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MEMORANDUM

September 29, 2020

SUBJECT: Ability to extend disaster declaration
(Work Order No. 32-LS0138)

TO: Senator Tom Begich
Attn: Mercedes Colbert

FROM: Megan A. Wallace
Director



You have asked whether the governor can unilaterally extend the current disaster declaration. You also asked whether the governor can end the disaster before the current November 15 expiration date.

On March 11, 2020, the governor issued a declaration of a public health disaster emergency under AS 26.23.020 in anticipation of the spread of the novel coronavirus disease (COVID-19). The legislature subsequently extended the governor's disaster declaration until November 15, 2020, through passage of ch. 10, SLA 2020.¹

AS 26.23.020(c) provides:

(c) If the governor finds that a disaster has occurred or that a disaster is imminent or threatened, the governor shall, by proclamation, declare a condition of disaster emergency. The disaster emergency remains in effect until the governor finds that the danger has passed or the disaster has been dealt with so that the emergency no longer exists. The governor may terminate the disaster emergency by proclamation. *A proclamation of disaster emergency may not remain in effect longer than 30 days unless extended by the legislature by a concurrent resolution.* The proclamation must indicate the nature of the disaster, the area threatened or affected, and the conditions that have brought it about or that make possible the termination of the disaster emergency. A proclamation to declare a condition of disaster emergency must also state whether the governor proposes to expend state funds to respond to the disaster under (i) or (j) of this section.²

¹ Section 2(a), ch. 10, SLA 2020.

² (Emphasis added).

In order to further extend the governor's March 11, 2020, disaster declaration, the legislature must do so by law.³ AS 26.23.020(c) is clear that the legislature holds the exclusive power to extend a disaster declaration beyond 30 days; therefore, the governor is without authority to unilaterally extend the disaster declaration.

No statutory provision authorizes the governor to issue a second declaration for the same emergency. The governor can take actions within the scope of the disaster declaration for the 30 days that it is in effect. After that, it may only be extended by the legislature.⁴ A "disaster emergency" is defined as "*the condition* declared by proclamation of the Governor."⁵ This definition limits the disaster to the condition (singular) declared in the governor's proclamation. In this case, the condition is described as "an outbreak of COVID-19."⁶ Unless the governor wishes to address a different emergency, the governor likely cannot issue a second proclamation to address the same disaster or condition because the power to extend a disaster emergency rests solely with the legislature.⁷ If the governor were able to simply issue another disaster proclamation for the same disaster or condition, it would subvert the intent of AS 26.23.020(c) and infringe on the legislature's exclusive power to extend a disaster emergency. Therefore, if the governor were to issue

³ Although AS 26.23.020(c) states that the legislature may extend a disaster declaration by concurrent resolution, AS 26.23.025(b) provides that if a disaster occurs during the legislative session, any action the governor takes after the end of session is void if it was not "ratified by law adopted during that session." AS 26.23.025(c) allows the legislature to "terminate a disaster emergency at any time by law." The phrase "by law" does not include a resolution. In addition, the Alaska Supreme Court has held that the state constitution only allows the legislature to take actions affecting people outside the legislature by enacting a bill. A disaster declaration affects agencies and individuals outside the legislature. Therefore, any action the legislature takes to terminate, extend, or otherwise affect a disaster declaration must be taken by law.

⁴ AS 26.23.0020(c).

⁵ AS 26.23.900(3) (emphasis added).

⁶ Gov. Mike Dunleavy, State of Alaska Declaration of Disaster Emergency (March 11, 2020).

⁷ This year, the Wisconsin governor issued a second disaster declaration related to the COVID-19 pandemic, and the governor's action was challenged in state court, where the plaintiffs argued that the governor lacked the power to unilaterally extend the disaster by issuing a new proclamation. See <https://www.will-law.org/will-sues-governor-overs-over-second-covid-19-emergency-declaration/>. The litigation in Wisconsin has not yet been resolved.

a second disaster proclamation after the disaster declaration expires on November 15, 2020, a court would likely find that the proclamation violates AS 26.23.020(c).⁸

You have also asked about the power to terminate the disaster before November 15, 2020. The legislature may terminate a disaster emergency at any time by law.⁹ In addition, sec. 2, ch. 10, SLA 2020 (SB 241), allows the governor to terminate the disaster using the following procedure:

(b) Notwithstanding (a) of this section, if the commissioner of health and social services certifies to the governor that there is no longer a present outbreak of novel coronavirus disease (COVID-19) or a credible threat of an imminent outbreak of COVID-19, the governor shall issue a proclamation that the public health disaster emergency identified in the declaration issued by the governor on March 11, 2020, no longer exists as of a date determined by the governor. The certification must be based on specific information received from a state or federal agency or another source that the commissioner determines to be reliable.

(c) The governor shall submit a proclamation issued under (b) of this section to the revisor of statutes, the president of the senate, the speaker of the house of representatives, and the lieutenant governor.

If you have additional questions, or if I may be of further assistance, please advise.

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⁸ Please note, however, that this would be an issue of first impression before Alaska courts. If a second disaster declaration were issued, even if it were not challenged, AS 26.23.020(k)(2)(A) requires the governor to convene a special session within five days of declaring the disaster or submitting a financing plan to the legislature, absent agreement by both presiding officers that no special session is necessary. AS 26.23.020(k).

⁹ AS 26.23.025(c).