MEMORANDUM

State of Alaska
Department of Law

TO:	Honorable Mike Dunleavy Governor	DATE:	August 25, 2021
		TEL. NO.:	269-5100
FROM:	Treg Taylor Attorney General	SUBJECT:	Appropriations from funds swept June 30, 2021 into the CBR

You requested a memorandum that could be publicly disseminated addressing the following question: "Whether appropriations validly enacted prior to July 1, 2021, but with a July 1 effective date that have a funding source that was otherwise swept into the constitutional budget reserve as of June 30, 2021, can be expended without a reverse sweep?"

There is a reasonable argument these monies can be expended, but it would be an issue of first impression for the courts. Ultimately, we cannot say with certainty what the courts would decide, especially in light of the recent superior court decision regarding the Power Cost Equalization Fund.

For background, article 9, section 17 of the Alaska Constitution establishes the constitutional budget reserve fund. Subsection (d) of section 17 requires that any money taken from the fund under subsections (b) and (c) must be repaid through what has become known as the "sweep." Subsection (d) states:

> 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.

The question presented involves an interpretation of the phrase "available for appropriation at the end of each succeeding fiscal year." This is not an issue of whether the fund exists in the general fund or not; that was the question addressed by the superior court in the recent Power Cost Equalization Fund decision. Rather, the question is, for those funds in the general fund and otherwise swept as of June 30, should the amount that is needed to pay validly enacted appropriations that have a July 1st effective date be retained in the funds for expenditure in FY'22? In other words, are the amounts needed for the validly enacted appropriations considered "not available for appropriation" under

subsection (d) because they have already been obligated to be expended for a purpose in the next fiscal year?

The Alaska Supreme Court has addressed how to interpret "available for appropriation" in one prior decision: *Hickel v. Cowper*, 847 P.2d 922 (Alaska 1994). Although this decision mainly addressed this phrase as it is used in subsection (b), the court said that it's interpretation of "available for appropriation" for purposes of (b) also applies to (d). The court described its ruling as follows:

> Instead, we consider it appropriate, as well as consistent with both the language of the amendment and the intent of the framers, to focus on the legal status of the various funds implicated in relationship to the legislative power of appropriation. The "amount available for appropriation" must include all funds over which the legislature has retained the power to appropriate and which are not available to pay expenditures without further legislative appropriation.[1]

The court also explained:

> 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]

In the scenario presented, there is a reasonable argument that appropriations validly enacted prior to July 1, 2021, but with a July effective date, are already "validly committed by the legislature to some purpose."[3] According to *Hickel v. Cowper*, this would remove these amounts from being available for appropriation.

The countervailing argument—and practical concern— is whether an appropriation having an effective date after the sweep has already occurred means the money in the fund has already been swept, and therefore there are no actual funds to

---

1 *Id.* at 927.

2 *Id*. at 930-931 (emphasis added).

3 *Id*.

support what is otherwise a valid appropriation.[4] It is unclear where the court would come down on this issue. If the monies cannot be considered validly committed until the appropriation is effective, then there would be no money available in the fund to carry out the appropriation. If, on the other hand, the monies can be considered validly committed before their effective date, then the money needed to pay those appropriations should not be swept and would be available for expenditure in FY'22 to carry out the appropriation. In light of the reasonable arguments on both sides, I believe it is legally defensible to release the funds and pay out the validly enacted appropriations for FY'22.

[4] By operation of law, the sweep occurs at 11:59 pm on June 30th of any given fiscal year. Consequently, an appropriation that is effective July 1st may be valid, but the underlying account has no funds to support the appropriation.