November 26, 2008

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of Initiative Application on
Taxation of Leases of Gas Resources (08GRTI)
A.G.O. file no. 663-09-0038

Dear Lieutenant Governor Parnell:

You have asked us to review an application for an initiative petition entitled "An Act levying a tax on certain gas reserves; providing for a conditional repeal of the tax on certain gas reserves; relating to a credit against the oil and gas production tax attributable to the production of gas; relating to expenses that are not lease expenditures for the purpose of the oil and gas production; and providing for an effective date." We have completed our review and find that the application complies with the constitutional and statutory provisions governing the use of the initiative, and therefore recommend that you certify the application.

I. SUMMARY OF THE PROPOSED BILL AND ANALYSIS

A. BRIEF SUMMARY AND BACKGROUND

The provisions of this initiative are aimed at encouraging development of large deposits of gas reserves. The initiative would tax some confirmed below-ground reserves of natural gas unless the producers committed to sell the gas through a yet-to-be-built pipeline to North American markets, such as the "AGIA" pipeline, or a similar pipeline. One commentator has indicated that "the proposed measure is an effort to force the three companies that hold most of the gas that would be taxed to commit the product for sale through one of two pipeline construction projects."[1]

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[1] *See State Tax News and Analysis,* "Lawmakers File Petition to Tax Natural Gas Reserves," (Bob Tkacz, Juneau, Oct. 6, 2008).

This initiative petition is similar to an initiative petition submitted in 2005, "05GAS2," which appeared on the 2006 General Election ballot ("2006 initiative"). Some of the same prime sponsors of 05GAS2 are also members of the initiative committee for the current initiative.[2] We reviewed the earlier initiative application and recommended that you certify that application in 2005 Inf. Op. Att'y Gen. (Aug. 29, 2005).[3] Also in 2005, we reviewed and recommended certification of a similar predecessor initiative, "05GAST," in 2005 Inf. Op. Att'y Gen. (Aug. 1; 663-05-0213).[4] For background, we refer you to these earlier review memoranda.

B. SECTIONAL SUMMARY

The bill proposed by this initiative application is seven pages long, and is divided into ten sections. Section 1 sets out the short title of the bill. Section 2 creates the new tax with the addition of new sections to Title 43, Revenue and Taxation, AS 43.58.210 – AS 43.58.900. Section 3 adds a new section, AS 43.55.027, to the oil and gas production tax statute. Section 4 amends AS 42.55.165, lease expenditures. Sections 5 and 6 are contingent repealing clauses. Section 7 adds an "escrow provision" to the uncodified law. Section 8 adds a new section to the uncodified law authorizing lessee surrender of leases. Section 9 adds a severability clause to the uncodified law. Section 10 adds "notice of date of first flow of gas" to the uncodified law.

The bill is summarized in more detail below, with some highlights of potential problems that may arise in implementing certain provisions of the bill.[5]

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[2] Current initiative sponsors Representatives Harry Crawford and David Guttenberg also sponsored 05GAS2 and 05GAST.

[3] The prior initiative, 05GAS2, appeared on the November 7, 2006, general election ballot, and failed to pass by a vote of 80,909 in favor and 152,889 against.

[4] After you certified this application, the sponsors withdrew their application for 05GAST.

[5] Staff from the Oil, Gas and Mining section of our office provided assistance in preparing this review, including the summary of the bill to be enacted, the sectional summary, and the proposed ballot summary for the bill.

Section 1.

Short title, "Alaska Gasline Now! Act."

Section 2.

AS 43.58.210. Levies an annual tax of three cents per thousand cubic feet of natural gas on "taxable gas." The initiative is not explicit as to whom the tax is levied against, however it appears from other provisions of the bill that the drafters intended to make "the person holding the right to produce gas from the lease or property" liable to pay the new tax.[6] (*See e.g.*, proposed AS 43.58.220(b)(6)).

AS 43.58.220(a). Taxable gas is gas that, on January 1 of the tax year, is within a lease or property that is within a unit that contains one trillion cubic feet (TCF) of gas or more, and is within a lease or property that has been in continual existence since January 1, 1990. This section raises several questions, including whether taxable gas is limited to recoverable gas or gas that is recoverable but marginally economic, and the application of the tax to a joint state/OCS unit.

AS 43.58.220(b). Describes gas that is not subject to the new tax:

(b)(1) – Nonconventional gas;

(b)(2) – Gas that does not contain hydrocarbons (e.g., carbon dioxide);

(b)(3) – Gas that, within seven years after January 1 of the tax year, will be consumed as fuel in the unit in which it is located, or is gas liquids to be blended with oil and shipped to market in the oil pipeline. There are serious implementation problems with this section, such as whether it is practicable to require payment of a tax without knowing until seven years later whether such liability actually existed;

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[6] The 2006 initiative specified that the new tax applied to "leases having taxable gas" and that the tax was to be paid by the lessee. The current initiative, however, does not specify who pays. This ambiguity might cause problems for DOR because lessees could argue that they owe no tax because they do not own the reserves. The question of ownership of reserves has not been addressed by the Alaska courts, but, a number of other states consider an oil and gas lease to be in the nature of a "profit a prendre," which allows the lessee to extract oil and gas from the property but does not constitute present ownership of resources in the ground. If the lessees do not own the gas, presumably the owner is the lessor, which in most cases is the State of Alaska. The initiative proponents clearly did not contemplate the state taxing itself.

(b)(4) – The state's royalty share of gas;

(b)(5) – Gas that was first discovered after December 31, 2005. The Department of Revenue (DOR) may have difficulty implementing this section because the term "discovered" is not explained. For example, if a gas-containing pool was discovered before 2005, but its extent was not delineated until after 2005,[7] is all of the gas in the pool considered to have been discovered before 2005, or only that portion thought to exist based on the initial discovery;

(b)(6) – Gas that is within a North Slope lease or property and the gas producer (or a person who has purchased gas to be produced) demonstrates to the commissioner's satisfaction that the person has committed to acquiring firm transportation capacity in a binding open season on (A) a pipeline project authorized under an Alaska Gasline Inducement Act (AGIA) license; (B) a pipeline from the North Slope to market that is developed by a person that has made the same commitments as those required by AGIA, (this provision raises a potential conflict with AGIA licensee project assurances under AS 43.90.440); or (C) a pipeline designed to accommodate throughput of no more than five hundred million cubic feet a day. This subsection is the cornerstone of the initiative, and sets out the goal of the measure, which is to get gas flowing to market through a major pipeline.

AS 43.58.220(c). Establishes the volume of gas exempt from the tax under subsection (b)(6).

AS 43.58.220(d). Definitions for this section ("nonconventional gas," "North Slope," "open season," and "right to produce gas").

AS 43.58.230(a). Establishes that DOR shall determine the volume of taxable gas on the date the Act becomes effective "after consultation" with the Department of Natural Resources (DNR) and the Alaska Oil and Gas Conservation Commission (AOGCC). In making this determination, DOR is supposed to rely on the estimate of gas reserves in the DNR Division of Oil and Gas 2006 Annual Report, "absent clear and convincing evidence to the contrary." DOR does not know what "after consultation" means. For example, if DOR rejects DNR and the AOGCC's advice, is there is an argument that DOR's determination is an abuse of discretion? Further, the first sentence in the section

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[7] A field may be discovered, and it's extent unknown, until engineering and drilling of exploratory wells delineating the extent of the field. This section sets up a tension between the producers and the taxing authority where the producers will want to claim a greater amount of gas was discovered after December 1, 2005, and the taxing authority will claim that more of the gas was discovered before this date.

allows DOR to make the determination and requires only consultation with DNR and the AOGCC, but the last sentence requires DOR to rely on DNR's 2006 Annual Report. It is not clear why DOR must rely on the 2006 report, rather than on DNR's most up-to-date annual report. In addition, the last sentence in the section appears incomplete. The sentence provides that DOR is to rely upon the annual report "absent clear and convincing evidence to the contrary." DOR does not know whether "to the contrary" refers to the accuracy of the 2006 report itself or to the applicability of the 2006 report if, for example, new reserve estimates have made the 2006 report outdated.

AS 43.58.230(b). For a unit where each person with an interest in a lease or property in that unit has agreed to a formula(s) for the allocation of hydrocarbons, DOR is directed to use that formula(s) in allocating taxable gas among each holder of interest for the purpose of assessing and collecting the new tax. DOR may have problems implementing this provision if the lessees have agreed to different formulas for allocation of oil and gas.

AS 43.48.230(c). Establishes the allocation of taxable gas for a unit in which all persons having an interest in the lease or property have not agreed to a formula for the allocation of hydrocarbons. In that case, DOR may allocate taxable gas in any manner it considers reasonable. This includes a means of allocation that takes into consideration one or more of:

> (1) An agreement between the department and all persons holding an interest in leases or properties in the unit regarding the allocation of taxable gas;
> (2) The amount of gas initially determined within a lease or property and the amount of gas remaining;
> (3) The amount of recoverable gas reserves or resources within the lease or property; or
> (4) The surface acreage of the lease or property.

AS 43.58.230(d). Allows DOR to delegate to DNR and AOGCC the authority to determine the allocation of taxable gas under subsection (c) in order "[t]o facilitate the use of confidential information available" to the two agencies. If there is a protest of an allocation decision, DNR and AOGCC are required to assist DOR in determining the proper allocation for tax purposes. This appears to give DOR the authority to order DNR and AOGCC to assist DOR; but it is not clear what form of assistance DNR and the AOGCC must provide.

AS 43.58.240. Sets out the process for filing taxpayer returns and payment of the tax. These tax returns are not like residential real property taxes, where the government

sends the taxpayer an assessment in advance of payment of the tax. Instead, the tax is more like federal personal income taxes, where the taxpayer calculates the tax to be paid, pays the tax to the government, and may be audited and assessed additional taxes due or to be refunded. For these gas reserves taxes, the taxpayer will file a return, DOR will review the return, DOR may conduct an audit, and the audit can trigger an assessment. AS 42.58.240 includes the following subsections:

(a) Requires a return setting out the location and volume of taxable gas existing on January 1 of the tax year. However, the section does not notify the taxpayer of the level of detail required in a tax return. For example, does the return need to be backed up by a petroleum engineer's report or can the lessee simply state its best guess of the location and volume of gas? The DOR hopes it can clarify this requirement in the regulations adopted to implement this section.

(b) With the written approval of DOR, a unit operator may submit returns or pay the tax on behalf of each person with an interest in the unit.

(c) The annual tax is payable to DOR on or before June 30 of each year or in installments at the times and under the condition that DOR may establish by regulation.

(d) Under the direction of or with the approval of DOR, a person may file a single return for all of the person's leases or properties within a unit and may pay the tax in a single payment.

(e) DOR may, by written notice, require a person filing a return to submit additional information "relating to the assessment of the tax" within 30 days after providing notice to the person. As explained above, there is no assessment when a return is filed. Assessments are issued by DOR if DOR audits a taxpayer and finds additional taxes or a refund is owed. Therefore, DOR is not certain what this subsection means, and interprets it to apply to the audit phase of the taxation process.

AS 43.58.250. Directs DOR to adopt regulations relating to making and filing returns and paying the tax and that are otherwise necessary for enforcement of the initiative. Through the regulations, DOR is required to address:

(1) The annual preparation of the tax roll of property that includes each lease or property with taxable gas. However, DOR does not prepare "tax rolls" for this type of tax. This tax is not a property tax where a tax roll would ordinarily be part of the taxation process. Therefore, DOR does not understand the use of the term "tax roll" in

this section. If this section means that DOR is supposed to prepare a list of taxpayers who file returns, DOR can do that.

(2) The means for providing notice to operators and persons having an interest in a lease or property having taxable gas of the volume of taxable gas for each lease or property. DOR does not understand what this notice is supposed to include. Producers are supposed to self-identify the volume of taxable gas in their tax returns. (*See e.g.*, proposed 43.58.240(a)). Subsection (2) apparently requires DOR to also identify the volume of taxable gas, while not explaining how the producers would use this information.

(3) The procedure by which a person aggrieved by an action of the department may appeal that action and obtain a hearing. This initiative imposes a number of duties on DOR, including the duty to determine whether a person has made firm commitments to transport gas on a pipeline (*see e.g.*, proposed AS 43.58.220(b)(6)) and the duty to determine the amount of taxable gas in each state-approved oil and gas unit (AS 43.58.230(a)). It appears that the sponsors intend those determinations, in the absence of an assessment, to be appealable. Although DOR already has a number of detailed appeal procedures relating to assessments, these regulations propose an additional appeal procedure specific to DOR's determinations that are not assessments. These proposed regulations would be in addition to existing regulations, 15 AAC 05.001 – 15 AAC 05.050, which already set out DOR's appeal and hearing procedures for appeals of tax assessments under AS 43 (other than property tax assessments under AS 43.56), and AS 43.05.240, AS 43.05.241, and AS 43.05.405 – AS 43.05.499, which already establish appeal and hearing procedures for challenges to DOR's actions "fixing the amount of a tax."

(4) Preparation of the final taxation roll and a supplemental tax roll to be certified using the procedures applicable to the preparation of the original tax roll. As explained above, DOR does not use tax rolls for these types of taxes. Therefore, DOR has the same questions here as in relation to subsection (1) above, with the additional question of what is meant by a "supplemental tax roll."

AS 43.58.900. Definitions.

Section 3.

AS 43.55.027. Adds a new section to the oil and gas production tax that authorizes an annual tax credit against 20 percent of a producer's oil or gas severance taxes until the producer recovers the full amount of any reserve taxes paid. The credit is available "after

the date the first flow of gas in a pipeline transporting North Slope gas to market with a minimum delivery capacity of 2,000,000,000 cubic feet a day generates revenue to its owners." The credit may be claimed "only against 20 percent of the net amount of tax due under this chapter." The net amount of tax due is determined after the application of all credits applicable under the production tax, other that the credit authorized by this section.

The DOR has questions about whether the credit is intended to be available only against the production tax on gas that was subject to the reserves tax before it was produced, or against the total production tax for oil and gas produced by a producer whose production includes any amount of gas that was subject to the reserves tax before it was produced. DOR is also uncertain on how to determine the amount of the tax if the credit is limited to the production tax on gas, or on same gas (i.e., gas subject to the reserves tax) because the production tax is generally not calculated separately for oil and gas, except for Cook Inlet production and gas used in the state that is subject to the tax ceiling under AS 43.55.011(o).[8]

DOR interprets "first flow of gas in a pipeline," set out in proposed AS 43.55.027(b), as the first flow of any producer's gas, not the first flow of the gas generated by the producer requesting the tax credit. In relation to the phrase "generates revenue to its owners," DOR has questions on how it will determine that revenue is being "generated," and whether "owners" refers to the owners of the pipeline or the owners of the gas.

Section 4.

AS 43.55.165(e)(14). The initiative amends the list of lease expenditures that a producer is not allowed to deduct from production taxes owed, to include the gas reserves tax paid under the initiative. The effect of this amendment is that a taxpayer may not deduct the reserves tax paid under the initiative from production taxes owed. In addition to imposition of the new gas reserves tax, this section making the reserves tax non-deductable, is another incentive to producers to develop the large gas reserves.

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8 Alaska Statute 43.55.011(o), on the oil and gas production tax, provides:

> Notwithstanding other provisions of this section, for a calendar year before 2022, the tax levied under (e) of this section for each 1,000 cubic feet of gas for gas produced from a lease property outside the Cook Inlet sedimentary basin and used in the state may not exceed the amount of tax for each 1,000 cubic feet of gas that is determined under (j)(2) of this section.

Section 5.

This section repeals the reserves tax created by this initiative "on the date on which the first flow of gas in a pipeline transporting North Slope gas to market with a minimum delivery capacity of 2,000,000,000 billion cubic feet a day generates revenue to its owners." DOR has the same questions on how to implement the section as previously discussed under AS 43.58.210 and AS 43.55.027, above. That is, how does DOR determine who are the "owners" referenced, and how will DOR determine that revenues are being generated? We assume that the repeal is not retroactive. If, for example, where a taxpayer did not make a commitment to a gas pipeline or did not consume the gas on site, and the gas held by another producer starts "flowing" in 2020, the first taxpayer still owes tax for 2012.

This section identifies an effective date (i.e., the date that there is the first flow of gas). However, to the extent that the initiative identifies an effective date, it cannot be sooner than the effective date set out in the Alaska Constitution.[9]

Section 6.

Repeals the changes made to AS 43.55.165(e)(14) under this Act when the contingency described in Section 5 of this Act occurs (first flow of gas in major pipeline).

Section 7.

Adds an "escrow" provision to the un-codified law. Under this provision, a taxpayer is required to place into an escrow account the amount of disputed taxes levied under AS 43.58. The escrow account will be in a financial institution approved by DOR. The provision provides that, "[u]pon final resolution of the dispute, the amount in escrow, if any, owing to the department, together with culminated interest, shall be paid to the department and may be appropriated for any legal purpose."

There appears to be a typographical error in the last sentence of the provision – "culminated interest" should probably be "cumulated interest."

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[9] *See* Alaska Const. art. XI, § 6 ("[a]n initiated law becomes effective ninety days after certification").

Section 8.

Provided certain conditions are met, this section authorizes a lessee to surrender a lease to DNR to avoid the tax liability created by the Act.

Section 9.

Severability clause.

Section 10.

Adds a new section to the uncodified law directing the DNR commissioner, as soon as practicable after the first flow of gas described in Section 5, to certify to the DOR commissioner and the reviser of statutes the date on which the first flow of gas occurs.

C. ANALYSIS

Under AS 15.45.070, within 60 calendar days after the date the application is received, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial." From your transmittal documents we understand that you received the completed application on September 30, 2008. Therefore, your certification decision is due on December 1, 2008.[10] The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080.

1. The Form of the Application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the (1) the proposed bill, (2) 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 proposed bill attached, and (3) designation of an initiative committee consisting of

[10] *See* October 1, 2008 memorandum from Lieutenant Governor Sean Parnell to Attorney General Talis Colberg, re: gas reserves tax initiative and amended receipt date.

> three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The application meets the first and third requirements. With respect to the second requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

2. The Form of the Proposed Bill

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects--dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation--are listed in AS 15.45.010 and in article XI, section 7 of the Alaska Constitution.[11]

The form of the bill to be enacted by this initiative satisfies the requirements of AS 15.45.040.[12] The bill is confined to a single subject, taxation of gas resources. The subject of the bill is expressed in the title of the bill, and the bill contains the required enacting clause language. Given the requirement that the "usual rule is to construe voter initiatives broadly so as to preserve them whenever possible," we conclude that the bill does not appear to clearly address a subject prohibited from initiative by the Alaska

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[11] Constitutional amendments are also a prohibited subject. *State v. Lewis,* 559 P.2d 630, 639 (Alaska 1977); *Starr v. Hagglund*, 374 P.2d 316, 317 n.2 (Alaska 1962).

[12] We also note that our office has advised the lieutenant governor in the past that there is no explicit prohibition on certification of initiative applications relating to taxation. *See* 1985 Inf. Op. Att'y Gen. (May 10; 663-85-401); 1992 Inf. Op. Att'y Gen. (Apr.2; 663-92-0447); 1994 Inf. Op. Att'y Gen. (Jul. 14; 663-94-0667); 1999 Inf. Op. Att'y Gen. (May 25; 663-99-0214); 1999 Inf. Op. Att'y Gen. (Jul. 6; 663-99-0260); 2001 Inf. Op. Att'y Gen. (May 2; (663-01-0156); 2003 Inf. Op. Att'y Gen. (Oct. 6; 663-03-0179). This initiative does not designate the use of state assets in a manner that is executable, mandatory, and reasonably definite, with no further legislative action, and therefore does not amount to an appropriation. *See McAlpine v. Univ. of Alaska,* 762 P.2d 81, 91 (Alaska 1988).

Constitution.[13] As noted in our earlier review memoranda, in the pre-election review of an initiative it is appropriate to consider the issue of whether the initiative proposes a prohibited subject under the Alaska Constitution, art. XI, sec. 7.[14]

The escrow provisions set out in section 7 in the current bill raises issues regarding the prohibited subjects of dedication of revenue, making an appropriation, and prescribing a court rule.[15] The initiative also implicates the constitutional budget reserve (CBR) provision of the Alaska Constitution.[16] These same questions were raised by the earlier gas tax initiatives, and addressed in our earlier review memorandum.[17] We summarize our previous advice on these questions as follows.

Our principle concern is that the escrow account authorized by section 7 would constitute a dedicated fund. The escrow provision set out at section 7 is identical to the

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[13] *See Pullen v. Ulmer,* 923 P.2d 54, 58 (Alaska 1996); *Yute Air Alaska, Inc. v. McAlpine,* 698 P.2d 1173, 1181 (Alaska 1985).

[14] *See Trust the People v. State,* 113 P.3d 613, 625-26 (Alaska 2005) (pre-election judicial review may extend only to subject matter restrictions that arise from a provision of Alaska law that expressly addresses and restricts Alaska's constitutionally-established initiative process); *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989, 993 (Alaska 2004) (proscriptions of article XI, section 7 of the Alaska Constitution are subject matter restrictions that provide grounds for pre-election review); *Brooks v. Wright,* 971 P.2d 1025, 1027 (Alaska 1999) (pre-election review is limited to ascertaining whether the initiative complies with the particular constitutional and statutory provisions regulating initiatives).

[15] The prohibition on initiatives for appropriations, dedicated funds, or court rules is set out in the Alaska Constitution, art. XI, sec. 7: "The initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts… or prescribe their rules…." The prohibition on dedicated funds is set out in the Alaska Constitution, art. IX, sec. 7: "The proceeds of any state tax or license shall not be dedicated to any special purpose."

[16] *See* Alaska Const. art. IX, § 17. Under this provision, "all money received by the State…as a result of the termination…of an administrative proceeding or of litigation…involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund."

[17] *See* 2005 Inf. Op. Att'y Gen., pp. 5-10 (Aug. 29; 663-06-0014).

escrow clause set out at section 5 of the 2006 initiative, except that it does not include the last few words "including construction of a state-owned-natural gas pipeline." This difference is not material for purposes of analyzing whether the current bill includes prohibited subjects. The escrow account can be viewed as having attributes of a dedicated fund because it reserves money for a specific purpose and segregates a potentially substantial amount of tax revenue from all other funds of the state. Disputes over taxes could last a long time, and during this time the money in escrow would be unavailable for use of other state purposes, outside the state's general fund and out of reach of the legislature. On the other hand, one can argue that the funds in the escrow account have not yet become the proceeds of a tax levy until after a determination is made on disputed taxes. Following a determination that the taxes are owed to the state, the money in the account would become state money available to the legislature for any state purpose.[18] There are arguments on both sides of this point, and we cannot say for certain that the escrow clause creates a dedicated fund. Therefore, we find that while the escrow clause may violate the dedicated fund prohibition, that conclusion is not so clear that we can recommend that you deny certification of this initiative application.

The escrow account is not an appropriation because it does not designate the use of state assets in a manner that is executable, mandatory, and reasonably definite with no further legislative action.[19] The account is a depository for disputed taxes pending resolution of the dispute. If the dispute is decided in the state's favor, the money becomes state revenue available for appropriation at that time. If the dispute is decided in the taxpayer's favor, the money would have to be refunded to the taxpayer even if it had

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[18] At first reading, the language of the escrow provision may seem to conflict with the requirement of the art. IX, sec. 17 of the Alaska Constitution, on the constitutional budget reserve fund, because it directs escrow funds to be paid to the Department of Revenue and provides that they may be appropriated "for any legal purpose." However, it is possible to reconcile this language with the constitutional CBR requirement. The DOR generally has the responsibility to collect and manage state funds and revenues, including revenues to be deposited in the CBR, *see* AS 37.10.430, AS 44.25.020(2), so the initiative's directive to pay escrow funds to the DOR should be interpreted as incorporating an implied directive for the DOR to deposit those funds in the CBR in accordance with art. IX, sec. 17. Similarly, the initiative's reference to appropriations for any legal purpose should be interpreted as providing for appropriation in accordance with the restrictions of art. IX, sec. 17, which include the three-fourths vote requirement. Therefore, we do not believe that the initiative violates the budget reserve fund provision of the Constitution.

[19] *See McAlpine v. Univ. of Alaska,* 762 P.2d 81, 91 (Alaska 1988).

initially been deposited in the general fund. Such refunds do not require an appropriation.[20]

Although the escrow provision would require a court to place disputed funds in an escrow account, this does not make the provision a court rule. The escrow provision does not conflict with an existing court rule, and establishment of an escrow account for disputed tax payments is not a matter of traditional judicial regulation.[21]

In another earlier opinion[22] we also earlier analyzed whether this type of initiative would constitute "local or special legislation," a prohibited subject for the initiative under the Alaska Constitution, art. XI, sec. 7.[23] Therefore, we also incorporate by reference our analysis of that point set out in our earlier opinion. As set out in that earlier review, we find that the bill proposed by the initiative does not appear to be local or special legislation because it is fairly and substantially related to legitimate state purposes.[24] The sponsors have indicated that the purpose of the bill is to encourage development of gas resources for the benefit of the people, addressing a matter of statewide concern.

There is also an issue with the title and effective date of the bill. While the title says the Act provided for an effective date, the initiative does not contain a specific effective date provision. The lack of an effective date is not a flaw in the initiative (though the title should be fixed). Under the Alaska Constitution, Article XI, section 6, an initiative that is passed by the voters becomes effective 90 days after the date that the lieutenant governor certifies the election returns approving the initiative.[25]

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20 AS 43.10.210 provides the DOR with authority to refund taxes if the taxpayer makes an overpayment.

21 The Alaska Rules of Court, Civil Rule 67 on deposits in court does not operate as an escrow account, and the escrow provision in this initiative establishes a separate and distinct procedure from this court rule.

22 *See* 2005 Inf. Op. Att'y Gen. at 7-8 (Aug. 1; 663-05-0213).

23 *See* Alaska Const. art. XI, § 7 ("[t]he initiative shall not be used to…enact local or special legislation").

24 *See Baxley v. State,* 958 P.2d 422, 430 (Alaska 1998).

25 *See also* AS 15.45.220.

There is another issue under existing AS 43.55.017(a), which provides that the state may not impose a tax on producing oil or gas leases.[26] Consequently, there is a question whether a reserves tax on gas in producing fields constitutes a tax on a producing oil or gas lease in contravention of AS 43.55.017(a). To the extent of any such inconsistency with AS 43.55.017(a), however, the initiative would probably be construed as an exception to the general limitation in AS 43.55.017(a).[27]

As you know, the lieutenant governor is obligated to ensure that a proposed initiative does not violate the restrictions of article XI, section 7 of the Alaska Constitution; however, the "usual rule is to construe voter initiatives broadly so as to preserve them whenever possible."[28] We have also considered the admonition set out in *Citizens Coalition v. McAlpine,* 810 P.2d 162, 168 (Alaska 1991) to "interpret all constitutional provisions—grants of power and restrictions on power alike—as broadly as the people intended them to be interpreted." Based on our pre-election review of this initiative with respect to article XI, section 7, of the Alaska Constitution, and the various cases interpreting use of the initiative in Alaska, discussed above and in footnotes, we do not find that the bill to be initiated here includes a prohibited subject. We have noted numerous ambiguities in the measure proposed by the initiative in this opinion; however potential problems in implementing the measure are not a bar to your certification of the initiative application.

In general, a legal review of constitutional or other legal infirmities would occur when and if the bill is passed by the voters and challenged in court.[29] However, the lieutenant governor does have the highly circumscribed "power to refuse to give life to

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[26] AS 43.55.017 provides that the taxes imposed by the chapter of state law on the oil and gas production tax are in place of all other taxes that may be imposed on producing oil or gas leases, on oil or gas produced or extracted in the state, and on the value of intangible drilling and development costs.

[27] *See Pena v. State,* 664 P.2d 169, 175 (Alaska App. 1983) (where possible, conflicting statutes will be harmonized).

[28] *See, e.g., Pullen v. Ulmer*, 923 P.2d 54, 58 (Alaska 1996); *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

[29] *See Trust the People*, 113 P.3d at 625-26; *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999).

proposals or laws that are clearly unconstitutional."[30] As we have explained above, although there are many ambiguities and legal issues presented in the initiative measure, we do not find that the initiative measure is clearly unconstitutional.

II. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared a ballot-ready petition summary and title for your consideration. We have worked with staff from the oil, gas and mining section of our office to prepare this summary. It is our practice to provide you with a proposed title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180. Under AS 15.45.180, the title of an initiative is limited to 25 words, and the body of the summary is limited to the number of sections in the proposed law multiplied by 50. Here there are 10 sections, so the maximum number of words for the summary is 500. We have used 244 words in the summary below. We propose that the same title and summary be used on the petition and on the ballot in order to reduce the chance of collateral attack due to a divergence between the ballot and petition summaries. We propose the following summary for your review:

Taxation of Gas Reserves

> This initiative would impose a new state tax on large deposits of natural gas until the first flow of gas in a major new gas pipeline system. The tax would be three cents a year per thousand cubic feet of taxable gas in the ground. "Taxable gas" is gas within a lease or property in a unit that contains one trillion cubic feet of gas or more. The gas is taxable if the lease or property has been in existence since January 1, 1990. Some forms of gas are exempt from the tax. Gas that will be consumed as fuel where it is located, within seven years after January 1 of the tax year is exempt. Gas first discovered after December 31, 2005, is exempt. Gas on the North Slope belonging to a person who has committed to shipping the gas under an AGIA or similar pipeline project or in a small pipeline is also exempt. State agencies would set the taxable volume of gas. Taxpayers would have to file returns showing the location and volume of taxable gas. The state would adopt rules on tax returns and payment. Taxpayers who dispute taxes owed would have to deposit the amount of taxes levied into an escrow account. A lessee may surrender a lease to the state to avoid taxes under

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[30] *See Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003); *Alaska Action Center, Inc., v. Municipality of Anchorage*, 84 P.3d 989, 992-93 (Alaska 2004); *Trust the People*, 113 P.3d at 625 n.50.

this Act. If and when taxable gas is produced and transported in a major gas pipeline system, the gas tax would be repealed.

Should this initiative become law?

This summary has a Flesch test score of 56.6, which is close to the target readability score of 60 set out in AS 15.60.005. We have tried to use simple words to summarize the complicated subject matter of this initiative in order to ensure that the summary meets the readability standards of AS 15.60.005.

III. CONCLUSION

For the reasons set out above, we find that the proposed bill and application are in the proper form, and that the application complies with the constitutional and statutory provisions governing the use of the initiative. Therefore, we recommend that you certify this initiative application, and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

Please contact me if we can be of further assistance to you on this matter.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By:

Sarah J. Felix
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cc: Gail Fenumiai, Director
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