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[redacted]

VIA E-MAIL TO: Members of the Alaska Legislature and Governor Dunleavy

May 14, 2021

Distinguished Members of the Alaska Legislature
and
The Honorable Michael Dunleavy

Re: POMV Spending Cap

Governor Dunleavy and Members of the Alaska Legislature:

Introduction

I have been retained by various individual Alaskans who are concerned the legislature, with approval from the governor, may approve a budget that overdraws the Permanent Fund Earnings Reserve Account ("ERA"). There is much discussion at present about exceeding the 5% cap established in Senate Bill 26 (2018), now embodied in statutory law at AS 37.13.140 & AS 37.13.145.

It is the firm belief of the individuals I represent that overdrawing the ERA will cause long-lasting, devastating economic harm to the State of Alaska and its citizens.

The purpose of this correspondence is to inform the legislature and the governor that if a budget is adopted that withdraws funds from the ERA in an amount that exceeds the 5% cap in AS 37.13.140(b), by appropriating more than permitted under AS 37.13.145(e), my clients will bring suit to enforce the cap and stop the overdraw.

Constitutional Analysis

A. The 5% Spending Cap is Constitutional Limit on Spending Funds Derived from the Alaska Permanent Fund

Our Constitution contains specific provisions about earnings from the Permanent Fund. Article IX, Section 15 states: "All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law." The legislature has the authority to limit the deposit into the general fund as "provided by law." In

Hickel v. Cowper, 874 P.2d 922, 935 (Alaska 1994), the court ruled that "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." Applying the *Hickel v. Cowper* ruling to the provisions of Article IX, Section 15, the legislature's authority to appropriate funds in the ERA and the governor's authority to veto the appropriation of funds from the ERA are subject restrictions as "provided by law."

In 2018, the legislature used its authority to cap funds available for appropriation to the general fund. SB 26 (2018) established the percent of market value cap on appropriations from the ERA at 5.25% for the FY19, FY20, and FY21 budgets. Starting with the FY22 budget, the statute places a 5% cap on the allowable withdrawal from the ERA.

B. The 5% Limit on Spending of Funds Derived from the Alaska Permanent Fund is Not an Impermissible Dedication

In contrast to laws that establish a formula for spending that the legislature is *not* required to follow, the POMV law establishes a formula that *restricts* the level of funding available for spending. (emphasis added). Essentially, the law placed a limit on the legislature's appropriation authority, not a statutory mandate to spend. While the legislature retains the authority to change the cap formula, the legislature cannot exceed the cap unless it changes the law. Accordingly, it follows as a matter of logic and according to the plain meaning of words in the POMV statute, the Alaska Legislature and the Governor of Alaska are bound by the limit on spending embedded in law.

The Alaska Supreme Court has consistently ruled that statutes establishing a formula for certain expenditures do not create a dedicated fund and do not require appropriations according to a statutory formula. In *Simpson v. Murkowski*, 129 P.3d 435, 446-47 (Alaska 2006), the court held that the governor had constitutional authority to veto the longevity bonus appropriation even though the applicable statute, AS 47.45.010, mandated payments in specific amounts. Since the court's decision in *Simpson*, the legislature has neither repealed AS 47.45.010 nor made appropriations that followed the formula.

Most recently, in *Wielechowski v. State*, 403 P.3d 1141, 1148 (Alaska 2017), the court found that the 1976 constitutional amendment establishing the Permanent Fund, Article IX, Section 15, did not create a dedicated fund. It held that "the Permanent Fund dividend program must compete for annual legislative funding just as other state programs." *Id.*, 403 P.3d at 1152. The *Wielechowski* case eliminates

any argument the legislature is required to "follow the statute" in making appropriations. The legislature cannot pass laws that require it to appropriate more funds than are available.

The case law addressing mandatory spending according to a formula do not implicate formula limitations on spending. For example, the Alaska Supreme Court has held that the legislature has the authority to require local contributions to state-local cooperative programs to fund public schools *and* it has the authority to cap the local contribution to public schools. *State v. Ketchikan Gateway Borough*, 366 P.3d 86, xx (Alaska 2016); *see* AS 14.17.410(b)(2) & (c)(1)-(2). (emphasis added). Thus, the legislature has authority to set caps on the funds available for spending.

The Alaska Supreme Court's holdings and analysis in *Wielechowski* and other cases that addressed formula spending mandates are distinguishable from the situation where the law limits the appropriation process. The legislature has chosen to limit the withdrawals from the ERA to 5% of the POMV. This limit has the force of law through the enactment of a statute grounded in the "provided by law" provision of the Alaska Constitution at Article IX, Section 15. This implicit constitutional restriction on overdrawing funds derived from the Permanent Fund is binding and must be adhered to unless and until, the legislature changes the formula in AS 37.13.140(b). If the legislature chooses to change—or even eliminate—the cap, the requirements are the same for passing other changes in the law: a majority of the house, a majority of the senate, and the governor's approval.

Conclusion

In preparing this opinion letter, it became clear during the discussions among the individuals I represent that they were not advocating for—or against—the wisdom of the 5% formula embedded in Alaska law. But the phrase that was repeated in our discussions, over and over, was formulated as a question: Are we a state that adheres to the rule of law? There is an obvious and pernicious impact of passing laws and then failing to adhere to the law, particularly where the law serves as a limit and not a mandate, as is the situation described above. The spending limit from the Alaska Permanent Fund ERA must take place in accord with the cap in AS 37.13.140(b), so long as the statute remains in effect and limits withdrawal from the ERA.

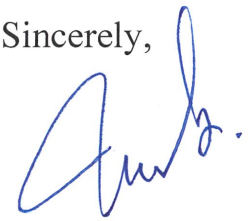
If the legislature approves a budget that draws on funds that exceed the statutory POMV cap, the governor can bring the budget into compliance by exercising the veto authority in Article II, Section 15 to bring the budget within the limits of the POMV cap, an allocation of executive branch authority that ought to give any member of the legislature considerable pause. Alternatively, if the legislature

deviates from conforming to the POMV cap and the governor approves a budget that exceeds the POMV cap, then the legislature and the governor should expect my clients and others to file suit seeking judicial review to enforce SB 26 (2018), AS 37.13.140-145.

The obvious call to adhere to the rule of law limiting the expenditure of funds from the ERA according to the 5% metric applied to the POMV is essentially nothing more than a prudent budgetary tool. Follow the law or change the law, if you will, but do not ignore the law limiting expenditure of funds derived from the Permanent Fund that is part of the Alaska Constitution.

On behalf of the Alaskan citizens I represent, I would be pleased to respond to questions you may present.

Sincerely,



Joseph W. Geldhof