THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law
CIVIL DIVISION

P.O. Box 110300
Juneau, AK 99811-0300
Main: (907) 465-3600
Fax: (907) 465-2075

May 23, 2019

The Honorable Bert Stedman
Co-Chair, Senate Finance Committee
Alaska State Senate
State Capitol 518
Juneau, Alaska 99801

The Honorable Natasha von Imhof
Co-Chair, Senate Finance Committee
Alaska State Senate
State Capitol 516
Juneau, AK 99801

Re: *SB 1001*

Dear Co-Chair Stedman and Co-Chair von Imhof:

Thank you for the opportunity to present SB 1001 to the Senate Finance Committee on May 21. There were a few questions for the Department of Law regarding prior legal opinions on this topic and how the department's opinion may have changed. We thought it would be helpful to provide a timeline that starts with the passage of HB 287 (ch. 6 SLA 2018) and shows how we arrived at the release of the Attorney General Opinion on May 8, 2019. We hope this helps address the committee's questions:

April 18, 2018	HB 287 passes the legislature
April 30, 2018	HB 287 transmitted to the governor
May 1, 2018	Department of Law submits bill review letter to the governor; the bill review does not identify a constitutional issue with the future appropriations in Sections 4 and 5(c) and (d). See Attachment A.
Nov. 30, 2018	Office of Management and Budget (OMB) posts proposed budget under Governor Walker on its website that includes education funding for FY20; OMB was uncertain of the validity of the appropriation made in HB 287 and included the appropriation, with funding, in the FY20 budget to ensure funding for K-12 education

Dec. 14, 2018	OMB posts proposed budget under new administration and continues to include education funding for FY20.
Feb. 13, 2019	OMB submits amended budget to the legislature and continues to include education funding for FY20.
Feb. 28, 2019	Memo from Legislative Legal Services on whether the legislature could pass a two-year biennial budget that concluded "while the legislature can appropriate money received during past or current years that is available, it may not be able to appropriate money that may be received in future years"; Department of Law was provided a copy of this memorandum and when we started to look at the question of whether the future appropriations in HB 287 were constitutional, took this memo into account in our evaluation. See Attachment B.
April 5, 2019	House Finance passes HB 39 (operating budget) out of committee without including education funding; Department of Law began considering whether an Attorney General Opinion was appropriate to evaluate the constitutionality of HB 287, since it appeared the legislature may rely on it for education funding for FY20.
April 9, 2019	Attorney General Kevin G. Clarkson sends a letter to Senate President Giessel and Speaker Edgmon raising the significant constitutional concerns with HB 287 and letting the legislature know a formal Attorney General Opinion would follow after the issue had been thoroughly vetted through the department. See Attachment C.
May 8, 2019	The Attorney General Opinion was released. See Attachment D.

Sincerely,

KEVIN G. CLARKSON
ATTORNEY GENERAL

By:
Cori M. Mills
Legislative Liaison

CMM/nrd
Enclosures

cc: w/encls. Suzanne Cunningham, Legislative Director, Office of the Governor
Kevin G. Clarkson, Attorney General
Donna Arduin, Director, Office of Management and Budget

THE STATE
of ALASKA
GOVERNOR BILL WALKER

ATTACHMENT A
Department of Law
CIVIL DIVISION

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
Fax: 907.465.2520

May 1, 2018

The Honorable Bill Walker
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HB 287: Appropriations: Pupil education and transportation: (SCS HB 287(FIN))
Our file: 2018200330

Dear Governor Walker:

At the request of your legislative director, we have reviewed SCS HB 287 (FIN), an appropriation bill making appropriations for fiscal years 2019 and 2020 for public education and transportation of students.

Since this is an appropriation bill, it is exempt from the constitutional requirement that it be confined to one subject; however, since it is an appropriation bill it "shall be confined to appropriations" (art. II, sec. 13, Constitution of the State of Alaska). Accordingly, you may "veto, strike, or reduce items" in the bill (art. II, sec. 15, Constitution of the State of Alaska). Further, some provisions of this bill are contingent upon enactment of a separate bill – Senate bill 26, a bill primarily relating to spending from the earnings of the Alaska permanent fund.

Sections 1, 2, and 3 of the bill present typical appropriation provisions to appropriate to the Department of Education and Early Development K-12 aid to school districts, K-12 support, and appropriations for Mt. Edgecumbe boarding school. Section 2 details the funding by agency (federal receipts, unrestricted general fund, etc.) for the appropriations made in sec. 1. Next, Section 3 sets out the statewide funding sources for appropriations made in sec. 1 (unrestricted or designated general funds, public school trust funds, statutory designated program receipts, federal receipts, and interagency receipts). Except for the fact this bill addresses only education funding, nothing appears unusual about secs. 1 – 3.

Sections 5(a) and (b) are fund capitalization provisions that appropriate from the general fund to the public education fund.

Sections 4, 5(c), and 5(d) include education related appropriations for fiscal year 2020 from the general fund. Pursuant to sec. 8, these appropriations do not take effect until July 1, 2019. Although not common, it is permissible for the legislature to include in a budget bill appropriations for future fiscal years. These appropriations do not bind a future legislature because a future legislature can always amend, reappropriate, or repeal the future appropriations. Section 6 provides that the appropriations in sec. 5 are for the capitalization of a fund and do not lapse.

Section 7 is a contingency provision. It provides that the fiscal year 2020 appropriations in sections 4, 5(c), and 5(d) are contingent on passage and enactment into law by the Thirtieth Alaska State Legislature of a version of Senate Bill 26. Senate Bill 26 proposes a framework for the spending of permanent fund income. The Alaska Supreme Court has found that contingency language should be subject to the same analysis as legislative intent language.[1] This requires consideration of whether such a provision violates the confinement clause of the Alaska Constitution which states that "[b]ills for appropriations shall be confined to appropriations."[2] Alaska courts have used a five factor test to determine whether language added to an appropriations bill violates the confinement clause. Under this test (the *Hammond factors*), the qualifying language must (1) not administer the program of expenditures; (2) not enact law or amend existing law; (3) be the minimum necessary to explain the legislature's intent regarding how the money appropriated is to be spent; (4) be germane, that is, appropriate, to an appropriations bill; and (5) not extend beyond the life of the appropriation.[3]

Here, an appropriation to fund education for fiscal year 2020 appears to be reasonably related (germane) to the contingency provision regarding enactment into law of SB 26 given that SB 26 concerns a possible funding source for the future appropriations.[4] Additionally, we would raise constitutional concerns if the linkage between enactment of SB 26 into law and the appropriations would infringe on the governor's veto authority. We do not see such an issue with sec. 4 as it establishes a $30,000,000 appropriation and you could reduce or strike that appropriation amount. Section 5(c) and (d) presents unusual language because the provisions do not include an estimated amount, likely because the legislature is not able to determine an amount given that these appropriations are for fiscal year 2020. In these circumstances, you could strike language concerning the estimated

---

1 *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 378-84 (Alaska 2001).

2 Art. II, sec. 13.

3 *Alaska Legislative Council*, 21 P.3d 367, 377 (Alaska 2001).

4 Under the germaneness test, courts will generally uphold conditions expressed for purposes of the appropriation. *Id.*

amount so long as it did not alter the purpose of the appropriation.[5] We are available for additional consultation on that issue if desired.

We have identified no other constitutional or legal issues in the bill. We will assist the agencies throughout the year in interpreting and applying the provisions of the bill, as well as related legislation, to make certain that appropriations are implemented in a manner that is consistent with enabling statutes and valid legislative intent.

Sincerely,

JAHNA LINDEMUTH
ATTORNEY GENERAL

By: Susan R Pollard for

William E. Milks
Senior Assistant Attorney General
Labor and State Affairs Section

---

5 *See Wielechowski v. State*, 403 P.3d 1141 (Alaska 2017).

LEGAL SERVICES

ATTACHMENT B

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 28, 2019

SUBJECT: Two-year budget (Work Order No. 31-LS0606)

TO: Senator Mike Shower
Attn: Scott Ogan

FROM: Megan A. Wallace
Director

You have asked whether the legislature could pass a two-year (or biennial) budget in one session.

There is no specific restriction on the legislature's appropriation power under the Constitution of the State of Alaska that would limit the ability of the legislature to forward fund state programs. However, several provisions of the Constitution of the State of Alaska are potentially implicated by forward funding state programs. This includes: (1) art. IX, sec. 12, relating to the duty of the governor to prepare the annual state budget; (2) art. IX, sec. 17(d), relating to repayment of money appropriated from the constitutional budget reserve fund (CBR); and (3) art. IX, sec. 7, relating to dedicated funds.[1]

Under art. IX, sec. 12, Constitution of the State of Alaska, the governor is required to prepare a budget for the next fiscal year and to prepare a general appropriation bill to authorize the proposed expenditures contained in the budget.[2] Though sec. 12 could be read strictly to require the governor to prepare a budget and appropriation for the next

---

[1] It is also not entirely clear how art. IX, sec. 16, Constitution of the State of Alaska (appropriation limit), would be applied in light of a biennial budget.

[2] Article IX, sec. 12, Constitution of the State of Alaska, states:

> **Budget.** The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State. The governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures, and a bill or bills covering recommendations in the budget for new or additional revenues.

fiscal year, thus preventing the governor from preparing budgets for future fiscal years, it is unlikely that the courts would construe sec. 12 so narrowly as to preclude forward funding of state programs.[3] Also, sec. 12 would not prevent the legislature from making appropriations for forward funding a program more than a year in advance because the governor's duty to prepare a budget and appropriation for the next fiscal year does not place any limitation on the authority of the legislature to enact appropriations to be expended in future years.

A more significant issue in regard to forward funding state programs is the repayment or "sweep" provision of the CBR in art. IX, sec. 17(d) of the Constitution of the State of Alaska.[4] The repayment provision of sec. 17(d) requires that any money in the state's general fund that is available for appropriation at the end of a fiscal year must be transferred into the CBR to repay prior appropriations that were made from the fund. If funds held in the general fund (or other fund) are "swept" to repay prior appropriations from the CBR, then they would not be available to fund the programs when the time came for the funds to be expended.

The Alaska Supreme Court has determined that funds are available for appropriation (and thus available to repay the state's indebtedness to the CBR) at the end of the fiscal year if the legislature has retained the power to appropriate the funds, and a further appropriation by the legislature is required before the funds may be expended.[5]

If, on the other hand, a two-year budget contains appropriations of future revenue receipts,[6] a court may invalidate those appropriations as a dedicated fund as the Alaska

---

[3] You may want to consider a constitutional amendment to specifically allow for a biennial budget. *See e.g.* HJR 2 (21st Alaska State Legislature). Please note, however, that if a court decides that such an amendment is a revision to the state constitution, it cannot be submitted to the voters by the legislature and validly adopted. *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999). There are also numerous statutory changes that would be needed to conform to a biennial state budget. In particular, provisions of the Executive Budget Act (AS 37.07) will need changes.

[4] Article IX, sec. 17(d), Constitution of the State of Alaska, states:

> (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 constitutional budget reserve fund. The legislature shall implement this subsection by law.

[5] *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994).

[6] For example, even if the legislature made appropriations effective in fiscal year 2021, the legislature would be appropriating those future revenues during this legislature.

Supreme Court did in *SEACC v. State*.[7] In addition, a superior court has determined that a continuing appropriation, that is, money appropriated during a current year from future fiscal year receipts, violates the prohibition against dedicated funds.[8] Consequently, while the legislature can appropriate money received during past or current years that is available, it may not be able to appropriate money that may be received in future years.

If I may be of further assistance, please advise.

MAW:boo
19-097.boo

[7] 202 P.3d 1162 (Alaska 2009).

[8] *Trustees for Alaska v. State*, 3-AN-84-12053 Civ. (Aug. 30, 1985).

THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

ATTACHMENT C
Department of Law
OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501
Main: (907) 269-5100
Fax: (907) 269-5110

April 9, 2019

Delivered Via Email

The Honorable Cathy Giessel
Senate President
Alaska State Senate
State Capitol Room 111
Juneau, AK 99801
Email: Senator.Cathy.Giessel@akleg.gov

The Honorable Bryce Edgmon
Speaker of the House
Alaska State House of Representatives
State Capitol Room 208
Juneau, AK 99801
Email: Representative.Bryce.Edgmon@akleg.gov

Re: *Fiscal Year 2020 Operating Budget Legislation*

Dear Senate President Giessel and Speaker Edgmon:

The Department of Law believes that recent legislative action regarding education spending for fiscal years 2020 and 2021 presents a constitutional problem. Although proposed spending for K-12 education was included in each of the budget proposals presented by the executive branch (November 30, December 15, and February 13), the operating budget bill being debated by the House does not include a K-12 appropriation for FY20. It appears that the intent of the House of Representative is to rely solely on an appropriation included in the education funding bill enacted in 2018 (HB 287). It appears that the House is also proposing a similar approach to funding education for FY21.

In the Department of Law's opinion, the 2018 appropriation that "forward funded" education by committing a future legislature and governor to spend future revenues on education, is unconstitutional. This forward funding violates the Alaska Constitution's: (1) prohibition against dedicating revenues, (2) general framework providing for an annual budget where the legislature and the governor can consider funding priorities in comparison to revenues and make decisions accordingly, and (3) provision granting the

Governor line item veto authority. Unless the Legislature appropriates education funding for FY20, there will be no lawful appropriation for education funding for that year. Repeating the same practice would risk education funding for FY21.

Unlike past forward funding appropriations that committed *current* year revenues to be spent in future years, both the appropriation in HB 287 for FY20 education spending and the appropriation included in the current committee substitute for HB 39 for FY21 education spending would require the expenditure of *future* year revenues. This action unconstitutionally dedicates revenues and sidesteps the constitutionally required annual budgeting process including the governor's line-item veto.

Article IX, section 7 of the Alaska Constitution provides that "the proceeds of any state tax or license shall not be dedicated to any special purpose."[1] In considering this constitutional prohibition against dedicating state revenues, the Alaska Supreme Court has emphasized the importance the constitutional convention delegates placed on "preserv[ing] control of and responsibility for state spending in the legislature and the governor,"[2] and that the purpose of the dedicated funds prohibition was to ensure "that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented."[3]

The Alaska Constitution includes a specific provision setting forth a budget process in which all state spending needs are considered on an annual basis. Article IX, section 12 mandates that the governor submit a budget "for the next fiscal year" that sets forth "all proposed expenditures and anticipated income of all departments, offices, and agencies of the State."[4] The legislature, in turn, has the responsibility to determine how much to spend and on what and to pass appropriation bills authorizing annual spending which are then subject to the governor's line item veto power and the legislature's authority to override a veto.[5] In light of these provisions, the Alaska Supreme Court has described Alaska's budget process as requiring that legislators consider the competing

---

1 Art. IX, sec. 7.

2 *Sonneman v. Hickel*, 836 P.2d 936, 938 (Alaska 1992).

3 *Id.* at 938–39.

4 Art. IX, sec. 12. The budget must be submitted "at a time fixed by law" which the legislature has established as December 15 in the Executive Budget Act. AS 37.07.020.

5 Art. IX, sec. 13 ("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. Unobligated appropriations at the end of the period of time specified by law shall be void."); Art. II, secs. 15 and 16 (Governor's authority to strike or reduce items in an appropriation bill and the legislature's authority to override a veto).

demands for state funding each year. For example, the Court ruled that the legislature and the governor have a "joint responsibility … to determine the State's spending priorities on an *annual* basis."[6] And the Court in its recent permanent fund dividend decision pointed out that "[a]bsent another constitutional amendment, the Permanent Fund dividend program must compete for *annual* legislative funding just as other state programs."[7]

As you are aware, the operating budget proposals provided on November 30, December 15, and February 13 all included proposed appropriations for FY20 K-12 spending. But as of the date of this letter, the operating budget bill being debated by the House does not include a K-12 appropriation.[8] The Department of Law believes that the Alaska Supreme Court would find that the 2018 forward funded appropriation was (1) an unconstitutional dedication of state revenues, (2) a violation of the Alaska Constitution's annual budget process, and (3) an unconstitutional attempt to circumvent the governor's line item veto power. Under this analysis removing K-12 education appropriations from the FY20 operating budget and relying solely on an action of the legislature in 2018 that committed future revenues would leave education unfunded in FY20.

The legal analysis does not change simply because of the importance of education funding. The Supreme Court pointed out in *Southeast Alaska Conservation Council*:[9]

> dedicating funds for a deserving purpose or a worthy institution is an attractive idea. Our constitutional founders were aware of the power of the dedication impulse. They decided that the good that might come from the dedication of funds for a particular purpose was outweighed by the long-term harm to state finances that would result from a broad application of the practice.[10]

We are aware that in a context other than education funding Legislative Legal Services has expressed a similar concern that an appropriation that seeks to commit future revenues rather than current year revenues is an unconstitutional dedication of revenues.

---

6 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 93 (Alaska 2016) (emphasis added).

7 *Wielechowski v. State*, 403 P.3d 1141, 1152 (Alaska 2017) (emphasis added).

8 Moreover, additional forward funding appropriations based on future revenues have been included in the proposed budget bill for FY21: (1) FY21 education funding that would not go into effect until July 1, 2020 and (2) a future appropriation from the Constitutional Budget Reserve Fund for a reverse sweep.

9 202 P.3d 1162 (Alaska 2009).

10 *Id.* at 1176-77.

I am in the process of fully vetting this issue and plan on issuing a formal attorney general opinion on the subject in the near future. But I thought it was important to raise this concern with you now so you can consider this information as you continue your deliberations on the FY20 budget.

Sincerely,

Kevin G. Clarkson
Attorney General

THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

ATTACHMENT D

Department of Law
OFFICE OF THE ATTORNEY GENERAL

P.O. Box 110300
Juneau, Alaska 99811
Main: 907.465.3600
Fax: 907.465.2520

May 8, 2019

The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: *FY20 Education appropriation*

Dear Governor Dunleavy:

You have asked for a legal opinion on whether an appropriation of future revenues for K-12 education spending for fiscal year 2020 included in an appropriation bill enacted in 2018 was consistent with the requirements of article IX of the Alaska Constitution.

I. SUMMARY AND SHORT ANSWER

It is the opinion of the Department of Law that the appropriation is unconstitutional because it contravenes the annual budgeting process required by the Alaska Constitution and it is an improper dedication of funds. Over 25 years ago, the Alaska Supreme Court held that the Alaska Constitution mandates an annual budgeting process—"the constitutional framers believed that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented."[1] Less than two years ago the Court again emphasized this annual budgeting process in the legal dispute over whether the permanent fund dividend must be appropriated each year—"[a]bsent another constitutional amendment, the Permanent Fund dividend program must compete for *annual* legislative funding just as other state programs."[2] As detailed below, we believe last year's appropriation for FY20 K-12 education spending improperly binds a future legislature and future governor in contravention of the annual budgeting process and violates the constitutional prohibition against dedicating state revenues. Absent an appropriation for FY20 K-12 education in the budget bills passed

---

1 *Sonneman v. Hickel*, 836 P.2d 936, 938-39 (Alaska 1992).

2 *Wielechowski v. State*, 403 P.3d 1141, 1152 (Alaska 2017) (emphasis added).

this legislative session, the only appropriation for education will be one that is unconstitutional in the view of the Department of Law.

II. DETAILED ANALYSIS

A. The FY20 operating budget and education spending.

The FY19 operating budget bill included an appropriation for education spending in FY20.[3] Although the legislature's action in this regard has been referred to as "future funding," the more appropriate description of the legislature's action is "future appropriating."[4] In essence, in FY19 the legislature future appropriated future FY20 revenue for education in FY20. The three FY20 operating budget submissions (November 30, December 15, and February 15) all included a proposed appropriation for FY20 K-12 spending as well. The legislature, however, did not include these appropriations in the versions of the operating budget recently passed by each house.[5] Although the legislature has the opportunity to include an appropriation for FY20 K-12 spending in other appropriation bills pending in the legislature, it has not done so as of the time of this opinion.

B. An annual budget has been the norm and Alaska law recognizes an annual budget process.

The Alaska Constitution, court decisions, and historical practice demonstrate that Alaska has a well-established annual budgeting model. The Alaska Constitution mandates that the governor submit a budget "for the next fiscal year" that sets forth "all proposed expenditures and anticipated income of all departments, offices, and agencies of the State."[6] The legislature, in turn, has the responsibility to determine how much to

---

3 HB 287, secs. 4 and 5(c), ch.6, SLA 2018.

4 In contrast to what occurred here which is attempting to appropriate future revenues, the legislature and governor in 2014 appropriated current revenues into the public education fund to be used for education funding in a future fiscal year. HB 266, secs. 28(c) and 39, ch. 16, SLA 2014.

5 *See* SCS CSSSHB 39.

6 Alaska Const. art. IX, § 12. The budget must be submitted "at a time fixed by law," which the legislature has established as December 15 in the Executive Budget Act. AS 37.07.020.

spend and on what, and to pass appropriations bills authorizing that spending.[7]

The Alaska Supreme Court at various times has described an annual budget process in which legislators consider the competing demands for state funding. For example, the Court has stated that the legislature and the governor have a "joint responsibility . . . to determine the State's spending priorities on an annual basis."[8] The Court, in its recent Permanent Fund dividend decision, pointed out that "[a]bsent another constitutional amendment, the Permanent Fund dividend program must compete for annual legislative funding just as other state programs."[9] Additionally, the Constitution's framers appear to have envisioned an annual budgeting process for state government where a governor taking office in December would have thirty days to prepare a budget from the material that is made available to him.[10]

It is the Department of Law's opinion that legislative appropriations that attempt to bypass the annual budgeting process by appropriating future revenues for future years violate the annual budgeting process mandated by the Alaska Constitution.

C. The Constitution prohibits dedicating state revenues, and one of the reasons for this provision is to ensure that all funds are available on an annual basis to decide funding priorities.

The Alaska Constitution provides that "the proceeds of any state tax or license shall not be dedicated to any special purpose."[11] This prohibition on the dedication of funds is designed to "preserve control of and responsibility for state spending in the legislature and the governor."[12] The purpose of the dedicated funds prohibition is to ensure "that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented."[13] The Alaska Supreme Court has found that

---

7 Alaska Const. art. IX, § 13 ("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. Unobligated appropriations at the end of the period of time specified by law shall be void.").

8 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 93 (Alaska 2016).

9 *Wielechowski*, 403 P.3d at 1152.

10 3 Proceedings of the Alaska Constitutional Convention 2304 (Jan. 16, 1956).

11 Alaska Const. art. IX, § 7.

12 *Sonneman*, 836 P.2d at 938.

13 *Id.* at 938–39.

the dedicated funds "prohibition is meant to apply broadly"[14] and that it "prohibits the dedication of any source of revenue."[15]

An Alaska Supreme Court decision regarding the Marine Highway System Fund (MHSF) supports the conclusion that the legislature's forward appropriation for education is an improper dedication. In *Sonneman v. Hickel*, the Court rejected an argument that the MHSF statute violated the prohibition against dedicating funds even though its described purpose was to provide funding for marine highway operations. The Court concluded that the statute was not an improper dedication because it was phrased permissively. Although money was segregated, the statute provided that the legislature "may" appropriate money from the fund for marine highway operations. The statute did not create a legal restraint on the legislature's ability to spend the fund for other purposes.[16]

Significantly, the Court found that a statutory provision limiting the authority of an executive branch department to seek money from the fund violated the prohibition against dedicated funds.[17] The Court emphasized the fundamental importance that the drafters of Alaska's Constitution placed on preserving maximum freedom for the legislature and the governor to annually determine budget priorities:

> The constitutional clause prohibiting dedicated funds seeks to preserve an annual appropriation model which assumes that not only will the Legislature remain free to appropriate all funds for any purpose on an annual basis, but that government departments will not be restricted in requesting funds from all sources. As the debates make clear, all departments were to be in the same position as competitors for funds with the need to sell their viewpoint along with everyone else.[18]

The key to the Court's holding in *Sonneman* is that the anti-dedication clause is violated whenever the legislature attempts to restrict the use of future revenues to a single purpose—thus making the future funds immune from either a future legislature's

---

14 *See Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1170 (Alaska 2009); *see also*, *State v. Alex*, 646 P.2d 203 (Alaska 1982) (holding that salmon assessment violated the dedicated funds prohibition).

15 *Wielechowski*, 403 P.3d at 1147.

16 *Sonneman*, 836 P.2d at 939.

17 *Id.* at 940.

18 *Id.*

appropriation power or a future executive branch's reach.

Similarly, the Court broadly interpreted the constitutional prohibition against dedicated funds in *Southeast Alaska Conservation Council v. State.*[19] There, the Court concluded that a state law that transferred land to the University of Alaska and then permitted revenues from the land to be deposited in a University trust fund for use only by the University violated the constitutional prohibition against dedicated funds.[20] Again, the improper dedication stemmed from the legislature's attempt to restrict the use of future revenues from the land for a single purpose, placing the funds outside the appropriation power of a future legislature and beyond the reach of a future executive branch.[21]

The common theme in these and other dedicated fund cases is that a current legislature may not bind a future legislature and executive's use of future revenues. The Court has gone so far as to say, "Alaska Constitution article IX, section 7 prohibits the legislature from dedicating future revenues directly to any special purpose."[22] It is the Department of Law's opinion that legislative appropriations that attempt to bypass the annual budgeting process by appropriating future revenues for future years, thereby binding future legislatures and executives, violates the prohibition against dedicated funds.

D. Making appropriations of future revenues violates the governor's constitutional right to strike or reduce appropriations by veto.

The Alaska Constitution grants the governor the power to veto bills and to strike or reduce by veto individual appropriations contained in a budget bill.[23] The Alaska Supreme Court notes that the governor's line item veto power was granted by the drafters of the Alaska Constitution because they intended "to create a strong executive branch with a strong control on the purse strings of the state."[24] Delegate Rivers explained that this special veto power was "a provision in regard to the appropriation and spending of

---

19 *Southeast Alaska Conservation Council v. State,* 202 P.3d 1162 (Alaska 2009).

20 *Id.*

21 *Id.* at 1170.

22 *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386, 387 (Alaska 2003); *see also Trustees for Alaska v. State*, 3-AN-84-12053 Civ. (Aug. 30, 1985) (holding that continuing appropriations of future revenues from the general fund to various other funds was unconstitutional).

23 Alaska Const. art. II, § 15.

24 *Thomas v. Rosen*, 560 P.2d 793, 795 (Alaska 1977).

money which would allow somewhat more power to lie in the strong executive."[25] The Alaska Supreme Court has observed that historically the line item veto power originated as a reform measure to prevent legislators from "logrolling" and to give the governor the ability to limit state expenditures.[26]

It is the Department of Law's opinion that appropriations by the legislature of future revenues for future years at the end of one governor's administration in order to side-step the next governor's line item veto authority violate the Alaska Constitution by improperly circumscribing the governor's veto power. Otherwise, in anticipation of a new governor, an outgoing legislature could appropriate future revenues for specific purposes for the next four years and negate the incoming governor's line item veto power over those funds altogether for the entirety of his or her term. This type of end-run around the strong executive contravenes the clearly-expressed intent of the delegates and the structure of the constitution they created.

E. Forward-funding appropriations of future revenues are inconsistent with the Executive Budget Act.

In addition to the constitutional problems outlined above, these appropriations are inconsistent with Alaska statutes. The Executive Budget Act sets forth various responsibilities of the governor and the legislature including the obligation of the governor to submit by December 15 a budget and appropriation bills "for the succeeding fiscal year that must cover all estimated receipts, including all grants, loans, and money received from the federal government and all proposed expenditures of the state government."[27] The proposed budget expenditures "may not exceed estimated revenue for the succeeding fiscal year."[28] Among the expenditures that must be included in the proposed budget are expenditures for each agency's "annual facility operations, annual maintenance and repair."[29] The Executive Budget Act's statement of policy includes a requirement that there be public participation "in the development of the annual budget."[30]

A legislature's attempt to appropriate future revenues for future years violates the Executive Budget Act because the future appropriation would eliminate the governor's

---

25 3 Proceedings of the Alaska Constitutional Convention 1741 (Jan. 11, 1956).

26 *Alaska Leg. Council v. Knowles*, 21 P.3d 367, 372 and n.33 (Alaska 2001).

27 AS 37.07.020(a).

28 AS 37.07.020(c).

29 AS 37.07.020(e).

30 AS 37.07.010.

participation in the budgeting process with respect to those future revenues (particularly if there is a new governor coming into office).

III. CONCLUSION

Alaska's constitutional framework is based on each legislature and governor assessing Alaska's yearly needs and the revenues available to meet those needs. Each branch holds power over state spending—the legislature by appropriation and the governor by line-item veto. Moreover, the Alaska Constitution contains a clear prohibition on the dedication of any state revenues "to any special purpose." Given these basic constitutional rules, it is our opinion that an appropriation that seeks to expend future money (in contrast to an appropriation authorizing revenues that have been received by the state in the current fiscal year to be spent in a future fiscal year) is unconstitutional. Such future appropriations violate the annual budgeting process mandated by the Constitution. Further, such appropriations violate the anti-dedication clause. And, when the future appropriations span from an out-going governor to an incoming new governor, it is our opinion that the future funded appropriations unconstitutionally circumscribe the new governor's line item veto power.

It makes no difference to the constitutional analysis what degree of importance might be placed on education spending. As the Supreme Court pointed out in *Southeast Alaska Conservation Council*:[31]

> [D]edicating funds for a deserving purpose or a worthy institution is an attractive idea. Our constitutional founders were aware of the power of the dedication impulse. They decided that the good that might come from the dedication of funds for a particular purpose was outweighed by the long-term harm to state finances that would result from a broad application of the practice.[32]

Sincerely,

Kevin G. Clarkson
Attorney General

---

31 202 P.3d 1162 (Alaska 2009).

32 *Id.* at 1176-77.