SCOMM

101:30

TUES
√ RESERVES

State of Alaska Fund Balances
(millions of dollars)

Fund	Current Balance	Purpose and Limits on Use/ Impacts of Spending
Constitutional Budget Reserve Fund	$1,965.3	Purpose: to save windfall revenues and cushion longer term declines in revenues. Fund can be used to offset revenue shortfalls by majority vote under certain conditions; other appropriations require 3/4 vote of legislature. Appropriations from fund are required to be repaid from surplus revenues. Impact of spending from the fund is to reduce the state's ability to offset future revenue shortfalls.
Permanent Fund Earnings Reserve Account	$818.0	Projected balance as of June 30, 1996. Purpose: to offset potential shortfalls in funds available for inflation-proofing the Permanent Fund. No limits on appropriations for other purposes except for public pressure to protect the Fund. Impact of spending from the ERA is to potentially create a shortfall in inflation-proofing funds. However, this will depend on future earnings of the Permanent Fund and the impact is uncertain.

What is an appropriate level of reserves for Alaska?

Revenues for the next year's state budget are based on the mid case projection of oil prices and production. In any given year there is a substantial chance that oil revenues will be hundreds of millions of dollars less than the mid case projection. The consequences to the state's economy of addressing such a large shortfall exclusively with budget cuts in a single year would be to severely aggravate an already difficult economic downturn. In 1986-87, the combination of low oil prices and sharply curtailed state spending threw the state into a severe recession, with the following impacts:

- Alaska lost 22,000 jobs — 10 percent of the work force;
- Anchorage's population dropped by 29,000 residents (about 9 percent);
- Over 10,000 residential properties were foreclosed on statewide; and
- At the worst point there were over 90 bankruptcies per month in Anchorage.

One potential policy for use of reserve funds is: if anticipated revenues drop more than a predetermined percentage from the mid case projection, a combination of budget cuts

and use of reserves should be put into place. The appropriate mix will depend on several factors, such as how late in the fiscal year the revenue drop occurs, private sector economic conditions, the amount of cuts already budgeted for the year and the expected duration of the problem.

How much insurance against oil price declines should the state maintain in the form of reserve funds? One reasonable benchmark would be for the state to be prepared to offset a drop in oil prices from the mid case projection for a given year, to the historical low point in oil prices over the last ten years. This ten-year low point was reached in FY 94 in terms of inflation-adjusted oil prices, with an average for the year of $14.22 per barrel.

If this benchmark were applied to the FY 96 budget, about $275 million in reserves would be necessary to insure against a potential drop in oil prices from the mid-case revenue forecast to the $14.22 level. Since lower-than-forecast oil prices could occur in two consecutive years, it may be prudent to maintain about twice this amount, or approximately $500 million, in reserves to offset oil price fluctuations. This amount would also be sufficient to provide cash necessary to handle a major natural disaster or other emergency requiring immediate and extensive state action.

In addition to providing insurance against oil price fluctuations, reserve funds are also an important element of cushioning the state's adjustment to lower long-term revenues. While reserves cannot fill the fiscal gap indefinitely, if appropriately used, they can smooth this transition to lower revenues and help to avoid excessive impacts to the Alaska economy and work force.

Other reserve fund issues

To ensure that reserves are replenished, a repayment mechanism is required. The commission believes that the repayment provision of the current Constitutional Budget Reserve (CBR) is not as clear and workable as it should be. For instance, it does not make sense to completely drain capital replacement funds (for highways, ferries, state equipment, etc.) a the end of the year in order to pay back the CBR. The very purpose of these funds is to provide a rational, planned source of funds to replace aging equipment and facilities.

An alternative approach would be to repay reserves with year end balances in the general fund and future oil revenue increases. As oil revenues are restored, any amount over the mid case projection should be returned to reserves at year end along with any balances from the general fund appropriation. Any settlement income or other "windfall" should also be deposited in reserves.

A number of other issues have been raised concerning the operation and effectiveness of the Constitutional Budget Reserve, including the 3/4 vote requirement, and the uncertainty regarding the definition of the term "amount available for appropriation," which sets the threshold for use of the Reserve.

The commission has yet to determine whether the CBR is the best long term strategy for implementing the state's reserves policy. At this point, the commission is focusing its

efforts on the development of an effective reserves policy. When this step is complete, the commission will then turn to a more detailed review of the CBR issues discussed above, and address possible solutions to these issues. It should be noted that any changes to the Constitutional Budget Reserve provisions will require a constitutional amendment.

Another potential reserves policy would be that if reserves build up to a level which is more that 1.5 times the amount required under the general rule, the legislature should consider depositing the excess in the corpus of the Permanent Fund. However, an automatic deposit may not be advisable, because under the circumstances it may be more fiscally prudent to build up somewhat larger reserves.

Our experience from the years of dramatic oil price increases tells us that it is absolutely critical that the state not increase spending just because revenues have taken an upturn. This only leads to a level of spending which cannot be sustained when prices return to their more accustomed level, let alone when they drop below the mid case level. Additional revenues from price spikes should be used to replenish reserves or as an addition to the corpus of the Permanent Fund.

Melissa, Annalee also wanted to add a bullet on dedicated funds to the end of the Budget Process section:

- *Review the issue of dedicated funds to determine whether such funds would help or hinder the process of closing the fiscal gap.*

Melissa - Here are some minor revisions to the Reserves and Budget Process sections requested by Annalee McConnell. I've put the new or reworded sections in italics.

Thanks -- Jack Kreinheder

Post-it™ brand fax transmittal memo 7671	# of pages ▸ 4
To Melissa Fouse	From Jack Kreinheder
Co.	Co.
Dept.	Phone #
Fax # 758-9869	Fax #

What is needed, therefore - - both as a means of concretely dealing with the fiscal gap, and as a means of not unnecessarily contributing to it - - is for the fiscal gap to be operationalized, or operationally defined. That is, it needs to be given a particular size and shape. Once that is done, and not before, it can be fitted with a specific strategy (or set of strategies) for solving it.

For example: If the Budget Reserve Fund were to be capitalized to yield a scheduled stream of investment income for the general fund for a set number of years, operating and capital budget expenditures were ratcheted down over the same period via a separate schedule, and a mix of tax provisions adjusted to yield yet a different scheduled flow of tax revenue in the same time period, the remaining "fiscal gap" (if any) would thereby have been imparted a specific size and shape, "X" dollars high and "Y" years long. It would no longer be something vague, or constantly changing. In short, to the degree that these fiscal flows were scheduled (agreed upon, enacted, appropriated, etc.) - - i.e., stabilized - - the gap would, in effect, have been defined, at least over the period. The defined gap might be small for the first year or two, small in the middle several years, and very large in the last few out years; or vice versa; or whatever. The point is, stabilization of revenues and expenditures would prove to be the key to developing the strategy, and to achieving and maintaining a consensus for implementing it.

This is an important point: until the fiscal gap is operationally defined, it will be difficult if not impossible to develop and settle upon a strategy or plan for dealing with it. So long as our sense of the fiscal gap remains vague and shifting, it will be very difficult to either lay out a strategy or plan of action, or to obtain (and maintain) agreement on it.

DRAFT: 7/25/95
JF

The key to developing an operational definition of the fiscal gap, as shown in the example, is to approach it through stabilization of the State's revenue and expenditure streams. The reason for this is that stabilization will provide the one thing currently missing that is indispensable for solving the problem of the fiscal gap: it will impart a size and shape to the gap that does not keep changing; and which, therefore, is amenable to a continuing solution strategy that itself need not change from year to year.

This will provide two crucial things, in particular: (1) a solution strategy that can be applied gradually, over a number of years; and, (2) a basis for achieving and maintaining public support for - - and a political consensus for - - that strategy. In addition, it will allow a measured assessment of our needs and problems, and thus establishment of a good "fit" between our needs and our resources. In the broader scheme of things, it will also contribute mightily to overall economic stability in the state, insofar as Alaska's economy is affected hugely by State fiscal policy decisions.

To achieve this operationalization of the fiscal gap, many approaches are possible. The Commission is exploring all of them. Under review at present are the following:

- *Development of a Reserves Policy*

  Approaches for employing existing and future reserve funds not just as a "shock absorber" (e.g., for dealing with sudden or short-term revenue decreases), but also as a "stabilizer" (e.g., to enhance program planning and economic development through provision of a steady year-to-year level of expenditures.

MAY CREATE SECTION

or capital investment; i.e., through capitalization of reserves).

- *Application of Permanent Fund Earnings*

  Approaches for using portions of the Fund's earnings to augment budget revenue.

- *Petroleum Hedging*

  Investment banking approaches for reducing risk and maximizing income through the use of security and commodity futures, options, etc.

- *Economic Development Initiatives*

  Approaches to further development of North Slope oil and gas resources, oil and gas exports,, etc.

- Oil and Gas Settlements

  Approaches for striking a balance between current use and deferred use of oil litigation settlement funds.

What about Reserves?

Why do we need reserves?

- To absorb the shock of extraordinary drops in the price or production of oil, the source of 78 percent of our state revenues. Alaska is much more vulnerable to fluctuations in the price of a single commodity — oil — than any other state. Reserves can be used in combination with budget cuts so that the state's economy doesn't suffer as badly as it did in the oil price crash of 1986.
- To provide a "surge tank" for windfall revenues from oil tax settlements and oil price spikes, in order to avoid the spending sprees that might result if these windfall revenues flowed directly into the general fund.
- To have funds available for immediate state response to extraordinary disasters and emergencies.
- To reassure the state's bond market that the state has adequate resources to pay bond debt in the event of a major change in revenues or expenditures as described above.
- In the past, the state has used reserve funds for all of these purposes. However, there has not been a consistent policy for using reserve funds from year to year, and the use of reserves has not been as effective in closing the long-term fiscal gap as it might have been.
- While reserve funds have been used to temporarily fill the fiscal gap for several years, over the long term, this is not a viable use of reserves, because the reserves will soon be depleted.
- If the state adopted a proposal to use a portion of the 5-year average earnings of the Permanent Fund to support government services, reserve funds could be used to offset years of low Permanent Fund earnings, to avoid any reduction in the principal balance of the Fund.

What reserves does Alaska have now?

Alaska's major liquid reserve accounts are the following:

What is an appropriate level of reserves for Alaska?

Revenues for the next year's state budget are based on the mid case projection of oil prices and production. In any given year there is a substantial chance that oil revenues will be hundreds of millions of dollars less than the mid case projection. The consequences to the state's economy of addressing such a large shortfall exclusively with budget cuts in a single year would be to severely aggravate an already difficult economic downturn. In 1986-87, the combination of low oil prices and sharply curtailed state spending threw the state into a severe recession, with the following impacts:

- Alaska lost 22,000 jobs — 10 percent of the work force;
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- At the worst point there were over 90 bankruptcies per month in Anchorage.

One potential policy for use of reserve funds is: if anticipated revenues drop more than a predetermined percentage from the mid case projection, a combination of budget cuts and use of reserves should be put into place. The appropriate mix will depend on several factors, such as how late in the fiscal year the revenue drop occurs, private sector economic conditions, the amount of cuts already budgeted for the year and the expected duration of the problem.

To avoid excessive impacts on the economy, it would be prudent to avoid budget cuts (beyond the cuts already planned in the budget) of more than 3-5 percent per year. A 5 percent cut in the total general fund operating budget is equivalent to about $120 million. For each $1 per barrel decline in the price of oil, the state loses about $120 million in revenues. Therefore, cutting $120 million from the state budget in a single year would offset an oil price decline of only $1 dollar per barrel. Under this potential reserves policy, a drop in oil prices of more than $1 per barrel would need to be covered by reserve funds.

How much insurance against oil price declines should the state maintain in the form of reserve funds? One reasonable benchmark would be for the state to be prepared to offset a drop in oil prices from the mid case projection for a given year, to the historical low point in oil prices over the last ten years. This ten-year low point was reached in FY 94 in terms of inflation-adjusted oil prices, with an average for the year of $14.22 per barrel.

If this benchmark were applied to the FY 96 budget, with a mid case oil price projection of $16.52 per barrel, the potential drop in revenues to be offset would be about $275 million. If $120 million of this amount could be offset by budget cuts, this would leave about $155 million to be covered from reserve funds. Since lower-than-forecast oil prices could occur in two consecutive years, it may be prudent to maintain about twice this amount, or $300 million, to offset oil price fluctuations. This amount would also be sufficient to provide cash necessary to handle a major natural disaster or other emergency requiring immediate and extensive state action.

Other reserve fund issues

To ensure that reserves are replenished, a repayment mechanism is required. The commission believes that the repayment provision of the current Constitutional Budget Reserve is not as clear and workable as it should be. For instance, it does not make sense to completely drain capital replacement funds (for highways, ferries, state equipment, etc.) a the end of the year in order to pay back the CBR. The very purpose of these funds is to provide a rational, planned source of funds to replace aging equipment and facilities.

An alternative approach would be to repay reserves with year end balances in the general fund and future oil revenue increases. As oil revenues are restored, any amount over the mid case projection should be returned to reserves at year end along with any balances from the general fund appropriation. Any settlement income or other "windfall" should also be deposited in reserves. Any changes to the Constitutional Budget Reserve provisions will require a constitutional amendment.

Another potential reserves policy would be that if reserves build up to a level which is more that 1.5 times the amount required under the general rule, the legislature should consider depositing the excess in the corpus of the Permanent Fund. However, an automatic deposit may not be advisable, because under the circumstances it may be more fiscally prudent to build up somewhat larger reserves.

Our experience from the years of dramatic oil price increases tells us that it is absolutely critical that the state not increase spending just because revenues have taken an upturn. This only leads to a level of spending which cannot be sustained when prices return to their more accustomed level, let alone when they drop below the mid case level. Additional revenues from price spikes should be used to replenish reserves or as an addition to the corpus of the Permanent Fund.

How can we stabilize the state's revenues?

INSERT discussion of Cremo plan and other stabilization strategies

Budget Process Improvements

The public, executive branch and legislature will be better served in the budget process if a number of changes are made to improve the quality of information, ease of understanding and accountability. Process improvements under consideration by the commission are briefly noted below:

- Develop a budget format and executive summary that are more understandable to the general public and legislature.

- Establish and track progress on performance measures that relate to the effectiveness of all state services and assets.

Alaska State Legislature

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Drue Pearce
President of the Senate

June 30, 1995

Mr. Brian Rogers, Chairman
Long Range Financial Planning Commission

Dear Chairman Rogers and Members of the Commission:

The issue of implementation of the Constitutional Budget Reserve Fund (CBR) provisions is one of the more important issues facing Alaska as we look for ways to manage future state spending.

There are a number of issues that need to be resolved before the CBR can work as was intended by the Legislators who voted to put the amendment language on the ballot.

For example, Article IX, Sec. 17(c) states that an appropriation from the budget reserve fund may be made to any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature. When the Constitutional Amendment was drafted, the requirement for a three-fourths vote seemed like the perfect way to avoid frivolous actions by the legislature. The effect has been just the opposite.

It is a nearly impossible to imagine a time in Alaska when one political party may hold three-fourths of the seats in each house. Therefore, under the current provisions it is necessary for members of the minority party to cooperate to access the CBR. The drafters of the constitutional amendment and the voters who adopted the CBR wanted to make it difficult to appropriate the money from the fund and believed that the requirement for a three-fourths vote would protect the fund. I doubt that anyone envisioned that members of the minority could hold access to the CBR hostage in exchange for concessions and special interest projects, the effect of which is a larger state budget rather than a reduced one.

In addition, a number of other issues remain:

1. The "amount available for appropriation" has not been clearly defined.
2. The repayment provision has no implementation guidelines.
3. The court has not given sufficient guidance to identify specific funds included in either "funds available" or the section 17(d) payback requirement.
4. Does section 17(d) need to be implemented by law?

I request that the Long Range Financial Planning Commission schedule discussion of proper implementation of the Constitutional Budget Reserve at one of its meetings and that it include a recommendation in its report to correct this barrier to effective financial management and smaller state budgets.

Thank you for your attention to this matter. Feel free to contact me with any questions you might have.

Sincerely,

Drue Pearce
Senate President

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CONSTITUTIONAL BUDGET RESERVE

History

The Alaska Legislature enacted SJR 5 during the 1990 session, placing a ballot measure before the voters to consider a constitutional amendment to establish a budget reserve fund --which the voters subsequently approved at the November 1990 general election.

The approved ballot measure was incorporated in the Alaska Constitution as Article IX, Section 17 and became effective on January 2, 1991, establishing the constitutional budget reserve as a separate fund in the state treasury. It provides for the deposit of of certain tax and mineral revenue dispute settlements into the fund, established limitations on the appropriation of monies from the fund, and required that such amounts withdrawn from the fund be repaid.

In implementing the provision for the deposit of funds, the Department of Revenue requested an attorney general's opinion to define the term "administrative proceeding" as it is used in Section 17. Specifically, the opinion asked whether the term applied to informal conferences and audits or only to formal hearings and court proceedings. The April 24, 1992 attorney general opinion determined that Section 17 applied only to administrative actions that were similar to litigation, i.e. the formal hearings held by the Department of Revenue. In conformance with the opinion, the Department deposited in the general fund (rather than the budget reserve fund), all settlement monies received as a result of informal tax conferences. These receipts have been generally referred to as "administrative settlement" receipts.

The Governor relied on this opinion in submitting his fiscal year 1994 budget request to the 1993 legislative session, and included these settlement monies as a part of the overall spending plan, i.e., within the amounts available for appropriation in the normal course of the budget process. The Legislature, during the 1993 session thus included $1.006 billion of these "administrative settlement" monies in the FY93/94 spending plan as available for appropriation.

On July 12, 1993, the Senate majority filed suit seeking judicial review of the attorney general opinion regarding these administrative settlement receipts. On November 19, 1993, the superior court issued its decision which concluded that the term "administrative proceeding" did apply to informal administrative proceedings. The superior court held that an administrative proceeding

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commences with the issuance of a tax assessment to a taxpayer, thus invalidating the Attorney General's April 24, 1992 opinion. As a result, those settlement amounts which were reached by virtue of an informal conference should have been deposited in the budget reserve fund.

The superior court decision was appealed to the supreme court, which upheld the lower court and ordered restoration of the amounts it determined properly due to the budget reserve fund with interest payable from the date of receipt of the settlements. The court order put the state in a position in which the general fund did not contain a balance suffficient to repay the amount due to the constitutional budget reserve and provide adequate funding for the FY94/95 budgets.

One part of the proposed solution to the repayment and budget gap problem took the form of HB58, enacted as Ch. 5, SLA 94. It amended Title 37, The Executive Budget Act, to provide guidance in the administration of the constitutional budget reserve fund, particulary in relation to providing definitions of the broad terms used in Section 17, e.g. "administrative proceeding" and "amount available for appropriation." Th legislation defined the "amount available for appropriation" as the annually recurring unrestricted general fund revunues, plus general fund program receipts, and any general fund balance carried forward from the previous fiscal year. The courts subsequently found that this definition did not measure up to its view of the constitutional amendment even though this definition had longstanding use in the state budget process and state financial reporting.

The repayment issue was resolved in separate legislation, HB505 enacted as Ch. 14, SLA 94, in the form of a "round trip" appropriation which transferred the amount due from the general fund to the constitutional budget reserve fund ($1,055.6 million) and then from the constitutional budget reserve fund back to the general fund. It appears this satisfied the courts.

The appropriation out of the CBR was accomplished under the provisions of sec. 17(c) which require a 3/4 vote majority of each body of the legislature as opposed to sec. 17(b) whereby funds may be withdrawn with a simple majority vote. The superior court decision as affirmed by the supreme court states that the sec. 17(b) withdrawal provision is not available to the legislature because the funds available test had not been met, i.e., the legislation failed to include all funds the court would consider available--and the courts have not defined what all those funds may be.

The extent of the judicial guidance is that the supreme court has found that the **"amount available for appropriation" includes all monies over which the legislature has retained the power to appropriate and which requires further appropriation before expenditure.**

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Within this meaning, the court has **included** and specifically mentioned as available for appropriation such funds as:

- trust receipts, e.g. federal funds
- Railbelt Energy Fund (and by its reasoning, also other energy funds like the Power Cost Equalization fund)
- Educational Facilities and Maintenance Construction Fund
- Marine Highway System Vessel Replacement Fund (and by its reasoning, other funds in the general fund like the Marine Highway fund for system operations)
- Permanent Fund Earnings Reserve Account because appropriations may be made from it and is not subject to expenditure without legislative action.

With respect to the Earnings Reserve Account, the court also held that it must be considered as "available for appropriation", but is not to be included in the Section 17(d) repayment provision because it is not in the general fund. The supreme court in it May 27, 1994 decision, did provide some guidance regarding the Section 17(d) repayment provision: "we see no reason to give 'available for appropriation' a different meaning in subsection (d) than we did in subsection (b). We recognize, however, that **the payback provision in section 17(d) is limited only to those funds which are 'available for appropriation' and 'in the general fund'."** Thus available funds that are not in the general fund, such as the permanent fund earnings reserve account, need not be deposited in the budget reserve.

The supreme court has **excluded** from its definition of "funds available":

- monies which already have been validly committed by the legislature for some purpose.
- illiquid assets owned by the state that are not available so long as they remain illiquid

Under this definition, and by this reasoning, the court says that the oil and hazardous substance release response fund is not counted as available because the entire balance may be expended at any time without further appropriation [once it is in the hands of the commissioner of the department of environmental conservation].

Remaining Issues

1. Is the repayment provision to be implemented by automatic "sweep" of the subject monies by the state accountant or through specific enactment of appropriations to the budget reserve?

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2. Does the court give sufficient guidance to further identify specific funds included in either "funds available" and the section 17(d) payback requirement?

The court left it to the executive and legislative branch officials (emphasis added, their words) to apply its general definition to every fund within the treasury of the State of Alaska--who are these offficials?

3. To what extent does section 17(d) need to be implemented by law--and how much will the interested parties and the courts allow?

JUN-29-'95 THU 14:01 ID: FAX NO: #009 P04

DIVISION OF LEGAL SERVICES

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Juneau, Alaska 99801-2105

MEMORANDUM December 7, 1993

SUBJECT: Budget Reserve Fund (Work Order No. 8-LS1412)

TO: Senator Drue Pearce
Co-chair, Senate Finance Committee

Senator Steve Frank
Co-chair, Senate Finance Committee

FROM: Tamara Brandt Cook
Director

You have asked how money may be appropriated by the legislature from the Budget Reserve Fund established under article IX, sec. 17 of the state constitution. Under subsection (a) it is provided: "Money may be appropriated from the fund only as authorized under (b) or (c) of this section." I take this to mean that these two methods whereby the legislature may appropriate money are entirely independent from each other.

Under subsection (b) a formula is set out under which a determination is made as to whether, and how much, money may be appropriated from the budget reserve fund based upon the amount of appropriation made in the previous calendar year for the previous fiscal year. In other words, supplemental appropriations will generally be disregarded. If the amount available for appropriation for a fiscal year is less than the amount appropriated for the past fiscal year, the amount of shortfall may be appropriated from the budget reserve fund. No special vote requirement is needed for appropriations under this subsection.

Under subsection (c) the legislature may appropriate money from the budget reserve fund upon approval of three-fourths of the members of each house. Other than the special vote requirement, no other restrictions apply.

Under article IX, section 17(b) of the state constitution amounts may be appropriated from the budget reserve fund when ". . . the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year. . ." You have asked specifically how the amount available for appropriation is to be determined.

Unfortunately, since the matter has not yet been considered by the court, any answer I provide to your question will be speculative at best.

At the very least this language includes the balance in the unrestricted general fund available at the beginning of a fiscal year plus revenue received by the general fund during that year and money lapsed into the general fund during that year.

In addition, there are certain statutory funds within the general fund with restrictions on expenditure. Money in these funds may be appropriated, either for the limited uses set out in the statute or for other uses by amending the restrictions contained in the statute or relying upon the legislature's "power of the purse" and ignoring the restrictions. (For the proposition that statutorily imposed restrictions on appropriations from a fund violate the prohibition on dedicated funds, see Sonneman v. Hickel, 836 P.2d 936 (1992)) Since these funds may be appropriated, I believe a court would tend to conclude that amounts in them are "available for appropriation" under section 17(b). An example of such a fund is the Railbelt Energy Fund (AS 37.05.520).

Likewise, federal funds are made available to the state for restricted uses but can only be expended if appropriated. I would think a court would find these to be "available for appropriation," albeit for the limited uses permitted under federal law.

However, because subsection (b) is not limited to money that is available for appropriation from the general fund while subsection (d) specifically requires repayment only from general fund money, I would think that a court would find that money available for appropriation under subsection (b) is not limited to general fund money. If it were, like subsection (d), it could have said so. Therefore, all of the income of the Permanent Fund could be considered available for appropriation. Once a portion of it is appropriated to the dividend fund, that money, I would think, should not be counted as available for appropriation again, since the Department of Revenue has authority to distribute it without further legislative action. You will recall that under article IX, section 16, the earnings of the permanent fund are to be deposited in the general fund unless otherwise provided by law, and the legislature has so provided by denominating the earnings reserve as an account in the permanent fund. Yet the legislature has also regularly made appropriations from the earnings reserve account, so it would seem difficult for a court to find that that money, is not "available for appropriation." On the other hand, the principal of the permanent fund is certainly not "available for appropriation." Article IX, section 15 states specifically that the principal may only be used for income-producing investments.

There are dozens of other accounts and funds established by statute, ranging from loan funds to trust funds to funds required under federal law. Other accounts have been established by administrative agencies. To the extent that those funds contain unencumbered and unobligated balances, they may provide a resource for reappropriation

purposes, but because they are typically appropriated to the fund for a specific program and can still be expended under the original appropriation, a fair argument could be made for the proposition that they are not balances "available for appropriation" within the terms of the constitution and do not become available until the original purpose is accomplished and the remaining funds are lapsed or the program is repealed.

You have also asked me whether it is possible to make up shortfalls in the FY 1994 budget from the Budget Reserve Fund when the legislature convenes again under article IX, sec. 17(b). The subsection sets limits upon which fiscal year money may be appropriated for (based upon the amount available for appropriation from other sources during that same fiscal year), and sets limits upon the amount that may be appropriated from the fund (based upon the amount appropriated within a specific time period for the prior fiscal year, which was intended to exclude most "supplemental" appropriations). It does not set a limit upon when the money for a fiscal year may be appropriated. In short, the legislature could make a supplemental appropriation just before the end of a fiscal year for that same year and fund it from the Budget Reserve Fund if the mathematical condition is met. So, for example, if state revenue continues to be less than projections for FY 1994 and if the court orders the state to transfer $900,000,000 during FY 1994 to the Budget Reserve Fund, it may be that some amount of money could be appropriated for FY 1994 under article IX, sec. 17(b) after the legislature convenes this January.

As I pointed out, in determining whether the legislature may make an appropriation from the Budget Reserve Fund for a given fiscal year under section 17(b) it may be necessary to consider amounts available in the state treasury outside of the unrestricted general fund balance as well as the amount of that balance. This figure must then be compared to the amount actually appropriated for the previous fiscal year from all sources, excluding amounts that may have been appropriated after December 31 of that previous fiscal year. So, despite declining revenue received by the state during FY 1994 it is possible, that upon considering other funds available in various accounts, the total amount "available for appropriation" will not be less than the total of relevant appropriations made for FY 1993, in which case the legislature will not be able to appropriate money from the Budget Reserve Fund for FY 1994 under sec. 17(b).

By the way, according to Mike Greany, Director of Legislative Finance, the relevant level of FY 1993 appropriations is just over $2.7 billion. Repayment to the Budget Reserve Fund from the earnings reserve account would substantially deplete that account, by far the largest source of money available for appropriation outside of the general fund revenue stream. If oil prices stay low, the actual revenue stream for FY 1994 may be around $1.9 billion. With additional funds, other than the earnings reserve money, taken into account, it looks possible that money available for appropriation in FY 1994 could be around $2 billion, which would enable the legislature to appropriate up to $.7 billion for FY 1994

from the Budget Reserve. Obviously, these are very rough calculations, but they serve as a concrete example of the way sec. 17(b) could come into play for FY 1994.

Despite the foregoing discussion, which I expect was the way sec. 17(b) was intended to function, there is an ambiguity created by the last phrase of that subsection. That phrase states that the amount of appropriations that may be made from the Budget Reserve Fund may only ". . . provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year." (Emphasis added.) The calendar year previous to what? If this refers, not to calendar year 1992 with respect to FY 1993, but to the calendar year previous to the year the appropriation from the Budget Reserve Fund is proposed to be made, an entirely different result occurs. For example, if in the calendar year 1994 an appropriation is to be made for FY 1994, do we look to appropriations made in calendar year 1993 (the calendar year previous to 1994) for FY 1993 (the fiscal year previous to 1994)? If so, only supplemental appropriations made for FY 1993 may be considered, so the amount available for appropriation for FY 1994 would have to be less than the $40 or $50 million in supplementals enacted during calendar 1993 for FY 1993. This reading appears to lead to an absurd practical result, but the literal language of the constitution could be so interpreted.

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MEMORANDUM May 16, 1994

SUBJECT: **Effect of failure by one house to adopt by three-quarter vote appropriations from the budget reserve fund included in the budget**

TO: Senator Drue Pearce
Co-chair, Senate Finance Committee

FROM: Tamara Brandt Cook
Director TBC

You have asked whether the failure of the House to adopt, by three-quarter vote, appropriations from the budget reserve fund included in the budget invalidates the budget as a whole when those appropriations have already been adopted by the Senate. The Attorney General has concluded that, in this situation, the budget bill is invalid because identical legislation has not passed both bodies. (Letter, May 12, 1994) While it is quite possible that the Attorney General is correct, this is not a foregone conclusion. The court has not considered the matter.

There are two situations involving supermajority vote requirements that the court has treated as requiring action separate from that taken on the rest of a bill. Failure by one house to adopt an effective date or to change a court rule does not invalidate the bill as a whole.

With respect to a difference in effective dates, in 1980 in connection with the enactment of ch. 177, SLA 1980 (SCS HB 207 am S (H fld eff date)) the bill adopted by the Senate included an effective date and the bill adopted by the House did not. In that instance, the bill was enrolled and transmitted to the Governor. On July 1, 1980, the Attorney General advised the Governor that the House and Senate did not pass the same bill and the Governor, acting on that advice, returned the bill to the House unsigned. The Governor's transmittal letter is set out in the 1980 Senate Journal at page 1781. Legislative counsel advised that under art. II, secs. 17 and 18, Constitution of Alaska, the bill became law without the Governor's signature, with an effective date of October 5, 1980. By judgment dated March 19, 1981, in Alaska Legislative Council v. Hammond, Case No. 4FA-80-1689, the Superior Court for the

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Fourth Judicial District upheld the validity of the enactment. It is true that an ingredient in this ruling was the fact that the failure of or change to an effective date is not an amendment to the substantive provisions of the bill. This is certainly not true in the case of differences in the budget involving an appropriation from the budget reserve fund.

However, in considering whether failure to adopt a court rule change by one house invalidated the bill as a whole, the court did not focus on the fact that substantive provisions of the bill do not differ (they do), but on the fact that a different vote is required for the enactment of legislation than the vote required to change a court rule. The court did not conclude that statutes purporting to change court rules but not receiving a two-thirds majority in each house are invalid, only that they are ineffective in changing the court rule. (Leege v. Martin, 379 P.2d 447 (Alaska 1963)) In a later case, the court cited AS 01.10.030 for the proposition that legislation purporting to change a court rule but failing to receive the vote required in both houses is severable from the rest of the Act. (Galbraith v. State, 693 P.2d 880 (Alaska 1985) at 883, footnote 4)

The Attorney General in the letter based his opinion, at least in part, on the lack of evidence that the legislature intended the CBRF appropriations to be severable from the budget as a whole. AS 01.10.030 provides that evidence.

Clearly, the possibility that the failure of one house to adopt an appropriation from the CBRF by the required three-fourths vote could be deemed to amount to failure to adopt identical legislation is a matter of great concern with the budget itself at issue. The risk of this result could be avoided by refraining from co-mingling appropriations that require different vote levels. However, on balance I believe that a fairly strong argument could be made for the validity of the Act, without the CBRF appropriations, and, I think it is more likely than not that such an argument would prevail.

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