SCOMM

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#123

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU 99811

August 31, 1977

Hon. Clark Gruening
Chairman
House Special Committee on
the Permanent Fund
528 West Fifth, Suite 270
Anchorage, Alaska 99501

Re: Permanent fund, irretrievability of money appropriated to; our file J-66-106-78

Dear Representative Gruening:

You have asked whether money appropriated to the permanent fund in excess of the amount required by the constitution is irretrievable.

Section 15 of article IX of the Alaska Constitution, as added by the 1976 amendment to the constitution, reads as follows (emphasis added):

> At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in <u>a permanent fund</u>, the <u>principal</u> of which <u>shall be used only</u> for those <u>income-producing investments</u> specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

Your question really is whether the limiting language of section 15 applies not only to the mandatory 25 percent of mineral revenues placed in the permanent fund but also to any additional money placed in the fund.

We believe that the answer is yes.

The language of the amendment providing for the permanent fund is clear enough. There is to be a permanent fund. At least 25 percent of the enumerated mineral revenues are to be placed in it. The use of the words "[a]t least" clearly contemplates that additional monies may well be placed in the fund. Once there, they form the fund's principal. That principal "shall be used only" for income-producing investments. Hence, on its face, what becomes a part of the principal may no longer be withdrawn for another purpose. Only the income from investments of the principal is available.

It is a universal principle that the legislature's law-making power is plenary except as limited by the state or federal constitutions. In order to hold that the legislature may not appropriate additional monies to the permanent fund and also provide for their subsequent withdrawal, the courts must find an express or implied prohibition against its doing so. Facially, the constitution's restriction on the use of the fund's principal seems to constitute such an implied restriction, i.e., the principal may be invested but nothing else, including a withdrawal, may be done with it.

It could be possible, one might argue, for the legislature to make appropriations to the fund by law and specify that they are made on the condition that they are intended to be retrievable and are null and void ab initio if ruled not to be. The problem is that the courts would likely rule that the condition itself is so inconsistent with the provisions of section 15 that it is absolutely void, i.e., that the legislature is prohibited from withdrawing from the principal both directly and indirectly.

Or the legislature could appropriate to the fund and specify that the monies appropriated are not to be considered a part of the fund's "principal" in the sense of the constitution, i.e., as monies available solely for investment, but rather are to be considered as a temporary addition to the fund which is to be used for investment but which shall be accounted for separately and may be withdrawn. Again, the problem is that the courts would likely rule that such legislation is so inconsistent with the provisions of section 15 that it is void. Either there is a permanent fund or there is not.

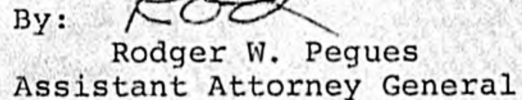
We are dealing here with a peculiar--perhaps unique--quasi-trust. Unlike most trusts, the principal may not be reached whatever, either now or in the future. No one has a future right to the principal. Instead, the principal is to be invested in perpetuity to produce income.

Only the income from investments may be reached. Absent still another constitutional amendment, we see no way around this result. A permanent fund was intended, and a permanent fund appears to have been achieved.

Accordingly, we doubt very much that any money appropriated to the permanent fund may subsequently--without a constitutional amendment--be withdrawn.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL



By:
Rodger W. Pegues
Assistant Attorney General

RWP:chp

July 11, 1977

Honorable Avrum M. Gross
Attorney General
Pouch K
Juneau, Alaska 99811

Dear friend Av:

After seeing you and the Governor on KAKM a few days ago, I was pleased to hear your offer to assist in the review of legal and constitutional issues involving the Permanent Fund. I believe it would be most helpful to receive a senond view from the executive on the very same issues we are posing to the Agency attorneys.

In this regard, I appreciated receiving Rod's comments, a copy of which is enclosed.

It would be useful to follow up on both questions in more depth. For example, you might examine the inflation question further and consider whether appropriations over the 25% are irr irretrievable for general fund use regardless of whether they were made pursuant to a statutory formula, eg. HB 298 or whether they were made as a special "adhboc" appropriation in the budget bill.

I would also be interested in your views as to whether the legislature could set the level of funding above the 25% by joint or concurrent resolution.

I will be sending you this month a copy of the committee's issue paper which will be completed shortly. I would appreciate your comments then. I agree - let's keep an open exchange of information.

Cordially,

BåarkClark GRUBning, CHAirman
House Special Committee on
The Permanent Fund

bcc: TERRY & HUGH

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99811

July 1, 1977

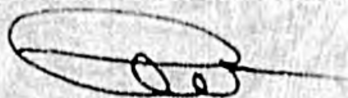
The Honorable Clark Gruening
Chairman
Legislative Interim Committee on
the Alaska Permanent Fund
c/o Legislative Affairs Agency
Pouch Y
Juneau, Alaska 99811

Dear Clark:

During the interim between sessions, your committee will be working on various approaches to dealing with the permanent fund. I realize that you have the Legislative Affairs Agency available to aid you in your work, and I have no desire nor intention to intrude upon that relationship. However, since I am sure the fruits of your efforts will at some time or another be reviewed by the administration, I thought it might be helpful if we were to have someone in this office assigned to provide you any assistance you might desire for the purpose of coordinating any efforts we might make in this area with the efforts of your committee. My only intent here is to be helpful, so if you don't need the help or you think that you would prefer to do your work totally independent of the executive branch, that's fine too, but I at least wanted to make the offer.

If you would like some help from our office, let me know and I will assign an attorney to work with your committee between sessions.

Yours very truly,



Avrum M. Gross
Attorney General

AMG:as

Copied to Terry & Hugh

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU 99811

July 5, 1977

Hon. Terry Gardiner
Alaska State Legislature
P. O. Box 6092
Ketchikan, Alaska 99901

Re: Permanent Fund

Dear Terry:

We have finally come out from under long enough to give you a short answer to your questions on this. In order of your inquiries, the answers are as follows:

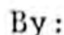
(1) The creation of the permanent fund did not legally obligate the legislature to keep the income of the fund abreast of inflation. There almost certainly is an implied obligation to manage as a prudent person, which means that reasonable efforts to make profitable investments with an eye on inflation are probably a legal requirement. We confess that we cannot be sure. We will have to compare the language establishing our permanent fund with that of others and see what the cases say.

(2) Appropriations made to the permanent fund by law may not be withdrawn even though they are in excess of the amount required by the constitution. Only the income of the fund is available from the fund. Of course, a standing appropriation could be repealed, and if so, no further money would go into the fund from it.

Please advise if you require more on this. We realize that there will be hundreds of questions. We cannot conduct unlimited research on all of them. For the most part, we believe it will be best to limit our research to the issues which are of practical application. Even then, we will be stretched.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: 
Rodger W. Pegues
Assistant Attorney General

RWP:chp

cc: Clark Gruening
Fran Ulmer

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STATE OF ALASKA
Inter-Department Route Slip

TO:
MAIL STATION NUMBER 3100

DEPARTMENT Legislature

ATTENTION Rep. Terry Gardiner

- [ ] Approval
- [ ] Signature
- [ ] Comment
- [ ] Contact Me
- [ ] Prepare Reply
- [ ] For Your File
- [ ] Note & Return
- [ ] Initial & Return
- [ ] Return As Requested
- [ ] Return For Approval
- [ ] Necessary Action
- [x] Your Information

Remarks:

File PF – Legal

FROM:
MAIL STATION NUMBER 0300

DEPARTMENT Law

BY Pete Froehlich DATE 3/17/77

02-002 (REV.10/73)

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / POUCH K – STATE CAPITOL
JUNEAU 99811

March 17, 1977

The Honorable Terry Gardiner
Alaska State Legislature
PouchV
Juneau, Alaska 99811

Dear Representative Gardiner:

Your letter to the Attorney General dated February 25, 1977, has been referred to me for response. I have enclosed a copy of a memorandum written by Assistant Attorney General Rodger Pegues to former Commissioner Warwick on April 1, 1975, as you requested. I fully concur with the conclusion drawn in that memorandum.

The legislature has never had any authority to mandate the submission by the governor of a particular item or dollar amount in his budget proposal. Therefore, nothing in chapter 75 SLA 1974 (including AS 41.20.365(a)) requires the governor to submit a budget proposal of "not less than 3/8 of one percent of the total yearly state and federal" highway matching funds for trails and footpaths grants.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By:
Peter B. Froehlich
Assistant Attorney General

PBF:bvd

Enclosure

cc: Repr. Mike Miller
Russ Cahill
Ron Lind

MEMORANDUM State of Alaska

TO: The Honorable Andrew S. Warwick
Commissioner
Department of Administration

DATE: April 1, 1975

FILE NO:

TELEPHONE NO:

FROM: Avrum M. Gross
Attorney General

SUBJECT: Funding of Trails, etc.
AS 41.20.365 (a)

By: Rodger W. Pegues
Assistant Attorney General

You have asked if the state budget must include proposed funding pursuant to the following statute:

> An amount not less than three-eighths of one per cent of the total yearly state and federal matching sum combined . . . shall be appropriated annually [for the program] . . . . AS 41.20.365 (a).

It is our view that if the statute were mandatory, it would offend the constitutional prohibition against dedicated funds (Alaska Constitution, Art. IX, § 7) and trespass against the separation of powers. Accordingly, the statute may not be construed as imposing a mandatory duty on the Governor or the legislature.

The essence of the prohibition against dedicated funds is that annual appropriations should be based on a current assessment of needs as compared to revenues (1956 Alaska Constitutional Convention Minutes 2364). The statute provides, instead, for a fixed formula which, while undoubtedly reasonable when adopted, may have no reasonable relationship to actual needs or revenues at another time. Hence, it violates the constitutional prohibition if deemed to be mandatory.

It is recognized that one legislature may not bind another and that the statute does not compel any legislature to appropriate funds according to the formula. It is suggested, however, that the statute does compel the Governor to include the funds in his annual budget pursuant to the formula. We do not agree.

The power to appropriate is vested in the legislature (Alaska Constitution, Art. II, § 13; Art. IX, § 13). But the power to prepare and submit the annual state budget is vested in the Governor (Alaska Constitution, Art. IX, §12). The legislature has the authority to require when the Governor is to submit the budget, id., but is without any authority to tell him what he shall submit.

Re: Funding of Trails, etc.
AS 41.20.365 (a)

Budgeting is the ultimate tool of executive policy determinations. The choices made in developing an administration's program are necessarily reflected in its budget proposals. It is inherent under our system of government that the executive proposes and the legislature disposes. If the statute were deemed to be mandatory, the legislature would be performing both executive and legislative functions.

Of course, nothing prevents the Governor from proposing the funding to the legislature as part of his budget. Making the funding part of his budget would indicate his decision that the program should be undertaken and continued and his proposal that the necessary funds should be appropriated and expended.

Additionally, the legislature could establish a multi-year program and appropriate at one time the funds to be expended in each year of the program. This would have the effect of establishing the budget for those years to that extent, but, being well within the legislative power to appropriate, does not trespass against the separation of powers.

RWP:pg

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU 99811

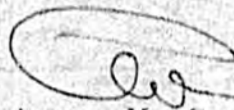
August 4, 1977

Representative Clark Gruening
Chairman
House Special Committee on
the Permanent Fund
528 West 5th, Suite 270
Anchorage, Alaska 99501

Dear Clark:

Thanks for your letter of July 11. We'll do everything possible to afford you any legal assistance you may need in connection with your committee's work. I have seen the rough draft of the committee's issue paper and I think it's a good start. I can't conceive of any other issue which is going to have as much long-range impact for the state as the Permanent Fund, so you must be really excited with the prospect of shaping policy in that regard. I know it's going to be a long, difficult process and to the extent we can help, we will.

Yours very truly,



Avrum M. Gross
Attorney General

AMG:as

1. contributions rate any diff formula in election
2. leg

Could increase con by joint resolution

August 11, 1977

William Anderson
Box 4-1696
Anchorage, AK 99509

Dear Mr. Anderson:

Thank you for providing me copies of the exchange of correspondence between you and Attorney General Gross about the legality of Alaska's Motor Vehicle Operator's licensing of persons age 70 or more.

Although the constitutionality of the present statute may be questionable, I believe the major problem with the law is the rather arbitrary line it draws at age 70. It is interesting to note, however, that in one aspect the law seems to discriminate in favor of people 70 and older by limiting reexamination of these individuals to a test of eyesight and "an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle." In other words, the department cannot require a testing of ability to read or by written test as required for all new applicants and as can be required of all renewal applicants under 70. Enclosed is a copy of the relevant statute.

I would support legislation to establish a uniform policy as to periodic reexamination so that reexamination is required every two or three years regardless of age. I would appreciate your thoughts on this.

Cordially,

Rep. Clark Gruening

Enclosure

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL
POUCH K – STATE CAPITOL
JUNEAU 99811

July 12, 1977

Mr. William Anderson
Box 4-1696
Anchorage, Alaska 99509

Dear Mr. Anderson:

Thank you for your letter on drivers' tests. What you say is not without merit, and there can be no question that whenever the law classifies people by their ages, it is bound to include some who should not be included and exclude some who should be. Thus there are teenagers who are far more ready and able to cast an informed vote than some of their elders and elders who are far more ready and able to drive safely than their teen-age grandchildren.

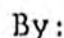
But the constitution does not require perfection, it merely requires that the classification have a reasonable relationship to its purpose. It may fairly be said that the United States Supreme Court will uphold any classification (except in matters affecting fundamental rights, e.g., free speech) which is not shown to be more than half wrong. The Alaska Supreme Court's test is stricter. It requires a fair and substantial relationship. It would probably uphold the requirement here, for it does not deny one the privilege of driving but rather requires a test. Those actually qualified to drive will pass the test. Those not, will not.

The mandatory retirement cases involve age discrimination by private parties in violation of state law. The United States Supreme Court ruled that the state law was not preempted by a federal law under which mandatory retirement at or after age 60 (younger for special classes, e.g., police) was not made unlawful. In other words, the court ruled that the States were free to impose a stricter bar against mandatory retirement than has been imposed by the United States.

We may, by law, render legal advise solely to state agencies and officials, and may not therefore, give you an opinion on this matter. We hope that this answers your questions.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: 
Rodger W. Pegues
Assistant Attorney General

Anchorage, Alaska

July 22, 1977

TO: U. S. SENATOR TED STEVENS

U. S. SENATOR MIKE GRAVEL

U. S. REPRESENTATIVE DON YOUNG

ALASKA STATE SENATORS & REPRESENTATIVES

Gentlemen:

Enclosed is a copy of a letter sent to Avrum Gross, Alaska Attorney General, in which questions are raised about the legality of Alaska's Motor Vehicle Operator's licensing of persons age 70 or more.

The answer to this letter from the Office of the Alaska Attorney General is also enclosed, and I believe you will agree that none of the questions are answered...only that the Attorney General will not render an opinion, and will not aid in any way to revoke or modify this Statute which is so clearly unfair and discriminatory.

To my knowledge, the law in question only states that any person 70 or more must pass these tests every year; it gives no other reason than that age of 70, it mentions no other reason.

I believe there are, or have been, persons in the U. S. Supreme Court rendering decisions affecting us all when they were past the age of 70. Also, there are persons in the U. S. Congress and in State Legislatures voting on and passing laws affecting us all.

There are doctors of medicine over 70 rendering and making decisions affecting other persons' very lives. Does the age of 70 mean they are all unfit to do so?

I think you will agree that if it hadn't been for people being put in a second class status as a group of citizens under the laws pertaining to U. S. Territories, then these same citizens voting for Statehood and equal rights under the U. S. Constitution, that you would be unable to hold your positions as at present, (I dare say some of these voters were over 70), and there would not have been created a State of Alaska.

The Alaska Statute is wrong in that it creates a group, singled out for age only, and is slanted, biased and clearly discriminatory.

You collectively and as individuals are being asked for and are being given the opportunity to help us right a wrong and to put the people over 70 back into a first-class citizen's status of equality under the law.

Yours truly,

William Anderson

William Anderson
Box 4-1696
Anchorage, Alaska 99509

July 6, 1977
Anchorage, Ak.

Mr. Avrum Gross
Attorney General,
State of Alaska
Juneau, Alaska 99811

Dear Mr. Gross:

The Alaska statute pertaining to the licensing of Alaska citizens as operators of motor vehicles upon public roads and highways after these citizens attain the age of 70 years is, I believe, illegal.

Certainly this statute is unfair, improper, biased and discriminatory, and for the following reasons:

After reaching 70, the citizen must renew his or her motor vehicle operator's license each year, after passing eyesight test, written test, and driving test. Other selected citizens only have to pass eyesight tests, and then only every three years. This, in itself, singles out the older person and puts them in a second class status.

Further, this statute in effect says that any person 69 years, eleven months and twenty-nine days old is a first-class citizen, but two days later he or she is second-class.

We all know that the citizens 70 years of age are in a minority group, and that not all are in the best physical condition, but on the other hand some of the younger ones who are licensed for three years without these driving and written tests are not in the best condition.

There have been millions of people under 70 who are now dead who had driver's licenses, who must have been in worse physical condition or they would not have died, and no one saw fit to deny them an operator's or driver's license simply because they reached a certain age.

It would be only fair if 70-year-olds have to submit to all these tests, that every driver submit to these same tests and not single out the older ones for this discrimination, for the reason that they have been fortunate enough to live this long.

When a person 70 or over wants to purchase an automobile, no one says you are too old, you must take a test of some kind.

I believe there was a recent U. S. Supreme Court decision that no one could be forced to take a mandatory retirement from any employment because of reaching a certain age. I also believe this reasoning would or should apply to this statute. Also, I think some of the judges on the U. S. Supreme Court are or have been over age 70, and to my knowledge no one forced them to take a yearly examination.

For these and other reasons, I believe this statute to be illegal, and I know it practices and forces older people to be discriminated against and denied equal rights.

Your opinion on the legality of this statute is solicited because you are the Attorney General of the State of Alaska, and so it can be determined what, if any, further action will or can be initiated to do away with this unfair and biased statute.

Yours truly,

William Anderson
Box 4-1696
Anchorage, Alaska 99509

August 11, 1977

Avrum Gross
Attorney General
Department of Law
Pouch K
Juneau, AK 99811

Dear Mr. Gross:

I attempted valiantly but vainly to ferret you out in Juneau yesterday. So I'm sending along this letter instead.

Clark Gruening, Chairman of the House Special Committee on the Permanent Fund, has asked me to follow up on his letter to you of July 11, requesting your view on a pair of questions on the Fund. I'm attaching a copy of that letter.

Clark also asked me to include a couple of opinions from Billy Berrier. As with the first questions he sent, he would like you to offer your view to the Committee.

Sincerely,

Mike Doogan
Administrative Assistant

Enclosures

fund should be used to purchase obligations financing capital expenditures. For example, may the fund be used to purchase bonds issued to finance relocation of the capital? I have assumed this was not intended and have so stated in the transmittal letter.

If you wish to acknowledge, or go to the extent of withdrawing, the currently pending HJR 39, you may wish to add a comment on it in the transmittal letter to the legislature.

AMG:md:JRM

Hugh Malone

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU 99811

January 3, 1976

M E M O R A N D U M

TO: The Honorable Jay S. Hammond
Governor

FROM: Avrum M. Gross
Attorney General

RE: Proposed joint resolution calling for a constitutional amendment establishing a permanent fund.

Attached is the proposed joint resolution calling for a constitutional amendment to establish a permanent fund to which mineral leasing revenues would be dedicated.

In contrast to HJR 39 which you introduced last year, the attached resolution would establish a constitutional permanent fund into which 10 percent of all mineral leasing revenue and mineral production taxes would automatically be dedicated without further legislative action. Last year's resolution would simply have given the legislature the authority to establish a permanent fund by law which could be changed or repealed by subsequent legislatures.

The revenues that would be dedicated include mineral leasing rentals, royalties and bonuses. Questions do arise, however, as to some special circumstances. For example, what is to occur when the state takes its royalty in kind? Should 10 percent of the proceeds from the sale of royalties taken in kind be dedicated to the fund? I have assumed that this would be the case and have included language in the draft transmittal letter to clarify our intent in this respect.

Also, what is to occur if the state changes its leasing policy from the traditional bonus bidding with a 1/8 or 1/6 royalty to a royalty bidding arrangement with a nominal cash bonus with the state instead receiving a larger royalty share such as 50 percent? Again I have assumed that you have intended that a full 10% of this larger royalty

share would be dedicated to the fund, and I have included language in the transmittal letter to state your position on this.

Also, what is to occur with respect to the revenue sharing which the state receives from federal mineral leasing? If this revenue is to be included, we should add some appropriate language in the resolution and in the transmittal letter to accomplish it.

Other revenue that would be dedicated to the fund would include mineral production taxes. I have assumed that this would only include the state's oil and gas properties production tax ("severance tax"), the oil and gas conservation tax (conservation tax), and the mining license tax regardless what form they may take in the future. Taxes that have not been included are the oil and gas exploration, production and pipeline property tax (20-mil property tax) and the oil and gas reserves ad valorem tax (reserve tax). If it is intended that these taxes should also be dedicated then the resolution and draft transmittal letter should be changed accordingly.

A question can be raised as to what amount of tax should be dedicated. For example, what is to occur with respect to any production taxes which the state must transmit to the Native Fund? Should 10 percent of taxes which the state receives and then transmits to the Native Fund be dedicated? I have assumed not and have so stated in the draft transmittal letter.

Also, what is to occur with respect to the production taxes which the state does not receive in cash but in effect receives through the application of accumulated "reserve tax" credits? For example, a taxpayer having a production tax liability of $100,000 may credit his accumulated reserve tax against the production tax up to $50,000 and only pay the remaining amount. Again, I have assumed that the production tax paid by the reserve tax credit would not be dedicated. If it is intended that more than just the net amount of cash tax revenue received by the state should be dedicated, then some additional changes should be made to the transmittal letter.

The resolution specifies that the fund will be used for investment only, with the legislature specifying the types of investment. A question has arisen whether the

#123

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU 99811

August 16, 1977

Representative Clark Gruening
Chairman
House Special Committee on
the Permanent Fund
528 West Fifth, Suite 270
Anchorage, Alaska 99501

Dear Representative Gruening:

This responds to that part of your request of July 11, 1977, for advice on making appropriations (or otherwise funding) the permanent fund at more than 25 percent of mineral revenues by joint or concurrent resolution.

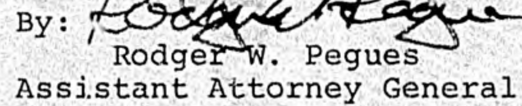
The law making power of the State is vested in the legislature and is exercised by the passage of bills which are subject to a veto. Alaska Const., art. II, §§ 1, 13, 14 and 15. A veto may be overriden by two-thirds majority (three-fourths for revenue or appropriation bills) of the entire membership. Id., § 16. Appropriations are made by law. Id., § 13, art. IX, § 13. Whether the appropriation is continuous or annual would appear to make no difference; either or both would require passage of a law. Items in appropriation bills may be stricken or reduced by a veto and a three-fourths majority is required to override. A resolution is not subject to a veto.

We are of the opinion that, under our constitution, the legislature may not appropriate money to the Permanent Fund (or otherwise place money in that fund) by a joint or concurrent resolution. First, the constitutional safeguards for enacting legislation, i.e., for exercising the law-making power, do not apply to resolutions and are not observed in adopting resolutions. Second, the governor plays an integral part in the exercise of the law-making power, i.e., by approving or disapproving bills passed by the legislature. The governor plays no role whatever in the adoption of resolutions. Accordingly, except where its use is provided for by the constitution, e.g., art. III, § 23 (disapproving executive orders) and art. X, § 12 (disapproving boundary changes), a resolution may not be used in lieu of a bill to exercise law-making power.

We will answer your two other questions as soon as possible.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: 
Rodger W. Pegues
Assistant Attorney General

RWP:chp

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STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99811

September 16, 1977

Hon. Clark Gruening
Chairman
House Special Committee on
  the Permanent Fund
528 West Fifth, Suite 270
Anchorage, Alaska 99501

Re: Permanent fund, accounting
for inflation; our file J-66-107-78

Dear Representative Gruening:

You have asked whether there is any legal requirement that the statutory guidelines for administering the permanent fund take inflation into consideration.

We believe that the answer is no.

The answer to your question requires an inquiry into the legal nature of the permanent fund and, there being no law on the precise subject, involves some speculation.

First, we believe that, despite the absence of an actual transfer of legal and equitable interests to a trustee and beneficiary respectively, the Alaska Supreme Court will treat the permanent fund as a trust or quasi-trust, and as a general rule, apply trust concepts in determining its administrators' duties. We make this assumption (1) because of the tendency of the court, exemplified by such cases as Moore v. State, 553 P.2d 8 (Alaska 1976), to impose trust-like duties upon the State's management of its patrimony, and (2) because the constitutional amendment which created the permanent

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fund is extremely similar to the classic spendthrift trust both in its roots or causes and in its establishment, i.e., the owner of the State's capital, the people, dissatisfied with the state government's spending of the royalty bonus from the Prudhoe Bay leases, has resolved to remove a portion of that capital from the spending power of the government and to place it in trust, with only the income from its investment available to the government for expenditure.

Because the people established the trust, we believe that the state government will be deemed to be the trustee, not the trustor. This means that, despite the power vested in it by the constitutional amendment to designate by law the kinds of investments to be made, the legislature--as the appropriating arm of the government--will not be deemed to be the trustor or settlor, and that therefore, its power to designate eligible investments is not plenary but rather is limited by the express terms of the amendment on the one hand and by implied trust concepts on the other. In other words, the legislature may designate only income-producing investments and may not designate imprudent, income-producing investments or provide for imprudent administration of the fund principal. To the extent, if any, that it did, the managers of the fund would nevertheless remain under a duty to make only prudent income-producing investments and to provide a prudent administration.

Finally, we believe that the Alaska Supreme Court

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will rule that--absent exceptional circumstances involving the very existence of the State or its citizens--the preservation of the fund principal is of primary import, i.e., that investment policies cannot endanger the principal. This belief rests on what we perceive to be the essential character of this trust or quasi-trust, i.e., a conservative, cautionary nest egg. */

Of course, the Alaska Supreme Court could rule that no trust or quasi-trust exists and that the law of trusts does not, therefore, govern the fund's administration. That would remove the administration of the fund from the operation of the prudent-man rule. There would then be no duty to limit investments to those which are prudent. That would pretty much give the legislature the power to authorize the expenditure of the fund's principal on any income-producing investment even though it would not be a prudent, i.e., an investment which a trustee could not properly make. This result would allow the fund principal to be frittered away and thereby frustrate the basic purpose of the constitutional amendment. Principally for that reason, we believe the Alaska Supreme Court will impose trust concepts to avoid that result and to give the amendment its full effect.

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*/ While the permanent fund is essentially a conservative device, the constitutional amendment was not overly conservative. It did not apply to taxes on minerals at all and it still leaves 75 percent of other mineral revenues available for expenditure.

There can be no question that a trustee must take into consideration the trend of prices and the cost of living, the prospect of inflation or deflation. RESTATEMENT (SECOND) OF TRUSTS 2d § 227, Comment e (1959). To do otherwise would hardly be the conduct of a man of prudence. Accordingly, the fund managers will have to take inflation (or deflation) into account in making and changing investments, if--as we believe--the fund constitutes a trust.

It does not follow, however, that the legislature has a duty to provide specific guidelines on the matter. If the court rules that there is a trust, the prudent-man rule applies. If it rules otherwise, the rule does not apply. Unless the legislature itself resolves the question by making the fund a trust, the matter is entirely up to the court. Whichever way it rules, the court would not, and could not, order the legislature to adopt any particular guidelines. It would merely order the fund managers to follow the prudent-man rule.

Nor does the legislature have any duty to increase the amount of the fund principal because of inflation. The constitutional amendment, which sets forth the principal terms of the trust, makes it mandatory to deposit 25 percent of the designated mineral revenues in the fund. That is the trust property which must be administered, we believe, under the prudent-man rule. While the legislature _qua_ legislature clearly has the power to increase that amount, nothing in

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trust law places a duty on it to do so. It could also provide for all or a portion of the income from the principal to be deposited in the fund, _i.e._, added to the principal. But under the terms of the trust, _i.e._, the constitutional amendment, it has no duty to do so.

We hope that this answers your question. We remind you that we are making an educated guess as to the trust or quasi-trust nature of the permanent fund. We believe it is a trust or quasi-trust and that trust law applies. We are constrained to add that we could be wrong. The legislature may wish to treat the fund as a trust. That would resolve the issue. It should feel free, however, to experiment and treat it otherwise insofar as it determines the public interest warrants doing so, and let the court resolve the issue.

Sincerely yours,

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