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MEMORANDUM April 29, 2019

SUBJECT: Constitutional issues (HJR 7; Work Order No. 31-GH1068\A)

TO: Representative Zack Fields
Attn: Logan Basner

FROM: Megan A. Wallace
Director

You have asked whether the above-referenced constitutional amendment would constitute a revision, requiring a constitutional convention. In my opinion, a court would likely construe that the combination of changes to the appropriation limit and budget reserve fund, along with the establishment of the savings reserve fund, in the same constitutional amendment as a revision rather than an amendment.

The Alaska Supreme Court in *Bess v. Ulmer* established that:

> In deciding whether the proposal is an amendment or revision, we must consider both the quantity and quality of the proposed constitutional changes . . . an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof [while] even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.
>
> The process of amendment, on the other hand, is proper for those changes which are "few, simple, independent, and of comparatively small importance." The core determination is always the same: whether the changes are so significant as to create a need to consider the constitution as an organic whole.[1]

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[1] 985 P.2d 979, 987 (Alaska 1999). The Alaska Supreme Court, in *Bess v. Ulmer*, adopted a hybrid of approaches used in Florida and California to determine whether the three constitutional amendments in that case were constitutional revisions or amendments. *Id.* ("We take a hybrid approach."); *id.* at 988 ("Under our hybrid analysis . . . .").

HJR 7 does not simply amend the existing appropriation limit, it also drastically changes the composition of the constitutional budget reserve fund in art. IX, sec. 17, Constitution of the State of Alaska, by (1) renaming it; (2) changing the requirements for deposits of settlement proceeds; (3) changing withdrawal requirements; (4) repealing and eliminating the provision authorizing withdrawals for any public purpose with a three-fourths vote of each house of the legislature; and (5) repealing and eliminating the constitutional sweep. More significantly, HJR 7 proposes that the balance of the general fund at the end of each fiscal year shall be deposited in either the Alaska permanent fund or the savings reserve fund. This mandatory deposit is especially restrictive of the legislature's foundational appropriation power[2] since the legislature may not appropriate from the principal of the Alaska permanent fund and HJR 7 provides limited access to the savings reserve fund. HJR 7 authorizes withdrawal from the savings reserve fund if the amount in the general fund is less than the appropriation limit and only in an amount necessary to provide for total appropriations equal to the proposed appropriate limit.

In sum, in its current form HJR 7 undeniably restricts the legislature's power of appropriation. If challenged, these changes may be deemed to be so significant as to create a need to consider the constitution as an organic whole and may be the "sweeping change" that is not permitted to be accomplished in an amendment to the state constitution proposed by the legislature.[3] Accordingly, careful consideration of this resolution is warranted.

If you have any questions, please advise.

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[2] *See id.* (holding that a proposed change to the constitution was a permissible amendment, because "[i]t does not, however, deprive the executive branch of a 'foundational power,' and as a result does not constitute a revision.)"

[3] The analysis in this memorandum is limited to HJR 7 in its current form. If the legislature were to propose a constitutional amendment merely revising the existing appropriation limit in a manner that does not significantly restrict the power of appropriation of future legislatures, it may ultimately withstand constitutional challenge.