

LEGAL SERVICES

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MEMORANDUM

March 27, 2013

SUBJECT: Is an appropriation necessary to return fund earnings to the proposed natural gas pipeline fund? (CSSSHB 4(RES))
(Work Order No. 28-LS0021\P)

TO: Representative Mike Hawker
Attn: Rena Delbridge

FROM: Dennis C. Bailey
Legislative Counsel
and 
Kathryn L. Kurtz
Revisor of Statutes

You have asked why an additional appropriation would be required in order to return the earnings from money in the proposed in-state natural gas pipeline fund back to the fund. The short answer is: to avoid a dedicated fund problem.

CSSSHB 4(RES) (28-LS0021\P, sec. 31.25.100) establishes the fund:

Sec. 31.25.100. In-state natural gas pipeline fund. The in-state natural gas pipeline fund is established in the corporation and consists of money appropriated to it. Unless otherwise provided by law, money appropriated to the fund lapses into the general fund on the day this section is repealed. Interest and other income received on money in the fund shall be separately accounted for and may be appropriated to the fund. The corporation may use money appropriated to the fund without further appropriation for the planning, financing, development, acquisition, maintenance, construction, and operation of an in-state natural gas pipeline.

The third sentence of sec. 21.25.100 provides that interest and other income received on money in the fund shall be separately accounted for and may be appropriated to the fund. The permissive language avoids the constitutional prohibition against the dedication funds to a particular purpose under art. IX, sec. 7, Constitution of the State of Alaska, which provides:

SECTION 7. Dedicated Funds. The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section

15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

If interest and other income received on money in the fund is not specifically appropriated to the fund by the legislature, its inclusion in the fund may violate the dedicated fund clause. The Alaska Supreme Court mentioned this issue in *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162 (Alaska 2009):

First, there is a substantial question as to whether appropriating unrestricted funds into the ETF would in itself violate the dedicated funds clause. While the dedicated funds clause is not, of course, violated merely by the fact of an appropriation for a specific purpose, it would be of concern that the income generated by the appropriation would be dedicated. We think that there is sufficient doubt as to the constitutionality of an appropriation made for the purpose of generating dedicated income that the University's suggestion that this might be done cannot justify severance.

...

Our cases have not specifically addressed whether income earned by an agency from appropriated funds is covered by the dedicated funds clause. A 1982 attorney general opinion considered this question and concluded that such income likely would be covered. The opinion discusses policy reasons that would also apply to appropriating money to dedicated funds:

A difficulty that arises from the view that the dedicated funds prohibition is not applicable to interest or investment income on separate funds is that it permits steadily increasing amounts of money to be received and used by state departments and agencies without legislative control through the annual budget process. This is precisely the problem posed by the dedication of revenue sources which the drafters sought to avoid. For this reason, while we are not certain about the likely outcome, we doubt that a blanket exception for derivative income would be approved by the courts.

.... Although not expressly addressed by them, the framers were very much aware of the boom-bust cycle of Alaska's economy. In fact, a driving force behind statehood was the desire of Alaskans themselves to be able to manage the income derived from those brief periods . . . when the state may receive enormous sums of money

which are then immediately available for expenditure or placement, by appropriation, into a variety of funds and accounts for various permissible purposes. Depending on the number and size of those funds and accounts, the interest earned on the money placed in them could itself be substantial [T]he significance of that interest income in properly managing the state's budget leads us to the conclusion that our framers would have considered it to be within the dedicated fund prohibition.

Southeast Alaska Conservation Council v. State, 202 P.3d 1162, 1175 and n.71 (Alaska 2009), quoting 1982 Formal Op. Att'y Gen. 13 at 16 - 17. See also *Myers v. Alaska Housing Finance Corporation*, 68 P.3d 386, 391 (Alaska 2003) ("the anti-dedication clause would prohibit the legislature from appropriating the tobacco settlement revenue stream for more than the immediately forthcoming fiscal year directly to secure a bond issue"). But see 1982 Op. Alaska Att'y Gen. (Nov. 30) ("[u]ntil the question is ruled on by the courts, we will defend legislative action dedicating, by general law, derivative income to the funds which 'earned' them").

I have enclosed a copy of the case for the discussion in the case of the rationale supporting the prohibition against dedicated funds.

In my opinion, the response to your question does not depend on the income remaining in the fund account. If the income from the fund is purportedly designated for the fund without an appropriation, such a designation would dedicate or earmark the income of the fund to for predetermined purpose. Article IX, sec. 7 prohibits such a dedication.

If I may be of further assistance, please advise.

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Enclosure