ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
Anchorage, Alaska
September 1, 2021
1:02 p.m.

MEMBERS PRESENT

Representative Matt Claman, Chair
Representative Liz Snyder, Vice Chair
Representative Harriet Drummond
Representative Jonathan Kreiss-Tomkins
Representative Christopher Kurka
Representative Sarah Vance

MEMBERS ABSENT

Representative David Eastman

COMMITTEE CALENDAR

HOUSE JOINT RESOLUTION NO. 7
Proposing amendments to the Constitution of the State of Alaska relating to the Alaska permanent fund, appropriations from the permanent fund, and the permanent fund dividend.

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HJR 7
SHORT TITLE: CONST. AM: PERM FUND & PFDS
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/18/21	(H)	READ THE FIRST TIME - REFERRALS
02/18/21	(H)	STA, JUD, FIN
04/20/21	(H)	STA AT 3:00 PM GRUENBERG 120
04/20/21	(H)	Heard & Held
04/20/21	(H)	MINUTE(STA)
05/04/21	(H)	STA AT 3:00 PM GRUENBERG 120
05/04/21	(H)	Heard & Held
05/04/21	(H)	MINUTE(STA)
05/06/21	(H)	STA AT 3:00 PM GRUENBERG 120
05/06/21	(H)	Moved CSHJR 7(STA) Out of Committee
05/06/21	(H)	MINUTE(STA)
05/10/21	(H)	STA RPT CS(STA) 4DNP 2NR 1AM
05/10/21	(H)	DNP: CLAMAN, EASTMAN, VANCE, TARR

05/10/21	(H)	NR: STORY, KREISS-TOMKINS
05/10/21	(H)	AM: KAUFMAN
05/14/21	(H)	FIRST SPECIAL SESSION BILL
05/14/21	(S)	FIRST SPECIAL SESSION BILL
05/24/21	(H)	JUD AT 1:00 PM GRUENBERG 120
05/24/21	(H)	Heard & Held
05/24/21	(H)	MINUTE(JUD)
05/26/21	(H)	JUD AT 1:00 PM GRUENBERG 120
05/26/21	(H)	Heard & Held
05/26/21	(H)	MINUTE(JUD)
06/02/21	(H)	JUD AT 1:00 PM ANCH LIO DENALI Rm
06/02/21	(H)	Heard & Held
06/02/21	(H)	MINUTE(JUD)
06/04/21	(H)	JUD AT 1:00 PM ANCH LIO DENALI Rm
06/04/21	(H)	Heard & Held
06/04/21	(H)	MINUTE(JUD)
06/09/21	(H)	JUD AT 3:00 PM ANCH LIO DENALI Rm
06/09/21	(H)	Heard & Held
06/09/21	(H)	MINUTE(JUD)
08/16/21	(H)	THIRD SPECIAL SESSION BILL
08/31/21	(H)	DISCHARGE FROM JUD FLD Y18 N22
08/31/21	(H)	JUD AT 1:00 PM ANCH LIO DENALI Rm
08/31/21	(H)	-- Delayed to 9/1/21 at 1:00 pm --
09/01/21	(H)	JUD AT 1:00 PM ANCH LIO DENALI Rm

WITNESS REGISTER

CORY MILLS, Deputy Attorney General
Office of the Attorney General
Civil Division
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Answered questions during the hearing on HJR 7.

NEIL STEININGER, Director
Office of Management & Budget
Office of the Governor
Juneau, Alaska
POSITION STATEMENT: Answered questions during the hearing on HJR 7.

MEGAN WALLACE, Director
Legislative Legal Services
Legislative Affairs
Juneau, Alaska

POSITION STATEMENT: Responded to questions during the hearing on HJR 7.

ACTION NARRATIVE

1:02:39 PM

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 12:40 p.m. Representatives Kurka (via teleconference), Vance (via teleconference), Kreiss-Tomkins (via teleconference), Drummond (via teleconference), Snyder (via teleconference), and Claman were present at the call to order.

HJR 7-CONST. AM: PERM FUND & PFDS

1:04:00 PM

CHAIR CLAMAN announced that the only order of business would be HOUSE JOINT RESOLUTION NO. 7, Proposing amendments to the Constitution of the State of Alaska relating to the Alaska permanent fund, appropriations from the permanent fund, and the permanent fund dividend. [Before the committee was CSHJR 7(STA).]

CHAIR CLAMAN paraphrased the introductory paragraph of a memorandum ("memo") [included in the committee packet] dated 8/31/21, with a subject of "Topics and Questions for House Judiciary Committee Meeting on September 1, 2021," which he had sent to those invited to testify. The paragraph read as follows [original punctuation provided]:

> Proposed constitutional amendments addressing financial issues raise questions about funds that are subject to the "sweep" provisions in Article IX, Section 17. The leading case applying those provisions is Hickel v. Cowper, 847 P.2d 922 (Alaska 1994). Most recently, the Superior Court in Alaska Federation of Natives v. Dunleavy ruled that the Power Cost Equalization Fund ("PCE") was not "in the general fund" and was not sweepable under Article IX, Section 17. These two cases lead to a number of questions.

CHAIR CLAMAN opined that the two court cases bear on the consideration of HJR 7, thus he said he invited a representative from the Department of Law and from Legislative Legal Services to answer the questions in the memo.

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CORY MILLS, Deputy Attorney General, Office of the Attorney General, Civil Division, Department of Law, addressed the aforementioned list of questions. The first question:

> 1. Are there cases other than Hickel v. Cowper and AFN v. Dunleavy that address whether particular funds are subject to sweep?

MS. MILLS said she was unaware of any such cases. She said Hickel v. Cowper is the one [Alaska] Supreme Court case to interpret the phrase "available for appropriation." She said that was actually more in regard to subsection (b) - the constitutional amendment, not the sweep - but the court said that "available for appropriation" should be "interpreted the same for both of those provisions." She continued:

> It did not address what is in the general fund for purposes of the sweep. And that's AFN v. Dunleavy superior court case. The state has chosen not to appeal that case, and so, it is binding as to the PCE but otherwise not binding on other courts.

MS. MILLS addressed the second question:

> 2. Has Judge Garton's decision in AFN v. Dunleavy changed how the Department of Law analyzes whether or not a fund is sweepable? How?

MS. MILLS said she thinks DOL's approach to the superior court decision is to look at the PCE and the facts surrounding it and [to ask] whether there are other similarly situated funds that DOL otherwise considered sweepable but should no longer be considered sweepable because they are so similar to the PCE. She said the PCE is unique; it is the only fund that is on the sweep list that exists within the public corporation but is otherwise available for appropriation. She stated that because of its unique nature, DOL did not find any other funds that "fit that exact fact pattern." She said that "the Hickel decision" is the binding precedent so far since it is a supreme court case on issues regarding the sweep.

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MS. MILLS addressed the third question:

3. The administration did not appeal AFN v. Dunleavy. What is the precedent of the superior court decision and how will it affect other Alaska courts considering whether funds are subject to sweep? Is the court's discussion on page 12, footnotes 76 and 77, binding on future courts?

MS. MILLS said AFN v. Dunleavy was a superior court case; therefore, it is not binding, and opinion will not be published. Its only impact relates to the PCE; the court ordered that the PCE not be swept. In accordance with that legal mandate by the superior court, the administration is not "sweeping PCE." She said anything else in that decision is "persuasive only." If another case is brought, another court does not have to follow the superior court reasoning or decision. She said the Alaska Supreme Court is in no way bound by a superior court decision.

MS. MILLS, regarding the dicta in footnotes 76 and 77, explained that on page 12 the court says there are other funds that the legislature has determined are separate funds and cites statutes that refer to "separate funds". She said it appears the court was trying to show how the legislature has acted in regard to funds, because there is no fund that is "precisely similar" to the PCE endowment fund. That said, Ms. Mills remarked that there is no evidence that the court looked at the legislative history and was interpreting those statutes to determine whether the funds were in the general fund (GF) or not; "it was simply citations to footnotes for purposes of illustrating different ways in which the legislature has explained funds within the law." Without any analysis by the court or legal mandate, she said, there is nothing binding about those footnotes, and DOL continues to use Hickel v. Cowper as the main case by which to interpret the sweep provision.

MS. MILLS moved on to the forth question:

4. Please explain the difference, if any, between the general fund and the state treasury.

MS. MILLS indicated the answer may vary depending on which statute is read, because the terms are not used consistently. She named some terms: fund, account, general funds, and treasury. She said it is not clear when the legislature enacted all the statutes whether they had different meanings in mind, and to figure that out would require delving into legislative history to determine the intent of the legislature when it used those terms. For example, in some places, "treasury" and

"general fund" seemed to indicate the same thing, while in other circumstances they do not.

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MS. MILLS prefaced the fifth question to mention that aside from the PCE and any funds as can be categorized as PCE - and none were found by DOL - the sweep analysis has not changed; therefore, "the list that the Office of Management & Budget has continues to remain the same in terms of what's subject to the sweep and what's not." The fifth question:

> 5. Please advise whether the following funds are subject to sweep and why or why not:
>
> a. The Permanent Fund Earnings Reserve Account (Art. IX, Sec. 17)
>
> b. Funds such as the school construction grant fund (AS 14.11.005) that are expressly created "in the general fund"
>
> c. Funds such as the curriculum improvement and best practices fund (AS 14.07.182) that are "established," but not "in the general fund"
>
> d. Funds such as the in-state natural gas pipeline fund (AS 31.25.100) that are established in a state corporation
>
> e. Funds such as the disaster relief fund (AS 26.23.300) that are established "in the Office of the Governor"
>
> f. Funds such as the power cost equalization endowment fund (AS 42.45.070) that are established "as established as a separate fund" of a state entity, such as the Alaska Energy Authority
>
> g. Funds such as the (statutory) budget reserve fund (AS 37.05.540(a)) or the Servicemembers' Group Life Insurance premium fund (AS 26.05.263) that are established as a separate fund "in the state treasury."

MS. MILLS said the Permanent Fund Earnings Reserve Account was specifically pointed out in Hickel v. Cowper as not subject to the sweep because it exists in the permanent fund, not the general fund. She said the school construction grant fund has never been subject to the sweep because it can be spent without an appropriation, thus failing "the second part of the test." She explained that the test is whether a fund is both in the general fund and available for appropriation, and this is based on the Hickel v. Cowper analysis. She said the school

construction grant fund is in the general fund but "was already not on the sweep list for another reason." Ms. Mills said the curriculum improvement and best practices fund "doesn't mention where it's at; it just establishes the fund." She said DOL does not read any meaning into that; "it has to go somewhere." The fact that it does not say general fund does not change DOL's analysis. That said, she commented that the fund has never had any money in it, so it has not been swept. Furthermore, she offered her understanding that it could be spent without appropriation, so it would not be on the sweep list to begin with.

MS. MILLS said the instate natural gas pipeline fund was established in a state corporation. She offered her understanding that all funds in corporations can be spent without appropriation, thus are not available for appropriation under the Hickel v. Cowper analysis, so this fund is not on the sweep list. She added, "But it otherwise would be similar to PCE in that it exists in a state corporation and therefore wouldn't be swept for the second reason, as well." Ms. Mills said the disaster relief fund was established in the Office of the Governor and, since it can be spent without appropriation and cannot be swept, DOL has not done any further analysis.

MS. MILLS said the PCE endowment fund was the subject of the AFN v. Dunleavy decision and is not subject to the sweep, and the administration has ensured that that money is available. She said the statutory budget reserve (SBR) fund has always been viewed by both the legislative and executive branches as available for appropriation and in the general fund, thus subject to the sweep, and it remains on the sweep list. The service members group life insurance premium fund is another that can be spent without appropriation, so DOL has not done an analysis because it fails one part of the two-part test already, so it is not sweepable.

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MS. MILLS turned to the sixth and final question, which was:

> 6. HB 3003, recently approved by the House, appropriates dividend funds from the (statutory) budget reserve to pay the Permanent Fund dividend. What is the administration's current position with respect to an appropriation from (statutory) budget reserve (AS 37.05.540(a))?

a. If the SBR funds are subject to sweep, when does the sweep occur?

b. If the governor contends the SBR funds are subject to sweep and the legislature contends that they are not, what options are available to the legislature to resolve any dispute?

MS. MILLS reiterated that the SBR has historically been found to be sweepable, and DOL does not think the AFN v. Dunleavy decision in any way binds the state to a new interpretation. She continued as follows:

> It also isn't a ... similarly situated fund; it's not in a corporation; it says it's in the state treasury. As I stated before, exactly what that means and in what context - we'd have to go back and look at the legislative history, but it's also evident that both sides have always considered it sweepable, which we think points to the fact that everyone believed it was in the general fund.

MS. MILLS said that means that funds that were in the SBR that were not previously validly committed when the clock turned from one fiscal year to the next were swept. So, there basically is not money in that fund from which to do any new, additional appropriation. She said under law, the funds are swept into the constitutional budget reserve (CBR) at 11:59 p.m. on June 30 of any given fiscal year. Then they are swept back out in a reverse sweep at midnight or 12:01 a.m. [July 1 of any given fiscal year].

MS. MILLS, addressing the last portion of the sixth question, offered suggestions as to what could be done if the governor contends that SBR funds are subject to a sweep, but the legislature thinks not. She said she thinks legislation clarifying where the SBR is and making it more similar to the PCE endowment fund and AFN v. Dunleavy decision would provide clarity. Otherwise, she suggested, the two branches could have further discussion on what the terms in the constitution mean.

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CHAIR CLAMAN asked whether DOL has a list of all funds in sweepable and "nonsweepable" categories that it could provide to the committee.

MS. MILLS deferred to Neil Steininger.

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NEIL STEININGER, Director, Office of Management & Budget, Office of the Governor, said the Office of Management & Budget could provide the list.

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REPRESENTATIVE VANCE asked whether the administration has a position on whether the PCE fund should continue to be in "the constitutional amendment proposal" in light of the recent court case.

MS. MILLS answered that she could not speak to that issue. She said she had not heard that there are "plans to ... change that proposal at this point," but offered to have someone "who is leading that bill" get back to the committee.

REPRESENTATIVE VANCE asked whether Ms. Mills could speak to any legal effects, in light of the case, if the PCE is not included in the constitutional provision as proposed under HJR 7.

MS. MILLS responded that even though the fund is "not sweepable at the moment," it is fully available for appropriation; therefore, it can be used for multiple purposes by the legislature. She continued:

> Placing the money that's in the endowment fund into the permanent fund and creating some sort of constitutional protection would make it so that you couldn't ... ever take the whole fund or appropriate the whole fund in any way. So, that's ... the one, I guess, legal status difference that I'd point out.

REPRESENTATIVE VANCE, regarding the use of the percent of market value (POMV) for PCE in Alaska, asked:

> If the legislature wanted to use that portion of the fund to invest in energy infrastructure in rural Alaska, would it be permissible under the current language or is it exclusively for the PCE subsidy program?

MS. MILLS explained that she would need to consult with the lead attorney on the constitutional amendment and get back to Representative Vance with an answer.

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CHAIR CLAMAN asked whether the legislature, under the current structure, could use PCE endowment funds to build an electric infrastructure in rural Alaska.

MS. MILLS answered there is nothing that would prohibit using money from the PCE endowment fund to pay for that project.

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REPRESENTATIVE KURKA cited the first two sentences of Article 9, Section 13, of the Constitution of the State of Alaska, which read:

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law.

REPRESENTATIVE KURKA said he could see having various laws on the books outlying payments for programs or various expenses, but remarked that the money still cannot be taken out unless it is appropriated. He said he is having difficulty understanding how the state is paying for things that have not been appropriated.

MS. MILLS responded that there are two types of appropriations that the legislature does in the budget bill. There are appropriations into funds that then need to be further appropriated, such as the PCE fund. Then there is appropriation into a fund that has automatic spending authority; a prime example is the permanent fund dividend. Ms. Mills stated, "... The funds I listed ..., the money can then be spent automatically by the agency per a statute. There are other funds where you appropriate in, but there's another appropriation that's necessary before the money can actually be spent from the treasury."

REPRESENTATIVE KURKA said it sounded like Ms. Mills was saying there can be multi-year appropriations instead of an annual basis.

MS. MILLS explained that the legislature has control of only the funds within its purview within a given year; that money could still be expended for years in the future. A good example are

the public corporation funds. She said the legislature can spend only the money that is in front of it in any given year; it cannot spend "another legislature's money." She said that is the position of DOL that is currently being litigated in the forward appropriation case.

MS. MILLS, in response to a follow-up question, clarified the two-part test from Hickel v. Cowper to determine what is considered available for appropriation under the CBR both for purposes of subsection (b), which determines when a majority vote is needed versus a three-quarter vote, and for purposes of the sweep where the same language is used. She said the court described "available for appropriation" as follows:

> Instead we consider it appropriate, as well as consistent with both the language of the amendment and the intent of the framers, to focus on the legal status of the various funds implicated in relationship to the legislative power of appropriation. The amount available for appropriation must include all funds over which the legislature has retained the power to appropriate.

MS. MILLS said when talking about what's available for appropriation for purposes of the CBR, that's the test the court has lined out.

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CHAIR CLAMAN, regarding the PCE, offered his understanding that the court ruled that that endowment is not in the GF, which was the basis of Judge Garton's ruling, and wasn't subject to sweep because it wasn't in the GF, but it's still available for appropriation. So, even though the legislature has put that money into the PCE, and there are provisions that allow for the expenditure of those funds, the legislature could appropriate that money in a variety of different ways, but it still is not subject to sweep. He asked if he got that right.

MS. MILLS said she believed so. She said Hickel v. Cowper dealt only with the term "available for appropriation". She said subsection (b) of the CBR amendment does not refer to the GF; "it just says ... you're comparing what's available for appropriation to what was actually ... spent or budgeted the previous year." She said subsection (d) is where the term "general fund" is introduced. She went over, once again, the information about the two-part test for determining whether

monies are sweepable. She said as Chair Claman points out, the PCE endowment fund was found by the Hickel v. Cowper court to be available for appropriation; the question the court grappled with is whether it is in the GF, since it is designated as in the Alaska Energy Authority (AEA). The court determined that because it was in the AEA, it was not in the GF but rather in the corporation.

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MEGAN WALLACE, Director, Legislative Legal Services, Legislative Affairs Agency, said she would address just some of the questions provided, since she and Ms. Mills do not disagree on others. She began with question 4, which asks the difference between the general fund and the state treasury. She echoed Ms. Mills' response that that is a complicated question to answer. She said that in the AFN v. Dunleavy case, the Department of Law took the position that all funds, except for constitutional funds - the permanent fund and the CBR - are in the general fund. The plaintiff argued there was a broader definition and that the legislature had the power to establish separate funds outside of the GF but would still be considered within the state's treasury and, thus, still be bound by the constitutional requirement that money could not be expended from the state treasury absent appropriation.

MS. WALLACE said in AFN v. Dunleavy, the court looked through legislative history of the CBR amendment and found that the legislature was not prohibited from establishing funds outside the general fund, for example, by the dedicated funds clause. She noted that the opinion in AFN v. Dunleavy has not been appealed; it is an unpublished superior court opinion, which at most will have persuasive value if a separate court were to consider similar issues in terms of determining specifically which funds are in the GF versus in the state treasury, which would have an impact on potential future analysis as to what funds can be swept.

MS. WALLACE stated that while Hickel v. Cowper is an Alaska Supreme Court case that does analyze Article IV, Section 17, the case did not specifically do any analysis on the issue of determining which funds were in the GF versus the legislature's power to set up a fund separate from the GF but still within the state treasury. Ms. Wallace concurred with Ms. Mills that when determining whether or not something is subject to the sweep, the analysis is a two-part test to determine whether it is available for appropriation and is in the general fund. She

said the only case that specifically analyzes that second issue is the recent AFN v. Dunleavy case. Ms. Wallace said the impact, from her position, and in terms of the advice that she gives to the legislature, is that while it's only a superior court decision and not binding on future courts should the issue arise, it should be instructive in terms of at least evaluating how future courts might come out on the issue. She said it is always possible that a court could reach a different conclusion, but indicated that it is also possible that the decision could be persuasive to future courts in analyzing these issues. She continued:

> To the extent that there is new interpretation about what it means to be in the general fund versus in the state treasury - funds that had not been subject to that analysis - we may have to go back and analyze them in terms of whether or not, if those funds were looked at, whether a court would reach a conclusion different ... [from] what has been a historical interpretation. And an example of that is ... this statutory budget reserve fund. When Hickel v. Cowper was litigated back in the '90s, the parties agreed or stipulated that the statutory budget reserve fund was available for appropriation. And that was the main issue that was being litigated in Hickel v. Cowper. And so, there was no real dispute that the fund was available for appropriation. But I'm not aware of any specific analysis that has occurred really examining that fund and analyzing whether or not it's in the general fund or whether the legislature exercised its lawmaking power and established that fund as a special fund separate from the general fund.

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MS. WALLACE said her office had not had time to look at the legislative history and conduct a full analysis of all the funds; however, she restated her understanding that she and Ms. Mills are consistent in understanding what the test is: Is it available for appropriation? Is it in the GF? She continued:

> If a fund can be expended without further appropriation, meaning the legislature has already appropriated money once into that fund ... and by law that money can be spent without having to enact a further appropriation, then those funds, under Hickel v. Cowper, are not sweepable.

> The earnings reserve account, which was on the list, ... was specifically addressed by Hickel v. Cowper, and the Alaska Supreme Court noted that even though that fund was available for appropriation, it was not in the general fund, and therefore not subject to the sweep.

1:48:57 PM

CHAIR CLAMAN, directing attention to question 6, asked for Ms. Wallace's perspective on whether SBR funds are subject to sweep in light of the AFN v. Dunleavy case.

MS. WALLACE responded that when the court was analyzing whether the PCE fund was in the general fund, it specifically noted that the legislature has previously expressly created many funds in the general fund. The court also noted that the legislature has created separate funds. In footnote 77, the court "evidences separate funds that the legislature has established," and one of them is the SBR, which is found in AS 37.05.540(a). She indicated that in any further litigation there could be another opinion from the Alaska Superior Court or Alaska Supreme Court holding that the SBR is "another fund that's outside the general fund and therefore not subject to the sweep." She said based on "the position that was just described" [by Ms. Mills], it sounds like DOL's administration "has not reconsidered the 'sweepability' of that fund in light of this decision, and therefore, to the extent that there's disagreement about what the AFN case really means with respect to the SBR," she thinks there is the potential for litigation, particularly if the disagreement is about how much money from the SBR is available to the legislature for appropriation going forward.

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REPRESENTATIVE KREISS-TOMKINS asked Ms. Wallace about formalities of legal precedent and whether the question could be forced to get a concrete precedent on the record so that Alaska would not be subjected to this uncertainty and, if so, what recourse exists through the legal system to do so.

MS. WALLACE answered that the only mechanism for this issue to be decided by the Alaska Supreme Court would be for one of the parties involved to appeal Judge Garton's decision, but that did not happen. She said the Alaska Supreme Court does not issue revisory opinions. Ms. Wallace said if there is further dispute

about the sweepability of the SBR or any other fund, she could almost guarantee the Garton opinion would be cited; however, the issue would have to be separately litigated, so the AFN v. Dunleavy case would not be considered binding evidence. In response to a follow-up question, she said either party can appeal a decision.

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REPRESENTATIVE KREISS-TOMKINS asked Ms. Mills if she could speak in more concrete terms as to why the administration did not appeal to the Alaska Supreme Court given that the Alaska Superior Court disagreed with the administration's legal interpretation of the sweep.

MS. MILLS replied that the decision to not appeal a decision has multiple facets. She said PCE is a unique fund, and everyone was in agreement about getting the payments made, so it was not a decision that the administration felt like appealing.

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CHAIR CLAMAN asked whether, specific to the PCE, it was Ms. Mills' opinion that the court's decision would be binding on the administration 10 years from now.

MS. MILLS answered that unless there is intervening supreme court precedent that would reverse or overturn that position, it is an injunction on the state that lasts.

CHAIR CLAMAN asked, "So, it's not just binding on this administration; it would be binding on future administrations unless the supreme court issued an opinion that would give a basis to say that [Judge] Garton's analysis is flawed?"

MS. MILLS replied, "Yes, I believe that's correct."

2:02:04 PM

REPRESENTATIVE KURKA, regarding the authority to create funds outside the GF, offered his understanding of the Constitution of the State of Alaska that there is an intent to expressly prohibit dedicated funds. He said it seems like [the legislature] has been "playing a game to try to get around that and to violate the intent of the constitution." He asked if the constitution clearly delineates the legislature's authority to create separate funds outside of the GF.

MS. MILLS said she thinks Representative Kurka was annunciating DOL's position in the lawsuit, which was that when voters voted on the GF, they did not think it was different from the Alaska Energy Authority funds or any other funds. Instead of saying that the term "general fund" had a specific meaning, the judge found that the legislature can determine what the GF is and determine "which funds are the general fund versus which funds are not." She highlighted that that was not the state's position. In terms of whether there is a place in the constitution that allows the legislature to create separate funds, she said, "I don't think the constitution ever contemplated that, especially as it originally stood before the constitution budget reserve." At that point, she said, the constitution addressed expenditures in the treasury in general terms. She continued:

> But then you get the legislative authority in Article 2, which allows you to pass legislation, and you can pass legislation that ensures different pots of money go different places so that ... for accounting purposes you know what's going on. But you still can't dedicate those funds, and that's Article 9, Section ... [7] that doesn't allow dedicated funds. And so, ... you have funds, but they can't be dedicated to specific purposes; they can still be appropriated by the legislature, except for a few exceptions.

CHAIR CLAMAN told Representative Kurka that Judge Garton noted that the term "general fund" does not appear in the constitution until 1986, when it appears in Article 9, Section 15, establishing the permanent fund.

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REPRESENTATIVE CLAMAN asked Ms. Mills what her perspective was regarding whether the permanent fund is part of the treasury.

MS. MILLS responded she does not think there is a clear answer. She explained she thinks the treasury would be viewed as "the big treasury," but there are arguments that the treasury "sits in one place" and the permanent fund of the constitutional fund "sits in another." Arguments on the PCE were regarding what the GF is, for purposes of the sweep in interpreting the CBR. She reiterated that [DOL's] thought was that the public did not know about "all these little funds" and instead thought the GF is

that from which the legislature can appropriate; therefore, "it's that universe of things that is in the general fund, except for ... your constitutionally created funds."

REPRESENTATIVE CLAMAN summarized that there could be an argument made that "treasury" refers to "every dollar that is ... owned by the state," and he offered his understanding that Ms. Mills was not certain "where that is from a legal analysis."

MS. MILLS said she would agree with that. Then she pointed out that there is question concerning how "treasury" is used from statute to statute.

REPRESENTATIVE CLAMAN asked whether there was reference to a general fund prior to 1976.

MS. MILLS answered she does not know.

REPRESENTATIVE CLAMAN asked whether, if statute were passed now to provide clarity, it would affect the sweepability "for right now" or if disagreement would require going to court.

MS. MILLS said she thinks it would be accurate to say it would not affect things now, because "you have to look at what the statute was when the sweep occurred, not what a new statute says." There are still many questions about the CBR, including cases regarding appropriation availability and what goes into the CBR. She said, "There are many surrounding questions that ultimately the supreme court would have to ... weigh in on to get a definitive answer."

REPRESENTATIVE CLAMAN asked if Ms. Mills would view the question on the SBR as more to do with whether it is in the GF as opposed to whether it is available for appropriation.

MS. MILLS confirmed that is absolutely the fundamental question for the SBR.

REPRESENTATIVE CLAMAN summarized, "So, the availability for appropriation is really not a particularly challenging issue on that fund; it's more whether it's in the general fund or not."

MS. MILLS answered that is correct.

2:12:44 PM

MS. MILLS recalled that Representative Vance had asked about the governor's constitutional amendment and the PCE and whether the position had changed on that, and she reported she had just received confirmation that the governor had not changed his position on that and still wants to see the PCE constitutionalized in order to protect the endowment and ensure an annual payment.

2:13:39 PM

REPRESENTATIVE VANCE thanked Ms. Mills for the clarifying information, which she said would be helpful in decision-making.

2:14:28 PM

MS. WALLACE, regarding options available to the legislature, remarked:

> Even though ... we are lawyers ..., we always hesitate to jump right to the recommendation to solve this issue by litigation because of the risk involved, but while litigation is always an option to kind of understand what the answer to this potential issue is, another option that is available to the legislature is to reverse the sweep and to reconstitute the statutory budget reserve fund so that those funds do remain available to the legislature to appropriate. So, ... reversing the sweep, finding additional funds to make up for any funds that were appropriated in HB 3003, are all additional options, aside from litigation, that the legislature has to pursue.

2:16:03 PM

CHAIR CLAMAN asked whether the opportunity for the legislature to reverse sweep had not already passed because the money is already in the CBR, which would require a three-quarter vote to move it.

MS. WALLACE responded that the reverse sweep has always been an appropriation out of the CBR fund back to the funds from which the monies originated. She said it would continue to be "just an appropriation" under Article 9, Section 17, from the CBR back to the original sub-fund; the legislature would just be enacting a separate appropriation. She said she assumed that would occur retroactively to July 1, which would allow any appropriations

for the remainder of the fiscal year "to be funded out of those balances." She continued:

> A little bit of that ... appears to be a nonissue based on the administration's separate announcement of the manner or mechanism in which it's going to carry out the sweep this year, meaning that it's going to deem the FY 22 appropriations not available for appropriation, so those funds will not be swept. But ... if the administration sweeps the money from the SBR to the CBR, the legislature may withdraw that and appropriate it from the CBR back to the ... statutory budget reserve fund with a three-quarter vote, and once it does that, there will be money in that to fund future appropriations. So, if they did that simultaneously and then used the funds for the dividend, that would be an option available for the legislature.

CHAIR CLAMAN proffered that that is different from the Washington, Wyoming, Alaska, Montana, Idaho (WWAMI) funds, because the administration's position on WWAMI funds were that because the legislature had made an appropriation on the funds before the end of the fiscal year, they were no longer available for appropriation.

MS. WALLACE responded that is correct. She said the funds that the House was looking to appropriate from the SBR were funds that remained after the FY 22 appropriations in HB 69 were accounted for. [The House] was only looking to appropriate the balance, so to speak, of the SBR, and so while the House has appropriated those funds in HB 3003, the position from the administration is that those funds are not available because they've been swept into the CBR.

MS. WALLACE, in response to a follow-up remark by Chair Claman, confirmed that [at the time HB 3003] was being considered, Legislative Legal Service's advice to [the House Finance Committee] had been that "the funds were likely available based on the AFN v. Dunleavy litigation and decision, based on the analysis that we've already gone over in this hearing, but with the caution that that was a superior court decision and that there was some risk of using those funds because it wasn't binding precedent on future courts."

2:22:00 PM

REPRESENTATIVE SNYDER expressed thanks for the helpful discussion and emphasized that the last 5 or 10 minutes had been enlightening.

2:22:24 PM

CHAIR CLAMAN announced that CSHJR 7(STA) was held over.

2:22:33 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:22 p.m.