ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
May 26, 2021
12:19 p.m.

MEMBERS PRESENT

Representative Matt Claman, Chair
Representative Liz Snyder, Vice Chair
Representative Harriet Drummond
Representative Jonathan Kreiss-Tomkins
Representative David Eastman
Representative Christopher Kurka
Representative Sarah Vance

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE JOINT RESOLUTION NO. 7
Proposing amendments to the Constitution of the State of Alaska relating to the Alaska permanent fund, appropriations from the permanent fund, and the permanent fund dividend.

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HJR 7
SHORT TITLE: CONST. AM: PERM FUND & PFDS
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/18/21	(H)	READ THE FIRST TIME - REFERRALS
02/18/21	(H)	STA, JUD, FIN
04/20/21	(H)	STA AT 3:00 PM GRUENBERG 120
04/20/21	(H)	Heard & Held
04/20/21	(H)	MINUTE(STA)
05/04/21	(H)	STA AT 3:00 PM GRUENBERG 120
05/04/21	(H)	Heard & Held
05/04/21	(H)	MINUTE(STA)
05/06/21	(H)	STA AT 3:00 PM GRUENBERG 120
05/06/21	(H)	Moved CSHJR 7(STA) Out of Committee
05/06/21	(H)	MINUTE(STA)
05/10/21	(H)	STA RPT CS(STA) 4DNP 2NR 1AM
05/10/21	(H)	DNP: CLAMAN, EASTMAN, VANCE, TARR

05/10/21	(H)	NR: STORY, KREISS-TOMKINS
05/10/21	(H)	AM: KAUFMAN
05/14/21	(S)	FIRST SPECIAL SESSION BILL
05/20/21	(H)	FIRST SPECIAL SESSION BILL
05/24/21	(H)	JUD AT 1:00 PM GRUENBERG 120
05/24/21	(H)	Heard & Held
05/24/21	(H)	MINUTE(JUD)
05/26/21	(H)	JUD AT 1:00 PM GRUENBERG 120

WITNESS REGISTER

CORI MILLS, Deputy Attorney General
Office of the Attorney General
Civil Division (Anchorage)
Department of Law
Anchorage, Alaska
POSITION STATEMENT: Testified during the hearing on HJR 7.

JOE GELDHOF, Attorney at Law
Law Office of Joseph W. Geldhof
Juneau, Alaska
POSITION STATEMENT: Testified and responded to questions during the hearing on HJR 7.

ACTION NARRATIVE

1:02:53 PM

CHAIR MATT CLAMAN called the House Judiciary Standing Committee meeting to order at 12:19 p.m. Representatives Vance, Drummond, Snyder, and Claman were present at the call to order. Representatives Eastman, Kurka, and Kreiss-Tomkins (via teleconference) arrived as the meeting was in progress.

HJR 7-CONST. AM: PERM FUND & PFDS

[Contains discussion of HB 69.]

1:03:41 PM

CHAIR CLAMAN announced that the only order of business would be HOUSE JOINT RESOLUTION NO. 7, Proposing amendments to the Constitution of the State of Alaska relating to the Alaska permanent fund, appropriations from the permanent fund, and the permanent fund dividend. [Before the committee was CSHJR 7(STA).]

CHAIR CLAMAN stated that the committee would hear invited testimony on constitutional and statutory issues raised by a potential overdraw of the earnings reserve account (ERA) as proposed by the executive branch.

1:05:55 PM

CORI MILLS, Deputy Attorney General, Office of the Attorney General, Civil Division (Anchorage), Department of Law, stated that her office had been asked to address whether the legislature can appropriate more money from the ERA than the 5 percent statutory percent of market value (POMV) cap. She emphasized that the office considers this a policy question along the lines of how to spend the earnings reserve money, whether to go over the cap, and whether to fund the permanent fund dividend (PFD). She said the Office of the Attorney General has heard from those who think the original formula for the PFD should be followed and others who think the formula for the statutory 5 percent POMV should be followed. She reiterated these are policy questions, not legal questions. Therefore, she said the short answer is that yes, the legislature has the constitutional authority to spend the income from the permanent fund from the ERA, regardless of what the POMV cap and dividend formula are in statute.

MS. MILLS reviewed the statutes to build a framework for the discussion of the issue. She said Alaska Statute (AS) 37.13.140(b) sets forth that the amount available for appropriation is 5 percent of the average market value of the fund for the first five of the preceding six fiscal years. Ms. Mills related that AS 37.13.145(e) states that the legislature may not appropriate from the ERA to the general fund (GF) a total amount that exceeds the amount available for appropriation. She noted that 37.13.145(f) states that the combined total transfer of money to the dividend and the 5 percent limit in subsection (e) may not exceed the amount of 5 percent. In other words, "The amount to the dividend, as well as what you use for the general fund can't exceed 5 percent."

MS. MILLS said since [Senate Bill 26 was signed into law on 6/27/18, during the Thirtieth Alaska State Legislature], it has been the opinion of the Department of Law (DOL) that it is not binding on the legislature, because the constitutional power of appropriation and the prohibition of the dedicated funds forecloses the statute being binding; therefore, the legislature gets to make those annual appropriation choices every year.

1:09:18 PM

MS. MILLS advised that it is necessary to seek out the Constitution of the State of Alaska. She said the Alaska Supreme Court does not spend a lot of time on statutory language in terms of these questions; rather, the court first looks to the constitution to set up the framework, and then determines whether the statute fits within that framework. She said the dedicated funds clause is in Article 9, Section 7, of the state constitution prohibiting dedication of funds unless an exception applies. She continued as follows:

> For a statute to limit the legislature's ability to spend funds that are otherwise available for appropriation, you must have a constitutional exception to the dedicated funds clause. And we know from the Alaska Supreme Court already that they determined the income from the permanent fund is available for appropriation. ... That's based on Wielechowski v. State. ... We view this as the seminal case; it's the only case to have interpreted the permanent fund amendment, and particularly this second sentence in the amendment that talks about the permanent fund income.

MS. MILLS cited most of the fourth paragraph of the introduction portion of the opinion from Wielechowski v. State, which read as follows [original punctuation provided]:

> The narrow question before us is whether the 1976 amendment to the Alaska Constitution exempted the legislature's use of Permanent Fund income from the Constitution's anti-dedication clause. The answer cannot be found by weighing the merits of the dividend program or by examining the statutory dividend formula. The answer is found only in the language of the Alaska Constitution. And, as we explain below, the answer is no — the 1976 amendment did not exempt the legislature's use of Permanent Fund income from the Constitution's anti-dedication clause.

MS. MILLS said that is the end of the analysis. She stated: the permanent fund income is available for appropriation; appropriations have to be done through an appropriation bill, as mandated under Article 2; appropriations cannot be done under substantive law; placing a cap on spending permanent fund income, as was done under Senate Bill 26, is merely a guideline

- it is not binding; to be binding, a constitutional amendment is required.

1:12:46 PM

MS. MILLS highlighted another portion of the Alaska Supreme Court's opinion [found under "3. Wielechowski's arguments" at "c. Plain meaning"], which read as follows, [original punctuation provided]:

> The phrase "unless otherwise provided by law" does not plainly allow the legislature to dedicate Permanent Fund income; the phrase appears to simply provide an alternative to depositing the income into the general fund.

MS. MILLS brought attention to language [further down in the same paragraph under "c. Plain meaning," which read as follows, original punctuation provided:

> The second sentence of the Permanent Fund clause permits the creation and use of the earnings reserve for deposit of the fund's income pending appropriation; it does not give the legislature the authority to dedicate that income.

MS. MILLS explained that that phrase allows the money to be deposited somewhere, but ultimately, the legislature still has its full appropriation authority over the income from the fund.

MS. MILLS talked about legislative history specific to when the statutes [under Senate Bill 26] were created. She said there were comments made on the floor that illustrate that the legislature knew at the time the POMV was passed that it was not binding, and that the legislature would need a constitutional amendment. She said one legislator indicated that Senate Bill 26 and its effective date were meaningless and likely to be ignored; another commented that it would not limit draws or require future dividends to be paid; another admitted that the legislature would likely be pushed to spend more than the statutory cap and gave the example of the 90-day session limit that has not been binding on the legislature; and another comment made at the time was that future legislatures could ignore the limitation, since it is merely statutory. Ms. Mills said this illustrates that the legislative history supports what the Alaska Supreme Court has said about the interpretation.

MS. MILLS discussed the specific proposed appropriations where there is an overdraw beyond the statutory cap, at least as it has been "put forward so far to the legislature." She said the two proposals she is aware of are HB 69, to pay the dividend, and "the governor's bridge gap proposal of $3 billion." She said in both cases the money is not being appropriated to the general fund. She reviewed that under AS 37.13.145(e), the legislature may not appropriate from the ERA to the GF [a total amount that exceeds the amount available for appropriation]. She added, "So, the 5 percent cap applies to appropriations to the general fund, which, to us, shows how difficult it is when you have this broad appropriation power to put any sort of limit on it outside of the constitution."

MS. MILLS stated that the HB 69 appropriation would go to the Alaska Housing Capital Corporation account. She added, "There may be a question there as to whether that's the general fund or not, but then the second one, the governor's, would go to the CBR - the constitutional budget reserve, and that is not the general fund; and so, it technically still ... does not meet the prohibition in the statute." In conclusion, Ms. Mills stated:

> We think the constitution trumps, and in this case the constitution allows the legislature full authority to spend the income of the permanent fund in whatever way you deem appropriate.

1:16:45 PM

REPRESENTATIVE KURKA offered his understanding that when the budget is signed by the governor, it is state law. He said he does not hear that point being referenced.

MS. MILLS responded that under Article 2, appropriations must be made under an appropriation bill, while substantive law is made in a separate type of bill. She said, "So, when the permanent fund language says, 'unless otherwise provided by law', 'by law' is an appropriation."

1:18:02 PM

[Due to technical difficulties, the question asked by Representative Eastman and the subsequent response by Ms. Mills was not audible. They repeated the question and answer following an at-ease.]

1:19:46 PM

The committee took an at-ease from 1:19 p.m. to 1:20 p.m.

1:20:41 PM

CHAIR CLAMAN asked Representative Eastman to repeat his question.

1:20:58 PM

REPRESENTATIVE EASTMAN asked for a description of all the sources of funding that can be used for appropriation.

1:21:29 PM

MS. MILLS suggested reading Article 9, Section 7, of the state constitution, under which the dedication of funds is prohibited, which means "you can't limit how the legislature decides to spend money." There are exceptions, such as federal funding. Article 9, Section 13, states that no money shall be withdrawn from the treasury except in accordance with appropriations made by law. She explained that means the legislature gets to determine how the money is spent in combination with the governor, "who has the veto authority at the end of the day." The dedication and appropriations clauses together amount to all revenues, including permanent fund income, which has been determined by a court to be a type of revenue, being available for appropriation. She added, "And in very specific, limited instances, those can be limited to certain dedicated purposes in terms of how they're spent; but overall, it's all available for all spending decisions by the legislature."

MS. MILLS said "available for appropriation" is found in AS 37.14.140 and 145 and is defined in the first of those two. She reiterated her previous comments about the 5 percent of POMV and that the view of the Office of the Attorney General is that the constitution trumps the statutory definition.

1:23:56 PM

CHAIR CLAMAN asked whether the ERA is part of the general fund.

MS. MILLS answered that multiple Alaska Supreme Court cases must be considered because the constitutional budget reserve fund (CBRF) has language which distinguishes general fund from all funds.

CHAIR CLAMAN said that he recognizes that specific funds have been created, but once outside the purview of dedicated funds, there could be other funds which are part of the general fund and are appropriated as such.

MS. MILLS responded that it's all part of the State Treasury, available for use as deemed appropriate by the legislature.

CHAIR CLAMAN asked whether money drawn from the ERA and transferred to the CBRF is simply taken from a large fund and put into a dedicated fund.

MS. MILLS responded that, constitutionally, it doesn't matter whether the money is being moved from the general fund or the ERA.

CHAIR CLAMAN noted that in the case of Wielechowski v. State, Wielechowski needed the ERA to be a dedicated fund in order to force the payment by statute, but the court's decision that the ERA is not a dedicated fund made the funds available for appropriation.

MS. MILLS replied that the court found that there was no exception to the dedicated funds clause.

CHAIR CLAMAN asked whether the Wielechowski decision says that because the ERA is not a dedicated fund, legislators cannot, by statute, require spending at a certain level. He asked why the same analysis applies to the question of "you are supposed to spend something, as opposed to you shouldn't spend something."

1:30:07 PM

MS. MILLS responded that while the case could be viewed as a question of the dedicated funds clause, it was actually about not allowing spending for any purpose other than the specific purpose of the fund. The funds would remain in the account "if the governor didn't want to spend the money in the exact way that the statute said," she explained. She said that in her opinion, this is the same situation of restricting money from uses other than those determined by statute not being permitted by Alaska Supreme Court precedent.

CHAIR CLAMAN asked whether the legislature has ever violated that precedent as relates to school bond reimbursements.

MS. MILLS replied that she doesn't believe it has.

CHAIR CLAMAN asked whether it's the view of DOL that the state should provide school bond debt reimbursement despite statute saying it shouldn't.

MS. MILLS replied, "I believe that's where we should fall." She referred to the State v. Ketchikan Gateway Borough case which dealt with local contributions, and in which it was determined that the state and local contribution was not a tax or license under the constitution, "so therefore the dedicated funds clause didn't apply." She explained that the appropriations clause still allowed the legislature to take the actions it did, so if the legislature "wanted to spend more money on school bond debt reimbursement than the statute said, it could absolutely do that."

CHAIR CLAMAN said that the school bond debt reimbursement formula had been amended yearly until 2014, when an adjustment for the following three years was made. He said that his understanding is that the amount specified by the BSA formula in the line item has never been exceeded, and when more funds are directed to schools it's called something else with a different budget line item, but the cap in statute is still adhered to. He asked whether it's the view of DOL that the legislature has the ability to fund schools in excess of the BSA.

MS. MILLS told Chair Claman that the legislature has "full appropriation authority" and that the BSA, as well as other items, are in statute because local governments need to have some certainty in their budgets. She opined that it was a "prudent move" by the legislature for the local governments to have a base of funds, but that it's ultimately the appropriation bill that governs.

CHAIR CLAMAN remarked that he finds it "troubling" that the laws governing how the legislature manages spending are "essentially meaningless."

MS. MILLS responded that when looking at Alaska Supreme Court decisions and the constitutional convention minutes, it's clear that the delegates wanted the legislature to have flexibility in spending necessary to address whatever is happening in the state. She said that the legislature has appropriated the PFD according to the formula for decades, but according to the Alaska Supreme Court, "ultimately the constitution governs."

CHAIR CLAMAN said that similar to the situation with the BSA, it's not mandatory to follow the PFD formula.

MS. MILLS replied, "You're exactly right because they either haven't been challenged or the legislature's been following them just like they did the PFD for decades."

1:36:23 PM

REPRESENTATIVE EASTMAN asked whether it would be helpful to consider an appropriation bill as a one-time, nonpermanent statute.

MS. MILLS responded that it would be helpful, but Article 2 is very specific in that appropriations need to be done within an appropriation bill.

REPRESENTATIVE EASTMAN asked what the difference is between an appropriation and a transfer.

MS. MILLS explained that the CBR is a constitutional fund, so it has very specific limits on moving money in and out. Money may be transferred from one sub-fund to another within the GF, but it can't leave the Treasury.

1:39:24 PM

CHAIR CLAMAN asked, "You had said you can't have a statute that limits an appropriation, did I get that right?"

MS. MILLS responded, "Yes." In response to a follow-up question regarding where that is found in the constitution, she cited a portion of Article II, Section 13, of the Alaska State Constitution, which read:

> SECTION 13. Form of Bills. Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations.

CHAIR CLAMAN said that the statute doesn't say that appropriations cannot be limited in a separate law.

MS. MILLS responded, "But then you go to the dedicated funds clause and the appropriation clause, and you get back to the

same discussion we were having before, which is that saying you can't touch money is the same as a dedication."

1:40:30 PM

REPRESENTATIVE EASTMAN asked whether moving funds within the general fund from one account to another would negate the necessity of an appropriation bill.

MS. MILLS responded that there are so many accounts for a specific purpose that it's difficult to answer without a set of relevant facts.

REPRESENTATIVE EASTMAN asked, "If we can do these transfers and they don't necessarily need an appropriation then whatever could be transferred isn't going to be subject to appropriation, right?" He continued:

> I mean, we're talking about available for appropriation, but if it doesn't take an appropriation, then I guess that also would be available for transfer or some other way of describing it because we won't need an appropriation, so it does need to be available for appropriation.

MS. MILLS responded that if the money is to be removed from the treasury, then an appropriation is necessary.

1:43:17 PM

REPRESENTATIVE KREISS-TOMKINS asked to circle back to the reference to the reverse sweep and asked whether, from the perspective of the DOL, the ERA is "sweepable."

MS. MILLS stated her belief that this issue was addressed in Hickel v. Cowper, [874 P 2d. 922 (Alaska 1994)], but that it's known that the permanent fund was specifically noted as not in the GF "for purposes of the reverse sweep."

REPRESENTATIVE KREISS-TOMKINS asked whether Ms. Mills is saying that the administration does not believe the ERA is sweepable, since the budget has not yet been finalized. He asked whether the administration would sweep the ERA into the CBR.

MS. MILLS answered yes and said she agreed with Representative Kreiss-Tomkins' statement.

1:45:40 PM

REPRESENTATIVE KURKA asked why [the ERA] is not being swept.

MS. MILLS answered that the CBR has very specific language, and subsection (d) says that the sweep only applies to those funds which are available for appropriation in the general fund.

1:47:20 PM

JOE GELDHOF, Attorney at Law, Law Office of Joseph W. Geldhof, explained that he represents a group of individuals, referred to as the Concerned Citizens for Constitutional Protection (CCCP), who have been observing the "fiscal crisis" in the state. He expressed that CCCP has watched the statutory budget reserve (SBR) and CBR be "essentially drained," and the state has not figured out how to address the ongoing use of these savings accounts to come up with a balanced and sustainable budget. He noted that the CCCP includes individuals, including: a friend who has litigated several times against the State of Alaska, including a case that involved the dedication of funds and taxation issues; the Mayor of Homer; and a number of others. He said that the commonality within the group is that members care about Alaska and about the fiscal future of the state.

MR. GELDHOF noted that he had provided a written decision to the committee [included in the committee packet] and would be happy to take questions about the document. He recalled that Ms. Mills had said that this is largely a matter of policy, and he said he disagrees with that notion. Although there is policy involved, the legal issues are the area of most importance to him. He explained that legal issues arose with the attorney general's contention that "you can basically just do whatever you want." He emphasized that he also wants to speak about the presumption of laws passed by the legislature being enforceable in constitution. He shared his understanding that the legislature passed a statute and has been invited by the Office of the Attorney General to "blow it off" and not follow it. He deduced that Wielechowski v. State is something which is relied on heavily. He said that the individuals involved in this case, Alaska State Senator Bill Wielechowski, former Alaska State Senator Clem Tillion, and former Alaska State Senator Rick Halford, attempted to determine whether there was an implicit designation of funds in the constitution that required payment of the PFD. He explained that the Alaska Supreme Court unanimously said such a designation is "an impermissible dedication of fund." He mentioned the statute implemented by

the legislature that set a 5 percent cap for withdrawal of the POMV from the combined ERA and permanent fund accounts. He expressed his understanding that "the overdraw is not a mandatory spending."

1:52:07 PM

MR. GELDHOF responded that there is a statutory cap on spending, and it is easily distinguishable from the requirement to spend. He compared it to the difference between an "accelerator and a brake" when driving a car. He shared that he has "searched and searched" and has not found an Alaska Supreme Court case that interprets a statute that is based on a constitutional provision that says, "You can do whatever you want and blow through your statutory caps." He suggested reading the Hickel v. Cowper case from 1994 and shared that his reading of the case is that the Alaska Supreme Court specifically stated that the statutory cap issue was not addressed. He said he understands that the court reserved issues for "down the trail." The idea that the 5 percent cap can be ignored is incorrect and, as he understands it, has never been litigated. Mr. Geldhof concluded that CCCP is concerned that the state is going to "throw money that we don't have and throw caution to the wind" for short term political gain. He explained that CCCP will ask the courts to rule on this issue.

1:53:57 PM

MR. GELDHOF asked, "What is the policy here?" He said that he has listened to the proceedings in the legislature and the testimony from the Office of the Attorney General. He shared his understanding that the legislature is being invited to do exactly what the Callan consultants [from Callan Associates, Inc.] for the Alaska Permanent Fund Corporation advised against because it would destroy the combined assets in the ERA and permanent fund. He continued that the consultants said that 5 percent would be too high while the attorney general said that the legislature can do "whatever you want" based on the Wielechowski case. He noted that this case provides a slender comfort, but is not binding, because it is about the dedication of funds. He continued that the statute on the 5 percent POMV is not a dedicated fund, it's a cap, and there are other caps in statutory law that are followed.

MR. GELDHOF offered an "easy solution": if the legislature wants to go on record as disregarding the advice from the Callan consultants and the permanent fund trustees in favor of spending

money, then the statute should be amended. He suggested that the legislature go on record and let the citizens of Alaska know that legislators "really don't care" about the fiscal integrity of the savings accounts in the permanent fund and ERA. Mr. Geldhof concluded that CCCP knows the struggles that the legislature faces, but it wants the legislators to either live within the means set out in the statute or amend the statue. He demanded that the advice "to ignore the law" from the attorney general and the [Dunleavy] Administration not be taken. He noted that there is a presumption of constitutionality and that statues enacted by the legislature are presumed to be valid.

1:57:35 PM

REPRESENTATIVE EASTMAN explained that he has read the letter provided by Mr. Geldhof and understands that he is before the committee to defend the cap found in AS 37.13.140 and AS 37.13.145. He asked, since there is a cap on appropriations, whether Mr. Geldhof also believes that that cap should apply to the current efforts of the legislature to move a greater amount of money than the cap would permit.

MR. GELDHOF responded that his understanding is that the proposal is to move $4 billion from the ERA into the corpus of the permanent fund. He said that moving funds via an appropriation doesn't raise "any constitutional image" because the money would be put into the corpus, which would a "safe harbor" that would preclude legislators and the administration from spending it. He said that he doesn't think that presents a statutory or constitutional issue.

REPRESENTATIVE EASTMAN asked for clarification on how Mr. Geldof arrived at his conclusion. He said that he understands Mr. Geldof's argument to be that there is an appropriation cap of 5 percent, and if legislators were to appropriate money beyond that cap, then it would be a statutory violation. He stated that he thought he heard Mr. Geldof say contrarily that if legislators appropriate $4 billion in the current budget and send it to the corpus, then that would not be part of the cap and could be ignored. He asked Mr. Geldof to explain whether that is a legal argument, a political argument, or something else.

MR. GELDOF responded that the fundamental purpose of the statute and of Senate Bill 26 was to protect the combined assets of the ERA and the permanent fund. He said that taking funds from the ERA and putting these funds where they cannot be spent doesn't

create any problem, neither does an obligation to appropriate money to inflation-proof it. He expressed that Senate Bill 26 aims to overdraw the ERA in a way that would diminish future opportunities and prospects. He highlighted the real issue in his mind as being whether the chief executive will exercise his or her constitutional veto or appropriation reduction powers.

2:02:21 PM

CHAIR CLAMAN noted that if money is being transferred from the ERA into the corpus, then no changes to the overall fund are being enacted. He explained that the withdrawal wouldn't change the fund value, which might be the reason why it gets analyzed differently.

MR. GELDOF responded with his interpretation that analytically, Chair Claman is calling for an accounting methodology that doesn't diminish the overall value of the combined ERA and permanent fund. He said that that makes sense analytically, but from a practical point of view, if the money is not appropriated properly and gets utilized for projects of varying worthiness, it would not deviate from the 5 percent cap and would be presumptively valid.

2:04:13 PM

REPRESENTATIVE EASTMAN asked for clarification that the statutes being referenced are AS 37.13.145(f), which is where the combined total of the transfer is found, and AS 37.13.145(e), where the information on the cap is found. In AS 37.13.145(a), it is found that the ERA is being specifically referenced, and AS 37.13.145(f) is referring to the cap on the appropriations. He noted that the way that the statute is written, the ERA is specifically called out and places a cap on that particular account, which he stated is one of multiple accounts in the permanent fund. He suggested that it might be helpful to clarify legislative history because there was intent to protect the account, but also to ensure that funds going to the dividend were not limited. He mused that if the legislature simply permitted more money to be taken out of the ERA and sent to the corpus, it could be taking away from funds that could be paid as a dividend.

MR. GELDHOF responded that he thinks the correct way of reading the statutes referenced by Representative Eastman is that the 5 percent application represents the combined market value of the corpus, which can't be touched. The proceeds from the ERA is

added to combined value, and then the 5 percent is applied. The 5 percent of the value cannot be taken out of the permanent fund, he continued, because it can only come out of the ERA. He stated that the question becomes, "are we going to go over that 5 percent?"

REPRESENTATIVE EASTMAN restated that his question regards AS 37.13.145(f), which refers to the earnings specifically. He explained that the POMV is being used to determine the size of the corpus, and that is being used to decide how much the state can suitably appropriate from this amount. He asked for a response from Mr. Geldhof on whether the state would need to protect the dividend portion of a statute just as much as the portion of the statute that refers to the protection of the permanent fund's value.

2:08:59 PM

MR. GELDHOF explained that he agrees with Ms. Mills in that it is not acceptable to introduce a statute that says, "You must pay." He shared his understanding that the Office of the Attorney General is saying that, contrarily, it is not acceptable to use a statute to say, "You can't exceed." He expressed that this is wrong, and the two uses of statutes are two separate issues. He noted that he is on the board of the Permanent Fund Defenders and is a big proponent, as well as the other board members, of paying a permanent fund dividend and putting the permanent fund dividend formula in the state constitution. He said that the issue of whether the state is able to use a statute to dedicate funds has already been settled by the Alaska Supreme Court, and it was decided that statutes cannot be used in this way. The issue that has not yet been ruled upon, he continued, is whether the statute that has been enacted has any vitality in meaning. He shared his opinion that he thinks it does, and the members of CCCP also agree that it has meaning. He concluded that the easy way out of potential litigation on this issue is to change the statute. He suggested that the legislators pass a statute that says the legislature is going to "suspend the 5 percent" and go on record to say that there will be a deviation from the 5 percent cap. He shared his understanding that all the public wants is for this business to be done publicly and transparently.

2:11:12 PM

CHAIR CLAMAN inferred that the attorney general's analysis suggested that the appropriation authority under the

constitution is "higher" than the legislature's authority to pass statutes. He asked if Mr. Geldhof shares that interpretation.

MR. GELDHOF responded that Alaska is a jurisdiction that has a constitution to limit, as well as assign, the powers of all three branches [of government]. He opined that the legislative branch is the highest and most significant branch. He expounded that the executive branch executes "faithfully and consistently with the laws," while the judicial branch interprets the laws and resolves disputes. Regarding the legislature's powers of appropriation, he said, they are "extraordinary" but not without restrictions. Further, he offered his belief that the attorney general's "vague" analysis is "an invitation for mischief." He pointed out that the public thinks that statutes passed by the legislature have meaning. He went on to convey that the statutory provision that limits the expenditure of the combined market value was enacted in law and follows from the constitutional principal in Article 9, Section 15, which specifies that the income from the permanent fund shall be deposited into the GF unless otherwise provided by law; however, the legislature set up the ERA. He offered his understanding that the "[otherwise] provided by law statute" stems from the legislature's general power and constitutional power in Article 9, Section 15. He asserted that the legislature set up a restriction on over-appropriating the money, emphasizing that "[the legislature] provided by law, in a statute, which is binding, a cap, and unless and until you change that cap, you should follow it."

2:14:50 PM

REPRESENTATIVE EASTMAN questioned whether the income from the permanent fund falls under the category of proceeds from a state tax or license.

MR. GELDHOF opined that it does not [fall under the category of proceeds from a state tax or license]. Further, he stated his interest in asking that question to Angela Rodell, the Chief Executive Officer of the Alaska Permanent Fund Corporation (APFC), as well as to APFC's counsel.

2:16:33 PM

MS. MILLS reiterated that despite Mr. Geldhof's statements, Wielechowski v. State advised what the legislature could do with permanent fund income. She cited another line from the

introductory paragraph, which stated that "the legislature's use of permanent fund income is subject to normal appropriation and veto budgetary processes." Therefore, she surmised that permanent fund income is similar to the GF, in that it can't be dedicated. In response to the previous question from Representative Eastman, she said, the Alaska Supreme Court indicated that permanent fund income is revenue, and under the Alaska Supreme Court's precedent, revenue is a state tax or license; thus, she maintained that the permanent fund income is subject to the dedicated funds clause and is a state tax or license for purposes of the constitution. Based on that premise, she argued that permanent fund income should be considered as any other spending. She questioned if any member of the legislature believes that a statutory spending limit could be enacted that caps spending overall. She added, "[The attorney general] doesn't think you can do that." To conclude, she said [the attorney general] does not view this particular issue as an open question because the court has made it clear in all its precedents. Furthermore, she offered her belief that the legislature has the authority to make the policy decision, which should not be based on the threat of litigation.

2:20:00 PM

CHAIR CLAMAN considered a scenario in which DOL viewed the 5 percent as enforceable. Based on that scenario, he asked if the legislature would be breaking the law if they put the $4 billion into the corpus from the ERA.

MS. MILLS said subsection (e) of the statute referenced by Representative Eastman states that the legislature may not appropriate, from the ERA to the GF, a total amount that exceeds the 5 percent. She noted that subsection (f) is the combined total of money from the ERA to the dividend fund. Based on that, she said, appropriating money from the ERA to the permanent fund would not fall under the statute.

REPRESENTATIVE CLAMAN asked [if transferring $4 billion into the corpus from the ERA] would be allowed.

MS. MILLS answered that is correct.

2:21:15 PM

REPRESENTATIVE EASTMAN asked what DOL's position was before the Alaska Supreme Court decided to define state tax or license equivalent to revenue.

MS. MILLS answered that she was unsure [of DOL's opinion at that time.]

2:22:24 PM

CHAIR CLAMAN questioned why putting a cap on GF expenditures would create a dedicated fund.

MS. MILLS replied there are two things to consider. The first consideration is the dedicated funds clause, which sets forth that revenues of the state cannot be dedicated. She added, "If you are saying these can't be used in a certain way, that's the other side of the coin from saying you can only spend it in this way." The second consideration, she said, pertains to the way legislation is passed. She stated her understanding that appropriations do not necessarily hold a higher authority, but they do have a specific process, and to restrict [the legislature's] authority through a substantive law bill on appropriations would violate the concept that appropriations occur in appropriations bills.

CHAIR CLAMAN remarked that "that doesn't really hold a lot of water" because it only takes 21 votes to change the law. He explained that if a cap is put into law that the legislature does not like, then the legislature could change the cap with 21 votes in the House, 11 votes in the Senate, and the governor's signature. He asked how that would create a dedicated fund.

MS. MILLS emphasized that every year appropriations must be passed in an appropriation bill. She expounded that every year, the legislature must consider all the revenues and all available money. She suggested that the court recognized that passing a statute is different, which was an argument that Senator Wielechowski made; however, it was dismissed by the court.

CHAIR CLAMAN interjected by pointing out that Wielechowski v. State is "a different animal" because it pertains to a statute that says, "You shall spend this much money"; further, the court decided that it's not a dedicated fund. He pointed out that there's nothing in the Wielechowski case that says the legislature does not have the authority to put limits on its spending authority. He asked Ms. Mills why that can't be done.

MS. MILLS replied that she and Chair Claman may disagree on this legal point. She reiterated that [the attorney general] believes that spending decisions are done through

appropriations. She maintained that to limit that authority through a substantive statute is limiting [the legislature's] appropriation power. She emphasized that appropriations are done through a specific process.

CHAIR CLAMAN asked whether the legislature's appropriation power is included in Article 2, Section 1, which states that the legislative power of the state is vested in the legislature. Further, he sought confirmation that it is inherently in the legislature's power to limit itself.

MS. MILLS answered, "But Chair Claman, you can. Every year you get to make those decisions and decide to hold back, or not, on the way you spend. It's an annual spending decision."

CHAIR CLAMAN posited that Ms. Mills is indicating that the appropriation authority is a "higher" authority than [the legislature's] statutory authority. He reasoned that the legislature "is not saying how you spend it, we're just saying this is all you have available to spend." He added that the cap in the POMV law specifies how much money can be spent. He asked why the legislature does not have the authority to limit how much money it has available to spend.

MS. MILLS replied, "Because that's not how the constitution was set up by our framers."

2:26:49 PM

CHAIR CLAMAN pointed out that nowhere in the constitution does it read that the [legislature's] appropriation authority trumps everything else that the legislature does, "which is essentially the argument you're making," he said.

MS. MILLS remarked:

> I'm saying that appropriations have to go through a specific process and there's an annual process that was set forth in the constitution and you can't use the substantive law process to do appropriations; whether you view that as a higher power because you have to do it on an annual basis, to me, that's a subjective descriptor ...; but they are two separate processes and our constitutional convention delegates, again, were very clear that they wanted the legislature to have full flexibility every year to look at the revenues, look at what was in the fund,

> and determine how to spend it. Having a substantive law that you would have to change by statute - again, I know you say that Wielechowski was different, but the argument was very similar.

CHAIR CLAMAN stated that the Wielechowski case was about "whether or not this was a dedicated fund," and the court decided it's not; therefore, those funds have to compete for everything else. He asked if Ms. Mills agrees that the POMV does not create a dedicated fund.

MS. MILLS replied, "It depends on if you're interpreting it as binding or not. If it's binding, I think there's a really strong argument that [it] is a prohibited dedication."

CHAIR CLAMAN asked if the legislature passed a law that limits spending to no more than 5 percent, why it would create a dedicated fund. He said he does not follow that logic and asked Ms. Mills to explain. Additionally, he questioned what it's being dedicated to.

MS. MILLS answered:

> It's being dedicated to not being spent. It' still a dedication, it's just a negative dedication and you're taking it out of the pool that the legislature can appropriate. ... Appropriation laws are laws, and if you have a substantive law that says you can't spend more than this, why couldn't an appropriation bill change that?

CHAIR CLAMAN pointed out that the money stays in the Treasury. He added, "I guess I have difficulty with the analysis that it's somehow a negative dedicated fund."

2:29:49 PM

CHAIR CLAMAN referencing the Employment Security Act and several other statutes, which limit how much the legislature is obligated to pay, asked if DOL's position is that those statutes could be written off because they have no binding effect on the state.

MS. MILLS explained that in part, the purpose of a statute is to advise the executive branch how to implement the law. Regarding Chair Claman's question, she said, those statutes are telling the executive branch how the appropriation can be distributed.

She added, "If you wanted to give more or create a new program, that's where we get into fuzzy lines about what's the appropriation and what's the program."

CHAIR CLAMAN regarding employment security benefits, questioned whether the legislature has the authority to increase the weekly benefit in the budget without changing the statute.

MS. MILLS said she would need to look at the specific statute in question and how the appropriation was written. Nonetheless, she said the legislature can "absolutely" provide grants to individual Alaskans through an appropriation bill.

CHAIR CLAMAN noted that his previous question was not about grants. He asked again if the legislature could increase the weekly benefit in an appropriation bill.

MS. MILLS opined that depending on how it's written, it could be done.

2:33:49 PM

REPRESENTATIVE EASTMAN asked if the statute route or the appropriation route was more difficult, regarding the veto process. He clarified his question by asking if the governor could line item veto a piece of legislation that was not an appropriation bill.

MS. MILLS responded that the governor cannot line item veto a substantive law bill. This came up previously in a case regarding bonds, she recalled. The courts had decided that since it was not an appropriation bill, the governor could not line item veto the legislation. Therefore, only an appropriation bill can be line item vetoed, she concluded.

REPRESENTATIVE EASTMAN asked which had a higher threshold, to override a veto through an appropriation bill, or substantive law bill.

MS. MILLS responded it would be the appropriation bill, which requires a three-quarters override.

REPRESENTATIVE EASTMAN referred to the Uniform Rules and how appropriation bills are dealt with differently than substantive law bills. He then asked which had more strict controls in conference committees.

MS. MILLS offered her understanding there is more flexibility in appropriation bills when it comes to conference committees than substantive law bills.

REPRESENTATIVE EASTMAN suggested that Uniform Rule 42 may be the one he was referencing. He said Ms. Mills' answer was not his recollection.

2:36:35 PM

REPRESENTATIVE SNYDER clarified that unless it is an appropriation bill, the legislature cannot limit spending and cannot direct spending. She inquired if there was anything that disallowed the legislature from putting a limit or directive in an appropriation bill that would apply indefinitely or over multiple years.

MS. MILLS responded that is a current issue in the Alaska Supreme Court. The court is looking at whether the legislature could forward fund appropriations for education. She said DOL's position is that Alaska has an annual spending model in that every year the legislature considers the spending for one year at a time and cannot bind the next legislature on spending. The case is undecided, and the answer depends on what the court says, she explained.

2:37:53 PM

CHAIR CLAMAN, regarding the question on whether the legislature could forward fund, opined that DOL was taking a distinctly different position under the current administration than it took during the last administration.

MS. MILLS responded that having looked at the history and having been a part of it, "we just never looked at the question."

CHAIR CLAMAN asked if the notation that one legislature can't bind the next is from Carr-Gottstein Properties v. State, [899 P.2d 136 (Alaska 1995)], and he asked whether that [restriction] would have any effect regarding the POMV law.

MS. MILLS answered she thinks it does, and that it plays into the annual appropriation model that every year the legislature makes spending decisions. The terminology on not binding another legislature generally has to do with how the legislature spends money, she explained, not substantive law, because things that are codified can be overturned.

CHAIR CLAMAN explained the reason he was curious for Ms. Mills' opinion was because he understood the Carr-Gottstein case as relating to the incurring debt provisions, not relating to dedicated funds or appropriations. As per that case, he understood that the legislature can enter all the leases the legislature wants, but the legislature cannot bind the next legislature to renew a lease. He asks if he missed something that comes into play here.

MS. MILLS argued that Carr-Gottstein had to with debt, and whether one legislature could bind another to pay dept, making it a spending issue of whether one legislature could force another to put a debt into the appropriation bill. Only general obligation (GO) bonds can require funding from another legislature.

CHAIR CLAMAN concluded that GO bonds need to come before the public for a vote, which would resolve the issue. The only issue he saw was state leases, in which the landlord takes the risk that the legislature will not want to fund the lease.

MS. MILLS agreed with Chair Claman's understanding.

2:41:33 PM

REPRESENTATIVE VANCE asked how Ms. Mills reconciled the legislature's power of appropriation in the constitution with the constitutional spending cap.

MS. MILLS replied that is exactly how a spending cap has to be done, through a constitutional amendment. She continued that she didn't think a statutory spending limit would be binding.

2:42:46 PM

MR. GELDHOF stated that there has been a lot of talk about the general power of appropriation by the legislature according to the power of the constitution. He proposed focusing on the appropriation being discussed, which comes from the ERA, and the source of the ERA, the Alaska permanent fund. He argued this issue cannot be looked at abstractly, as if the legislature could do as it wished according to appropriation powers. Generally speaking, he stated, the legislature has a great deal of discretion in terms of appropriating. What the legislature can't do, and is not implicated in this case, he declared, is dedicate funds and bind future legislatures. That is not what

is being discussed, Mr. Geldhof argued. What is being discussed, he stated, was whether the Alaska State Legislature, in the context of dealing with Article 9, Section 15, of the constitution, relating to the permanent fund, were to set up restrictions on the amount of money in a statute.

MR. GELDHOF opined that the statutes are not aspirational, and the legislature is obligated to follow them. The legislature's power as lawmakers to put a restrictor device on an account uses the Article 9, Section 15, provision that states, "otherwise provided by law". This money, he explained, goes into the ERA, because the legislature used its authority to pass a statute that says it will spend 5 percent of the combined permanent fund and ERA. Mr. Geldhof said unless and until the legislature uses its law powers to change the restriction, the legislature must follow it as a matter of law.

MR. GELDHOF posed the question: "Are we a state that follows the rule of law?" The implication here, he suggested, from the Office of the Attorney General is to engage in ad hoc fiscal decision-making. He opined that would cause ruination of one of the best ideas that has ever come forward - the permanent fund. He rhetorically asked if he was being harsh, before continuing to state that for six years the state has had an imbalanced, unsustainable budget. The call from the Office of the Attorney General has been to open the floodgate and overdraw the ERA, which is a part of the permanent fund.

2:45:32 PM

MR. GELDHOF challenged committee members, asking if they wanted to be part of the group of people who that kicks the can down the road, and overdraws and overspends. He drilled further asking if they wanted to ignore their own statutes. He implored the committee, if the legislature would continue to behave this way, to have the courage to pass a law that says the legislation is no longer binding.

MR. GELDHOF stated that he believed Wielechowski was not on point in controlling this case, because it was dealing with a mandatory spending and a dedication of funds. This is a cap adopted in order to protect the permanent fund and the ERA. He suggested going back to Hickel v. Cowper. The obvious question that was unanswered, he declared, was whether a statutory prohibition, the spending cap of 5 percent of POMV, precludes an overdraw. The court in Hickel v. Cowper talked about the statute but said there is no statutory or constitutional

provision that precludes [an overdraw]. He argued that the court left open the idea that the legislature could adopt a restriction.

MR. GELDHOF concluded his argument by asking the committee what was wrong with following the law and whether the legislature was so undisciplined that it needed to spend money that the state couldn't afford. He requested if the legislature wanted to tap into funds in an unsustainable way, that it at least have the wherewithal to change the statute that limits the draw to 5 percent.

2:48:34 PM

REPRESENTATIVE EASTMAN sought further understanding of what was behind the inability to bind future legislatures. He acknowledged that there may be some value in not allowing one legislature to bind those that come after, but he argued that other legislatures don't seem to believe they need to follow statutes. He asked how far a legislature can go in binding a future legislature, and where the stopping point is.

MR. GELDHOF replied that he was again inclined to talk about policy. He surmised that if the legislature asked the court whether [statutes] meant anything and the Office of the Attorney General were to respond that they do not, then legislators would have to consider what that would mean to their constituents. He concluded by restating his argument that a law should be changed, not ignored.

2:52:35 PM

MS. MILLS responded to Representative Eastman's question about binding future legislatures. She stated that the constitutional convention delegates were concerned about legislatures being able to look at what was available in resources in any given year and make decisions. Specifically, they were concerned, she explained, that giving a legislature the ability to bind a future legislature without knowing what circumstances they could face was dangerous. They wanted to give flexibility, and part of that was making sure each legislature could make decisions on spending with the knowledge and resources based on current knowledge.

2:54:59 PM

CHAIR CLAMAN announced that HJR 7 was held over.

2:55:35 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 2:55 p.m.