

# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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May 25, 1989

Honorable Steve Cowper  
Governor  
State of Alaska  
P.O. Box A  
Juneau, AK 99811

Re: CSHB 154 (2d Fin)(efd fld) -- making supplemental appropriations  
Our file: 883-89-0076

Dear Governor Cowper:

As requested by your legislative staff assistant, Shari Kochman, we have reviewed CSHB 154(2d Fin)(efd fld), making miscellaneous supplemental appropriations for various purposes, including the Exxon Valdez oil spill. The primary legal issue raised by the passage of this bill involves the absence of an immediate effective date. You originally introduced this bill to supplement fiscal year (FY) 1989 appropriations to various agencies. The version of the bill you introduced contained an immediate effective date. However, the House of Representatives failed to adopt the immediate effective date by the two-thirds majority vote required by art. II, sec. 18 of the Alaska Constitution. 1989 House Jour. 1661 (May 6, 1989).

For a bill enacting measures other than appropriations, the failure to adopt an express effective date results in the application of the 90-day effective date set out in art. II, sec. 18, of the Alaska Constitution. However, the method of determining the effective date for an appropriation bill rests on other considerations. "An appropriation bill is not 'legislation' in the strict sense." Carr v. Frohmlar, 56 P.2d 644, 670 (Ariz. 1936). These bills provide authority to spend money to pay for something that is authorized by general law. An appropriation is more like an administrative message passed between branches of government and is distinct from other general law. This is evident because general law cannot be amended in an appropriation bill. Alaska Const., art. II, sec. 13. Nor may the people enact appropriations directly through the initiative process. Alaska Const., art. XI, sec. 7. A strict interpretation of the absence of an effective date would imply that no money may be expended under the appropriations made in this bill until 90 days after you sign the bill. However, it would be irresponsible to disrupt state government functions to await the constitutionally specified effective date.

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The bill contains appropriations necessary to supplement existing appropriations made to finance public assistance and aid to the elderly necessary to feed and clothe recipients of these benefits. Additionally, the bill contains appropriations necessary to compensate individuals who are presently suffering from the unforeseen effects of the Exxon Valdez oil spill in Prince William Sound. Obligations to cover these and other purposes covered by FY 1989 appropriations supplemented by this bill must be continuously incurred and honored to finance state activities that were originally set in motion by enactment of general appropriation Acts for FY 1989.

The majority of the appropriations contained in the bill are stated to be "supplemental" appropriations. These appropriations add to existing FY 1989 appropriations made to implement the executive budget for the year. The Alaska Constitution requires the governor to prepare the state budget to cover a fiscal year and implies that the general appropriation bill to finance state government operations must also cover the fiscal year. Alaska Const. art. IX, sec. 12. The FY 1989 executive budget is financed by appropriations in effect since July 1, 1988 and remains operative until June 30 of this year unless reappropriated administratively or by the legislature. We believe that it is reasonable to construe the operative effect of a supplemental appropriation to relate back to the effective date of the original appropriation once it is enacted.

Under federal precedent, a supplemental appropriation is subject to the same effective date and conditions attached to the original appropriation. The effect of a supplemental appropriation has been explained in the following manner: "A supplemental appropriation supplements the original appropriation, partakes of its nature, and is subject to the same limitations as to the expenses for which it can be used as attach by law to the original appropriation." 4 Comp. Dec. 601 (1897). See also 27 Comp. Gen. 96 (1947); 25 Comp. Gen. 601 (1946); 20 Comp. Gen. 769 (1941). In our opinion, the absence of an effective date does not change the operative effect of true supplemental appropriations contained in the bill. These appropriations carry the effective date of the appropriations that they are intended to supplement. By their nature, supplemental appropriations merge with the original appropriation and, upon enactment, relate back to the first of the fiscal year.

Some of the appropriations made in this bill are probably not intended to supplement existing FY 1989 appropriations. It is difficult to determine whether the legislature intended certain appropriations to be supplementary. If it is possible to

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point to an existing FY 1989 appropriation for the same or similar purpose, it would be reasonable to consider the appropriation supplementary and thereby operative retrospectively to the beginning of the fiscal year. Other appropriations that are clearly not supplemental in nature should be implemented with caution before the constitutional effective date arrives. These appropriations take effect prospectively only and probably would be determined to relate back to obligations incurred after the beginning of FY 1990.

In an earlier opinion issued by this office, we concluded that the Department of Administration (DOA) has broad powers to allocate authority to expend an appropriation even before it is enacted. 1981 Inf. Op. Att'y Gen. (July 10; J-66-866-81). An appropriation is considered "enacted" when the governor signs it into law. AS 01.10.070(f)(4). General law, apart from appropriations acts, creates legal, and in some cases, strong moral obligations to perform governmental functions in ways that require the payment of money to others before appropriations take effect. In the earlier opinion, we advised that obligations may be incurred and money expended under an appropriation if the only condition to its taking effect is the passage of time. Id. We observed that the chaos resulting from the temporary closure of government was compelling enough to justify the obligation of appropriations even before enactment. This extraordinary approach avoided the irrational result of a nonfunctioning government while the governor reviewed the budget bill. We cautioned executive agencies to incur obligations only for those appropriations that would not conflict with intended vetoes.

The interpretation set out in the 1981 opinion would allow executive agencies to obligate appropriations before they take effect. Under a federal appropriations law rubric, this process is known as "advance obligation" of appropriations. The federal Antideficiency Act expressly forbids the advance obligation of appropriations. 31 U.S.C. 665(a). The state public finance code contains some of the provisions of the federal statute but does not go so far as to prohibit advance obligations. AS 37.05.170 provides that

No payment may be made and no obligation incurred against any fund unless the Department of Administration certifies that its records disclose that there is a sufficient unencumbered balance available in the fund and that an appropriation or expenditure authorization has been made for the purpose for which it is intended to incur the obligation.

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The foregoing provision requires DOA to determine that a sufficient appropriation was "passed" before an obligation may be incurred against it. Section 170 does not require that the appropriation be "enacted" or even take effect before DOA can allocate spending authority to the agency charged with the power to expend it. The section merely requires the department to certify that spending authority does not exceed appropriations. Section 170 may be construed to mean that a certification may be made based on an appropriation that has passed the legislature but has not been enacted. The legislature must be presumed to know the proper phraseology to use to restrict DOA's discretion. By failing to adopt a stricter standard, after our 1981 opinion was issued, it can be presumed that the legislature accepted our construction of sec. 170.

Before enactment, all appropriations in the bill should be conservatively obligated to avoid possible conflicts with the governor's veto power. Agencies should coordinate with the office of management and budget (OMB) before obligating appropriations that may be stricken or reduced. The power to make an advance obligation, particularly for an appropriation that does not expressly carry a fiscal year designation by either being designated "supplemental" or some other provision in the bill, should not be considered a routine procedure.

The extraordinary power to spend before an appropriation takes effect is based in part on the rule of necessity. That is, a sovereign state may, in the absence of appropriations, expend amounts to perform necessary functions mandated by statute or the state constitution. Our 1981 opinion cited above relies on the rule of necessity in part to support the authority to obligate appropriations contained in the general appropriations act before the bill took effect. To fall within the rule of necessity applied in our earlier opinion, advance obligations should be incurred only if immediate expenditure is necessary to protect the public interest. In making the determination of necessity, the courts will give great weight to determinations of the agencies charged with the implementation of the appropriation. 3 C. Sands, Sutherland Statutory Construction sec. 65.03 (4th ed. 1986 rev'd). These determinations must be made in writing and retained in the official records of the implementing agencies.

To summarize our analysis of the effective-date issue, there is strong precedent for remedying the absence of an effective date for the supplemental appropriations contained in the bill. They can be given retrospective application to the beginning of the current fiscal year. Care should be taken to assure that the governor's power of veto is not compromised. For other

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appropriations in the bill, there is authority in the form of an earlier opinion of this office that these appropriations can be obligated at least from the beginning of the fiscal year for which they are made. However, as an additional measure to assure the validity of an expenditure, any advance obligation incurred under those appropriations must be justified as necessary to protect the public interest.

Set out below is a review of specific provisions in the bill which merit special attention.

Page 2, line 23 -- Page 3, line 2: Section 1(b) and (c) of the bill are prime examples of the budget writer's continuing love affair with the concept of "program receipts." It appears that the intent of the legislature is to tie the appropriations for the increased cost of health care benefits to a return of reserves held by the insurer and amounts related to premium tax credits. The mention of premium tax credits causes some concern in that the legal fiction of program receipts seems to be very liberally applied to a new revenue source. It is possible to consider these provisions to be the equivalent of formulas to measure the amount appropriated from the general fund. This construction is preferred over one that considers the designation of "general fund program receipts" to be an admission that amounts attributable to a premium tax can be considered anything other than unrestricted revenue.

Page 7, lines 19 -- 23: Section 34 transfers \$28,000 from the Agriculture Reserve Loan Fund, and then appropriates that amount for repairs to utilities at the McKinley Meat and Sausage Plant. The plant is owned by the loan fund. This section raises the issue of whether the legislature can transfer amounts out of a revolving loan fund by appropriation. The Alaska Constitution limits the use of appropriation bills to appropriations of money. Alaska Const., art. II, sec. 13. It could be argued that a transfer may only be authorized by an amendment to the enabling Act for the loan fund. We believe that the legislature's plenary power of appropriation most likely will be found to extend to uncommitted amounts contained in statutory revolving loan funds.

Page 11, lines 6 - 26: Section 55 appears to be part supplemental appropriation and part FY 1990 appropriation. Section 55(c) states that the appropriation shall be allocated between FYs 1989 and 1990. This means that the appropriation may be obligated immediately as a supplemental. Additionally, the title of this bill announces that this appropriation is to be considered to supplement existing FY 1989 operating and capital appropriations.