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MEMORANDUM

March 4, 2022

SUBJECT: Alaska arts and cultural investment fund and the constitutional sweep (CSSB 71(FIN); Work Order No. 32-LS310(W))

TO: Representative Geran Tarr
Attn: David Song

FROM: Andrew Dunmire
Legislative Counsel 

You asked whether the Alaska arts and cultural investment fund (fund) created in CSSB 71(FIN) would be subject to the sweep. There has been significant recent litigation in the superior courts relating to the sweepability of particular funds, due to the absence of a reverse sweep appropriation. In the wake of this litigation, it is likely that the Alaska arts and cultural investment fund would not be subject to the sweep. Even if the fund were swept, nothing would prevent restoration of the swept funds to the Alaska arts and cultural investment fund through a reverse sweep appropriation. However, the reverse sweep requires a three-quarters vote.

1. The sweep and "reverse sweep."

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

An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

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

Art. 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. The Alaska Constitution does not impose a duty on the legislature to repay the money

appropriated from the CBR. Instead, it sets up an automatic repayment method that does not depend upon action by the legislature. This repayment method is known as the "sweep."

The legislature has historically appropriated "swept" money back into the various accounts from which the money originated. This type of appropriation is known as the "reverse sweep." The "reverse sweep" appropriation is simply an appropriation of money *from the CBR* back to the various accounts from which money was swept. Article IX, sec. 17(c) of the Alaska Constitution explicitly authorizes an appropriation from the CBR if that appropriation receives an affirmative vote of three-fourths of the members of each house of the legislature. However, reverse sweep provisions in recent budget bills have failed to receive the requisite three-quarters vote.

2. The Alaska arts and cultural investment fund and the "sweep."

The Alaska Supreme Court considered the application of the constitutional sweep provision in *Hickel v. Cowper*,¹ and concluded that the sweep applies only to money "available for appropriation" that is also "in the general fund."

The *Hickel* decision also explained that funds that have been committed by the legislature are not available:

It is far more reasonable to interpret "amount available for appropriation" in light of the relative consequences of and circumstances attendant in making appropriations from different sources. **In this light, monies which already have been validly committed by the legislature to some purpose should not be counted as available.**²

The *Hickel* court clarified that funds which may be used to pay government expenditures without further appropriation are not sweepable:

[O]ne of the fundamental characteristics of an appropriation, in the public law context, is that it authorizes governmental expenditure without further legislative action. Therefore, 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. This is true regardless of whether the fund is nominally established within the general fund or within a state agency.³

¹ 874 P.2d 922 (Alaska 1994).

² *Id* at 930 - 931 (emphasis added).

³ *Id.* at 933.

In this bill, proposed AS 44.27.059(b) states that the Alaska State Council on the Arts "may spend money appropriated to the fund to carry out the purposes of this chapter and to pay the costs of administering the fund without further appropriation." Therefore, under the *Hickel* standard, this fund may be used to pay state expenditures without further appropriation and is not subject to the sweep.⁴

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⁴ Two recent trial court decisions interpreted the *Hickel* standard. In *Alaska Federation of Natives v. Dunleavy*, the Anchorage Superior Court found that the Power Cost Endowment Fund was not subject to the sweep because it was not in the general fund. In *Short v. Dunleavy*, a different judge on the Anchorage Superior Court found that the Higher Education Investment Fund is subject to the sweep because it is both available for appropriation and in the general fund. Either of these cases may someday result in a new decision from the Alaska Supreme Court, but superior court orders are generally not binding in Alaska, and neither order challenges the holding from *Hickel* or changes the analysis you requested for this bill.