

LEGAL SERVICES

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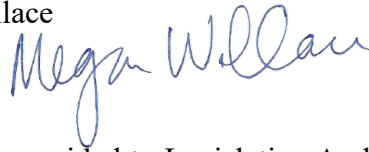
MEMORANDUM

September 16, 2020

SUBJECT: Power cost equalization (Work Order No. 32-LS0101)

TO: Representative Chris Tuck
Attn: Ken Alper

FROM: Megan A. Wallace
Director



You have asked for historical advice provided to Legislative Audit regarding the issue as to whether the power cost equalization endowment fund is subject to the constitutional sweep. This office cannot share confidential advice given to other offices, but I have provided some analysis of this issue below.¹

Article IX, sec. 17(d), Constitution of the State of Alaska, provides:

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.

Article IX, sec. 17(d) requires that money in the general fund available for appropriation at the end of a fiscal year be transferred into the constitutional budget reserve fund (CBR) for repayment of appropriations that have been made over the years from the CBR. To avoid this result, the legislature has historically appropriated "swept" money back into the various accounts from which it originated. The "reverse sweep" appropriation is simply an appropriation of money *from the CBR* to the various accounts, which is authorized under art. IX, sec. 17(c) if there is a three-fourths vote.

What funds are subject to the constitutional sweep?

Article IX, sec. 17(d) requires that any amount of money in the general fund available for appropriation at the end of a fiscal year be transferred into the budget reserve fund to repay appropriations that have been made over the years from the CBR. The Alaska Supreme Court has considered the application of the constitutional sweep provision and concluded that the use of the phrase "available for appropriation" in that subsection has

¹ You may wish to request this information from the Legislative Auditor.

the same meaning as the phrase has in the other subsections of art. IX, sec. 17, except that the sweep applies only to money "available for appropriation" that is also "in the general fund," and therefore excludes funds that are outside of the general fund. The court specifically found the earnings reserve account to be "subject to appropriation" but outside of the general fund and protected from the sweep.²

In *Hickel v. Cowper* the Alaska Supreme Court noted:

We see no reason to give "available for appropriation" a different meaning in subsection (d) than we did in subsection (b). We recognize, however, that the payback provision in sec. 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. This additional limitation has no effect on funds which exist within the general fund.^[3]

Nowhere in the constitution or in statute is "general fund" defined. The court, in *Hickel*, decided that the constitutionally created permanent fund, together with its earnings reserve account, is outside the general fund.

Are the PCE funds subject to the constitutional sweep?

The power cost equalization (PCE) endowment fund is established in the Alaska Energy Authority, a public corporation with a "separate and independent legal existence."⁴

In *Hickel*, the Court concluded that trust funds, including amounts in trust accounts such as the Public Employees' Retirement Fund and federal funds, are "available for appropriation," but only the amount actually appropriated is counted as "available" for purposes of applying the formula under art. IX, sec. 17(b). Therefore, it would appear that the balance left in a trust fund is not subject to the sweep because it is not counted as "available" until actually appropriated for expenditure. Like trust receipts, money held by a public corporation does not appear to be treated by the court as "available for appropriation" until it is actually appropriated. The court noted:

Money appropriated from the AHFC and the AIDEA therefore must be counted as available for appropriation. However, money which either organization determines to be in excess of the amount required to fulfill its purposes, see AS 18.56.089(b)(1); AS 44.88.205(b)(1), should not be

² *Hickel v. Cowper*, 874 P.2d 922, 936 n. 32 (Alaska 1994).

³ *Id.*

⁴ AS 42.45.070; AS 44.83.020.

counted unless actually appropriated to another purpose or transferred to the general fund. The statutes do not automatically transfer these funds out of the respective organizations.⁵

Under this interpretation it seems clear that money held by a public corporation of the state is, like money in a trust fund, not "available" until appropriated and, therefore, protected from the sweep. On the face of this holding, it might legitimately be concluded that the PCE endowment fund is not subject to the sweep.

However, caution is warranted. The court did not specifically consider whether money held by a public corporation of the state that is not immediately available to the corporation for its purposes without an additional appropriation is included within the protection extended to other corporate funds. If confronted with the issue, the court would limit its holding to cover only money held by a public corporation that may be used by the corporation without further legislative appropriation action, based on its reasoning with respect to the treatment of funds established by law for designated purposes. Otherwise, of course, the legislature could simply, by statute, place all state revenue in an account held by a public corporation that the corporation could not touch, while retaining absolute legislative discretion over the use of the funds, and avoid the application of the sweep.

Money may be used from the PCE endowment fund only as appropriated from that fund under AS 42.45.085(a) and (d). Furthermore, 42.45.085(b) states: "Nothing in this section creates a dedicated fund." In the statute itself is the recognition that the legislature could elect to appropriate money from the fund for a purpose entirely apart from PCE payments and unconnected with any program of the Alaska Energy Authority.

A compelling argument could be made that money in a public corporation, even if "available" for purposes of art. IX, sec. 17(b), is not part of the general fund, and, therefore, is protected from the sweep. Note, though, that this argument is not foolproof. The court has already recognized that the legislature has the power to appropriate unencumbered money from a public corporation. So, the court might refuse to accept the notion that money in public corporations is outside of the general fund for purposes of sec. 17(d), because this result could, potentially, permit the legislature to shelter large amounts of money from the sweep by placing it in a statutorily created public corporation that has no authority to touch it.

Likewise, an argument could be made that money in a statutorily created "endowment" is not subject to sweep because it is a trust fund. The weakness in this position is that the "endowment" is not a trust in the legal sense, but rather a label that the legislature has placed on a public fund while retaining the right to appropriate money from the fund for purposes other than those "trust" purposes identified by statute.

⁵ *Hickel*, 874 P. 2d at 931 n. 23.

While a very good argument can be made for the proposition that money in the PCE endowment fund is not subject to the sweep, it is not a certainty that the argument would prevail. On July 10, 2019, Attorney General Kevin Clarkson authored an opinion finding that the PCE endowment fund was sweepable because the fund "is available for appropriation and has all the essential attributes of general fund money." In concluding that the funds in the PCE endowment fund "are no different than general funds," the opinion noted that "money in the PCE Fund is not dedicated, can be used by the legislature at will for any public purpose, and cannot be spent without legislative authorization" Under this reasoning, the earnings reserve account would not be subject to the sweep, since the earnings reserve account also meets these criteria established by the attorney general. However, since the Alaska Supreme Court found in *Hickel v. Cowper* that the earnings reserve account was exempt from the sweep because it was not "[i]n the general fund,"⁶ it is likely that a court considering whether the PCE endowment fund is subject to the sweep would continue to base its determination on whether the funds are "in the general fund." While a court would likely consider whether the funds are "in the general fund," if a court instead focused its analysis on whether the funds "are no different than general funds," as described by the attorney general, then the court may find that both the PCE endowment fund and earnings reserve account are subject to the sweep.

Lastly, let me add that the PCE endowment fund may include contributions and federal funds received by the authority under AS 42.45.070(a)(3). Those funds are likely restricted as to the use to which they may be put, and, in the nature of true trust funds, not subject to "sweep" regardless of the treatment of other money in the endowment fund.

If I may be of further assistance, please advise.

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⁶ *Id.* at 936 n. 32.