



THE STATE
of **ALASKA**
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Honorable Representative Mark Neuman
Co-Chair of the House Finance Committee
Alaska State House of Representatives
Alaska State Capitol, Room 505
Juneau, Alaska 99801

Honorable Representative Steve Thompson
Co-Chair of the House Finance Committee
Alaska State House of Representatives
Alaska State Capitol, Room 515
Juneau, Alaska 99801

Re: Issue raised relating to the CBR sweep (HB 245)

Dear Co-Chairs and Members of the House Finance Committee:

We understand an issue has been raised as to whether the permanent fund earnings reserve account ("ERA") must be "swept" into the Constitutional Budget Reserve ("CBR") (art. IX, sec. 17(d) of the Alaska Constitution) in order to repay the CBR for prior appropriations from the budget reserve fund under the new framework set forth in the proposed Alaska Permanent Fund Protection Act ("APFPA"). For the reasons set forth below, it is our opinion that the ERA would not be subject to the CBR sweep.

I. Constitutional Budget Reserve

The CBR was established by constitutional amendment in 1990 at article IX, section 17 of the Alaska Constitution. There are four subsections to this constitutional provision:

(a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes

imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. Section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.

(b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

(c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

(d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.

II. The Permanent Fund Earnings Reserve Account

The earnings reserve account is "established as a separate account in the fund." AS 37.13.145(a). The "fund" is defined in statute as "the Alaska permanent fund established under art. IX, sec. 15 of the Constitution of Alaska." AS 37.13.900(3).

III. *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994)

Under art. IX, sec. 17(b), an appropriation can be made from the CBR by a majority vote when the "amount available for appropriation" for the upcoming fiscal year is less than the amount "appropriated for the previous fiscal year." The Alaska Supreme Court in *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994) addressed the definition of monies "available for appropriation" under art. IX, sec. 17(b). The Court held as follows:

"amount available for appropriation" within the meaning of article IX, section 17 of the Alaska Constitution includes all monies over which the legislature has retained the power to appropriate and which require further

appropriation before expenditure. In addition, all amounts actually appropriated, whether or not they would have been considered available prior to appropriation, are available within the meaning of section 17. Illiquid assets, such as land and unexploited natural resources, are not available so long as they remain illiquid. For these reasons, trust receipts are available for appropriation, as are funds like the Railbelt energy fund and the educational facilities maintenance and construction fund, which are not available for expenditure without additional appropriations. In contrast, the oil and hazardous substance release response fund is not counted as available because the entire balance of the fund may be expended at any time without further legislative action.*Finally, the permanent fund earnings reserve account must be counted as available for appropriation, because appropriations may be made from it and it is not subject to expenditure without legislative action.*

Id. at 935 (emphasis added). Significantly, the Court in *Hickel* acknowledged a distinction between the amount available for appropriation under subsection (b), which would include the ERA, and the "payback" provision in subsection (d) which was limited to funds in the general fund and thus would not include the earnings reserve account. The Court stated as follows:

the payback provision in section 17(d) is limited to only those funds which are 'available for appropriation' and 'in the general fund.' Thus, available amounts outside the general fund, such as the earnings reserve account, need not be deposited in the budget reserve.

Id. at 936, n. 32 (emphasis added).

IV. The impact on the earnings reserve account resulting from the proposed Alaska Permanent Fund Protection Act and the fiscal year 2017 operating budget

The proposed APFPA seeks to establish a stable budget framework by adopting a set of rules that would result in a sustainable yearly draw of money from the ERA to the general fund to support state operating expenses. The APFPA also provides for additional revenues in the form of royalties and oil and gas production taxes to be appropriated to the Alaska permanent fund and to the ERA in order to ensure that a sustainable yearly draw can be made from the ERA to the general fund. Additionally, the bill changes the calculation of money to be withdrawn from the ERA to pay permanent fund dividends so that the amount withdrawn is based on an amount equal to fifty percent of the resource royalties received by the state. The proposed fiscal year 2017 operating budget seeks appropriations along the model established under the APFPA. Specifically, the operating

budget bill seeks an appropriation of \$3.3 billion dollars from the ERA to the general fund. It also seeks to appropriate 24.5 percent of resource royalties to the ERA, along with an additional 50 percent of resource royalties to the ERA in order to provide for dividend payments from the ERA. The proposed fiscal year 2017 operating budget also seeks to appropriate one hundred percent of oil and gas production tax revenue to the ERA next fiscal year.

V. Analysis and Conclusion

The issue is whether the ERA would be subject to a sweep to the CBR under art. IX, sec. 17(d). As set forth above, in *Hickel v. Cowper* the Alaska Supreme Court acknowledged a distinction between the definition of monies available for appropriation under art. IX, sec. 17(b) and monies subject to sweep under the payback provision in art. IX, sec. 17(d). As discussed above, the Court noted that amounts outside the general fund were not subject to the sweep and it specifically identified the ERA as an account outside the general fund that would not need to be deposited into the CBR under the sweep provision. *Id.* at 936, n. 32.

Although the question would appear to be settled based on the plain language in the constitution and the Court's decision in *Hickel*, it appears the Division of Legislative Finance is assessing whether the ERA should be considered subject to the CBR sweep under the framework proposed in the Alaska Permanent Fund Protection Act. This consideration appears to be based on the following: the account would no longer be comprised only of income from the permanent fund, and the account would be used to pay state government operating expenses rather than being a fund restricted to the payment of dividends. Although both of these statements are true, this information does not transform the ERA into a fund within the general fund. The proposed legislation does not seek to change the existing statutory provisions¹ that clearly identify the ERA as a fund in the permanent fund. This is important because the sweep provision in art. IX, section 17(d) expressly limits the funds subject to the sweep to those monies that are "in the general fund." As the Court in *Hickel* noted when it was interpreting Section 17: "Our analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. We are not vested with the authority to add missing terms or hypothesize differently worded provisions in order to reach a particular result." *Id.* at 927-928. Moreover, although the ERA under the proposed legislation will be used to pay for general government operating expenses through an appropriation to the general fund, the ERA has always been available to pay for government operating expenses even if it has not been traditionally used for that purpose. In fact, the Court in *Hickel* held that the ERA was available for appropriation by the legislature.

¹ AS 37.13.145(a); AS 37.13.900(3).

Consequently, based on the constitutional language in section 17(d), the existing statute establishing the earnings reserve account in the permanent fund, the Court's analysis in *Hickel*, and the other reasons set forth above, it is our opinion that the earnings reserve account "need not be deposited in the budget reserve" under the CBR sweep provision. *Id.* at 936, n. 32.

Sincerely,

CRAIG W. RICHARDS
ATTORNEY GENERAL



By:

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