

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

February 8, 2023

SUBJECT: Constitutional amendments: appropriation limit and permanent fund (SJR 4; Work Order No. 33-LS0205\A)

TO: Senator James Kaufman
Attn: Matthew Harvey

FROM: Emily Nauman
Director 

You asked several questions related to a hypothetical constitutional amendment that includes both a change to the permanent fund structure and an appropriation limit; because these answers are based on a *hypothetical* constitutional amendment, they should be considered informative, but not instructive as to whether an actual proposed amendment would pass muster. Please find each of your questions and our responses, below.

1. Can a single resolution contain language amending our current appropriation limit and amending the permanent fund portion of the constitution? Would combining an appropriation limit and permanent fund changes pass the test of a valid amendment, or would it be considered an impermissible revision?

While a resolution could be drafted that includes both a change to the structure of the permanent fund and an appropriation limit, it is quite possible that a court would find that those changes, when combined, would constitute a revision, requiring a constitutional convention.

Alaska has one case distinguishing an amendment from a revision: *Bess v. Ulmer*.¹ In *Bess*, the court stated that among the framers of the state constitution "there was consensus that 'amendment' contemplated a simple change, whereas 'revision' would encompass broader and more comprehensive changes."² As explained in *Bess*,

¹ 985 P.2d 979.

² *Id.* at 982.

amendments are changes that are "'few, simple, independent, and of comparatively small importance,'"³ that do not "'alter the basic governmental framework' of the Constitution."⁴

In deciding whether a proposal is an amendment or revision, the court separately analyzes the quantitative and qualitative nature of the proposed constitutional changes, giving preference to neither analysis but instead considering how the two together affect the structure of the constitution and resulting government.⁵ The hypothetical resolution would likely amend *at least* three sections of the constitution. While this is not many sections, changes that place new and or restrictive limits on legislative appropriations have the effect of limiting the flexibility of the legislature. Because one of the fundamental powers of the legislature is the power of appropriation, the court may view those changes as significantly impactful.

There have been no Alaska Supreme Court decisions interpreting the revision and amendment distinction since *Bess*, so it is difficult to predict whether a court would find your hypothetical resolution an amendment or a revision. However, I do not recommend combining the appropriation limit and changes to the Alaska permanent fund into one amendment, because to do so would be to invite a *Bess* challenge. You could consider breaking the permanent fund and appropriation limit changes into separate amendments. However, be aware that depending on the level of the restriction the proposed appropriation limit places on the legislature's power of appropriation, the changes to the appropriation limit alone could result in the type of "sweeping change" the court has suggested may be a revision rather than an amendment.⁶

2. If it is unclear whether the hypothetical resolution is an amendment or a revision, and a disclaimer memorandum from this office is included with the resolution, can the legislature still pass the resolution?

Yes. The inclusion of a memorandum from this office related to the constitutionality of a piece of legislation does not prevent a resolution from being introduced or passed by the legislature.

3. If the legislature passed the hypothetical resolution, would litigation result?

Likely. A public interest litigant or the attorney general could challenge the constitutionality of the resolution in court. If the resolution is challenged, a court would

³ *Id.* at 987 (quoting Judge John A. Jameson, *A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding* §540 (Chicago, Callaghan and Company, 4th ed. 1887)).

⁴ *Id.* at 988 (quoting *Brosnahan v. Brown*, 651 P.2d 274, 289 (Cal. 1982)).

⁵ *Id.* at 987.

⁶ *See Id.* at 993.

then examine whether the resolution complies with the Alaska Constitution sections related to revision and amendment.

4. Is it possible for litigation to prevent the amendments proposed in a resolution from being placed on the ballot? Or postpone the placement of the question on the ballot?

Yes. If the Alaska Supreme Court determined that the hypothetical resolution constituted a revision, the resolution would be invalidated, the changes would likely not appear on the ballot or be implemented in the constitution.⁷ It is possible that a court could delay the appearance of the amendment question on the ballot while it renders a decision.

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⁷ To implement the changes, the people could call a constitutional convention at the next ten-year election cycle (2032) under art. XIII, sec. 3, Constitution of the State of Alaska, or the legislature could call a constitutional convention under art. XIII, sec. 2, Constitution of the State of Alaska. The only statutory directives related to a constitutional convention are set out in AS 15.50.080 - 15.50.100. If you would like more information about the constitutional convention process, please let me know.