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More Constitutional Problems for Gasline Contract

Administration promises to pay oil company losses

JUNEAU – Yet another constitutional flaw was uncovered in the governor's proposed natural gas pipeline contract. A series of constitutional deficiencies have been discovered since details of the contract were released.

Sen. Hollis French and Rep. Max Gruenberg (both D-Anchorage) pointed out the newest constitutional irregularities in Juneau today. Gruenberg and French, both lawyers, pointed out serious flaws with the indemnification language in the proposed contract -- language that requires Alaska to essentially insure the world's largest three oil producers against the normal risks of doing business.

The gasline contract calls for the State to indemnify the Producers against financial losses, in spite of the mandate of Article IX, section 13 of Alaska's constitution, which states that "[n]o money shall be withdrawn from the treasury except in accordance with appropriations made by law."

The contract provisions may operate without any legislative action, however. "The system set up by the contract amounts to back door payments of the Producer's bills," French said.

Moreover, the "promise-to-pay" provisions in the contract are in conflict with a 2005 Attorney General's Opinion, which sets out the general rule that "a state official may not enter into indemnification agreements."

The contract would indemnify the Producers against:

- Costs imposed by a gas reserves tax
- Costs incurred through the normal regulation process
- Penalties for a producer's failure to meet capacity obligations
- Additional costs imposed by municipalities on producers operating in their jurisdictions

"The problem with the contract is that it allows these payments to be made to the Producers without any legislative approval. These payments simply get set off against the oil taxes owed to the state. These payments could leave the State owing the Producers money at the end of each month," Gruenberg said.

A 2005 Attorney General's (#661-05-0132, August 23, 2005) outlines a far more stringent approach with respect to "promise-to-pay" agreements. According to that opinion, the general rule is that no indemnification may be done without a concurrent appropriation to cover the potential loss. In other words, the state must set aside money to pay for its promise.

The opinion states that "To find otherwise could create a financial obligation of the state without legislative approval in contravention of article IX, section 13."

If no appropriation is made, then the opinion requires that the promise be qualified, and it must be done according to a precise set of words that clearly state that

(1) There is no appropriation currently available to indemnify the other party,
(2) That enactment of an appropriation in the future to fund a payment remains in the sole discretion of the legislature, and
(3) That "the Legislature's failure to make such an appropriation creates no further liability or obligation."

The language in the contract is contrary to this opinion, according to Legislative Counsel.

"It is unsettling that the Attorney General did not follow his own advice in the contract," French said. "The contract says the Legislature's failure to make an appropriation does not extinguish the obligation, which is directly the opposite of what is stated in the opinion."

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