

HOUSE BILL NO. 57

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTY-SECOND LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES JOSEPHSON, Kreiss-Tomkins

Introduced: 2/18/21

Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the budget reserve fund established under art. IX, sec. 17(d),**
2 **Constitution of the State of Alaska; relating to money available for appropriation for**
3 **purposes of applying art. IX, sec. 17, Constitution of the State of Alaska; and providing**
4 **for an effective date."**

5 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

6 * **Section 1.** The uncoded law of the State of Alaska is amended by adding a new section
7 to read:

8 LEGISLATIVE FINDINGS AND INTENT. The legislature finds and intends as
9 follows:

10 (1) A lack of clarity in statute concerning the mechanics of the budget reserve
11 fund payback provision in art. IX, sec. 17(d), Constitution of the State of Alaska, known as
12 the "sweep provision," may adversely limit the availability of important fund sources and
13 jeopardize the continuation of certain state programs. The meaning of the terms "available for
14 appropriation" and "general fund" in art. IX, sec. 17(d), is pivotal to understanding the sweep

1 provision. In July 2019, significant disagreement arose between the legislative and executive
2 branches over which fund sources were subject to the sweep, highlighting the need for more
3 clarity on this matter. It is the intent of the legislature to create statutory definitions for these
4 terms that bring them into closer alignment with both legal precedent and existing state fiscal
5 systems.

6 (2) The legislature is responsible for implementing art. IX, sec. 17(d), as it
7 initially attempted to do in 1994 with passage of House Bill 58 (ch. 5, SLA 1994). The
8 provision of that Act defining "available for appropriation," AS 37.10.420, was subsequently
9 found to be broadly unconstitutional by the Alaska Supreme Court in *Hickel v. Cowper*, 874
10 P.2d 922 (Alaska 1994). In its decision, the Court provided a framework for determining
11 which funds may be considered available for appropriation and invited the legislative and
12 executive branches to rewrite the 1994 statute to adopt legal standards consistent with the
13 Court's reasoning. The Court noted that it was outlining general parameters for which funds
14 would and would not be found by the legislature to be available for appropriation, writing,
15 "We ... make no attempt to name and classify as 'available' or 'unavailable' every fund within
16 the treasury of the State of Alaska. We leave it ... to executive and legislative branch officials
17 more familiar with all of the funds involved to apply the general definition we adopt today"
18 (874 P.2d at n. 27). The legislature has yet to amend AS 37.10.420 to reflect the Court's
19 findings. While administrative processes and interpretations have been developed to align
20 state fiscal policies with the Court's decision in *Hickel*, the legislature has yet to assess funds
21 in the treasury through the lens of the ruling to determine which it considers subject to
22 appropriation under art. IX, sec. 17(d). The confusion and uncertainty caused by the lack of
23 legislative attention to remedying the disparity between statutory and constitutional
24 requirements was noted by the Legislative Auditor, who recommended, in Finding No. 2019-
25 089 of the State of Alaska FY 2019 Single Audit, that the legislature seek legal advice on this
26 issue and "take action accordingly" (II-169). It is the intent of the legislature to update the
27 definition of "available for appropriation" under AS 37.10.420 to specifically reflect the
28 findings set forth in *Hickel*.

29 (3) In its ruling in *Hickel*, the Court emphasized a commonsense approach to
30 interpreting the constitution and the definition in question and did not require in its analysis
31 that the state adopt "a radically different approach to government financing" (874 P.2d at

928). While dismissing the overly narrow construction of "available for appropriation" supported by the state in the case, the Court also considered the position of former Governor Cowper to be untenable: "Gov. Cowper's position would require a complete restructuring of the established financial system of the state government" (874 P.2d at 927). The Court further illustrated the value it placed on the continuity of programs and the legislature's judgment, citing the example of the state's revolving loan funds: "[T]he existing state programs dependent on these funds would have to be curtailed if these funds were expended on another purpose. These funds are maintained, however, because in the judgment of the legislature they serve worthwhile purposes" (874 P.2d at 929). It is the intent of the legislature to protect the financial security of existing programs and maintain the integrity of state financial structures to the greatest extent possible.

(4) The legislature finds that appropriated funds that can be expended without further legislative action and are not available for appropriation may not be included in the sweep provision. In Hickel, the Court asserted that "all funds over which the legislature has retained the power to appropriate and which are not available to pay expenditures without further legislative appropriation" must be considered as available for appropriation and maintained that, conversely, funds that could be expended with no additional appropriation fall outside of what is considered available and would not be subject to the sweep provision (874 P.2d at 927). The Court reasserted this principle repeatedly in its ruling, stating that, in determining the amounts available for appropriation, art. IX, sec. 17, did not require "counting funds already validly appropriated to a specific purpose as still 'available'" and that money already "validly committed by the legislature to some purpose should not be counted as available" (874 P.2d at 930-31). The Court summarized this principle, stating, "funds established by the legislature which may be used to pay state expenditures without further legislative action are not available for appropriation, to the extent that expenditures are authorized ... On the other hand, funds which require further legislative appropriation before expenditures can be made against them are available for appropriation" (874 P.2d at 933). The Court held this to be true regardless of whether the funds were given to a state agency to spend or were held in the general fund and provided, as an example of this principle, the oil and hazardous substance release prevention and response fund, commonly called the "Response Fund," held in the Department of Environmental Conservation. This fund is fully

1 expendable at the direction of the commissioner and is not subject to the sweep provision
2 because use of the entire fund requires no further legislative authorization or appropriation
3 (874 P.2d at 933, 935). It is the intent of the legislature to codify this principle in the statutory
4 definition of "available for appropriation."

5 (5) Funds that cannot immediately be expended through appropriation are not
6 considered available for appropriation and are not subject to the sweep provision. The Court
7 in the Hickel case asserted that the voters, in supporting passage of the legislatively referred
8 constitutional amendment that created the constitutional budget reserve fund in 1990, were
9 not trying to eliminate state services or liquidate state assets before funds in the constitutional
10 budget reserve fund could be accessed (874 P.2d at 928). Under the Court's decision,
11 categories of funds that are not immediately spendable include illiquid assets, revolving loan
12 funds, and grants to the state from private entities. The Court suggested that revolving loan
13 funds should not, typically, be considered as available for appropriation. This would include
14 the agricultural revolving loan fund; the scholarship revolving loan fund; the teacher
15 scholarship revolving loan fund; the commercial fishing revolving loan fund; the power
16 project fund; the bulk fuel revolving loan fund; the alcoholism and drug abuse revolving loan
17 fund; the small business economic development revolving loan fund; the small business
18 revolving loan fund; and the historical district revolving loan fund (874 P.2d at n. 16). The
19 Court held that "[p]rivate entities may also grant the State money to use for specific purposes"
20 (874 P.2d at n. 22) and that money received by the state from private entities for restricted
21 purposes is not sweepable. The Court also addressed illiquid assets, asserting "[i]lliquid
22 assets, such as land and unexploited natural resources, are not available so long as they remain
23 illiquid" (874 P.2d at 935). It is the intent of the legislature to include this principle in the
24 codified definition of "available for appropriation."

25 (6) Funds considered to be trust receipts, despite being included in the metric
26 for calculating what is available, are to be excluded from the sweep. The Hickel Court held
27 that all funds appropriated are very clearly available for appropriation (874 P.2d at 927). The
28 Court also held that all amounts which are in fact appropriated, including trust receipts, must
29 be considered available for appropriation (874 P.2d at 931-32) and outlined special treatment
30 for trust receipts, including federal funds, noting that they are considered within the "amounts
31 available for appropriation," but only to the extent that they were, in fact, appropriated (874

1 P.2d at 931). Further still, the Court held that the only portion of a trust that was to be
 2 considered available for appropriation was the part that would be expended consistent with
 3 application of prudent "trust principles" and defined trust receipts as "all funds, whatever the
 4 source, which the State can only use for a specific stated purpose under applicable law" (874
 5 P.2d at n. 22). The Court did not discuss whether the funds are subject to art. IX, sec. 17(d),
 6 but to the extent that a legislature appropriated trust funds, those funds would be expended
 7 and not subject to the sweep. It is the intent of the legislature to include this principle in the
 8 codified definition of "available for appropriation" and to clarify in statute the principle that
 9 trust receipts are not fully subject to the sweep provision.

10 (7) The Hickel Court treated money appropriated by state corporations in
 11 much the same way as trust receipts, holding that only the money appropriated from a
 12 corporation must be counted as available for appropriation, even if a corporation had funds in
 13 excess of what it required to fulfill its purpose. The Alaska Energy Authority is designated in
 14 statute as the authority in which the power cost equalization endowment fund is housed.
 15 Under AS 44.83.070, the administration of the power cost equalization endowment fund lies
 16 within the scope of the Alaska Energy Authority's corporate purposes. Therefore, the fund is
 17 not sweepable under the framework of the Hickel decision because excess money in the fund
 18 is not available for appropriation and money in the fund does not constitute a subfund of the
 19 general fund. The power cost equalization endowment fund is not fully available for
 20 appropriation nor sweepable for the following reasons: first, the funds are housed in a
 21 corporation; second, the fund follows an endowment model, which requires application of
 22 prudent "trust principles," and the Hickel Court held that this results in far less than the
 23 appropriation of all that is capitalized; third, the Court held that the "money which [AHFC or
 24 AIDEA] determines to be in excess of the amount required to fulfill its purposes ... should
 25 not be counted unless actually appropriated to another purpose or transferred to the general
 26 fund" (874 P.2d at n. 23); and, fourth, the legislature has never fully appropriated the funds,
 27 and it is unlikely that it would do so, as that would defy the very purpose of the fund. It is the
 28 intent of the legislature that the above principles control treatment of power cost equalization
 29 endowment fund money and apply equally to other corporate structures, including AHFC and
 30 AIDEA (874 P.2d at n. 23).

31 (8) The earnings reserve account, as an account in the Alaska permanent fund,

1 is located outside the general fund and is thus not subject to the sweep provision. Article IX,
 2 sec. 15, Constitution of the State of Alaska, authorizes the legislature to place income from
 3 the corpus of the permanent fund where it wishes. In AS 37.13.145, the legislature requires
 4 income from permanent fund investments to be placed in an earnings reserve account within
 5 the permanent fund. While these funds are "available for appropriation" for purposes of a
 6 17(b) analysis, they are not part of the general fund and, therefore, are not sweepable (874
 7 P.2d at 934). As the Hickel Court declared, "the earnings reserve account ... need not be
 8 deposited in the budget reserve" (874 P.2d at n. 32). It is the intent of the legislature to codify
 9 fund types that exist in the state treasury separately from the general fund to eliminate all
 10 uncertainty as to what constitutes the general fund.

11 (9) No statutory nor constitutional definition for the term "general fund"
 12 exists. Even though this term is found more than 200 times in the Alaska Statutes and twice in
 13 the Constitution of the State of Alaska, there is no clear legal definition for the primary
 14 account in the state treasury. Agreement among the Office of Management and Budget, the
 15 Legislative Finance Division, and the Division of Legislative Audit on what constitutes the
 16 general fund is currently lacking. It is common practice in public finance for states to have a
 17 statutory definition for this term. Alaska's lack of legal definition has been cited by both
 18 legislative attorneys and the Department of Law as a barrier to fully understanding which
 19 funds make up the general fund. This makes the composition of the general fund a matter of
 20 policy rather than law and open to interpretation. If an administration or legislature chooses to
 21 interpret "general fund" too broadly, destabilization of reoccurring programs may result.
 22 Without some legal constraints in place, funding sources for important state programs may be
 23 interpreted as general funds that are subject to the sweep provision. There is a need to ensure
 24 that the definition created reflects the reality of the state's budgetary processes and is based on
 25 common sense rather than the policy choices of any given legislature or administration. It is
 26 the intent of the legislature to define "general fund" in a way that is practical, logical, and
 27 stabilizing.

28 * **Sec. 2.** AS 37.10.420(a) is repealed and reenacted to read:

29 (a) For purposes of applying art. IX, secs. 17(b) and (d), Constitution of the
 30 State of Alaska,

31 (1) "the amount available for appropriation" or "funds available for

1 appropriation"

2 (A) means

3 (i) immediately usable funds the legislature has retained
4 the power to appropriate and that are not available for expenditure
5 without further legislative appropriation;

6 (ii) the amount that would not otherwise be counted as
7 available but from which the legislature makes appropriations;

8 (iii) the actual amount of trust receipts appropriated in
9 accordance with trust principles; in this sub-subparagraph, "trust
10 receipts" includes federal receipts, funds allotted to the state by private
11 entities for a specific purpose, and other funds the state may only use
12 for a specific purpose under applicable law; and

13 (iv) the amount appropriated under explicit statutory
14 authority from executive agency funds outside of the general fund for
15 the purpose of administering these funds;

16 (B) does not include illiquid assets, funds expendable without
17 further legislative appropriation, or funds validly appropriated by the
18 legislature;

19 (2) "the amount appropriated for the previous fiscal year" means the
20 amount appropriated from the

21 (A) constitutional budget reserve fund under the authority
22 granted in art. IX, sec. 17, Constitution of the State of Alaska; and

23 (B) same revenue sources used to calculate the money available
24 for appropriation for the current fiscal year; and

25 (3) "the amount of appropriations made in the previous calendar year
26 for the previous fiscal year" means appropriations made from sources identified in (2)
27 of this subsection for a fiscal year that were enacted during the calendar year that ends
28 on December 31 of that same fiscal year.

29 * **Sec. 3.** AS 37.10.420(b) is amended to read:

30 (b) If the amount appropriated from the budget reserve fund has not been
31 repaid under art. IX, sec. 17(d), Constitution of the State of Alaska, the Department of

Administration shall transfer to the budget reserve fund the amount of money comprising the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year, or as much of it as is necessary to complete the repayment. The transfer shall be made on or before December 16 of the following fiscal year. **Funds established within the general fund that by law require no further appropriation before expenditure or are required to be held separately by law are not subject to art. IX, sec. 17(d), Constitution of the State of Alaska.**

These funds include

- (1) the real estate recovery fund (AS 08.88.450);**
- (2) the anatomical gift awareness fund (AS 13.50.160);**
- (3) the fund for the improvement of school performance (AS 14.03.125);**
- (4) the curriculum improvement and best practices fund (AS 14.07.182);**
- (5) the school construction grant fund (AS 14.11.005);**
- (6) the major maintenance grant fund (AS 14.11.007);**
- (7) the public education fund (AS 14.17.300);**
- (8) the memorial education revolving loan fund (AS 14.43.255);**
- (9) the vaccine assessment fund (AS 18.09.230);**
- (10) the fire prevention and public safety fund (AS 18.74.210);**
- (11) the assistive technology loan guarantee fund (AS 23.15.125);**
- (12) the vocational rehabilitation small business enterprise revolving fund (AS 23.15.130);**
- (13) the training and building fund (AS 23.20.130);**
- (14) the servicemembers' group life insurance premium fund (AS 26.05.263);**
- (15) the disaster relief fund (AS 26.23.300);**
- (16) the fuel emergency fund (AS 26.23.400);**
- (17) the harbor facility grant fund (AS 29.60.800);**
- (18) the community assistance fund (AS 29.60.850);**
- (19) the derelict vessel prevention program fund (AS 30.30.096);**

- 1 (20) the in-state natural gas pipeline fund (AS 31.25.100);
- 2 (21) the Alaska liquefied natural gas project fund (AS 31.25.110);
- 3 (22) the state insurance catastrophe reserve account
- 4 (AS 37.05.289);
- 5 (23) the Alaska children's trust grant account (AS 37.14.205);
- 6 (24) the Alaska veterans' memorial endowment fund
- 7 (AS 37.14.700);
- 8 (25) the FICA administration fund (AS 39.30.050);
- 9 (26) the peace officer and firefighter survivors' fund
- 10 (AS 39.60.010);
- 11 (27) the dividend fund (AS 43.23.045);
- 12 (28) the dividend raffle fund (AS 43.23.230);
- 13 (29) the commercial vessel passenger tax account (AS 43.52.230);
- 14 (30) the regional cruise ship impact fund (former AS 43.52.230(c));
- 15 (31) the oil and gas tax credit fund (AS 43.55.028);
- 16 (32) the Alaska Gasline Inducement Act reimbursement fund
- 17 (AS 43.90.400);
- 18 (33) the special revolving fund - surplus property (AS 44.68.130);
- 19 (34) the oil and hazardous substance release prevention account
- 20 (AS 46.08.010(a)(1));
- 21 (35) the oil and hazardous substance release response account
- 22 (AS 46.08.010(a)(2));
- 23 (36) the Adak airport operations fund;
- 24 (37) the Alaska Transportation Infrastructure Bank (ATIB)
- 25 highway account (P.L. 104-59, sec. 350);
- 26 (38) the Alaska Transportation Infrastructure Bank (ATIB)
- 27 repayment account (P.L. 104-59, sec. 350);
- 28 (39) donated commodity fee;
- 29 (40) the election fund required under 52 U.S.C. 21004;
- 30 (41) Federal Highway Administration airspace leases;
- 31 (42) the fisheries disaster fund (P.L. 108-7, 117 Stat. 549);

1 **(43) Northern Tobacco Securitization Corporation (NTSC) bond**
 2 **funding;**

3 **(44) school trust land sales.**

4 * **Sec. 4.** AS 37.10.420(c) is amended to read:

5 (c) In this section,

6 **(1) "general fund"**

7 **(A) means the primary operating fund of the state,**
 8 **consisting of all money paid into the state treasury that is not specifically**
 9 **authorized by law to be placed in a separate fund;**

10 **(B) does not include**

11 **(i) funds held or managed by legally separate entities**
 12 **that the state is financially accountable for, including funds held or**
 13 **managed by public corporations and the University of Alaska;**

14 **(ii) enterprise funds;**

15 **(iii) debt service funds;**

16 **(iv) special revenue funds;**

17 **(v) the Alaska permanent fund;**

18 **(vi) internal service funds used to support**
 19 **interagency operations between state agencies on a cost-**
 20 **reimbursement basis; or**

21 **(vii) agency funds;**

22 **(2)** "unrestricted revenue accruing to the general fund" or "unreserved,
 23 undesigned general fund balance carried forward" is money not restricted by law to a
 24 specific use that accrues to the general fund according to accepted principles of
 25 governmental or fund accounting adopted for the state accounting system established
 26 under AS 37.05.150 in effect on July 1, 1990.

27 * **Sec. 5.** This Act takes effect June 30, 2021.