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**MEMORANDUM**

April 21, 2011

**SUBJECT:** Contingency Language in Capital Budget  
**TO:** Representative Les Gara  
**FROM:** Doug Gardner  
Director

You have asked for a brief analysis of the constitutionality of the contingency language found in sec. 39<sup>1</sup> of the draft CSSB 46(FIN), especially focusing on the concept that substantive law may not be in an appropriations bill.

1. The Governor's Veto Power Relating to Sec. 39(a). 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

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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.

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 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.

2. The Confinement Clause Relating to Sec. 39(a). 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.

3. Section 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.

If I may be of further assistance, please advise.

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