Sean Parnell, Governor

DEPARTMENT OF LAW

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April 24, 2013

The Honorable Mead Treadwell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of SB 21 Referendum Application
A.G. File No. JU2013200274

Dear Lieutenant Governor Treadwell:

You asked us to review an application for a referendum to reject Senate Bill 21, passed during the legislative session that adjourned April 14, 2013. The Division of Elections designated the referendum as "13SB21."

Because the application complies with the constitutional and statutory provisions governing the referendum process, we recommend that you certify the application.

I. SUMMARY OF THE ACT TO BE REFERRED AND EFFECT OF REFERENDUM

A. Summary of Senate Bill 21

During the 2013 legislative session, the legislature passed HCS CSSB 21 (FIN) am H (SB 21), "An act relating to the interest rate applicable to certain amounts due for fees, taxes, and payments made and property delivered to the Department of Revenue; relating to appropriations from taxes paid under the Alaska Net Income Tax Act; providing a tax credit against the corporation income tax for qualified oil and gas service industry expenditures; relating to the oil and gas production tax rate; relating to gas used in the state; relating to monthly installment payments of the oil and gas production tax; relating to oil and gas production tax credits for certain losses and expenditures; relating to oil and gas production tax credit certificates; relating to nontransferable tax credits based on production; relating to the oil and gas tax credit fund; relating to annual statements by producers and explorers; establishing an Oil and Gas Competitiveness

Review Board; relating to the determination of annual oil and gas production tax value including adjustments based on a percentage of gross value at the point of production from certain leases or properties; and making conforming amendments."

The majority of the bill would amend Title 43, Chapter 55 of the Alaska Statutes—the oil and gas production tax and oil surcharge ("production tax"). In addition, the bill would amend the statutory interest rate for delinquent taxes and would enact a corporate income tax credit for qualified oil and gas service-industry expenditures. Last, the bill would establish an Oil and Gas Competitiveness Review Board in the Department of Revenue (DOR). Because the focus of the referendum is to reject SB 21 and "restore the previously applicable state oil taxation laws"[1] it is important to understand the laws amended by SB 21.

Under those laws, AS 43.55, the production tax, is levied annually on oil and gas producers based on the value of all oil and gas produced from leases or properties in the state. A producer first determines the gross value at the point of production of all oil and gas by subtracting the costs of transporting the product to market from the sales value. Then, lease expenditures are deducted from the gross value to determine the annual production tax value of the oil or gas.[2] Under current law, the tax is 25 percent of the annual production tax value plus a monthly "progressivity" tax, which applies only in months in which the producer's monthly average production tax value exceeds $30. The progressivity tax rate may not exceed 50 percent.

Tax credits are a key component of the production tax. A producer or explorer may be eligible for tax credits for exploration work, capital spending, carried-forward losses, or exploration or production in new areas. Tax credits can be taken directly against production tax liabilities or, for a producer or explorer without a production tax liability, may be redeemed as transferable tax credit certificates and sold, transferred, or redeemed for cash. Under AS 43.55.028, such credits are presented to DOR for purchase

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1 *See* 13SB21 Referendum Application.

2 AS 43.55.160 (determination of production tax value of oil and gas). This statute is amended in section 28 of SB 21.

through the oil and gas tax fund.[3] Other credits are nontransferable and may only be applied against a producer's production tax liability.

SB 21 maintains the basic structure of the current production tax but with several significant changes.

First, the base tax rate is increased from 25 percent to 35 percent. Also, the progressivity tax will not apply to oil and gas produced after December 31, 2013. Through a new provision, a producer may be able to reduce its gross value at the point of production for certain oil and gas produced north of 68 degrees North latitude (i.e., on the North Slope) by up to 30 percent through a "gross revenue exclusion."

SB 21 adds two new nontransferable tax credits to AS 43.55.024. One is a credit of $5 per taxable barrel of oil that qualifies for the gross revenue exclusion; the other is a sliding-scale credit for taxable oil that does not qualify for a gross revenue exclusion. Neither credit is transferable or redeemable for cash, nor may any unused portion be carried forward to a later calendar year.

SB 21 eliminates the 20-percent tax credit for qualified capital expenditures on the North Slope and amends the carried-forward loss credit. Current law allows a credit for 25 percent of a carried-forward loss, that is, the extent to which a producer's costs exceed its revenues in a calendar year. The bill retains the 25-percent loss credit for expenditures south of the North Slope, but increases the loss credit for expenditures incurred on the North Slope to 45 percent of a loss from January 1, 2014, to January 1, 2016. After January 1, 2016, the North Slope loss credit would be 35 percent.

SB 21 also extends the exploration tax credit under AS 43.55.025 for five years for certain exploration projects, and removes a qualifying requirement related to well distance for exploration wells drilled outside the Cook Inlet sedimentary basin and south of the North Slope. SB 21 also amends restrictions on transferable tax credit certificates to allow tax credit certificates based on North Slope expenditures to be issued as one (instead of two) certificates.

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[3] The oil and gas tax credit fund is not a dedicated fund and is managed by the Department of Revenue. *See* AS 43.55.028 (d), and (h). The legislature may make appropriations to the fund if the balance of the fund is insufficient to purchase transferable tax credits.

SB 21 also makes changes not directly related to the production tax. The bill lowers the interest rate on delinquent taxes to three percent above the applicable federal rate. Under current law, a delinquent tax bears interest at five percent above the applicable federal rate, or 11 percent, whichever is greater.

SB 21 also adds a credit to the Alaska Net Income Tax Act (AS 43.20) for expenditures related to oil and gas service-industry expenditures. The credit may not exceed $10 million in a calendar year, and applies only against a taxpayer's corporate income tax liability. The credit may not be transferred or redeemed for cash, and any unused portion may be carried forward for five years.

Finally, SB 21 establishes an Oil and Gas Competitiveness Review Board in the DOR tasked with reviewing the state investment climate and fiscal systems.

SB 21 does not have an alternate effective date, and so will become law 90 days after the governor's signature.[4] Most of the bill's substantive changes take effect on or after January 1, 2014, except for sections related to transferable tax credits, which apply retroactively to January 1, 2013.

B. Effect of Referendum

If the sponsors successfully complete the application and petition process, this referendum would appear on the ballot for the August 2014 statewide primary election.[5] If the voters reject SB 21, the law becomes void 30 days after the election result is certified,[6] and certification usually occurs a few weeks after the election.

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4 *See* AS 01.10.070(a).

5 Under article XI, section 5 of the Alaska Constitution, a referendum appears "on the ballot for the first statewide election held more than one hundred eighty days after adjournment" of the legislative session at which the act referred was passed. *See also* AS 15.45.420 (a referendum is placed "on the election ballot for the first statewide general, special, or primary election held more than 180 days after adjournment of the legislative session at which the act was passed"). 13SB21 would appear on the August 2014 primary election ballot, absent an intervening special election that meets the 180 day requirement.

6 Alaska Const. art. XI, § 6; AS 15.45.440.

II. ANALYSIS

A. The Framework for Use of the Referendum

Article XI, section 1 of the Alaska Constitution provides that "[t]he people may … approve or reject acts of the legislature by referendum." Under article XI, section 2, a referendum

> is proposed by an application containing . . . the act to be referred. The application shall be signed by not less than one hundred qualified voters as sponsors, and shall be filed with the lieutenant governor. If he finds it in proper form he shall so certify. Denial of certification shall be subject to judicial review.

The constitution also imposes certain restrictions on the use of the referendum. Specifically, "[t]he referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety."[7]

Under AS 15.45.330, the lieutenant governor must review an application for a proposed referendum and within seven calendar days of receipt either "certify it or notify the referendum committee of the grounds for denial." 13SB21 was filed on April 18, 2013. The seventh calendar day after the filing date is April 25, 2013. Under AS 15.45.310, certification shall be denied if: "the application is not substantially in the required form;" "there is an insufficient number of qualified sponsors;" or "more than 90 days have expired since the adjournment of the legislative session at which the act being referred was passed."[8]

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[7] Alaska Const. art. XI, § 7.

[8] Arguably, 13SB21 is premature because the law has not yet been signed by the governor and therefore is not an "act" subject to referendum. However, we believe the better view is that the application is timely. Article XI, section 5 of the Alaska Constitution provides that "[a]referendum petition may be filed only within ninety days after adjournment of the legislative session at which the act was passed." Though SB 21 was passed during the legislative session that adjourned April 14, 2013, to date, SB 21 has not been transmitted to the governor for action. There is no express deadline in the Alaska Constitution for transmitting a bill to the governor for action. And after SB 21 is transmitted, the governor will have 20 days, Sundays excepted, to act on the bill or it

In evaluating a referendum application, you must determine whether the application is in its "proper form."[9] The form of a proposed referendum is prescribed by AS 15.45.270, which requires four things:

> (1) the act to be referred; (2) a statement of approval or rejection; (3) the printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the act to be referred and the statement of approval or rejection attached; and (4) the designation of a referendum committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the referendum; the designation must include the name, mailing address, and signature of each committee member.

However, as noted above, the referendum may "not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety."[10] Therefore you must determine not only whether the application complies with the technical legal requirements governing the referendum, but whether the referendum is being applied to any prohibited subjects and therefore should not reach the ballot.[11]

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becomes law without the governor's signature. Alaska Const. art. II, § 17. Thus, the 90-day deadline for filing a referendum petition could expire before SB 21 is transmitted and the governor's 20-day period for acting on the bill expires. The constitutional framers likely did not intend to allow such a delay to insulate a law from review by referendum.

9 Alaska Const. art. XI, § 2.

10 Alaska Const. art. XI, § 7; AS 15.45.250.

11 *See, e.g.*, *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n. 7 (Alaska 1988) (citing *Boucher v. Engstrom*, 528 P.2d 456, 460-61 (Alaska 1974), *overruled on other grounds by McAlpine*, 762 P.2d at 85. Unlike initiatives, referenda are uncommon in Alaska, particularly at the state level. Accordingly, there is limited controlling case law in this area. However, the Alaska Supreme Court clearly treats the certification process for referenda and initiatives similarly and discusses them together with no obvious distinction between the two. The minutes of the Alaska Constitutional Convention also indicate that the two concepts were fully intertwined and were effectively two sides of the same coin. *See* Proceedings of Alaska Constitutional Convention (Dec. 16, 1955). We

B. The 13SB21 Referendum Application & the Constitutionality of SB 21

We conclude that 13SB21 should be certified for two reasons. First, the referendum application is technically sufficient. Second, the referendum is not being applied to a clearly prohibited subject.

Specifically, the application meets the first, second, and fourth technical legal requirements: it contains the act to be referred, a statement of rejection, and a designated referendum committee of three members. The application is also timely, because fewer than 90 days have expired since the adjournment of the legislative session at which SB 21 was passed.[12] We understand that the Division of Elections has confirmed that the signature threshold mandated by the third requirement is met.

As noted above, you must also determine whether the referendum is being applied to any prohibited subject.[13] In so doing, you must bear in mind the Alaska Supreme Court's mandate: "[i]n matters of initiative and referendum . . . the people are exercising a power reserved to them by the constitution and the laws of the state, and . . . the constitutional and statutory provisions under which they proceed should be liberally construed."[14] While liberal access to the initiative and referendum process is required, the restrictions on that process are nevertheless important conditions requiring strict compliance.[15]

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therefore conclude that similar standards govern. *See, e.g., Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1217 (Alaska 1993) (evaluating certification of a municipal referendum petition under same standards as initiative petitions and citing *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273 (Alaska 1982), an initiative case). *See also Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 729 (Alaska 2010); *Sitkans for Responsible Gov't v. City & Borough of Sitka*, 274 P.3d 486, 493 (Alaska 2012).

[12] *See* note 8, *supra*.

[13] *See, e.g., Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 991 (Alaska 2004).

[14] *Planned Parenthood*, 232 P.3d at 729 (internal citations and quotations omitted).

[15] *Citizens for Tort Reform v. McAlpine*, 810 P.2d 162, 168 n.14 (Alaska 1991).

In the case of a referendum, we must look to the act being referred to see whether any restriction is implicated.

Again, the referendum "shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety."[16] We address each restriction in turn.

1. Dedication of Revenue

SB 21 does not dedicate funds. SB 21 does not impose restrictions on how proceeds of any state tax or license may be spent. In fact, article IX, section 7 of the Alaska Constitution prohibits the legislature from dedicating "[t]he proceeds of any state tax or license . . . to any special purpose," subject to limited exceptions that do not apply here.

2. Appropriations

Because SB 21 does not set aside a specified amount of funds or property in a manner that can be effectuated without further legislative appropriation, it does not clearly make an appropriation.[17] SB 21 amends substantive law by altering the tax

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[16] Alaska Const. art. XI, § 7. *See also* AS 15.45.250.

[17] The Alaska Supreme Court applies a two-part analysis to determine whether an initiative violates the article XI appropriations restriction. *See Alliance of Concerned Taxpayers v. Kenai Peninsula Borough*, 273 P.3d 1128, 1136-37 (Alaska 2012). First, the court determines whether the initiative deals with a public asset. Second, the court determines whether the "two core objectives" of the restriction are implicated: The first core objective is to prevent "give-away programs that appeal to the self-interest of voters and endanger the state treasury by allowing rash, discriminatory, and irresponsible appropriations"; and the second is to preserve "legislative discretion by ensuring that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs." *Id.* at 1137 (citing *Anchorage Citizens for Taxi Reform*, 151 P.3d 418, 423 (Alaska 2006)) (internal quotations omitted, emphasis in original). The court has held that these restrictions "prohibit an initiative whose primary object is to require the outflow of state assets" in the form of either land or money. *See Thomas v. Bailey*, 595 P.2d 1, 7 (Alaska 1979). A key element in determining whether an initiative makes an appropriation is whether the initiative bill would "designate the use of state

structure for the oil and gas production tax. Under SB 21 as well as under current law, taxpayers may request that the Department of Revenue redeem transferable tax credit certificates for cash. But the funds necessary to redeem such certificates are contingent on additional legislative action.

While the purposes of the restrictions on referenda theoretically could accommodate a broader interpretation of the term "appropriation," no Alaska court has addressed this issue and therefore no basis currently exists to deny certification for that reason. Thus, we conclude that under existing case law, 13SB21 would not clearly repeal an appropriation.

3. Local or Special Legislation

SB 21 is not local or special legislation. A local or special act is one that is not reasonably related to a matter of common interest to the whole state.[18] There is no argument that SB 21 is unrelated to matters of common interest to the entire state.

4. Emergency Act

While SB 21 is arguably important to Alaska's future, nothing suggests that it is necessary for the *immediate* preservation of the public peace, health, or safety.

Because the 13SB21 application satisfies the requirements of AS 15.45.270 and is not being applied to a prohibited subject, it should be certified.

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assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action." *See McAlpine,* 762 P.2d at 91. The court considers whether the initiative sets aside specific sums of money for a specific purpose that is "ascertainable" and "definite," as opposed to being "ancillary," "incidental," or "redundant." *Id.* at 89-90. Initiatives that would "merely create new government programs or liabilities do not constitute appropriations." *Id.* at 90.

[18] *See, e.g., Abrams v. State,* 534 P.2d 91, 94 (Alaska 1975).

III. PROPOSED BALLOT TITLE AND PROPOSITION SUMMARY

We prepared a ballot-ready proposition summary and title for your consideration to assist you in compliance with AS 15.45.320(a)(5) and AS 15.45.410.

Under AS 15.45.410(a), the ballot title "shall, in not more than 25 words, indicate the general subject area of the act." The proposition "shall, in not more than 50 words for each section, give a true and impartial summary of the act being referred." The word "section" in AS 15.45.410(a) is defined as "each section of the Alaska Statutes created, amended, or repealed in the Act, and each section of the Act that does not create or amend codified law."

SB 21 has 38 sections. Therefore, the summary may not exceed 1,900 words. We used 996 words in the summary and 18 words in the title of the following proposed ballot language, which we submit for your review:

Ballot Measure No. ___: Referendum

An Act Relating to the Oil and Gas Production Tax, Interest Rates on Overdue Taxes, and Tax Credits

Voters are asked to approve or reject a law amending provisions of Title 43 of the Alaska Statutes governing the oil and gas production tax and oil surcharge (collectively, "production tax") and the statutory interest rate for delinquent taxes. The law provides a corporate income tax credit for qualified oil and gas service-industry expenditures and establishes an Oil and Gas Competitiveness Review Board in the Department of Revenue.

The law makes several changes to the production tax. For oil and gas produced after January 1, 2014, the law increases the base tax rate on the annual production tax value of oil and gas produced from leases or properties in the state from 25 percent to 35 percent. The law eliminates the "progressivity tax," which applies only in a month in which a producer's average monthly production tax value exceeds $30.

The law provides that qualified oil and gas produced from leases or properties on the North Slope would be eligible for a 20-percent reduction (called a "gross revenue exclusion") in the gross value at the point of production. The gross revenue exclusion applies only to oil and gas produced from a lease that was not in a unit on January 1,

2003, from a new participating area (reservoir), or from acreage added to an existing participating area.

The law provides for an additional 10-percent gross revenue exclusion for oil and gas produced from a North Slope unit that consists solely of state leases for which the lessee (the producer of the oil and gas) is obligated to pay the state a royalty share (in money or in kind) that exceeds 12.5 percent of the value of the oil or gas produced from the lease.

The law provides that North Slope tax credits may be used to permit a taxpayer to apply a credit against its tax, or receive a certificate, in a single calendar year (instead of allowing only half the credit to be applied in a single calendar year).

The law adds two new tax credits for North Slope producers of oil and gas that may be applied against the producer's production taxes. Neither credit is transferable or redeemable for cash, nor may any unused portion be carried forward to a later calendar year. The first is a credit of $5 per barrel of taxable oil that qualifies for the gross revenue exclusion. The second is a sliding-scale credit for each barrel of North Slope taxable oil that does not qualify for a gross revenue exclusion. The sliding-scale credit varies, and is based on $10 increments of the gross value at the point of production. It ranges from $8 a barrel in a month in which the average gross value at the point of production is less than $80 a barrel to $0 a barrel when the average gross value at the point of production equals or exceeds $150 a barrel. At a gross value between $100 and $110 per barrel, the credit would be $5 per barrel.

The law eliminates the 20-percent tax credit for qualified capital expenditures on the North Slope after January 1, 2014.

The law amends the carried-forward credit for losses incurred to explore, develop, or produce North Slope oil and gas by increasing the loss credit to 45 percent of a loss from January 1, 2014, to January 1, 2016. After January 1, 2016, the North Slope loss credit would be 35 percent. The law does not change the 25-percent loss credit for expenditures incurred south of the North Slope.

The law also extends the exploration tax credit under AS 43.55.025 for five years for certain exploration projects, and removes a qualifying requirement related to well distance for exploration wells drilled outside the Cook Inlet sedimentary basin and south of the North Slope.

The law amends the tax limitation on gas used in the state so it would not apply to gas first produced after December 31, 2012, and before January 1, 2027, from leases outside the Cook Inlet sedimentary basin and south of the North Slope.

The law also lowers the interest rate that applies to overdue taxes from five percent above the applicable federal rate, or 11 percent, whichever is greater, to three percent above the applicable federal rate.

The law substitutes the Alaska Net Income Tax Act for the progressivity tax as a suggested funding source for the legislature to consider when appropriating funds to the Community Revenue Sharing Fund.

The law adds a credit to the Alaska Net Income Tax Act for expenditures related to the oil and gas service industry. Expenditures that can qualify for credit include manufacturing or modifying tangible personal property in Alaska if that property will be used in the exploration, development, or production of oil and gas. The credit may not exceed $10 million in a calendar year, and applies only against a taxpayer's corporate income tax liability. The credit may not be transferred or redeemed for cash, and any unused portion may be carried forward for five years. An expenditure that is the basis for this credit may not be used as a deduction from the taxpayer's income tax, a credit or deduction under another provision in Title 43, or for any federal tax credit that a taxpayer may take under Alaska law.

The law establishes an Oil and Gas Competitiveness Review Board in the Department of Revenue. The Board's duties include considering fiscal policies and levels of investment relating to oil and gas exploration, development, and production in the state and reviewing the state's competitive position to attract and maintain investment in the oil and gas sector in the state. The Board is required to make reports to the legislature in 2015 and 2021. Under the law, the Board would exist until February 28, 2021.

Most of the law would take effect on or after January 1, 2014, except for sections related to transferable tax credits. Those sections would apply retroactively to January 1, 2013.

A yes vote rejects the law. A no vote approves the law.

SHOULD THIS LAW BE REJECTED? Yes or No.

This summary has a Flesch test score of 36.1. Although this figure falls short of the target readability score of 60 set out in AS 15.80.005,[19] the intricacies of SB 21 and the use of complex terms such as "progressivity tax" and "gross revenue exclusion" make it difficult to provide a summary with a higher readability score. We note that this office has previously recommended a proposed ballot summary with a Flesch test score of 33.8 for a complicated ballot initiative, and that summary was upheld verbatim by the Alaska Supreme Court.[20] We therefore believe a court would uphold this summary as well.

IV. CONCLUSION

For the foregoing reasons, we find that the 13SB21 application is in the proper form and complies with the constitutional and statutory provisions governing use of the referendum. We therefore recommend that you certify the referendum application and notify the referendum committee of your decision. You may then begin to prepare petitions in accordance with AS 15.45.320.

Please contact me if we can be of further assistance in this matter.

Sincerely,

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By:

Elizabeth M. Bakalar
Assistant Attorney General

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19 And as directed by AS 15.45.410(b).

20 *See* 2007 Op. Alaska Att'y Gen. (Oct. 17); *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1082-84 (Alaska 2009).