ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
Anchorage, Alaska
May 11, 2011
8:06 a.m.

MEMBERS PRESENT

Representative Carl Gatto, Chair
Representative Steve Thompson, Vice Chair
Representative Wes Keller
Representative Bob Lynn
Representative Lance Pruitt
Representative Max Gruenberg

MEMBERS ABSENT

Representative Lindsey Holmes
Representative Mike Chenault (alternate)

OTHER LEGISLATORS PRESENT

Representative Paul Seaton
Representative Dan Saddler
Representative Alan Dick

COMMITTEE CALENDAR

PRESENTATION(S): THE LEGALITY & CONSTITUTIONALITY OF THE SENATE'S CAPITAL BUDGET LANGUAGE

- HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

JOHN J. BURNS, Attorney General
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Testified during the presentation on the legality & constitutionality of the Senate's capital budget language.

CHRISTOPHER POAG, Assistant Attorney General

Labor and State Affairs Section
Civil Division (Juneau)
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Answered questions during the presentation on the legality & constitutionality of the Senate's capital budget language.

BRIAN BJORKQUIST, Senior Assistant Attorney General
Labor and State Affairs Section
Civil Division (Anchorage)
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Testified during the presentation on the legality & constitutionality of the Senate's capital budget language.

DOUG GARDNER, Director
Legislative Legal and Research Services
Legislative Affairs Agency
Juneau, Alaska
POSITION STATEMENT: Testified during the presentation on the legality & constitutionality of the Senate's capital budget language.

PAM FINLEY, Revisor of Statutes
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska
POSITION STATEMENT: Testified during the presentation on the legality & constitutionality of the Senate's Capital Budget language.

ACTION NARRATIVE

8:06:07 AM

CHAIR CARL GATTO called the House Judiciary Standing Committee meeting to order at 8:06 a.m. Representatives Gatto, Lynn, Keller, Pruitt, and Thompson were present at the call to order. Representative Gruenberg arrived as the meeting was in progress. Representatives Seaton, Saddler, and Dick were also in attendance.

Presentation(s): The Legality & Constitutionality of the Senate's Capital Budget Language

[Contains discussion of SB 46.]

8:06:43 AM

CHAIR GATTO announced that the only order of business would be the presentation regarding the legality and constitutionality of the Senate's capital budget language.

8:09:33 AM

JOHN J. BURNS, Attorney General, Department of Law (DOL), related his understanding the legislature would like to know why the DOL believes the contingency clause non-severability language in the version of the capital budget recently transmitted from the Senate to the House is unconstitutional. He voiced the caveat that until such time the legislature passes the capital budget any discussion with respect to the unconstitutionality of the bill is purely speculative since the language could change. He stated his responsibility as attorney general is to uphold the constitution. Thus, politics must always yield to the constitutional provisions and principles that govern the administration of the state. He said that the capital budget issue is not about "building a better mouse trap." Instead, the issue surrounds the process and the integrity of adhering to constitutional principles. The principles of our democratic form of government are grounded in the constitution. Thus, the state must look to the Alaska State Constitution to determine the issues on which the capital budget has floundered. He offered his belief that the Senate clearly intended to use the contingency and non-severability language to constrain the power of the executive branch.

MR. BURNS explained Alaska's Constitution establishes an appropriation process that consists of four discrete steps. First, the governor is required to submit a budget to the legislature for consideration. Second, the legislature as a bicameral body has the power to pass appropriation bills. Third, the governor, per the constitution, has line item veto authority. Finally, the legislature has the power and authority to override the governor's veto. This process has been in place since statehood and provides the foundation of the checks and balances that constrain the exercise of power between two co-equal branches of government. He identified Sections 48 and 49, which were previously Sections 36 and 37 of SB 46 of the capital budget, as provisions that disrupt the process and upset the delicate balance of power set forth in Alaska's constitution.

He asserted that the contingency and non-severability provisions in Sections 48 and 49 are unconstitutional, individually and collectively. The power to appropriate money for a public purpose is vested in the legislature. Nonetheless, the governor does play a vital role in the appropriation process. The governor's authority to propose a budget and his power to strike or reduce appropriation items provide a significant and important part of this process. He further asserted that any attempt to disrupt this process violates the balance of power carefully woven into this process.

MR. BURNS reported the line item veto power has been described by Professor Richard Briffault, a constitutional scholar quoted in two prior Alaska Supreme Court cases, as "the coming together of three widespread state constitutional policies: First, the rejection of legislature 'logrolling,' second, the imposition of fiscal constraints on the legislature, and third, the strengthening of the governor's roles in budgetary matters." Alaska's constitutional convention delegates intended to create a strong executive branch with a strong control over the purse strings of the state, he said. The constitution provides the governor this control, in part, by granting the governor line item veto authority to strike or reduce individual items in an appropriation bill. He said it was both logical and prudent for the constitutional delegates to confer this power on the governor. The governor's position is uniquely different than that of the legislature since the governor has a statewide constituency as opposed to the legislature, which has discrete geographic constituencies. Additionally, the governor's position is obligated with the responsibility to review and evaluate appropriations on a statewide basis. Therefore, it is prudent to give the governor the authority to strike or reduce individual appropriation items and to act as a constraint on excessive spending. Nonetheless, the constitution makes it clear that the final power and final step in the appropriation process rests with this body. The legislature has the power to override the governor's veto.

8:16:11 AM

MR. BURNS turned to the contingencies in SB 46. He stated that Section 48, the linkage clause, seeks to link together what is now approximately 20 appropriation items consisting of 105 separate and distinct projects comprising an estimated $454 million in spending. This section would require the enactment of all or none of these projects without reductions. He advised that these linked appropriations constitute approximately 25

percent of the unrestricted general funds proposed to be expended in the Senate's version of the capital budget. He said, "Section 48 is unconstitutional." It violates Article II, Section 15 of the constitution in that it deprives the governor of his clear authority to reduce or strike individual appropriation items. He asked members to consider this logically, and how it would be if the legislature could link one appropriation item to another, as in this case approximately 20, or in future cases perhaps linking all transportation projects or all construction projects, regardless of location. In doing so the legislature would effectively eliminate the governor's constitutional power to strike or reduce individual line items. The governor would only have two choices, to reject all or accept all as a group. He offered that allowing or linking appropriations with such contingency language would eviscerate the line item veto authority vested in the governor by the constitution. It would enable the legislature by fiat to circumvent the governor's constitutional authority. Thus, the language in Section 48 usurps the governor's line item veto power and upsets the checks and balances built into the appropriation process by the constitutional framers, he concluded.

MR. BURNS pointed out the proponents of Section 48 of the bill argue that linking appropriation items may be constitutional because the governor still would retain his right to veto the entire package of bundled appropriations. He asserted this argument is wrong for three reasons: First, the plain language of the constitution affords the governor the authority to strike or reduce appropriation items and not bundles of appropriation items. Thus, the language in Section 48 violates Article II, Section 15 of the constitution because it not only prohibits striking an item but also eliminates the ability of the governor to exercise his constitutional right to reduce an item.

MR. BURNS continued. Secondly, if the legislature could bundle appropriation items and require passage of all or none it would have the authority to "logroll" which is to put together a Christmas tree of items and impose an all or nothing rule. The line item veto as vested represents one of the basic principles. He noted that constitutional delegates had the benefits of numerous other states when framing Alaska's constitution so it was able to avoid the mistakes other states made. He related that Alaska's constitutional framers took the best provisions, which included providing for a strong executive branch from the standpoint of the line item veto. Many other states with a line item veto inserted it later, after their original constitutions

were formed due to runaway budgets and excessive legislative spending.

8:20:54 AM

CHAIR GATTO asked how many other states have a three-quarter vote requirement for overriding vetoes.

MR. BURNS deferred to Mr. Poag and Mr. Bjorkquist.

CHAIR GATTO offered his belief it was just a handful. He related his understanding that Alaska's constitutional framers went for the strongest possible language. He offered this requirement provides a good indication that Alaska's constitutional framers intended to allow the governor and executive branch a great deal of authority over the budget.

MR. BURNS answered absolutely. He was unsure of the numbers, but agreed only a few states have a three-quarter vote override on vetoes. He highlighted the significance of the types of votes that require a three-fourths vote, such as veto overrides are which pertain to appropriations issues. This further indicates the strong desire of the constitutional framers to give the executive branch the authority over appropriations and the budgetary process, he said.

CHAIR GATTO recalled only one veto override during his nine-year tenure with the legislature. He characterized the veto override as a very high hurdle. He reiterated his belief that the constitutional framers wanted the executive branch to have a strong authority.

MR. BURNS added the minutes from the constitutional convention support that theory. He also noted Representative Gruenberg has prepared a memorandum that discusses this. He expressed significant concern over the most current version of Section 49 of SB 46, which essentially eliminates the ability of the legislature to exercise its judgment in the context of a veto override. The non-severability provisions basically say that if the body does not override the veto, then the entire provision is non-severable and all appropriations fail. He offered his belief Representative Gruenberg's write-up addresses that issue admirably.

REPRESENTATIVE GRUENBERG recalled either Mr. Burns or Mr. Poag said that Alaska is the only state to have a three-fourths vote to override a veto.

8:25:02 AM

CHRISTOPHER POAG, Assistant Attorney General, Labor and State Affairs Section, Civil Division (Juneau), Department of Law (DOL), said he reviewed a law review memo a few years ago that indicated 43 states had adopted a line item veto, and of those 42 states limit the line item veto to appropriation bills. Thus, all but one state affirm that the line item veto is limited to appropriation bills. He said that 34 states require a two-thirds vote to override a veto, whereas the Alaska legislature has a two-thirds vote to override an immediate effective date clause and retroactive provisions. He stressed that a two-thirds vote is a higher hurdle than a simple majority. Of the remaining states, other than Alaska, most have a more diluted override, either a three-fifth or simple majority, he said. At the time the article was written, Alaska was the only state with a three-fourths veto override. He related that members' packets include a copy of minutes of day 49 and day 50 of the Alaska Constitutional Convention. The delegates held a discussion to amend the three-quarter override to return to a two-thirds vote. Additionally, they held discussions to consider requiring an override by each body instead of in a joint session. However, the amendments failed after heated discussion. The constitutional framers determined that the three-quarter override was necessary in joint session even though by doing so it would dilute the Senate's power since the Senate only has 20 members while the House has 40. He said the reason for this is clearly stated and he quoted, "We wish for our executive branch to have a strong control of the purse strings." He pointed out that quote was picked up by the Alaska Supreme Court in the Knowles case [Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001)].

MR. POAG said it appears to the DOL that this provision is not unique among states but is a clear indication that Alaska's constitutional framers meant for the line item veto power to be a strong line item veto power, not a weak or diluted one. He said Alaska's constitution is unique and has a very powerful line item veto.

8:27:41 AM

REPRESENTATIVE GRUENBERG asked for the date of the law article.

MR. POAG related his understanding that it was in 1993. He offered to provide a copy to Representative Gruenberg.

REPRESENTATIVE GRUENBERG said it was remarkable that Alaska is the only state with a three-fourth veto override and is another factor that distinguishes Alaska, in the event of litigation. He remarked that it is hard to find cases on this kind of issue.

8:28:43 AM

REPRESENTATIVE KELLER offered his belief that this debate is a red herring; everyone is fixated on the debate. He offered his further belief that the budget process is not the place to test constitutionality. He pointed out as the debate continues comments have been made that the legislature needs to pass the bill in order to test its constitutionality, but to his understanding by definition Article II, Section 16, disqualifies the entire debate which is germane. It says bills for appropriation shall be confined to appropriations. He thought to use this as a test of power seemed to be a stretch for him.

MR. BURNS referred to Article II, Section 13, of the Alaska Constitution in terms of the confinement provisions. He said that represents another basis of support that intrudes upon the legislative bodies under Article II, Section 16, to override the veto process. He thought the two most directly affected by Sections 48 and 49 are the line item veto, Article II, Section 15, and the confinement provisions, Article II, Section 13.

8:31:04 AM

REPRESENTATIVE KELLER said it seems that the appropriate way to address an issue relating to the governor's power would be via statute. He thought perhaps one germane topic could result in a resolution. He asked for comments.

MR. BURNS responded that certainly the process by which the legislature can use the constitutional language and the authority vested in the governor's office is via a constitutional amendment. That is the appropriate process rather than through fiat to amend the constitution, which is what he believed was the attempt in Sections 48 and 49 of SB 46, he said.

CHAIR GATTO agreed that Alaska has a powerful executive branch. However, the power of the purse is in the legislature. The governor can't add to the budget. The governor can deliver an enormous budget, but the legislature can make its own. He thought while the governor and the executive branch have

significant input that is only as accepted by the legislature. He pointed out that the legislature could reject the entire governor's budget if it so chooses and just write its own. He surmised that the legislature has the power and should not lose sight of the legislature's ability and responsibility to account for every dollar spent.

CHAIR GATTO noted one reason why the legislature is arguing over the energy projects being packaged in one place is because it works to dilute the legislature's ability to account for money it is spending. He commented that the House has an opposing viewpoint. In the event that the Senate chooses to leave this language out of the bill, he asked whether the legislature should just drop the constitutional question and wait for it to resurface or seek legal resolution.

8:34:12 AM

REPRESENTATIVE GRUENBERG raised the issue of judicial review. He reminded members that since Marbury v. Madison [5 U.S. (1 Cranch) 137 (1803)] the judiciary has had the final say on constitutionality, but what is usually overlooked has been the legislative review. The legislature has the primary viewpoint in the sense of first view. He offered his belief that legislative review is even more important than judicial review because so few cases overturn statutes. He opined that generally legislatures do a fairly good job with the advice of attorneys general and legal services on constitutionality matters. However, occasionally the concept of executive branch review happens when the legislature passes something which is vetoed. The legislature through the judiciary committees, which have primary jurisdiction over these matters, is at the epicenter in this case and many other cases since they are the first to review bills for constitutionality, he pointed out.

8:36:33 AM

MR. BURNS acknowledged Representative Gruenberg appropriately articulated this in his memorandum that preserves the relationships between checks and balances, as well as the legislature's concerns in preserving its rights under Article II, Section 16, in the veto override process. The constitution sets a clear process to follow, with respect to bills and appropriations, and to corrupt or modify that process to force agreements that bootstrap things is not appropriate procedurally or constitutionally, he said.

REPRESENTATIVE GRUENBERG referred to Legislative Council v. Knowles as a paradigm. As a matter of logic in almost every case, a conflict of interest in the attorney general's staff or the attorneys for the legislative branch arose. He said the question the attorneys must ask is whether they represent the people or the alliance. The issue is ever present and represents an essential question, he remarked.

8:38:51 AM

MR. BURNS responded he will not hesitate to answer that his responsibility is first and foremost to uphold Alaska's constitution. He clarified that he is not at this meeting to represent the governor, although he works in that capacity as an appointed attorney general. However, his first and foremost responsibility, which he believes is clear in the statutes, is to uphold the constitution and the statutes of this great state. He concluded that clearly what is at issue is the constitutionality of Sections 48 and 49 of SB 46.

8:39:49 AM

MR. BURNS referred to Section 49, the non-severability or inseverability section. He said that Section 49 exacerbates the constitutional violation because it asks the courts to empower the legislature to do indirectly what the legislature cannot achieve directly. Further, it seeks to achieve through the back door what the legislature cannot achieve through the front door. Section 49 effectively says that if the bill the legislature proposes through the contingency is invalid by usurping constitutional provisions, then the court must invalidate the entirety of the appropriation. He characterized Section 49 of SB 46 as a "poison pill." Although there are number of cases and legal treatises that have spent time discussing non-severability and deference provided to a legislature in the context of non-severability, those cases are inappropriate at the federal level since the federal government does not have line item veto authority. However, the distinction has been made with respect to state cases in which non-severability has been evaluated that it is unconstitutional when the non-severability is being applied to eclipse or usurp another body's authority. He said that is precisely what is being sought to be achieved here and what makes this non-severability provision problematic and unconstitutional. He reiterated that it effectively allows the legislature to do indirectly what it clearly cannot do directly.

CHAIR GATTO, for the public's benefit, explained that severability in this instance means if any part of the bill is determined to be unconstitutional, the bill can be severed and the remainder of the bill remains legal. He reiterated that non-severability means if one part of the bill is unconstitutional, then the whole bill is unconstitutional. He likened it to the national health care bill in that if one part of the bill is found to be unconstitutional, the whole law would be found unconstitutional since the health care bill and subsequent act do not contain a severability clause. He pointed out that SB 46, the bill under discussion today contains a non-severability clause so unfortunately the "whole thing falls apart." He asked if he was correct.

8:44:03 AM

MR. BURNS answered absolutely. He noted that Alaska has passed a statute that presumes severability. The statute says to the extent a portion of a bill is invalid, the invalid provision is presumed to be severed from the remainder of the bill. The legislature would not want to enact something that was invalid. The key, however, is to sever something and have the remainder stay in effect. What U.S. District Court Judge Vinson, Florida, found with respect to the Patient Protection and Affordable Care Act (PPACA) case in his ruling in Florida v. Health and Human Services was while a myriad of provisions existed the requirement of mandatory health care was so intricately intertwined with the entirety of the bill that it could not be severed. Additionally, because Congress had not included a severability provision, the court was not able to "tease them apart" so the entirety was held to be invalid due to the one unconstitutional provision. He related that flows nicely into the context of what the legislature is trying to achieve here. The Senate, via Section 49, has sought to infuse everything and say "you can't pull them apart." However, in reviewing the provisions in Section 4 of the bill, there is not any way to construe the projects as intricately intertwined so they cannot be pulled apart. The premise on which the Senate has sought to achieve this is to say the projects fall under AS 44.99.115, which pertains to energy policy. Thus, since the projects are all energy related, although the projects are not geographically connected or interconnected, the projects cannot be pulled apart or removed. He offered his belief that a review of the individual items reveals that the logic does not flow in the context of a non-severability provision.

MR. BURNS concluded the provisions and projects are not so intricately intertwined to the degree they cannot be separated. The most significant issue is raised in the memorandum from Representative Gruenberg regarding the following two cases: State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980) and Legislative Research Committee v. Brown, 664 S.W. 2d 970, 925, 927-28 (Ky. 1984), a Kentucky Supreme Court case. Both cases discuss it is not possible to achieve an unconstitutional objective through judicial fiat. The legislature cannot ask the court to do something it cannot do. However, he related that deference is given to the legislature in the context of its drafting of legislation, particularly given the context of non-severability since it demonstrates the legislature has considered the matter. He offered his belief that the judiciary is very unlikely to give such deference to allow a legislative body to usurp or eclipse a power that is clearly conferred upon the executive branch.

CHAIR GATTO characterized it as "just a second bite of the apple."

8:48:04 AM

REPRESENTATIVE GRUENBERG related a scenario in which [SB 46] passes in its current form, the governor imposes a line item veto, the court rules and finds two sections [Sections 48 and 49] unconstitutional. He inquired as to whether it would be necessary to sustain the line item veto, or if the court might remand the case by issuing a simple declaration of unconstitutionality. In that instance the legislature could determine whether to allow the line item veto or redo the entire bill, in other words, not make the final decision on whether the line item veto would stand. He related his understanding that two different issues exist: first, whether the clauses are unconstitutional and the second, what result flows from that decision. He said he wasn't entirely certain the court would reach the second issue, but it may determine the clauses were unconstitutional and that the remedy is up to the legislature to decide. He asked if anyone has considered whether this would be a likely outcome.

8:50:35 AM

MR. BURNS hesitated to guess what the court might do. He agreed the court could do either thing. He offered his belief the court would first look at Section 48, the contingency language. He predicted the court would find the provisions

unconstitutional and the provisions would be stripped from the appropriation. Next, he thought the court will consider the non-severability provision. He said that courts typically view provisions in the context of severability and non-severability. The question is whether the non-severability provision could essentially be severed from the remainder of the bill while the rest of the bill is kept intact. He anticipated the court would do just that and find Section 48 unconstitutional, and would find the application of Section 49 as the Senate trying to achieve the unconstitutional provision. He predicted the court would sever Section 49 from the remainder of the bill and the appropriation bill would proceed forward with whatever line item vetoes included. He characterized that approach as "certainly a heck of a risk" because the practical implications of such posturing and the concern of going to court is the effect it would have on the projects in the bill. One possible result would be that the court puts everyone back to "square one" which would result in phenomenal delay for the energy projects.

REPRESENTATIVE GRUENBERG argued that sometimes the courts reach the same result, not on the basis of severability but rather on the basis of abstention and comity and refusal to interject itself into a co-equal branch of government. He found that this issue also leads to further questions. Even if the court reached the decision Mr. Burns suggested, the court might not direct a remedy based on abstention and comity. While he did not view any constitutional impediment or anything in the bill that would prevent this from happening, the unfortunate result could potentially delay projects past the construction season. He wondered whether the court would employ comity, which is respect for the other branch of government, or abstention, which is another way of saying the same thing, and would reach the same result of "tossing the ball back" to the legislature.

8:54:57 AM

MR. BURNS acknowledged that is always a distinct possibility, particularly with co-equal branches of government, and poses a significant risk. He hoped that the court would view this language as so blatantly unconstitutional as to strip it out and sever it given the context of Sections 48 and 49. He said his sense from legal cases and treatises and most importantly from the history of the Alaska Constitutional Convention with regard to the strong executive branch relative to the line item veto, the striking or reduction [would cause] the court to find these sections so unconstitutional as to sever them. However, he reiterated that he cannot predict what the court will do.

REPRESENTATIVE GRUENBERG offered his hope that was this matter to be litigated that both sides would address the court otherwise it could act without guidance of either counsel.

MR. BURNS assured the committee that the DOL would aggressively articulate its position with the court.

8:57:19 AM

CHAIR GATTO speculated on a scenario in which the court upheld Sections 48 and 49. He inquired as to whether it would be possible for the legislature to pass a one line capital budget appropriation bill and say, "take it or leave it."

MR. BURNS said the real concern is that once the legislature starts down that path it is difficult to stop. For instance, there could be a situation in which a contingency clause with non-severability language could be used for any of the primary components of the capital budget, including transportation, education, or facilities. He recalled a bankruptcy adage, "pigs get fat, hogs get slaughtered" which was given in the context of overreaching and prefunding retirement plans. The court typically rules that retirement plans are exempt, but in one instance someone loaded it with millions of dollars. The court ruled that clearly the intent was to violate the provisions of law. He asked, "Where do you draw the line?" In response to comments, he clarified his point is that typically retirement plans aren't available to be attached, but someone had loaded the retirement so as to eclipse the exemption. He made the analogous point that if 105 items are bundled together, why not bundle 250 items, or the entire bill. He said in Article 13 of the Alaska State Constitution, the confinement provision is clear that there has to be a nexus between the purpose and the appropriation.

MR. BURNS offered his belief that the whole purpose of giving the executive branch strong authority in the constitution in the context of the line item veto was to eliminate "logrolling," or the bundling together of items, which essentially eliminates the ability to evaluate into constrained, excessive spending.

9:02:19 AM

MR. BURNS related that the discussion has surrounded Article II, Section 15, of Alaska's constitution with respect the line item veto. He asserted that Sections 48 and 49 are also

unconstitutional with respect to the issue of Article II, Section 13, or the confinement provision. He said that according to Article II, Section 13, appropriation bills must be confined to appropriations. The Alaska Supreme Court has indicated that the confinement clause prevents the legislature from enacting substantive policy outside of the public eye. In interpreting the confinement clause the Alaska Supreme Court adopted a five-part assessment commonly referred to as the Hammond test.

MR. BURNS reported the Hammond test was articulated in the Knowles case mentioned by Representative Gruenberg in his memo. He related five tests were in the Hammond test. The contingency provision and intent language inserted by the Senate in SB 46 failed the Hammond test. He related his understanding that the Senate based the SB 46 bundling on AS 44.99.115, which is the state energy policy. He stressed the importance of AS 44.99.115, which does not mandate an energy policy be implemented by linking energy projects or appropriations. Instead, AS 44.99.115 encourages state agencies to communicate with communities to determine their needs and identify and develop cost effective sources of energy. Second, this bill violates the Hammond test since it links appropriations within a bill, which is not provided for in AS 44.99.115, and in doing so in this appropriation bill, it effectively amends existing law. One of the tests in Hammond explains how money is to be spent and this goes beyond the minimum necessary. Third, linking appropriations is a direct attempt to control how monies are spent on projects and SB 46 attempts to administer the program of expenditures, which again is in violation of the Hammond test. Fourth, linking appropriations that bear no direct relationship to one another is not a condition germane to the purpose of the appropriation, which is again one of the Hammond tests. He concluded these conditions describe the concerns with SB 46, relative to the confinement clause. Setting aside all the legal machinations discussed, from a practical perspective Sections 48 and 49 bear some discussion and comment. By including these provisions, essentially anyone would have the right to challenge the provisions. The legislature, especially in light of Section 49 (b) would have the authority, as well as individual legislators since it takes away a legislator's right in the veto override. Additionally, anyone who is upset or perturbed by the language and the attempt to usurp the executive branch's control could effectively disrupt and challenge the validity of that action via a judicial process. The result is to cloud the projects such that even if approved, entities may not be able to receive the appropriated funds. Additionally,

obtaining financing could prove difficult in light of the cloud that hangs over these projects. Most importantly, the state has a desire to move the projects forward to completion and to help the economy without the necessity to wait for a final court determination.

9:07:08 AM

REPRESENTATIVE GRUENBERG disagreed on the point of the confinement clause because he did not see the need to do so. He said the only sentence in Article II, Section 13, of the Alaska constitution that applies is: "Bills for appropriations shall be confined to appropriations." He offered his belief that specifically SB 46 is confined to appropriations. He clarified that the language does not say one appropriation must have a relation to another appropriation, but they must all be appropriations. The only items that are arguably not appropriations and are relevant in this case are Sections 48(a) and 49 of the bill. He indicated these sections provide instructions on how the appropriations shall be treated by a potential vetoing authority on the one hand and a potential court on the other. He explained the provisions are necessary, therefore, to the drafter's opinions to effectuate what the legislature wishes to do with respect to those appropriations.

9:08:51 AM

MR. BURNS concurred that Section 13 does not articulate anything beyond what was just quoted. However, he pointed out that the final determiner of constitutional issues is the Alaska Supreme Court. The Alaska Supreme Court in two instances, Hammond and Knowles, clearly articulated what are an appropriation and an item, by listing five criteria, including the minimum necessary germaneness. Notwithstanding what the constitution says, evaluating the appropriation in the context of that litmus test of five criteria balances this, because in theory, one could use language that says this is an appropriation and it is all necessary. Using the logic of appropriateness of appropriation anything would be appropriate under the confinement clause. However, the Alaska Supreme Court has already said that one must consider the content of what is in the appropriation to ensure that it is truly an appropriation.

REPRESENTATIVE GRUENBERG related his understanding then that Mr. Burns is saying the language on its face is not necessarily unconstitutional, but that applying it in certain cases may violate the confinement clause concept.

MR. BURNS agreed with that summation and deferred to Mr. Bjorkquist.

9:10:46 AM

CHAIR GATTO referred the Section 13 language in SB 46, which requires that "appropriations shall be confined to appropriations." He asked whether the second plural tends to mean more than one appropriation.

9:11:22 AM

BRIAN BJORKQUIST, Senior Assistant Attorney General, Labor and State Affairs Section, Department of Law (DOL), responded that Chair Gatto is correct that bills for appropriation are limited to appropriations, but he noted multiple appropriations can be contained in an appropriation bill, which typically does occur. Appropriation bills are not limited to a single subject and appropriations can occur for multiple subjects and types of appropriation. Thus, so long as the bill is limited to appropriations it would be considered constitutional. He concluded that is precisely what the constitutional provision is intended to provide. He related the distinction is that while an appropriation bill is limited to appropriations it cannot include substantive law. An appropriation is defined to be an item designated for a specific purpose with a funding source. Therefore, as long as an appropriation bill is limited to the definition of an appropriation the bill is acceptable. He identified the confinement clause violated in SB 46 is due to the linkage of various appropriations to each other. The Hammond test needs to be applied individually on an item-by-item basis since each item represents an appropriation. He suggested that an appropriation for one project, such as a transmission line on the Kenai Peninsula, does not have a connection to another project, such as a hydro project in Western or Southeast Alaska. The language goes beyond what is necessary to identify what the money is intended to be spent for in that the language with the appropriation item itself identifies the sum of money, the purpose for which it is directed, and the source of funds. In the first instance the language is directed to the Intertie, but there is no connection to the others, he said.

MR. BJORKQUIST pointed out it's also instructive to consider the intent language in Section 4 of the current version of SB 46, on page 98, lines 6-12, since it begins by describing the state energy policy, but on line 10 it switches to, "Therefore, the

legislature intends that the package of appropriations and projects listed below are all necessary to achieve a statewide balance in addressing the state's diverse energy needs." He asserted the language in that sentence creates substantive law. That sentence creates a new energy program or a new energy policy and links all of these appropriations together "to achieve a statewide balance in addressing the state's diverse energy needs." He said this connection of projects creates the problem. He suggested looking at it from the standpoint of the criteria that was used to pick these projects and these communities which are now part of what is designated as " ... necessary to achieve a statewide balance." He further asked what criteria was used for other projects and communities not included in this mix of appropriation. He said that this linkage of this mix of appropriations represents a policy, programmatic decision being made by the legislature. He suggested in applying the Hammond test that the energy program itself results in substantive law and this amends or changes what is in AS 44.99.115, which is the state's policy that focuses on helping individual communities and does not mention a statewide balance. He related that the linkage of these projects, in terms of the legislature administering a program of expenditures, links all of these projects and is administering all of the energy programs by linking all of the projects and appropriations together.

MR. BJORKQUIST said when considering an appropriation as an individual item that identifies an appropriation, a sum of money designated for a specific purpose with a funding source, each individual item lists the amount of the appropriation, purpose of the appropriation, and funding source of the appropriation. Thus, each project and item alone is an appropriation. He referred to page 98, line 18, of SB 46, noting that the Alaska Industrial Develop & Export Authority (AIDEA) coal to liquids project stands on its own. The language is the minimum necessary language for the appropriation. He then directed attention to the next line, which he opined is superfluous to the first appropriation because it goes beyond the minimum necessary language necessary for that particular appropriation. Thus, that too violates the minimum necessary test of the Hammond test. He reiterated that from a practical sense, the linkage of the projects creates a problem with respect to the confinement clause.

9:17:45 AM

CHAIR GATTO expressed concern with the language that says, "to achieve a balance" since 60 legislators must strike a balance. He noted that the word "all" has been used repeatedly. He offered his belief that the statement itself is strongly subject to interpretation so he was unsure if it would be considered illegal or irresponsible, regardless he found it an unacceptable justification for reaching a conclusion. Thus, he dismissed the conclusion because the justification for it is unreasonable. He argued that everyone would not agree on the proper balance, which is not possible to find for all Alaskans. He asked if the aforementioned is related to the legality or non-legality of that section.

9:19:04 AM

MR. BJORKQUIST thought his comments directly related to the confinement clause in that the energy policy to "identify, assist with the development of the most cost effective, long term source of energy for each community statewide." This bill selects all of the projects necessary for a statewide balance, but the selection is not done according to statute since criteria are not in the statute to identify each and every one of these projects as affecting a statewide balance. He said that is the reason mentioning the language in SB 46 that refers to linking projects for a statewide balance, is considered a substantive decision. It is not an appropriation on an individual item-by-item basis. He said he agreed with Chair Gatto's assessment.

CHAIR GATTO pointed out he discussed the differences between appropriation and allocation. He said an appropriation is a set amount of money for projects, but the allocation is for each one. However, the allocations can be swapped per Mr. Poag.

MR. BJORKQUIST acknowledged statutory provisions allow the administration to move money between allocations of an appropriation under the Fiscal Procedures Act, an area of law with which Mr. Poag is more conversant.

CHAIR GATTO related his understanding that an "item" could be defined in several ways, and therefore he expressed interest in discussing defining the term "item." He pointed out that in members' packets the memo from Mr. Gardner to Senator French describes an "item" in a manner which he thought was clear.

9:22:43 AM

MR. BJORKQUIST acknowledged there are several different ways for the legislature to choose to make an appropriation, however there are consequences for each. Additionally, with each of those options, the governor maintains line item veto power. The Alaska Supreme Court has found one historical purpose of the line item veto is to prevent "logrolling," which he opined happens by linking the projects together in Section 4 of SB 46. He said that to the extent a project is part of an energy plan, it is an energy plan created in SB 46, which is substantive law. In response to a question, he offered his understanding that the governor has line item veto over an appropriation and consequences exist to line item veto of an appropriation that contains allocations.

9:24:10 AM

REPRESENTATIVE GRUENBERG maintained his dissent with respect to the confinement issue. He said that the only constitutional provision that is relevant is the single sentence in Article II, Section 13, which he read, as follows: "Bills for appropriations shall be confined to appropriations." The aforementioned language does not say that the legislature cannot tie appropriations together; rather, he opined that it considers the entire bill. Therefore, as long as the entire bill deals solely with appropriations, the clear text would seem to sustain it. He said he understood the Hammond test, but did not believe it applied in this particular case because the constitutional text only considers the bill as a whole. Again, as long as the bill is an appropriation bill and it doesn't contain other things, the sentence has been not violated. He ventured his belief that the discussion on the confinement clause would happen if Section 48(a) and Section 49 were not in the bill. He said if it really was a confinement issue and those sections were not in the bill, the DOL would likely argue that due to the intent language the confinement was violated. He characterized that by itself as a weak reed to lean upon. He expressed the committee's concern with the effect of the two clauses, but the DOL's argument focuses on a different part of the bill. He pointed to the intent language on page 98, which he maintained was simply an expression of legislative intent and is not any more binding than a policy statement. It would be like a resolution in the sense that it gives a sense of the legislature. However, from a constitutional sense, he said he was unaware it would carry that authority. He also said that the underpinning of his response is to maintain the conversation wouldn't be happening today were it not for Section 48(a) and

Section 49. The DOL's argument doesn't deal with those sections and the text of the constitution looks at the bill as a whole.

9:27:58 AM

MR. BJORKQUIST clarified that he didn't intend for his comments to be wholly focused on the intent language of Section 4, however, he did believe the language is instructive as to how a court would interpret Section 48(a), which links the projects together. The two must be read in combination with one another. Additionally, he thought that Section 49 must be read in combination with the other two sections to understand what is happening with the bill as a whole. He respectfully disagreed that the Hammond test isn't instructive as to the constitution since the Alaska Supreme Court has identified it as the test for determining the confinement clause and when it is violated. Thus, the Alaska Supreme Court has already given instruction, which identifies that is the test to use to interpret the constitution confinement clause.

REPRESENTATIVE LYNN asked Mr. Burns to provide a copy of his presentation to the committee.

MR. BURNS agreed to do so.

9:29:50 AM

REPRESENTATIVE PRUITT related that the legislature must make an assumption that any act is automatically constitutional. The legislature relies on opposition to prove otherwise, he said.

MR. BURNS acknowledged what he is referring to is considered the rebuttable presumption, which is the assumption that this body will do things that are constitutional. However, he noted that just passing a bill doesn't make it constitutional. Thus, with respect to Sections 48 and 49 of SB 46, the fact the legislature passes it, if it does, does not mean that it passes the litmus test of rebuttable presumption of constitutionality. He related the presumption is the legislature presumes it is constitutional and the court looks to the questions of whether it is constitutional. Based on the reasons just articulated by the DOL, he offered his belief that the presumption would be rebutted very quickly. In response to a question, he responded that the court is the final determiner of constitutionality.

MR. BURNS surmised that the goal of SB 46 was to usurp or restrict the powers of the governor, given the concern over the

line item veto. He said just passing a bill does not pass constitutional muster until it is challenged in court. Everyone taking an oath of office has an obligation to uphold the constitution. He acknowledged Representative Gruenberg articulated this well when he said that in large measure, the legislature must police itself since legislative oversight, executive oversight, and judicial oversight exist and the hope and desire is that the legislature will review the bill for legality and practicality and find the language in those sections is inappropriate and will strip it from the bill.

CHAIR GATTO said he has a strong appreciation for actions the Senate took given the use of the term retaliatory veto. He offered his belief the Senate did not have any recourse but to seek enough votes for a three-fourth veto override in the event the governor exercised the line item veto. He further said the committee has already discussed that an override is an enormously high bar. Thus, he related that given the threat of a veto, the Senate is protecting itself by inserting the language since this is too important to allow the governor to exercise what he has already threatened to do.

9:34:01 AM

MR. BURNS remarked that he has not seen any indication of a retaliatory veto, but clearly "two wrongs never make a right." The governor has an obligation under Article II, Section 15 of Alaska's constitution that he shall return any vetoed bill with a statement of his objection to the house of origin. Thus, the governor would be required to explain the reason for any veto, which in turn empowers the legislature to override the veto. When the constitutional founders evaluated the three-fourths requirement, significant debate ensued. The founders identified that they knew it would constrain the legislative body, but they wanted checks and balances and the power to constrain excessive spending within the executive branch, subject to the burden of the three-fourths vote on a veto override. He acknowledged the clear risk, but offered the delegation considered the risk and decided that in the context of the public arena a governor must justify the decision, which serves as an appropriate check and balance as well. He clarified that the basis of the objection plus the legislature's ability to override a veto is the appropriate check and balance.

CHAIR GATTO questioned whether simply saying that the capital budget includes a heat pump for a boat house is too expensive would constitute sufficient explanation or justification.

MR. BURNS agreed it could be a justification for a veto. He pointed out that what was described was excessive spending, and he ventured the governor and the legislature have the responsibility to ensure expenditures are in the best interest of the public. He said to the extent that $150,000 is in the budget for a heat pump may well be sufficient justification.

9:37:16 AM

REPRESENTATIVE THOMPSON, referring to language in Sections 48 and 49 of SB 46, asked how the language would relate to a third party litigant that may object to a hydro project. He related his understanding and concern that such action could halt all of the projects.

MR. BURNS agreed that's a real concern since anyone could challenge the unconstitutionality of a provision. He related a scenario in which someone opposed to the Susitna hydro project could challenge the unconstitutionality of Section 48. Additionally, as discussed by Representative Gruenberg's memo, any legislator whose ability to exercise judgment has now been eclipsed by Section 49(b) could also raise a challenge. He said the practical implications were that while this may be a wonderful, theoretical, and academic issue, significant implications exist in reality as to these projects.

9:39:43 AM

REPRESENTATIVE KELLER related his understanding that this is a policy question first. He recalled the comment that the judicial review is the final say, but pointed out that in terms of the sovereignty of what is in the constitution the [final say] is had by Alaskans. There is an initiative process and ultimately the final decision rests with the people.

9:42:19 AM

REPRESENTATIVE GRUENBERG said he hoped that the bill would be resolved and not proceed to court and expressed concern that the bill would set a precedent. He said he thought the question would be on a smaller scale as to whether a clause or two clauses would be constitutionally permissible. He related a scenario in which a dam and intertie are directly related. He suggested a small clause could be appropriate to link the two. He asked whether it would be appropriately linked in terms of the constitution. He referred to the A.L.I.V.E. Voluntary v.

State case, since the majority and minority dissent was exactly on this point. He explained that the majority, on a 3-2 vote, said that to tie two things together the legislature cannot impinge the constitutional right of the governor to sever. It's not a question of the benefit policy wise, but whether the legislature itself could do so, or whether it must be only the governor. He asked whether the Alaska constitution would permit even a "mini tie-together clause."

MR. BURNS offered his belief that there may be situations in which there is a very close nexus, meeting the Hammond requirements, and connectivity in which a linkage makes perfect sense. Again, it's a balancing of the confinement provisions and Article II, Section 15, of the Alaska State Constitution, which discusses the ability to line item veto to strike or reduce. He said it must be a situation in which there is a very clear nexus between one item and another item, such that in isolation neither item has any value. Although there could be instances, they would be rare and would be evaluated on a case-by-case basis. With regard to Representative Keller's comments, Mr. Burns noted his agreement that this is about a process. The process for appropriation bills is critical since it allows vetting and all parties to have a say. However, creating agreements "behind the doors" emasculates that type of process. Again, this is about a process and transparency of government doing things appropriately. The constitution envisions that transparent process and it is the legislature and the administration's obligation to ensure that happens, he said.

9:48:00 AM

The committee took an at-ease from 9:48 a.m. to 9:58 a.m.

9:58:31 AM

DOUG GARDNER, Director, Legislative Legal and Resources Services, Legislative Affairs Agency, began by reminding members he has a duty of confidentiality to all 60 legislators and that the agency is a policy neutral organization. He said although he agrees with much of the attorney general's comments, he disagrees with some of the analyses and conclusions. He offered his belief that another side of the issue exists. However, he reiterated his role is not to advocate for a specific position, but to answer questions. He agreed with Representative Gruenberg's analysis that this case is not a confinement clause case. He said he did not think the Hammond test is violated by any of the provisions discussed, including Section 4 intent

language. He also did not think anyone in the room thought that the intent language and allocations in Section 4 were legally binding. He related that Section 4 language has a stated purpose and a funding source has been identified. He reiterated he did not believe the case was a confinement clause case.

MR. GARDNER agreed with both Representative Gruenberg and Attorney General Burns, to the extent that the issue has been framed as a separation of powers issue. He offered his belief that this case is a classic separation of powers issue between the legislature's prerogative to appropriate and the executive branch's derivative power to strike or reduce appropriations in the line item veto process. He noted that Pam Finley was legislative counsel in Legislative Council v. Knowles, 21 P.3d 367 (Alaska 2001), a confinement clause case, and therefore he collaborated with Ms. Finley on drafting the memorandums from the agency.

10:03:13 AM

MR. GARDNER noted his agreement with Attorney General Burns that the two remaining issues are the cross contingencies in Section 48, to which he will refer to as the contingencies, and the non-severability clause. He then provided an overview reinforcing that Section 4 deals only with the non-severability clause with respect to the energy projects. With regard to the suggestion that there is an imbalance in the constitutional framework between the legislative prerogative to appropriate and the more limited power of the governor, as described by the Knowles case, to strike or reduce an appropriation. Thus far SB 46 articulates if all the energy projects cannot be funded, then none of the projects should be funded. He offered his belief the legislature is "pushing the envelope" on its appropriation power and SB 46 places a significant burden on the governor, which may be considered by some a Draconian result if the governor were to strike or reduce any of the appropriations in the bill in Section 4.

MR. GARDNER the related that if an appropriation is contingent and the governor [uses his veto power], the result of the non-severability clause is the parties "come back to zero." One way to view the situation is that it is indeed a perfect balance despite the extreme circumstances in which a large number of projects are tied together with contingencies. He pointed out the funding remains for appropriation. Perhaps the framers realized both parties would still have to work together in some way in order to move forward. He then recognized the alternate

view offered by Representative Gruenberg that the legislature appropriates, the governor uses a line item veto, and the remedy is contained in the veto override of Article II of Alaska's constitution. Although there is the possibility that the court would avoid the contingency analysis and thereby not have to address the contingency, he was unsure how easy it would be for the court to do so.

10:08:18 AM

MR. GARDNER returned to Mr. Burns' earlier question regarding whether this could be done "a little bit," and offered his belief that fact patterns do exist [to support doing this "a little bit"]. For example, the Snettisham project consists of separate items or allocations within an appropriation for a dam, a power transmission line, an undersea cable, and distribution center. He opined it would be difficult to argue that the legislature would want one without the other, so a nexus exists. Therefore, it would be hard to conceive of a situation in which the legislature would appropriate funds for the dam and substation without the cable and it would also be shocking for the governor to strike one of the items. He suggested that the discussion needs to probe deeper and look beyond contingencies preventing a line item veto, which is difficult given that it's a political conundrum for which the outcome is unknown. He highlighted that in the Knowles case the discussion by the Alaska Supreme Court suggested that contingencies closely related to the appropriation would be appropriate, while ones that held less of a nexus or relationship might not withstand scrutiny. He then referred to the Karcher case [Karcher v. Kean, 479 A.2d 403, 412 (New Jersey 1984)] cited by Mr. Burns in which there is no question the court observed that most legislative appropriations do have some kind of contingency or other reason for them. Mr. Gardner stated he was unaware of any cases, produced by either party, which indicate that contingencies are a non-starter.

MR. GARDNER explained that the aforementioned increases the difficulty in advising the legislature since some cases allow a "little bit" of contingency or suggest some contingencies are allowed, although it has not been defined as to how broadly that could occur. He related agreement with Mr. Burns that SB 46 represents a broad contingency and may be one of the broader contingencies that the bodies have had to consider. Thus, it exposes an argument of how a wind generation project in one part of the state and an electrical transmission line in another part of the state are related and whether enough of a nexus exists.

He said he was unsure of what action the Alaska Supreme Court would take. However, he offered his view, with respect to the Snettisham project, that one would understand that striking one element would eliminate the whole project. With respect to SB 46, the question is whether a governor would really expect that striking a wind generation project in Western Alaska would eliminate all of the other energy projects in the bill. The countervailing point would be how the term "nexus" would be defined and whether it would be a physical nexus such as the case with the Snettisham project in which the nexus is physical, financial, and functional. He suggested that one result of this case is that the Alaska Supreme Court would specify for the legislature the type and scope of contingencies that would be allowable. In this case [SB 46], it could be argued that the nexus is an equitable distribution as one of the bodies has articulated the projects represent an equitable distribution of energy projects in a very diverse state. Thus, if the projects represent an equitable distribution, the question becomes whether the projects represent enough of a nexus to support a finding that the contingencies are constitutional and do not offend the notion of strike or reduce. He offered his belief that arguments exist on both sides of that issue and it will be a very difficult point for the Alaska Supreme Court to decide. In conclusion, Mr. Gardner said he did not believe that the confinement clause is a significant issue at this point, and therefore he disagreed with the DOL on that point.

10:15:06 AM

CHAIR GATTO asked whether the entire capital budget could be listed as a single project since the projects all represent the state's infrastructure, in which case the governor could take it or leave it. He surmised that everyone could agree with respect to the Snettisham project that one element has no meaning without the other components. However, the legislature doesn't agree that a windmill and building an elementary school 800 miles away are connected. He inquired as to whether the term "nexus" could be defined.

MR. GARDNER responded that the agency has suggested some elements in its May 3, 2011, memo to Representative Gruenberg. He said he would have a difficult time arguing an entire capital budget had the type of nexus that was appropriate that respected the governor's executive branch line item veto power and the legislature's ability to appropriate and address concerns.

10:17:41 AM

MR. GARDNER, in response to a question, pointed out that if the entire capital budget were considered linked, it would represent an extreme view and unlikely a court would find it constitutional. However, a court would likely find that a dam and a power line were connected in terms of constitutionality. He offered his belief that "what we're presented with is something in the middle, probably more towards the upper end and a little harder to defend." He indicated that whether the energy projects represent a fair and equitable distribution is a question he cannot answer. One of the issues upon which lawyers advise their clients and which he would do, were he asked by Legislative Council, is that going before the Alaska Supreme Court over a novel issue of constitutional law may not result in exactly what was desired and could result in some intermediate position that may change how appropriations are done. Therefore, the exploration of a novel constitutional issue has some real consequences for both sides.

CHAIR GATTO asked whether Legislative Council has some sort of superior position with respect to making determinations.

MR. GARDNER explained that the Legislative Council converts the legislature's attorneys into advocates if the council authorizes the attorneys to represent the legislature. At that point, the attorneys become advocates, take a position, and essentially litigate with the DOL.

CHAIR GATTO asked how the agency's attorneys can be an advocate for one body if the two bodies of the legislature disagree.

MR. GARDNER responded that sometimes the agency hires outside counsel, though he did not think this would be one of those situations. He pointed out that his current role is "policy neutral," which would change if the Legislative Council otherwise authorized.

10:20:56 AM

REPRESENTATIVE GRUENBERG pointed out that one advantage to this type of litigation is that it first goes through the Superior Court and then to the Alaska Supreme Court; the trial courts are helpful to the advocates. He said he had not considered the dimension of time. Often an item is struck in a line item veto not because of the merits of the project but due to the inability to afford it all at once. Thus, two things could be linked together, but the projects cannot be completed all at

once. He pointed out that the [DOL] attorneys represent the executive branch but not from the budget perspective. The governor and the executive branch, he surmised, will be concerned about the cost at that point in time, particularly because of the anti-lapse statute that gives these projects a five-year life before the project must go through the reappropriation mode. He concluded if that were the basis for a reduction, or potentially a strike, and the legislature has tied projects together in toto it could cause a constitutional problem. The governor must be able to represent the state and the budget over time as well as a snapshot in time. The aforementioned fact argues strongly for the governor having the maximum flexibility in this area, he said.

REPRESENTATIVE GRUENBERG surmised that it would not be beneficial to obtain any legal opinions since so many variables exist. Instead, he hoped the negotiation process would wind up eliminating the two clauses since litigation could cause more problems than it would solve. He offered his belief that this hearing is focused only on the constitutional issues. He thought this sets a dangerous precedent and this "has got more wrinkles than the rear end of a hippo."

10:25:01 AM

MR. GARDNER offered his belief that as the process has ensued the non-severability has been changed and redrafted and that in and of itself demonstrates the legislature is just at the beginning of a complex process with permutations that have not been considered. He opined that exploring the constitutional issues could raise issues not considered. He was unsure of what action the Alaska Supreme Court would take during litigation.

10:26:27 AM

REPRESENTATIVE THOMPSON asked his view on how a third party litigant could bring the process to a halt.

10:26:51 AM

PAM FINLEY, Revisor of Statutes, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), explained that if the governor does not use his line item veto power or does and the legislature overrides the veto, then a third party litigant would have nothing to gain by litigating the constitutionality of SB 46. The courts might say that the contingency, which really hasn't been triggered, probably was invalid. She

explained that the non-severability will only take effect if there is a veto and there isn't an override of the veto, which may result in many people in court. The fear has been that if the legislature and the executive branch did not trigger the non-severability, someone else could use the provision. As currently written coming out of the Senate, a third party could not use it to stop a project such as the Susitna Dam or any other project. However, if the legislature and the executive branch are in court, probably a third party could also weigh in.

REPRESENTATIVE THOMPSON said if future litigation were to take place, it would not have a backwards effect on other projects contained in Section 4 of SB 46.

MS. FINLEY related her understanding that if the Susitna Dam project was challenged on some other grounds, this bill would not affect it.

CHAIR GATTO posed a scenario in which project 31 was challenged and the Susitna Dam was listed as project 40, and asked whether the 40 projects would then be in limbo waiting for resolution of project 31.

MS. FINLEY answered yes, noting it would be worse than that since the possibility of challenge would prevent contractors from proceeding due to the projects being in limbo.

CHAIR GATTO understood the contractors' issue, but also wanted to ascertain whether he understands the legal issue. He noted that project 40 is also vulnerable if a lawsuit is filed against another project.

MS. FINLEY agreed, assuming that the contingency clause has been triggered and everyone is in court.

10:30:06 AM

REPRESENTATIVE THOMPSON, referring to the language with respect to achieving statewide balance to address the state's diverse energy needs, pointed out people in Nulato may not feel the project is equitable.

MR. GARDNER said he did not mean to suggest that he was endorsing any of the arguments, but instead was simply observing that the language included by the Senate would be one of the arguments advanced for the nexus.

10:30:59 AM

MR. GARDNER, referring to the non-severability clause, said although it's conceivable that an outcome could occur one way or the other on the nexus analysis, the case law indicates that the inclusion of a non-severability clause is an instruction to the court that says if it doesn't work the way it intended, take it out. Thus, Section 4 would be deleted. Mr. Gardner highlighted that it's difficult to predict how the court would apply a non-severability analysis in the context of appropriations, given the two constitutional provisions. He acknowledged issues exist and that one can't definitively say the court won't carve out some type of separate provision for non-severability clause enforcement in the context of appropriations. However, non-severability clauses get enforced such as what occurred in Brown [Comm'n v. Brown, 664 S.W.2d 907, 919 (Ky.1984)], although he acknowledged the distinctions between the cases. Although he agreed with Mr. Poag that those cases are as good as the state and the constitutional law that's in place, he maintained non-severability clauses tend to get enforced and there isn't any reason to suspect otherwise. Therefore, if the contingency clause is found to be unconstitutional, the net result due to the non-severability clause could be no energy projects, as outlined in Section 4 of SB 46 as it's currently written would go forward.

REPRESENTATIVE GRUENBERG did not recall a non-severability clause ever being included in an appropriation bill. He asked for clarification.

10:33:50 AM

MS. FINLEY responded that she was unsure whether there has never been one, but she did not recall any. However, there may have been non-severability clauses in substantive legislation.

REPRESENTATIVE GRUENBERG asked that this issue be researched further, and that the result get disseminated in writing.

MS. FINLEY said one of the problems with the contingency clause and the non-severability clause is that in this particular case they wind up in the same place though conceptually they are quite different. She referred to the Alaska Seafood Marketing Institute (ASMI) appropriation in the Knowles case, in which the legislature said that the appropriation was contingent on ASMI having no out-of-state employees above a range of about 21 or 22. The courts ruled that was a violation of the confinement

clause. The court next needed to determine whether to sever the bad contingency from the appropriation. In other words, the question became does ASMI get funded despite the confinement clause violation. In Knowles, the court found the state has a general presumption of severability and it severed the clause. However, she urged members to consider situations in which the legislature does not want to fund a project so it places a contingency on the funding. Thus, the legislature would place a non-severability clause to signal to the court the legislative intent not to fund a project. She reiterated that the concepts are different and can be different in other situations.

10:37:06 AM

REPRESENTATIVE GRUENBERG agreed and added that his question for research should also include contingency clauses.

CHAIR GATTO recalled the Carlson case involving fishing fees for resident and nonresident fishermen.

MS. FINLEY responded the case was not a contingency just a violation of the constitution. She noted that he is correct that it is related to the ASMI contingency case, but the court struck down the ASMI contingency not for the same reason it struck down the Carlson case just mentioned. The ASMI case was an attempt to place substantive law into an appropriation. If the legislature wanted to do that, then it needed to pass a law specifying ASMI may not employ out-of-state employees, which may have been unconstitutional. Still, the requirement should have been in substantive law. In response to whether the state can insist that an oil company have 80 percent Alaska hire, Ms. Finley responded that she was not prepared to answer that at the moment.

10:39:45 AM

REPRESENTATIVE KELLER asked when it might be advantageous for the legislature to have a case go to the Alaska Supreme Court. He inquired as to whether there is any instance in which it would be wise. He thought thoroughly vetting an issue could lead to a decision being based on debate and records.

MR. GARDNER said he prefers not to comment on policy. He agreed that going to court provides an answer to the question asked, but as Representative Gruenberg suggested it may be that the question is formulated differently. He suggested that lawyers are generally risk-averse, and prefer to have control of their

own destiny. He speculated that most try to keep their clients out of court whenever possible. He concluded that it's always preferable to avoid court and he could not imagine many situations unless an unresolvable crisis existed and a constitutional matter needed to be unraveled. However, when there are other approaches to be taken, lawyers would suggest those approaches should be pursued first.

10:43:07 AM

REPRESENTATIVE PAUL SEATON commented that the legislature frequently uses fair and equitable distribution with various projects, including schools. He pointed out that under the latest version of SB 46 many things have been moved from the "item" column to the "allocation" column. He then related his understanding that for allocations, the agency, with the consent of the Office of Management & Budget (OMB), can move those appropriations; that is change the numbers.

MS. FINLEY posed an example in which there were three bridges, one of which costs a little more and one of which costs a little less; the point of the allocation is for the legislature to essentially allow the executive branch to move the funding with the OMB's approval. She said she has serious doubts that the executive branch could decide to build one of the three bridges, but not the other two since it would likely be a violation of the appropriation power. However, that issue hasn't been litigated. The legislature, she said, lists the bridges because it wants them built. If the executive branch ignored the allocations and decided to only build one bridge, the legislature would stop doing allocations, she predicted.

CHAIR GATTO suggested it would be reasonable to say the bridge over the Yukon River is necessary to carry heavy pipe, and therefore take additional funding from bridges two and three and put it toward bridge one.

MS. FINLEY responded she was unsure of how that action would be viewed by either the court or the legislature. However, she acknowledged some funding could be moved.

CHAIR GATTO inquired as to whether some money or a little money could be moved, which he interpreted as the item/project having been over funded.

MS. FINLEY explained that allocations are used because the amount needed is not a certain amount, but only an approximate

amount. Thus, the actual costs for construction may come in over or under the projected cost, which is why adjustments are allowed. In response to a further question, she clarified that the bill contains allocations in Section 4 as well as appropriations and some items, such as the large hydroelectric projects, only are appropriations.

10:47:25 AM

CHAIR GATTO noted that the cover letter indicates the projects are listed as allocations and the proposed committee substitute modifies the intent language. He opined that was a significant change.

10:48:00 AM

REPRESENTATIVE SEATON related his understanding that when it went from Version B to Version S, the items were changed to allocations. He questioned whether using "allocations" gives the executive branch the legislature's authority to appropriate by allowing the executive branch to change the amount the legislature appropriated.

MS. FINLEY answered yes; allocations give more power to the executive branch in terms of where the funds are spent. If the legislature wants funds only to be spent on a specific project such as project "x" it needs to appropriate to project "x." In instances in which the legislature is willing to allow movement of funds, the legislature sets an appropriation plus an allocation for that appropriation. Historically, the governor has used a line item veto on allocations and changed the amount of the appropriation up above.

CHAIR GATTO asked if an appropriation is allocated as 50 percent to each of two projects, but the governor moves it to 60 percent [for one project] and 40 percent [for another project], he/she has essentially vetoed an allocation.

MS. FINLEY said that is the reason she was reluctant to agree that all the funding could be moved since it essentially would undermine the legislature's allocation power. The law is as yet uncertain about this, she noted.

10:51:38 AM

MR. GARDNER, in response to Representative Seaton's question regarding the power given to the governor, referred to page 99

of the bill. For example, the $16,333,000 appropriation for the Alaska Energy Authority has been broken down into the following allocations: $1 million for the Alaska Energy Plan, $5 million for bulk fuel upgrades, $330,000 for electrical emergencies, and $10 million for the Rural Power System. If the governor decided to line item veto the $1 million for the Alaska Energy Plan allocation, the governor's practice has been to go to the main appropriation and reduce it to $15,333,000. He characterized the practice as a mutual respect between the line item veto and the legislature being willing to give enough flexibility to put things into an allocation. He said there has not been a net result in which other projects have been increased within a category of appropriation.

10:53:16 AM

REPRESENTATIVE GRUENBERG pointed out that there is an Alaska Supreme Court case that requires the governor to reduce the full amount because the effect would be to increase the remaining items.

CHAIR GATTO acknowledged that the funding would drift up to another item.

MS. FINLEY concluded that moving the funding without a veto might be an illegal use of the appropriation.

CHAIR GATTO and REPRESENTATIVE GRUENBERG offered their understanding that such a scenario would be an illegal use of the veto.

10:54:34 AM

REPRESENTATIVE GRUENBERG asked where the term allocation is defined.

MS. FINLEY answered that the term is not defined, but instead used in the Executive Budget Act. The Act says specifically that money cannot be transferred between appropriations but can be transferred between allocations. In further response to Representative Gruenberg, she acknowledged that conceivably there could be a constitutional issue with a delegation issue.
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10:57:16 AM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 10:57 a.m.