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MEMORANDUM April 29, 2021

SUBJECT: Authority of legislature to approve or reject an executive branch contract (CSHB 81(RES); Work Order No. 32-GH1706\I.1)

TO: Representative Andy Josephson
Attn: Catherine Reardon

FROM: Emily Nauman
Deputy Director

The attached amendment requires legislative approval of net profit share modifications (lease contracts). The amendment is likely an unconstitutional violation of the separation of powers doctrine of the Alaska constitution.

Contracts to implement and execute the laws of the state are normally considered to fall within the province of the executive branch, so requiring the approval of an executive branch contract by the legislature appears to be an intrusion into executive branch powers. While the legislature may enact standards for the exercise of an executive power, it may generally not reserve the power to approve or authorize a particular action. As the United States Supreme Court noted, "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[1]

Although some executive and legislative powers overlap (e.g., regulations are legislative in nature), the Alaska Supreme Court has held that the separation of powers doctrine requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision.[2] Although the legislature has extensive power over the purse strings of the state, there is no express authority in the state constitution that allows the legislature to approve executive branch contracts or requires the executive branch to submit its contracts to the legislature for approval.

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[1] *Bowsher v. Synar*, 478 U.S. 714, 733 - 34 (1986), *quoting I.N.S. v. Chadha*, 462 U.S. 919 (1983).

[2] *Bradner v. Hammond*, 553 P.2d 1, 8 (Alaska 1976).

The executive branch has, for many years, taken the position that the requirement for legislative approval of royalty oil contracts is unconstitutional.[3] Attorney general opinions also reflect that conclusion. The Department of Law has held fairly consistently to the position that negotiation of contracts is the prerogative and obligation of the administration, to the exclusion of the legislature, citing separation of powers principles:

> [O]ur office [that is, the Department of Law] has noted that a statute requiring legislative approval of an individual contract . . . was possibly constitutionally infirm. 1987 Inf. Op. Att'y Gen. (April 1; 663-87-0392); 1985 Inf. Op. Att'y Gen. (Aug. 13; 166-065-86); 1981 Inf. Op. Att'y Gen. (Nov. 3; J66-159-82); 1976 Inf. Op. Att'y Gen. (Feb. 11; Boness).[4]

In addition, the attorney general has stated:

> In approving individual contracts, the legislature does not exercise a lawmaking function. Consequently, in the absence of a constitutional grant of such power or some unique circumstance that we cannot presently contemplate, a statute requiring legislative approval of an individual contract is a violation of the separation of powers.[5]

There are a few cases in other states where a court has found legislative oversight of contracts to be constitutionally permissible. This line of reasoning regarding legislative oversight appears in New Jersey where the court recognized the importance of legislative oversight where projects require continued budget appropriations.[6] In that case, the court seemed to place importance on the limited potential that the legislative action had to interfere with executive action and emphasized that the legislature had no control over the agency's projects unless the governor first approved them.[7] However, there was a vigorous dissent in the case, and the dissent cited an Alaska case to support its position.[8]

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[3] *See* Governor's transmittal letter for SB 164 dated April 22, 1995, Senate Journal, pages 1190 - 1191. However, while the executive branch has consistently asserted that legislative approval provisions are unconstitutional, it has often complied with these requirements as an accommodation to the legislative desire for oversight.

[4] Quoted in Opinion of the Attorney General 1988-2, August 30, 1988.

[5] 1981 Inf. Op. Att'y Gen. (Nov. 3; J66-159-82), at 4 - 5.

[6] *Enourato v. N.J. Building Auth.*, 448 A.2d 449, 453 (New Jersey 1982).

[7] *Id.* at 453 - 454.

[8] *Id.* at 461.

This case was cited by a Virginia court to hold that a legislative approval requirement did not violate the separation of powers doctrine.[9]

However, the attached amendment can be distinguished from those cases: it is not for the legislative oversight of multi-year projects requiring continuing legislative appropriations. Further, there is also significant, and more recent, precedent from other states concluding that legislative approval of contracts is unconstitutional.[10]

In conclusion, while it may be possible to successfully make a case in this situation that the legislature's approval does not violate the separation of powers doctrine, there seems not to be much authority for that position.

If I may be of further assistance, please advise.

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Attachment

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[9] *See Baliles v. Mazur*, 297 S.E.2d 695, 700 - 701 (Virginia 1982) (emphasizing the reasonableness of legislative oversight for major projects).

[10] *See Opinion of the Justs.*, 892 So. 2d 332, 338 (Ala. 2004) ("Pursuant to Senate Bill 133, the Legislature retains the right to approve all contracts subject to review under § 29–2–41, Ala.Code 1975. This infringes upon the right and ability of the executive branch to execute the laws enacted by the Legislature."). *See also In re Opinion of the Justs.*, 129 N.H. 714, 718, 532 A.2d 195, 197 (1987) (citing eight other cases for the same proposition).