

# LEGAL SERVICES

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## MEMORANDUM

April 22, 2011

**SUBJECT:** Contingency Language in CSSB 46(FIN)  
(Work Order No. 27-GS1740\X)

**TO:** Representative Mike Chenault  
Attn: Tom Wright

**FROM:** Doug Gardner  
Director

You have asked for: (1) a brief analysis of the function of secs. 39 and 40 of CSSB 46(FIN), and (2) the constitutionality of the contingency language found in sec. 39<sup>1</sup> of the draft CSSB 46(FIN).

### 1. The Function of Secs. 39 and 40 of CSSB 46 (FIN); What These Sections Do.

Section 39 of the draft CSSB 46(FIN) (27-GS1740\X) provides two contingencies. The first, in subsection (a), makes each of the appropriations in sec. 7 of the Act contingent on enactment of every appropriation in sec. 7, without reduction. In other words, if the governor were to veto all or a portion of any line item in sec. 7, the contingency would not be met, and none of the appropriations in the section would take effect.

The contingency in sec. 39(b) makes the appropriations in sec. 4 dependent on the FY 2012 year-to-date average price of Alaska North Slope crude oil exceeding \$150 a barrel on October 1, 2011. If the price does not exceed that measure, the appropriations in sec. 4 would not take effect.

Section 40 of the draft CS relates to severability of the contingency provisions in sec. 39. Sec. 40(a) provides that if the contingency in sec. 39(a) is held invalid, the contingency is not severable from the appropriations made in sec. 7 of the Act. The function of this provision is to indicate the legislature's intent that if sec. 39(a) is invalidated, the appropriations made in sec. 7 not stand. In other words, if the contingency fails on

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<sup>1</sup> In full, sec. 39 reads:

**Sec. 39. CONTINGENCY.** (a) Each of the appropriations made in sec. 7 of this Act is contingent on passage by the Twenty-Seventh Alaska State Legislature in the First Regular Session and enactment into law of every appropriation made in sec. 7 of this Act.

(b) The appropriations made in sec. 4 of this Act are contingent on the fiscal year 2012 year-to-date average price of Alaska North Slope crude oil exceeding \$150 a barrel on October 1, 2011.

constitutional grounds, it is the intent of the legislature that the appropriation fail as well. The severability provision in sec. 40(b) has the same effect on secs. 39(b) and sec. 4.

## **2. The Constitutionality of Governor's Veto Power Relating to Secs. 39 and 40.**

### **a. Sec. 39(a) Contingency Language and Confinement Clause.**

The contingency language found in sec. 39(a) of the capital budget bill does not prohibit the governor from vetoing items in sec. 7 of the bill. Instead, it provides that a veto by the governor of an item in sec. 7 of the bill will have the secondary result of deleting all projects found in sec. 7 from the bill. The governor is still free to exercise his veto regarding sec. 7.

Whether a court would uphold the validity of the contingency language found in sec. 39(a) is a question I cannot answer, as this is a scenario that has not arisen in the past. The contingency found in sec. 39(a) could be held unconstitutional because of a separation of powers issue related to the governor's veto powers, but I am not completely convinced that a court would rule the contingency language invalid. In fact, the veto power of the governor can be characterized as a legislative power (appropriating the state's money) that was conferred upon the governor in the state constitution. Likewise, the legislature, in art. III, secs. 25 and 26 of the state constitution, was bestowed an executive power in having the power to confirm certain appointees by the governor. Regarding the ability to confirm appointees, the Alaska Supreme Court held in Bradner v. Hammond, 553 P.2d 1 (Alaska 1976), that the legislature's power to confirm should be limited to the specific instances listed in the constitution and not broadly construed because the legislature was exercising what was essentially an executive power. Bradner, 553 P.2d at 7 - 8. One could look at the Bradner case in light of the governor's line item veto power and argue that the line item veto power -- a legislative function in that it relates to appropriations -- should not be broadly construed, but viewed in more limited terms. Thus, the contingency of sec. 39(a) could be viewed as the legislature taking full advantage of its power of appropriation in choosing a statewide approach to funding energy projects, and that the governor still retains his strictly construed power to veto all of sec. 7 of the bill.

Of course, a court may hold that the contingency language found in sec. 39(a) of the bill does violate the governor's power of line item veto, but I do not believe that it is an open-and-shut case. There are certainly arguments to be made on both sides. In essence, a court's decision may come down to whether or not the projects in sec. 7 are sufficiently tied to each other that the contingency is reasonable.

As for a potential confinement clause issue (i.e. substantive law in an appropriations bill) relating to the intent language found in sec. 7 of the bill and the contingency in sec. 39(a), in Knowles v. Legislative Council, 21 P.3d 367 (Alaska 2001), the state Supreme Court established a five-part test for substantive contingencies related to appropriations:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law

or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Id. at 377. In taking these one by one, it first appears that one could argue that the minimum language necessary to explain the legislature's intent has been used. Based on the statutory energy policy found in AS 44.99.115, the legislature intends that its interpretation of the policy be followed in funding projects in all areas of the state. The intent language does not administer a program, as each project may still be carried out in accordance with existing law. For example, the Alaska Energy Authority is not being given any further guidelines on how to use the potential \$5,000,000 for "bulk fuel upgrades." I would certainly say that this intent language does not amend existing law or extend beyond the life of the appropriation. Finally, the intent language is likely germane, as it is tying all of the projects in sec. 7 of the bill to a state energy policy that it is attempting to follow.

**b. Contingency Language in Sec. 39(b).**

As for the contingency language found in sec. 39(b) of the bill, I feel strongly that this is a valid contingency. As recently as 2006, the legislature has passed a capital budget bill containing contingency language that tied certain appropriations to the price of petroleum. Found at sec. 64(c), ch. 82, SLA 2006, the contingency stated:

The appropriation made by sec. 20(j) of this Act is contingent on an increase in petroleum tax revenue, as estimated by the Department of Revenue, due to the state for the months of April, May, and June 2006 in an amount equal to or greater than the appropriation made by sec. 20(j) of this Act.

While this contingency did not name an exact price, it is quite similar to the contingency found in sec. 39(b). The legislature has simply set aside a certain list of projects that it does not believe should be funded unless the state generates a certain amount of revenue in the first three months of fiscal year 2012. If the price of Alaska North Slope crude oil reaches a certain level, then the legislature believes that money may be spent on the projects listed in sec. 4. This appears to me to be a fiscal policy decision -- that money should only be spent on certain projects if the state receives sufficient funds based on the price of oil.

**c. Nonseverability Clause in Sec. 40.<sup>2</sup>**

Like the contingency language in sec. 39, the nonseverability clause in sec. 40 of the bill is not an "item" subject to the governor's line item veto power in art. II, sec. 15. See

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<sup>2</sup> You requested an analysis of the non-severability clause in sec. 40 of a version of the bill that was produced for another client. Since you had a copy of it by permission of the other client as I understand it, and faxed us the two pages with sec. 39 and sec. 40 from the other client's version on 4-21-11, we will provide an opinion for you regarding sec. 40 of the bill on that basis.

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generally, Alaska Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001). So the governor, in my view, may not veto the nonseverability language itself in sec. 40 of CSSB 46(FIN). The question then becomes, if the governor ignores the contingency language in sec. 39(a), which is the section of the bill that is your focus, and vetoes any of the selected energy projects or "items" in sec. 39(a), or if the court declares that contingency language invalid, will a court give effect to the legislature's "all or nothing" intent by upholding the non-severability clause in sec. 40 of the bill.

The general rule is that provisions of a bill are presumed to be severable in the event that a portion of the bill is found to be unconstitutional. The legislature has provided by statute that all bills are to be construed as if they contained a severability clause. AS 01.10.030. The Alaska Supreme Court has found that this statute expresses legislative intent in favor of severability. See generally, Williams v. Zobel, 619 P.2d 422 (Alaska 1980). The inclusion of a specific severability clause in a bill creates an even stronger, but not conclusive, presumption of severability. Conversely, the inclusion of a nonseverability clause demonstrates the legislature's intent that if the nonseverable section of the bill identified by the legislature is found unconstitutional or otherwise invalid, the legislature's intent was for the remainder not to stand. The ultimate factor in determining whether an invalid provision of a bill is severable is the intent of the legislature. If it is clear that the legislature intended a bill or a portion of a bill to take effect as passed by the legislature or not at all, then that bill or provision would be found to be nonseverable. See, Lynden Trans., Inc v. State, 532 P.2d 700 (Alaska 1975).

It is always hard to predict how a court would interpret the non-severability clause in sec. 40. However, there is a good argument a court would view the nonseverability language in sec. 40 as a strong message of intent from the legislature that, if the legislature was constitutionally unable to use the contingency language in sec. 39(a) to fund "all or none" of the identified energy projects, the legislature did not want any of the appropriations to be effective.

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1 expenses for the fiscal year ending June 30, 2012.

2 (c) The unexpended and unobligated balance, not to exceed \$450,000, of the  
3 appropriation made in sec. 1, ch. 41, SLA 2010, page 46, line 33 (Legislative Council -  
4 \$36,425,700) is reappropriated to the Legislative Council to conduct for the legislature an  
5 independent third-party scientific and multidisciplinary study of statutory and permitting  
6 requirements and processes related to large mine development in the state for the fiscal years  
7 ending June 30, 2011, June 30, 2012, June 30, 2013, and June 30, 2014.

8 (d) The unexpended and unobligated balance, after the appropriation made in (c) of  
9 this section, estimated to be \$2,230,000, of the appropriation made in sec. 1, ch. 41, SLA  
10 2010, page 46, line 33 (Legislative Council - \$36,425,700) is reappropriated to the Legislative  
11 Council to begin scoping, planning, and implementing a system-wide redesign of the Bill  
12 Action Status and Inquiry System (BASIS), an integrated document management system, and  
13 a consolidation of the legislature's internal and external websites.

14 (e) The unexpended and unobligated balance, estimated to be \$8,275,000, of the  
15 appropriation made in sec. 1, ch. 41, SLA 2010, page 46, line 27 (Budget and Audit  
16 Committee - \$13,911,100) is reappropriated to the Legislative Budget and Audit Committee  
17 to begin scoping, planning, and implementing an enhanced content management platform to  
18 integrate appropriation data, tracking, and reporting with the legislature's Bill Action Status  
19 and Inquiry System (BASIS) and for other purposes of the committee.

20 \* Sec. 38. STATUTORY BUDGET RESERVE FUND. (a) The sum of \$300,000,000 is  
21 appropriated from the general fund to the statutory budget reserve fund (AS 37.05.540).

22 (b) The sum of \$200,000,000 is appropriated from the general fund to the statutory  
23 budget reserve fund (AS 37.05.540).

24 \* Sec. 39. CONTINGENCY. (a) Each of the appropriations made in sec. 7 of this Act is  
25 contingent on passage by the Twenty-Seventh Alaska State Legislature in the First Regular  
26 Session and enactment into law of every appropriation, without reduction of any  
27 appropriation, made in sec. 7 of this Act.

28 (b) The appropriations made in sec. 4 of this Act are contingent on the fiscal year 2012  
29 year-to-date average price of Alaska North Slope crude oil exceeding \$150 a barrel on  
30 October 1, 2011.

31 \* Sec. 40. NONSEVERABILITY. (a) Notwithstanding AS 01.10.030, if the contingency

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1 found in sec. 39(a) of this Act is held to be invalid, then the contingency is not severable from  
2 the appropriations made in sec. 7 of this Act.

3 (b) Notwithstanding AS 01.10.030, if the contingency found in sec. 39(b) of this Act  
4 is held to be invalid, then the contingency is not severable from the appropriations made in  
5 sec. 4 of this Act.

6 \* Sec. 41. LAPSE. (a) The appropriations made in secs. 17, 18, 19(1), and 38 of this Act are  
7 for the capitalization of funds and do not lapse.

8 (b) The appropriations made in secs. 20, 22, 25(a), 26(c), 26(e), 26(g), 27, 29, 30(c),  
9 31(b), 31(c), 32(c), 32(d), 37(d), and 37(e) of this Act are for capital projects and lapse under  
10 AS 37.25.020.

11 (c) A grant awarded in this Act to a named recipient under AS 37.05.316 is for a  
12 capital project, unless specifically identified in this Act as an operating grant, and lapses  
13 under AS 37.25.020 unless otherwise stated or designated for a fiscal year.

14 (d) The appropriation made in sec. 21 of this Act lapses June 30, 2015.

15 \* Sec. 42. Sections 22 - 37 and 38(a) of this Act take effect June 30, 2011.

16 \* Sec. 43. Except as provided in sec. 42 of this Act, this Act takes effect July 1, 2011.