

# LEGAL SERVICES

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### MEMORANDUM

April 25, 2022

**SUBJECT:** Hearing notes; sweep and scoop

**TO:** Senator Bert Stedman  
Co-Chair, Senate Finance Committee  
Attn: Pete Ecklund

**FROM:** Megan Wallace  
Director 

Below is a summary of the testimony provided to the Senate Finance Committee on April 25, 2022, relating to the constitutional budget reserve fund and the "sweep" provision under art. IX, sec. 17(d) of the Alaska Constitution. If members require a more formal opinion, or have additional questions, please do not hesitate to contact me.

### SWEEP

Legal background on what is sweepable:

- As OMB stated, to determine whether a fund is sweepable under art. IX, sec. 17(d), the two-part test is whether the fund is: (1) "in the general fund" *and* (2) "available for appropriation."

*Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994) – addressed the phrase "available for appropriation" and held that funds which may be used to pay state expenditures without further legislative action – or further legislative appropriation -- are *not* available for appropriation and thus not sweepable. On the other hand, funds that require further appropriation are considered "available for appropriation" and are sweepable.

In the last year, we've had two cases decided that relate to sweep issues, one involving the power cost equalization (PCE) endowment fund (*AFN v. Dunleavy*, 3AN-21-06737CI, decided in August 2021 by the superior court and not appealed) and the second is the higher education investment fund (HEIF) case (*Short v. Dunleavy*, 3AN-22-04028CI, decided in February 2022 by the superior court and currently under appeal in the Alaska Supreme Court).

- *AFN v. Dunleavy* focused on the first part of the sweepability test, which was whether the PCE endowment fund was "in the general fund."

- The court held that the fund was "available for appropriation" but it was *not* "in the general fund" – The superior court held that the Department is PERMANENTLY ENJOINED from sweeping the PCE endowment fund. This ruling was not appealed by the administration.
- The court held that the PCE fund is a separate fund outside the general fund.
- The court noted that the legislature has also created other "separate funds" and listed those other funds in footnote 77 of the opinion. It was there that the court noted that the legislature established the statutory budget reserve fund in AS 37.05.540(a) "as a separate fund in the state treasury." Based on this notation, our office advised that the statutory budget reserve fund would also likely be considered outside the general fund and not subject to the sweep. I concur with the OMB Director that reliance on this opinion for funds other than the PCE fund is subject to change over time and potentially subject to further challenge because the court's decision is not binding as to other funds.

### SCOOP

It has historically been the advice of our office that funds subject to the sweep are swept on June 30th, as a matter of law and operation of the constitution, and because appropriations for the new fiscal year do not take effect until July 1, any balance of a sweepable fund as of June 30 is swept (regardless of whether the legislature made appropriations from that fund taking effect July 1). Meaning, if there were appropriations that were to take effect July 1, those appropriations would be hollow or without funding, because the balance of the sweepable fund is swept at midnight on June 30th.

An Alaska Attorney General opinion from last year (dated August 25, 2021), however, relies on a sentence from *Hickel v. Cowper*, which states that "monies which already have been validly committed by the legislature to some purpose should not be counted as available." The AG advised it was legally defensible to not sweep the FY 22 funds appropriated in the budget that had passed but not yet taken effect, and the governor ordered that those FY 22 appropriations not be swept. That was a new interpretation of *Hickel* not previously taken by prior administrations, our office, Legislative Finance, or Legislative Audit.

- The other case I just mentioned - ***Short v. Dunleavy***- may ultimately be relevant to this second issue. There, the court held that the HEIF was available for appropriation and sweepable, but that the FY 22 appropriations made from the HEIF should not be swept, even though those appropriations had not yet taken effect at the time of the sweep. The court reasoned that "the money is no longer available for appropriation because the money can now be expended without further legislative action." That decision has been appealed to the Alaska Supreme Court on an expedited basis, with oral argument scheduled for May 3,

2022. The parties requested a decision by May 4, 2022, but the Court did not commit to providing a decision by the requested date.

- So, while the superior court did not specifically adopt the "validly committed" argument set forth by the AG, the court did find that the appropriations for the upcoming fiscal year, which had not yet taken effect on June 30th, should *not* be swept. Because this decision has been appealed and is actively being litigated, we will have to wait and see what the Alaska Supreme Court has to say, if anything, on this issue.

MAW:mjt

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