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MEMORANDUM

January 22, 2025

SUBJECT: Executive Order establishing a Department of Agriculture
(Work Order No. 34-LS0380)

TO: Senator Cathy Giessel
Attn: Paige Brown

FROM: Alpheus Bullard 
Legislative Counsel

You asked whether proposed Executive Order 136 (EO 136) conforms to art. III, sec. 23, of the Constitution of the State of Alaska. In central part, EO 136 establishes the Department of Agriculture (DAG), and re-assigns certain existing duties of the Department of Natural Resources (DNR) to the new department. While EO 136 establishes a new principal department in the executive branch, it does not expand, contract, or otherwise alter the powers and duties of the executive branch. Accordingly, a court would likely find that the EO's establishment of DAG and transfer to DAG of DNR's former duties relating to agriculture are permissible constitutional exercises of the governor's authority.

The authority of the governor to split the duties of an existing department, and to establish a new executive branch department under the authority of an executive order, is found in art. III, sec. 23, Constitution of the State of Alaska. That section provides:

The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

The executive order power provided by art. III, sec. 23, is a sliver of legislative power delegated to the governor by the constitution. Just as the legislature's power over executive branch appointments is limited to the confirmation of certain appointments as

expressly provided by the constitution,¹ and just as the governor's power to veto appropriations made by the legislature is limited to that provided by the constitution,² the governor's executive order power is limited to that expressly set out in art. III, sec. 23; a limited power to amend statutes as necessary to reorganize the executive branch.

Article III, sec. 23, does not provide authority to the governor to expand, contract, or otherwise change the functions of the reorganized executive branch units. So, the appropriate analysis is whether proposed EO 136 would expand, contract, or change the functions of the executive branch in addition to its reorganization of the executive branch's existing functions.³

Proposed EO 136 establishes DAG and transfers to it existing statutory functions of DNR that relate to agriculture. While the EO eliminates the position of the director of the division of agriculture in the Department of Natural Resources,⁴ requires the commissioner of the Department of Natural Resources to consult with the new commissioner of agriculture instead of with the Board of Agriculture and Conservation (AS 03.09.010),⁵ and renames the "Alaska Natural Resource Conservation and Development Board" the "Alaska Soil and Water Conservation and Development Board[,]"⁶ the EO is unlikely to be interpreted to do more than "make changes in the

¹ *Id.*; see also *Dunleavy v. Alaska Legislative Council*, 498 P.3d 608, 612 (Alaska 2021).

² *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001).

³ Art. III, sec. 22, of the Constitution of the State of Alaska also provides that the executive branch may not allocate its functions, powers, and duties between more than 20 principal departments. At present the executive branch is organized into fewer than 20 principal departments, Accordingly, the art. III, sec. 22, limitation is not relevant in this instance.

⁴ See sec. 41, which repeals AS 03.09.020(b).

⁵ See sec. 24. Note that the new commissioner of DAG, or the commissioner's designee serves as the director of the Board of Agriculture and Conservation (board). Under current law, the existing director of the division of DNR with responsibility for agriculture serves as the director of the board under AS 03.09.020(a). Accordingly, the EO's requirement that the commissioner of DNR consult with the commissioner of agriculture under AS 38.05.020(b)(7), instead of with the board, is unlikely to be perceived as a substantive change because the commissioner of DAG *is* the director of the board.

⁶ Sec. 30.

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organization of the executive branch [and assign] functions among its units."⁷ The EO does not contain statutory changes that diminish, enlarge, or significantly change the powers and duties of the executive branch. This, combined with the fact that state courts have generally affirmed the powers of a strong executive branch, make it likely a court would find that EO 136 conforms to the constitutional requirements of art. III, sec. 23.⁸

If you find EO 136 objectionable for policy reasons or if you disagree with this assessment, the legislature's course of action is to disapprove the EO, as described in art. III, sec. 23, Constitution of the State of Alaska.⁹ Be aware that under art. III, sec. 23, the legislature has 60 days to reject an executive order, otherwise the order becomes effective on the date chosen by the governor.

If I may be of further assistance, please advise.

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⁷ While the EO creates new law in sec. 39, these provisions do not expand the powers of the executive branch. New AS 44.38.010 makes the commissioner of agriculture the principal executive officer of the Department of Agriculture, and sec. 44.38.020 (establishing the DAG's powers and duties) employs language identical to the current statutory text relating to the duties of DNR with respect to agriculture (AS 44.37.030). Sec. 44.38.030 clarifies that the commissioner of DAG may adopt regulations necessary to carry out DAG's powers and duties. DNR does not currently have such broad explicit authority (to adopt regulations relating to its agricultural duties), but it is currently empowered to adopt regulations in relation to its powers and duties under AS 03.05.010(b), which is also amended by sec. 2 of the EO, and AS 03.05.030, and is required to "administer the state program for . . . agriculture, [and] soil conservation" under AS 44.37.020(a), which is moved to the lead-in of sec. 44.38.020(a), enacted in sec. 39 of the EO.

⁸ The Alaska Supreme Court has considered a challenge to the creation of a new department by executive order. EO 55 created the Department of Corrections (DOC) in 1983. About three decades later, a prisoner filed a pro se lawsuit alleging, among other claims, that "DOC's creation by executive order violated the separation of powers doctrine." *Rae v. State*, 407 P.3d 474, 477 (Alaska 2017). The Alaska Supreme Court's analysis of the claim was cursory: it found "no merit" to the argument and simply noted that "the Constitution itself, in article III, section 23, clearly empowers the executive to adjust the organization of its agencies." *Id.* at 478.

⁹ See also Uniform Rule 49(a)(4).