THE STATE of ALASKA

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October 14, 2019

The Honorable Kevin Meyer
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *19OGTX Ballot Measure Application Review*
AGO No. 2019200671

Dear Lieutenant Governor Meyer:

You asked us to review an application for an initiative bill entitled:

An Act relating to the oil and gas production tax, tax payments, and tax credits. (19OGTX).

Despite the seemingly simple and straightforward title of the initiative bill, the language of the bill is difficult to interpret and raises a number of implementation and constitutional questions. The bill does not follow normal drafting conventions and does not clearly identify what statutes it is seeking to amend or create, while also stating that the new laws would go into effect "notwithstanding" any existing laws to the contrary. Because of these issues, the bill may not accomplish what was actually intended by the initiative sponsors. It is also likely to lead to litigation over the meaning of various provisions and questions of equal protection, due process, and the delegation of authority to Department of Revenue. These various issues are discussed briefly in the first section of this letter describing the proposed initiative bill.

However, none of these issues amount to legal grounds to deny certification of the initiative. Instead, these are mainly post-enactment concerns. The Alaska Supreme Court "refrain[s] from giving pre-enactment opinions on the constitutionality of statutes, whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."[1] Because the low threshold

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1 *Kohlhaas v. State*, 147 P.3d 714, 717 (2006).

required of initiatives is met, we conclude that the application complies with the constitutional and statutory provisions governing the initiative process.

I. The proposed initiative bill.

The bill proposed by this initiative would change the production tax applied to certain oil production on the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year and more than 400 million barrels of total cumulative production. This applicability section uses new terms such as "field" and "units," currently not used in the tax code, so it is unclear exactly what areas would fall under this new tax regime.

The initiative bill would change the production tax such that oil meeting the production thresholds stated above would be taxed according to the greater of one of two new taxes. One tax—in Section 3 of the initiative bill—would be a tax on the gross value at the point of production of the oil at a rate of 10 percent when oil is less than $50 per-barrel to a maximum of 15 percent when oil is $70 per-barrel or higher. In existing law, the gross value at the point of production is calculated with deductions for transportation costs.

The other tax—in Section 4 of the initiative bill—is more difficult to ascertain. It would be based on a calculation of a production tax value for the oil that would allow deductions for certain lease expenditures in addition to transportation costs. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50, the remainder of which would be multiplied by the volume of the oil, and then the product of that would be multiplied by 15 percent. Where it gets truly confusing is that the initiative bill describes this tax as an "additional production tax," but includes no reference to the tax to which it is meant to be added. Because it is unclear what tax it would be added to, the plain reading of the bill language is that it would not be in addition to any other tax for that oil. The only tax applied could be the so-called "additional tax," and this tax would always be lower than the alternative gross minimum tax in section 3 because of the way they are both calculated. In this event, it is unclear whether the initiative could result in a tax increase or decrease across various oil prices when compared to existing tax law. .

The initiative bill would also eliminate the applicability of certain tax credits and other tax incentives against these two taxes. The taxes would also be calculated for each field, unit, or nonunitized reservoir on a monthly basis, instead of an annual basis.

As a starting point, the initiative bill fails to amend specific statutes and instead includes the general phrase: "Notwithstanding Any Other Statutory Provisions to the Contrary, the Oil and Gas Production Tax in AS 43.55 Shall Be Amended as Follows." It

is unclear how these provisions will actually be inserted into existing statute by the revisor of statutes, which makes it difficult to determine exactly how the initiative bill would change existing law.[2] The vagueness of the language and the lack of definitions would also lead to numerous implementation and potential constitutional concerns post-enactment. In light of the difficulties interpreting this initiative bill, the following provides a sectional summary of the initiative bill and a discussion of the implementation and potential legal concerns with each section.

Section 1 would add the short title "Fair Share Act" to uncodified law.

Section 2 would add an applicability section to establish that the new taxes under section 3 (alternative gross minimum tax) and section 4 (tax on production tax value) apply only to oil produced from "fields, units, and nonunitized reservoirs" north of 68 degrees North latitude that have produced in excess of 40,000 barrels of oil per day (bpd) in the previous calendar year and 400,000,000 barrels of total cumulative oil production. It is unclear from the language in the initiative bill as to whether the change in tax would apply to oil meeting one or both of the above production thresholds. The bill also fails to provide any definitions for "fields, units, or nonunitized reservoirs." These implementation issues may ultimately raise constitutional concerns, such as whether the law unconstitutionally violates equal protection[3] and due process.[4]

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[2] Vagueness or failure to follow technical drafting requirements is not a ground on which an initiative application can be denied.

> The general rule is that a court should not determine constitutionality of an initiative unless and until it is enacted. The rule against pre-election review is a prudential one, steeped in traditional policies recognizing the need to avoid unnecessary litigation, to uphold the people's right to initiative laws directly, and to check the power of individual officials to keep the electorate's voice from being heard."

Alaskans for Efficient Government, Inc. v. State, 153 P.3d 296, 298 (Alaska 2007).

[3] See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from others. The test is whether the difference in treatment is an invidious discrimination); *State v. Reefer King Co., Inc.*, 559 P.2d 56, 65 (Alaska 1976) (the classification in question must "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").

[4] See *Pacific Tel. & Tel. Co. v. City of Seattle, Wash.*, 291 U.S. 300, 304 (1934)

Under existing law, the State is divided into segments for purposes of the oil and gas production tax. Oil from the North Slope and gas not used in the state produced on the North Slope are included in one segment. Instead of one North Slope segment for this oil, section 2 would divide the North Slope segment into the "fields, units, and nonunitized reservoirs" that meet the production thresholds and then all other areas would remain under the current oil and gas production tax regime. This would be the first time the terms "fields, units, and nonunitized reservoirs" would be found within the tax statutes, and the initiative bill does not provide any definitions or guidelines for how the Department of Revenue should determine what this means. This raises questions on the delegation of taxing authority and the discretion granted to the Department of Revenue to sort out which areas of the North Slope are taxed under the 19OGTX tax regime and which areas fall under the existing tax statutes.

Additionally, there is a question of when the tax would go into effect if these thresholds are met. Would it occur the next tax year after the threshold was reached or the month after the threshold was reached?

Section 3 would establish a "monthly alternative gross minimum production tax" on oil identified in section 2. The gross tax rate would be 10 percent of the gross value of oil at the point of production in a calendar month where the average per-barrel price for Alaska North Slope (ANS) crude oil for sale on the United States' West Coast is less than $50. The gross tax due under this section would increase by 1 percent of the gross value at the point of production for each $5 increment by which the average per-barrel price for Alaska North Slope crude oil for sale on the United States' West Coast is equal to or exceeds $50. The maximum tax rate under this section may not exceed 15 percent when ANS is $70 per barrel or higher. Credits, carried-forward lease expenditures, operating losses or other offsets may not be used to reduce the amount of tax due below the amounts calculated under section 3.

Under existing law, a tax floor amount is calculated based on the gross value of oil for North Slope oil and gas on a segment basis as part of the annual tax levy. Generally in existing law, the application of tax credits, carried-forward lease expenditures, and other

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> The demands of due process are satisfied if reasonably clear definition is afforded in time to give the taxpayer an opportunity to comply...Before the duties of the administrative officer are performed we cannot say that the ordinance falls short of that requirement. At this stage appellant can show no more than apprehension that the definition which the administrative officer will lay down may be deficient. The Constitution cannot allay that fear.

offsets are not limited to the tax based on production from a particular field or unit. By creating these more discrete segments and a separate monthly tax levy, Department of Revenue would have an increased administrative responsibility to keep track of the different segments and when credits, etc. could be used. It would also have to be done on a monthly basis, instead of an annual basis, which means the per-barrel price of oil will have to be tracked each month, instead of the average over the year.

Section 4 would apply to oil identified in section 2 but only if the monthly tax would be greater under this section than the calculation in section 3 as required by section 6 of the bill. For that oil, the per-taxable-barrel credit under AS 43.55.024(i) and (j) may not be used. Further, a tax would be levied for each month in which a producers' average monthly production tax value for oil is equal to or more than $50. The tax due is the difference between the average monthly production tax value for a barrel of oil and $50, multiplied by the volume of taxable oil produced by that producer in a month, multiplied by 15 percent.

Subsection (b) of this section directs that: "An *additional* production tax shall be paid…" But no effort is made to identify what the "additional production tax" is in addition *to*, and the plain language of the initiative bill does not provide an answer. The sponsors likely intended for this to be in addition to the existing tax levied by AS 43.55.011(e). But the "Notwithstanding" language at the top of the initiative bill would seem to indicate that other tax statutes to the contrary do not apply when the production being taxed falls under the applicability section. Although it is unclear exactly how this section would ultimately be placed into the statutes, the plain reading limits the tax to what is included in section 4—meaning that it is a standalone tax, not added to another tax for that oil.

Section 5 would require that the alternative gross minimum tax (proposed in section 3) and the additional production tax (proposed in section 4) shall be calculated separately for oil and gas in each calendar month. In the monthly calculation, lease expenditures shall be divided equally over the 12 months of the tax year. Further, for each of the subject properties, lease expenditures shall be calculated, deducted, and carried forward separately.

This is the first mention of gas in the initiative bill. Section 2 only applies to oil production and sections 3 and 4 only apply to production that meets the threshold in section 2—which is only oil production. Yet, section 5 states that oil and gas under sections 3 and 4 should be calculated separately. It is unclear what this provision would accomplish. The plain reading of sections 3 and 4 is that they would only apply to oil production and not gas production. This would be an implementation issue for the Department of Revenue.

Section 6 would provide that the tax due in a month shall be the greater of the tax levied under section 3 (alternative gross minimum tax) or section 4 (tax on production tax value).

As mentioned above, the plain meaning of section 6 is that the tax due will be determined by the greater of the calculation in sections 3 or 4, not section 4 plus some other tax. The likely result would be that section 4 is never implemented because the ten to fifteen percent alternative minimum tax is on the gross value and the fifteen percent under section 4 is on the net value. There is no legislative history to help determine the intent for these provisions, and it would be difficult to insert language into the initiative bill or insert another statute that is not expressly referenced.

Section 7 would establish that all filings and supporting information provided to the Department of Revenue relating to the tax calculations of sections 3 and 4 shall be a matter of public record. Although this could raise concerns over the constitutional right to privacy, the reality is that most of the tax documents would still likely be protected from disclosure. This is because making the tax documents "a matter of public record" simply means the Public Records Act applies, instead of being exempt from it. Under the Public Records Act, the Department of Revenue would have to review all the requested records and redact those portions that should be protected for reasons of privacy, proprietary information, or balance of interests, for example. These protections would likely apply to most, if not all, of the tax documents.

This section would conflict with current law that actually makes it a crime to disclose confidential tax documents.[5] Based on the "Notwithstanding…" language, we assume this provision is intended to supersede the existing statute for any tax documents submitted for areas falling under section 2 of the initiative bill. This could be difficult to implement for the Department of Revenue because a document may contain information about multiple areas or require multiple different tax filings in order to keep them separate.

Section 8 states that nothing in the proposed legislation requires a dedication of revenue, enactment of local or special legislation, or performance of an unconstitutional act. The section would provide that the legislature could, but is not required to, use the revenues obtained from enactment of this act for essential government services, capital projects, the permanent fund, and permanent fund dividends.

Section 9 is a severability clause.

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[5] AS 43.05.230.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative bill within 60 calendar days of receipt and "certify it or notify the initiative committee of the grounds for denial." The application for the 19OGTX initiative was filed with the Division of Elections on August 16, 2019. The sixtieth calendar day after the filing of the initiative is Tuesday, October 15, 2019.

Under AS 15.45.080, certification shall be denied only if: "(1) the proposed bill to be initiated is not confined to one subject or is otherwise 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."

A. Form of the proposed initiative bill.

In evaluating an application for an initiative bill, you must determine whether the application is in the "proper form."[6] Specifically, you must decide whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[7]

The form of an initiative bill is prescribed by AS 15.45.040, which requires four things: (1) that the bill be confined to one subject; (2) that the subject be expressed in the title; (3) that the bill contain an enacting clause stating: "Be it enacted by the People of the State of Alaska"; and (4) that the bill not include prohibited subjects. The list of prohibited subjects is found in article XI, section 7 of the Alaska Constitution and AS 15.45.010. An initiative bill includes a prohibited subject when it makes or repeals appropriations; enacts local or special legislation; dedicates revenue; or creates courts, defines their jurisdiction, or prescribes their rules.[8] You may deny certification only if the measure violates one or more of these restrictions, or if "controlling authority establishes its unconstitutionality."[9]

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6 Alaska Const. art. XI, § 2.

7 *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

8 AS 15.45.010; *see also* Alaska Const. art. XI, § 7 (prohibiting dedicating revenue, creating courts, defining court jurisdiction or prescribing court rules).

9 *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 n. 22 (Alaska 2003) (this is an exception to the general rule that the court will not review the constitutionality of legislation or initiative pre-enactment; the example given is a bill requiring segregation in direct violation of *Brown v. Board of Educ. Of Topeka, Kan.*, 349 U.S. 294 (1955)).

The initiative bill meets all four requirements of AS 15.45.040. It is confined to one subject—oil and gas taxation. The subject is expressed in the title, and the bill has the required enacting clause. Finally, it does not include any of the prohibited subjects and is not clearly unconstitutional under existing authority.

When evaluating the initiative bill, we carefully considered whether the initiative bill would enact local or special legislation and whether it violates the single-subject rule. When reviewing ballot initiatives, the court will "construe voter initiatives broadly so as to preserve them whenever possible. However, whether an initiative complies with article XI, section 7's limits on the right of direct legislation requires careful consideration."[10]

In order to determine if the initiative bill would enact special or local legislation, the court first considers "whether the proposed legislation is of general, statewide applicability."[11] If the answer is yes, then there is no violation. But if the answer is no, you must then ask "whether the initiative nevertheless bears a fair and substantial relationship to legitimate purposes."[12] This is similar to the most deferential standard applied in an equal protection review.[13] The court has also said the legislation or initiative bill "need not operate evenly on all parts of the state to avoid being classified as local or special."[14]

19OGTX further divides what is currently known as the North Slope segment for purposes of the oil and gas production tax. Instead of one North Slope segment, the initiative bill appears to divide the North Slope into "fields, units and nonunitized reservoirs"[15] that meet the applicability section and other areas that do not meet the applicability section. The purpose of these changes is presumably to increase the State's share of money from oil and gas development. Oil and gas development generally is a matter of statewide concern and will have statewide impacts both in the private sector and the public sector. Previous court cases have found that maximizing the economic benefits of oil and gas production to the people of Alaska is a legitimate state purpose.[16] This initiative bill would further divide the North Slope segment with the goal of bringing

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10 *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015).

11 *Id.* at 1131.

12 *Ibid.*

13 *Ibid.*

14 *Boucher v. Engstrom*, 528 p.2d 456, 463 (Alaska 1974).

15 These terms are not currently found in the Department of Revenue statutes or regulations governing taxation. Likewise, the term "nonunitized reservoir" is not currently found in the Department of Natural Resources statutes or regulations.

16 *Baxley v. State*, 958 P.2d 422, 431 (Alaska 1998).

more money into the state treasury, which in turn funds government services. Similar to bills amending Northstar oil and gas leases,[17] authorizing a three-way land exchange,[18] and excluding Fairbanks and Anchorage from being the capital,[19] this initiative bill appears to bear a fair and substantial relationship to the legitimate purpose of developing the State's oil and gas resources in the interest of all Alaskans. Therefore, it is not considered special or local legislation.

We also evaluated whether 19OGTX violates the single-subject rule because it includes both a substantive change to oil and gas laws as well as a change to the way tax records are treated and a statement on what the revenue could be spent on. Article II, section 13 of the Alaska Constitution requires that "[e]very bill shall be confined to one subject." In the context of initiative bills, the single-subject rule is intended to protect "the voters' ability to effectively exercise their right to vote by requiring that different proposals be voted on separately."[20] Confining initiative bills to one subject assures both that voters can "express their will through their votes more precisely," and "prevents the adoption of policies through stealth or fraud, and prevents the passage of measures lacking popular support by means of log-rolling."[21] Log-rolling, the Court has explained, "consists of deliberately inserting in one bill several dissimilar or incongruous subjects in order to secure the necessary support for passage of the measure."[22]

We conclude that 19OGTX does not violate the single-subject rule because the provisions all relate to the administration of the proposed oil and gas tax. Section 7 of the initiative bill relates specifically to the tax records filed under "the calculation and payment of the taxes set forth in Section 3 and 4." It is not a separate and distinct proposal on public records, but rather implements how documents that are created because of the new tax should be handled. Under existing law, these documents are all confidential and are not considered public records.[23] This initiative bill would make the

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[17] *Id.* at 430-431.

[18] *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977).

[19] *Boucher v. Engstrom*, 528 P.2d 456, 462-64 (Alaska 1974).

[20] *Id.*

[21] *Id.*

[22] *Gellert*, 522 P.2d at 1122; see also Proceedings of the Alaska Constitutional Convention at 1746-47 (discussion of the single-subject requirement and the concern over log-rolling).

[23] AS 40.25.100, 43.05.230.

tax documents filed under the new tax regime public records and subject to the Public Records Act, including the protections provided under the Public Records Act like proprietary information and balance of interests.[24]

Additionally, section 8 of the initiative bill does not amount to a separate and distinct subject. Section 8 simply states the legal reality that revenues generated by the new oil and gas tax "*could* be used to fund essential government services, capital projects, the permanent fund, and permanent fund dividends." It does not attempt to dedicate the funds to any particular purpose or create a new program that would be funded by this money. Oil and gas tax and royalties make up the majority of the money in the state general fund, which is then used to pay for the State's budget. Section 8 of the bill is acknowledging this fact and does not create any new distinct proposal that would amount to log-rolling, even if the language is clearly included to entice people to vote for the initiative bill.

The conclusion that an initiative bill satisfies the constitutional and statutory requirements does not speak to the initiative bill's ultimate constitutionality or workability. The Alaska Supreme Court "refrain[s] from giving pre-enactment opinions on the constitutionality of statutes, whether proposed by the legislature or by the people through their initiative power, since an opinion on a law not yet enacted is necessarily advisory."[25] The question is about timing—when is a lawsuit challenging an initiative bill proper, and the answer is often after the initiative bill has been enacted. As detailed in the discussion above regarding the initiative bill's provisions, 19OGTX raises many questions that cannot be answered until the revisor of statutes places the initiative bill in the statutes and the Department of Revenue adopts regulations interpreting the new statutory provisions. At this stage, "all doubts as to all technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the" liberal construction of the initiative bill.[26] This in no way forecloses, and we do not opine on, future litigation over the constitutionality or interpretation of the initiative bill post-enactment. There are significant constitutional issues that can be argued with respect to this bill. However, these issues must be addressed by the courts post-enactment if legal challenges are made.

B. Form of the application.

The form of an initiative application is prescribed by AS 15.45.030, which provides that the application must include the

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24 AS 40.25.120(4), (12), (14)

25 *Kohlhaas v. State*, 147 P.3d 714, 717 (2006).

26 *Yute Air Alaska Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1974).

(1) 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 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 on its face meets the first requirement, as well as the latter portion of the second requirement regarding the statement on each signature page. With respect to the first clause of the second requirement, we understand the Division of Elections has reviewed the sponsor signatures and determined that the application contains the signatures and addresses of 163 qualified voters. The application also designates three sponsors to serve on an initiative committee, thus satisfying the third requirement. Therefore, the application is in the proper form.

III. Proposed ballot and petition summaries.

We have prepared a ballot-ready petition title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our office's standard practice. Under AS 15.45.180 a ballot proposition must include a "true and impartial summary of the proposed law." That provision also requires that an initiative's title be limited to 25 words, and that the number of words in the body of the summary be limited to the number of sections in the proposed law multiplied by fifty. "Section" is defined as "a provision of the proposed law that is distinct from other provisions in purpose or subject matter."

The bill has nine sections, which would allow the number of words in the summary not to exceed 450. Below is a summary with 20 words in the title and 396 words in the summary, which we submit for your consideration.

An Act changing the oil and gas production tax for certain fields, units, and nonunitized reservoirs on the North Slope

This act would change the oil and gas production tax for areas of the North Slope where the company produced more than 40,000 barrels of oil per day in the prior year and/or more than 400 million barrels total. It is unclear whether the area has to meet both the 40,000 and 400,000 million thresholds or just one of them. The new areas would be divided up based on "fields, units, and nonunitized reservoirs" that meet the production threshold. The Act does not define what a field or unit is. For any areas that meet the production threshold, the tax would be the greater of one of two new taxes.

(1) One tax would be a tax on the gross value at the point of production of the oil at a rate of 10% when oil is less than $50 per-barrel. This tax would increase to a maximum of 15% when oil is $70 per-barrel or higher. No deductions could take the tax below the 10% to 15% floor.

(2) The other tax would be based on a calculation of a production tax value for the oil that would allow lease expenditure and transportation cost deductions. This tax on production tax value would be calculated based on the difference between the production tax value of the oil and $50. The difference between the two would be multiplied by the volume of oil, and then that amount would be multiplied by 15%. The existing per-taxable-barrel credit would not apply. The Act uses the term "additional tax" but it does not designate what tax is in addition to. The result is that this tax would likely always be less than the tax above.

The Department of Revenue would calculate the tax for each field, unit, or nonunitized reservoir on a monthly basis. Taxes are currently calculated on an annual basis, with monthly estimated payments. Since these new taxes would only apply to certain areas, a taxpayer would still have to submit annual taxes for the areas where the new taxes do not apply.

The Act would also make all tax documents relating to the calculation and payment of the new taxes a matter of public record. This would mean the documents would be reviewed under the normal Public Records Act process, and any information that needed to be withheld, for example for privacy or balance-of-interests reasons, would be withheld.

Should this initiative become law?

This summary has a Flesch test score of 54.7. We believe the summary satisfies the target readability standards of AS 15.80.005.[27]

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[27] Under AS 15.80.005(b), "The policy of the state is to prepare a neutral summary that is scored at approximately 60." While this summary is slightly below the target readability score of 60, the Alaska Supreme Court has upheld ballot summaries scoring as

IV. Conclusion.

Despite the failure to follow technical drafting requirements, the proposed bill and application are in the proper form for an initiative and the application complies with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify the initiative bill application and notify the initiative committee of your decision. You may then begin to prepare a petition under AS 15.45.090.

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

Sincerely,

KEVIN J. CLARKSON
ATTORNEY GENERAL

By:

Cori Mills
Assistant Attorney General

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low as 33.8 for a complicated ballot initiative. *See* 2007 Op. Att'y Gen. (Oct. 17; 663070179); *Pebble*, 215 P.3d at 1082-84.