change in appropriation authority, although the change does not impact the substantive analysis above.

¹⁰ *See* ch. 8, SLA 2020. The legislature has not passed a standalone capital budget for fiscal year 2021.

legislature." In this case, there are arguably no eligible appropriations to increase, because the full legislature did not approve any fiscal year 2021 appropriations. RPL requests are not typically meant to replace the capital budget process. Because these RPLs replace the governor's fiscal year 2021 capital budget requests, LB&A might consider allowing the 45-day wait period to expire before allowing expenditure by the governor, as to give the legislature the opportunity to convene to consider a capital budget. That choice, however, is a policy decision. If LB&A approves these RPLs, the governor will be permitted to expend the funds immediately upon approval, without the full legislature having considered these appropriations as part of the fiscal year 2021 capital budget.

5) Agriculture Grant Programs Funding – Economic Assistance – RPL #10-2021-5319

Like the RPLs above, this appropriation request would typically be made in the capital budget. The governor also acknowledges that while a capital budget request was made for this grant, it was not included by the legislature in the fiscal year 2021 budget. However, instead of relying on a prior year's capital appropriation, the governor seeks to increase a fiscal year 2021 operating "agricultural development" appropriation. While grant authority may fall within the department's agricultural development authority, if challenged, it might also be argued that the purpose of that appropriation did not include these grants and full legislative approval is necessary to expend these funds. Thus, as mentioned above, because this RPL is meant to replace the governor's fiscal year 2021 capital budget request, some caution is warranted.

6) Chinook Mitigation – RPL # 11-2021-0021

Like the RPLs above, this appropriation request would typically be made in the capital budget. However, unlike the RPLs above, the last time the legislature funded the projects requested in RPL#11-2021-0021 was in 2011 and 2012, and those projects have since been closed out and are not available to add expenditure authority. Instead, the governor relies on operating budget appropriations made for statewide fisheries management.¹¹ While "Chinook Mitigation" may fall within the Department of Fish and Game's authority for statewide fisheries management, if challenged, it might also be argued that the purpose of that appropriation did not include Chinook Mitigation and full legislative approval is necessary to expend these funds. Thus, as mentioned above, because this RPL is meant to replace the governor's fiscal year 2021 capital budget request, some caution is warranted.

7) Pacific Coastal Salmon Recovery Fund – RPL #12-2021-0022

This RPL request is also for a program regularly funded by the legislature through capital appropriations. This RPL seeks to increase a capital appropriation made in fiscal year

¹¹ See sec. 1, page 14, line 12, ch. 8, SLA 2020.

2020 to allow for expenditure of federal receipts to be received in fiscal year 2021. AS 37.07.080(h) does not expressly preclude the governor from seeking an increase to an appropriation made in a previous fiscal year, so there does not appear to be any legal issue with this request. However, as discussed above, because this RPL is meant to replace the governor's fiscal year 2021 capital budget request, some caution is warranted.

8) Marine Fisheries Patrol Improvements – RPL #12-2021-0047

This RPL request has also "been included annually in the Department's capital budget request." This RPL seeks to increase a capital appropriation made in fiscal year 2020 to allow for expenditure of federal receipts to be received in fiscal year 2021. AS 37.07.080(h) does not expressly preclude the governor from seeking an increase to an appropriation made in a previous fiscal year, so there does not appear to be any legal issue with this request. However, as discussed above, because this RPL is meant to replace the governor's fiscal year 2021 capital budget request, some caution is warranted.

9) Fairbanks PM2.5 Nonattainment Area Voluntary Heating Device Change Out Program – RPL #18-2021-0447

Like the RPLs above, this appropriation request would typically be made in the capital budget. However, unlike the RPLs above, the last time the legislature funded this project was in 2018, so the governor is seeking to increase a capital appropriation previously made by the legislature in fiscal year 2019 to allow for expenditure of funds received in fiscal year 2021. While not expressly prohibited by AS 37.07.080(h), as discussed above, some caution is warranted.

If you have any additional questions, please advise.

MAW:boo

20-170.boo