IN THE SUPREME COURT OF THE STATE OF ALASKA

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Appellants, v. GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION Appellees.	**Supreme Court No. S-18333** Trial Court Case No. 3AN-22-04028CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE ADOLF V. ZEMAN

APPELLANTS' EXCERPT OF RECORD
VOLUME 1 OF 1

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FILED
STATE OF ALASKA
THIRD DISTRICT
2022 JAN -4 AM 9: 15
BY DEPUTY CLERK

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COMPLAINT

Plaintiffs Madilyn Short, Riley von Borstel, Kjrsten Schindler, and Jay-Mark Pascua hereby file this complaint against Defendants Governor Michael J. Dunleavy ("Governor"), the State of Alaska, Office of Management and Budget ("OMB"), and the State of Alaska, Department of Administration ("DOA"; collectively "the Executive Branch"), by stating and alleging the following:

I. INTRODUCTION

1. This suit challenges the Executive Branch's decision to transfer the more than $410 million from the Higher Education Investment Fund ("HEIF") to the Constitutional Budget Reserve ("CBR") under article IX, section 17(d) of the Alaska Constitution, which negatively impacts the Alaska Performance Scholarship ("APS"), the

Alaska Education Grant ("AEG"), and the Washington-Wyoming-Alaska-Montana-Idaho medical school ("WWAMI") programs.

2. Because the Executive Branch's decision to sweep the HEIF into the CBR violates article IX, sections 13 and 17(d) of the Alaska Constitution, Plaintiffs are entitled to declaratory and injunctive relief to protect the long-term funding source for the APS, AEG, and WWAMI programs.

II. PARTIES

3. Plaintiff Madilyn Short is a 23-year-old first-year medical student in the WWAMI program through the University of Washington. Ms. Short is originally from Bethel and graduated from Dartmouth College with a degree in Neuroscience in 2020. The WWAMI program's loan forgiveness program was a determining factor in her decision to join the WWAMI program upon graduation and return to her home state of Alaska. As an Iñupiaq and Yup'ik woman from rural Alaska, Ms. Short understands the value and importance of access to a quality education and health care. It is from that acute understanding that Ms. Short continues to pursue working with Alaska Native communities. Ms. Short believes it is important that Alaska Native medical providers have the option to serve Alaska Native communities. Continued opportunities provided through the WWAMI program reserve the option for future Alaska Native people to pursue quality educational scholarship, and without this program Alaska Native people will face, yet another, barrier to entry. The American Indian and Alaska Native

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population account for approximately 2.9% of the U.S. population,[1] and approximately 0.4% of the physician workforce.[2] For her, this lawsuit is about access. It is about fighting against the institutionalization of barriers for underserved, underrepresented, and disadvantaged populations and communities. She believes that the actions taken by the Executive Branch effectively shut out opportunities for Alaskans and destabilizes the pipeline for future Alaskan-grown talent to return home and contribute to our state. Ms. Short is a plaintiff in this lawsuit to ensure the protection of the HEIF so that more Alaskans become doctors, return home to Alaska, and improve health care for all Alaskans. In addition to attending medical school, Ms. Short is assisting with research in cooperation with the Alaska Native Health Tribal Consortium. Most recently, Ms. Short received the 2021 Lu Young Youth Leadership award from the Alaska Federation of Natives.

4. Plaintiff Riley von Borstel is a 21-year-old student of senior standing who is pursuing three majors (justice, political science, and performing arts) at the University of Alaska Fairbanks ("UAF"). She grew up in Seward, Alaska, and graduated from Seward High School. Ms. von Borstel has received annual scholarships through the APS

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[1] *See* United States Census Bureau, Race and Ethnicity in the United States: 2010 Census and 2020 Census (Aug. 12, 2021), https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html.

[2] *See* AMERICAN MEDICAL ASSOCIATION, Report of the Council on Medical Education, *Study of Declining Native American Medical Student Enrollment*, at 2 (2018), https://www.ama-assn.org/system/files/2021-05/a18-cme-05.pdf.

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program at the highest level ($4,755) based on her coursework, GPA, and college admissions test scores. She decided to attend UAF in part because of the availability of the APS scholarships, which have helped make it possible for her to graduate college without student loans. Ms. von Borstel currently plans to attend law school after graduating college. She is a plaintiff in this lawsuit to help protect the HEIF so that others like her will be able to take advantage of educational opportunities at home in Alaska, since losing funding for the APS program would be devastating for students. In addition to school, Ms. von Borstel has served as the student body president at UAF for two years, and has been involved in multiple theatrical productions on campus.

5. Plaintiff Kjrsten Schindler is a 20-year-old junior studying biology at UAF. She and her family moved to Delta Junction in 2012, where she lived on a farm and graduated from a homeschool program (Raven Homeschool) with honors. Ms. Schindler has received annual scholarships through the APS program at the highest level ($4,755) based on her coursework, GPA, and college admissions test scores. She decided to attend UAF in part because of the availability of the merit-based APS scholarship, which she and her family understood she could be eligible for if she worked hard in school after she moved to Alaska. Ms. Schindler currently has plans to become a veterinarian and move back home to Delta Junction, a community which recently lost its one veterinarian. She is a plaintiff in this lawsuit to protect the HEIF so that other Alaskans will have the same opportunity to obtain a great education and have a future career at home in Alaska. In

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her spare time, Ms. Schindler enjoys visiting the family farm and running dog teams recreationally.

6. Plaintiff Jay-Mark Pascua is a 20-year-old junior studying computer science at the University of Alaska Anchorage ("UAA"). He was born and raised in Anchorage, and graduated from West Anchorage High School. Mr. Pascua has received annual scholarships through the APS program at the highest level ($4,755) based on his coursework, GPA, and college admissions test scores. Mr. Pascua has also received grants (including $4,000 in his sophomore year) through the AEG program. He would not have been able to afford to attend college without the financial support provided by the APS and AEG programs, and he is the first in his family to pursue a postsecondary education. Mr. Pascua currently plans to become a software engineer after graduation. He is a plaintiff in this lawsuit to protect the HEIF because the programs it supports provide substantial financial benefits for students who are already struggling to make ends meet, and he wants future students to have the same opportunity to receive those benefits. When his coursework schedule permits it, Mr. Pascua works a part-time job in the evenings as an IT student assistant at UAA.

7. Defendant Governor Michael J. Dunleavy is the chief executive for the State of Alaska, and is being sued in his official capacity.

8. Defendant OMB is an entity within the Office of the Governor, and acted at the Governor's direction to issue a list identifying new funds subject to a sweep into the CBR, including the HEIF.

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9. Defendant DOA is the State agency charged with effectuating the annual CBR sweep.

10. Plaintiffs have standing as citizen taxpayers, and bring this suit of great import in the public interest of all Alaskans. Plaintiffs also bring this suit because of particularized harms to Plaintiffs as current and prospective recipients of prior awards and benefits derived from the HEIF.

III. JURISDICTION AND VENUE

11. This court has jurisdiction over this dispute, as well as the ability to enter a declaratory judgment and provide injunctive relief, under AS 22.10.020.

12. Venue is proper in the Third Judicial District as Defendants maintain offices and may be served within Anchorage, Alaska, and the claims arise from actions that will have impacts, in part, within the Third Judicial District.

IV. RELEVANT FACTUAL ALLEGATIONS

13. Voters approved the creation of the Budget Reserve Fund — commonly referred to as the CBR — in 1990, which now exists in article IX, section 17 of the Alaska Constitution.

14. Article IX, section 17(d) of the Alaska Constitution provides, in full: "If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law."

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15. Subsection 17(d) establishes the budgetary mechanism commonly referred to as a "sweep," where any funds that are "in the general fund" and "available for appropriation at the end of each succeeding fiscal year" are "swept" back into the CBR to repay prior appropriations from the CBR.

16. The CBR sweep in subsection 17(d) has been routinely counteracted through a "reverse sweep" action by the legislature through appropriation bills. A "reverse sweep" requires a three-quarters vote in both houses of the legislature, consistent with article IX, section 17(c) of the Alaska Constitution.

17. The HEIF was established in 2012. *See* AS 37.14.750. The legislature funded the HEIF through a 2011 appropriation totaling $400 million (Ch. 5, §20(f), FSSLA 2011). The HEIF also permits cash contributions by Alaska corporations who receive tax credits by statute for contributions to the HEIF.

18. The legislature originally established the HEIF and appropriated funds to it to provide a long-term, stable funding source for scholarships and grants under the APS and AEG programs. The HEIF statute provides that that the commissioner of revenue shall identify 7% of the HEIF's value as being available for appropriation to the APS and AEG programs annually, confirming that the HEIF is intended to act as an endowment for those programs. Two thirds of this amount is identified for the APS program (AS 14.13.915(b)), and one third is identified for the AEG program (AS 14.13.915(a)). Over 5,500 students receive funding through these two programs each year. More

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recently, in addition to providing funding for the APS and AEG programs, the legislature has appropriated money from the HEIF to support the WWAMI program.

19. The APS program provides annual merit scholarships to Alaskans who attend qualified postsecondary educational institutions. Each APS recipient receives between $4,755 and $2,378 annually based on that student's GPA and college entrance exam test scores. Approximately 3,000 students receive money from the APS program each year.

20. The AEG program provides annual needs-based grants to Alaskans who attend qualified postsecondary educational institutions. Each AEG recipient receives up to $4,000 annually. Over 2,000 students receive money from the AEG program each year.

21. The WWAMI program provides loans to Alaskans attending the four-year medical school at the University of Washington, through the Alaska Commission on Postsecondary Education ("ACPE"). Twenty Alaskans are admitted to the WWAMI program each year, and 60 students in their second, third, and fourth years of medical school receive those loans through ACPE. The WWAMI program loans are forgiven for those who return to Alaska for work as doctors and residents after completing their medical training. Those who do not return to Alaska must repay half of their loans, and those repayments have recently been appropriated back into the HEIF from the ACPE. Students who receive WWAMI program loans receive approximately $30,000 in loans annually, resulting in hundreds of doctors returning to Alaska.

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22. The Governor introduced legislation in the 2019 legislative session that sought to terminate the HEIF and return all funds in it to the general fund. That legislation did not pass.

23. After the failure of that legislation, a legislative budget impasse occurred in 2019, and OMB took a very expansive view of what funds are subject to the annual sweep to repay the CBR. Previous administrations had identified only 32 out of 71 subfunds (and some only partially) as being subject to the sweep. Using inconsistent legal explanations and justifications, OMB identified a different, larger list of 54 funds and subfunds as being subject to the sweep. The HEIF was among the new funds or subfunds that the administration for the first time identified as subject to the annual sweep.

24. Former OMB Director Donna Arduin provided a letter and a new list to the co-chairs of the house and senate finance committee in July 2019 explaining why the Executive Branch believed the HEIF and other funds and subfunds were subject to the sweep. That letter, despite acknowledging that donations to funds and subfunds are not sweepable, nevertheless designated the entirety of the HEIF as being subject to the sweep for the first time in its history.

25. For a number of years, the legislature has been spending funds from the CBR to balance the budget. At the same time, the legislature has counteracted the sweep of monies into the CBR with a vote for a reverse sweep accompanying appropriation bills. After the new list was published, the legislature in 2019 enacted the "reverse sweep," so the funds on the 2019 list, including the HEIF, were not swept into the CBR.

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26. A similar budget impasse occurred in 2021, but the legislature failed to achieve the required three-quarters vote in both houses for the reverse sweep in 2021.

27. The HEIF contained over $410 million as of November 30, 2021, and had accrued nearly $75 million with over a 27% rate of return in FY2021. DOA must, by statute, effectuate the sweep by December 16 of each year. Presumably, the Executive Branch has now swept the funds in the HEIF into the CBR.

28. In 2021 for FY2022, the legislature appropriated over $21 million from the HEIF, which included: (1) $11.75 million to the APS program; (2) over $6.356 million to the AEG program; and (3) $3.258 million to the WWAMI program. Those appropriations were not vetoed by the Governor. Originally, as with other appropriations from funds that were on OMB's new list, the Executive Branch took the position that it could not honor the appropriations from the HEIF in FY2022 because the funds no longer existed in the HEIF as of July 1, 2021.

29. In July 2021, the Alaska Federation of Natives and nineteen other plaintiffs sued the Executive Branch over its decision to designate the Power Cost Equalization Endowment Fund as being subject to the sweep. In August, the superior court agreed with those twenty plaintiffs, concluding that the Executive Branch's interpretation of article IX, section 17(d) of the Alaska Constitution was unconstitutional. The Executive Branch did not appeal that decision.

30. Later that month, Attorney General Treg Taylor authored a memorandum concerning all of the FY2022 appropriations that OMB had previously determined could

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not be honored because of the lack of votes for a reverse sweep. And because Attorney General Taylor recognized that "monies which already have been validly committed by the legislature to some purpose should not be counted as available," (quoting *Hickel v. Cowper*, 874 P.2d 922, 930-31 (Alaska 1994)) he concluded that "it is legally defensible to release the funds and pay out the validly enacted appropriations for" FY2022.

31. Based on this new analysis the Governor directed OMB to "immediately" honor the FY2022 appropriations from the HEIF and other funds and subfunds designated to be swept. But the Executive Branch refuses to honor the original appropriations the legislature made to the HEIF, and still swept the funds remaining in the HEIF into the CBR.

32. There is no logical distinction between the legislature's prior appropriations to the HEIF from the legislature's recent appropriations from the HEIF for FY2022. All funds in the HEIF, whether appropriated to it by the legislature or donated by private entities, are not subject to the sweep under article IX, section 17(d) of the Alaska Constitution.

V. CLAIMS FOR RELIEF

COUNT I
(Violation of the Alaska Constitution)

33. Plaintiffs reallege and incorporate by reference all previous and subsequent paragraphs as set forth herein.

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34. The Executive Branch's interpretation of article IX, section 17(d) of the Alaska Constitution, as set forth in letters and analysis from July 2019, is incorrect as a matter of law.

35. The HEIF includes valid appropriations by the legislature and any funds contributed by private entities, and as a matter of law is not subject to transfer to the CBR under article IX, section 17(d).

36. Plaintiffs are entitled to a declaration that the HEIF is not subject to the CBR sweep under the Alaska Constitution.

37. Because the Executive Branch transferred funds to the CBR without a valid appropriation by the legislature, the Executive Branch also violated article IX, section 13 of the Alaska Constitution which reserves the power of appropriation to the legislature.

38. Plaintiffs are entitled to injunctive relief requiring the Executive Branch to return all monies transferred from the HEIF to the CBR and preventing any future transfers from the HEIF to the CBR without an appropriation by the legislature.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief as follows:

A. An order declaring that the Executive Branch's decision to sweep the HEIF into the CBR is unconstitutional;

B. An order setting aside and enjoining any past, current, or future act by the Executive Branch to unlawfully sweep the HEIF, and returning all such funds that were unconstitutionally "swept" into the CBR;

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C. An order awarding Plaintiffs their full reasonable costs and attorneys' fees as required by AS 09.60.010(c); and

D. An order granting any and all additional relief to which Plaintiffs are entitled that the court deems equitable and appropriate.

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THIRD DISTRICT
2022 JAN 4 AM 11:47
BY DEPUTY CLERK

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THIRD JUDICIAL DISTRICT AT ANCHORAGE

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MOTION FOR SUMMARY JUDGMENT

Plaintiff-students Madilyn Short, Riley von Borstel, Kjrsten Schindler and Jay-Mark Pascua ("Plaintiffs") move for summary judgment that the Higher Education Investment Fund ("HEIF") is not subject to the sweep into the Constitutional Budget Reserve ("CBR") under article IX, section 17 of the Alaska Constitution. Defendants Governor Michael J. Dunleavy (the "Governor"), the Office of Management and Budget within the Office of the Governor ("OMB"), and the Department of Administration ("DOA") that effectuates the transfers of state monies (collectively, the "Executive Branch"), violated both sections 17 and 13 of article IX of the Alaska Constitution by

transferring funds from the HEIF into the CBR without a valid appropriation by the legislature. This motion is supported by the affidavit of counsel and attached exhibits.[1]

I. INTRODUCTION

At the request of then-Governor Sean Parnell, the legislature appropriated $400 million to the newly-created HEIF — established in 2012 — to provide a long-term funding source for scholarships and grants to Alaskans pursuing postsecondary education in Alaska. Today, the HEIF (now valued at over $410 million) is primarily used to fund the: (1) Alaska Performance Scholarship ("APS"); (2) Alaska Education Grant ("AEG"); and (3) Washington-Wyoming-Alaska-Montana-Idaho medical school ("WWAMI") programs.

In 2019, for the first time in the HEIF's history, OMB claimed that the entirety of the HEIF was subject to the annual "sweep" of funds back into the CBR pursuant to article IX, section 17(d) of the Alaska Constitution. Although the legislature obtained enough votes in July 2019 to effectuate a "reverse sweep" to counter OMB's novel interpretation that year, the Executive Branch still considers the HEIF subject to the CBR sweep.

In 2021, the legislature failed to obtain the necessary three-quarters vote for a reverse sweep. OMB indicated in June 2021 that the Executive Branch — through the DOA — intended to sweep the entirety of the HEIF into the CBR, essentially eliminating

[1] *See* Affidavit of Jahna M. Lindemuth (Jan. 4, 2021) [hereinafter Lindemuth Aff.].

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the fund, despite the existence of lawful FY2022 appropriations from it. After twenty plaintiffs won a lawsuit invalidating the Executive Branch's decision to sweep the similarly-situated Power Cost Equalization ("PCE") Endowment Fund, the Governor directed OMB to honor FY2022's appropriations from the HEIF. Nevertheless, the Executive Branch continues to assert that the remainder of the HEIF is still subject to the sweep.

The Executive Branch's designation of the HEIF as being subject to the annual CBR sweep violates the Alaska Constitution in several ways. First, the HEIF is not subject to the CBR sweep under the express language and intended purpose of article IX, section 17(d) of the Alaska Constitution, recently confirmed by a new legal analysis by Attorney General Treg Taylor. Second, by transferring monies from the HEIF to the CBR without a valid appropriation from the legislature, the Executive Branch violated article IX, section 13 of the Alaska Constitution. Indeed, the Executive Branch's interpretation violates separation of powers by interfering with the legislature's appropriation powers and effectively undoing prior valid appropriations to the HEIF.

Plaintiffs respectfully request that this court GRANT Plaintiffs' motion for summary judgment, declare that the HEIF is not subject to the sweep, and order the HEIF's swept funds be returned to the HEIF immediately. Plaintiffs also ask that this court permanently enjoin the Executive Branch from sweeping monies appropriated to the HEIF to the CBR absent a valid appropriation.

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II. FACTUAL BACKGROUND

A. Voters Established The CBR In 1990.

The CBR was established after over 66% of voters approved the amendment of the Alaska Constitution in 1990.[2] The primary reason behind the creation of the CBR was to encourage the legislature to set aside "windfall" profits from settlements related to resource extraction in a reserve.[3]

The CBR has four general characteristics outlined in the four subsections of article IX, section 17 of the Alaska Constitution. In sum, the CBR: (1) is capitalized through certain settlement proceeds and earnings;[4] (2) may be accessed by a simple majority of the legislature "[i]f the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year";[5] (3) may otherwise be accessed with a three-quarters vote from both houses of the legislature;[6] and (4) must be "repaid" annually

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[2] *See* State of Alaska, Official Returns, November 6, 1990 General Election, at 4 https://www.elections.alaska.gov/Core/Archive/90GENR/90genr.pdf (printed Nov. 29, 1990) (showing 66.2% of voters approving the creation of the CBR).

[3] *See* State of Alaska, Official Election Pamphlet, Ballot Measure No. 1, at 2 (1990) [hereinafter 1990 Election Pamphlet] ("If approved, the [CBR] will help hold down spending by removing from the table the oil and gas revenue 'windfalls' that result from pending litigation and tax disputes.") (Exhibit 1 *to* Lindemuth Aff.); *see also Hickel v. Halford*, 872 P.2d 171, 177 n.8 (Alaska 1994) ("The record is replete with references . . . to the need to remove 'windfalls' from the normal appropriations power of the legislature." (citations omitted)).

[4] Alaska Const. art. IX, § 17(a).

[5] Alaska Const. art. IX, § 17(b).

[6] Alaska Const. art. IX, § 17(c).

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if there is "money in the general fund available for appropriation at the end of each succeeding fiscal year."[7]

This case concerns the final subsection relating to the annual replenishment of the CBR, accomplished by "sweeping" available money from the general fund at the end of each fiscal year.[8] Article IX, section 17(d) of the Alaska Constitution provides, in full:

> If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, *the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year* shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.[9]

This provision creates the budgetary mechanism commonly referred to as the CBR sweep, where any excess funds are "swept" back into the CBR at the end of each fiscal year with available monies.[10] Annual sweeps have previously been counteracted through a "reverse sweep" vote on appropriation bills to effectively re-appropriate funds from the CBR. The reverse sweep requires a three-quarters vote in both houses of the legislature.[11]

In recent years, the legislature has relied on funds from the CBR to balance the state's budget. And until very recently, the legislature has counteracted the CBR sweep through a

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7 Alaska Const. art. IX, § 17(d).

8 *Id.*

9 *Id.* (emphasis added).

10 *Id.*

11 *See* Alaska Const. art. IX, § 17(c) ("An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.").

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reverse sweep vote. Additionally, prior administrations only designated 32 out of 71 "subfunds" as being subject to the annual CBR sweep.[12]

B. The Legislature Established The HEIF In 2012.

1. Creation

The HEIF was established by the twenty-seventh legislature in 2012,[13] funded by $400 million the legislature had appropriated the year before.[14] By statute — and consistent with Governor Parnell's intent as the sponsor of the legislation — the HEIF serves as a stable, long-term funding source for scholarships and grants for the APS and AEG programs.[15] To further this goal, the legislature also provided that contributions to

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[12] *See* Presentation on Sweep and Reverse Sweep before the Senate Finance Committee by Kris Curtis, Legislative Auditor and Megan A. Wallace, Legal Services Dir., at 16 (July 9, 2019) [hereinafter FYE2018 Sweep List] (Exhibit 2 at 1 *to* Lindemuth Aff.).

[13] AS 37.14.750; *see also* ch. 74, SLA 2012.

[14] *See* ch. 5, § 20(f), FSSLA 2011 ("The sum of $400,000,000 is appropriated from receipts of the Alaska Housing Capital Corporation . . . to a fund created for the purpose of providing education grants or performance scholarships, or both, by the Twenty-Seventh Alaska State Legislature."); *see also* ch. 74, § 27, FSSLA 2012 ("The [HEIF] established in AS 37.14.750 . . . is the fund identified in sec. 20(f), ch. 5, FSSLA 2011.").

[15] *See* AS 37.14.7509(a) ("The [HEIF] is established . . . for the purpose of making grants awarded under [the AEG program] by appropriation to the account established under AS 14.43.915(a) and of making scholarship payments to qualified postsecondary institutions for students under [the APS program] by appropriation to the account established under AS 14.43.915(b).").

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the HEIF can qualify for a variety of tax credits.[16] The legislature intended the fund to exist into perpetuity, and provided by statute that "[m]oney in the fund *does not lapse*."[17]

The legislature also indicated its intent to preserve the corpus of the fund by providing in statute that the commissioner of revenue annually identify 7% of the HEIF's value as being available annually for further appropriation to the APS and AEG programs, expressly confirming that the HEIF is to act as an endowment for those programs.[18] Of those identified funds, two thirds are earmarked for the APS program,[19] and one third for the AEG program.[20] The legislature then makes annual appropriations from the HEIF (and of course, can always appropriate more or less than 7% if the current legislature so desires).[21]

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[16] *See* AS 43.20.014(a)(7); AS 43.55.019(a)(7); AS 43.56.018(a)(7); AS 43.65.018(a)(7); AS 43.75.018(a)(7); AS 43.77.045(a)(7); *see also* ch. 74, §§ 14-25, SLA 2012. Millions of dollars in education tax credits are provided to Alaskan corporations annually. *See* Indirect Expenditure Report, Legislative Finance Division (Jan. 2021), https://www.legfin.akleg.gov/IEBooks/2021IndirectExpenditureReport.pdf (Exhibit 3 *to* Lindemuth Aff.) (showing millions of dollars in annual education tax credits, which leads to an estimated annual benefit of over $166,000 for "[b]etween 30 and 40 companies").

[17] AS 37.14.750(a) (emphasis added).

[18] AS 37.14.750(c).

[19] AS 14.13.915(b); *see also* AS 37.14.750(c)(2).

[20] AS 14.13.915(a); *see also* AS 37.14.750(c)(1).

[21] *See Wielechowski v. State*, 403 P.3d 1141, 1147 (Alaska 2017).

2. Supported programs

The APS program provides annual merit scholarships to Alaskans who attend qualified postsecondary educational institutions.[22] Students qualify for the APS program through required high school courses, college entrance exam test scores, and their GPA.[23] Each APS recipient receives either $4,755, $3,566, or $2,378 annually based on that student's GPA and college entrance exam scores.[24] Nearly 3,000 students receive scholarships from the APS program each year.[25] Plaintiffs von Borstel, Schindler, and Pascua are three students who have received scholarships from the APS program in the past and would qualify for future scholarships as they continue their postsecondary education in Alaska.[26]

The AEG program provides annual needs-based grants to Alaskans who attend qualified postsecondary educational institutions.[27] Students qualify for the AEG program

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[22] *See* AS 14.43.810-.849; *see also* State of Alaska, FY2023 Governor's Operating Budget, Department of Education and Early Development, Alaska Performance Scholarship Awards Component Budget Summary, at 2 (Dec. 15, 2021) [hereinafter FY2023 APS Request] (Exhibit 4 *to* Lindemuth Aff.).

[23] *See* AS 14.43.820(a). Because college entrance exams were optional last year due to the COVID-19 pandemic, that requirement was waived. *See* FY2023 APS Request at 2 (Exhibit 4 *to* Lindemuth Aff.).

[24] *See* AS 14.43.825(a).

[25] *See* FY2023 APS Request at 2 (Exhibit 4 *to* Lindemuth Aff.).

[26] *See* Complaint at ¶¶ 4-6 (Jan. 4, 2022).

[27] *See* AS 14.43.400-.420; *see also* State of Alaska, FY2023 Governor's Operating Budget, Department of Education and Early Development, Alaska Education Grants Component Budget Summary, at 2 (Dec. 15, 2021) [hereinafter FY2023 AEG Request] (Exhibit 5 *to* Lindemuth Aff.).

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primarily based on financial need.[28] Each AEG recipient receives up to $4,000 annually from the program.[29] Nearly 3,000 students receive grants from the AEG program each year.[30] Plaintiff Pascua has received grants from the AEG program, and would qualify for future grants as he continues his postsecondary education in Alaska.[31]

Although the HEIF was originally established to provide funding to only the APS and AEG programs,[32] the legislature has more recently appropriated money from the HEIF to also support the WWAMI program, including in FY2022.[33] The WWAMI program provides loans to Alaskans going to the four-year medical school at the University of Washington, through the Alaska Commission on Postsecondary Education ("ACPE"), to help cover the difference between in-state and out-of-state tuition. Twenty (20) Alaskans are admitted to the WWAMI program each year,[34] and the 60 students in their second, third, and fourth years of medical school receive these loans. These

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28 *See* AS 14.43.415(a)(3); *see also* 20 AAC 16.015(a); 20 AAC 16.037.

29 *See* AS 14.43.420(a).

30 FY2023 AEG Request at 2 (Exhibit 5 *to* Lindemuth Aff.).

31 *See* Complaint at ¶ 6.

32 *See* AS 37.14.750(a).

33 *See* ch. 1, SSLA 2021, at 2 (Enrolled HB 69) (signed June 30, 2021) [hereinafter FY2022 Operating Budget] (appropriating over $3.2 million from the HEIF for the WWAMI program) (Exhibit 6 *to* Lindemuth Aff.). In FY2022, the legislature also appropriated funding ($138,200) from the HEIF to the Live Homework Help program — run through the Division of Alaska State Libraries, Archives and Museums — which provides free live online tutoring to thousands of students throughout Alaska, and is utilized by K-12 and introductory-level college students each year. *See id.* (Exhibit 6 *to* Lindemuth Aff.).

34 *See* AS 14.42.033.

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WWAMI program loans are forgiven for those who return to Alaska for work as doctors and residents after completing their medical training;[35] those who do not return to Alaska must repay half of their loans to the ACPE, which are appropriated back to the HEIF.[36] Students who receive WWAMI program loans receive approximately $30,000 in loans annually, and the program has resulted in hundreds of doctors returning to Alaska.[37] Plaintiff Short is a first-year medical student in the WWAMI program, and will be eligible to receive WWAMI program loans starting next fall.[38]

C. The Executive Branch Identified The HEIF As Being Subject To The CBR Sweep In 2019.

In July 2019, after the legislature failed to vote for the reverse sweep by the required three-fourths majority in both houses for the FY2020 operating budget, then-OMB Director Donna Arduin sent a letter outlining which funds would be subject to the CBR sweep pursuant to article IX, section 17(d) of the Alaska Constitution.[39] The letter

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[35] *See* AS 14.43.510. One third of the loan is forgiven for each year a doctor works in rural Alaska, and one fifth of the loan is forgiven for each year a doctor works elsewhere in Alaska. AS 14.43.510(b).

[36] *See* AS 14.43.510(a); *see also* FY2022 Operating Budget at 4 ("The amount received by the [ACPE] as repayment of WWAMI medical education program loans, estimated to be $504,044, is appropriated to the [HEIF] (AS 37.14.750).") (Exhibit 6 *to* Lindemuth Aff.).

[37] *See* OMB, Performance Details, Department of Education and Early Development, Washington, Wyoming, Alaska, Montana, Idaho (WWAMI) Medical Education, https://omb.alaska.gov/html/performance/details.html?p=185 (last accessed Jan. 3, 2022) (current as of Nov. 9, 2021).

[38] Complaint at ¶ 3.

[39] Letter from Donna Arduin, OMB Director, to Senators Natasha von Imhof and Bert Stedman, Co-Chairs of Senate Finance, Representative Neal Foster, Co-Chair of

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was also accompanied by a specific list of funds and accounts OMB asserted were subject to the CBR sweep.[40] The list included the HEIF in its entirety,[41] despite acknowledging that any "portion of a fund that comprises money donated to a fund for a particular purpose should not be included in the sweep."[42] Director Arduin's letter also did not account for WWAMI loan repayments which have typically been repaid into the HEIF.[43] At the time, the HEIF was valued at approximately $347 million,[44] and was the second-largest fund deemed subject to the CBR sweep by OMB.[45]

This novel (and incorrect) legal opinion was contrary to the position of multiple prior administrations, and meant that 54 funds or "subfunds" were now subject to the sweep, in comparison to 32 "subfunds" which were previously so designated.[46] This broad determination of what funds or "subfunds" were subject to the sweep was also arbitrary, as 9 of the "subfunds" previously identified were no longer designated as

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House Finance, and Representative Jennifer Johnston, Vice Chair of House Finance (July 12, 2019) [hereinafter Arduin Letter] (Exhibit 7 *to* Lindemuth Aff.).

40 Funds Subject to Sweep, OMB (July 12, 2019) [hereinafter FY2020 Sweep List] (Exhibit 8 *to* Lindemuth Aff.).

41 *Id.* at 2 (Exhibit 8 *to* Lindemuth Aff.).

42 Arduin Letter at 2 (Exhibit 7 *to* Lindemuth Aff.).

43 *See generally id.* (Exhibit 7 *to* Lindemuth Aff.).

44 *See* HEIF, Net Asset Value, As of the Month Ending June 28, 2019 (Exhibit 9 *to* Lindemuth Aff.).

45 *See* FYE2018 Sweep List (Exhibit 2 *to* Lindemuth Aff.); *see also* FY2020 Sweep List (Exhibit 8 *to* Lindemuth Aff.).

46 *Compare* FY2020 Sweep List (Exhibit 8 *to* Lindemuth Aff.), *with* FYE2018 Sweep List (Exhibit 2 *to* Lindemuth Aff.).

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subject to the sweep.[47] The HEIF's designation was also consistent with the Governor's expressed desire to eliminate the HEIF; he introduced legislation earlier in 2019 that would have repealed the HEIF statutes.[48] The legislature did not advance or pass that legislation.

After the Executive Branch made the determination that some funds — including the HEIF and the PCE Endowment Fund, both for the first time — were subject to the sweep, the legislature came up with enough votes to effectuate the reverse sweep at the end of July 2019.[49]

D. The Executive Branch Maintains Its Position That The HEIF Is Subject To The CBR Sweep For FY2022.

The legislature passed an operating budget for FY2022 in June 2021, and the Governor exercised his vetoes over the FY2022 budget on June 30, 2021.[50] The FY2022 operating budget included over $21 million from the HEIF to provide: (1) $11.75 million to the APS program; (2) over $6.356 million to the AEG program; and (3) $3.258 million

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[47] *See, e.g.*, FY2020 Sweep List (omitting, among other subfunds, the Railbelt Energy subfund, the Crime Victims Compensation Fund, and the Municipal Capital Project Matching Grant subfund) (Exhibit 8 *to* Lindemuth Aff.).

[48] 2019 House Bill No. 130, §§ 14, 15(b) (Exhibit 10 *to* Lindemuth Aff.); 2019 Senate Bill No. 110, §§ 14, 15(b) (Exhibit 11 *to* Lindemuth Aff.). The Governor also initially vetoed $130 million from the UA's budget. *See* State of Alaska, Governor Michael J. Dunleavy, FY2020 Budget Vetoes, Press Briefing – Items of Interest (June 28, 2019), https://omb.alaska.gov/ombfiles/20_budget/PDFs/Press_Items_of_Interest_High_Level_6-28-19.pdf (touting over $130 million in vetoes for UA).

[49] *See* 2019 Senate Journal 1422; 2019 House Journal 1340.

[50] *See generally* ch. 1, SSLA 2021.

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to the WWAMI program.[51] The Governor did not exercise his line-item veto authority over any of these appropriations.

However, the legislature failed to achieve the three-quarters vote necessary in both houses to effectuate the reverse sweep.[52] And immediately after the budget was passed, the Executive Branch confirmed that it intended to sweep into the CBR the funds identified by OMB in 2019, and that such monies would therefore not be available for the FY2022 appropriations.[53] Relevant here, the Executive Branch indicated that all monies existing in the HEIF as of June 30, 2021 would be swept, and the FY2022 appropriations from the HEIF to support the APS, AEG, and WWAMI programs would not be honored.[54]

E. The Governor Later Directs OMB To Honor FY2022 Appropriations From The HEIF.

In July 2021, the Alaska Federation of Natives ("AFN") and nineteen other plaintiffs sued the Executive Branch over its decision to designate the PCE Endowment

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[51] *See* FY2022 Operating Budget at 2-3 (Exhibit 6 *to* Lindemuth Aff.). The FY2022 budget also appropriated over half a million dollars of WWAMI loan repayments to the HEIF. *See id.* at 4 (Exhibit 6 *to* Lindemuth Aff.).

[52] *See* 2021 Senate Journal 1291; 2021 House Journal 1319.

[53] *See* Budgetary Issues Due to the CBR Vote Failure, OMB (June 17, 2021) [hereinafter FY2022 Impacted Appropriations] (identifying the HEIF as a fund where "[n]o activity can begin on these programs and projects until the sweep is resolved or an alternate fund is appropriated") (Exhibit 12 *to* Lindemuth Aff.); *see also* Press Release, Governor Mike Dunleavy, Governor Urges Legislature to Complete Budget (June 17, 2021) (providing a link to "[a] fact sheet of [CBR] budgetary issues," i.e., FY2022 Impacted Appropriations) (Exhibit 13 *to* Lindemuth Aff.).

[54] *See* FY2022 Impacted Appropriations at 1 (Exhibit 12 *to* Lindemuth Aff.).

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Fund as being subject to the sweep.[55] In August, the superior court in *AFN v. Dunleavy* agreed with those plaintiffs, concluding that the Executive Branch's interpretation of article IX, section 17(d) of the Alaska Constitution as including the PCE Endowment Fund was unconstitutional.[56] The Executive Branch did not appeal that decision.

Later that month, Attorney General Taylor authored a memorandum concerning all of the FY2022 appropriations that OMB had previously determined could not be honored because of the lack of votes for a reverse sweep.[57] And because Attorney General Taylor recognized that "monies which already have been validly committed by the legislature to some purpose should not be counted as available,"[58] he concluded that "it is legally defensible to release the funds to pay out the validly enacted appropriations for" FY2022.[59] Stated differently, Attorney General Taylor's memorandum specifically recognized that funds that the legislature had already appropriated for a specific purpose

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[55] *See generally* First Amended Complaint, *AFN v. Dunleavy*, 3AN-21-06737CI (July 26, 2021).

[56] *See* Order on Motion for Summary Judgment and Cross-Motion for Summary Judgment, *AFN v. Dunleavy*, 3AN-21-06737CI, at 22 (Aug. 11, 2021) [hereinafter AFN Order] (Exhibit 14 *to* Lindemuth Aff.).

[57] Memorandum from Treg Taylor, Attorney General, to Mike Dunleavy, Governor (Aug. 25, 2021) [hereinafter Taylor Memo] (Exhibit 15 *to* Lindemuth Aff.) ("You requested a memorandum . . . addressing the following question: 'Whether appropriations validly enacted prior to July 1, 2021, but with a July 1 effective date that have a funding source that was otherwise swept into the [CBR] as of June 30, 2021, can be expended without a reverse sweep?' ").

[58] *Id.* at 2 (emphasis omitted) (quoting *Hickel v. Cowper*, 874 P.2d 922, 930-31 (Alaska 1994)) (Exhibit 15 *to* Lindemuth Aff.).

[59] *Id.* at 3 (Exhibit 15 *to* Lindemuth Aff.).

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are not subject to the annual CBR sweep. Based on this new analysis, the Governor directed OMB to "immediately" honor the FY2022 appropriations from the HEIF and other funds and subfunds designated to be swept.[60]

Unfortunately, since Attorney General Taylor's August memorandum, the Executive Branch appears to have regressed back to its prior improper determination that the HEIF is nevertheless subject to the annual CBR sweep.[61] Rather than take Attorney General Taylor's August memorandum to its logical conclusion — that *all* existing appropriations "validly committed by the legislature to some purpose" are not sweepable[62] — the Executive Branch continues to ignore the plain language in article IX, section 17(d) of the Alaska Constitution stating that funds are only subject to the sweep if they are "available for appropriation at the end of each succeeding fiscal year."[63] Alaska Statute 37.10.420(b) requires that the Department of Administration effectuate

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[60] Memorandum from Mike Dunleavy, Governor, to Neil Steininger, Director of OMB (Aug. 25, 2021) (Exhibit 16 *to* Lindemuth Aff.). The Governor also directed OMB "to provide a status update to the Legislature's Finance Division on these appropriations." *Id.* (Exhibit 16 *to* Lindemuth Aff.). No status update appears to have been provided as of this filing.

[61] *See generally* Letter from Treg R. Taylor, Attorney General, to Pat Pitney, Interim President, University of Alaska (Dec. 15, 2021) (Exhibit 17 *to* Lindemuth Aff.).

[62] *See* Taylor Memo at 2 (quoting *Hickel*, 874 P.2d at 930-31) (Exhibit 15 *to* Lindemuth Aff.).

[63] Alaska Cont. art. IX, § 17(d).

the sweep by December 16 each year,[64] and the HEIF was valued at over $410 million at the end of November 2021.[65]

III. STANDARD OF REVIEW

Summary judgment is appropriate "where 'there is no genuine issue as to any material fact' and 'the moving party is entitled to judgment as a matter of law.' "[66] The interpretation of the Alaska Constitution is a legal matter for this court to decide in its "independent judgment."[67] A court's "analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself. [Courts] are not vested with the authority to add missing terms or hypothesize differently worded provisions . . . to reach a particular result."[68] "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense."[69]

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[64] AS 37.10.420(b) ("The transfer[/sweep] shall be made on or before December 16 of the following fiscal year.").

[65] *See* HEIF, Net Asset Value, As of the Month Ending November 30, 2021 [hereinafter HEIF Nov. 2021 Value] (Exhibit 18 *to* Lindemuth Aff.).

[66] *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) (quoting Alaska Civ. R. 56(c)).

[67] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) ("Questions of constitutional . . . interpretation . . . are questions of law to which we apply our independent judgment. We adopt the 'rule of law that is most persuasive in light of precedent, reason, and policy.' " (quoting *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016))).

[68] *Id.* (second alteration in original) (quoting *Hickel*, 874 P.2d at 927-28).

[69] *Id.* (quoting *Hickel*, 874 P.2d at 926).

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IV. ARGUMENT

The Executive Branch's claim that the HEIF is subject to the CBR sweep is based on an improper reading of article IX, section 17(d) of the Alaska Constitution. The legislature has made valid appropriations to the HEIF that do not lapse, and its monies — comprised of an initial $400 million appropriation, additional private contributions to the fund, proceeds of investments, and repaid loans from the WWAMI program — are therefore not "available for appropriation at the end of [a] . . . fiscal year," and are not subject to the CBR sweep. The Executive Branch's interpretation of section 17(d) impermissibly gives the Executive Branch the ability to constructively veto valid legislative appropriations years later, creating a separation of powers violation.

The Executive Branch recently acknowledged, as it must, that valid appropriations are not subject to the sweep.[70] The fact that the legislature can re-appropriate monies from the HEIF does not somehow negate all prior appropriations to the HEIF and subject those invested monies to the sweep. Because the Alaska Constitution does not prohibit the legislature from making appropriations to create special funds as endowments for

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[70] Taylor Memo at 2 ("[M]onies which already have been validly committed by the legislature to some purpose should not be counted as available." (emphasis omitted) (quoting *Hickel*, 874 P.2d at 930-31)) (Exhibit 15 *to* Lindemuth Aff.).

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specific public purposes,[71] and the appropriations to the HEIF by statute do not lapse,[72] this court should conclude that the HEIF is not subject to the annual CBR sweep.

A. The Plain Language Of Section 17(d) Excludes Appropriated Monies From The Annual CBR Sweep.

Article IX, section 17(d) of the Alaska Constitution provides that "the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund" to repay prior appropriations from the CBR.[73] As the superior court in *AFN v. Dunleavy* recently recognized, this language only requires money to be swept into the CBR *if* it is "available for appropriation *at the end of each succeeding fiscal year*."[74]

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[71] The legislature is free to create a special fund and place monies into them; it is only prohibited from permanently dedicating "the proceeds of any state tax or license" to fund it without further appropriation by the legislature. *See State v. Alex*, 646 P.2d 203, 210 (Alaska 1982) (noting that "the purpose of the proposed amendment [by the delegates to the Constitution] was to allow for the setting up of certain special funds, such as sinking funds for the repayment of bonds, but to prohibit the earmarking of any special tax to that sinking fund"); *see also* AS 37.14.750(a) ("The [HEIF] is established . . . for the purpose of making grants awarded under [the AEG program] by appropriation to the account established under AS 14.43.915(a) and of making scholarship payments to qualified postsecondary institutions for students under [the APS program] by appropriation to the account established under AS 14.43.915(b)."). The legislature still retains the statutory ability to appropriate monies from the HEIF to any other public purpose, which the legislature most recently exercised in FY2022, which means the HEIF is not a constitutionally-prohibited dedicated fund. *See* AS 37.14.750(b) ("Nothing in this section creates a dedicated fund.").

[72] *See* AS 37.14.750(a) ("Money in the fund does not lapse.").

[73] Alaska Const. art. IX, § 17(d).

[74] *Id.* (emphasis added); *see also* AFN Order at 8 (citing Alaska Const. art. IX, § 17(d)) (Exhibit 14 *to* Lindemuth Aff.).

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This temporal recognition of "the end of each succeeding fiscal year" is critical to understanding which specific monies must be swept back into the CBR. This language necessarily exempts valid appropriations for a fiscal year from the sweep, and subjects only leftover or additional monies not subject to an existing appropriation as being subject to the sweep. Stated differently, only excess monies in the general fund that have not been appropriated for some purpose, are vetoed appropriations, or have since lapsed, are "available for appropriation at the end of each succeeding fiscal year" and are therefore subject to the CBR sweep.

The commonsense interpretation of this requirement is that monies which have already been appropriated — like the previously-appropriated monies to the HEIF — are not "available for appropriation at the end of [a] . . . fiscal year" *unless* the appropriation has lapsed *and* the funds are no longer obligated. Section 17(d) must be read consistently with article IX, section 13 of the Alaska Constitution: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law. . . . Unobligated appropriations outstanding at the end of the period of time specified by law shall be void."[75] In other words, only surplus funds — i.e., *unobligated* monies that are not subject to a legislative appropriation — are subject to the annual CBR sweep. The plain language of section 17(d) simply does not subject previously-appropriated monies, like the HEIF, to the sweep.

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[75] Alaska Const. art. IX, § 13.

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B. The Framers' Intent And Voters' Understanding Of Section 17(d) Confirm That Only Unappropriated Monies Are To Be Swept Into The CBR.

In addition to the Alaska Constitution's plain language, this court is also directed to consider the "purpose of the provision and the intent of the framers" when interpreting the meaning of subsection 17(d).[76] And because section 17(d) was adopted by a majority vote of the people after a resolution of the legislature passed by a two-thirds vote of each house,[77] interpretation of section 17(d) may include an examination of the intent of the legislature that drafted the amendment, as well as consideration of what the voters may have understood the language to mean when they adopted it.[78]

There is little legislative history about article IX, section 17(d) of the Alaska Constitution, but the history that exists confirms that monies to be swept are only those that had not already been appropriated. Senate Joint Resolution 5 ("SJR 5"), the vehicle which allowed for the creation of the CBR, was completely rewritten through an amendment on the floor of the house on May 8, 1990.[79] Although only one short statement explained what would later become subsection 17(d), that statement was made by Representative Kay Brown, who would later author the sponsor statement in favor of

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[76] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Hickel*, 874 P.2d at 926); *see* Alaska Const. art. IX, § 17(d).

[77] *See* Alaska Const. art. XIII, § 1.

[78] *Wielechowski*, 403 P.3d at 1146-51.

[79] 1990 House Journal 4241 (adopting the current version of article IX, section 17 of the Alaska Constitution by adopting Amendment No. 10 to SJR 5).

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creating the CBR.[80] Representative Brown explained on the floor of the house that any money appropriated from the CBR "would be repaid . . . out of any general fund *surpluses* that *remain* at the end of the fiscal year."[81]

This statement shows that the framers to the amendment believed that only *surpluses* in the general fund would be subject to the CBR sweep. Such "remain[ing]" "surpluses" would *not* include appropriations for the upcoming fiscal year; nor would it include monies that had previously been appropriated and obligated for a specific public purpose, like those monies contained in the HEIF.

This understanding is also consistent with the legislature's understanding after passage of the amendment, when it enacted the enabling statute in 1994: "If the amount appropriated from the [CBR] has not been repaid . . ., [DOA] shall transfer to the [CBR] the amount of money comprising the *unreserved, undesignated* general fund balance to be carried forward as of June 30 of the fiscal year, or as much of it as is necessary to complete the repayment."[82] Had the legislature intended for section 17(d) to sweep

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[80] *See* 1990 Election Pamphlet at 1-2 (Exhibit 1 *to* Lindemuth Aff.).

[81] *See* House Floor Session on SJR 5, 16th Leg., 2d Sess., Audio 2, 1:02:50-1:03:08, http://www.akleg.gov/ftr/archives/1990/HFLR/121-HFLR-900508-2.mp3 (May 8, 1990) (emphasis added) (Statement of Representative Kay Brown) [hereinafter Statement of Representative Kay Brown] ("If money is borrowed, or appropriated from the budget reserve fund in that manner, or any money taken out of it, [it] would be repaid to the budget reserve fund out of any general fund surpluses that remain at the end of a fiscal year.").

[82] AS 37.10.420(b) (emphasis added); *see* Alaska Const. art. IX, § 17(d) ("The legislature shall implement this subsection by law."). *But see Hickel*, 874 P.2d at 936 (affirming the superior court's determination that AS 37.10.420 is unconstitutional with respect to defining amounts "available for appropriation"). The enabling statute is cited

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reserved or *designated* funds in the general fund — many of which existed at the time[83] — that "sweeping change to the state's budgetary framework" would have been discussed and debated by the legislature.[84]

Relatedly, there is also no indication whatsoever that the legislature somehow intended to restrict its own appropriation power through section 17(d) by limiting its ability to appropriate money to invest and save in such special funds or subfunds that happen to be technically in the general fund, but still allow the legislature to create special funds that are not subject to the CBR sweep outside the general fund, like the PCE Endowment Fund or the Earnings Reserve Account.[85] Nor was there any other indication

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here for purposes of the legislature's understanding at the time. *Hickel* is distinguishable, and likely incorrect as to section 17(d), as discussed *infra* Section IV.D.

83 *See e.g.*, AS 08.88.450 (establishing the now-real estate recovery fund in 1974, previously named the real estate surety fund, as a fund containing money that "does not lapse"); AS 14.03.125 (establishing a fund for school performance in 1990); AS 14.11.005 (establishing a school construction grant fund in 1990); AS 37.05.570 (establishing the Alaska public building fund in 2000 with monies that "do not lapse"); AS 37.14.700 (establishing the Alaska veterans' memorial endowment fund in 2002); AS 43.52.080(b) (establishing a vehicle rental tax account in 2003). In fact, when a sweep did occur for FY2004, these subfunds noted above were not identified as having "unexpended unobligated" balances subject to the sweep. *See* CBR Sweep Summary – DRAFT & General Fund Sweepable Subfund Available Balances Swept Into The CBR, OMB (Jan. 30, 2004), *in* S.B. 283 S. Fin. File (Exhibit 19 *to* Lindemuth Aff.); *see also* Hearing on S.B. 283 Before the S. Fin. Comm., 23rd Leg., 2d Sess., Minutes (Feb. 2, 2004) (Exhibit 20 *to* Lindemuth Aff.).

84 *Wielechowski*, 403 P.3d at 1149-50 ("There was little evident recognition, let alone the robust discussion that would be expected, for . . . a sweeping constitutional change and a consequent sweeping change to the state's budgetary framework.").

85 *See id.* at 1146-52; *see also* AFN Order at 17-20 (Exhibit 14 *to* Lindemuth Aff.). The Executive Branch did not appeal the superior court's decision in *AFN v. Dunleavy*.

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that the legislature somehow intended to limit its appropriation power. Without a "robust discussion" about such a "sweeping change to the state's budgetary framework,"[86] it should not be presumed that the legislature intended to limit its own appropriation powers in any way, and the Alaska Constitution's existing framework — which permits appropriations to separate funds whether in the general fund or not[87] — must remain unchanged.

Moreover, what the voters reasonably understood Ballot Measure 1 to mean (the ballot initiative that created the CBR) comports with the framers' view. The actual language on the ballot explained that the annual CBR sweep would occur with any "money *left* in the treasury's general fund."[88] And the 1990 general election voter pamphlet included a summary from the legislative affairs agency which emphasized that only "*[s]urplus* general fund money . . . [would] be deposited in the [CBR] at the end of each year until the [CBR] is repaid."[89]

Combined, the framers' intent and voters' understanding of what monies are subject to the CBR sweep comports with section 17(d)'s plain meaning. Only unobligated, surplus, leftover monies in the general fund were understood to be subject to the annual CBR sweep.

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86 *Wielechowski*, 403 P.3d at 1149-50.

87 *See* AFN Order at 17-20 (Exhibit 14 *to* Lindemuth Aff.); *State v. Alex*, 646 P.2d 203, 208-10 (Alaska 1982).

88 1990 Election Pamphlet at 1 (emphasis added) (Exhibit 1 *to* Lindemuth Aff.).

89 *See id.* (emphasis added) (Exhibit 1 *to* Lindemuth Aff.) ("Money that is appropriated from the [CBR] must be repaid.").

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And there was no desire or understanding by either the framers or voters for this sweep provision to somehow negate or undermine prior valid appropriations.[90] The framers' intent and voters' understanding aligns perfectly with the view that validly appropriated monies are not subject to the sweep.

C. The HEIF Is Not Subject To The Annual CBR Sweep Because To Conclude Otherwise Would Run Contrary To Section 17(d)'s Plain Language And Intent.

The legislature's decision to establish the HEIF[91] — an endowment-style fund whose appropriated investments "do[] not lapse"[92] — is entirely consistent with the plain language and intended purpose behind article IX, section 17(d) of the Alaska Constitution. The Alaska Supreme Court has repeatedly defined an "appropriation" in article II as "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[93] The legislature has done precisely

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[90] *Wielechowski*, 403 P.3d at 1151 ("It is a far leap to conclude voters understood and intended . . . to [change] the legislature['s] broad power[s] . . . . Surely there would have been some public discourse about a . . . sweeping [change in] legislative authority; its absence, like the absence of discussion in the . . . legislature, is telling.").

[91] AS 37.14.750.

[92] AS 37.14.750(a).

[93] *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 898 (Alaska 2004) [hereinafter *Knowles II*] (quoting *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977)). This Court has also defined it as "a sum of money dedicated to a particular purpose." *Id.* (quoting *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 373 (Alaska 2001) [hereinafter *Knowles I*]). "Appropriation" is more broadly defined in article XI of the Constitution, which limits the people's power to enact legislation through the initiative process. *Id.* at 893-94. The key reason for this difference in the meaning of

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that by appropriating money to the HEIF to permit investments to allow the continued support of Alaskans pursuing postsecondary educational opportunities in Alaska. Those appropriations were passed by the majority of the legislature and survived a governor's veto pen. They are final, valid, ongoing appropriations.

The fact that the legislature's appropriations to the HEIF are "final," "terminal," or "expended" is critical; the legislature has established a state asset for a public purpose, which is no different from the legislature investing in a new building on campus. HEIF monies have been "expended" — i.e., invested — to fulfill the intended purpose of those appropriations: To generate additional income and be otherwise available to provide funding for qualifying postsecondary educational programs for Alaskans. The HEIF is not comprised of "surplus" monies; it exists because of valid appropriations. Just like the state's physical long-term investments to construct new buildings, the commissioner of revenue has invested the HEIF in a number of securities and other financial instruments,[94] and the Executive Branch does not otherwise have the authority to use or direct money within the HEIF for whatever purpose it may please without another appropriation.

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appropriation is to ensure that only the legislature retains control over the allocation of state assets. *Id.* at 895.

[94] *See* HEIF Nov. 2021 Value at 1 (showing that over $400 million of the HEIF was invested as of November 30, 2021) (Exhibit 18 *to* Lindemuth Aff.). In fact, the HEIF accrued nearly $75 million with over a 27% rate of return in FY2021 alone. *See* State of Alaska, Department of Revenue, Treasury Division, Alaska Higher Education Fund (last accessed Jan. 30, 2022), https://treasury.dor.alaska.gov/home/investments/alaska-higher-education-fund (showing a 27.21% return in FY2021 for the HEIF).

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Furthermore, there is no practical or logical difference between FY2022 appropriations — which include appropriations *into* the HEIF,[95] along with appropriations *out* of the HEIF — and appropriations made by the legislature a decade earlier to establish the HEIF.[96] If OMB believes that the entire HEIF was swept into the CBR on June 30 at 11:59pm, then how could money still be available from the HEIF to fund the FY2022 appropriations on July 1?[97] The answer is simple; money has been appropriated to the HEIF, and so it cannot be considered "available" for purposes of the sweep.[98] Indeed, as Attorney General Taylor emphasized, "monies which already have been validly committed by the legislature to some purpose should not be counted as available,"[99] because "[t]o do otherwise would be to continue to count sums of money as 'available for appropriation' after they have been appropriated[.]"[100]

The Executive Branch's interpretation would effectively relegate the HEIF to a non-existent and annually-disappearing fund; if the legislature in the future again appropriated monies to the HEIF, those monies would only stay in the fund if the legislature had the votes to do an annual three-quarters vote for the "reverse sweep." If

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95 FY2022 Operating Budget at 4 (Exhibit 6 *to* Lindemuth Aff.).

96 *See* ch. 5, § 20(f), FSSLA 2011.

97 *See* Taylor Memo at 3 (Exhibit 15 *to* Lindemuth Aff.).

98 If anything, the existence of tax credits for cash contributions *and* additional appropriations *into* the HEIF *this year* should confirm the legislature's (and the Governor's) continued desire to maintain the HEIF far into the future.

99 *Hickel v. Cowper*, 874 P.2d 922, 930-31 (Alaska 1994).

100 *Id.* at 931 n.20.

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the legislature had provided funding to construct a new laboratory at UAA, renovate an engineering building at UAF, or purchase a new research vessel for UAS, we would not require the tearing down or selling of those assets every year if the legislature was unable to garner a three-quarter vote.

Adopting the Executive Branch's legal theory would (nonsensically) void an entire statutory framework set up to provide a long-term funding source for student educational programs. Even this administration is not proposing to sweep several other savings or investment accounts.[101] This court must "recognize that *any given sum of money can only be appropriated once during a given time period*,"[102] which necessarily and simply excludes monies that have already been appropriated. After all, there is no temporal limitation on the legislature's appropriation power, and the legislature has the ability to enact multi-year appropriations or appropriations that do not lapse, as was done here.[103] In essence, the Executive Branch's theory would effectively repeal the HEIF, even though the Governor's legislation aimed at doing so actually failed.

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[101] Such existing accounts for entities include the Alaska Railroad, the Alaska Gasline Development Corporation, the Alaska Aerospace Corporation, and, critically, the Earnings Reserve Account. The superior court in *AFN v. Dunleavy* concluded that a similar savings or investment account, the PCE Endowment Fund, is also not subject to the annual CBR sweep. *See* AFN Order at 22 (Exhibit 14 *to* Lindemuth Aff.).

[102] *Hickel*, 874 P.2d at 931 n.20 (emphasis added).

[103] *See* AS 37.14.750(a).

D. The Alaska Supreme Court's Decision In *Hickel v. Cowper* Does Not Require Appropriated Monies To Be Swept.

The Executive Branch will argue that *Hickel v. Cowper* is controlling and requires that the HEIF be swept. But *Hickel* is distinguishable, and to the extent it can be read to require the sweep of the HEIF, is wrongly decided. It did not consider the differences between sections 17(b) and 17(d), including the temporal differences or purposes of each section. It also failed to consider the framers' intent and voters' understanding in adopting the constitutional amendment creating the CBR.

In *Hickel*, the Alaska Supreme Court considered which funds must be counted for purposes of calculating when the legislature could make appropriations from the CBR with a simple majority under article IX, section 17(b) of the Alaska Constitution.[104] In that context, the *Hickel* Court defined what "available for appropriation" means.[105] And under those circumstances, it makes sense for the Court to require an apples-to-apples comparison; that comparison includes subfunds and savings accounts the legislature created for specific purposes to determine what is in the general fund each year to determine when a super-majority vote is needed to access the CBR under section 17(b).[106] But because a CBR sweep was not at issue, the *Hickel* Court did *not* consider what monies

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[104] *See* 874 P.2d at 926-935.

[105] *See id.*

[106] *Id.* at 935 ("The State correctly argues that this symmetry is necessary in order to insure that the comparison required by section 17(b) fairly measures the need for access to the [CBR].").

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are "available for appropriation *at the end of each succeeding fiscal year*"[107] — which is the relevant and unique language within section 17(d) — performed at a different time for a different reason that does not require *Hickel*'s expansive definition of "available for appropriation" for section 17(b). Stated differently, the Court's consideration of section 17(b)'s language concerning when a simple majority vote could *access* the CBR is necessarily distinguished from section 17(d)'s language on when "surplus" money is available to *repay* the CBR.

Because the Supreme Court was called upon to consider the application of section 17(b) in *Hickel*, the Court's assumption in dicta that the analysis of "available for appropriation" should be the same for section 17(d) is not well considered, and does not account for the temporal differences on when the analysis is performed, let alone the purposes for which it is done.[108] Indeed, the Court failed to identify the temporal limitation — "at the end of each succeeding fiscal year" — in noting in a footnote the two factors relevant under section 17(d).[109] Just as a court may not add terms to a constitutional provision, a court cannot delete terms in interpreting the plain language in section 17(d).[110] This court is not bound by the dicta in *Hickel*, as *Hickel* held only that

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[107] Alaska Const. art. IX, § 17(d) (emphasis added).

[108] *Hickel*, 874 P.2d at 936.

[109] *Id.* at 936 n.32 ("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.' " (emphasis in original))

[110] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) ("[Courts] are not vested with the authority to add missing terms or hypothesize differently worded

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AS 37.10.420 was unconstitutional; there was no sweep at issue in that case and *Hickel* did not decide or consider which funds would be subject to the sweep.

Additionally, the *Hickel* Court itself recognized that any analysis determining which funds are sweepable must necessarily exempt "monies which already have been validly committed by the legislature to some purpose," which the Court recognized "should not be counted as available."[111] In fact, Attorney General Taylor relied on (and emphasized) that exact language when concluding that FY2022 appropriations were not subject to the sweep.[112]

There is another reason why this court should not rely on select language from *Hickel* to decide this case; the Alaska Supreme Court itself has called some of *Hickel*'s language into question. Indeed, the Court recently acknowledged that it explained some budgetary mechanisms incorrectly in *Hickel*, in part because its holding on section 17(b) was decided on an expedited basis.[113] In sum, *Hickel*'s identification of funds "available for appropriation" for purposes of section 17(b)'s language on accessing the CBR does not bind this court with respect to section 17(d)'s language identifying surplus monies actually "available" for the sweep at the end of the fiscal year.

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provisions . . . to reach a particular result." (second alteration in original) (quoting *Hickel*, 874 P.2d at 927-28)).

[111] *Hickel*, 874 P.2d at 930-31.

[112] Taylor Memo at 2 (quoting *Hickel*, 874 P.2d at 930-31) (Exhibit 15 *to* Lindemuth Aff.).

[113] *See Wielechowski*, 403 P.3d at 1151 n.66.

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E. Recognizing That Prior Appropriations Are Not Subject To The Annual CBR Sweep Acknowledges The Legislature's Broad Power Over Appropriations.

Article IX, section 13 of the Alaska Constitution provides: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law." In addition to correctly recognizing that appropriated monies (like the HEIF) cannot be subject to the sweep according the plain language, framers' intent, voters' understanding, and purpose of article IX, section 17(d), such an interpretation also recognizes the legislature's appropriation power in article IX, section 13 of the Alaska Constitution, and comports with the separation of powers between the executive and the legislature's power of appropriation. To conclude otherwise would allow the Executive Branch to transfer monies out of the HEIF without a valid appropriation, and effectively allow the administration to invalidate multi-year appropriations and statutes creating such funds.

The Alaska Constitution "gives the legislature the power to legislate and appropriate."[114] "[T]he legislature, and only the legislature, retains control over the allocation of state assets among competing needs."[115] An appropriation bill, like the ones

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[114] *Knowles I*, 21 P.3d 367, 371 (Alaska 2001) (footnote omitted) (first citing Alaska Const. art. II, § 1; then citing Alaska Const. art. II, § 13).

[115] *Knowles II*, 86 P.3d 891, 895 (Alaska 2004) (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988)); *see State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1142-43 (Alaska 1987) (recognizing that the appropriation power resides in the legislature and cannot be delegated to the executive); *see also Mallott v. Stand for Salmon*, 431 P.3d 159, 165 (Alaska 2018) (noting that the restriction on the people's power to appropriate "was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets" (emphasis omitted) (quoting *Pullen v. Ulmer*, 923 P.2d 54, 63 (Alaska 1996)).

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which initially capitalized the HEIF and appropriated more money to the HEIF in FY2022, is a special kind of legislation. An appropriation "set[s] aside from the public revenue . . . a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[116] To make an appropriation the legislature need only sufficiently describe a monetary asset transfer "to allow identification of the monies involved."[117]

With the goal of "safeguard[ing] the independence of each branch," and "protect[ing each] from domination and interference" from the other branches, the Alaska Supreme Court has made clear that separation of powers means that one branch cannot interfere with how another branch exercises its core powers.[118] "As Justice Brandeis said, the doctrine was adopted 'not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments,

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[116] *Knowles II*, 86 P.3d at 898 (quoting *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977)). The Alaska Supreme Court has also defined an appropriation as "a sum of money dedicated to a particular purpose." *Id.* (quoting *Knowles I*, 21 P.3d at 373).

[117] *Id.* at 898 n.39.

[118] *Bradner v. Hammond*, 553 P.2d 1, 6 n.11 (Alaska 1976) (quotation omitted). As the Washington Supreme Court phrases it, "To determine whether a particular action violates separation of powers, we look 'not [to] whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.' " *Brown v. Owen*, 206 P.3d 310, 316 (Wash. 2009) (alteration in original) (quoting *Carrick v. Locke*, 882 P.2d 173, 177 (Wash. 1994)).

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to save the people from autocracy.' "[119] In fact, the Alaska Supreme Court recently reiterated the separation of powers doctrine in *State v. Recall Dunleavy*:

> The Alaska Constitution "vest[s] 'legislative power in the legislature; executive power in the governor; and judicial power' in the courts." Derived from this "distribution of power among the three branches of government" is the separation of powers doctrine, which "limits the authority of each branch to interfere in the powers that have been delegated to the other branches." Although not specifically named in the Constitution, "the separation of powers and its complementary doctrine of checks and balances are part of the constitutional framework of this state."[120]

The Alaska Supreme Court has broadly construed the legislature's powers of appropriation because the appropriation power has been expressly delegated to the legislature in the Alaska Constitution.[121] As a check on the legislature's appropriation power, a governor may exercise line-item vetoes to appropriations made by the legislature during a short time period set out in the Alaska Constitution, subject to the legislature's ability to override his vetoes.[122] "But this control gives the governor no appropriation

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[119] *Fairbanks N. Star Borough*, 736 P.2d at 1142 (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

[120] *State v. Recall Dunleavy*, 491 P.3d 343, 367 (Alaska 2021) (alteration in original) (footnotes omitted) (first quoting *Jones v. State, Dep't of Revenue*, 441 P.3d 966, 981 (Alaska 2019); then quoting *Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007); and then quoting *id.* at 34-35).

[121] *See DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 724-25 (Alaska 1962) (noting that the Court is "not inclined to pass judgment on the means selected by the legislature to accomplish legitimate purposes unless they are clearly in violation of the constitution").

[122] Alaska Const. art. II, §§ 15-17.

power,"[123] and "the [governor's] veto power, though discretionary, may be exercised only within constitutional limits."[124] And to maintain the separation of powers, courts must strictly construe the governor's check on the legislative power of appropriation.[125] For example, in *State v. Fairbanks North Star Borough*, the Court held that giving the governor "the exercise of sweeping power over the entire budget with no guidance or limitation" was an unconstitutional delegation of legislative power.[126]

The Executive Branch's interpretation of section 17(d) allows the executive to move monies out of the HEIF against the will of the legislature, effectively voiding prior appropriations that comprise the HEIF by "sweeping" it into the CBR.[127] Taken to its logical conclusion, the Executive Branch is effectively arguing that the legislature lacks the power to appropriate monies to a particular separate subfund to invest for a specific public purpose. But this would be a radical (and new) limitation on the legislature's appropriation power.

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[123] *Knowles I*, 21 P.3d at 372.

[124] *Recall Dunleavy*, 491 P.3d at 370; *see also id.* at 366 ("[A]s with all discretionary governmental actions, the exercise of the governor's veto power must be 'within constitutional bounds.' " (quoting *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975))).

[125] *See Bradner*, 553 P.2d at 7 ("The lack of ambiguity in . . . the Alaska Constitution mandate[s] that this court interpret these express provisions as embodying . . . the maximum parameters of . . . executive . . . authority[.]").

[126] *Fairbanks N. Star Borough*, 736 P.2d at 1142-43.

[127] *See* FY2022 Impacted Appropriations (Exhibit 12 *to* Lindemuth Aff.); *see also* FY2020 Sweep List (Exhibit 8 *to* Lindemuth Aff.).

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The Executive Branch's position that the governor can sweep validly-appropriated funds back into the CBR has no support in the Alaska Constitution, and should be rejected because it would create a severe and unconstitutional imbalance through the executive's encroachment on the legislative power to appropriate.[128] Indeed, under this interpretation, a governor will be able to undo and effectively veto *any* validly-appropriated fund years later, including the HEIF. It would not make sense for this court to interpret section 17(d) as having dramatically changed a fundamental principle of separation of powers in our government without any discussion.[129] Such an interpretation would give the Executive Branch the unprecedented ability to arbitrarily claw back appropriations from years prior and effectively veto, reduce, or eliminate items and programs long settled, which would be a nonsensical result in the case of multi-year projects, including capital projects. This court should reject the Executive Branch's interpretation of article IX, section 17(d), if for no other reason than to prevent such an encroachment on the legislature's appropriation powers as enshrined in the Alaska Constitution.

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[128] *See Recall Dunleavy*, 491 P.3d at 365-71 (confirming that a governor could violate separation of powers).

[129] *See Wielechowski v. State*, 403 P.3d 1141, 1149-50 (Alaska 2017) ("There was little evident recognition, let alone the robust discussion that would be expected, for . . . a sweeping constitutional change and a consequent sweeping change to the state's budgetary framework."); *id.* at 1151 ("It is a far leap to conclude voters understood and intended . . . to [change] the legislature['s] broad power . . . . Surely there would have been some public discourse about . . . such sweeping [changes to] legislative authority; its absence, like the absence of discussion in the . . . legislature, is telling.").

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V. CONCLUSION

The State's current interpretation of article IX, section 17(d), which subjects the HEIF to the annual CBR sweep, cannot be correct. Only excess, unappropriated funds left over "at the end of each succeeding fiscal year" are subject to the sweep, which necessarily excludes previously-appropriated monies like those appropriated to the HEIF which have been invested to support Alaskans pursuing postsecondary educational opportunities in Alaska. The $410+ million HEIF has already been appropriated, appropriations to that fund "do[] not lapse", the plain language, framers' intent, and voters' understanding all comport with the view that the HEIF should not be subject to the sweep, and concluding otherwise would impermissibly encroach on the legislature's appropriation authority. This court should GRANT Plaintiffs' motion for summary judgment and permanently enjoin the Executive Branch from sweeping the HEIF into the CBR without a valid appropriation enacted by the legislature.

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DATE: Jan. 4, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email and US Mail on January 4, 2022 on the following:

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By: s/Jennifer Witaschek

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED in the Trial Courts
State of Alaska Third District

JAN 04 2022

Clerk of the Trial Courts
By_____Deputy

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,

Plaintiff,

v.

GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Defendants.

Court No.: 3AN-22-04028CI

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AFFIDAVIT OF JAHNA M. LINDEMUTH

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Jahna M. Lindemuth, being first duly sworn and deposed, hereby state as follows:

1. I am co-counsel of record for Plaintiff-students Madilyn Short, Riley von Borstel, Kjrsten Schindler, and Jay-Mark Pascua.

2. Attached as Exhibit 1 is a true and correct copy of two pages from the State of Alaska's Official Election Pamphlet for the general election held in November 1990. These two pages include information on Ballot Measure No. 1 for that election, which was the proposal to create what would eventually become the Constitutional Budget Reserve ("CBR"), located in article IX, section 17 of the Alaska Constitution.

3. Attached as Exhibit 2 is a true and correct copy of pages 16 and 17 taken from a PowerPoint Presentation on the Sweep and Reverse Sweep made by Kris Curtis, Legislative Auditor, and Megan A. Wallace, Legal Services Director, before the Senate Finance Committee on July 9, 2019. These pages detail the sweep balance for each subfund of the general fund, along with which funds would not be subject to the sweep, for the fiscal year ending in 2018.

4. Attached as Exhibit 3 is a true and correct copy of the cover page and pages 222 and 223 of the Legislative Finance Division's Indirect Expenditure Report from January 2021. These pages detail the amount of education tax credits, which would include contributions to the HEIF, provided to corporations for FY2015 through FY2018.

5. Attached as Exhibit 4 is a true and correct copy of the Department of Education and Early Development's Alaska Performance Scholarship Awards Component Budget Summary, which was part of the Governor's FY2023 proposed Operating Budget, as released on December 15, 2021.

6. Attached as Exhibit 5 is a true and correct copy of the Department of Education and Early Development's Alaska Education Grants Component Budget Summary, which was part of the Governor's FY2023 proposed Operating Budget, as released on December 15, 2021.

7. Attached as Exhibit 6 is a true and correct copy of select pages from FY2022's operating budget (2021 House Bill 69), which includes over $21.5 million in appropriations from the HEIF in FY2022.

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8. Attached as Exhibit 7 is a true and correct copy of the letter dated July 12, 2019, from the former Director of OMB, Donna Arduin, to the Co-Chairs and Vice Chair of Finance Committees, regarding which funds OMB believes are subject to the annual CBR sweep.

9. Attached as Exhibit 8 is a true and correct copy of the list prepared by OMB, as enclosed with former Director Arduin's July 12, 2019 Letter (Exhibit 7), titled "Funds Subject to Sweep."

10. Attached as Exhibit 9 is a true and correct copy of the HEIF Net Asset Value as of June 28, 2019, and the HEIF Schedule of Investment Income (Loss) and Changes in Invested Assets as of June 28, 2019, available on the Department of Revenue website at https://treasury.dor.alaska.gov/home/investments/alaska-higher-education-fund.

11. Attached as Exhibit 10 is a true and correct copy of 2019 House Bill No. 130, as introduced by Governor Dunleavy on April 12, 2019, which proposed repealing the statutes which created the HEIF.

12. Attached as Exhibit 11 is a true and correct copy of 2019 Senate Bill No. 110, as introduced by Governor Dunleavy on April 12, 2019, which proposed repealing the statutes which created the HEIF.

13. Attached as Exhibit 12 is a true and correct copy of a list prepared by OMB dated June 17, 2021, and entitled "Budgetary Issues Due to the CBR Vote Failure," which details the appropriations OMB initially identified as being impacted by the FY2022 sweep.

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14. Attached as Exhibit 13 is a true and correct copy of the Press Release issued by Governor Dunleavy on June 17, 2021, entitled "Governor Urges Legislature to Complete Budget." This Press Release includes a link to Exhibit 12.

15. Attached as Exhibit 14 is a true and correct copy of the superior court's Order on Motion for Summary Judgment and Cross-Motion for Summary Judgment in *AFN v. Dunleavy et al.*, 3AN-21-06737CI, dated August 11, 2021.

16. Attached as Exhibit 15 is a true and correct copy of a memorandum from Attorney General Treg Taylor to Governor Dunleavy on FY2022 appropriations from swept funds, dated August 25, 2021.

17. Attached as Exhibit 16 is a true and correct copy of a memorandum from Governor Dunleavy to OMB Director Neil Steininger on FY2022 appropriations from funds deemed subject to the sweep by OMB, dated August 25, 2021.

18. Attached as Exhibit 17 is a true and correct copy of a letter from Attorney General Taylor to Interim President of the University of Alaska Pat Pitney regarding whether the HEIF should be subject to the annual CBR sweep, dated December 15, 2021.

19. Attached as Exhibit 18 is a true and correct copy of the HEIF Net Asset Value as of November 30, 2021, and the HEIF Schedule of Investment Income (Loss) and Changes in Invested Assets as of November 30, 2021, available on the Department of Revenue website at https://treasury.dor.alaska.gov/home/investments/alaska-higher-education-fund.

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20. Attached as Exhibit 19 is a true and correct copy of the draft CBR Sweep Summary included in draft Senate Bill No. 283, as prepared by OMB, on January 30, 2004, and presented to the Senate Finance Committee on February 2, 2004.

21. Attached as Exhibit 20 is a true and correct copy of the Senate Finance Committee Minutes from February 2, 2004.

FURTHER AFFIANT SAYETH NAUGHT.

Jahna M. Lindemuth
Alaska Bar No. 9711068

SUBSCRIBED AND SWORN to before me this 4th day of January, 2022.

Notary Public in and for Alaska
My Commission Expires: 9/17/25

JENNIFER WITASCHEK
NOTARY PUBLIC
STATE OF ALASKA
My Commission Expires:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via email and US Mail on January 4, 2022 on the following:

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CASHION GILMORE & LINDEMUTH

By: s/Jennifer Witaschek

BALLOT MEASURE NO. 1

Budget Reserve Constitutional Amendment [HCS CSSSSJR 5 (Fin) am H]

BALLOT LANGUAGE

This proposal would create the "Budget Reserve Fund" in the state treasury. Money the state receives from mineral revenue lawsuits or administrative actions would be deposited in the Fund, and invested at competitive rates. The Fund could be used when money available for appropriation in the year is less than the year before, but only to make up the shortfall. The legislature could only appropriate from the Fund for other purposes with a 3/4 vote. At the end of each year, the Fund would have to be paid back from money left in the treasury's general fund.

Should this constitutional amendment be adopted?

Yes ☐ No ☐

VOTES CAST BY MEMBERS OF THE 16TH ALASKA LEGISLATURE ON FINAL PASSAGE

House:	Yeas	38	Senate:	Yeas	15
	Nays	2		Nays	5

LEGISLATIVE AFFAIRS AGENCY SUMMARY

This measure will amend the state constitution by creating the budget reserve fund. Money from certain mineral revenue sources received by the state from an administrative proceeding or litigation is placed in the fund. Income of the fund is kept in the fund.

Appropriations may be made from the fund if money available for a fiscal year is less than the amount appropriated for the prior year. When this occurs the amount that may be taken from the fund is limited. Only the money needed to make up the difference may be appropriated.

Money may also be appropriated from the reserve fund by special vote of the legislature. Three-fourths of the members of each house must approve. The amount that may be taken is unlimited when this vote is obtained.

Money that is appropriated from the reserve fund must be repaid. Surplus general fund money must be deposited in the reserve fund at the end of each year until the reserve fund is repaid.

FULL TEXT OF PROPOSED LAW

*Section 1. Article IX, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 17: BUDGET RESERVE FUND. (a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under Section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. Section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.

(b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

(c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

(d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.

*Section 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

STATEMENT IN SUPPORT

Cut the budget.
Reduce state spending.
Get state spending under control.

Each year these battle cries are raised by Alaskans. While elected officials say they listen and promise to do all they can, the simple fact is the Legislature's record shows it consistently spends most or all of the money available in the treasury. Alaska is confronted with an impending fiscal crisis of staggering proportions as a result of an inevitable "gap" between general fund revenues and current state spending levels. Present levels

BALLOT MEASURE NO. 1

of state general fund expenditure simply cannot be sustained over the long term.

Ballot Measure Number 1 is the first step Alaskans can take to *effectively* control state spending.

The measure creates the Budget Reserve Fund in the Constitution. Revenues from mineral or oil and gas legal settlements and administrative proceedings will be deposited into the Budget Reserve. The Legislature will be able to spend money from the Budget Reserve only if:

- revenues are less than the amount appropriated the previous year, in which case money could be appropriated from the Budget Reserve in an amount not to exceed the shortfall; or
- three-fourths of the members of both the House and Senate vote to spend money from the Budget Reserve for a public purpose, such as a disaster.

The Legislature will be required to repay any money it appropriates from the Budget Reserve. If the next year revenues are insufficient the Legislature cannot afford to replenish the Budget Reserve, the "debt" will carry forward until it is repaid.

Legal settlements involving mineral or oil and gas revenues received after July 1, 1990, will be deposited into the Budget Reserve. As an example, if voters approve this ballot measure, $216 million of the amount the state received in September from ARCO's settlement of royalty litigation will be deposited into this Budget Reserve. Should voters not approve this measure, these funds will be available to the legislature to spend next year.

Approval of Ballot Measure Number 1 is the first step toward a long-term spending plan. With Alaska's revenues subject to the whims of the world oil market, trying to take steps which will provide some stability in Alaska's spending is especially difficult. If approved, the Budget Reserve Fund will help hold down spending by removing from the table the oil and gas revenue "windfalls" that result from pending litigation and tax disputes. At the very least, this ballot measure will establish a savings account that can help minimize the effects of a "boom" one year, and a "bust" the next.

While other major budget decisions will be necessary to close the future's fiscal gap, this Ballot Measure is a major step toward a long-term spending plan for the state. It is a step we urge Alaskans to support.

If approved by the voters, the Budget Reserve Fund will be a significant help in managing the transition to sustainable spending.

Senator Jan. Faiks
Representative Kay Brown
Representative Randy Phillips

STATEMENT IN OPPOSITION

In sharp contrast to what its proponents have been telling us, the proposed budget reserve fund

- will *not* save any windfalls,
- does *not* require a ¾ vote to gain access to it,
- *endorses* the legislature's bloated $3 billion budget
- will result in *slower growth* of the Permanent Fund, and
- will *reduce the amount* of future PFD checks.

Your vote *against* Ballot Measure #1 will send a signal to the legislature that you do not approve of their excessive spending, and that you want the windfalls deposited into the Permanent Fund.

The most significant danger of this proposal is that it will establish a budget floor at $3 billion, and allow it to increase every year. Under paragraph (b) of the proposed constitutional change, a simple majority in the legislature could "borrow" funds from the reserve, to make up any shortfall in revenues, *up to the amount appropriated in the previous year.* This year the legislature spent more than $3 billion. Some of that was vetoed by the governor, but it is expected the legislature will restore the funding and add supplemental appropriations in January. In other words, *the total amount appropriated for FY 91 has not yet been determined. A "yes" vote on this ballot measure amounts to rubber-stamping a blank check of at least $3 billion!*

How would the budget continue to increase? Legislative leaders can easily get a ¾ vote out of their members by dangling capital project plums in front of them.

The appeal of this ballot measure is to save the "windfalls" of oil tax settlements, variously estimated at between $2 billion and $5 billion. This can easily be spent in three years.

Constitutionally, 25% of our oil income is dedicated to the Permanent Fund. And under state law, an additional 25% of income from certain leases is put into the Permanent Fund. In other words, as much as 50% of the windfalls should be deposited in the Permanent Fund, by law. The language in this constitutional amendment is unclear regarding the second 25%, and could be interpreted by big-spending legislators to rationalize putting only the constitutionally-dedicated 25% into the Permanent Fund, and leaving 75% for them to spend.

It would be better to save all of these anticipated windfalls, by putting 100% into the Permanent Fund. There, these funds will help the Permanent Fund produce greater annual income, for use as Permanent Fund Dividends to all Alaskans, or to fund necessary functions of state government. In the Permanent Fund, the windfalls would definitely be saved, and would not be accessible by big spenders in the legislature.

If you are one of the 65% of Alaskans who in opinion polls consistently ask the legislature to cut the budget, or if you believe the windfalls should *truly* be saved, you owe it to yourself not to be taken in by the proponents of Ballot Measure #1. Vote NO on the budget reserve amendment.

Representative Terry Martin

FYE 18 Sweep Balance by General Fund Subfund

Fund Description	Sweep FYE 18	Fund Description	Sweep FYE 18
Statutory Budget Reserve Fund	184,150,931	Alaska Technical and Vocational Education Program Account	1,038,799
Alaska Comprehensive Health Insurance Fund	87,044,559	Originator Surety Fund	938,966
Alaska Capital Income Fund	42,421,966	Municipal Capital Project Matching Grant	653,499
Alaska Marine Highway System	30,901,112	Unincorporated Community Capital Project Matching Grant	646,158
Alaska Marine Highway System Vessel Replacement	22,127,890	Building Safety Account	571,355
Tobacco Use Education and Cessation Account	18,596,705	Oil and Hazardous Substance Release Response Mitigation Account	356,601
Alcohol and Other Drug Abuse Treatment and Prevention Fund	9,858,600	Crime Victims Compensation Fund	324,777
Commercial Passenger Vessel Environmental Compliance	8,308,766	Vocational Rehabilitation Small Business Enterprise Revolving	294,960
Workers' Safety and Compensation Administration Account	4,031,105	Alaska Debt Retirement	29,937
Employment assistance and Training Program Account	4,014,680	Civil Legal Services Fund	10,357
Workers' Compensation Benefits Guaranty Fund	2,878,253	1 Cent Per Barrel of Oil Produced Surcharge	455
Recidivism Reduction Fund	2,867,491	4 Cent Per Barrel of Oil Produced Surcharge	263
Railbelt Energy	2,796,346	State Land Reforestation	194
State Land Disposal Income	2,777,158	Educational Facilities Maintenance and Construction	45
AMHS Capitalization	2,629,444	Trauma Care Fund	26
Oil and Hazardous Substance Release Prevention Mitigation Account	1,416,373		

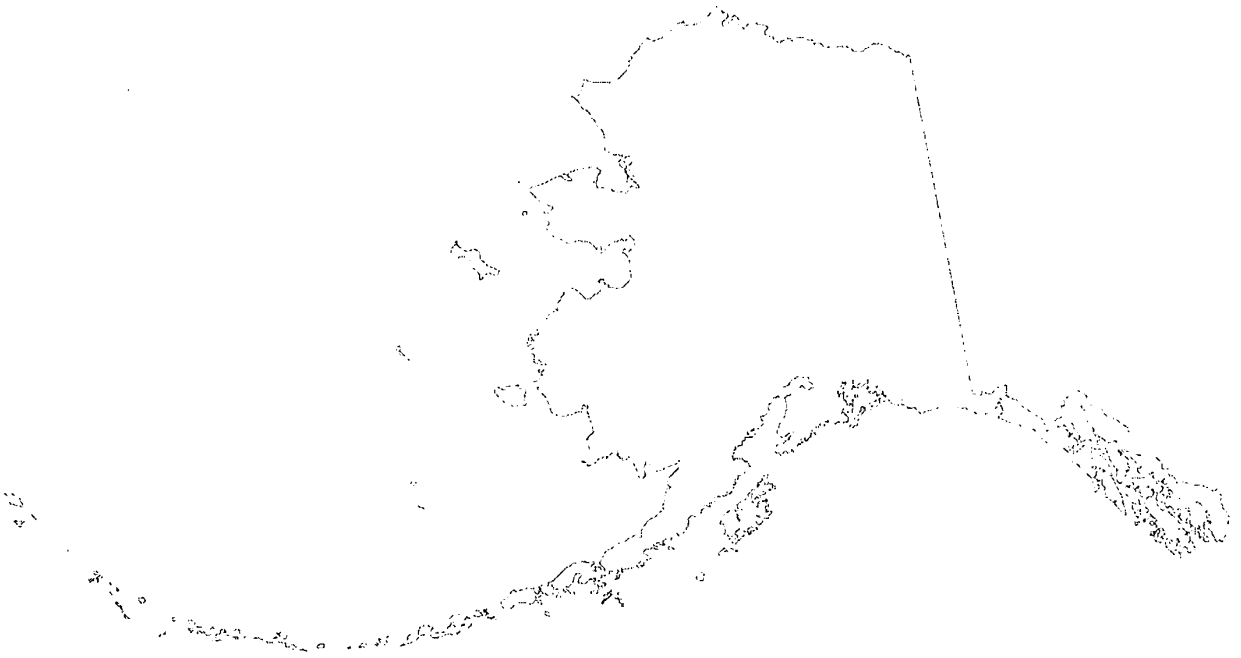
EXHIBIT 2
Page 1 of 2

Exc. 59

FYE 18 General Fund Subfund – Non Sweepable

Fund Description	FYE 18 Fund Balance	Fund Description	FYE 18 Fund Balance
Alaska Higher Education Investment Fund	344,243,758	Alaska Transportation Infrastructure Bank Highway Account	704,365
School Construction Grant	116,611,022	FICA Administration	603,067
Regional Educational Attendance Area School Fund	93,083,571	Assistive Technology Loan Guarantee	446,802
Community Revenue Sharing Fund	91,192,462	Donated Commodity Fee	424,806
Major Maintenance Grant	50,099,582	Real Estate Surety	394,514
Oil and Hazardous Substance Release Response Account	48,053,200	Randolph - Sheppard Small Business	393,830
Disaster Relief	23,909,512	Adak Airport Operations Fund	272,794
Commercial Vessel Passenger Tax Account	20,183,316	Alaska Veterans' Memorial Endowment	208,823
Vaccine Assessment Account	15,356,057	Alaska Surplus Property	141,432
State Insurance Catastrophe Reserve	10,212,495	Art in Public Places	85,885
Oil and Hazardous Substance Release Prevention Account	9,628,132	Training and Building	77,201
Municipal Harbor Facility Grant Fund	8,181,601	Peace Officer and Firefighter Survivors Fund	70,100
Memorial Education Revolving Loan Fund	8,156,111	Alaska Historical commission Receipts Account	35,204
Public Education Fund	7,958,971	Fuel Emergency	22,573
Permanent Fund Dividend	7,815,936	Fund for the Improvement of School Performance	21,749
School Trust Land Sales	7,199,479	FHWA - Airspace Leases	19,049
NTSC Bonds Funding	6,958,826	Alaska Children's Trust Grant Account	17,200
Alaska Transportation Infrastructure Bank Repayment Account	3,802,626	Anatomical Gift Awareness Fund	9,470
Election Fund	2,506,389	Fisheries Disaster Fund	6,842
Oil & Gas Tax Credit Fund	1,204,099		

Indirect Expenditure Report



January 2021

Legislative Finance Division

www.legfin.akleg.gov

Revenue

Applicable Program
Multiple Tax Programs

Indirect Expenditure Name
Education Credit

Department of Revenue Submission per AS 43.05.095

(1) Description of Provision
A non-transferable credit applicable to the Corporate Income Tax, Fisheries Business Tax, Fishery Resource Landing Tax, Insurance Premium Tax, Title Insurance Premium Tax, Mining License Tax, Oil and Gas Production Tax, and the Oil and Gas Property Tax. The credit is available for up to 50% of annual contributions up to $100,000, 75% of the next $200,000, and 50% of annual contributions beyond $300,000. The credit for any one taxpayer cannot exceed $1,000,000 annually across all eligible tax types. The credit is for contributions to qualified education purposes given in AS 43.20.014(a).

(2) Type
Credit

(3) Authorizing Statute, Regulation or Other Authority
AS 21.96.070, AS 43.20.014, AS 43.55.019, AS 43.56.018, AS 43.65.018, AS 43.75.018, AS 43.77.045

(4) Year Enacted
1987, last amended 2018

(5) Sunset or Repeal Date
01-01-25

(6) Legislative Intent
The Legislature intended to encourage private businesses to make charitable contributions to support Alaskan schools.

(7) Public Purpose
To encourage private businesses that pay tax to contribute to Alaska educational institutions and facilities.

(8) Estimated Revenue Impact
FY 2015 - $6,746,110
FY 2016 - $6,299,749
FY 2017 - $5,448,717
FY 2018 - $4,784,876
FY 2019 - FY 2019 incomplete.
Note: All returns with tax periods beginning in FY 2019 have not yet been received, so FY 2019 data is incomplete.

(9) Cost to Administer
No additional cost; is administered with current resources.

(10) Number of Beneficiaries / Who Benefits
Between 30 and 40 companies

Legislative Finance Analysis per AS 24.20.235

(1) Estimate of Annual Revenue Foregone by the State
$5,819,863

Revenue

Applicable Program
Multiple Tax Programs

Indirect Expenditure Name
Education Credit

Legislative Finance Analysis per AS 24.20.235

(2) Estimate of Annual Benefit to Recipients (cont.)
$166,282

(3) Legislative Intent Met?
Yes. The credit has resulted in significant donations to educational institutions.

(4) Should it be Continued, Modified or Terminated?
No recommendation based on recent legislative action.

State of Alaska
FY2023 Governor's Operating Budget

Department of Education and Early Development
Alaska Performance Scholarship Awards
Component Budget Summary

Component: Alaska Performance Scholarship Awards

Contribution to Department's Mission

To provide performance-based scholarships to Alaskans.

Core Services

- The Alaska Performance Scholarship (APS) is a performance-based scholarship that is effectively raising the collective academic achievement of Alaska's students. Central to the program are the eligibility requirements that students 1) engage in a rigorous secondary education program of study; and 2) perform well on standards-based, college or career readiness assessments.

Major Component Accomplishments in 2021

- Available funding of $11,750.0 in Alaska Performance Scholarships (APS) and $5,841.8 in Alaska Education Grants (AEG);
- Enhanced the Alaska Student Aid Portal (ASAP), a web-based financial aid management system that provides eligible Alaskans with information about their individual APS and/or AEG accounts;
- ASAP, functioning as the financial aid management tool for participating postsecondary institutions for online certification of student enrollment and continuing eligibility, enabled paperless aid disbursement through schools to participating students, and was used to deliver approximately $9.3 million to nearly 2,800 APS recipients and $5.8 million to just under 2,700 AEG recipients; and
- Produced the 2020 APS Outcomes Report on the first nine high school graduate cohorts, documenting significant positive program impacts specifically that APS students take more credits and need less remediation, persist in their studies, and stay in Alaska at higher rates, compared to their non-APS peers.

Key Component Challenges

- The COVID-19 health pandemic resulted in the cancelation of ACT, SAT and WorkKeys standardized tests around the state impacting class of 2021 graduates' ability to qualify for the APS. The standardized testing requirement for the class of 2021 was waived to mitigate the impact on students;
- Inability to receive student performance data from high schools prevents early outreach to high school juniors and seniors about potential APS eligibility and importance of staying on track;
- Effecting a statewide culture that values higher education and understands the importance of taking a rigorous high school curriculum;
- A student's lack of awareness regarding timeline and preparation necessary for APS eligibility and recognition of the extent of the award, in terms of its full amount students can be eligible for; and
- Ensuring adequate preparation and course availability at district levels for students to have access to the curriculum requirements for eligibility and necessity of earlier outreach and preparation academically, prior to senior year.
- Uncertainty of funding for APS from the Higher Education Investment Fund (HEIF).

Significant Changes in Results to be Delivered in FY2023

- With information from the review of outcomes for the first decade of the APS program, make improvements to the program to increase eligibility and use of the scholarship;
- Ongoing expended use of email and other electronic communications to reduce costs of communicating with customers;
- Further streamlining of APS outcomes reporting protocols to reduce costs of reporting;
- Further improvements to ASAP to provide streamlined processing and reduce the need for costly manual

processing; and
- Updated education programs for teachers, counselors, and other mentors assisting students with becoming APS-eligible.

Statutory and Regulatory Authority

AS 14.43.810-849
20 AAC 16.205-16.900

Contact Information
Contact: Sana Efird, Executive Director **Phone:** (907) 465-6740 **E-mail:** sana.efird@alaska.gov

Component Detail All Funds
Department of Education and Early Development

Component: Alaska Performance Scholarship Awards (2990) Formula Component
RDU: Alaska Performance Scholarship Awards (610)

	FY2021 Actuals	FY2022 Conference Committee	FY2022 Authorized	FY2022 Management Plan	FY2023 Governor	FY2022 Management Plan vs FY2023 Governor	
71000 Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
72000 Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
73000 Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
74000 Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
75000 Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
77000 Grants, Benefits	9,334.3	11,750.0	11,750.0	11,750.0	0.0	-11,750.0	-100.0%
78000 Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
Totals	**9,334.3**	**11,750.0**	**11,750.0**	**11,750.0**	**0.0**	**-11,750.0**	**-100.0%**
Fund Sources:							
1004 Gen Fund (UGF)	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
1226 High Ed (DGF)	9,334.3	11,750.0	11,750.0	11,750.0	0.0	-11,750.0	-100.0%
Unrestricted General (UGF)	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Designated General (DGF)	**9,334.3**	**11,750.0**	**11,750.0**	**11,750.0**	**0.0**	**-11,750.0**	**-100.0%**
Other Funds	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Federal Funds	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Positions:							
Permanent Full Time	0	0	0	0	0	0	0.0%
Permanent Part Time	0	0	0	0	0	0	0.0%
Non Permanent	0	0	0	0	0	0	0.0%

Component Detail All Funds
Department of Education and Early Development

Component: Alaska Performance Scholarship Awards (2990) — Formula Component
RDU: State Financial Aid Programs (720)

	FY2021 Actuals	FY2022 Conference Committee	FY2022 Authorized	FY2022 Management Plan	FY2023 Governor	FY2022 Management Plan vs FY2023 Governor	
71000 Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
72000 Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
73000 Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
74000 Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
75000 Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
77000 Grants, Benefits	0.0	0.0	0.0	0.0	11,750.0	11,750.0	100.0%
78000 Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
Totals	**0.0**	**0.0**	**0.0**	**0.0**	**11,750.0**	**11,750.0**	**100.0%**
Fund Sources:							
1004 Gen Fund (UGF)	0.0	0.0	0.0	0.0	11,750.0	11,750.0	100.0%
1226 High Ed (DGF)	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
Unrestricted General (UGF)	**0.0**	**0.0**	**0.0**	**0.0**	**11,750.0**	**11,750.0**	**100.0%**
Designated General (DGF)	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Other Funds	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Federal Funds	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Positions:							
Permanent Full Time	0	0	0	0	0	0	0.0%
Permanent Part Time	0	0	0	0	0	0	0.0%
Non Permanent	0	0	0	0	0	0	0.0%

Change Record Detail - Multiple Scenarios with Descriptions
Department of Education and Early Development

Component: Alaska Performance Scholarship Awards (2990)
RDU: State Financial Aid Programs (720)

Scenario/Change Record Title	Trans Type	Totals	Personal Services	Travel	Services	Commodities	Capital Outlay	Grants, Benefits	Miscellaneous	Positions PFT	Positions PPT	Positions NP
********** Changes From FY2022 Conference Committee To FY2022 Authorized **********												
FY2022 Conference Committee												
	ConfCom	11,750.0	0.0	0.0	0.0	0.0	0.0	11,750.0	0.0	0	0	0
1226 High Ed	11,750.0											
Replace Unavailable Higher Education Investment Fund to Support Performance Scholarships												
	OTI	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund	11,750.0											
1226 High Ed	-11,750.0											
Fund change to replace unavailable Higher Education Investment Fund appropriation with Unrestricted General Fund appropriation to ensure funding is available in FY2022.												
Higher Education Investment Fund to Support Performance Scholarships												
	FndChg	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund	-11,750.0											
1226 High Ed	11,750.0											
Reverse fund change replacing Higher Education Investment Fund appropriation with Unrestricted General Fund appropriation and restore validly committed appropriation from the Higher Education Investment Fund.												
	Subtotal	**11,750.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**11,750.0**	**0.0**	**0**	**0**	**0**
********** Changes From FY2022 Management Plan To FY2023 Governor **********												
Replace Authority Unavailable due to Alaska Constitution Article IX Section 17(d)												
	FndChg	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund	11,750.0											
1226 High Ed	-11,750.0											
The enactment of Article IX, Section 17(d) of the Alaska Constitution transferred available balances of funds used by this appropriation to the Constitutional Budget Reserve Fund (CBR); a process commonly referred to as the "CBR sweep". Budget authority that cannot be satisfied with projected fiscal year 2023 revenue collections are replaced with unrestricted general funds to ensure continuity of service.												
	Totals	**11,750.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**11,750.0**	**0.0**	**0**	**0**	**0**

Line Item Detail (1676)
Department of Education and Early Development
Grants, Benefits

Component: Alaska Performance Scholarship Awards (2990)

Line Number	Line Name	FY2021 Actuals	FY2022 Management Plan	FY2023 Governor
7000	Grants, Benefits	9,334.3	11,750.0	11,750.0

Object Class	Servicing Agency	Explanation	FY2021 Actuals	FY2022 Management Plan	FY2023 Governor
		7000 Grants, Benefits Detail Totals	**9,334.3**	**11,750.0**	**11,750.0**
7002 Benefits		Alaska Performance Scholarship awards.	9,334.3	11,750.0	11,750.0

State of Alaska
FY2023 Governor's Operating Budget

Department of Education and Early Development
Alaska Education Grants
Component Budget Summary

Component: Alaska Education Grants

Contribution to Department's Mission

To provide need-based grants to Alaskans to support access and success in postsecondary programs.

Core Services

- The Alaska Education Grant (AEG) program provides higher education grants to Alaska residents who demonstrate financial need and are attending eligible in-state institutions.

Major Component Accomplishments in 2021

- Disbursed $5,836,192 in grant awards to 2,691 recipients.

Key Component Challenges

- Uncertainty of funding for AEG from the Higher Education Investment Fund (HEIF).

Significant Changes in Results to be Delivered in FY2023

No changes in results delivered.

Statutory and Regulatory Authority

General AS 14.43.400 – AS 14.43.420

Funding AS 14.43.915

20 AAC 16.005 – 20 AAC 16.050

Contact Information

Contact: Sana Efird, Executive Director
Phone: (907) 465-6740
E-mail: sana.efird@alaska.gov

Component Detail All Funds
Department of Education and Early Development

Component: Alaska Education Grants (3340) — Non-Formula Component
RDU: State Financial Aid Programs (720)

	FY2021 Actuals	FY2022 Conference Committee	FY2022 Authorized	FY2022 Management Plan	FY2023 Governor	FY2022 Management Plan vs FY2023 Governor	
71000 Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
72000 Travel	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
73000 Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
74000 Commodities	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
75000 Capital Outlay	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
77000 Grants, Benefits	0.0	0.0	0.0	0.0	5,841.8	5,841.8	100.0%
78000 Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
Totals	**0.0**	**0.0**	**0.0**	**0.0**	**5,841.8**	**5,841.8**	**100.0%**
Fund Sources:							
1004 Gen Fund (UGF)	0.0	0.0	0.0	0.0	5,841.8	5,841.8	100.0%
1226 High Ed (DGF)	0.0	0.0	0.0	0.0	0.0	0.0	0.0%
Unrestricted General (UGF)	**0.0**	**0.0**	**0.0**	**0.0**	**5,841.8**	**5,841.8**	**100.0%**
Designated General (DGF)	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Other Funds	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Federal Funds	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0%**
Positions:							
Permanent Full Time	0	0	0	0	0	0	0.0%
Permanent Part Time	0	0	0	0	0	0	0.0%
Non Permanent	0	0	0	0	0	0	0.0%

Change Record Detail - Multiple Scenarios with Descriptions
Department of Education and Early Development

Component: Alaska Education Grants (3340)
RDU: State Financial Aid Programs (720)

Scenario/Change Record Title	Trans Type	Totals	Personal Services	Travel	Services	Commodities	Capital Outlay	Grants, Benefits	Miscellaneous	Positions PFT	Positions PPT	Positions NP
	Subtotal	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0**	**0**	**0**
********** **Changes From FY2022 Management Plan To FY2023 Governor** **********												
Transfer Alaska Education Grants from Program Administration and Operations												
	Trin	5,841.8	0.0	0.0	0.0	0.0	0.0	5,841.8	0.0	0	0	0
1226 High Ed	5,841.8											

Transfer the Alaskan Education Grant Program to a new component to improve budget transparency. The Alaska Education Grant program was formerly budgeted within the Program Administration & Operations' component. The former budget structure inflated the Program Administration & Operations' budget and perpetuated the misunderstanding that this authority is part of ACPE operations. This structure change sets these grants in a stand-alone component and Results Delivery Unit (RDU) titled State Financial Aid Programs which clearly identifies them as state educational financial aid to be used for higher education and postsecondary programs in Alaska and provide for more transparency and oversight for these pass-through grants. The Alaska Performance Scholarship component is also located under the State Financial Aid Programs RDU.

Replace Authority Unavailable due to Alaska Constitution Article IX Section 17(d)												
	FndChg	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
1004 Gen Fund	5,841.8											
1226 High Ed	-5,841.8											

The enactment of Article IX, Section 17(d) of the Alaska Constitution transferred available balances of funds used by this appropriation to the Constitutional Budget Reserve Fund (CBR); a process commonly referred to as the "CBR sweep". Budget authority that cannot be satisfied with projected fiscal year 2023 revenue collections are replaced with unrestricted general funds to ensure continuity of service.

	Totals	**5,841.8**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**5,841.8**	**0.0**	**0**	**0**	**0**

Line Item Detail (1676)
Department of Education and Early Development
Grants, Benefits

Component: Alaska Education Grants (3340)

Line Number	Line Name	FY2021 Actuals	FY2022 Management Plan	FY2023 Governor
7000	Grants, Benefits	0.0	0.0	5,841.8

Object Class	Servicing Agency	Explanation	FY2021 Actuals	FY2022 Management Plan	FY2023 Governor
		7000 Grants, Benefits Detail Totals	**0.0**	**0.0**	**5,841.8**
7002 Benefits		Alaska Education Grant awards.	0.0	0.0	5,841.8

LAWS OF ALASKA

2021

SECOND SPECIAL SESSION

Source
CCS HB 69(brf sup maj fld H/S)

Chapter No.
_____

AN ACT

Making appropriations for the operating and loan program expenses of state government and for certain programs; capitalizing funds; amending appropriations; making capital appropriations, supplemental appropriations, and reappropriations; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

	Allocations	Appropriation Items	General Funds	Other Funds
The amount allocated for Museum Operations includes the unexpended and unobligated balance on June 30, 2021, of program receipts from museum gate receipts.				
Online with Libraries (OWL)	477,700			
Live Homework Help	138,200			
Andrew P. Kashevaroff Facilities Maintenance	1,365,100			
Broadband Assistance Grants	7,797,900			
Alaska Commission on Postsecondary Education		**19,752,600**	**9,666,100**	**10,086,500**
Program Administration & Operations	16,494,600			
WWAMI Medical Education	3,258,000			
Alaska Performance Scholarship Awards		**11,750,000**	**11,750,000**	
Alaska Performance Scholarship Awards	11,750,000			
Alaska Student Loan Corporation		**9,936,500**		**9,936,500**
Loan Servicing	9,936,500			
*****		*****		
***** **Department of Environmental Conservation** *****				
*****		*****		
Administration		**9,551,100**	**4,472,700**	**5,078,400**
Office of the Commissioner	1,071,500			
Administrative Services	5,648,200			
The amount allocated for Administrative Services includes the unexpended and unobligated balance on June 30, 2021, of receipts from all prior fiscal years collected under the Department of Environmental Conservation's federal approved indirect cost allocation plan for expenditures incurred by the Department of Environmental Conservation.				
State Support Services	2,831,400			
DEC Buildings Maintenance and Operations		**657,000**	**657,000**	
DEC Buildings Maintenance	657,000			

		Operating	New Legislation	Total
1145	Art in Public Places Fund	30,000	0	30,000
1151	Technical Vocational Education Program Receipts	490,800	-27,400	463,400
1226	Alaska Higher Education Investment Fund	21,502,300	0	21,502,300
*** Total Agency Funding ***		365,538,400	506,100	366,044,500
Department of Environmental Conservation				
1002	Federal Receipts	25,450,000	0	25,450,000
1003	General Fund Match	4,930,900	0	4,930,900
1004	Unrestricted General Fund Receipts	12,723,700	0	12,723,700
1005	General Fund/Program Receipts	9,049,500	0	9,049,500
1007	Interagency Receipts	1,605,400	0	1,605,400
1018	Exxon Valdez Oil Spill Trust--Civil	6,900	0	6,900
1052	Oil/Hazardous Release Prevention & Response Fund	15,751,200	0	15,751,200
1055	Interagency/Oil & Hazardous Waste	401,300	0	401,300
1061	Capital Improvement Project Receipts	3,608,900	0	3,608,900
1093	Clean Air Protection Fund	4,632,500	0	4,632,500
1108	Statutory Designated Program Receipts	78,600	0	78,600
1166	Commercial Passenger Vessel Environmental Compliance Fund	1,527,400	0	1,527,400
1205	Berth Fees for the Ocean Ranger Program	2,432,900	0	2,432,900
1230	Alaska Clean Water Administrative Fund	817,600	0	817,600
1231	Alaska Drinking Water	410,600	0	410,600

reclamation trust fund income account (AS 37.14.800(a)) to the mine reclamation trust fund operating account (AS 37.14.800(a)).

(k) Twenty-five percent of the donations received under AS 43.23.230(b), estimated to be $275,000, is appropriated to the education endowment fund (AS 43.23.220).

(*l*) The amount received by the Alaska Commission on Postsecondary Education as repayment of WWAMI medical education program loans, estimated to be $504,044, is appropriated to the Alaska higher education investment fund (AS 37.14.750).

(m) The unexpended and unobligated balance of the large passenger vessel gaming and gambling tax account (AS 43.35.220) on June 30, 2022, estimated to be $0, is appropriated to the general fund.

(n) The sum of $250,000,000 is appropriated from federal receipts received from sec. 9901, P.L. 117-2 (Subtitle M—Coronavirus State and Local Fiscal Recovery Funds, American Rescue Plan Act of 2021) to the general fund for general fund revenue replacement.

* **Sec. 72.** LEGISLATIVE COUNCIL. Section 40, ch. 8, SLA 2020, is amended to read:

Sec. 40. LEGISLATIVE COUNCIL. The sum of **$3,500,000** [$2,500,000] is appropriated from the general fund to the Legislative Council for the Redistricting Board for operations for the fiscal years ending June 30, 2021, [AND] June 30, 2022**, and June 30, 2023**.

* **Sec. 73.** RETIREMENT SYSTEM FUNDING. (a) The sum of $193,494,000 is appropriated from the general fund to the Department of Administration for deposit in the defined benefit plan account in the public employees' retirement system as an additional state contribution under AS 39.35.280 for the fiscal year ending June 30, 2022.

(b) The sum of $97,699,500 is appropriated from the general fund to the Department of Administration for deposit in the defined benefit plan account in the public employees' retirement system as an additional state contribution under AS 39.35.280 for the fiscal year ending June 30, 2022.

(c) The sum of $142,665,000 is appropriated from the general fund to the Department of Administration for deposit in the defined benefit plan account in the teachers' retirement system as an additional state contribution under AS 14.25.085 for the fiscal year ending June 30, 2022.

(d) The sum of $4,185,000 is appropriated from the general fund to the Department of

THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Office of the Governor
OFFICE OF MANAGEMENT AND BUDGET
Donna Arduin, Director

Court Plaza Building
240 Main Street, Suite 801
Juneau, Alaska 99811-0020
Main: 907.465.4660
Fax: 907.465.2090

July 12, 2019

The Honorable Natasha von Imhof
Co-Chair, Senate Finance Committee
Alaska State Legislature
State Capitol, Room 516
Juneau, AK 99801-1182

The Honorable Bert Stedman
Co-Chair, Senate Finance Committee
Alaska State Legislature
State Capitol, Room 518
Juneau, AK 99801-1182

The Honorable Neal Foster
Co-Chair, House Finance Committee
Alaska State Legislature
State Capitol, Room 505
Juneau, AK 99801-1182

The Honorable Jennifer Johnston
Vice Chair, House Finance Committee
Alaska State Legislature
State Capitol, Room 501
Juneau, AK 99801-1182

Dear Co-Chairs and Vice Chair of the House and Senate Finance Committees,

As you are aware, the Legislature was unable to achieve a three-fourths vote to reverse the sweep of money in the general fund and sub-funds of the general fund available for appropriation at the end of each fiscal year, into the Constitutional Budget Reserve Fund (CBRF). This requirement is found under Article IX, Section 17(d) of the Alaska Constitution. As a result, the staff of the Office of Management and Budget, the Division of Finance, and the Department of Law went through the arduous process of establishing a framework and guidelines to be applied to every single fund to determine whether the fund is subject to the constitutional sweep. Hundreds of hours of staff time were spent making these determinations. The Governor was not involved in this process; no political influence took place when making these determinations.

The CBRF was established by constitutional amendment in 1990 in Article IX, Section 17 of the Alaska Constitution. There are four subsections to this constitutional amendment:

- (a) Revenue into the CBRF – money received from the termination of administrative and judicial proceedings involving mineral revenues is deposited into the CBRF;
- (b) Expenditures from the CBRF by majority vote – only if "the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year" *and* the appropriation is limited to the amount necessary to make total appropriations equal to the amount appropriated in the previous year;
- (c) Expenditures from the CBRF by a three-fourths vote of the members of each house – the Legislature can appropriate from the fund for any public purpose if such a supermajority vote is obtained;
- (d) **Repayment requirement – "If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for**

appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law."

The language of Article IX, Section 17(d) guided the framework for establishing the criteria used to evaluate each fund. The following guidelines were used to evaluate each fund:

- All financial assets outside of the permanent fund and the constitutional budget reserve are considered to be part of the general fund, not simply the accounts and funds managed directly by the Division of Finance and Treasury.
- Funds for which the legislature has retained the power to appropriate from and that are not available to pay expenditures without further legislative appropriation are subject to the sweep unless a constitutionally dedicated fund or not in the general fund;
- Funds that list purposes for which money in the fund can be used but still require a second appropriation to spend from the fund are subject to the sweep unless a constitutionally dedicated fund or not in the general fund;
- Money in funds that is already validly appropriated to a particular purpose are not subject to the sweep;
- Federal funds are not subject to the sweep;
- Other trust funds such as the Public Employees Retirement Fund that can only be used for a specific stated purpose under law such as constitutionally permissible dedicated funds and pension funds are not subject to the sweep;
- Donations - the portion of a fund that comprises money donated to a fund for a particular purpose should not be included in the sweep;
- Public corporation accounts/funds are not subject to the sweep *unless* the money is in an account or fund that cannot be accessed by the corporation without an additional legislative appropriation (e.g. the Power Cost Equalization Endowment fund);
- Receipts subject to refund (e.g. Alaska Marine Highway, University tuition or student housing) are not subject to the sweep.

Attached, please find the finalized list with the determination on what funds will sweep to the CBRF and what monies will remain in the fund in which they currently reside. The effective date of the sweep is June 30, 2019; however, the deposit of swept funds into the CBRF will not take place until late August-early September timeframe to allow for the close out of FY2019 expenditures.

Please do not hesitate to contact the Office of Management and Budget should you or your staff have any questions.

Sincerely,

Donna Arduin
Director

Enclosure

1. Funds Subject to Sweep

cc. Honorable Cathy Giessel, President, Alaska State Senate
Honorable Bryce Edgmon, Speaker, House of Representatives
Honorable Kevin Clarkson, Attorney General, Department of Law
Mr. David Teal, Director, Legislative Finance Division
Ms. Suzanne Cunningham, Director, Governor's Legislative Office
Mr. Hans Zigmund, Director, Division of Finance

Prepared by the Office of Management and Budget

Fund Code	Name	Reference
1005	General Fund/Program Receipts	AS 37.05.142-.146, AS 37.10.050-.060
1044	AK Debt Retirement Fund	AS 37.15.011
1049	Training and Building Fund	AS 23.20.130
1052	Oil and Hazardous Substance Release Prevention Mitigation Account	AS 46.08.010-.040, AS 43.55.201&.300 AS43.40.005-.007
1054	State Employment & Training Program	AS 23.15.625 AS 37.05.146
1076	Marine Highway System Fund	AS 19.65.060, AS 37.05.550
1082	Vessel Replacement Fund	AS 37.05.550
1109	Test Fisheries Receipts	AS 16.05.050(a)(14)
1139	AHFC Dividend	
1140	AIDEA Dividend	
1141	RCA Receipts	AS 37.05.146(c)(22), AS 42.05.254
1150	ASLC Dividend	
1151	Technical Vocational Education Program Account	AS 23.15.830 AS 37.10.200
1153	State Land Disposal Income Fund	AS 38.04.022(a), AS 37.05.146(b)
1154	Shore Fisheries Development Lease Program	AS 38.05.082 AS 37.05.146(b)
1155	Timber Sale Receipts	AS 38.05.110 AS 37.05.146(b)
1156	Receipt Supported Services	AS 37.05. 142 through 146
1157	Workers Safety and Compensation Administration Account	AS 23.05.067(e) AS 18.60, AS 23.30
1162	Alaska Oil & Gas Conservation Commission Rcpts	AS 31.05.093, AS 37.05.146(c)(23)
1166	Commercial Passenger Vessel Environmental Compliance Fund	AS 46.03.460-.490
1168	Tobacco Use Education and Cessation Fund	AS 37.05.580
1169	PCE Endowment Fund	AS 42.45.070-.085
1172	Building Safety Account	AS 44.31.025 AS 37.05.146(c)(53)
1173	Miscellaneous Earnings	-
1180	Alcohol & Other Drug Abuse Treatment & Prevention Fund	AS 43.60.050
1195	Snow Machine Registration Receipts	AS 28.39.010-250
1197	Alaska Capital Income Fund	AS 37.05.565
1200	Vehicle Rental Tax Receipts	AS 43.52.080
1201	Commercial Fisheries Entry Commission Receipts	AS 16.43, AS 16.05.490, AS16.05.530, AS 37.05.146(c)(29)
1203	Workers' Compensation Benefits Guaranty Fund	AS 23.30.082
1211	Cruise Ship Gambling Tax	-
1213	Alaska Housing Capital Corporation Receipts	-
1214	Whittier Tunnel Toll Receipts	23 USC 129(a)(3)
1218	146(c)code	AS 37.05.146(c)
1221	Civil Legal Services Fund	AS 37.05.590

EXHIBIT 8
Page 1 of 2

Fund Code	Name	Reference
1226	Alaska Higher Education Investment Fund	AS 37.14.750 (fund) AS 14.43 (program)
1234	License Plates	AS 28.10.421
1237	Vocational Rehabilitation Small Bus. Enterprise Revolving Fd	AS 23.15.130
1243	Statutory Budget Reserve Fund	AS 37.05.540
1246	Recidivism Reduction Fund	AS 43.61.010
1247	Medicaid Monetary Recoveries	37.05.146(c)(59) and AS 09.58 and AS 47.05.210
1248	Alaska Comprehensive Health Insurance Fund	AS 21.55.430(a)
1249	Motor Fuel Tax Receipts	AS 43.40.010(f)(g)(j)
1254	Marijuana Education and Treatment Fund	AS 43.61.010(f)
3200	Statutory Budget Reserve Fund	
3205	Alaska Historical Commission Receipts Account (Partially Sweep)	
3221	Originator Surety Fund	
3222	Trauma Care Fund (Partially Sweep)	
3223	Abandoned Vehicle Fund	
3225	AMHS Capitalization	
3233	Fish and Game Civil Fines & Penalties	
3388	$.01 Per Barrel of Oil Produced Surcharge	
3389	$.04 Per Barrel of Oil Produced Surcharge	
N/A	Reappropriations of FY19 Operating Appropriations	

AK Higher Education Investment
Net Asset Value
As of the Month Ending
June 28, 2019

Cash and Cash Equivalents		
Short-term Fixed Income Pool *(Internally Managed)*	$	41,044.35
ST Liquidity *(Internally Managed)*		-
Total Cash and Cash Equivalents		41,044.35
Fixed Income Securities		
Interim-term *(Internally Managed)*		-
Broad-term *(Internally Managed)*		106,588,313.88
High Yield *(Internally Managed)*		-
Total fixed Income Securities		106,588,313.88
Broad Domestic Equity		
SSgA Russell 3000		139,270,385.56
Total Broad Domestic Equity		139,270,385.56
Global Equity Ex-U.S.		
SOA International Equity Pool		84,440,912.70
Total Global Equity Ex-U.S.		84,440,912.70
Real Assets		
Real Estate Investment Trust Pool *(Internally Managed)*		16,751,691.60
Total Real Assets		16,751,691.60
Receivables and Payables		
Income Receivable/Payable		12.82
Payable To/From		-
Total Receivables and Payables		12.82
Total Assets	**$**	**347,092,360.91**

EXHIBIT 9
Page 1 of 2

AK Higher Education Investment
Schedule of Investment Income (Loss) and Changes in Invested Assets
As of the Month Ending
June 28, 2019

	1-Month	Fiscal YTD
Cash and Cash Equivalents		
Short-term Fixed Income Pool *(Internally Managed)*	$ 12.82	$ 1,379.05
ST Liquidity *(Internally Managed)*	-	
	12.82	1,379.05
Fixed Income Securities		
Interim-term *(Internally Managed)*	-	-
Broad-term *(Internally Managed)*	1,513,707.88	8,020,278.44
High Yield *(Internally Managed)*	-	27,792.47
	1,513,707.88	8,048,070.91
Broad Domestic Equity		
SSgA Russell 3000	9,157,838.40	12,211,276.42
	9,157,838.40	12,211,276.42
Global Equity Ex-U.S.		
SOA International Equity Pool	4,723,441.33	1,336,255.46
	4,723,441.33	1,336,255.46
Real Assets		
Real Estate Investment Trust Pool *(Internally Managed)*	234,114.44	2,081,407.77
	234,114.44	2,081,407.77
Total Investment Income (Loss)	**$ 15,629,114.87**	**$ 23,678,389.61**
Payable To/From	-	-
Total Invested Assets, Beginning of Period	**331,746,228.37**	**344,265,007.31**
Net Contribution (Withdrawal)	**(282,982.33)**	**(20,851,036.01)**
Total Assets	**$ 347,092,360.91**	**$ 347,092,360.91**

HOUSE BILL NO. 130

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTY-FIRST LEGISLATURE - FIRST SESSION

BY THE HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 4/12/19
Referred: House Special Committee on Energy, Education, Community and Regional Affairs, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the community assistance fund and to community assistance;**
2 **repealing the civil legal services fund, power cost equalization endowment fund, power**
3 **cost equalization and rural electric capitalization fund, curriculum improvement and**
4 **best practices fund, and Alaska higher education investment fund; disposing of**
5 **proceeds; and providing for an effective date."**

6 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

7 *** Section 1.** AS 14.43.825(f) is amended to read:
8 (f) Payment of a scholarship is subject to appropriation [AND THE
9 AVAILABILITY OF FUNDS FOR EXPENDITURE UNDER AS 37.14.750]. If
10 insufficient funds are appropriated [OR AVAILABLE] in a fiscal year to pay all
11 eligible scholarships, the commission may not award a scholarship to a new applicant,
12 and the commission shall pay existing awards on a pro rata basis for that fiscal year.
13 *** Sec. 2.** AS 14.43.915(a) is amended to read:

(a) The Alaska education grant account is created as an account in the general fund. **The department may seek appropriations to fund grants and awards from this account** [MONEY MAY BE APPROPRIATED TO THE ACCOUNT FROM THE ALASKA HIGHER EDUCATION INVESTMENT FUND UNDER AS 37.14.750 AND FROM OTHER SOURCES]. The commission may use the money in the account to pay grants awarded under AS 14.43.400 - 14.43.420 and to pay the cost of administration of the Alaska education grant program created under AS 14.43.400.

* **Sec. 3.** AS 14.43.915(b) is amended to read:

(b) The Alaska performance scholarship award account is created as an account in the general fund. **The department may seek appropriations to fund awards from this account** [MONEY MAY BE APPROPRIATED TO THE ACCOUNT FROM THE ALASKA HIGHER EDUCATION INVESTMENT FUND UNDER AS 37.14.750 AND FROM OTHER SOURCES]. The commission may use the money in the account to pay scholarships awarded to students under AS 14.43.810 - 14.43.849.

* **Sec. 4.** AS 14.43.915(c) is amended to read:

(c) Of the total amount available annually to the commission for payment of grants under AS 14.43.400 - 14.43.420 and for payment of scholarships under AS 14.43.810 - 14.43.849, one-third of the combined amount in the accounts established under (a) and (b) of this section shall be available solely for payment of grants awarded under AS 14.43.400 - 14.43.420. The commission shall annually allocate to all qualified applicants for scholarships awarded under AS 14.43.810 - 14.43.849 two-thirds of the combined amount in the accounts. If an insufficient number of qualified applicants are awarded grants under AS 14.43.400 - 14.43.420 or scholarships under AS 14.43.810 - 14.43.849, or both, before the end of that fiscal year, the commissioner shall redeposit the remaining funds **into the relevant account** [INTO THE ALASKA HIGHER EDUCATION INVESTMENT FUND ESTABLISHED UNDER AS 37.14.750].

* **Sec. 5.** AS 29.60.850 is repealed and reenacted to read:

Sec. 29.60.850. Community assistance. The legislature may appropriate funds

for the purpose of community assistance.

* **Sec. 6.** AS 29.60.855(a) is amended to read:

(a) The basic amount used for determining the basic community assistance payment for a fiscal year is $300,000. However, if the amount **appropriated** [AVAILABLE] for payments for that fiscal year under **AS 29.60.850** [AS 29.60.850(c)] is less than the amount necessary to make the payments under (b) of this section, the department shall reduce the basic amount pro rata.

* **Sec. 7.** AS 29.60.860(a) is amended to read:

(a) Subject to (b) of this section, if the amount **appropriated** [AVAILABLE] for distribution under **AS 29.60.850** [AS 29.60.850(c)] exceeds the amount needed to fully fund all the basic community assistance payments, the **excess amount** [BALANCE] shall be distributed on a per capita basis to municipalities, to reserves, and to communities in the unorganized borough.

* **Sec. 8.** AS 37.05.530(g) is amended to read:

(g) The provisions of this subsection apply to amounts received by the state under 42 U.S.C. 6506a(*l*) or former 42 U.S.C. 6508, as follows:

(1) amounts received and not appropriated for grants to municipalities under (d) of this section shall be deposited at the end of each fiscal year as follows:

(A) 25 percent of amounts received by the state during that fiscal year under 42 U.S.C. 6506a(*l*) or former 42 U.S.C. 6508 to the principal of the Alaska permanent fund; and

(B) .5 percent of amounts received by the state during that fiscal year under 42 U.S.C. 6506a(*l*) or former 42 U.S.C. 6508 to the public school trust fund (AS 37.14.110);

(2) if, after making the grants under (d) of this section, the amounts remaining are insufficient to make payment in full of the deposits required by (1)(A) and (B) of this subsection, the deposits shall be allocated pro rata between the fund deposits;

(3) the amounts remaining after the making of the payment of the deposits in full to the Alaska permanent fund and the public school trust fund under (2) of this subsection may be appropriated

[(A) FIRST,] to each of the funds described in (1)(A) and (B) of this subsection to recover amounts not paid to those funds on or after September 1, 2006, because of deficiencies in making the payments required by (2) of this subsection; [AND

(B) AFTER APPROPRIATIONS AUTHORIZED BY (A) OF THIS PARAGRAPH, TO THE POWER COST EQUALIZATION AND RURAL ELECTRIC CAPITALIZATION FUND (AS 42.45.100);]

(4) the amounts remaining [AFTER ANY APPROPRIATION TO THE POWER COST EQUALIZATION AND RURAL ELECTRIC CAPITALIZATION FUND] shall lapse into the general fund for use by the state for the following facilities and services: planning; construction, maintenance, and operation of essential public facilities; and other necessary public services.

* **Sec. 9.** AS 42.05.141(b) is amended to read:

(b) The commission shall perform the duties assigned to it under **AS 42.45.100 - 42.45.180** [AS 42.45.100 - 42.45.190].

* **Sec. 10.** AS 42.45.100 is repealed and reenacted to read:

Sec. 42.45.100. Power cost equalization and rural electric capitalization program. The legislature may appropriate funds for the purpose of equalizing power cost a kilowatt-hour statewide at a cost close to or equal to the mean of the cost a kilowatt-hour in Anchorage, Fairbanks, and Juneau by paying money to eligible electric utilities in the state.

* **Sec. 11.** AS 42.45.180(a) is amended to read:

(a) The authority may make a grant from **legislative appropriations** [THE FUND] for an eligible utility for a small power project that will reduce the cost of generating or transmitting power to the customers of the utility. The amount of the grant may not exceed 75 percent of the cost of the project. The authority may not make a grant under this section unless the eligible utility has secured financing for 25 percent of the cost of the project [FROM A SOURCE OTHER THAN THE POWER COST EQUALIZATION AND RURAL ELECTRIC CAPITALIZATION FUND], as provided under (c) of this section.

* **Sec. 12.** AS 42.45.180(c) is amended to read:

1 (c) In determining whether an eligible utility has secured financing for 25
2 percent of the cost of the project [FROM A SOURCE OTHER THAN THE POWER
3 COST EQUALIZATION AND RURAL ELECTRIC CAPITALIZATION FUND],
4 the authority shall accept solicited and unsolicited proposals for third party financing
5 or for a joint venture between the utility and an entity from the private sector provided
6 that the private sector participant has
7 (1) a valid state business license;
8 (2) a resolution or letter of agreement executed by the eligible utility
9 agreeing to participation by the private sector participant;
10 (3) a business plan that illustrates how the proposed project will reduce
11 the cost of generating or transmitting power to the customers of the utility.
12 * **Sec. 13.** AS 43.77.045(a), as amended by sec. 32, ch. 101, SLA 2018, is amended to read:
13 (a) A person engaged in a floating fisheries business is allowed a credit
14 against the tax due under this chapter for contributions of cash or equipment accepted
15 for
16 (1) direct instruction, research, and educational support purposes,
17 including library and museum acquisitions, and contributions to endowment, by an
18 Alaska university foundation, by a nonprofit, public or private, Alaska two-year or
19 four-year college accredited by a national or regional accreditation association, or by a
20 public or private nonprofit elementary or secondary school in the state;
21 (2) secondary school level vocational education courses, programs, and
22 facilities by a school district in the state;
23 (3) vocational education courses, programs, and facilities by a state-
24 operated vocational technical education and training school;
25 (4) a facility by a nonprofit, public or private, Alaska two-year or four-
26 year college accredited by a national or regional accreditation association or by a
27 public or private nonprofit elementary or secondary school in the state;
28 (5) Alaska Native cultural or heritage programs and educational
29 support, including mentoring and tutoring, provided by a nonprofit agency for public
30 school staff and for students who are in grades kindergarten through 12 in the state;
31 (6) education, research, rehabilitation, and facilities by an institution

that is located in the state and that qualifies as a coastal ecosystem learning center under the Coastal America Partnership established by the federal government;

(7) [THE ALASKA HIGHER EDUCATION INVESTMENT FUND UNDER AS 37.14.750;

(8)] funding a scholarship awarded by a nonprofit organization to a dual-credit student to defray the cost of a dual-credit course, including the cost of

(A) tuition and textbooks;

(B) registration, course, and programmatic student fees;

(C) on-campus room and board at the postsecondary institution in the state that provides the dual-credit course;

(D) transportation costs to and from a residential school approved by the Department of Education and Early Development under AS 14.16.200 or the postsecondary school in the state that provides the dual-credit course; and

(E) other related educational and programmatic costs;

(8) [(9)] constructing, operating, or maintaining a residential housing facility by a residential school approved by the Department of Education and Early Development under AS 14.16.200;

(9) [(10)] childhood early learning and development programs and educational support to childhood early learning and development programs provided by a nonprofit corporation organized under AS 10.20, a tribal entity, or a school district in the state, by the Department of Education and Early Development, or through a state grant;

(10) [(11)] science, technology, engineering, and math programs provided by a nonprofit agency or a school district for school staff and for students in grades kindergarten through 12 in the state; and

(11) [(12)] the operation of a nonprofit organization dedicated to providing educational opportunities that promote the legacy of public service contributions to the state and perpetuate ongoing educational programs that foster public service leadership for future generations of residents of the state.

* **Sec. 14.** AS 14.07.182; AS 37.05.146(c)(70), 37.05.590; AS 37.14.750; AS 42.45.070,

1 42.45.080, 42.45.085, 42.45.099, 42.45.180(b), 42.45.190; AS 43.20.014(a)(7);
2 AS 43.55.019(a)(7); AS 43.56.018(a)(7); AS 43.65.018(a)(7); AS 43.75.018(a)(7); and
3 AS 43.77.045(a)(7) are repealed.
4 * **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to
5 read:
6 (a) The department of revenue shall make a good faith attempt to return unexpended
7 donations to the Alaska higher education investment fund, repealed in sec. 14 of this Act, the
8 power cost equalization fund, repealed in sec. 14 of this Act, and the power cost equalization
9 and rural electric capitalization fund, repealed in sec. 10 of this Act, to the original donors.
10 (b) The department of revenue shall place any unexpended amounts from the
11 remaining funds, repealed by secs. 5 and 14 of this Act, into the general fund.
12 * **Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to
13 read:
14 TRANSITION. (a) Litigation, hearings, investigations, and other proceedings related
15 to funds repealed by this Act continue in effect and may be completed notwithstanding the
16 repeal.
17 (b) Regulations adopted to implement a fund repealed by this Act remain in effect as
18 issued, or until revoked, vacated, or otherwise modified under the provisions of this Act.
19 (c) Contracts, rights, liabilities, and obligations created by a fund repealed by this Act,
20 and in effect of the effective date of this Act, remain in effect notwithstanding this Act's
21 taking effect.
22 * **Sec. 17.** This Act takes effect July 1, 2019.

SENATE BILL NO. 110

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTY-FIRST LEGISLATURE - FIRST SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 4/12/19
Referred: Community and Regional Affairs, Finance

A BILL

FOR AN ACT ENTITLED

"An Act relating to the community assistance fund and to community assistance; repealing the civil legal services fund, power cost equalization endowment fund, power cost equalization and rural electric capitalization fund, curriculum improvement and best practices fund, and Alaska higher education investment fund; disposing of proceeds; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 14.43.825(f) is amended to read:

(f) Payment of a scholarship is subject to appropriation [AND THE AVAILABILITY OF FUNDS FOR EXPENDITURE UNDER AS 37.14.750]. If insufficient funds are appropriated [OR AVAILABLE] in a fiscal year to pay all eligible scholarships, the commission may not award a scholarship to a new applicant, and the commission shall pay existing awards on a pro rata basis for that fiscal year.

*** Sec. 2.** AS 14.43.915(a) is amended to read:

(a) The Alaska education grant account is created as an account in the general fund. **The department may seek appropriations to fund grants and awards from this account** [MONEY MAY BE APPROPRIATED TO THE ACCOUNT FROM THE ALASKA HIGHER EDUCATION INVESTMENT FUND UNDER AS 37.14.750 AND FROM OTHER SOURCES]. The commission may use the money in the account to pay grants awarded under AS 14.43.400 - 14.43.420 and to pay the cost of administration of the Alaska education grant program created under AS 14.43.400.

* **Sec. 3.** AS 14.43.915(b) is amended to read:

(b) The Alaska performance scholarship award account is created as an account in the general fund. **The department may seek appropriations to fund awards from this account** [MONEY MAY BE APPROPRIATED TO THE ACCOUNT FROM THE ALASKA HIGHER EDUCATION INVESTMENT FUND UNDER AS 37.14.750 AND FROM OTHER SOURCES]. The commission may use the money in the account to pay scholarships awarded to students under AS 14.43.810 - 14.43.849.

* **Sec. 4.** AS 14.43.915(c) is amended to read:

(c) Of the total amount available annually to the commission for payment of grants under AS 14.43.400 - 14.43.420 and for payment of scholarships under AS 14.43.810 - 14.43.849, one-third of the combined amount in the accounts established under (a) and (b) of this section shall be available solely for payment of grants awarded under AS 14.43.400 - 14.43.420. The commission shall annually allocate to all qualified applicants for scholarships awarded under AS 14.43.810 - 14.43.849 two-thirds of the combined amount in the accounts. If an insufficient number of qualified applicants are awarded grants under AS 14.43.400 - 14.43.420 or scholarships under AS 14.43.810 - 14.43.849, or both, before the end of that fiscal year, the commissioner shall redeposit the remaining funds **into the relevant account** [INTO THE ALASKA HIGHER EDUCATION INVESTMENT FUND ESTABLISHED UNDER AS 37.14.750].

* **Sec. 5.** AS 29.60.850 is repealed and reenacted to read:

Sec. 29.60.850. Community assistance. The legislature may appropriate funds

for the purpose of community assistance.

* **Sec. 6.** AS 29.60.855(a) is amended to read:

(a) The basic amount used for determining the basic community assistance payment for a fiscal year is $300,000. However, if the amount **appropriated** [AVAILABLE] for payments for that fiscal year under **AS 29.60.850** [AS 29.60.850(c)] is less than the amount necessary to make the payments under (b) of this section, the department shall reduce the basic amount pro rata.

* **Sec. 7.** AS 29.60.860(a) is amended to read:

(a) Subject to (b) of this section, if the amount **appropriated** [AVAILABLE] for distribution under **AS 29.60.850** [AS 29.60.850(c)] exceeds the amount needed to fully fund all the basic community assistance payments, the **excess amount** [BALANCE] shall be distributed on a per capita basis to municipalities, to reserves, and to communities in the unorganized borough.

* **Sec. 8.** AS 37.05.530(g) is amended to read:

(g) The provisions of this subsection apply to amounts received by the state under 42 U.S.C. 6506a(*l*) or former 42 U.S.C. 6508, as follows:

(1) amounts received and not appropriated for grants to municipalities under (d) of this section shall be deposited at the end of each fiscal year as follows:

(A) 25 percent of amounts received by the state during that fiscal year under 42 U.S.C. 6506a(*l*) or former 42 U.S.C. 6508 to the principal of the Alaska permanent fund; and

(B) .5 percent of amounts received by the state during that fiscal year under 42 U.S.C. 6506a(*l*) or former 42 U.S.C. 6508 to the public school trust fund (AS 37.14.110);

(2) if, after making the grants under (d) of this section, the amounts remaining are insufficient to make payment in full of the deposits required by (1)(A) and (B) of this subsection, the deposits shall be allocated pro rata between the fund deposits;

(3) the amounts remaining after the making of the payment of the deposits in full to the Alaska permanent fund and the public school trust fund under (2) of this subsection may be appropriated

[(A) FIRST,] to each of the funds described in (1)(A) and (B) of this subsection to recover amounts not paid to those funds on or after September 1, 2006, because of deficiencies in making the payments required by (2) of this subsection; [AND

(B) AFTER APPROPRIATIONS AUTHORIZED BY (A) OF THIS PARAGRAPH, TO THE POWER COST EQUALIZATION AND RURAL ELECTRIC CAPITALIZATION FUND (AS 42.45.100);]

(4) the amounts remaining [AFTER ANY APPROPRIATION TO THE POWER COST EQUALIZATION AND RURAL ELECTRIC CAPITALIZATION FUND] shall lapse into the general fund for use by the state for the following facilities and services: planning; construction, maintenance, and operation of essential public facilities; and other necessary public services.

* **Sec. 9.** AS 42.05.141(b) is amended to read:

(b) The commission shall perform the duties assigned to it under **AS 42.45.100 - 42.45.180** [AS 42.45.100 - 42.45.190].

* **Sec. 10.** AS 42.45.100 is repealed and reenacted to read:

Sec. 42.45.100. Power cost equalization and rural electric capitalization program. The legislature may appropriate funds for the purpose of equalizing power cost a kilowatt-hour statewide at a cost close to or equal to the mean of the cost a kilowatt-hour in Anchorage, Fairbanks, and Juneau by paying money to eligible electric utilities in the state.

* **Sec. 11.** AS 42.45.180(a) is amended to read:

(a) The authority may make a grant from **legislative appropriations** [THE FUND] for an eligible utility for a small power project that will reduce the cost of generating or transmitting power to the customers of the utility. The amount of the grant may not exceed 75 percent of the cost of the project. The authority may not make a grant under this section unless the eligible utility has secured financing for 25 percent of the cost of the project [FROM A SOURCE OTHER THAN THE POWER COST EQUALIZATION AND RURAL ELECTRIC CAPITALIZATION FUND], as provided under (c) of this section.

* **Sec. 12.** AS 42.45.180(c) is amended to read:

1 (c) In determining whether an eligible utility has secured financing for 25
2 percent of the cost of the project [FROM A SOURCE OTHER THAN THE POWER
3 COST EQUALIZATION AND RURAL ELECTRIC CAPITALIZATION FUND],
4 the authority shall accept solicited and unsolicited proposals for third party financing
5 or for a joint venture between the utility and an entity from the private sector provided
6 that the private sector participant has
7 (1) a valid state business license;
8 (2) a resolution or letter of agreement executed by the eligible utility
9 agreeing to participation by the private sector participant;
10 (3) a business plan that illustrates how the proposed project will reduce
11 the cost of generating or transmitting power to the customers of the utility.
12 * **Sec. 13.** AS 43.77.045(a), as amended by sec. 32, ch. 101, SLA 2018, is amended to read:
13 (a) A person engaged in a floating fisheries business is allowed a credit
14 against the tax due under this chapter for contributions of cash or equipment accepted
15 for
16 (1) direct instruction, research, and educational support purposes,
17 including library and museum acquisitions, and contributions to endowment, by an
18 Alaska university foundation, by a nonprofit, public or private, Alaska two-year or
19 four-year college accredited by a national or regional accreditation association, or by a
20 public or private nonprofit elementary or secondary school in the state;
21 (2) secondary school level vocational education courses, programs, and
22 facilities by a school district in the state;
23 (3) vocational education courses, programs, and facilities by a state-
24 operated vocational technical education and training school;
25 (4) a facility by a nonprofit, public or private, Alaska two-year or four-
26 year college accredited by a national or regional accreditation association or by a
27 public or private nonprofit elementary or secondary school in the state;
28 (5) Alaska Native cultural or heritage programs and educational
29 support, including mentoring and tutoring, provided by a nonprofit agency for public
30 school staff and for students who are in grades kindergarten through 12 in the state;
31 (6) education, research, rehabilitation, and facilities by an institution

that is located in the state and that qualifies as a coastal ecosystem learning center under the Coastal America Partnership established by the federal government;

(7) [THE ALASKA HIGHER EDUCATION INVESTMENT FUND UNDER AS 37.14.750;

(8)] funding a scholarship awarded by a nonprofit organization to a dual-credit student to defray the cost of a dual-credit course, including the cost of

(A) tuition and textbooks;

(B) registration, course, and programmatic student fees;

(C) on-campus room and board at the postsecondary institution in the state that provides the dual-credit course;

(D) transportation costs to and from a residential school approved by the Department of Education and Early Development under AS 14.16.200 or the postsecondary school in the state that provides the dual-credit course; and

(E) other related educational and programmatic costs;

(8) [(9)] constructing, operating, or maintaining a residential housing facility by a residential school approved by the Department of Education and Early Development under AS 14.16.200;

(9) [(10)] childhood early learning and development programs and educational support to childhood early learning and development programs provided by a nonprofit corporation organized under AS 10.20, a tribal entity, or a school district in the state, by the Department of Education and Early Development, or through a state grant;

(10) [(11)] science, technology, engineering, and math programs provided by a nonprofit agency or a school district for school staff and for students in grades kindergarten through 12 in the state; and

(11) [(12)] the operation of a nonprofit organization dedicated to providing educational opportunities that promote the legacy of public service contributions to the state and perpetuate ongoing educational programs that foster public service leadership for future generations of residents of the state.

* **Sec. 14.** AS 14.07.182; AS 37.05.146(c)(70), 37.05.590; AS 37.14.750; AS 42.45.070,

1 42.45.080, 42.45.085, 42.45.099, 42.45.180(b), 42.45.190; AS 43.20.014(a)(7);
2 AS 43.55.019(a)(7); AS 43.56.018(a)(7); AS 43.65.018(a)(7); AS 43.75.018(a)(7); and
3 AS 43.77.045(a)(7) are repealed.
4 * **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to
5 read:
6 (a) The department of revenue shall make a good faith attempt to return unexpended
7 donations to the Alaska higher education investment fund, repealed in sec. 14 of this Act, the
8 power cost equalization fund, repealed in sec. 14 of this Act, and the power cost equalization
9 and rural electric capitalization fund, repealed in sec. 10 of this Act, to the original donors.
10 (b) The department of revenue shall place any unexpended amounts from the
11 remaining funds, repealed by secs. 5 and 14 of this Act, into the general fund.
12 * **Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to
13 read:
14 TRANSITION. (a) Litigation, hearings, investigations, and other proceedings related
15 to funds repealed by this Act continue in effect and may be completed notwithstanding the
16 repeal.
17 (b) Regulations adopted to implement a fund repealed by this Act remain in effect as
18 issued, or until revoked, vacated, or otherwise modified under the provisions of this Act.
19 (c) Contracts, rights, liabilities, and obligations created by a fund repealed by this Act,
20 and in effect of the effective date of this Act, remain in effect notwithstanding this Act's
21 taking effect.
22 * **Sec. 17.** This Act takes effect July 1, 2019.

Budgetary Issues Due to the CBR Vote Failure

Appropriations with Immediate Problems -

These are appropriations made from funds that do not have FY2022 revenues anticipated and programs that do not have easy access to alternate sources of funding. No activity can begin on these programs and projects until the sweep is resolved or an alternate fund is appropriated. Includes direct appropriations from the CBR.

Dept	Fund		Description	Amount
DCCED	1169	PCE	AEA Power Cost Equalization and Supporting Costs	32,736.8
DCCED	1243	SBR	Capital - West-Su Access	8,500.0
DCCED	1243	SBR	Capital - Mat-Su Road Repair	10,000.0
DCCED	1243	SBR	Capital - ATIA	10,000.0
DCCED	1243	SBR	Capital - Voice of the Arctic	1,000.0
DEC	1052	SPAR	Spill Prevention and Response account appropriations.	15,751.2
DEED	1226	Higher Ed	AK Performance Scholarship Award	11,750.0
DEED	1226	Higher Ed	Live Homework Help	138.2
DEED	1226	Higher Ed	Alaska Education Grant Program	6,356.1
DEED	1226	Higher Ed	WWAMI Medical Education	3,258.0
DEED	1243	SBR	Capital - Houston Middle School Replacement	9,000.0
DFG	1243	SBR	Capital - Endangered Species Act Statehood Defense	2,000.0
DHSS	1243	SBR	Capital - Palmer Veteran's Pioneers Home Roof Replacement	2,268.0
DMVA	1243	SBR	Capital - JBER Maintenance (needed to match Fed maintenance funding)	3,812.5
DNR	1243	SBR	Capital - RS2477 Statehood Defense	2,500.0
DNR	1243	SBR	Capital - Global Navigations Satellite System Network	5,000.0
DNR	1243	SBR	Capital - ASTAR	5,000.0
DNR	1243	SBR	Capital - Nenana Totchaket Land Development	5,000.0
DNR	1243	SBR	Capital - Agriculture and Mariculture Surveys	3,500.0
DNR	1243	SBR	Capital - Permit Backlogs	3,500.0
DNR	1243	SBR	Capital - Firebreak Construction	10,000.0
DNR	1243	SBR	Capital - Park Sanitation	2,029.0
DOC	1243	SBR	Capital - Point Mackenzie Farm Produce Processing Plant	1,500.0
DPS	1243	SBR	Capital - Wildlife Trooper Repair and Replacement and Vessel Haul Outs	1,900.0
Debt	1001/1243	CBR/SBR	School Bond Debt	4,150.0
Fund Cap	1001	CBR/SBR	Oil and Gas Tax Credits	114,000.0
PFD	1001/1243	CBR/SBR	Dividend Payments	368,000.0
			Total of Immediately Problematic Appropriations	**642,649.8**

Mitigation:

Mitigation for this group of programs will require legislative action. Options include reconsideration of the reverse sweep in a subsequent appropriation vehicle or appropriating an alternate fund source for the impacted appropriations.

Budgetary Issues Due to the CBR Vote Failure

Delayed Complications -

Most of these programs will collect revenue during the fiscal year allowing them to delay funding problems associated with the sweep. Projected revenues are not likely to cover expenses however all listed funds should have sufficient revenue to avoid problems until at least 3rd quarter FY2022. Amounts reflect total appropriations, not total reliance on the swept funds. Actual FY2022 revenue will determine extent of the budget gap generated by the sweep.

Dept	Fund		Description	Amount
Various	1151	TVEP	Technical Vocational Education Program	13,259.1
DNR	1155	Timber Sales	Forest Management	1,039.6
DEC	1166	CPVEC	Air Quality, Spill Prevention, Water	1,019.3
DHSS	1168	Tobacco	Various Tobacco Cessation Programs	9,102.2
Law	1168	Tobacco	Legal Services Related to the Tobacco Fund	102.8
DOLWD	1172	Building Safety	Labor Standards / Mechanical Inspections	2,226.4
Debt	1173	Misc. Earnings	Debt Service Payments	568.3
Courts	1180	Alcohol	Therapeutic Courts	518.0
DHSS	1180	Alcohol	Various Alcohol Safety Programs and Grants	21,124.5
DNR	1195	Snow Machine	Snowmobile Trail Development Program and Grants - Capital	250.0
DNR	1200	VRT	Parks Management	4,265.1
DOT	1200	VRT	Central, Northern, Southcoast Highways and Aviation	6,336.0
DOT	1214	Whittier Tolls	Whittier Tunnel / Central Region Highways and Aviation	1,974.0
DCCED	1221	Civil Legal Serv	Community and Regional Affairs	311.6
DOR	1226	Higher Ed	Treasury Division - Fund Management	316.4
DCCED	1234	License Plates	Veteran's Services	17.6
DOLWD	1237	Voc Rehab RLF	Vocational Rehab	198.2
DHSS	1246	Recidivism	Behavioral Health Programs	7,425.9
DOC	1246	Recidivism	General Operations	11,546.0
DPS	1246	Recidivism	Council on Domestic Violence and Sexual Assault	2,000.0
DHSS	1247	Recoveries	Medicaid	219.8
DHSS	1254	MET	Behavioral and Public Health Programs	11,805.5
DOLWD	1049/1054	STEP	State Employment Training	9,262.3
DNR	1153/1154	Land Disposal	Mining, Land, and Water / Agriculture Development	6,845.4
DOLWD	1157/1203	Workers Comp	Workers' Safety and Compensation / Workers' Comp	10,158.6
			Total of Delayed Complications	**121,892.6**

Mitigation:

Mitigation efforts will depend on the level of confidence in achieving a reverse sweep vote at a later date. If we believe the legislature will resolve this issue in a subsequent appropriation bill we can utilize several tools to delay the impacts to this category of programs. The Division of Finance can utilize interfund borrowing and OMB can authorize mid-year budget transactions with the expectation that they be reversed once the reverse sweep is authorized.

Office of Governor
MIKE DUNLEAVY

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Governor Urges Legislature to Complete Budget

June 17, 2021

June 17, 2021 (Juneau, AK) – Alaska Governor Mike Dunleavy and Deputy Attorney General Cori Mills held a press conference today where he urged the Legislature to complete its constitutionally mandated task of passing a state operating and capital budget. The Legislature has failed to pass a Fiscal Year 2022 budget that meets the minimum requirements under the Alaska Constitution – specifically, an effective date that would allow funds to be spent at the start of the FY 2022 fiscal year on July 1, 2021. Due to legislative inaction, the governor was forced to direct members of his administration to distribute layoff notices at 4:00 p.m. today. The governor has announced that if necessary, he will call the legislature into a special session to begin Wednesday, June 23rd to resolve the constitutional issue.

"The legislative session is now entering its sixth month and the outcome to this point is a budget that is unfinished, unfunded and has an effective date that will put thousands of hard working state employees out of work and shutdown many functions of state government until September," **said Governor Dunleavy**. "Active discussions are underway with legislative leadership and, my administration is standing by to provide whatever assistance it can. It's my hope and the hope of Alaskans that some of the maneuvers and brinksmanship that crafted this budget be put aside and the result in a constitutionally sound budget that serves all Alaskans because we are running out of time."

Contrary to what some are saying, the effective date is contained in bills as required in Section 18 of the Alaska Constitution.

Without legislative action by June 18th at 11:59 p.m. to resolve the FY 22 budget's effective date of July 1, 2021, the budget does not take effect until 90 days after enactment, and thousands of pink slips will be delivered to state employees. In the event of a partial government shutdown, essential public health and safety workers will continue in their necessary roles.

On May 13th, with the end of the regular legislative session quickly approaching with no completed budget and little progress to protect the Permanent Fund and Alaskans' Permanent Fund Dividend in sight, Governor Dunleavy issued proclamations calling the Legislature into two 30-day special sessions beginning May 20th and August 2nd. Now, following nearly 150 days of legislative session, the FY 22 budget remains unfunded.

The State of Alaska potential government shutdown notice can be found here.

The Department of Law memo on the FY 22 effective date clause can be found here.

A fact sheet of budgetary issues can be found here.

Watch the governor's press conference here.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA FEDERATION OF NATIVES, ET AL., Plaintiffs,	)	
v.	)	
GOVERNOR MICHAEL J. DUNLEAVY in his official capacity., THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION Defendant.	)	Case No.: 3AN-21-06737 CI

ORDER ON MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiffs brought this lawsuit challenging the decision by the Office of Management and Budget to include the Power Cost Equalization Endowment Fund on the list of funds subject to sweep under the provisions of article IX, section 17(d) of the Alaska Constitution. Both parties have moved for summary judgment. Because the Power Cost Equalization Endowment Fund is not in the general fund, it is not subject to the sweep provision of article IX, section 17(d). Therefore, the court grants Plaintiffs' motion for summary judgment and denies Defendants' cross-motion for summary judgment.

Facts and Proceedings

I. The Constitutional Budget Reserve

In 1990, Alaska voters approved the creation of the Budget Reserve Fund, commonly known as the Constitutional Budget Reserve (CBR).[1] The CBR was created through constitutional amendment, resulting in article IX, section 17 of the Alaska Constitution. Section 17 provides in full:

> (a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.
>
> (b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.
>
> (c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.
>
> (d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in

[1] Article IX, § 17 was placed on the ballot after being passed by a legislative resolution approved by a two-thirds vote of each house in the 1990 legislature. *See Hickel v. Halford*, 872 P.2d 171, 172 (Alaska 1994); ALASKA CONST. art. XIII, § 1.

the budget reserve fund. The legislature shall implement this subsection by law.[2]

Generally, the CBR is a constitutionally-created savings account from which the Legislature may appropriate funds under specified circumstances, but to which those funds must be repaid. Section 17(a) established the CBR, provides that certain money received by the State is deposited in the CBR, and authorizes appropriation of money from the fund pursuant to sections 17(b) and (c).[3] Section 17(b) authorizes appropriation from the CBR by simple majority vote "[i]f the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year."[4] In other words, the Legislature may use the CBR to make up budget shortfalls by simple majority vote. Section 17(c) authorizes appropriation from the CBR "for any public purpose" by three-quarters vote of the Legislature.[5] In other words, the Legislature may use the CBR "for any public purpose" by super-majority vote. Section 17(d) requires repayment of an appropriation made from the CBR, and mandates that, until the CBR is repaid, "the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the [CBR].[6] This budgetary mechanism is commonly known as the "sweep."

The Legislature may, and routinely has, offset the effect of Section 17(d) or the sweep by a "reverse sweep" through Section 17(c).[7] During the early 2000s the Legislature borrowed funds from the CBR to make up for budget shortfalls; that debt was repaid to the CBR in 2010.[8] Since 2016 the Legislature has appropriated money from the CBR to make up for

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2 ALASKA CONST. art. IX, §17.
3 ALASKA CONST. art. IX, §17(a).
4 ALASKA CONST. art. IX, §17(b).
5 ALASKA CONST. art. IX, §17(c).
6 ALASKA CONST. art. IX, §17(d).
7 *Amended Complaint* ¶ 32 (filed 7/26/2021).
8 Ch. 13, § 19(a), SLA 2010.

budget shortfalls and has used article IX, section 17(c) to reverse sweep those amounts, preventing the sweep that would otherwise operate pursuant to article IX, section 17(d).[9] The current debt to the CBR is approximately $10 billion.[10] This year, the Legislature did not pass a reverse sweep as part of its FY2022 operating budget.[11]

II. The Power Cost Equalization Endowment Fund

In 2000, the Legislature established the Power Cost Equalization Endowment Fund (PCE Endowment Fund or "the fund") to provide a long-term, stable financing source for power cost equalization.[12] The PCE Endowment Fund is an endowment intended to fund the Power Cost Equalization and Rural Electric Capitalization Fund (PCE-CAP).[13] The PCE-CAP, in turn, is used to:

> (1) equaliz[e] power cost per kilowatt-hour statewide at a cost close to or equal to the mean of the cost per kilowatt-hour in Anchorage, Fairbanks, and Juneau by paying money from the fund to eligible electric utilities in the state; and
>
> (2) mak[e] grants to eligible utilities under AS 42.45.180 to improve the performance of the utility. [14]

The PCE Endowment Fund was established as "a separate fund of the [Alaska Energy A]uthority."[15] The Alaska Energy Authority is a public corporation of the state. It is part of the Department of Commerce, Community and Economic Development but is a separate legal entity.[16] The PCE Endowment Fund is capitalized through legislative appropriations to the fund not designated for annual power cost equalization expenditure, accumulated earnings,

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9 *Amended Complaint* ¶ 40.
10 *Opposition and Cross-Motion for Summary Judgment* at *10 (filed 7/20/2021) (hereinafter "*Opposition*").
11 *Motion for Summary Judgment* at *11 (filed 7/19/2021) (hereinafter "*Motion*").
12 AS 42.45.070; Ch. 60, §1, 6 SLA 2000.
13 AS 42.45.100(b)(3).
14 AS 42.45.100(a).
15 AS 42.45.070(a).
16 AS 44.83.020.

and other gifts, bequests, contributions, and federal grants not designated for annual power cost equalization.[17] The year it was established, the Legislature appropriated $100 million to the PCE Endowment Fund from the CBR using its authority under article IX, section 17(c).[18] The Legislature later appropriated other sums into the PCE Endowment Fund from the general fund.[19] As of June 30, 2021, the PCE Endowment Fund contained approximately $1.15 billion.[20]

The Commissioner of Revenue is the fiduciary of the PCE Endowment Fund and is directed by statute to manage the fund and invest it to meet the objectives of the PCE-CAP.[21] By statute, five percent of the monthly average market value of the three previous closed fiscal years, as determined by the Commissioner on July 1, may be appropriated from the PCE Endowment Fund to fund the PCE-CAP, reimburse the Department of Revenue for the costs of establishing and managing the fund, and reimburse other costs of administering the fund.[22] This year, the Legislature appropriated $32.355 million from the PCE Endowment Fund to the PCE-CAP for the fiscal FY2022.[23] That appropriation was not vetoed by the Governor.[24]

III. The Office of Management and Budget's Determination that the PCE Endowment Fund is Subject to the CBR Sweep

In 2019 the Legislature did not pass a reverse sweep as part of the FY 2020 operating budget.[25] Then-Attorney General Kevin Clarkson issued a letter to co- and vice- chairs of the Senate and House Finance Committees stating that the Department of Law had determined

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17 AS 42.45.070(a).
18 Ch. 75, § 1(b), SLA 2000.
19 *Eg.* Ch. 82, § 20(j), SLA 2006; Ch.3, § 26(c), FSSLA 2011.
20 *Affidavit of Jahna Lindemuth* Ex. 4 (filed 7/19/2021).
21 AS 42.45.080(a).
22 AS 42.45.080(c)(1); AS 42.45.085(a).
23 Ch. 1, § 57(d), SSLA 2021.
24 *Amended Complaint* ¶ 39.
25 *Motion* at *7.

that, because the PCE Endowment Fund is available for appropriation and has all the essential attributes of general fund money, it should be swept pursuant to article IX, section 17(d).[26] At the same time the Director of Office of Management and Budget (OMB) issued a letter to the co- and vice- chairs of the Senate and House Finance Committees outlining which funds OMB had determined were subject to sweep pursuant to article IX, section 17(d).[27] The letter set forth OMB's criteria in determining which funds were subject to sweep and included a list of funds.[28] The PCE Endowment Fund was on the list.[29] Co-Plaintiff Alaska Federation of Natives sent a letter to Clarkson challenging the Attorney General's opinion.[30] The Legislature ultimately passed a reverse sweep in July 2019.[31]

This year, the Legislature again did not pass a reverse sweep as part of its FY2022 budget.[32] OMB issued a document entitled "Budgetary Issues Due to the CBR Vote Failure" in mid-June.[33] That document identified FY2022 appropriations affected by the Legislature's failure to enact a reverse sweep, and included the Legislature's $32.736 million appropriation for power cost equalization.[34] The document asserts that the appropriations are from funds that lack 2022 revenues or alternate funding sources and provides that "no activity may begin on these programs and projects until the sweep is resolved or an alternate fund is appropriated."[35] The Governor has called the Legislature into special session to consider, among other topics, the CBR.[36]

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26 *Affidavit of Jahna Lindemuth* Ex. 4.
27 *Affidavit of Jahna Lindemuth* Ex. 6.
28 *Affidavit of Jahna Lindemuth* Ex. 7.
29 *Affidavit of Jahna Lindemuth* Ex. 8.
30 *Affidavit of Jahna Lindemuth* Ex. 14.
31 *See* 2019 Senate Journal 1422; 2019 House Journal 1340.
32 *Motion* at *11.
33 *Affidavit of Jahna Lindemuth* Ex. 11.
34 *Id.*
35 *Id.*
36 *Affidavit of Jahna Lindemuth* Ex. 13. That session has not begun.

Plaintiffs filed this lawsuit on July 19, 2021, asserting in their complaint that by declaring that no funds are available in the PCE Endowment Fund to effect the Legislature's appropriation, the Governor has constructively and unlawfully vetoed the Legislature's valid appropriation for FY2022 rural energy subsidies.[37] The complaint alleges that the Governor violated article IX, section 17(d) by designating the PCE Endowment Fund for sweep, and violated the separation of powers doctrine by effectively vetoing decades of appropriations of the Legislature into the PCE Endowment Fund, and by refusing to appropriate (and therefore effectively vetoing the Legislature's transfer of funds from the PCE Endowment Fund to the PCE-CAP for FY 2022).[38] Plaintiffs ask the court to declare that the PCE Endowment Fund is not subject to the CBR sweep, and to enter an order prohibiting the Governor from transferring funds out of the PCE Endowment Fund without an appropriation by the Legislature and to return any funds improperly swept.[39]

At the time the complaint was filed, Plaintiffs filed a motion for summary judgment and a motion for a preliminary injunction.[40] This court granted Plaintiffs' partially unopposed request to expedite the briefing schedule in this matter, and Defendants filed a cross-motion for summary judgment.[41] The court held oral argument on August 6, 2021 and the parties filed supplemental briefs in response to this court's order on August 9, 2021.

Discussion

The importance of the PCE Endowment Fund and the policy of power cost equalization are not at issue in this lawsuit. Nor is there any dispute whether a sweep of the

37 *Amended Complaint* ¶ 45.
38 *Amended Complain* ¶ 48-57.
39 *Id.* ¶ 51-52.
40 *Motion; Motion for Preliminary Injunction* (filed 7/19/2021).
41 *Opposition.*

PCE Endowment Fund would cause harm to many rural Alaska communities. Instead, this lawsuit requires the court to interpret article IX, section 17(d) of the Alaska Constitution and determine whether the PCE Endowment Fund is subject to its repayment provision.

I. Legal Standards

Summary judgment must be granted "'where 'there is no genuine issue as to any material fact' and 'the moving party is entitled to judgment as a matter of law.'"[42] "The proper interpretation of a constitutional provision presents a question of law to which the court applies its independent judgment."[43] "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense."[44] To interpret the provision, the court "should look to the plain meaning and purpose of the provision and the intent of the framers."[45]

The plain language of article IX, section 17(d) sets forth a two-part test for determining what money must be deposited in the CBR.[46] The money must be:

1) In the general fund; and

2) Available for appropriation at the end of each succeeding fiscal year.[47]

Therefore, whether the PCE Endowment Fund is sweepable under article IX, section 17(d) depends on whether it is "in the general fund" and "available for appropriation at the end of [this] fiscal year."[48] Plaintiffs argue that the fund does not meet either part of this test.[49] Defendants argue that the PCE Endowment Fund meets both prongs of the test.[50]

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42 *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) (quoting Alaska R. Civ. P. 56(c).
43 *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1996.)
44 *Id.* (quoting *Sonneman v. Hickel*, 836 P.2d 936, 940 (Alaska 1992)).
45 *Id.* (quoting *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992).
46 *See Hickel v. Cowper*, 874 P.2d at 935 & n. 32.
47 ALASKA CONST. art. IX, §17(d); *see also Hickel*, 874 P.2d at 935 & n. 32.
48 *Id.*
49 *Motion* at *13-20.
50 *Opposition* at *21-34.

II. The PCE Endowment Fund is Available for Appropriation Within the Meaning of Article IX, Section 17(d)

Whether the PCE Endowment Fund is "available for appropriation" within the meaning of article IX, section 17(d) is governed by the Alaska Supreme Court's decision in *Hickel v. Cowper*.[51] In *Hickel*, former Governor Steve Cowper challenged as facially unconstitutional parts of AS 37.10.420, which defines terms contained in article IX, section 17, including "available for appropriation."[52] In that decision, the court primarily considered the meaning within article IX, section 17(b) (the provision of section 17 that authorizes the Legislature to appropriate from the CBR by simple majority to make up for budget shortfalls).[53] The court held that "'amount available for appropriation' within the meaning of article IX, section 17 of the Alaska Constitution includes all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure."[54]

In arriving at this definition, the court expressly considered whether an "initial appropriation" to a fund established by the Legislature brought the money in the fund outside the definition of "available for appropriation."[55] Reasoning that "one of the fundamental characteristics of an appropriation, in the public law context, is that it authorizes governmental expenditure without further legislative action,"[56] the court concluded that "because the initial 'appropriations' to these funds cannot support any expenditure, the money in these funds remains 'available for appropriation' until further appropriations are made."[57] The court

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51 *Hickel*, 874 P.2d at 922.
52 *Id.* at 925.
53 *Id.* at 926
54 *Id.* at 935.
55 *Id.* at 933-934.
56 *Id.* at 933.
57 *Id.* at 934.

concluded that this was true whether the fund is established in the general fund or in a state agency.[58]

The PCE Endowment Fund is "available for appropriation" according to this definition. Even though the money in the PCE Endowment Fund was appropriated to it by the Legislature, those "initial appropriations" do not support any expenditure. Instead, expenditure of money from the fund requires a further appropriation by the Legislature.[59] By contrast, if the Legislature appropriates money from the fund to the PCE-CAP Fund, the Alaska Energy Authority may expend that money in the fund without a further act by the Legislature.[60] Even though the PCE Endowment Fund is "a separate fund of the [A]uthority," and even though the Authority is a public corporation with a legal existence separate from the department in which it is housed, neither the Authority nor any other entity has authority to expend money from the fund absent further appropriation by the Legislature.

Plaintiffs argue in their motion for summary judgment that the PCE Endowment Fund is not "available for appropriation" because the monies in the fund have already been appropriated, the appropriation has not expired, and the funds remain obligated (to the fund).[61] According to Plaintiffs, the PCE Endowment Fund is not available for appropriation under *Hickel* because, under *Hickel*, "monies which have already been validly committed by the legislature to some purpose should not be counted as available."[62] The Plaintiffs reason that the Legislature validly appropriated money into the PCE Endowment Fund, it is still being used for the purpose for which it was appropriated, and it is therefore not available.[63]

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58 *Id.* at 933.
59 AS 42.45.085(a).
60 AS 42.45.100-170.
61 *Motion* at *18.
62 *Reply in Support of Motion for Summary Judgment and Opposition to Cross-Motion* at *19 (filed 8/2/2021) (hereinafter "*Reply*").
63 *Id.* at *19-23.

But this definition is contrary to the supreme court's holding in *Hickel*, which considers not just whether money was validly appropriated, but also distinguishes between initial appropriations and appropriations within the meaning of section 17, particularly with respect to funds established by the Legislature.[64] However valid an initial appropriation of money may have been, that money remains available for appropriation within the meaning of article IX, section 17 if "the [L]egislature has retained the power to appropriate and which require further appropriation before expenditure."[65]

Plaintiffs have also argued, during oral argument, that the court should not apply *Hickel*'s definition of "available for appropriation" to section 17(d) because *Hickel* was concerned primarily with section 17(b), and because section 17(b) concerns money available for appropriation "for a fiscal year" and section 17(d) concerns money available for appropriation "at the end of each succeeding fiscal year." But there is no basis to ignore the rule of statutory construction that the same words in the same statute (or here, constitutional provision) should be given the same meaning.[66] And, at the end of each succeeding fiscal year, the funds are available for appropriation because the Legislature retains the power to appropriate those funds at any time and for any purpose.[67] Moreover, the supreme court did not restrict its definition to section 17(b) and applied it to section 17(d) when it declared AS 37.10.420(b) unconstitutional.[68]

Because the Legislature has retained that authority with respect to the PCE Endowment Fund and because the fund requires further appropriation before expenditure, it

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64 *Hickel*, 874 P.2d at 930-935.

65 *Id.* at 935.

66 *See Fancyboy v. Arctic Village Elec. Coop.* Inc, 984 P.2d 1128, 1133 (Alaska 1999).

67 *See* AS 42.45.070(b); AS 42.45.085(a); *see also Sonneman v. Hickel*, 836 P.2d 936, 939-40 (Alaska 1992).

68 *Hickel*, 874 P.2d at 936 & n. 2 ("We see no reason to give 'available for appropriation' a different meaning in subsection (d) than we did in subsection (b).").

is available for appropriation within the meaning of *Hickel* and within the meaning of article IX, section 17.

III. The PCE Endowment Fund is Not in the General Fund

Although the PCE Endowment Fund is available for appropriation, it is not subject to the CBR sweep unless it is also "in the general fund."[69] Whether the PCE Endowment Fund is in the general fund presents a more difficult question, because the term "general fund" is not defined in the state constitution, in statute, or by the Alaska Supreme Court.

Plaintiffs argue that the PCE Endowment Fund is not in the general fund because the Legislature established it as a separate fund and because the Legislature validly appropriated the corpus of the fund from the general fund in prior years.[70] Plaintiffs contend that the CBR repayment provision was never intended or understood to cover separate funds to which the Legislature had already appropriated money for a specific purpose.[71] Defendants argue that the PCE Endowment Fund is in the general fund because it was created by the Legislature, and only money in a fund established by the Constitution is outside the general fund.[72] According to the Defendants, the Legislature lacks authority to designate funds as outside the general fund for purposes of article IX, section 17(d).[73] Defendants argue that adopting the Plaintiffs' proposed definition of general fund would undermine the repayment policy established by section 17(d) because it would allow the Legislature to evade the repayment obligation by a majority vote by simply declaring a pot of money not part of the general fund.[74]

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69 ALASKA CONST. art. IX, §17(d); *see also Hickel*, 874 P.2d at 936 & n. 32.
70 *Motion* at *13-17.
71 *Reply* at *11-12.
72 *Opposition* at *18-26.
73 *Id.* at *21-22.
74 *Opposition* at *28.

a. The Legislature Established the PCE Endowment Fund as a Separate Fund.

By statute, the Legislature created the PCE Endowment "as a separate fund of the [Alaska Energy Authority]."[75] The Legislature has expressly created many funds and accounts in the general fund for various purposes.[76] The Legislature has also created separate funds.[77] In interpreting AS 42.45.070(a), the court must presume "that the legislature intended every word, sentence, or provision...to have some force and effect, and that no works or provision [is] superfluous."[78] In addition, "where certain things are designated in a statute, 'all omissions should be understood as exclusions.'"[79] Accordingly, the Legislature's express creation of the fund as "separate" and "of the authority" and its omission of the phrase "in the general fund" must be interpreted to mean that the Legislature intended to create a fund outside the general fund.

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75 AS 42.45.070(a).

76 *E.g.*, AS 06.60.500; AS 06.65.310; AS 08.88.450(a); AS 14.03.125(a); AS 14.11.005; AS 14.11.030(a); AS 14.43.915(a) &(b); AS 18.09.230(a); AS 18.65.225; AS 18.70.360; AS 19.65.060(a); AS 21.55.430(a); AS 23.15.625; AS 23.15.830; AS 23.30.082(a); AS 26.05.665(a); AS 29.60.850(a); AS 30.30.096(a); AS 37.05.289(a); 37.05.500-520; AS 37.05.550(a); AS 37.05.555(a); AS 37.05.560(a); AS 37.05.565(a); AS 37.05.570(a); AS 37.05.580(a); AS 37.05.600(a); AS 37.05.565(a); AS 37.05.570(a); AS 37.05.580(a); AS 37.05.590; 37.05.600(a); AS 37.05.610(a); AS 37.10.200(a); AS 37.14.205(a); AS 37.14.750(a); AS 37.15.011(a); AS 37.15.230(a); AS 38.05.874(a); AS 39.30.095(a); AS 39.60010(a); AS 41.15.180(b); AS 43.23.220(a); AS 43.23.230(a); AS 43.40.010(f), (g), (h), (j); AS 43.52.080(b); AS 43.52.230(a); AS 43.60.050(a); AS 43.61.010(c), (f); AS 43.77.050(a); AS 43.90.400(a); AS 45.56.640; AS 46.03.317(a); AS 46.03.482(a); AS 46.06.041(a); AS 46.08.020(b); AS 46.08.025(b); AS 46.14.270.

77 *E.g.*, AS 26.05.263(a) ("The Servicemembers' Group Life Insurance premium fund is established as a separate fund in the state treasury. The fund consists of appropriations by the legislature to it. Money appropriated to the fund does not lapse"); AS 37.05.540(a) ("There is established as a separate fund in the state treasury the budget reserve fund."); AS 37.14. 031(a); AS 37.14.300(a); AS 37.15.240(a); AS 42.45.010(a); AS 42.45.040(a); AS 42.45.045(a); AS 42.45.100(a) ("The mental health trust fund is established as a separate fund of the Alaska Mental Health Trust Authority."); AS 43.23.045(a) ("The mental health trust fund is established as a separate fund of the Alaska Mental Health Trust Authority."); AS 43.23.048(a); AS 43.55.028(a) ("The Alaska clean water administrative fund is established as a separate fund that is distinct from other money or funds in the treasury."); AS 46.03/036(a) ("The oil and gas tax credit fund is established as a separate fund of the state."); AS 46.03.032(a) ("The Alaska drinking water fund is established as a separate fund that is distinct from other money or funds in the treasury."); AS 46.03.038(A) ("The Alaska drinking water administrative fund is established as a separate fund that is distinct from other money or funds in the state treasury."); AS 47.25.621(c) ("The Alaska affordable heating fund is established as a separate fund to be managed by the Department of Revenue. ").

78 *McDonnell v. State Farm Mut.Auto Ins. Co.*, 299 P.3d 715, 721 (Alaska 2013) (internal citations omitted).

79 *Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956 & n. 34 (Alaska 2018) (quoting *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991) (quoting *Puller v. Municipality of Anchorage*, 574 P.2d 1285, 1287 (Alaska 1978))) (explaining principle of statutory construction *expressio unius est exclusion alterius*).

However, as Defendants argue,[80] if the Legislature lacks constitutional authority to take money out of the general fund simply by designating it as so, the Legislature's intent in creating the PCE Endowment Fund as a separate fund outside the general fund does not end the matter. The Alaska Energy Authority's independent, separate legal existence does not change this analysis. Even though the Authority is a public corporation with a separate legal existence, its assets are state assets in the treasury.[81] But the Legislature's establishment of the fund in the authority reflects its intent to place the money not in the general fund.

b. Alaska Statute 37.10.420(b) Does Not Define "General Fund."

In *Hickel v. Cowper*, the court declared unconstitutional AS 37.10.420(b), which provides:

> If the amount appropriated from the budget reserve fund has not been repaid under art. IX, sec. 17(d), Constitution of the State of Alaska, the Department of Administration shall transfer to the budget reserve fund the amount of money comprising the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year, or as much of it as is necessary to complete the repayment. The transfer shall be made on or before December 16 of the following fiscal year. [82]

The court concluded the definition was unconstitutional because it excluded "restricted funds within the general fund from the calculation of the amount available to pay back appropriations from the budget reserve fund."[83] The court recognized that "available amounts outside the general fund, such as the earnings reserve account [ERA], need not be deposited in the budget reserve."[84] While the court's decision does not answer the question presented by this case—what is the general fund and is the PCE Endowment Fund in it—it

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80 *Opposition* at *26-30.

81 *Cf. Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 732 (Alaska 2000) (assets of Alaska Railroad Corporation are assets of the state for purposes of the public notice clause of Alaska Constitution).

82 AS 37.10.420(b).

83 *Hickel*, 874 P.2d at 936.

84 *Id.* & n. 32.

does suggest, as argued by Defendants,[85] that the phrase must be read in light of the purposes of the CBR amendment. But while *Hickel* holds that even restricted funds in the general fund must be included in the definition of sweepable funds (assuming they are also available for appropriation), *Hickel* says nothing about money outside the general fund (except to note that they are not subject to sweep, and to identify the earnings reserve account as such a fund).[86]

c. The Legislative History of the CBR Amendment Does Not Indicate that the Amendment Constrained the Legislature's Authority to Establish a Fund Outside the General Fund, if the Legislature Had Such Authority.

The voter's pamphlet for the CBR amendment described the effect of article IX, section 17(d)'s repayment provision: "At the end of each year, the Fund would have to be paid back from money left in the treasury's general fund."[87] The Legislative Affairs Agency Summary stated that "Money that is appropriated from the reserve fund must be repaid. Surplus general fund money must be deposited in the reserve fund at the end of each year until the reserve fund is repaid."[88] The statement in support, signed by Representatives Jan Faiks, Kay Brown and Randy Phillips, assert that Ballot Measure Number 1 is the first step Alaskans can take to *effectively* control state spending."[89] In describing the repayment provision, the statement asserts that "[t]he Legislature will be required to repay any money it appropriates from the Budget Reserve. If the next year revenues are insufficient the Legislature cannot afford to replenish the Budget Reserve, the "debt" will carry forward until it is repaid."[90]

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85 *Opposition* at *6-9.
86 *Hickel*, 874 P.2d at 936 & n. 32.
87 *Affidavit of Jahna Lindemuth* Ex. 1 at *1.
88 *Id.*
89 *Id.* at *2.
90 *Id.*

Representative Terry Martin's statement in opposition did not address the repayment provision.[91]

These descriptions to voters of the repayment provision indicate that the repayment will come from "surplus general fund money" and "revenues." The descriptions do not inform the voter that funds designated by statute as separate will be nevertheless be considered part of the general fund and subject to the repayment provision. In describing the repayment provision on the House floor, Representative Brown asserted that the fund would be repaid out of "general fund surpluses that remain at the end of the fiscal year."[92] In addition, a prior version of SJR 5, which became article IX, section 17, employed the term "from the treasury," a much broader designation.

Nor does the plain meaning of "general fund" support an interpretation of funds established by law as separate from the general fund. The term "general fund" is defined in Black's Law Dictionary (from 1990, when the amendment passed) as:

> a collective designation of all the assets of the state which furnish the means for the support for government and for defraying the discretionary appropriations of the legislature. Such are distinguished from assets of a special character, such as the school fund. [93]

The dictionary definition must be considered in conjunction with any judicial interpretations of "general fund" that would have informed voters and the Legislature at the time the amendment was passed. If the Legislature had authority to establish a fund outside the general fund at the time the CBR amendment was passed, nothing in the legislative history of the amendment indicates that the amendment was intended to curtail that authority. But if

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91 *Id.*

92 *See* House Floor Session on SJR5, 16th Leg., 2d Sess., Audio 2, (1:02:51-1:03:10) (Statement of Representative Kay Brown).

93 *Affidavit of Jahna Lindemuth* Ex. 21 (filed 7/19/2021) (*General fund,* BLACK'S LAW DICTIONARY (6TH Ed. 1990)).

the Legislature never had authority to create a fund outside the general fund, the absence of any such legislative history makes sense.

d. The Legislature Is Not Prohibited from Establishing a Fund Outside the General Fund by the Dedicated Funds Clause.

The original articles of the Alaska Constitution do not mention the term "general fund." However, the dedicated funds clause[94] provides (in pertinent part) that "[t]he proceeds of any state tax or license shall not be dedicated to any special purpose except... when required by the federal government for state participation in federal programs."[95] In *State v. Alex*,[96] and *Sonneman v. Hickel*,[97] the Alaska Supreme Court considered the legislative history, origin and purpose of the clause, concluding that its purpose was to retain control over the budget and spending in the legislature and governor.[98] However, the court in *Alex* recognized that the dedicated funds clause did not prohibit the establishment of certain special funds[99] and the minutes of the constitutional convention relied on by the court in *Alex* indicate that, at the time, at least some delegates distinguished between "the general fund" and "the treasury."[100]

In 1968, the Legislature enacted AS 37.05.155, which provided for specified "special funds" to be accounted for separately "as accounts in the general fund."[101] In a 1969 opinion

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94 ALASKA CONST. art. IX § 7.

95 *Id.* This article was amended in 1976 when the Permanent Fund was established to create an exception for the restrictions placed on the use of the principal of that fund. HJR 111 (1975).

96 *State v. Alex*, 646 P.2d 203 (Alaska 1982).

97 *Sonneman v. Hickel*, 836 P.2d 936 (Alaska 1992).

98 *Alex*, 646 P.2d at 209-211 (holding that, because the constitution prohibits the dedication of any source of revenue, dedication of salmon assessments to qualified regional associations violated dedicated funds clause); *Sonneman*, 836 P.2d at 938-41 (holding that statute establishing Marine Highway System Fund does not violate dedicated funds clause because legislature may appropriate from the fund for any purpose, but that restriction on executive agency's authority to request appropriation for capital improvements violated dedicated funds clause).

99 *Alex*, 646 P.2d at 210.

100 *See* Alaska Const. Conv. Proceed. 2363 ("Now in this case the sinking funds for bonds, all this prohibits is the earmarking of any special tax to that sinking fund. You could still set up a sinking fund from the general fund or the treasury.").

101 Ch. 5, §1, SLA 1968 (renumbered as AS 37.05.500).

asserting that proposed legislation would violate the dedicated funds clause of the constitution,[102] the Alaska Attorney General opined that "[a]ll public moneys and revenue coming into the state treasury constitute the general fund of the state."[103] The opinion acknowledges that the general fund is not specifically created by statute, but that its existence is noted in AS 37.05.155.[104]

In 1977, in *Thomas v. Rosen*,[105] the Alaska Supreme Court considered whether a bond issue authorization was an appropriation bill within the meaning of article II, section 15 of the Alaska Constitution.[106] In considering whether the Governor had line-item veto authority over a bond issue authorization, the court was guided by the Wisconsin Supreme Court's definition of "appropriation" as "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money and no more, for that object, and no other."[107] In relying on that definition, the Alaska Supreme Court noted that for its purpose, "the operative phrase 'public revenue' is critical since it is the basis of the general fund and special funds from which the legislature may allocate."[108] In a footnote, the court also acknowledged that the general fund was not specifically created by statute but that it existed, and that its existence was noted in AS 37.05.155.[109] *Thomas'* description of "the public revenue" as the basis of "the general fund" and "special funds" supports the conclusion that the Legislature had some authority to

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102 ALASKA CONST. art. IX § 7. The dedicated funds clause of the constitution preserves state control over state revenue by (in part) prohibiting funds that the Legislature may only use for a specified purpose or by precluding state agencies from seeking appropriation for a given purpose. *Hickel*, 836 P.2d at 937.

103 1969 Op. Alaska Att'y Gen. No. 5 at *3 (April 15, 1969).

104 *Id.* at n. 10.

105 *Thomas v. Rosen*, 569 P.2d 793 (Alaska 1977).

106 *Id.* at 795.

107 *Id.* at 796 (quoting *Finnegan v. Dammann*, 264 N.W.622, 624 (Wis. 1936).

108 *Id.*

109 *Id.* & n. 8.

establish funds outside the general fund, so long as it abided by the dedicated funds clause of the constitution.

The term "general fund" appears for the first time in the constitution in 1976, through article IX, section 15, the amendment establishing the Permanent Fund. That amendment established the Permanent Fund, provided for its funding and investment, and provided that "[a]ll income from the permanent fund shall be deposited in the general fund unless otherwise provided by law."[110] Alaska Statute 37.13.145(a) established the Earnings Reserve Account (ERA) "as a separate account in the [Permanent Fund]" and provided that income from the Permanent Fund be deposited into the ERA "as soon as it is received."[111] Article IX, section 7 creates an exception for the dedicated funds clause "as provided by article IX, section 15."[112] Recently, in *Wielechowski v. State*,[113] the Alaska Supreme Court held that this provision referred to the dedication of certain specific mineral revenues to the Permanent Fund, and did not permit the Legislature to dedicate the earnings of the Permanent Fund income.[114]

While the court's decision in *Wielechowski* does not address the definition of "the general fund," it adds to the weight of authority that the Legislature's establishment of a fund outside the general fund does not constitute an unconstitutional dedication of funds. In *Hickel v. Cowper*, the court explained that "the money in the [ERA] never passes through the general fund, and is never appropriated as such by the Legislature."[115] In *Wielechowski* the court described the ERA as unique in that it is ""(1) an account existing outside of the general fund; (2) appropriable by the legislature; (3) managed by [Alaska Permanent Fund Corporation]; (4)

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110 ALASKA CONST. art. IX § 15.
111 AS 37.13.145(a).
112 ALASKA CONST. art. IX § 7.
113 *Wielechowski v. State*, 403 P.3d 1141 (Alaska 2017).
114 *Id.* at 1148-52.
115 *Hickel*, 874 P.2d at 934.

invested in income-producing assets; and (5) treated differently than other state revenues because of public expectations."[116]

The court's description of the ERA raises an important question for this case: whether the Legislature's authority to establish a fund outside the general fund for Permanent Fund earnings is bestowed on the Legislature by article IX, section 15, or whether the amendment merely recognized the Legislature's authority to establish a separate fund and provided that the income from the fund would be deposited into the general fund absent exercise of the Legislature's preexisting authority? If it is the former, then the Legislature had no authority to establish separate funds when the CBR amendment was adopted. If is the latter, then the absence of any discussion in the legislative history of the CBR amendment weighs against concluding that the amendment eliminated this power.

Because the term "general fund" was not a term of constitutional significance when the Alaska Constitution was established, the Legislature had authority to establish, by statute, funds outside and separate from the general fund.[117] This authority was circumscribed only by the dedicated funds clause. And the Legislature did establish "separate funds."[118] In 1980, the Legislature established the Power Cost Assistance Fund as a "separate fund" of the authority.[119] The statute creating that fund was repealed and reenacted the following year, again as a "separate fund" of the authority.[120] In 1984, the Legislature established the Power Cost

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116 *Wielechowski*, 403 P.3d at 1151.

117 The Alaska Constitution vests legislative power in the legislature. ALASKA CONST. art. II § 1.

118 *E.g.* Ch. 68, § 2, SLA 1967; Ch. 130, § 11, SLA 1974; Ch. 218, § 86, SLA 1975; Ch. 277, § 9, SLA 1976; Ch. 124, § 1, SLA 1977; Ch. 181, § 4, SLA 1978; Ch. 83, § 42, SLA 1980; Ch. 118, § 8, SLA 1981; Ch. 133, § 1, SLA 1984.

119 Ch. 83, § 42, SLA 1980.

120 Ch. 118, § 8, SLA 1981.

Equalization Fund as a "separate fund" of the authority.[121] These funds existed at the time the CBR amendment was passed in 1990.

Judicial decisions prior to adoption of the CBR amendment acknowledged the existence of the general fund, but also recognized that the Legislature could establish special or separate funds.[122] Given this authority, and given the absence of any indication in the legislative history that the CBR amendment was intended to circumscribe that authority or to define general fund more broadly than was already defined through statutes, this court concludes that the term "general fund" does not include a separate fund of a public corporation. Accordingly, it does not include the PCE Endowment Fund.

The Defendants argue that adopting Plaintiffs' proposed interpretation of "general fund" will undermine the repayment provision of article IX, section 17(d), allowing the Legislature to evade the repayment provision by establishing funds outside the general fund by simply majority vote.[123] But, absent an express provision in article IX, section 17(d) or other indications that the CBR amendment limited the Legislature's authority to establish funds separate from the general fund, the court will not lightly infer such a limitation.[124] The CBR must still be repaid. But because the Legislature established the PCE Endowment Fund as a separate fund, it may not be swept pursuant to article IX, section 17(d). In addition, the funds validly appropriated by the Legislature from the PCE Endowment Fund for FY2022 for the PCE-CAP must be distributed to the PCE-CAP in accordance with the Legislature's appropriation.

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121 Ch. 133, § 1, SLA 1984.
122 See *supra*, nn. 96-100, and accompanying text.
123 *Opposition* at *21-22.
124 *Cf. Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976).

Conclusion

Because the Plaintiffs have demonstrated that they are entitled to judgment as a matter of law, and because the Defendants have not shown that they are entitled to judgment as a matter of law, the court GRANTS Plaintiffs' motion for summary judgment and DENIES Defendants' Cross-Motion for Summary Judgment. The Department is PERMANENTLY ENJOINED from sweeping the PCE Endowment Fund into the CBR pursuant to article IX, section 17(d) of the Alaska Constitution. Plaintiffs are ORDERED to file a proposed final judgment within 20 days of service of this decision.[125]

DONE this 11th day of August 2021, at Anchorage, Alaska.

Josie Garton
Superior Court Judge

I certify that on 8/11/2021
a copy of the above was mailed to
each of the following at their
addresses of record:

Erik Groves
Samuel Gottstein
Scott Kendall
John Leman
Jahna Lindemuth
Katherine Demarest
Margaret Paton-Walsh

Elsie Roehl
Judicial Assistant

[125] Alaska R. Civ. P. 56(c).

MEMORANDUM

State of Alaska
Department of Law

TO:	Honorable Mike Dunleavy Governor	DATE:	August 25, 2021
		TEL. NO.:	269-5100
FROM:	Treg Taylor Attorney General	SUBJECT:	Appropriations from funds swept June 30, 2021 into the CBR

You requested a memorandum that could be publicly disseminated addressing the following question: "Whether appropriations validly enacted prior to July 1, 2021, but with a July 1 effective date that have a funding source that was otherwise swept into the constitutional budget reserve as of June 30, 2021, can be expended without a reverse sweep?"

There is a reasonable argument these monies can be expended, but it would be an issue of first impression for the courts. Ultimately, we cannot say with certainty what the courts would decide, especially in light of the recent superior court decision regarding the Power Cost Equalization Fund.

For background, article 9, section 17 of the Alaska Constitution establishes the constitutional budget reserve fund. Subsection (d) of section 17 requires that any money taken from the fund under subsections (b) and (c) must be repaid through what has become known as the "sweep." Subsection (d) states:

> If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.

The question presented involves an interpretation of the phrase "available for appropriation at the end of each succeeding fiscal year." This is not an issue of whether the fund exists in the general fund or not; that was the question addressed by the superior court in the recent Power Cost Equalization Fund decision. Rather, the question is, for those funds in the general fund and otherwise swept as of June 30, should the amount that is needed to pay validly enacted appropriations that have a July 1st effective date be retained in the funds for expenditure in FY'22? In other words, are the amounts needed for the validly enacted appropriations considered "not available for appropriation" under

subsection (d) because they have already been obligated to be expended for a purpose in the next fiscal year?

The Alaska Supreme Court has addressed how to interpret "available for appropriation" in one prior decision: *Hickel v. Cowper*, 847 P.2d 922 (Alaska 1994). Although this decision mainly addressed this phrase as it is used in subsection (b), the court said that it's interpretation of "available for appropriation" for purposes of (b) also applies to (d). The court described its ruling as follows:

> Instead, we consider it appropriate, as well as consistent with both the language of the amendment and the intent of the framers, to focus on the legal status of the various funds implicated in relationship to the legislative power of appropriation. The "amount available for appropriation" must include all funds over which the legislature has retained the power to appropriate and which are not available to pay expenditures without further legislative appropriation.[1]

The court also explained:

> It is far more reasonable to interpret "amount available for appropriation" in light of the relative consequences of and circumstances attendant in making appropriations from different sources. In this light, **monies which already have been validly committed by the legislature to some purpose should not be counted as available**.[2]

In the scenario presented, there is a reasonable argument that appropriations validly enacted prior to July 1, 2021, but with a July effective date, are already "validly committed by the legislature to some purpose."[3] According to *Hickel v. Cowper*, this would remove these amounts from being available for appropriation.

The countervailing argument—and practical concern— is whether an appropriation having an effective date after the sweep has already occurred means the money in the fund has already been swept, and therefore there are no actual funds to

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1 *Id.* at 927.

2 *Id.* at 930-931 (emphasis added).

3 *Id.*

support what is otherwise a valid appropriation.[4] It is unclear where the court would come down on this issue. If the monies cannot be considered validly committed until the appropriation is effective, then there would be no money available in the fund to carry out the appropriation. If, on the other hand, the monies can be considered validly committed before their effective date, then the money needed to pay those appropriations should not be swept and would be available for expenditure in FY'22 to carry out the appropriation. In light of the reasonable arguments on both sides, I believe it is legally defensible to release the funds and pay out the validly enacted appropriations for FY'22.

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[4] By operation of law, the sweep occurs at 11:59 pm on June 30th of any given fiscal year. Consequently, an appropriation that is effective July 1st may be valid, but the underlying account has no funds to support the appropriation.

STATE OF ALASKA
OFFICE OF THE GOVERNOR

MEMORANDUM

DATE: August 25, 2021

TO: Neil Steininger, Director
Office of Management and Budget

FROM: Mike Dunleavy
Governor

SUBJECT: Appropriations Enacted on June 30, 2021

I am directing the Office of Management and Budget, (OMB) and the Division of Finance (DOF), to immediately effectuate appropriations approved by the Legislature and signed into law by me, from fund sources that were eventually swept into the Constitutional Budget Reserve Fund, as of June 30, 2021. This decision is made after a review of all appropriations in light of the Superior Court's recent ruling on Power Cost Equalization. Part of that review included an analysis from the Department of Law. That analysis, a memorandum from Attorney General Taylor, is attached.

Effective immediately, I direct you to take the necessary actions to ensure these expenditures occur for Fiscal Year 2022 according to the enacted appropriations in House Bill 69 (Chapter 1, SSSLA 21). Furthermore, I direct OMB and DOF to provide a status update to the Legislature's Finance Division on these appropriations.

cc: Hans Zigmund, Director of Finance

THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Law
OFFICE OF THE ATTORNEY GENERAL
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Main: 907-269-5100
Fax: 907-276-3697

December 15, 2021

Via Email

Pat Pitney
Interim President
University of Alaska
P.O. Box 755000
Fairbanks, Alaska 99775
Email: kppitney@alaska.edu

Re: *Higher Education Investment Fund*

Dear President Pitney:

Thank you for your communications regarding the Higher Education Investment Fund (HEIF) and the automatic "sweep" of certain funds into the Constitutional Budget Reserve Fund (CBRF). I appreciate that you have made your counsel available to discuss the matter with attorneys at the Department of Law. Governor Dunleavy requested that I respond to your letter, since it involves an interpretation of the Alaska Constitution. Specifically, Art. IX, sec. 17(d) of the Alaska Constitution which states in part:

> "the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year **shall be deposited into the budget reserve fund.**"

Emphasis added.

Your previous letter suggested that the HEIF was not subject to the sweep provisions of the CBRF for at least two reasons.

First, the University contends that subjecting the HEIF to the sweep is a matter of executive discretion and that my August 25, 2021 memorandum justifies exempting the HEIF from the sweep.

Second, the University contends that even if the HEIF is subject to the sweep, only a limited portion of the fund is available to be swept through your interpretation of

AS 37.14.750(c), specifically the seven percent of the fund described in statute as available for withdrawal each year.[1]

As you know, the CBRF operates as a savings fund with special rules for legislative appropriations from the fund and a requirement that money withdrawn from the fund be repaid. Under the repayment provision, money "in the general fund" and "available for appropriation" at the end of a fiscal year **shall be deposited** in the CBRF until withdrawals from the CBRF have been repaid. This is colloquially known as the sweep.

With a rare exception, prior to the last legislative session, the Alaska State Legislature had been able to work together and historically passed budget language to reverse the sweep and maintain fund balances that would otherwise be deposited into the CBRF. During the 2019 legislative session it appeared that for the first time in recent history the required 3/4 vote of the legislature to reverse the CBRF sweep would not be achievable. In response, the administration performed a comprehensive review of all funds potentially implicated by the sweep. The HEIF was identified as a sweepable fund based on the enabling language in the statute.[2]

Governor Dunleavy agrees the HEIF provides critical support to a number of Alaskan students. He has provided funding for the annual costs of the HEIF scholarships every year he has been in office (including for this upcoming fiscal year, FY 2023). However, failure of the Legislature to work together and reverse the sweep results in a mandatory duty by the Governor to comply article IX, section 17 of the Alaska Constitution. No governor has the legal authority or discretion to ignore the constitution and its sweep requirements.

As previously stated, under the provisions of the CBRF (and as decided in the recent PCE case) money "in the general fund" and "available for appropriation" at the end of a fiscal year is subject to the sweep.

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[1] AS 37.14.750(c) states, in part, "As soon as is practicable after July 1 of each year, the commissioner of revenue shall determine the market value of the fund established in this section on June 30 for the immediately preceding fiscal year. The commissioner shall identify seven percent of that amount as available for appropriation."

[2] AS 37.14.750(a) ("The Alaska higher education investment fund is established in the general fund for the purpose of making grants awarded under AS 14.43.400 — 14.43.420 by appropriation to the account established under AS 14.43.915(a) and of making scholarship payments to qualified postsecondary institutions for students under AS 14.43.810 — 14.43.849 by appropriation to the account established under AS 14.43.915(b). Money in the fund does not lapse.")

Alaska Statute 37.14.750(a) clearly indicates that the HEIF is "established in the general fund for the purpose of making grants . . . by appropriation."[3] Consequently, the HEIF is subject to the sweep provisions in article IX, section 17(d) of the Alaska Constitution as the HEIF is explicitly established in the general fund and the legislature is required to appropriate funds from the HEIF to other accounts in order for funds to be spent.[4] Recent superior court litigation, clarifying the application of the sweep to the Power Cost Equalization Fund (PCE),[5] reinforces this principle of law.

Like the HEIF, the PCE was set up as an endowment out of which only a certain portion should be spent each year. Although the superior court determined the PCE was not "in the general fund," it did agree with us that the fund was fully available for appropriation regardless of any statutory limit on availability of funds for appropriation.

In regard to my analysis that the appropriations from the HEIF made in 2021 could proceed for this fiscal year, I believe that the University may have misconstrued the analysis. My memorandum dealt specifically with funds that had *already* been validly committed in a further appropriation from the fund into the scholarship and other accounts—the only difference was that the appropriation, although enacted, did not go into effect until after the reverse sweep was supposed to occur. I concluded, after reviewing the relevant case law, that there was a reasonable argument that the valid commitment of the funds had already occurred prior to the effective date of the appropriation, thereby making the appropriated funds no longer available for appropriations.[6] This allowed necessary funding, such as the funding for performance

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3 AS 37.14.750(a).

4 This letter take no position on whether accounts such as the Alaska education grant account and Alaska performance scholarship award account as subject to the sweep or whether funds previously appropriated from the HEIF are subject to the sweep.

5 *See Alaska Federal of Natives v. Dunleavy*, Case No. 3AN-21-06737CI, Order on Mot. for Summ. J. and Cross Mot. for Summ. J. at p. 10-11("Plaintiffs argue in their motion for summary judgment that the PCE Endowment Fund is not "available for appropriation" because the monies in the fund have already been appropriated, the appropriation has not expired, and the funds remain obligated (to the fund) . . . [b]ut this definition is contrary to the supreme court's holding in *Hickel* . . . . However valid an initial appropriation of money mayhave been, that money remains available for appropriation within the meaning of article IX, section 17 if "the [L]egislature has retained the power to appropriate and which require further appropriation before expenditure").

6 *Hickel v. Cowper*, 874 P.2d 922, 931 (Alaska 1994)("monies which already have been validly committed by the legislature to some purpose should not be counted as available").

scholarships, to continue in this fiscal year despite the legislature's failure to reverse the sweep.

With respect to the University's argument that only a portion of the HEIF is exposed to the sweep, this argument appears to be contrary to the plain language of the statute itself, and the *Weilechowski* decision by the Alaska Supreme Court.

Initially, AS 37.14.750(b) states "[n]othing in this section creates a dedicated fund." However, under the University's argument at least some percentage of the HEIF would essentially be a dedicated fund. Additionally, the statute is silent on the disposition of the remaining 93% of the fund following the appropriation of the 7% under AS 37.14.750(c).

As the PCE and the *Weilechowski* case made clear, absent a specific statutory directive[7] or constitutional limit on the availability of funds[8] the legislature maintains appropriation power over the funds regardless of state statutes. This makes the funds in the HEIF "available for appropriation."[9]

Similarly, the University's analysis seems to depart from the Supreme Court's analysis that trust receipts and restricted accounts in the general fund are available for appropriation under article IX, section 17, despite the intent and express language of those statutes attempting to designate the funds for certain purposes.[10] Consequently, it seems from the plain reading of AS 37.14.750, the HEIF is created within the general fund and there are no restrictions on the legislature's ability to make appropriations from the fund making the entire fund subject to the provisions of article IX, section 17.[11]

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7 *See, e.g.,* AS 18.08.085 (authorizing the commissioner to spend funds without further apportion); AS 26.23.300.

8 *E.g.* private donations for a particular purpose, limits on federal funds, etc.

9 *Hickel v. Cowper*, 874 P.2d 922, 933 (Alaska 1994).

10 *Id.* at 935-36.

11 *Curran v. Progressive Northwestern Ins. Co.*, 29 P.3d 829, 832 (2001)("When a statute's meaning appears clear and unambiguous, the party urging another meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent")(*internal citations omitted*)

Governor Dunleavy and I share your concerns regarding the HEIF and are available to discuss options that fall within the boundaries of the law and his authority. The one thing the governor cannot legally do if a Legislature fails to vote to reverse the sweep is ignore the mandate of article IX, section 17(d) of the Alaska Constitution. This duty was clearly described in the PCE case and requires the sweep of all funds "in the general fund" and "available for appropriation" by the Legislature.

Sincerely,

Treg R. Taylor
Attorney General

AK Higher Education Investment
Net Asset Value
As of the Month Ending
November 30, 2021

Cash and Cash Equivalents		
Short-term Fixed Income Pool *(Internally Managed)*	$	4,223,839.42
Total Cash and Cash Equivalents		4,223,839.42
Fixed Income Securities		
Interim-term *(Internally Managed)*		-
Broad-term *(Internally Managed)*		120,976,298.13
High Yield *(Internally Managed)*		-
Total Fixed Income Securities		120,976,298.13
Broad Domestic Equity		
SSgA Russell 3000		165,418,302.23
Total Broad Domestic Equity		165,418,302.23
Global Equity Ex-U.S.		
SOA International Equity Pool		98,584,115.06
Total Global Equity Ex-U.S.		98,584,115.06
Real Assets		
Real Estate Investment Trust Pool *(Internally Managed)*		21,346,862.46
Total Real Assets		21,346,862.46
Receivables and Payables		
Income Receivable/Payable		(44.92)
Payable To/From		-
Total Receivables and Payables		(44.92)
Total Assets	**$**	**410,549,372.38**

EXHIBIT 18
Page 1 of 2
000271

AK Higher Education Investment
Schedule of Investment Income (Loss) and Changes in Invested Assets
As of the Month Ending
November 30, 2021

	1-Month	Fiscal YTD
Cash and Cash Equivalents		
Short-term Fixed Income Pool *(Internally Managed)*	$ (44.92)	$ 843.13
	(44.92)	843.13
Fixed Income Securities		
Interim-term *(Internally Managed)*	-	-
Broad-term *(Internally Managed)*	177,789.49	162,563.42
High Yield *(Internally Managed)*	-	-
	177,789.49	162,563.42
Broad Domestic Equity		
SSgA Russell 3000	(2,532,347.98)	8,102,633.59
	(2,532,347.98)	8,102,633.59
Global Equity Ex-U.S.		
SOA International Equity Pool	(4,576,600.05)	(5,279,060.58)
	(4,576,600.05)	(5,279,060.58)
Real Assets		
Real Estate Investment Trust Pool *(Internally Managed)*	(217,715.93)	1,078,462.46
	(217,715.93)	1,078,462.46
Total Investment Income (Loss)	**$ (7,148,919.39)**	**$ 4,065,442.02**
Payable To/From	-	-
Total Invested Assets, Beginning of Period	**417,918,328.79**	**416,411,393.99**
Net Contribution (Withdrawal)	**(220,037.02)**	**(9,927,463.63)**
Total Assets	**$ 410,549,372.38**	**$ 410,549,372.38**

EXHIBIT 18
Page 2 of 2
000272

CBR Sweep Summary - DRAFT

	Fund	FY04 Appropriation	FY04 Revenue	FY04 Revenue Shortfall	Amount Swept	Minimum Reverse Amount	Fall 2003 Potential Sweep Balance		Notes If Revenue not equal to Appropriation	
No Reversal Necessary										
1	FHWA Airspace leases				$19,049	$0	$19,049			
2	State Forestation Fund				$194		$194			
3	AMHS Replacement Fund				$0		$0			
4	Education Facility Maintenance/Construction Fund				$0		$0			
	Total	$0		$0	$19,243	$0	$19,243			
Reversal Necessary to Support FY 04 Appropriation Level and Future Year Spending										
5	Voc Rehab Small Business Enterprise Revolving Loan Fund	$365,000	$230,000	$135,000	$121,587	$121,587	$0	5/	$13,413	Shortage does not appear to be a problem; actual expenditures are lower than authorization
6	Alaska Historical Commission	$0	$0	$0	$85,302	$0	$85,302	6/	$0	Extra sweep supports future appropriations.
7	Oil/Haz Substance Release Accounts	$20,171,600	$9,232,900	$10,938,700	$18,349,829	$10,938,700	$7,411,129	1/	$0	Extra sweep supports future appropriations.
8	Employment Assistance & Training (STEP)	$5,639,700	$4,650,000	$989,700	$1,947,655	$989,700	$957,955	3/	$0	See footnote
9	Workers Safety/Comp Account	$4,139,400	$4,139,400	$0	$4,547,743	$0	$4,547,743	4/	$0	See footnote
10	Commercial Passenger Vessel Env. Compliance Fund	$706,900	$706,900	$0	$1,099,965	$706,900	$393,065	5/	-$706,900	Revenue received late in year and funds FY05
11	Tobacco Ed/Cessation Fund	$5,395,600	$4,295,600	$1,100,000	$1,260,524	$1,100,000	$160,524	5/	$0	Extra sweep supports future appropriations.
12	Bldg Safety Account	$1,603,700	$1,508,000	$95,700	$92,843	$92,843	$0		$2,857	Small shortfall is not a problem
13	Alcohol/Drug Abuse Trtmnt/Prevention Fund	$21,400,000	$15,300,000	$6,100,000	$6,191,229	$6,100,000	$91,229	5/	$0	Extra sweep supports future appropriations.

	Fund	FY04 Appropriation	FY04 Revenue	FY04 Revenue Shortfall	Amount Swept	Minimum Reverse Amount	Fall 2003 *Potential* Sweep Balance		Notes If Revenue not equal to Appropriation	
14	Land Disposal Income Fund	$7,818,500	$4,318,500	$3,500,000	$5,048,554	$3,500,000	$1,548,554	7/	$0	Extra sweep supports future appropriations.
15	AMHS Fund	$86,945,400	$82,945,400	$4,000,000	$9,277,305	$4,000,000	$5,277,305		$0	The extra sweep amount is to load the fund for FY05. FY05 will be shortfunded without full reversal.
	Total	$154,185,800	$127,326,700	$26,859,100	$48,022,536	$27,549,730	$20,472,806		-$690,630	
Reverse to Restore Balance - So Available in FY 05										
16	Debt Retirement Fund	$53,820,600	$61,747,107	$0	$7,926,507	$7,926,507	$0	2/	-$7,926,507	The extra sweep amount is to load the fund for FY05. FY05 will be shortfunded without full reversal.
17	Ak Tech Voc Ed Pgm Fund (TVEP)	$4,561,500	$4,561,500	$0	$913,590	$913,590	$0	3/	-$913,590	See footnote
	Total	$58,382,100	$66,308,607	$0	$8,840,097	$8,840,097	$0		-$16,766,604	
Reverse to Restore Prior Year Account Balances over $999 to Communities										
18	Municipal Capital Matching Grants (sum of 2 grant programs)	$0	$0	$0	$2,301,844	$2,158,525	$143,319		-$2,158,525	Expenditure would require a supplemental appropriation. Potential sweep amount affects accounts less than $1000.
Policy Call										
19	Railbelt Energy Fund	$0	$0	$0	$29,571,811		$29,571,811		$0	
	Grand Total	$212,567,900	$193,635,307	$26,859,100	$88,755,531	$38,548,352	$50,207,179		-$19,615,759	

Notes:

1/ Department requests full amount be reversed to support future year spending; annual revenue not sufficient to maintain current spending level.

2/ Reversal will make the funding available to pay FY 05 debt costs.

3/ Since fund is a diversion of monies that would otherwise go into the unemployment insurance trust fund, reverse full amount.

4/ Since fund is a diversion of workers compensation tax monies assessed against insured and self-insured employers, reverse full amount.

5/ Reversal of full amount will make the funding available to pay FY 05 costs and ease fund cash flow.

6/ Department requests full amount be reversed to support future year spending.

7/ Department requests full amount be reversed to support FY 04 and FY 05 costs, including FY 05 debt.

GENERAL FUND
SWEEPABLE SUBFUND AVAILABLE BALANCES SWEPT INTO THE CBR

FUND NO.	ACCT NO.	DESCRIPTION	TOTAL Unexpended Unobligated Balance Swept	FY 04 Approp From the Fund
SUBFUNDS				
11126	10705	FHWA-AIRSPACE LEASES	19,049.22	0.00
12130	10741	STATE REFORESTATION	193.67	0.00
11137	10731	AMHS VESSEL REPLACEMENT	0.00	0.00
11142	10843	ED FAC MAINT & CONST	0.00	0.00
11116	10723	VOC REHAB SMALL BUS ENT RLF	121,587.19	365,000.00
11111	10717	AK HISTORICAL COMMISSION	85,301.62	0.00
11122	10708	OHSR PREVENTION ACCT	15,509,734.32	20,171,600.00
11139	10818	PREVENTION MITIGATION ACCT	2,741,388.70	for all 3
11153	10868	RESPONSE MITIGATION ACCT	98,706.41	accounts
11134	10713	EMPLOYMENT ASSIST & TRAINING	1,947,655.00	5,639,700.00
11173	10932	WORKERS SAFETY AND COMP FUND	4,547,743.00	4,139,400.00
11174	10935	COMMERCIAL PASSENGER VESSEL ENVIRON COMP	1,099,965.00	706,900.00
11175	10939	TOBACCO USE EDUCATION	1,260,524.73	5,395,600.00
11177	10955	BUILDING SAFETY ACCOUNT	92,843.00	1,603,700.00
11178	10956	ALCOHOL & OTHER DRUG ABUSE TREAT & PREV	6,191,229.00	21,400,000.00
11164	10911	LAND DISPOSAL INCOME FUND	5,048,554.33	7,818,500.00
12135	10732	AK MARINE HWY FUND	9,277,305.42	86,945,400.00
11138	10964	AK DEBT RETIREMENT FUND	7,926,507.00	53,820,600.00
11166	10913	AK TECH & VOC ED FUND	913,590.00	4,561,500.00
11146	10849	MUNI CIP MATCHING GRANT FUND	1,164,584.31	0.00
11147	10851	UNINCORP CIP MATCH GRANT FUND	1,137,260.00	0.00
11123	10728	RAILBELT ENERGY FUND	29,571,811.00	0.00
		TOTAL	88,755,532.92	212,567,900.00

OMB - January 30, 2004
EXHIBIT 19

MINUTES
SENATE FINANCE COMMITTEE
February 02, 2004
10:03 AM

TAPES

SFC-04 # 4, Side A

CALL TO ORDER

Co-Chair Lyda Green convened the meeting at approximately 10:03 AM.

PRESENT

Senator Lyda Green, Co-Chair
Senator Gary Wilken, Co-Chair
Senator Con Bunde, Vice Chair
Senator Fred Dyson
Senator Lyman Hoffman
Senator Donny Olson
Senator Ben Stevens

Also Attending: CHERYL FRASCA, Director, Office of Management and Budget, Office of the Governor; JOAN BROWN, Chief Budget Analyst, Office of Management and Budget, Office of the Governor.

Attending via Teleconference: There were no teleconference participants.

SUMMARY INFORMATION

SB 283-APPROP: REVERSE 2003 CBR SWEEP

The Committee heard from the Office of Management and Budget. The bill was held in Committee.

#SB283

> SENATE BILL NO. 283
> "An Act making an appropriation to reverse the deposit of money available for appropriation in the general fund at the end of fiscal year 2003 into the constitutional budget reserve fund; making an appropriation under art. IX, sec. 17(c), Constitution of the State of Alaska, from the constitutional budget reserve fund; and providing for an effective date."

This was the first hearing for this bill in the Senate Finance Committee.

Co-Chair Green noted the purpose of this meeting is to gather information on the accounts that normally carryover from one fiscal year to the next, but were not allocated from the Constitutional Budget Reserve (CBR) Fund by the legislature during the previous session.

CHERYL FRASCA, Director, Office of Management and Budget overviewed the sub-accounts that were "swept". She reminded that at the end of the previous legislative session, a number of these sub-accounts within the general fund were swept into the CBR fund, and that historically the major appropriation legislation contains a provision to reverse this sweep to restore the funds to their respective sub-accounts. She explained such a provision was not included in the FY 04 appropriation legislation. She noted that the FY 04 budget legislation contained several appropriations that relied on the availability of these revenues for expenditure during the fiscal year.

Ms. Frasca informed that during the previous summer she contacted the co-chairs of the House of Representatives and Senate Finance Committees to garner whether the intent was to implement the affected programs for the period of time before the legislature reconvened in January, as stipulated in the FY 04 budget appropriation, and was verbally instructed to continue the delivery of services.

Ms. Frasca detailed a handout titled "CBR Sweep Summary - DRAFT" [copy on file] listing the aforementioned accounts. She noted the following four items did not require a reversal.

FHWA Airspace leases
Amount Swept: $19,049
Minimum Reverse Amount: $0
Fall 2003 Potential Sweep Balance: $19,049

Ms. Frasca informed that these one-time revenues were initially received several years prior and that the funding source was not recurrent.

State Forestation Fund
Amount Swept: $194
Fall 2003 Potential Sweep Balance: $194

Ms. Frasca noted that in addition to the small dollar amount, this fund has not been accessed for several years.

AMHS [Alaska Marine Highway System] Replacement Fund
Amount Swept: $0
Fall 2003 Potential Sweep Balance: $0

Education Facility Maintenance/Construction Fund
Amount Swept: $0
Fall 2003 Potential Sweep Balance: $0

Ms. Frasca stated that because the balance of the two accounts is zero, there is no need to reverse the funding.

Ms. Frasca continued outlining those items in which a reversal was necessary to support FY 04 appropriation level and future year spending as follows.

Voc Rehab Small Business Enterprise Revolving Loan Fund
FY 04 Appropriation: $365,000
FY 04 Revenue: $230,000
FY 04 Revenue Shortfall: $135,000
Amount Swept: $121,587
Minimum Reverse Amount: $121,587
Fall 2003 Potential Sweep Balance: $0
Reversal of full amount will make the funding available to pay FY 05 costs and ease fund cash flow.
If Revenue not equal to Appropriation: $13,413 Shortage does not appear to be a problem; actual expenditures are lower than authorization.

Ms. Frasca told of proceeds from vending machine facilities to be utilized to aid blind and severely handicapped licensees who operate the vending machines. She stated the balance of this sub-account is accumulated to allow for larger projects, such as remodeling of facilities. She said the specific funds are intended for construction at the Atwood Building.

Alaska Historical Commission
FY 04 Appropriation: $0
FY 04 Revenue: $0
FY 04 Revenue Shortfall: $0
Amount Swept: 85,302
Minimum Reverse Amount: $0
Fall 2003 Potential Sweep Balance: $85,302
Department requests full amount be reversed to support future year spending.
If Revenue not equal to Appropriation:

Ms. Frasca noted this funding is generally utilized for special projects and the funds are accumulated over time.

Senator Dyson asked the proposed projects.

Ms. Frasca exampled a commemoration of the 50 year anniversary of Alaska statehood.

Oil/Haz Substance Release Accounts
FY 04 Appropriation: $20,171,600
FY 04 Revenue: $9,232,900
FY 04 Revenue Shortfall: $10,938,700
Amount Swept: $18,349,829
Minimum Reverse Amount: $10,938,700
Fall 2003 Potential Sweep Balance: $7,411,129
Department requests full amount be reversed to support future year spending; annual revenue not sufficient to maintain current spending level.
If Revenue not equal to Appropriation: Extra sweep supports future appropriations.

Ms. Frasca explained these funds are utilized to support capital projects and cover operating expenses in the Department of Environmental Conservation and the Department of Transportation and Public Facilities.

Ms. Frasca also noted this reversal request includes reversal of prior year balances.

Co-Chair Green clarified this request is not unusual.

Ms. Frasca affirmed a number of these items carry forward from one year to the next.

Employment Assistance & Training (STEP)
FY 04 Appropriation: $5,639,700
FY 04 Revenue: $4,650,000
FY 04 Revenue Shortfall: $989,700
Amount Swept: $1,947,655
Minimum Reverse Amount: $0
Fall 2003 Potential Sweep Balance: $4,547,743
Since fund is a diversion of workers compensation tax monies assessed against insured and self-insured employers, reverse full amount.

Ms. Frasca remarked that funds in this sub-account are used to fund various training programs.

Workers Safety/Comp Account
FY 04 Appropriation: $4,139,400
FY 04 Revenue: $4,139,400
FY 04 Revenue Shortfall: $0
Amount Swept: $4,547,743
Minimum Reverse Amount: $0
Fall 2003 Potential Sweep Balance: $4,547,743
Since fund is a diversion of workers compensation tax monies assessed against insured and self-insured employers, reverse full amount.

Ms. Frasca noted this is a diversion of workers compensation contributions that are used to fund the Division of Workers Compensation, and Occupational Safety and Health programs. She assured that failure to provide reversal of these funds in FY 04 would cause no pending crisis.

Commercial Passenger Vessel Env. Compliance Fund
FY 04 Appropriation: $706,900
FY 04 Revenue: $706,900
FY 04 Revenue Shortfall: $0
Amount Swept: $1,099,965
Minimum Reverse Amount: $706,900
Fall 2003 Potential Sweep Balance: $393,065
Reversal of full amount will make the funding available to pay FY 05 costs and ease fund cash flow.
If Revenue not equal to Appropriation: -$706,900 Revenue received late in year and funds FY 05

Ms. Frasca explained these funds are collected from cruise ships to address emissions and discharges. She stated that this program does not have a revenue shortfall in the current fiscal year.

JOAN BROWN, Chief Budget Analyst, Office of Management and Budget, Office of the Governor, interjected that a portion of these revenues are received at the end of the fiscal year and therefore the sweep has caused cash flow issues.

Ms. Frasca furthered that funds collected in May and June 2002 were swept into the CBR and thus unavailable for expenditure.

Tobacco Ed/Cessation Fund
FY 04 Appropriation: $5,395,600
FY 04 Revenue: $4,295,600
FY 04 Revenue Shortfall: $1,100,000
Amount Swept: $1,260,524
Minimum Reverse Amount: $1,100,000

Fall 2003 Potential Sweep Balance: $160,524
Reversal of full amount will make the funding available to pay FY 05 costs and ease fund cash flow.
If Revenue not equal to Appropriation: Extra sweep supports future appropriations.

Ms. Frasca reminded these funds represent 20 percent of the Tobacco Settlement funds annually received by the State and utilized to fund grants for tobacco cessation programs both within the Department of Health and Social Services and outside organizations.

Bldg Safety Account
FY 04 Appropriation: $1,603,700
FY 04 Revenue: $1,508,000
FY 04 Revenue Shortfall: $95,700
Amount Swept: $95,700
Minimum Reverse Amount: $92,843
Fall 2003 Potential Sweep Balance: $0
If Revenue not equal to Appropriation: $2,857 Small shortfall is not a problem.

Ms. Frasca stated this sub-account is utilized to fund the Department of Labor and Workforce Development mechanical inspection activities. She remarked that this program has a "shortfall" of approximately $96,000 as a result of the sweep.

Alcohol/Drug Abuse Trtmnt/Prevention Fund
FY 04 Appropriation: $21,400,000
FY 04 Revenue: $15,300,000
FY 04 Revenue Shortfall: $6,100,000
Amount Swept: $6,191,229
Minimum Reverse Amount: $6,100,000
Fall 2003 Potential Sweep Balance: $91,229
Reversal of full amount will make the funding available to pay FY 05 costs and ease fund cash flow.
If Revenue not equal to Appropriation: Extra sweep supports future appropriations.

Ms. Frasca explained this sub-account represents 50 percent of the proceeds of the alcoholic beverage tax and is utilized to fund grants for nonprofit organizations as well as some capital projects.

Co-Chair Green asked if these grants are awarded to "an agency".

Ms. Frasca replied that the alcohol tax revenues are utilized for several purposes, including construction of the Nome Youth Detention Facility, Medicaid expenses, suicide prevention programs,

the Department of Corrections, and the Alaska Council on Domestic Violence and Sexual Assault.

Land Disposal Income Fund
FY 04 Appropriation: $7,818,500
FY 04 Revenue: $4,318,500
FY 04 Revenue Shortfall: $3,500,000
Amount Swept: $5,048,544
Minimum Reverse Amount: $3,500,000
Fall 2003 Potential Sweep Balance: $1,548,554
Department requests full amount be reversed to support FY 04 and FY 05 costs, including FY 05 debt.
If Revenue not equal to Appropriation: Extra sweep supports future appropriations.

Ms. Frasca requested the full amount be reversed to make the balance available in FY 05.

AMHS Fund
FY 04 Appropriation: $86,945,400
FY 04 Revenue: $82,945,400
FY 04 Revenue Shortfall: $4,000,000
Amount Swept: $9,277,305
Minimum Reverse Amount: $4,000,000
Fall 2003 Potential Sweep Balance: $5,277,305
If Revenue not equal to Appropriation: The extra sweep amount is to load the fund for FY 05. FY 05 will be shortfunded without full reversal.

Ms. Frasca stated $4 million is necessary to fund operations for the remainder of FY 04 with the balance available to support the system in FY 05.

The Office of Management and Budget recommends the following two items be reversed "to Restore Balance - So Available in FY 05".

Debt Retirement Fund
FY 04 Appropriation: $53,820,600
FY 04 Revenue: $61,747,107
FY 04 Revenue Shortfall: $0
Amount Swept: $7,926,507
Minimum Reverse Amount: $7,926,507
Fall 2003 Potential Sweep Balance: $0
Reversal will make the funding available to pay FY 05 debt costs.
If Revenue not equal to Appropriation: -$7,926,507 the extra sweep amount is to load the fund for FY 05. FY 05 will be shortfunded without full reversal.

Ms. Frasca emphasized the funds are not necessary for FY 04, but rather would be needed for FY 05.

Ak Tech Voc Ed Pgm Fund (TVEP)
FY 04 Appropriation: $4,561,500
FY 04 Revenue: $4,561,500
FY 04 Revenue Shortfall: $0
Amount Swept: $913,590
Minimum Reverse Amount: $913,590
Fall 2003 Potential Sweep Balance: $0
Since fund is a diversion of monies that would otherwise go into the unemployment insurance trust fund, reverse full amount.
If Revenue not equal to Appropriation: -$913,590

Ms. Frasca explained these funds are utilized for University of Alaska programs, the Kotzebue Technical Center, the Alaska Vocational Technical Center, and the Galena Project Educational Vocational Training Center.

The Office of Management and Budget categorized the following item in the handout as "Reverse to Restore Prior Year Account Balances over $999 to Communities".

Municipal Capital Matching Grants (sum of 2 grant programs)
Amount Swept: $2,301,844
Minimum Reverse Amount: $2,158,525
Fall 2003 Potential Sweep Balance: $143,319
If Revenue not equal to Appropriation: -$2,158,525 Expenditure would require a supplemental appropriation. Potential sweep amount affects accounts less than $1000.

Ms. Frasca noted these funds represent the balance held by a number of smaller communities in their capital matching grants accounts. She stated that reversal of this item would restore the funds to each community.

This Office of Management and Budget noted this final item as a "Policy Call".

Railbelt Energy Fund
Amount Swept: $29,571,811
Fall 2003 Potential Sweep Balance: $29,571,811

Ms. Frasca stated the FY 04 budget does not contain an appropriation that is dependant upon these funds; however, the

Office of Management and Budget requests the funds be reversed.

Senator Hoffman asked the purpose of reversing these funds.

Ms. Frasca responded this would restore the account to allow future legislatures to utilize the funds.

Ms. Frasca relayed that departmental managers were "resting easier" with the knowledge that the legislature was considering reversal of these accounts.

Ms. Frasca pointed out that the FY 04 budget did not contain a necessary $120,000 appropriation to the Department of Revenue to manage the CBR. She requested these funds be appropriated.

Co-Chair Green ordered the bill HELD in Committee.

#

ADJOURNMENT

Co-Chair Lyda Green adjourned the meeting at 10:22 AM

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Plaintiffs, v. GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Defendants.	Court No.: 3AN-22-04028CI

Cashion Gilmore & Lindemuth
510 L Street, Suite 601
Anchorage, Alaska 99501
(907) 222-7932 fax (907) 222-7938

JAN 05 2022

JOINT MOTION FOR EXPEDITED BRIEFING AND DECISION SCHEDULE

Plaintiff-students Madilyn Short, Riley von Borstel, Kjrsten Schindler and Jay-Mark Pascua ("Plaintiffs") and Defendants Governor Michael J. Dunleavy, the Office of Management and Budget, and the Department of Administration ("Defendants") jointly move for an expedited briefing and decision schedule in this case.

The parties agree that this case involves purely legal issues that can be decided on summary judgment, and that this case needs to be decided on an expedited basis to provide guidance to the legislature during its upcoming 2022 regular session. The parties also recognize that there will likely be a subsequent appeal to the Alaska Supreme Court, and have agreed to the following schedule in this court so that the Supreme Court may issue its decision before the end of April 2022.

The parties respectfully request the following briefing schedule:

(1) Defendants' Opposition and Cross-Motion for Summary Judgment is due by **Wednesday, January 19**;

(2) Plaintiffs' Reply in support of Motion for Summary Judgment and Opposition to Cross-Motion for Summary Judgment is due by **Friday, January 28**;

(3) Defendants' Reply in support of Cross-Motion for Summary Judgment is due by **Friday, February 4**;

This parties request that this court schedule oral argument immediately after the close of briefing, and request a decision by this court no later than **Tuesday, February 22, 2022.**

CASHION GILMORE & LINDEMUTH
Attorneys for Plaintiffs

DATE: January 5, 2022

By: s/Jahna M. Lindemuth
Jahna M. Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No. 1511099

TREG R. TAYLOR
ATTORNEY GENERAL
Attorneys for Defendants

DATE: January 5, 2022

By: s/Margaret Paton Walsh (with consent)
Margaret Paton Walsh
Alaska Bar No. 0411074
Kate Demarest
Alaska Bar No. 1011074

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~~[PROPOSED]~~ ORDER

Based on the foregoing joint motion for an expedited briefing* and decision schedule,

IT IS SO ORDERED. Oral argument on the cross-motions for summary judgment is scheduled for February 8, 2022 - 10:00a.m. in Courtroom 503.

Date: 1/5/22

Hon. Adolf Zeman
Superior Court Judge

* Courtesy copies of all briefing should be provided to chambers when filed. If less than 50 pages, documents can be emailed to jmontanez@akcourts.gov Otherwise, hard copies should be delivered to chambers.

CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing was served via email on January 5, 2022 on the following:

Margaret Paton-Walsh
margaret.paton-walsh@alaska.gov

Katherine Demarest
kate.demarest@alaska.gov

CASHION GILMORE & LINDEMUTH

By: s/ Jennifer Witaschek

I certify that on 1/5/2022 a copy of the following was mailed/emailed to each of the following at their addresses of record S. Gottstein, S. Kendall, J. Lindemuth, M. Paton-Walsh.

Administrative Assistant

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FILED
2022 JUN 19 PM 3
CLERK OF THE TRIAL COURTS
BY DEPUTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT. RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,	)	
Plaintiffs,	)	
v.	)	
GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,	)	
Defendants.	)	Case No. 3AN-22-04028 CI

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
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ANCHORAGE, ALASKA 99501
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#2 ** **OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT**

This lawsuit is the second challenge to the State's interpretation of the Constitutional Budget Reserve ("CBR") amendment found in article IX, section 17(d) of the Alaska Constitution. That provision requires the sweep of "general fund" monies that are "available for appropriation at the end of each...fiscal year" into the CBR to repay previous withdrawals from the CBR. In the first case, *Alaska Federation of Natives v. State*, the superior court answered a question of first impression, holding that the power cost equalization fund ("PCE") was not sweepable because legislative drafting removed it from the general fund. But the court relied on controlling Alaska Supreme Court precedent, *Hickel v. Cowper*,[1] to reject the PCE plaintiffs' other

[1] *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994).

argument—that the PCE was not sweepable because it was not "available for appropriation" within the meaning of article IX, section 17(d).[2]

In this case, the PCE plaintiffs' attorneys repeat the exact argument they lost the first time around. A new group of plaintiffs challenge the executive branch's conclusion that section 17(d) mandated a sweep of the Higher Education Investment Fund ("HEIF") into the CBR at the end of fiscal year 2021. Ignoring both *Hickel v. Cowper* and last year's ruling, the plaintiffs argue that the HEIF is not sweepable because the legislature validly appropriated money into the fund and those appropriations have not lapsed. But this is the same faulty "available for appropriation" analysis that was rejected in *Hickel* and *AFN*. This Court should deny the plaintiffs' motion and grant the State's cross-motion. That outcome is unambiguously required by precedent and the plain language and purpose of the CBR amendment.

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I. BACKGROUND

A. The Constitutional Budget Reserve fund was created by the voters in 1990, with provisions making it difficult for the legislature to borrow from the fund, and requiring repayment.

In 1990, Alaska voters created the Constitutional Budget Reserve Fund (CBR) when they approved Article IX, section 17 of the State Constitution by a nearly two-to-one margin.[3] The CBR serves as an emergency savings account, with constitutionally mandated limitations on the legislature's ability to access the money. Section 17(a)

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[2] *Alaska Federation of Natives et al. v. Governor Dunleavy et al.*, 3AN-21-06737CI. Ex. 14, Order on Motion for SJ at 9-12.

[3] https://www.elections.alaska.gov/doc/forms/H28.pdf.

creates the fund, provides that certain oil-derived settlement and tax money must be deposited into the fund and invested, and instructs that "[m]oney may be appropriated from the fund only as authorized under (b) or (c) of this section."[4] Section 17(b) allows the legislature to appropriate from the fund by a simple majority vote to cover a budget gap "[i]f the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year."[5] And section 17(c) allows appropriation "for any public purpose," but only by a three-quarters supermajority vote of the legislature.[6]

Finally, when the legislature does dip into the CBR, section 17(d) requires that the money spent be "repaid" at the end of the fiscal year using "money in the general fund available for appropriation." This provision is commonly referred to as "the sweep."[7] For most of the CBR's history, the legislature has successfully circumvented this repayment obligation using a maneuver called the "reverse sweep"—a super-majority-approved appropriation of whatever money was swept by operation of section 17(d) at the end of one fiscal year directly back to where it came from at the beginning

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4 Alaska Const. Art. IX, § 17(a).

5 Alaska Const. Art. IX, § 17(b).

6 Alaska Const. Art. IX § 17(c).

7 Affidavit of Neil Steininger (Steininger Aff.) at ¶ 7.

of the next fiscal year.[8] The reverse sweep is accomplished via section 17(c)'s provision that the legislature may appropriate money from the CBR "for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature."[9]

B. The legislature passed a statute that limited the sweep provision to "undesignated" general funds only, and the Alaska Supreme Court invalidated that statute as unconstitutional.

In 1994, the legislature enacted AS 37.10.420 in an attempt to define "key phrases and concepts used across section 17, including the phrase 'amount available for appropriation,'" for purposes of both section 17(b) (authorizing spending from the CBR by majority vote based on a comparison of one year's appropriated amount to the next year's available amount) and the repayment provision of 17(d).[10] That statutory framework limited "funds available for appropriation" in the section 17(b) comparison to money "accruing to the general fund during the fiscal year," general fund "program receipts," and "the unreserved, undesignated general fund balance carried forward from the preceding fiscal year that is not subject to the repayment obligation" of section

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[8] Steininger Aff. at ¶ 7; *see e.g.*, Ch. 17, § 29(a), SLA 2018 ("Deposits in the budget reserve fund (art. IX, sec. 17, Constitution of the State of Alaska) for fiscal year 2018 that are made from subfunds and accounts other than the operating general fund (state accounting system fund number 1004) by operation of art. IX, sec. 17(d), Constitution of the State of Alaska, to repay appropriations from the budget reserve fund are appropriated from the budget reserve fund to the subfunds and accounts from which those funds are transferred"); Ch. 1, § 45(a), SSSLA 17 (same except for fiscal year 2017); Ch. 3, § 35(a), 4SSLA 16 (same except for fiscal year 2016).

[9] Alaska Const. Art. IX, § 17(c).

[10] *Hickel*, 874 P.2d at 936 (quoting AS 37.10.420(b)'s language attempting to identify sweepable funds under section 17(d)). Article IX, section 17's repayment provision provides that "[t]he legislature shall implement this section by law." Alaska Const. Art. IX, §17(d).

17(d).[11] And, for purposes of the repayment provision, the statute limited sweepable funds to "the amount of money comprising the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year, or as much of it as is necessary to complete the repayment."[12]

Former Governor Steve Cowper raised a facial challenge to the constitutionality of AS 37.10.420. He argued that it was inconsistent with sections 17(b) and 17(d).[13] The Alaska Supreme Court struck down the legislature's definition of "available for appropriation" in AS 37.10.420(a) and (b). The Court focused on the phrase "available for appropriation" in light of the purposes of section 17(b), which limits the legislature's ability to reach the CBR via a simple majority vote to years in which the State experiences a shortfall compared to the previous year. Former Governor Cowper argued for an expansive reading of the phrase "amount available for appropriation" to include essentially *all* of the State's assets, "however liquid."[14] He proposed that "available for appropriation" meant "all funds which the legislature can make available to itself by a majority vote."[15] The State argued to the contrary that "amount available for appropriation" should "include[] only revenues received by the State within the fiscal year" and "the *unreserved, undesignated general fund balance* carried forward from the

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11 *Id.* at 924 n.2 (quoting AS 37.10.420(a)).

12 *Id.* (quoting AS 37.10.420(b)).

13 *Id.* at 924-25.

14 *Id.* at 928.

15 *Id.*

preceding fiscal year that is not subject to repayment" under section 17(d).[16]

But the Court "reject[ed] both interpretations."[17] The State's view was too narrow because it "would allow [simple] majority access to the budget reserve whenever there was even the slightest decline from year to year in revenues, even if in the prior year a huge sum was left unappropriated or placed in the statutory budget reserve."[18] And former Governor Cowper's broader reading was equally problematic, because it would undermine the voters' intention to "allow[] the budget reserve to be used by a simple majority as necessary to maintain appropriations at a constant level."[19] The Court ultimately held that "amount available for appropriation within the meaning of article IX, section 17 . . . includes all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure."[20]

The Court went on to discuss subsection (d) of article IX, section 17, on the last page of its opinion. Because the Court "s[aw] no reason to give 'available for appropriation a different meaning in subsection (d) than . . . in subsection (b),"[21] it struck down AS 37.10.420(b) as well as AS 37.10.420(a).

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16 *Id.* at 926-27 (emphasis added). The statute uses a description, "undesignated general fund," similar to the accounting code "UGF," for "unrestricted general fund."

17 *Id.* at 927.

18 *Id.* at 930.

19 *Id.* The Court rejected this interpretation because it covered so many State assets that it "would require a complete restructuring of the established financial system of the state government." *Id.* at 927.

20 *Id.* at 935.

21 *Id.* at 936 & n.32.

C. The Higher Education Investment Fund provides a source of funds for scholarships for Alaskan students, but the money is available for other purposes and must be appropriated by the legislature before it can be spent.

The Higher Education Investment Fund ("HEIF") was created by statute in 2012 to provide investment income to support the Alaska Education Grant Program and the Alaska Performance Scholarship Award program.[22] At the same time, the legislature also created the Alaska education grant account and the Alaska performance scholarship account.[23] Alaska Statute 37.14.750(a) provides that the "Alaska higher education investment fund is established in the general fund for the purpose of making grants awarded under AS 14.43.400–14.43.420 by appropriation to the [Alaska education grant account] and of making scholarship payments to qualified postsecondary institutions for students under AS 14.43.810–14.43.849 by appropriation to the [Alaska performance scholarship award account]." The statute declares that "[m]oney in the fund does not lapse,"[24] and that "[n]othing in this section creates a dedicated fund."[25] It also provides that at the start of each fiscal year the Commissioner of Revenue will determine the value of the account at the end of the previous fiscal year and "shall identify seven percent of that amount as available for appropriation" to the Alaska education grant account and the Alaska performance scholarship award account.[26]

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22 *See* §§ 3, 11, 13 ch. 74 SLA 2012.

23 § 11 ch. 74 SLA 2012.

24 AS 37.14.750(a).

25 AS 37.14.750(b)

26 AS 37.14.750(c).

Although the purpose of the HEIF was to support these two named programs, the legislature undisputedly may appropriate money from the fund for other purposes. The plaintiffs concede the legislature has the ability to spend the HEIF for "any other public purpose," and that the legislature has done so.[27] And as the statutory scheme makes clear, money appropriated *into* the HEIF cannot be spent without another appropriation *out of* the fund, either to one of the statutorily-named accounts or to some other specified use. This critical fact is also not disputed by the plaintiffs.[28]

D. The legislature failed to pass a reverse sweep in 2021, and the State determined that the HEIF should be swept into the CBR.

Last year, the legislature did not pass a reverse sweep for the first time in many years. Based on an analysis performed in 2019—when the legislature almost failed to pass the reverse sweep—the State determined that the HEIF was subject to the mandatory sweep required by art. IX, section 17(d). The 2019 analysis was performed by the Office of Management and Budget ("OMB") in consultation with the Department of Law and the Department of Administration's Division of Finance.[29] The State, applying *Hickel v. Cowper*,[30] identified 54 funds as sweepable.[31] The complete results of the 2019 Analysis are shown on Exhibit B to the Affidavit of Neil Steininger, who participated in the analysis as OMB's Chief Budget Analyst and who is now the OMB

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27 Pl. Mot. S.J. at 9 & n.33, 18 & n.71; *see also*, Steininger Aff. at ¶ 5.

28 Pl. Mot. S.J. at 7, 18 & n.71.

29 Steininger Aff. ¶ 9.

30 *Id.* ¶ 14.

31 *Id.* ¶ 17 & Ex. B.

Director.[32] Of the 159 active general fund subfunds analyzed, 54 were deemed sweepable, including the HEIF, and 105 were deemed unsweepable.[33]

The plaintiffs, four student recipients of grants or scholarships, have filed suit claiming that the HEIF is not sweepable because the money in the fund was validly appropriated to the fund for the specific purpose of earning investment income to support grants and scholarships.

II. LEGAL STANDARDS

The parties agree that this case presents a legal question, with no disputed material facts[34] and have cross-moved for summary judgment on the legal issue. This Court's task is to apply ordinary principles of constitutional interpretation to determine whether the Higher Education Investment fund falls within the repayment subsection of the CBR provision of the Constitution. That subsection requires repayment of "the amount of money in the general fund available for appropriation" to the CBR at the end of the fiscal year "until the amount appropriated [from the CBR in the past] is repaid."[35]

"Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense."[36] Alaska courts interpreting the Constitution "look to the plain meaning and purpose of the provision and the intent of

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32 *Id.* ¶¶ 1, 17 & Ex. B.

33 *Id.* ¶¶ 17-18 & Ex. B.

34 *See* Alaska R. Civ. P. 56(c); Pl. Mot. S.J. at 16.

35 Alaska Const. Art. IX, § 17(d).

36 *Hickel*, 874 P.2d at 926 (quoting *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).

the framers."[37] Where, as with the CBR, the framers are the people themselves, the court must avoid "constru[ing] abstrusely any constitutional term that has a plain ordinary meaning," and should instead "defer to the meaning the people themselves probably placed on the provision."[38]

The Court can refer to legal and other dictionaries for guidance on how to interpret words in the Constitution,[39] but the Supreme Court has noted that it has "no power to rewrite constitutional provisions 'no matter how clearly advantageous and publicly supported' a policy may appear to be."[40]

III. ARGUMENT

A. The Alaska Supreme Court's holding in *Hickel v. Cowper* controls the outcome of this case and establishes that the HEIF is sweepable.[41]

In *Hickel v. Cowper*, the Alaska Supreme Court held that "funds which are 'available for appropriation' *and* 'in the general fund'" are subject to the repayment provision in article IX, section 17(d), based on its plain language.[42] The Court thus established a two-part test for the sweepability of funds: (1) is the money in the general

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37 *Id.*

38 *Id.* (quoting *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169 (Alaska 1991) (citations omitted).

39 *Id.* at 586. For example, in *Forrer v. State,* 471 P.3d 569, 590 (Alaska 2020) the Court reviewed a legal dictionary definition of the word "debt" in a case interpreting the constitution's restriction on the State's contracting of "debt." Art. IX, sec. 8.

40 *Forrer*, 471 P.3d at 590.

41 The legislation creating the HEIF included a series of tax breaks for donations to the fund and any such donations would likely not be sweepable. However, it appears that no such donations have been made. *See* Steininger Aff. at ¶ 18(c).

42 *Hickel*, 874 P.2d at 936.

fund? (2) is it available for appropriation? The plaintiffs do not contest that the HEIF is in the general fund, no doubt because the language of the statute creating the fund precludes any such argument. Alaska Statute 37.14.750 expressly provides that "[t]he Alaska higher education investment fund is establish *in the general fund*..." The question before the Court is simply whether the HEIF is "available for appropriation" under article IX, section 17(d) of the Alaska Constitution.

The answer is straightforward. In *Hickel*, the Alaska Supreme Court defined the phrase "amount available for appropriation within the meaning of article IX, section 17" to mean "*all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure*."[43] The money in the HEIF cannot be spent without a further appropriation. The plaintiffs concede this critical point.[44] And the statutory scheme is clear: funds in the HEIF are spent only "*by appropriation to*" the Alaska education grant account and Alaska performance scholarship account.[45] In other words, the legislature has retained the power to appropriate the funds in the HEIF, and those funds cannot be spent without a further appropriation. Thus, under *Hickel*, the HEIF is sweepable; that disposes of this case. This is the same analysis applied by the superior court in *AFN*.[46]

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43 *Id.* at 935 (emphasis added).

44 Pl. Mot. SJ at 17 ("The fact that the legislature can re-appropriate monies from the HEIF...");18, fn. 71 ("The legislature still retains the statutory ability to appropriate monies from the HEIF to any other public purpose.")

45 AS 37.14.750(a).

46 *Alaska Federation of Natives*, 3AN-21-06737CI. Ex. 14 at 9-12.

B. *Hickel*'s definition of "available for appropriation" for art. IX, section 17(d) was not dicta; nor was *Hickel* "wrongly decided."

The plaintiffs ask this Court to ignore the controlling precedent of *Hickel*, dismissing the central holding of that case as merely "select language"[47] that is somehow "dicta"[48] that does not bind the Court here. In the alternative, plaintiffs insist *Hickel* was "wrongly decided."[49] Neither contention has merit.

Although most of the Alaska Supreme Court's discussion in *Hickel* focuses on the meaning of the phrase "available for appropriation" in article IX, section 17(b), the plaintiffs' assertion that the Court merely "assum[ed]" in "dicta" that the "analysis of 'available for appropriation' should be the same for section 17(d)"[50] is wrong. *Hickel* answered a *facial challenge* to a statute purporting to interpret the meaning of the phrase "available for appropriation" in *both* sections 17(b) *and* 17(d).[51] And the Alaska Supreme Court found the statute's definition of "available for appropriation" for section 17(d) just as unconstitutional as its definition for section 17(b), expressly holding that it saw "no reason to give 'available for appropriation' a different meaning in subsection (d) than we did in subsection (b)."[52] Under *Hickel*'s clear holding, funds "over which the legislature has retained the power to appropriate and which require further

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47 Pl. Mot. SJ at 30.

48 *Id.* at 29.

49 *Id.* at 28.

50 *Id.* at 29.

51 *See*, *Hickel*, 874 P.2d at 923-25 (explaining factual background and procedural posture of litigation challenging AS 37.10.420(a) *and* (b)).

52 *Id.* at 936, fn. 32.

appropriation before expenditure" are "available for appropriation" for purposes of subsection (d).[53] Funds in the HEIF fall within *Hickel*'s definition of sweepable funds; they cannot be expended without further legislative action. This is not "dicta;" it is binding Alaska Supreme Court precedent that controls the outcome of this case.

Perhaps recognizing the futility of their "dicta" argument, the plaintiffs claim in the alternative that *Hickel*'s holding that "available for appropriation" means the same thing in article IX, section 17(d) that it means in article IX, section 17(b) was "not well considered"[54] and the case was "wrongly decided."[55] Not so. To the contrary, the Court considered and correctly rejected exactly the arguments the plaintiffs make here.

The plaintiffs assert that funds in the HEIF are not "available for appropriation" because the legislature previously appropriated those funds to the HEIF, those appropriations were "valid" and they have not lapsed.[56] They suggest that "commonsense" dictates "that monies which have already been appropriated—like the previously-appropriated monies to the HEIF—are not 'available for appropriation at the end of [a]...fiscal year' *unless* the appropriation has lapsed *and* the funds are no longer obligated."[57] In their view, "[o]nly unobligated, surplus, leftover monies in the general fund were understood to be subject to the annual CBR sweep."[58]

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53 *Id.* at 935.
54 Pl. Mot. SJ at 29.
55 *Id.* at 28.
56 *Id.* at 19.
57 *Id.*
58 *Id.* at 23.

This argument fails for several reasons. First, it ignores the constitutional meaning of the term "appropriation." As the Court explained in *Hickel*, "one of the fundamental characteristics of an appropriation, in the public law context, is that it authorizes governmental *expenditure* without further legislative action."[59] Applying this understanding, monies "appropriated" to a fund in the state treasury from which the legislature "may appropriate" for certain purposes in the future have not been "appropriated" in the constitutional sense, because further legislative action is required to expend the money.[60] These kinds of soft "appropriations"—or "initial" appropriations, to use *Hickel*'s language—simply authorize the transfer of funds between different accounts.[61] They do not authorize the *expenditure* of funds. They are, under the *Hickel* analysis and in reality, accounting designations and not true appropriations in the sense of expenditures of money.

Simply put, "appropriations" to the HEIF are not true appropriations. They do not authorize any expenditure of funds out of the state treasury.[62] Rather, they are simply transfers of money from one bucket available to the legislature to another bucket, equally available to the legislature. And whether the bucket transfer lapses or not is irrelevant to whether the money remains "available for appropriation" for purposes of the sweep. The money is available either way.

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59 *Hickel*, 874 P.2d at 933 (emphasis added).

60 *Id.* (discussing examples of funds requiring further appropriations to expend).

61 *Id.*

62 *See* Alaska Const. Art. IX, section 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law.")

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Second, the Court also addressed and rejected the plaintiffs' claim that money in funds like the HEIF has been "obligated" in a way that makes it unavailable for appropriation. The State made the same argument in *Hickel*, claiming that AS 37.10.420 "properly excludes 'restricted funds' because those funds, at least in part, have already been appropriated."[63] But the Court was not persuaded, "reject[ing]" both "the State's conception of relevant fund restrictions and the State's definition of when an amount has been validly appropriated."[64] Thus, the Alaska Supreme Court has expressly rejected the current plaintiffs' characterization of the "appropriation" of money into funds like the HEIF as "valid appropriations" for the purpose of analyzing article IX, section 17.

The plaintiffs declare that appropriations to the HEIF "are 'final,' 'terminal,' or 'expended,'" insisting that "the legislature has established a state asset for a public purpose," and comparing the HEIF to "the legislature investing in a new building on campus."[65] This argument is wishful thinking. The quotation marks appear to be air quotes—presumably for emphasis. They certainly do not indicate quotations of legal authority. And, in fact, there is nothing "final" or "terminal" about appropriations to the HEIF, precisely because the money has not actually been "expended." The money sits in a savings account where it remains available for appropriation. As a result, contrary to the plaintiffs' assertion, moving money into the HEIF is categorically opposite from

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63 *Id.* at 931 n.21.

64 *Id.*

65 Pl. Mot. SJ at 25.

the legislature "investing in a new building on campus."[66] Funds paid to contractors to construct a building do not sit in that building, available to be withdrawn and spent on an alternative purpose. There is no unspending the money spent on a building to move it into the CBR. But money in the HEIF remains "available for appropriation" and, therefore, subject to the sweep.

Finally, the Court in *Hickel* invalidated AS 37.10.420(b)'s unconstitutional definition of the funds subject to article IX, section 17's sweep provision: the "unreserved, undesignated general fund balance."[67] This unconstitutional definition is indistinguishable from the plaintiffs' definition that "only surplus funds—i.e. *unobligated* monies that are not subject to a legislative appropriation—are subject to the annual CBR sweep."[68] Because the plaintiffs' definition "excludes *restricted funds* within the general fund" even though "some of these funds remain 'available for appropriation' within the meaning of section 17,"[69] it is unconstitutional under *Hickel*. Thus, to the extent that funds in the HEIF are "obligated" or "restricted" at all,[70] any such limitations do not save it from the sweep.

The plaintiffs complain that the *Hickel* Court failed to acknowledge the "temporal differences or purposes" of subsections (b) and (d) when it decided that the

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66 *Id.*

67 *Hickel*, 874 P.2d at 936.

68 Pl. Mot. SJ at 19.

69 *Hickel*, 874 P.2d at 936 (emphasis added).

70 Because the money in the HEIF can be appropriated for any public purpose, there is really no "obligation" or "restriction" on this money.

phrase "amount available for appropriation" must mean the same thing in each section.[71] But they do not explain why the temporal difference has significance to the meaning of "available for appropriation" for the purposes of the CBR amendment. The Court held that funds "over which the legislature has retained the power to appropriate and which require further appropriation before expenditure"[72] were available for appropriation for purposes of article IX, section 17(b) because a more restrictive definition would allow the legislature to access the CBR too easily—i.e. even when substantial sums of money remained in the general fund that the legislature could use to cover the costs of government. "The language of section 17 and the purposes behind the establishment of the fund do not support such easy access."[73]

Similarly, neither the language nor the purpose of subsection 17(d) supports the plaintiffs' limited interpretation of "available for appropriation" for purposes of the sweep. Subsection (d) creates a constitutional obligation to repay sums withdrawn from the CBR, making it one of only two constitutional savings accounts.[74] Yet the plaintiffs argue this *constitutional* savings account is inferior to *statutory* savings accounts created by the legislature, making the repayments required by the Constitution the lowest imaginable priority for any money in the general fund at the end of the year. So long as

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71 Pl. Mot. SJ at 28

72 *Hickel*, 874 P.2d at 935.

73 *Id.* at 930 (noting that least restrictive interpretation "would allow majority access to the budget reserve whenever there was even the slightest decline from year to year in revenues, even if in the prior year a huge sum was left unappropriated or placed in the statutory budget reserve.")

74 The other, of course, is the Permanent Fund. Alaska Const. art. IX, section 15.

the legislature has labeled a statutory savings account with a possible future use, under the plaintiffs' analysis, the account is exempt from being used to meet the constitutional repayment obligation. This makes nonsense of the constitutional text.

The plaintiffs finally invite this Court to ignore *Hickel* because in a recent case, the Court recognized that in *Hickel* it had wrongly characterized the transfer of funds from the Permanent Fund's earnings reserve account to the Permanent Fund Dividend Fund.[75] But this mistake about the transfer to the Dividend Fund has no relevance to this Court's analysis of the sweepability of the HEIF. And the plaintiffs identify no other misunderstanding of the State's budgetary mechanisms in *Hickel*, much less one that would cause the Supreme Court to overrule the decision.

In sum, *Hickel* controls the outcome here and confirms that the HEIF is sweepable. The plaintiffs offer no basis for this Court—or the Alaska Supreme Court, if this case should be appealed—to second-guess precedent nearly three decades old.

C. There is no separation of powers issue in this case.

The plaintiffs complain that reading the CBR amendment as the Supreme Court did frustrates the purpose of funds like the HEIF and fails to recognize "the legislature's broad power over appropriations."[76] They assert that applying *Hickel* "would allow the Executive Branch to transfer monies out of the HEIF without a valid appropriation, and effectively allow the administration to invalidate multi-year appropriations and statutes

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75 *Wielechowski et al. v. State*, 403 P.3d 1141, 1151 n.66 (Alaska 2017).

76 Pl. Mot. SJ at 26-27, 31.

creating such funds,"[77] and that this "would create a severe and unconstitutional imbalance through the executive's encroachment on the legislative power to appropriate."[78]

This is nonsense. In a gymnastic effort to produce a separation of powers issue, the plaintiffs contort the constitutional language beyond recognition. Article IX, section 17 doesn't *allow* the executive branch to do anything. To the contrary, it *commands* that money in the general fund available for appropriation at the end of the fiscal year "*shall be deposited* in the budget reserve fund."[79] Any infringement on or limitation of the legislature's power of appropriation is a product of the voters' clear choice to enact constitutional language *for that precise purpose*.[80] The legislature's appropriation power is not curtailed by any discretionary action of the executive branch. The executive branch does not violate the separation of powers by obeying a constitutional mandate.

For the same reason, the plaintiffs' concern that *Hickel*'s definition of "available for appropriation" constitutes an unwarranted encroachment on the legislature's power of appropriation lacks merit. The intent of the CBR amendment was to limit the legislature's power of appropriation; the whole point of the CBR is to take revenues that would previously have been available to the legislature to appropriate every year and

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77 *Id.* at 31.

78 *Id.* at 33.

79 Alaska Const. art. IX, § 17(d).

80 *See* Ex. 1 to Pl. Mot. SJ at 2, Statement in Support ("The Legislature will be able to spend money from the Budget Reserve only if...;" "The Legislature will be required to repay any money it appropriates from the Budget Reserve.")

lock them away in a savings account requiring either a two-thirds majority or a decline in the state's funds to access and to require the legislature to repay any money it withdrew from that account. The limitation on the legislature's power of appropriations imposed by article IX, section 17 is a feature, not a bug. The *voters* imposed this limitation on the legislature's power through a constitutional amendment.

IV. CONCLUSION

Because the plaintiffs' arguments are foreclosed by binding Alaska Supreme Court precedent and are not supported by the plain language or purpose of article IX, section 17, the State respectfully asks this Court to deny the plaintiffs' Motion for Summary Judgment and grant the State's Cross-Motion.

DATED January 19, 2022.

TREG R. TAYLOR
ATTORNEY GENERAL

By: M.A. Paton Walsh

Margaret Paton Walsh
Alaska Bar No. 0411074
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FILED
STATE OF ALASKA
2022 JUN 19 PM 3:39
BY
DEPUTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT. RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,	)	
Plaintiffs,	)	
v.	)	
GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,	)	
Defendants.	)	Case No. 3AN-22-04028 CI

AFFIDAVIT OF NEIL STEININGER

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Neil Steininger, being duly sworn, state as follows:

1. I am the Director of the State of Alaska, Office of Management and Budget ("OMB"). I have held this position since January 2020. Previously, I served as the Department of Education and Early Development Administrative Services Director from June 2019 through January 2020 and before that, I was the OMB Chief Budget Analyst from October 2017 through June 2019.

2. I am familiar with the Constitutional Budget Reserve fund ("CBR") and its repayment obligation under article IX, section 17(d) of the Alaska Constitution.

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3. I am also familiar with the Higher Education Investment Fund ("HEIF"). The HEIF was established in 2012. *See* ch. 74, § 13 SLA 2012. The legislature had appropriated $400 million from the receipts of the Alaska Housing Capital Corporation in 2011 in order to create the fund. *See* ch. 5, 20(f), FSSLA 2011 ("The sum of $400,000,000 is appropriated from receipts of the Alaska Housing Capital Corporation...to a fund created for the purpose of providing education grants or performance scholarships, or both, by the Twenty-Seventh Alaska State Legislature.")

4. The statute creating the HEIF provides that it is not a dedicated fund and that it is an account in the general fund. It further provides that the money in the HEIF is intended to be appropriated to the Alaska education grant account and the Alaska performance scholarship award account to be spent from there on grants and scholarships. *See* AS 37.14.750.

5. The legislature has appropriated money each year since 2012 from the HEIF to the Alaska education grant account and the Alaska performance scholarship award account, which have then been used to provide grants and scholarships to Alaskan students. In addition to the statutorily expressed uses, the legislature has also appropriated funds from the HEIF to support students attending Washington-Wyoming-Alaska-Montana-Idaho ("WWAMI") medical school programs as well as other educational programs, as the plaintiffs concede. *See* Pl. Mot. SJ at 9 and fn. 33. Notably, the legislature has not limited use of the fund to higher education; for example, HEIF

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money has been appropriated to for the broadband access grant program,[1] and to fund both the Public Employee Retirement System ("PERS") and the Teachers Retirement System ("TRS").[2]

6. Over the past several years, the legislature has appropriated money from the CBR fund to the general fund in order to cover fiscal year budget deficits that have existed since fiscal year 2016, after the state's oil and gas revenues experienced a dramatic decline. Effectively, the CBR fund has served as an emergency savings account that has been tapped to cover annual deficits between state revenues and state expenditures.

7. Article IX, section 17(d) provides that once money is withdrawn from the CBR fund it must be repaid: "the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund." This is commonly referred to as "the sweep." But this has rarely taken place. Instead, the legislature has generally passed a provision in the annual operating budget bill providing that the amounts withdrawn from general fund subaccounts and deposited in the CBR fund at the end of the fiscal year pursuant to section 17(d) are immediately appropriated out of the CBR fund and back into the general fund

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[1] *See e.g.* DOE Transaction Detail for FY2016 Operating Budget at 16, available at https://www.legfin.akleg.gov/BudgetReports/LY2015/Operating/FinalEnacted/DOE-TransactionDetail.pdf

[2] *See e.g.* ch. 3, § 28(a)(2) and (b)(2) 4SSLA 2016; ch. 1, § 41(a)(2) and (b)(2) SSSLA 2017.

subaccounts. This process is commonly called the "reverse sweep." Under Article IX, section 17(c), it requires a three-quarters supermajority vote of the legislature.

8. In the first half of 2019, I was serving as the OMB Chief Budget Analyst. The initial fiscal year 2020 annual operating budget (HB 39) did not include the reverse sweep. Therefore, OMB was required to conduct a careful review of all of the many state funds and accounts to determine what ones would be transferred—"swept"—into the CBR fund.

9. I worked on that project with my colleagues and also testified on the subject of the CBR fund reverse sweep at a legislative hearing in July 2019. OMB worked closely with the Department of Law and the Division of Finance to assess the nature of each fund to determine whether the money in each fund should be swept into the CBR fund as required by article IX, section 17(d). There is one Alaska Supreme Court case, *Hickel v. Cowper*, that interpreted the CBR amendment and the meaning of "available for appropriation" that we had available to guide our decision making.

10. I am aware that the plaintiffs contend the 2019 review was contrary to the guidelines used by prior administrations. This is misleading. It is important to note that the legislature has rarely failed to pass the reverse sweep in a budget bill for the next fiscal year. And to my knowledge, no prior year presented a substantial threat to the continued funding of state programs because of the emptying of general fund subaccounts into the CBR. The 2018 and prior sweepability determinations used in the Annual Comprehensive Financial Reports were done primarily by Division of Finance.

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11. When the reverse sweep passes, the only "sweep" that occurs is an accounting event involving a reconciliation of accounts for the end of a fiscal year. This accounting exercise essentially recreates on paper an event between June 30 at 11:59pm (end of one fiscal year) and July 1 at 12:00am (beginning of next fiscal year) – with the event being the deposit of general fund account monies into the CBR fund and the immediate return of that money to the accounts they were withdrawn from.

12. Although the sweep theoretically happens at midnight on June 30, the actual accounting for the sweep must happen later in the calendar year, because it isn't possible to know what funds are available for appropriation at the end of the fiscal year until accounts have been reconciled and that takes time. The statute about effectuating the sweep—AS 37.10.420, declared unconstitutional by the Alaska Supreme Court—required the accounting to be completed and the sweep effectuated by December 16 each year. In practice, the amounts are not known until the audit of the state's annual comprehensive financial reports is completed.

13. When counteracted by the reverse sweep, the "sweep" has no real-world effect on any of the accounts and thorough review of the interpretation of applicability of the sweep serves no practical purpose. For that reason, OMB did not regularly review reporting of swept accounts in annual financial reports produced by DOF.

14. It was not until 2019 when the "reverse sweep" actually failed in the legislature that real tangible results in the form of major state programs being unfunded could have resulted from the CBR fund sweep. Because of that major event, OMB undertook a thorough review of all funds and accounts to determine which ones were subject to the

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CBR fund sweep under section 17(d) and the guidance provided by the *Hickel v. Cowper* case.

15. Given this unprecedented event, the legislature held hearings in July 2019 on the ramifications of the failure to pass the CBR fund "reverse sweep." On July 12, 2019, OMB submitted to the co-chairs of the House and Senate Finance Committees a letter outlining the framework and guidelines that OMB had developed and that had been applied to each fund to determine whether it was subject to the CBR fund sweep or repayment provision, with an attached list of the funds subject to the sweep. A true and correct copy of that letter and its attached list of funds is attached hereto as **Exhibit A**.

16. I participated in a Senate Finance hearing on July 18, 2019 and testified regarding the CBR fund sweep and the process and guidelines OMB used in determining what funds were subject to the sweep or repayment provision.

17. **Exhibit B** contains a complete list of the 54 general fund subfunds that we at OMB, in consultation with the Department of Law and the Division of Finance, determined to be sweepable in 2019. The total number of funds we analyzed was 159. Attached hereto as Exhibit B is a list showing in more detail the analysis regarding the 54 funds we deemed to be sweepable, and the 105 funds we determined were not sweepable, and reasons for each of our decisions.

18. As shown on Exhibit B, we determined that the HEIF is sweepable under section 17(d) and *Hickel v. Cowper* by applying the following series of tests:

a. Is the fund part of the general fund? (Answer: Yes. The HEIF was created as a fund in the general fund. AS 37.14.750).

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b. Can the money in the HEIF be expended without further legislative appropriation? (Answer: No. Further appropriation is necessary.)

c. Is the use of the fund restricted by law to some particular purpose? For example, is the fund a constitutionally permissible dedicated fund? (Answer: No.) Is the fund legally restricted by trust, bond, third parties via gift, contract, grant, federal restrictions, or otherwise? (Answer: No. Although the legislation creating the HEIF permits a variety of tax-deductible donations into the fund, *see* ch.74 §§14-25 SLA 2012, it does not appear that any such donations have been made.)

19. In 2019, the consequences of the failure to pass the reverse sweep were ultimately avoided because the legislature passed another appropriations bill for the fiscal year that included a CBR fund reverse sweep provision (CSSB 2002, sec. 17(a)).

20. I am now the OMB director, and I testify at budget related legislative hearings including in response to questions about the CBR fund sweep. Last year, the legislature again failed to pass the CBR fund reverse sweep when it enacted the fiscal year 2022 operating budget bill (HB 69). OMB has applied the same framework and guidelines that it applied in 2019 to determine which funds fall within the sweep.

21. On March 18, 2021, I gave a presentation about the CBR Sweep and Reverse Sweep. A true and correct copy of that presentation is attached hereto as **Exhibit C**.

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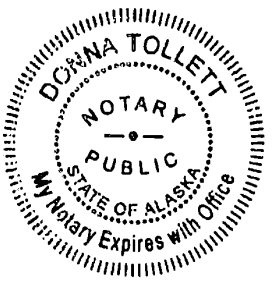
DATED: 1/19/2022

Neil Steininger

SUBSCRIBED and SWORN to before me this 19 day of January 2022.



Notary Public, State of Alaska
My commission expires: with office

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THE STATE of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Office of the Governor
OFFICE OF MANAGEMENT AND BUDGET
Donna Arduin, Director

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July 12, 2019

The Honorable Natasha von Imhof
Co-Chair, Senate Finance Committee
Alaska State Legislature
State Capitol, Room 516
Juneau, AK 99801-1182

The Honorable Bert Stedman
Co-Chair, Senate Finance Committee
Alaska State Legislature
State Capitol, Room 518
Juneau, AK 99801-1182

The Honorable Neal Foster
Co-Chair, House Finance Committee
Alaska State Legislature
State Capitol, Room 505
Juneau, AK 99801-1182

The Honorable Jennifer Johnston
Vice Chair, House Finance Committee
Alaska State Legislature
State Capitol, Room 501
Juneau, AK 99801-1182

Dear Co-Chairs and Vice Chair of the House and Senate Finance Committees,

As you are aware, the Legislature was unable to achieve a three-fourths vote to reverse the sweep of money in the general fund and sub-funds of the general fund available for appropriation at the end of each fiscal year, into the Constitutional Budget Reserve Fund (CBRF). This requirement is found under Article IX, Section 17(d) of the Alaska Constitution. As a result, the staff of the Office of Management and Budget, the Division of Finance, and the Department of Law went through the arduous process of establishing a framework and guidelines to be applied to every single fund to determine whether the fund is subject to the constitutional sweep. Hundreds of hours of staff time were spent making these determinations. The Governor was not involved in this process; no political influence took place when making these determinations.

The CBRF was established by constitutional amendment in 1990 in Article IX, Section 17 of the Alaska Constitution. There are four subsections to this constitutional amendment:

- (a) Revenue into the CBRF – money received from the termination of administrative and judicial proceedings involving mineral revenues is deposited into the CBRF;
- (b) Expenditures from the CBRF by majority vote – only if "the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year" *and* the appropriation is limited to the amount necessary to make total appropriations equal to the amount appropriated in the previous year;
- (c) Expenditures from the CBRF by a three-fourths vote of the members of each house – the Legislature can appropriate from the fund for any public purpose if such a supermajority vote is obtained;
- (d) **Repayment requirement – "If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for**

appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law."

The language of Article IX, Section 17(d) guided the framework for establishing the criteria used to evaluate each fund. The following guidelines were used to evaluate each fund:

- All financial assets outside of the permanent fund and the constitutional budget reserve are considered to be part of the general fund, not simply the accounts and funds managed directly by the Division of Finance and Treasury.
- Funds for which the legislature has retained the power to appropriate from and that are not available to pay expenditures without further legislative appropriation are subject to the sweep unless a constitutionally dedicated fund or not in the general fund;
- Funds that list purposes for which money in the fund can be used but still require a second appropriation to spend from the fund are subject to the sweep unless a constitutionally dedicated fund or not in the general fund;
- Money in funds that is already validly appropriated to a particular purpose are not subject to the sweep;
- Federal funds are not subject to the sweep;
- Other trust funds such as the Public Employees Retirement Fund that can only be used for a specific stated purpose under law such as constitutionally permissible dedicated funds and pension funds are not subject to the sweep;
- Donations - the portion of a fund that comprises money donated to a fund for a particular purpose should not be included in the sweep;
- Public corporation accounts/funds are not subject to the sweep *unless* the money is in an account or fund that cannot be accessed by the corporation without an additional legislative appropriation (e.g. the Power Cost Equalization Endowment fund);
- Receipts subject to refund (e.g. Alaska Marine Highway, University tuition or student housing) are not subject to the sweep.

Attached, please find the finalized list with the determination on what funds will sweep to the CBRF and what monies will remain in the fund in which they currently reside. The effective date of the sweep is June 30, 2019; however, the deposit of swept funds into the CBRF will not take place until late August-early September timeframe to allow for the close out of FY2019 expenditures.

Please do not hesitate to contact the Office of Management and Budget should you or your staff have any questions.

Sincerely,

Donna Arduin
Director

Enclosure
1. Funds Subject to Sweep

cc. Honorable Cathy Giessel, President, Alaska State Senate
Honorable Bryce Edgmon, Speaker, House of Representatives
Honorable Kevin Clarkson, Attorney General, Department of Law
Mr. David Teal, Director, Legislative Finance Division
Ms. Suzanne Cunningham, Director, Governor's Legislative Office
Mr. Hans Zigmund, Director, Division of Finance

Funds Subject to Sweep

Prepared by the Office of Management and Budget

Fund Code	Name	Reference
1005	General Fund/Program Receipts	AS 37.05.142-.146, AS 37.10.050-.060
1044	AK Debt Retirement Fund	AS 37.15.011
1049	Training and Building Fund	AS 23.20.130
1052	Oil and Hazardous Substance Release Prevention Mitigation Account	AS 46.08.010-.040, AS 43.55.201&.300 AS43.40.005-.007
1054	State Employment & Training Program	AS 23.15.625 AS 37.05.146
1076	Marine Highway System Fund	AS 19.65.060, AS 37.05.550
1082	Vessel Replacement Fund	AS 37.05.550
1109	Test Fisheries Receipts	AS 16.05.050(a)(14)
1139	AHFC Dividend	
1140	AIDEA Dividend	
1141	RCA Receipts	AS 37.05.146(c)(22), AS 42.05.254
1150	ASLC Dividend	
1151	Technical Vocational Education Program Account	AS 23.15.830 AS 37.10.200
1153	State Land Disposal Income Fund	AS 38.04.022(a), AS 37.05.146(b)
1154	Shore Fisheries Development Lease Program	AS 38.05.082 AS 37.05.146(b)
1155	Timber Sale Receipts	AS 38.05.110 AS 37.05.146(b)
1156	Receipt Supported Services	AS 37.05. 142 through 146
1157	Workers Safety and Compensation Administration Account	AS 23.05.067(e) AS 18.60, AS 23.30
1162	Alaska Oil & Gas Conservation Commission Rcpts	AS 31.05.093, AS 37.05.146(c)(23)
1166	Commercial Passenger Vessel Environmental Compliance Fund	AS 46.03.460-.490
1168	Tobacco Use Education and Cessation Fund	AS 37.05.580
1169	PCE Endowment Fund	AS 42.45.070-.085
1172	Building Safety Account	AS 44.31.025 AS 37.05.146(c)(53)
1173	Miscellaneous Earnings	-
1180	Alcohol & Other Drug Abuse Treatment & Prevention Fund	AS 43.60.050
1195	Snow Machine Registration Receipts	AS 28.39.010-250
1197	Alaska Capital Income Fund	AS 37.05.565
1200	Vehicle Rental Tax Receipts	AS 43.52.080
1201	Commercial Fisheries Entry Commission Receipts	AS 16.43, AS 16.05.490, AS16.05.530, AS 37.05.146(c)(29)
1203	Workers' Compensation Benefits Guaranty Fund	AS 23.30.082
1211	Cruise Ship Gambling Tax	-
1213	Alaska Housing Capital Corporation Receipts	-
1214	Whittier Tunnel Toll Receipts	23 USC 129(a)(3)
1218	146(c)code	AS 37.05.146(c)
1221	Civil Legal Services Fund	AS 37.05.590

Funds Subject to Sweep

Fund Code	Name	Reference
1226	Alaska Higher Education Investment Fund	AS 37.14.750 (fund) AS 14.43 (program)
1234	License Plates	AS 28.10.421
1237	Vocational Rehabilitation Small Bus. Enterprise Revolving Fd	AS 23.15.130
1243	Statutory Budget Reserve Fund	AS 37.05.540
1246	Recidivism Reduction Fund	AS 43.61.010
1247	Medicaid Monetary Recoveries	37.05.146(c)(59) and AS 09.58 and AS 47.05.210
1248	Alaska Comprehensive Health Insurance Fund	AS 21.55.430(a)
1249	Motor Fuel Tax Receipts	AS 43.40.010(f)(g)(j)
1254	Marijuana Education and Treatment Fund	AS 43.61.010(f)
3200	Statutory Budget Reserve Fund	
3205	Alaska Historical Commission Receipts Account (Partially Sweep)	
3221	Originator Surety Fund	
3222	Trauma Care Fund (Partially Sweep)	
3223	Abandoned Vehicle Fund	
3225	AMHS Capitalization	
3233	Fish and Game Civil Fines & Penalties	
3388	$.01 Per Barrel of Oil Produced Surcharge	
3389	$.04 Per Barrel of Oil Produced Surcharge	
N/A	Reappropriations of FY19 Operating Appropriations	

State of Alaska - Office of Management and Budget

Funding Source Sweep Analysis with Explanations (active funds only)

Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
1001	Constitutional Budget Reserve Fund	N	N				N/A
1041	Permanent Fund Earnings Reserve Account	N	N				N/A

Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
1003	General Fund Match	Y	Y	N	N	N	1
1004	General Fund Receipts	Y	Y	N	N	N	1
1037	General Fund / Mental Health	Y	Y	N	N	N	1

Analysis Notes:
1) If the funds can be spent without further appropriation, the funds are not sweepable.
2) The reserved balance of a fund cannot be swept. Reserved means there are restrictions imposed by a trust, bond or third party via gift, contract or grant; includes federal government and other restrictions.
3) Funds determined to be sweepable must have the following indicators: Y (Yes) in the subfund of the general fund column; N (No) in the dedicated funds column; N (No) in the spends without further appropriation column; and N (No) or P (Partial) in the Reserved Balance column.

Active Subfunds of the General Fund Analyzed in 2019 Determined Subject to the Sweep

Count	Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
1	1005	General Fund/Program Receipts	Y	Y	N	N	N	1
2	1044	AK Debt Retirement Fund	Y	Y	N	N	N	1
3	1049	Training and Building Fund	Y	Y	N	N	N	1
4	1052	Oil/Hazardous Prevention/Response Fund	Y	Y	N	N	P	2
5	1054	State Employment & Training Program	Y	Y	N	N	N	1
6	1076	Marine Highway System Fund	Y	Y	N	N	N	1
7	1082	Vessel Replacement Fund	Y	Y	N	N	N	1
8	1109	Test Fisheries Receipts	Y	Y	N	N	N	1
9	1139	AHFC Dividend	Y	Y	N	N	N	1
10	1140	AIDEA Dividend	Y	Y	N	N	N	1

Count	Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
11	1141	RCA Receipts	Y	Y	N	N	N	1
12	1150	ASLC Dividend	Y	Y	N	N	N	1
13	1151	Technical Vocational Education Program Account	Y	Y	N	N	N	1
14	1153	State Land Disposal Income Fund	Y	Y	N	N	N	1
15	1154	Shore Fisheries Development Lease Program	Y	Y	N	N	N	1
16	1155	Timber Sale Receipts	Y	Y	N	N	N	1
17	1156	Receipt Supported Services	Y	Y	N	N	N	1
18	1157	Workers Safety and Compensation Admin Account	Y	Y	N	N	N	1
19	1162	Alaska Oil & Gas Conservation Commission Rcpts	Y	Y	N	N	N	1
20	1166	Commercial Passenger Vessel Environmental Compliance Fund	Y	Y	N	N	N	1
21	1168	Tobacco Use Education and Cessation Fund	Y	Y	N	N	N	1
22	1169	PCE Endowment Fund	Y	Y	N	N	N	1
23	1172	Building Safety Account	Y	Y	N	N	N	1
24	1173	Miscellaneous Earnings	Y	Y	N	N	N	1
25	1180	Alcohol & Other Drug Abuse Treatment & Prevention Fund	Y	Y	N	N	N	1
26	1195	Special Vehicle Registration Receipts	Y	Y	N	N	N	1
27	1197	Alaska Capital Income Fund	Y	Y	N	N	N	1
28	1200	Vehicle Rental Tax Receipts	Y	Y	N	N	N	1
29	1201	Commercial Fisheries Entry Commission Receipts	Y	Y	N	N	N	1
30	1203	Workers' Compensation Benefits Guaranty Fund	Y	Y	N	N	N	1
31	1211	Cruise Ship Gambling Tax	Y	Y	N	N	N	1
32	1213	Alaska Housing Capital Corporation Receipts	Y	Y	N	N	N	1
33	1214	Whittier Tunnel Toll Receipts	Y	Y	N	N	N	1
34	1218	AS 37.05.146(c) codes that are not GFPR	Y	Y	N	N	N	1
35	1221	Civil Legal Services Fund	Y	Y	N	N	N	1
36	1226	Alaska Higher Education Investment Fund	Y	Y	N	N	N	1
37	1234	License Plates	Y	Y	N	N	N	1
38	1237	Vocational Rehabilitation Small Bus. Enterprise Revolving Fd	Y	Y	N	N	N	1
39	1243	Statutory Budget Reserve Fund	Y	Y	N	N	N	1
40	1246	Recidivism Reduction Fund	Y	Y	N	N	N	1
41	1247	Medicaid Monetary Recoveries	Y	Y	N	N	N	1
42	1248	Alaska Comprehensive Health Insurance	Y	Y	N	N	N	1
43	1249	Motor Fuel Tax	Y	Y	N	N	N	1

Count	Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
44	1254	Marijuana Education and Treatment Fund	Y	Y	N	N	N	1
45	3200	Statutory Budget Reserve Fund	Y	Y	N	N	N	1
46	3205	Alaska Historical Commission Receipts Account (Partially Sweep)	Y	Y	N	N	N	1
47	3221	Originator Surety Fund	Y	Y	N	N	N	1
48	3222	Trauma Care Fund (Partially Sweep)	Y	Y	N	N	N	1
49	3223	Abandoned Vehicle Fund	Y	Y	N	N	N	1
50	3224	Marine Highway System Fund (Main)	Y	Y	N	N	N	1
51	3225	AMHS Capitalization (subfund)	Y	Y	N	N	N	1
52	3233	Fish and Game Civil Fines & Penalties	Y	Y	N	N	N	1
53	3388	$.01 Per Barrel of Oil Produced Surcharge	Y	Y	N	N	N	1
54	3389	$.04 Per Barrel of Oil Produced Surcharge	Y	Y	N	N	N	1

Active Subfunds of the General Fund Analyzed in 2019 Determined Not Subject to the Sweep

Count	Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
1	1002	Federal Receipts	N	Y	N	N	Y	3
2	1007	Interagency Receipts	N	Y	N	N	Y	3
3	1008	General Obligation Bonds	N	Y	N	N	Y	3
4	1009	Revenue Bonds	N	Y	N	N	Y	3
5	1013	Alcoholism & Drug Abuse Revolving Loan	N	Y	Y	N	Y	4
6	1014	Donated Commodity/Handling Fee Account	N	Y	N	N	Y	3
7	1016	CSSD Federal Incentive Payments	N	Y	N	N	Y	3
8	1017	Benefits Systems Receipts	N	Y	N	N	Y	3
9	1018	Exxon Valdez Oil Spill Settlement	N	Y	N	N	Y	3
10	1021	Agricultural Loan Fund	N	Y	Y	N	Y	4
11	1023	FICA Administration Fund Account	N	Y	N	N	Y	3
12	1024	Fish and Game Fund	N	Y	N	Y	Y	5
13	1026	Highways/Equipment Working Capital Fund	N	Y	N	N	Y	3
14	1027	International Airport Revenue Fund	N	Y	N	N	Y	3
15	1029	Public Employees Retirement System Fund	N	Y	N	N	Y	3
16	1030	School Fund (Cigarette Tax)	N	Y	N	Y	Y	5
17	1031	Second Injury Fund Reserve Account	N	Y	N	Y	Y	5
18	1032	Fishermen's Fund	N	Y	N	Y	Y	5
19	1033	Surplus Property Revolving Fund	N	Y	Y	N	Y	4

Count	Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
20	1034	Teachers Retirement System Fund	N	Y	N	N	Y	3
21	1036	Commercial Fishing Loan Fund	N	Y	Y	N	Y	4
22	1040	Real Estate Surety Fund	N	Y	N	N	Y	3
23	1042	Judicial Retirement System	N	Y	N	N	Y	3
24	1043	Impact Aid for K-12 Schools	N	Y	N	N	Y	3
25	1045	National Guard & Naval Militia Retirement System	N	Y	N	N	Y	3
26	1048	University Restricted Receipts	N	Y	N	N	Y	3
27	1050	Permanent Fund Dividend Fund	N	Y	Y	N	Y	4
28	1055	Interagency/Oil & Hazardous Waste	N	Y	N	N	Y	3
29	1061	Capital Improvement Project Receipts	N	Y	N	N	Y	3
30	1062	Power Project Loan Fund	N	Y	Y	N	Y	4
31	1063	National Petroleum Reserve Fund	N	Y	N	N	Y	3
32	1066	Public School Trust Fund	N	Y	N	Y	Y	5
33	1069	Historical District Revolving Loan Fund	N	Y	Y	N	Y	4
34	1070	Fisheries Enhancement Revolving Loan Fund	N	Y	Y	N	Y	4
35	1074	Bulk Fuel Revolving Loan Fund	N	Y	Y	N	Y	4
36	1075	Alaska Clean Water Loan Fund	N	Y	Y	N	Y	4
37	1081	Information Services Fund	N	Y	N	N	Y	3
38	1092	Mental Health Trust Authority Authorized Receipts	N	Y	N	N	Y	3
39	1093	Clean Air Protection Fund	N	Y	N	Y	Y	5
40	1094	Mental Health Trust Administration	N	Y	N	N	Y	3
41	1100	Alaska Drinking Water Fund	N	Y	N	N	Y	3
42	1101	Alaska Aerospace Corporation Fund	N	Y	N	N	Y	3
43	1102	Alaska Industrial Dev & Export Authority Receipts	N	Y	N	N	Y	3
44	1103	Alaska Housing Finance Corporation Receipts	N	Y	N	N	Y	3
45	1104	Alaska Municipal Bond Bank Receipts	N	Y	N	N	Y	3
46	1105	Alaska Permanent Fund Corporation Receipts	N	Y	N	N	Y	3
47	1106	Alaska Student Loan Corporation Receipts	N	Y	N	N	Y	3
48	1107	Alaska Energy Authority Corporate Receipts	N	Y	N	N	Y	3
49	1108	Statutory Designated Program Receipts	N	Y	N	N	Y	3
50	1112	International Airports Construction Fund	N	Y	N	N	Y	3
51	1113	Alaska Housing Finance Corporation Bonds	N	Y	N	N	Y	3
52	1117	Randolph Sheppard Small Business Fund	N	Y	N	Y	Y	5
53	1133	CSSD Administrative Cost Reimbursement	N	Y	N	N	Y	3
54	1144	Clean Water Fund Bond Receipts	N	Y	N	N	Y	3
55	1145	Art in Public Places Fund	N	Y	N	N	Y	3

Count	Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
56	1147	Public Building Fund	N	Y	N	N	Y	3
57	1159	Drinking Water Fund Bond Receipts	N	Y	N	N	Y	3
58	1163	Certificates of Participation	N	Y	N	N	Y	3
59	1164	Rural Development Initiative Fund	N	Y	N	N	Y	3
60	1170	Small Business Economic Development Revolving Loan Fund	N	Y	Y	N	Y	4
61	1171	PF Dividend Appropriations in lieu of Dividends to Criminals	N	Y	N	N	Y	3
62	1174	UA Intra-Agency Transfers	N	Y	N	N	Y	3
63	1179	Passenger Facility Charges	N	Y	N	N	Y	3
64	1181	Alaska Veterans' Memorial Endowment Fund	N	Y	N	N	Y	3
65	1184	General Obligation Bond Debt Service Fund	N	Y	N	N	Y	3
66	1185	Election Fund (HAVA)	N	Y	N	N	Y	3
67	1186	Alaska Student Loan Corporation Bond Proceeds	N	Y	N	N	Y	3
68	1187	Federal Mental Health	N	Y	N	N	Y	3
69	1188	Federal Unrestricted Receipts	N	Y	N	N	Y	3
70	1190	Adak Airport Operations	N	Y	N	N	Y	3
71	1192	Mine Reclamation Trust Fund	N	Y	Y	N	Y	4
72	1196	Master Lease Line of Credit	N	Y	N	N	Y	6
73	1198	Alaska Fish and Game Revenue Bond Redemption Fund	N	Y	N	N	Y	3
74	1199	Alaska Sport Fishing Enterprise Account	N	Y	N	Y	Y	5
75	1202	Anatomical Gift Awareness Fund	N	Y	Y	N	Y	4
76	1205	Berth Fees for the Ocean Ranger Program	N	Y	N	Y	Y	5
77	1206	Commercial Passenger Vessel Tax	N	Y	N	Y	Y	5
78	1209	Alaska Capstone Avionics Revolving Loan Fund	N	Y	Y	N	Y	4
79	1210	Renewable Energy Grant Fund	N	Y	N	N	Y	3
80	1212	Federal Stimulus: ARRA 2009	N	Y	N	N	Y	3
81	1215	Uniform Commercial Registration fees	N	Y	N	N	Y	3
82	1216	Boat Registration Fees	N	Y	N	N	Y	3
83	1217	NGF Earnings	N	Y	N	N	Y	3
84	1220	Crime Victim Compensation Fund	N	Y	N	N	Y	3
85	1222	Regional Educational Attendance Area School Fund	N	Y	Y	N	Y	4
86	1223	Commercial Charter Fisheries RLF	N	Y	Y	N	Y	4
87	1224	Mariculture Revolving Loan Fund	N	Y	Y	N	Y	4

Count	Fund Code	Fund Title	Sweepable	Subfund of General Fund	Spends without Approp	Dedicated Fund	Reserved Balance	Comments
88	1225	Community Quota Entity Revolving Loan Fund	N	Y	Y	N	Y	4
89	1227	Alaska Microloan Revolving Loan Fund	N	Y	Y	N	Y	4
90	1229	AK Gasline Development Corporation In-state Pipeline Fund	N	Y	Y	N	Y	4
91	1230	Alaska Clean Water Administrative Fund	N	Y	N	Y	Y	5
92	1231	Alaska Drinking Water Administrative Fund	N	Y	N	Y	Y	5
93	1232	In-state Pipeline Fund Interagency	N	Y	N	N	Y	3
94	1233	Municipal Bond Bank Bonds	N	Y	N	N	Y	3
95	1235	Alaska Liquefied Natural Gas Project Fund (AGDC-LNG)	N	Y	Y	N	Y	4
96	1236	Alaska Liquefied Natural Gas Project Fund I/A (AK LNG I/A)	N	Y	Y	N	Y	4
97	1238	Vaccine Assessment Account	N	Y	Y	N	Y	4
98	1239	Aviation Fuel Tax Account	N	Y	N	N	Y	3
99	1241	General Fund/Liquefied Natural Gas	N	Y	N	N	Y	3
100	1244	Rural Airport Lease Receipts	N	Y	N	Y	Y	5
101	1245	Rural Airport I/A	N	Y	N	N	Y	3
102	1253	Bonds subject to appropriation	N	Y	N	N	Y	3
103	1255	Dividend Raffle Fund	N	Y	Y	N	Y	4
104	1256	Education Endowment Fund	N	Y	N	N	Y	3
105	3208	Oil/Hazardous Response Account	N	Y	N	N	Y	3

Total Subfunds Analyzed: (54+105)=159

Comment key:

1	Not reserved and does not spend without further appropriation so available for appropriation and sweepable
2	Only the mitigation & prevention sub-account is sweepable and only the portion that does not hold trust money from fed/other resources
3	Reserved = restrictions imposed by trust, bond or third parties via gift, contract, or grant; including federal government and other restrictions.
4	Available to spend without further appropriation
5	Dedicated Fund
6	Depends on use - Most DOT should come in as 1004

State of Alaska
Office of Management and Budget

Constitutional Budget Reserve Sweep and Reverse Sweep
March 18, 2021

Neil Steininger, Director

Office of Governor
MIKE DUNLEAVY

Funds in the Constitution

The Alaska Constitution refers to three distinct funds:

- Permanent Fund (PF) – Article IX, Section 15
  - Includes mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses.
  - Only the income may be appropriated
  - Includes the Earnings Reserve Account (ERA) per Hickel v. Cowper
- Constitutional Budget Reserve Fund (CBR) – Article IX, Section 17
  - Includes money received from the termination of administrative and judicial proceedings involving mineral revenues
- General Fund
  - Includes money received from taxes, fees, and other sources not constitutionally directed to the CBR or PF
  - Includes all designated general fund (DGF) accounts

Constitutional Budget Reserve Fund

The Constitutional Budget Reserve Fund (CBR) was established by constitutional amendment in 1990 in article IX, section 17 of the Alaska Constitution. There are four subsections:

- (a) Revenue into the CBR – money received from the termination of administrative and judicial proceedings involving mineral revenues is deposited into the CBR;
- (b) Expenditures from the CBR by majority vote only if – "the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year" and total appropriations are limited to the amount appropriated in the previous year;
- (c) Expenditures from the CBR by a three-fourths vote of the members of each house – the Legislature can appropriate from the fund for any public purpose if such a supermajority vote is obtained;
- (d) **Repayment requirement – "If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law."**

THE STATE of ALASKA

Governor Mike Dunleavy

Exc. 194

Repayment Requirement – Commonly Called the "Sweep"

- FY1995 to FY2010 CBR debt required repayment
  - Peak $5.2B in FY2005
  - Fully repaid in FY2010
- Current debt began FY2015
  - Greater than $11B currently owed

Sweep Effective Dates:

- Effective midnight on June 30 each year
- Reversed, pending three-quarter vote, 12:01 am July 1

Sweep Mechanics:

- Prior year account transactions closed August 31
- Balances subject to audit

THE STATE of ALASKA
Governor Mike Dunleavy

Exc. 195

Sweep Application

Subject to Sweep:

- Funds for which the legislature has retained the power to appropriate from and that are not available to pay expenditures without further legislative appropriation
- Funds that list purposes for which money in the fund can be used but still require appropriation to spend

Not Subject to Sweep:

- Money in funds that is already validly appropriated to a particular purpose
- Federal funds
- Other trust funds such as the Public Employees Retirement Fund that can only be used for a specific stated purpose under law or held in trust
- Donations for a particular purpose
- Accounts or funds subject to expenditure without further appropriation
- Receipts subject to refund – eg. Alaska Marine Highway, University tuition or student housing

THE STATE of ALASKA

Sweep Reversal

The sweep is a constitutional requirement, the reverse sweep is a policy decision with significant impacts.

Section 28(a) of the Governor's proposed FY22 operating budget:

- Sec. 28. CONSTITUTIONAL BUDGET RESERVE FUND. (a) Deposits in the budget reserve fund (art. IX, sec. 17, Constitution of the State of Alaska) for fiscal year 2021 that are made from subfunds and accounts of the operating general fund by operation of art. IX, sec. 17(d), Constitution of the State of Alaska, to repay appropriations from the budget reserve fund are appropriated from the budget reserve fund to the subfunds and accounts from which those funds were transferred.

This appropriation is...

- directing all "swept" subfunds to be transferred back to the fund they resided in prior to June 30.
- from the CBR requiring a supermajority vote per Alaska Constitution article IX, section 17(c).
- commonly called the "reverse sweep".

THE STATE of ALASKA

Sweep Impacts

Without enacting reversal:

- 3 Categories of Impact
  - High impact – Funds with no projected revenues in FY22
    - Impacted programs include scholarships from the higher education fund, the power cost equalization program.
  - Medium impact – Funds with FY22 revenues less than the amount appropriated for FY22
    - Impacted programs include alcohol safety program, chronic disease prevention, substance abuse grants, domestic violence and sexual assault prevention, Marine Highway System operations, and spill prevention and response.
  - No immediate impact – Funds without FY22 appropriations reliant on existing balances.
    - These funds are used for tracking purposes or as general savings accounts. Examples include cruise ship gambling tax and Alaska Housing Capital Corporation.
    - Also includes funds with balances that are already obligated through existing appropriations such as the Alaska comprehensive health insurance fund.

Exc. 198

Sweep Impacts

Without enacting reversal:

	FY22 Potential Shortfall
1169 Power Cost Equalization Fund	(57,471.5)
1226 Higher Education Fund	(25,818.7)
1197 AK Capital Income Fund	(17,503.8)
1200 Vehicle Rental Taxes	(5,863.3)
1168 Tobacco Use Education and Cessation	(2,671.1)
1151 Technical Vocational Education Program Fund	(1,261.5)
1180 Alcohol & Other Substance Abuse	(1,042.5)
1254 Marijuana Education and Treatment	(803.7)
1246 Recidivism Reduction Fund	(627.0)
1201 Commercial Fisheries Entry Commission	(597.8)
1054 State Employment and Training Fund	(330.3)

Impacts mitigated by enacting section 28(a) of the Governor's proposed FY22 operating budget.

THE STATE of ALASKA

More information, reports, and detailed department budget books at omb.Alaska.gov

Office of Governor
MIKE DUNLEAVY

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

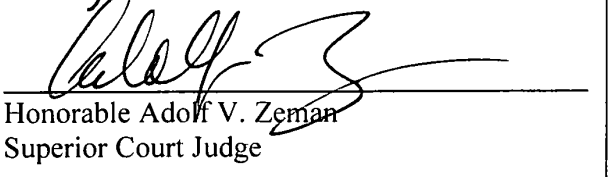
MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Plaintiffs, v. GOVERNOR MICHAEL J. DUNLEAVY, in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA DEPARTMENT OF ADMINISTRATION, Defendants.	Case No.: 3AN-22-04028 CI

[PROPOSED] ORDER GRANTING ALASKA LEGISLATIVE COUNCIL'S UNOPPOSED MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

JAN 20 2022

Upon full consideration of Alaska Legislative Council's Unopposed Motion for Leave to Participate as Amicus Curiae ("Motion"), the Motion is hereby GRANTED. The Brief of Amicus Curiae is due on Friday, January 28, 2022.

DATED this 21st day of January 2022.



Honorable Adolf V. Zeman
Superior Court Judge

CERTIFICATE OF SERVICE

This certifies that on January 20, 2022, a true and correct copy of the foregoing was served via email on:

Jahna M. Lindemuth Scott M. Kendall Samuel G. Gottstein Cashion Gilmore & Lindemuth 510 L Street, Suite 601 Anchorage, AK 99501 jahna@cashiongilmore.com scott@cashiongilmore.com sam@cashiongilmore.com *Attorneys for Plaintiffs*	Margaret Paton-Walsh Katherine Demarest Department of Law Office of the Attorney General 1031 W. 4th Avenue, Suite 200 Anchorage, AK 99501 margaret.paton-walsh@alaska.gov kate.demarest@alaska.gov *Attorneys for Defendants*

/s/ Karen P. Warne
Karen P. Warne, Practice Assistant

I certify that on 1/21/22 a copy of the following was mailed/faxed/hand-delivered to each of the following at their addresses of record.
K. Cuddy, J. Lindemuth, S. Kendall, S. Gottstein, M. Paton-Walsh

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Plaintiffs, v. GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Defendants.	Court No.: 3AN-22-04028CI

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REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT

I. Introduction

Without doing any independent analysis to interpret article IX, section 17(d) of the Alaska Constitution, the Executive Branch Defendants instead rely primarily on the Alaska Supreme Court's decision in *Hickel v. Cowper*.[1] Asserting that *Hickel* has already decided what funds are subject to the annual sweep of monies to repay the Constitutional Budget Reserve ("CBR"), the Executive Branch goes no further, claiming that this court's hands are tied and that the Higher Education Investment Fund ("HEIF") must therefore be subject to the sweep because its monies remain "available for appropriation."[2] The

[1] *See generally* 874 P.2d 922 (Alaska 1994).

[2] *See* Executive Branch's Opposition and Cross-Motion for Summary Judgment, at 1-2, 10-18 (Jan. 19, 2022) [hereinafter Opposition and Cross-Motion]; *see also id.* at 13

Executive Branch also argues, for the first time, that the appropriation that originally constituted the HEIF was somehow a defective or illegitimate "soft" appropriation, in order to defend their reliance on *Hickel*.[3]

The Executive Branch's reliance on *Hickel* is misplaced. *Hickel* is not a case about the legislature's appropriation power or what funds are subject to the sweep under section 17(d). *Hickel* instead primarily concerned when the legislature could access the money contained in the CBR under section 17(b),[4] and held that AS 37.10.420 was unconstitutional.[5]

Critically, the *Hickel* Court's reasoning for when money can be taken *out* of the CBR to stabilize state spending logically cannot be applied to when money must go back *into* the CBR as a repayment without violating the legislature's article II appropriation power. Section 17(d) provides that any general fund money that remains "available for appropriation at the end of each succeeding fiscal year" is automatically swept back into the CBR to repay prior appropriations from it.[6] To argue that *Hickel* is dispositive, the Executive Branch first misreads the test in *Hickel* to not sweep valid current

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(asserting that *Hickel* "is binding Alaska Supreme Court precedent that controls the outcome of this case").

[3] *See id.* at 14.

[4] *See Hickel*, 874 P.2d at 923 ("We are now required to interpret several . . . key terms of section 17, including 'amount available for appropriation' and 'amount appropriated for the previous fiscal year.' " (quoting Alaska Const. art. IX, § 17(b))).

[5] *See id.* at 926-36.

[6] Alaska Const. art. IX, § 17(d).

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appropriations, and then attacks the HEIF appropriation as a second-class "soft" appropriation that is not valid under the Constitution in order to make endowment funds like the HEIF subject to section 17(d)'s repayment requirement. Both arguments are fatally flawed and not supported by the law.

Plaintiffs' interpretation of section 17(d) is consistent with the provision's plain language, the 1990 framers' intent, and voters' understanding, and respects the legislature's appropriation power. It is also consistent with the Attorney General's recent memorandum allowing FY2022 appropriations to be paid, rather than sweeping the HEIF before payment.[7] Because the motion's constitutional analysis is both logical and not inconsistent with the proper reading of *Hickel*, this court should GRANT Plaintiffs' motion for summary judgment and DENY the Executive Branch's cross-motion.

II. Plaintiffs' Interpretation Of Article IX, Section 17(d) Is Rooted In Its Plain Language, Framers' Intent, And Voters' Understanding.

The parties agree that this court must decide the following legal question: whether the HEIF is subject to the annual CBR sweep contained in article IX, section 17(d) of the Alaska Constitution.[8] The Executive Branch pays lip-service to the framework for analyzing the Alaska Constitution,[9] but then does not actually follow it, hoping instead

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[7] *See generally* Memorandum from Treg Taylor, Attorney General, to Mike Dunleavy, Governor (Aug. 25, 2021) [hereinafter Taylor Memo] (Exhibit 15 *to* Affidavit of Jahna M. Lindemuth (Jan. 4, 2022) [hereinafter Lindemuth Aff.]).

[8] *See* Plaintiffs' Motion for Summary Judgment, at 16-18 (Jan. 4, 2022) [hereinafter Motion]; *see also* Opposition and Cross-Motion at 9.

[9] *See* Opposition and Cross-Motion at 9-10; *see also* Motion at 16, 20.

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that this court will blindly follow dicta in *Hickel*.[10] As described in the second half of this brief, the Executive Branch's argument is fundamentally flawed, and requires this court to hold that the initial appropriation to the HEIF was not constitutionally valid.

In contrast, Plaintiffs provided a robust constitutional analysis of section 17(d) to support their position.[11] The Executive Branch completely skipped over the required analytical framework for interpreting a voter-approved amendment to the Alaska Constitution: courts first analyze the plain language of the provision, and then they consider the purpose of that provision by looking to both the framers' intent[12] and voters' understanding.[13] Because Plaintiffs' interpretation harmonizes the underlying purpose

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[10] *See* Opposition and Cross-Motion at 10-20.

[11] *See* Motion at 17-35.

[12] Plaintiffs refer to the drafters of the constitutional amendment that created the CBR as its "framers," even though they were part of the 1990 legislature, to be consistent with the Alaska Supreme Court's precedent for analyzing amendments to the Alaska Constitution. *See Wielechowski v. State*, 403 P.3d 1141, 1144, 1146, 1148-50 (Alaska 2017); *see also Hickel*, 874 P.2d at 928 (noting that it considered "the intent of the framers" when defining "amount available for appropriation" for purposes of section 17(b)).

[13] *See Wielechowski*, 403 P.3d at 1146 (directing courts to "look to the plain meaning and purpose of the provision and the intent of the framers" (quoting *Hickel*, 874 P.2d at 926)); *see also id.* ("Our analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself." (quoting *Hickel*, 874 P.2d at 927)); *id.* at 1146-47 (" '[A]bsent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision' without 'add[ing] "missing terms" to the Constitution or . . . interpret[ing] existing constitutional language more broadly than intended by . . . the voters.' " (alterations in original) (footnote omitted) (first quoting *Hickel*, 874 P.2d at 926; then quoting *Hickel*, 874 P.2d at 927)).

and plain language of section 17(d) with the legislature's appropriation power, this court should adopt it.

A. The plain language of section 17(d) includes temporal language which limits the annual sweep to unappropriated general fund monies.

Although the Executive Branch tries to minimize and ignore the difference in language between sections 17(b) and 17(d), it is undisputed that section 17(d) contains a temporal limitation not found in section 17(b). The Executive Branch may wish differently, but the Alaska Supreme Court in *Hickel* did not analyze this plain language of section 17(d) at all.

The *Hickel* Court summarily noted in dicta, in the final footnote of its decision, that it "see[s] no reason to give 'available for appropriation' a different meaning in subsection (d) than . . . in subsection (b)."[14] But the Court did not consider the phrase "at the end of each succeeding fiscal year," or how the differences in language in these two sections might change the analysis.

Article IX, section 17(d) of the Alaska Constitution provides:

> If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, *the amount of money in the general fund* ***available for appropriation at the end of each succeeding fiscal year*** *shall be deposited in the budget reserve fund.* The legislature shall implement this subsection by law.[15]

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[14] *See Hickel*, 874 P.2d at 936 n.32. Notably, AS 37.10.420(a) only sought to define "the amount available for appropriation" and "funds available for appropriation" "[f]or purposes of" section 17(b), *not* section 17(d). *See* AS 37.10.420(a), (a)(1).

[15] Alaska Const. art. IX, § 17(d) (emphasis added).

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This language is different from the language in section 17(b) — which *was* analyzed by *Hickel* — concerning the counting and comparing of "amount[s] available for appropriation" for purposes of whether a supermajority vote is required to access the CBR.[16]

Rather than address section 17(d)'s plain language head on, the Executive Branch instead tries to flip the operative language with a sleight of hand, claiming that "section 17(d) requires that the money spent be 'repaid' at the end of the fiscal year using 'money in the general fund available for appropriation.' "[17] But the location of the temporal phrase "at the end of each succeeding fiscal year" after "available for appropriation" in section 17(d) is vital to its interpretation. This phrase is not about when the funds must be repaid as implied by the Executive Branch; it goes to when the analysis of what money remains "available for appropriation" must be considered.[18]

Obviously, a section 17(b) analysis must happen much earlier in the legislative session, before the budget is passed, as its purpose is to determine what vote is required to appropriate from the CBR. The section 17(d) analysis of what funds must be swept

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[16] Alaska Const. art. IX, § 17(b) ("If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.").

[17] Opposition and Cross-Motion at 3.

[18] Alaska Const. art. IX, § 17(d).

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happens after the budget is passed, and presumably after the legislature has adjourned, and must account for and respect all valid appropriations that have not lapsed.

If the section 17(b) and section 17(d) tests were the same, then virtually all "money in the general fund available for appropriation" would need to be diverted to repay the CBR each year, including funds that the legislature had just appropriated for the next fiscal year.[19] That cannot be the rule, especially given the *Hickel* Court's acknowledgement that the CBR was intended to help stabilize state finances.[20]

Plaintiffs' plain language interpretation, both here and in the opening brief,[21] acknowledges both the legislature's appropriation power and the overall framework for the CBR. At its core, article IX, section 17 made a handful of prospective changes to the state's budgeting framework. The CBR provides that certain windfall profits[22] are more difficult than most monies for the legislature to access[23] — except in lean times to stabilize state spending[24] — and that any amounts taken from the CBR are to be repaid with any leftover unappropriated money that remains at the end of a fiscal year.[25]

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[19] *See* Alaska Const. art. IX, § 17(d).

[20] *See Hickel*, 874 P.2d at 929 ("One of the purposes of the [CBR] amendment . . . was to provide a 'stabilizing mechanism' in the budgetary process." (citation omitted)).

[21] *See* Motion at 18-19.

[22] Alaska Const. art. IX, § 17(a).

[23] Alaska Const. art. IX, § 17(c).

[24] Alaska Const. art. IX, § 17(b).

[25] Alaska Const. art. IX, § 17(d).

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Plaintiffs' reading of section 17(d), where all remaining surplus funds existing in the general fund are used to repay the CBR each year, is consistent with its plain language.

Once the timing of the test is considered, Plaintiffs' interpretation of section 17(d)'s plain language is not inconsistent with *Hickel*. After all, as Attorney General Treg Taylor recently opined when determining that current appropriations should be excluded from the sweep and paid under *Hickel*,[26] "monies which already have been validly committed by the legislature to some purpose should not be counted as available,"[27] because "any given sum of money can only be appropriated once during a given time period."[28] Neither *Hickel* nor the Alaska Constitution should be read to disturb or void existing appropriations, such as the HEIF. As discussed below, this is why the Executive Branch both misstates *Hickel*'s definition of "available for appropriation" and argues that the initial HEIF appropriation is invalid under the Alaska Constitution.[29]

B. The 1990 framers intended for section 17(d)'s sweep to apply only to remaining surplus monies.

One of the fundamental principles for interpreting the Alaska Constitution is to look to the framers' intent.[30] Yet the Executive Branch provides *no* support for its

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[26] *See generally* Taylor Memo (Exhibit 15 *to* Lindemuth Aff.).

[27] *See id.* (emphasis omitted) (quoting *Hickel*, 874 P.2d at 930-31) (Exhibit 15 *to* Lindemuth Aff.).

[28] *Hickel*, 874 P.2d at 931 n.20.

[29] *See infra* Part III and accompanying text.

[30] *See Wielechowski*, 403 P.3d at 1146 (explaining that courts "look to the plain meaning *and purpose of the provision and the intent of the framers*" when analyzing a constitutional provision (emphasis added) (quoting *Hickel*, 874 P.2d at 926)); *see also id.*

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position through *any* citation to either the 1990 framers who drafted what is now section 17(d) *or* the constitutional delegates who established the legislature's appropriation power.[31]

Plaintiffs acknowledge there is very little history about what the 1990 framers intended for section 17(d) because its language was added on the house floor at the tail end of the legislative session.[32] But one statement that does exist also happens to be from one of the two representatives the *Hickel* Court relied on when interpreting the meaning of section 17(b).[33] And Representative Kay Brown explained section 17(d)'s language by stating that the CBR "would be repaid . . . out of any general fund surpluses that remain at the end of the fiscal year."[34] This statement simply cannot be seen as evincing an intent to claw back or undo prior valid legislative appropriations as the Executive Branch suggests.

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at 1148-50 (analyzing legislative history to determine the intent of the framers for a popularly-enacted constitutional amendment).

[31] *See generally* Opposition and Cross-Motion. *Hickel* also does not discuss the intent of the 1990 framers with respect to section 17(d). *See Hickel*, 874 P.2d at 936.

[32] *See* Motion at 20-23.

[33] *See Hickel*, 874 P.2d at 929 & n.18 (relying on a statement of Representative Kay Brown); *see also* State of Alaska, Official Election Pamphlet, Ballot Measure No. 1, at 2 (1990) [hereinafter 1990 Election Pamphlet] (listing Representative Kay Brown as one of the authors of the sponsor statement in favor of the ballot measure which created the CBR) (Exhibit 1 *to* Lindemuth Aff.).

[34] *See* House Floor Session on SJR 5, 16th Leg., 2d Sess., Audio 2, 1:02:50-1:03:08, http://www.akleg.gov/ftr/archives/1990/HFLR/121-HFLR-900508-2.mp3 (May 8, 1990) (emphasis added) (Statement of Representative Kay Brown) [hereinafter Statement of Representative Kay Brown].

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Representative Brown's statement, and Plaintiffs' explanation of it, is entirely consistent with overall purpose of the CBR. The CBR set aside certain windfall profits so that they could be used by a simple majority of the legislature in leaner times to help stabilize the operation of state government.[35] It was not, as the Executive Branch suggests, intended to fundamentally reshape the legislature's appropriation power.[36] As explained by the *Hickel* Court, "[o]ne of the purposes of the [CBR] amendment . . . was to provide a 'stabilizing mechanism' in the budgetary process."[37] It would be inconsistent with that stabilization principle for the CBR's repayment provision to be so powerful and draconian that it could undo valid appropriations, including special funds contemplated by the delegates at the constitutional convention.[38]

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[35] *See Hickel v. Halford*, 872 P.2d 171, 177 (Alaska 1994) ("[T]he purpose of the amendment . . . was to remove certain unexpected income from the appropriations power of the legislature, and to save that income for future need." (footnote omitted)); *id.* at 177 n.9 ("Article IX, section 17 is a response to a perceived impending fiscal crisis resulting from a growing gap between State spending levels and general fund revenues. To combat this 'gap' and the crisis thought to accompany it, the amendment seeks to hold down current spending levels, by preventing the legislature from appropriating certain 'windfall' receipts *and* creating a savings fund to help offset future revenue declines." (emphasis in original) (citations omitted)).

[36] *See* Opposition and Cross-Motion at 19-20 (claiming that the CBR was intended "to limit the legislature's power of appropriation; the whole point of the CBR is to take revenues that would previously have been available to the legislature to appropriate every year and lock them away in a savings account requiring either a [three-fourths] majority or a decline in the state's funds to access and to require the legislature to repay any money it withdrew from that account").

[37] *Hickel*, 874 P.2d at 929 (citation omitted).

[38] *See State v. Alex*, 646 P.2d 203, 208-210 (Alaska 1982); *see also infra* Section III.E and accompanying text.

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The Alaska Supreme Court has made it clear that a "robust discussion . . . would be expected" if the legislature had intended "a sweeping constitutional change and a consequent sweeping change to the state's budgetary framework."[39] It speaks volumes that the Executive Branch cannot point to any legislative history supporting its belief that section 17(d) authorized the sweep of monies that the legislature had already appropriated to a specific public purpose. The 1990 framers simply intended to repay the CBR with whenever "surplus[]" monies in the general fund "remain" after all other legislative appropriations.[40]

C. The voters understood that the sweep contained in section 17(d) would apply only to "[s]urplus general fund money."

The Executive Branch notes that voters' understanding of section 17(d) can be considered to determine its meaning.[41] But then, curiously, the Executive Branch fails to

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[39] *Wielechowski*, 403 P.3d at 1149-50.

[40] *See* Statement of Representative Kay Brown.

[41] *See* Opposition and Cross-Motion at 10; *see also Wielechowski*, 403 P.3d at 1146-47 (" '[A]bsent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision' without 'add[ing] "missing terms" to the Constitution or . . . interpret[ing] existing constitutional language more broadly than intended by . . . the voters.' " (alterations in original) (footnote omitted) (first quoting *Hickel*, 874 P.2d at 926; then quoting *Hickel*, 874 P.2d at 927)); *id.* at 1150-51 (analyzing "any published arguments . . . to determine what meaning voters may have attached to the [proposed constitutional amendment]" (alterations in original) (quoting *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007))).

cite a single new source to support its position that section 17(d) created a new overarching limitation on the legislature's appropriation power.[42]

Plaintiffs have already shown that the voters' understanding of section 17(d) would have comported with the 1990 framers' intent: only remaining surplus general fund money would be used to repay the CBR.[43] In the voting booth, voters would have seen an explanation that the CBR "would have to be paid back from money *left* in the treasury's general fund."[44] Additionally, the nonpartisan legislative affairs agency explained in the general election voter pamphlet that, although "[m]oney . . . appropriated from the [CBR] must be repaid," that repayment would *only* occur with "[s]urplus general fund money."[45] Furthermore, the statement in support of the measure clearly contemplated that only surplus funds would be used to repay the CBR; otherwise, its supporters would not have explained that "[i]f the next year revenues are insufficient [and] the Legislature cannot afford to replenish the [CBR], the 'debt' will carry forward until it is repaid."[46]

The fact that the Executive Branch did not point to a single piece of evidence to support its position about the voters' understanding of section 17(d) is particularly telling since it previously relied on such evidence in prior briefing. In *AFN v. Dunleavy*, the

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[42] *See generally* Opposition and Cross-Motion. Again, *Hickel* also does not discuss the voters' understanding of section 17(d). *See Hickel*, 874 P.2d at 936.

[43] *See* Motion at 20-24.

[44] 1990 Election Pamphlet at 1 (emphasis added) (Exhibit 1 *to* Lindemuth Aff.).

[45] *Id.* (Exhibit 1 *to* Lindemuth Aff.).

[46] *Id.* at 2 (Exhibit 1 *to* Lindemuth Aff.).

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Executive Branch cited multiple opinion pieces that had been published in the Anchorage Daily News about the CBR — on both sides of the issue — prior to the 1990 election.[47] Perhaps the Executive Branch this time around, recognizing that both of those 1990 opinion pieces actually support *Plaintiffs'* position, decided it might be better to ignore them.[48] But if anything, these two opinion pieces only strengthen Plaintiffs' position on what voters understood the sweep provision contained in section 17(d) to mean.

As the Alaska Supreme Court explained in *Wielechowski v. State*, it would be "a far leap to conclude voters understood and intended . . . to [change] the legislature['s] broad [appropriation] power . . . . Surely there would have been some public discourse about a . . . sweeping [change in] legislative authority; its absence, like the absence of discussion in the . . . legislature, is telling."[49] Voters understood that the CBR would impose limitations on when the legislature could spend certain windfall profits;[50] voters

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[47] *See* Defendants' Opposition and Cross-Motion for Summary Judgment, *AFN v. Dunleavy*, 3AN-21-06737CI, at 25, 27-28 (July 27, 2021) (first citing Roger Cremo, Opinion, ANCHORAGE DAILY NEWS, 1990 WLNR 4069423 (Oct. 20, 1990) [hereinafter Cremo Opinion]; then citing Staff, Opinion, "Bank it", ANCHORAGE DAILY NEWS, 1990 WLNR 4063810 (Aug. 31, 1990) [hereinafter Staff Opinion]); *see also* Staff Opinion (supporting the creation of the CBR); Cremo Opinion (opposing the creation of the CBR).

[48] *See* Staff Opinion ("If it passes, lawmakers can stash any *leftover* money [in the CBR]." (emphasis added)); Cremo Opinion ("There is provision for restoration of money taken from [the CBR]. . . . [A]ll that's required is that the legislature put back into the fund any *surplus* left in the General Fund at the end of each year, until restoration is complete." (emphasis added)).

[49] 403 P.3d at 1151.

[50] *See Hickel*, 874 P.2d at 929; *see also Hickel v. Halford*, 872 P.2d 171, 177 n.9 (Alaska 1992).

would not have understood that the CBR would impose "sweeping" changes to the legislature's regular budgetary process.[51] Because all of the evidence surrounding the 1990 election shows that voters would have understood section 17(d) to apply only to leftover or surplus general funds remaining at the end of the fiscal year, this court should accept Plaintiffs' interpretation.[52]

III. The Executive Branch's Argument That *Hickel* Controls Is Fatally Flawed And Must Be Rejected.

Rather than perform a constitutional analysis, the Executive Branch strenuously argues that the issue of what is "available for appropriation" for purposes of the section 17(d) sweep was already decided under *Hickel*, and that this court must follow that case. To hide the flaws in a blind application of the section 17(b) test found in *Hickel* to what funds are subject to the CBR sweep, the Executive Branch first misreads the test as not including valid current appropriations, and then argues that the legislature's initial appropriation to the HEIF is somehow not constitutionally valid because appropriations

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[51] *See Wielechowski*, 403 P.3d at 1151.

[52] Plaintiffs note that their interpretation of section 17(d) would continue to serve as a powerful repayment provision; the legislature's failure to obtain enough votes for a reverse sweep for FY2022 would likely still cause hundreds of millions of dollars to flow back into the CBR. *See* GF Sub Fund Sweep – FY19, Handout by Alexei Painer, Legislative Finance Analyst, Before S. Fin. Comm., 31st Leg., 2d Sess., Mar. 4, 2020 (showing that, without the "Power Cost Endowment" and "Alaska Higher Education Investment" funds being subject to the sweep, the legislature's failure to effectuate a reverse sweep in 2019 would still have swept over $327 million) (Exhibit 21 *to* Second Affidavit of Jahna M. Lindemuth (Jan. 27, 2022) [hereinafter Second Lindemuth Aff.]).

within the state treasury "are not true appropriations."[53] The Executive Branch also implicitly argues that the legislature does not have the power to move monies in the state treasury to establish special funds (like the HEIF) with appropriations that "do[] not lapse."

The Executive Branch is wrong. Not only is the Executive Branch's proposed test for sweepability based on a conveniently-selective reading of *Hickel*'s definition of "available for appropriation," its conception of the legislature's powers is fundamentally flawed. The legislature's appropriations to the HEIF are, in fact, constitutionally-valid appropriations. And the statutory scheme establishing an endowment-like framework for the HEIF is similarly not prohibited by the Alaska Constitution. The Executive Branch's interpretation of section 17(d) should be rejected.

A. The Executive Branch's proposed test for determining what funds are subject to the sweep is based on an improper and selective reading of *Hickel*.

First, the Executive Branch misreads the *Hickel* test for section 17(b) while arguing that the test should apply to section 17(d). The Executive Branch claims that *Hickel* defined "available for appropriation" as "all monies over which the legislature has retained the power to appropriate and which require further appropriation before

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53 *See* Opposition and Cross-Motion at 14.

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expenditure."[54] But this sentence actually states only *part* of the test for what funds the *Hickel* Court deemed to be "available for appropriation" with respect to section 17(b).

The *Hickel* Court primarily considered what funds should be considered "available for appropriation" for purposes of determining whether section 17(b)'s stabilization mechanism permits the legislature to access the CBR's monies through a simple majority vote.[55] And in that context, the *Hickel* Court held that:

> "amount available for appropriation" must include all funds over which the legislature has retained the power to appropriate and which are not available to pay expenditures without further legislative appropriation. ***It must also include all amounts which the legislature actually appropriates for the fiscal year***, whether or not they could have been considered available prior to the appropriation."[56]

The *Hickel* Court repeated this rule later in its opinion: "In addition, ***all amounts actually appropriated***, whether or not they would have been considered available prior to appropriation, ***are available within the meaning of section 17***."[57]

The fact that the Executive Branch purposefully ignored the unambiguous full definition of "available for appropriation" from *Hickel* shows precisely how unworkable using *Hickel*'s section 17(b) definition would be if applied to section 17(d). It also

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54 *See* Opposition and Cross-Motion at 11 (citing *Hickel*, 874 P.2d at 935).

55 *See Hickel*, 874 P.2d at 926-36.

56 *Id.* at 927 (emphasis added).

57 *Id.* at 935 (emphasis added).

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confirms the Executive Branch's outcome-oriented approach to defining section 17(d).[58] Were this court to adopt and apply *Hickel*'s section 17(b) definition of "available for appropriation" to section 17(d), *all* appropriations — *including those for the current fiscal year* — would be swept. With the CBR's current amount outstanding totaling roughly $10 billion, that would mean the legislature would not be able to fund state government — absent supermajorities in both legislative bodies — for the next two years.

Indeed, in addition to endowment funds like the HEIF, multi-year non-lapsing capital appropriations would also be annually threatened if the Executive Branch was strictly required to sweep all funds that met the section 17(b) test in *Hickel*. Appropriated funding for five-year capital budget projects, such as constructing a new building or an overpass, could be swept away into the CBR in year three; the Executive Branch's interpretation of the *Hickel* test would leave dozens of large-scale projects "mothballed" or abandoned throughout Alaska.

Understanding this, Attorney General Taylor opined that "monies which already have been validly committed by the legislature to some purpose should not be counted as available" when he determined that FY2022's appropriations should still be honored under *Hickel*.[59] But the Executive Branch's brief completely ignores the Attorney

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[58] After all, the Governor introduced legislation to eliminate the HEIF in 2019. *See* 2019 House Bill No. 130, §§ 14, 15(b) (Exhibit 10 *to* Lindemuth Aff.); 2019 Senate Bill No. 110, §§ 14, 15(b) (Exhibit 11 *to* Lindemuth Aff.).

[59] *See* Taylor Memo at 2 (emphasis omitted) (quoting *Hickel*, 874 P.2d at 930-31) (Exhibit 15 *to* Lindemuth Aff.).

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General's analysis from last August, just like it did for the full definition of "available for appropriation" found in *Hickel* for purposes of section 17(b).[60] The Executive Branch's dangerous misreading of *Hickel* should not be adopted by this court.

B. Appropriations to the HEIF are "true" appropriations.

There should be no dispute that the appropriation which capitalized the HEIF is, in fact, a valid appropriation under the Alaska Constitution. The Executive Branch characterizes the initial $400 million appropriation to the HEIF in 2011 as illegitimate,[61] in order to argue that it was somehow a "soft" or "not true appropriation[]."[62]

This court should easily reject the Executive Branch's mischaracterization. There is no question that the legislature appropriated $400 million from the Alaska Housing Capital Corporation for the soon-to-be-created HEIF in 2011:

> (f) The sum of $400,000,000 is appropriated from receipts of the Alaska Housing Capital Corporation created under AS 18.56.086 to a fund created for the purpose of providing education grants or performance scholarships, or both, by the Twenty-Seventh Alaska State Legislature.[63]

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60 *See generally* Opposition and Cross-Motion.

61 *See id.* at 7-8.

62 *See id.* at 14 ("They are, under the *Hickel* analysis and in reality, accounting designations and not true appropriations in the sense of expenditures of money.").

63 *See* ch. 5, § 20(f), FSSLA 2011 (Exhibit 22 *to* Second Lindemuth Aff.).

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There is also no question that the legislature explicitly identified that $400 million appropriation as the HEIF's initial capitalization in 2012.[64] And the legislature continues to make additional appropriations to the HEIF, including for FY2022.[65]

The initial HEIF appropriation was contained in an appropriation bill, required by article II, section 13 of the Alaska Constitution,[66] alongside hundreds of other valid appropriations from those years. The initial HEIF appropriation was precisely that — an appropriation. Nothing contained in that appropriation bill for FY2012 shows that the HEIF appropriation was somehow less of an appropriation than any other;[67] the same is true for the appropriation into the HEIF for FY2022.[68]

Notably, the initial $400 million appropriation to the HEIF was never made with the specific goal of converting CBR monies into an untouchable account. To the contrary, this appropriation was made when all prior appropriations from the CBR had been fully

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[64] *See* ch. 74, § 27, FSSLA 2012 ("The [HEIF] established in AS 37.14.750 . . . is the fund identified in sec. 20(f), ch. 5, FSSLA 2011.").

[65] *See* ch. 1, § 71(*l*), SSLA 2021 (Enrolled HB 69 (signed June 30, 2021) [hereinafter FY2022 Operating Budget] (appropriating over $500,000 to the HEIF in FY2022) (Exhibit 6 *to* Lindemuth Aff.).

[66] Alaska Const. art. II, § 13 ("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.").

[67] *See* ch. 5, § 20(f), FSSLA 2011 (Exhibit 22 *to* Second Lindemuth Aff.).

[68] *See* FY2022 Operating Budget at 4 (Exhibit 6 *to* Lindemuth Aff.).

repaid,[69] and the HEIF's initial monies came from outside of the general fund.[70] The HEIF's initial appropriation unquestionably meets the definition for an appropriation: "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[71] In fact, thanks to the legislature's appropriations directing the executive to invest its monies, the HEIF gained approximately $12.3 million in December 2021 alone, equivalent to an annualized rate of return of over 40%.[72]

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[69] *See* Legislative Finance Division, Fund Source Report, Constitutional Budget Reserve Fund, at 2 (last accessed Jan. 24, 2022) (noting that the CBR was fully repaid in FY2010) (Exhibit 23 *to* Second Lindemuth Aff.); *see also* Affidavit of Neil Steininger, at ¶ 6 (Jan. 19, 2022).

[70] *See* ch. 5, § 20(f), FSSLA 2011 (showing that the money to capitalize the HEIF came from the Alaska Housing Capital Corporation) (Exhibit 22 *to* Second Lindemuth Aff.).

[71] *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles*, 86 P.3d 891, 898 (Alaska 2004) [hereinafter *Knowles II*] (quoting *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977)).

[72] *Compare* HEIF, Net Asset Value, As of the Month Ending December 31, 2021 (valuing the HEIF at $422.8 million as of December 31, 2021) (Exhibit 24 *to* Second Lindemuth Aff.), *with* HEIF, Net Asset Value, As of the Month Ending November 30, 2021 (valuing the HEIF at $410.5 million as of November 30, 2021) (Exhibit 18 *to* Lindemuth Aff.). In contrast, the CBR's value did not even increase by $40,000 in December 2021, which is equivalent to an annualized rate of return of approximately 0.04%. *See* Treasury Division, Accounting Section, General Fund and Other Non-Segregated Investments (GeFONSI) (Jan. 20, 2022) (Exhibit 25 *to* Second Lindemuth Aff.).

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The HEIF monies are not just sitting around in a passive checking account of state government waiting to be spent. The HEIF monies have been appropriated, or obligated, with the specific purpose of generating money to fund scholarships and grants for Alaskan students pursuing postsecondary education in Alaska — a purpose that recent returns demonstrate the monies are fulfilling. That is exactly what "the executive officers of the government are authorized to use that money" for, and nothing else, *because* of the legislature's appropriations.[73] The fact that the legislature retains the ability to change its mind and appropriate those monies to a different purpose is immaterial to the authenticity or lawfulness of the prior appropriations.

C. The Alaska Constitution does not differentiate between appropriations, and the HEIF appropriation is constitutionally sound.

The Alaska Constitution "gives the legislature the power to legislate and appropriate."[74] Furthermore, "the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[75] The legislature needs only to sufficiently describe a monetary asset transfer "to allow identification of the monies involved" to constitute an appropriation.[76]

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[73] *Knowles II*, 86 P.3d at 898 (quoting *Thomas*, 569 P.2d at 796).

[74] *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) [hereinafter *Knowles I*] (footnote omitted) (first citing Alaska Const. art. II, § 1; then citing Alaska Const. art. II, § 13).

[75] *Knowles II*, 86 P.3d at 895 (emphasis added) (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988)).

[76] *See id.* at 898 n.39.

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In order to argue that the appropriations to the HEIF must be swept under *Hickel*, the Executive Branch attempts to redefine what an appropriation is under the Alaska Constitution, and argues that the "soft" appropriations to the HEIF are merely "accounting designations" and are not constitutionally valid.[77] According to the Executive Branch, so long as money appropriated to a subfund requires another appropriation before expenditure, the first appropriation moving monies within the state treasury is "not [a] true appropriation[]."[78]

In support of this new definition of an appropriation, the Executive Branch cites article IX, section 13 of the Alaska Constitution; that provision provides that "[n]o money shall be withdrawn from the treasury except in accordance with appropriations made by law."[79] The Executive Branch argues that under this constitutional provision the legislature's 2011 appropriation into the HEIF subfund was not a real appropriation because the funds did not leave the state treasury.[80]

As discussed above, the legislature's appropriation power is found in article II.[81] Article IX, section 13, entitled "Expenditures," does not limit or define the *legislature's*

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77 *See* Opposition and Cross-Motion at 14.

78 *See id.*

79 Alaska Const. art. IX, § 13.

80 *See* Opposition and Cross-Motion at 14 ("Simply put, 'appropriations' to the HEIF are not true appropriations.").

81 *See Knowles I*, 21 P.3d at 371 (explaining that the Alaska Constitution "gives the legislature the power to legislate and appropriate" (footnote omitted) (first citing Alaska Const. art. II, § 1; then citing Alaska Const. art. II, § 13)).

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appropriation power; instead this constitutional provision ensures that the *executive* cannot expend or obligate state money without the authority of the legislature.[82] The next sentence in section 13 confirms this limitation on the executive branch: "No obligation for the payment of money shall be incurred *except as authorized by law*."[83]

The Alaska Supreme Court has never interpreted article IX, section 13 as establishing a limitation on the legislature's appropriation power as the Executive Branch now suggests, nor has it ever held that there are second-class or "soft" appropriations under any other provision in the Constitution.[84] In fact, the Alaska Supreme Court in *Wielechowski* held that any transfer from the Earnings Reserve Account to the dividend fund — both "separate state treasury account[s]"[85] — *requires* a legislative appropriation.[86]

Hickel did not define "available for appropriation" to identify existing appropriations that could be diminished in some way. The purpose was to identify what

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[82] *See* Alaska Const. art. IX, § 13.

[83] *See* Alaska Const. art. IX, § 13 (emphasis added).

[84] *See Knowles II*, 86 P.3d at 893-87 (analyzing the legislature's appropriation power under article II, and not articles IX or XI); *Knowles I*, 21 P.3d at 371 ("[T]he Alaska Constitution . . . gives the legislature the power to . . . appropriate" (citing Alaska Const. art. II, § 13)); *see also Simpson v. Murkowski*, 129 P.3d 436, 446 (Alaska 2006) ("The legislature has the power to pass appropriation bills." (citing Alaska Const. art. II, §§ 1, 13)); *Hickel*, 874 P.2d at 925 ("[T]he power to appropriate is wholly legislative[.]" (citing Alaska Const. art. IX, § 13)).

[85] *See Wielechowski*, 403 P.3d at 1145.

[86] *See id.* at 1152.

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monies were part of a comparative "*amount* available for appropriation" to determine what type of legislative majority would be necessary to make *future* appropriations from the CBR under section 17(b).[87] *Hickel* defined "available for appropriation" in section 17(b) to have an apples-to-apples comparison to the prior year's spending to determine whether the legislature could access a certain amount of emergency CBR savings with a simple majority vote.[88] That decision did not hold that funds subject to valid appropriations that have not lapsed must be swept under section 17(d), or that such appropriations were somehow constitutionally invalid in the first instance.

D. The Executive Branch's interpretation also violates the HEIF statute which provides that appropriations to the HEIF do not lapse.

The statute creating the HEIF specifically states that appropriations to it "do[] not lapse."[89] The Executive Branch's argument would render those words meaningless, and would greatly truncate the legislature's appropriation power in a way never before allowed by the Alaska Supreme Court.

At the outset, it is important to reiterate that the executive branch of government must follow the law. Indeed, the Alaska Constitution itself explicitly provides that "[t]he

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87 *See Hickel*, 874 P.2d at 926-35; *see also Wielechowski*, 403 P.3d at 1151 n.66 ("In *Hickel* we considered, on an expedited basis, what funds were 'available for appropriation' *within the meaning of article IX, section 17(b) of the Alaska Constitution*[.]" (emphasis added) (citing *Hickel*, 874 P.2d at 925-26)).

88 *See Hickel*, 874 P.2d at 926-36.

89 AS 37.14.750(a).

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governor shall be responsible for the faithful execution of the laws."[90] And the HEIF is not just an aspirational goal or policy: it is law.[91] Furthermore, the Supreme Court has repeatedly directed courts to "construe statutes so as to avoid the danger of unconstitutionality."[92]

There should be no question that the HEIF was established as an endowment to support Alaskan students pursing post-secondary educational opportunities in Alaska.[93] This is clear from the HEIF statute itself, which provides that "[m]oney in the fund does not lapse,"[94] and which requires "the commissioner of revenue" to "identify seven percent" of the HEIF's value to support the Alaska Performance Scholarship ("APS") and Alaska Education Grant ("AEG") programs each year.[95]

The Executive Branch nevertheless claims that the sentence "[m]oney in the fund does not lapse" has no meaning and should be ignored.[96] But this court does not need to

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90 Alaska Const. art. III, § 16.

91 AS 37.14.750.

92 *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 1007 (Alaska 2019) (quoting *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001)); *see also State v. ACLU of Alaska*, 204 P.3d 364, 373 (Alaska 2009) ("[W]hen constitutional issues are raised, this court has a duty to construe a statute, where reasonable, to avoid dangers of unconstitutionality." (citing *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007))).

93 *See* AS 37.14.750(a).

94 AS 37.14.750(a).

95 *See* AS 37.14.750(c).

96 *See* AS 37.14.750(a).

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condone the Executive Branch's desire to circumvent and disrespect the law. Words have meaning, and the law provides that "[m]oney in the [HEIF] does not lapse."[97] Those words, and the rest of the HEIF statute, should be respected by the Executive Branch and this court.

E. The legislature retains the ability to establish separate funds.

By arguing that the HEIF was funded with an appropriation that is invalid under the Constitution, the Executive Branch effectively argues that the legislature cannot create special funds — including endowment funds — with appropriations that do not lapse.[98] But the exact opposite is true; the Alaska Supreme Court has previously held that the legislature *always* has been able to create such funds under our Constitution, so long as revenues or taxes appropriated to those special funds are not "dedicated," such that the funds remain under the control of the legislature to reappropriate for another use.

In *State v. Alex*, the Alaska Supreme Court considered the anti-dedication clause contained in article IX, section 7 of the Alaska Constitution.[99] And in discussing the constitutional convention history surrounding a change in the language for the anti-dedication clause, the *Alex* Court noted "that the purpose of the proposed amendment was *to allow for the setting up of certain special funds, such as sinking funds for the repayment*

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97 AS 37.14.750(a).

98 *See* Opposition and Cross-Motion at 17-18.

99 646 P.2d 203, 208-210 (Alaska 1982).

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of bonds, but to prohibit the earmarking of any special tax to that sinking fund."[100] The Supreme Court has repeated this holding, confirming that there is no constitutional provision prohibiting the legislature from establishing special funds.[101]

The parties agree that the HEIF is not a dedicated fund.[102] This means that the legislature can, and has, appropriated money from the HEIF for any public purpose, irrespective of the purposes listed in AS 37.14.750.[103] Indeed, the legislature's recent use of the HEIF to support medical students in the WWAMI program confirms that the HEIF is not a dedicated fund.[104]

But it is also just as clear that nothing in the Alaska Constitution prohibits the legislature from appropriating money to "set[] up" a "special fund[]" like the HEIF,[105]

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[100] *Id.* at 210 (emphasis added) (citing 4 Proceedings of the Alaska Constitutional Convention (PACC) at 2363 (Jan. 17, 1956)).

[101] *See Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1169 (Alaska 2009) ("We interpreted an amendment to the proposed provision that inserted 'proceeds of any state tax or license' in the place of 'all revenues' as an effort to 'allow for the setting up of certain special funds, such as sinking funds for the repayment of bonds,' rather than 'to exempt some sources of revenue from the prohibition.' " (quoting *Alex*, 646 P.2d at 210)).

[102] *See* Motion at 9, 18 n.71 (acknowledging that the HEIF's monies have been used for appropriations for more than just the APS and the AEG programs); Opposition and Cross-Motion at 8 ("Although the purpose of the HEIF was to support these two named programs, the legislature undisputedly may appropriate money from the fund for other purposes.").

[103] *See* FY2022 Operating Budget at 2 (Exhibit 6 *to* Lindemuth Aff.) (showing appropriations from the HEIF to the WWAMI and Live Homework Help programs); *see also* Opposition and Cross-Motion at 8.

[104] *See* FY2022 Operating Budget at 2 (Exhibit 6 *to* Lindemuth Aff.).

[105] *See Alex*, 646 P.2d at 210.

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including one with an appropriation that "does not lapse."[106] If the constitutional convention delegates wanted the legislature to possess the power to appropriate monies to establish "sinking funds for the repayment of bonds,"[107] the delegates certainly did not prohibit the creation of an endowment-style fund like the HEIF to generate income for future use for a public purpose.[108] And the legislature *has* established similar money-generating machines, like the Power Cost Equalization Endowment Fund, which is also a statutory creation subject to re-appropriation.[109]

There would be no reason for the legislature to establish a special fund permitting investments and future appropriations if the legislature somehow lacked the ability to establish such a fund containing money that "does not lapse."[110] One legislature cannot bind another to make specific appropriations; legislators always retain the ability to re-appropriate or re-direct funds to a different public purpose.[111] But the legislature certainly still retains the power to establish a fund to generate income to fund a public purpose, and

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106 AS 37.14.750(a).

107 *See Alex*, 646 P.2d at 210 (citing 4 PACC at 2363).

108 *See* AS 37.14.750(a) ("The [HEIF] is established . . . for the purpose of making grants [for the AEG program] . . . and of making scholarship payments [for the APS program.]"); *see also* AS 37.14.750(c) (requiring the commissioner of revenue to annually "identify seven percent" of the HEIF's value for the AEG and APS programs).

109 *See* AS 42.45.070-.085.

110 *See* AS 37.14.750(a) ("Money in the fund does not lapse.").

111 *See Knowles I*, 21 P.3d 367, 378 (Alaska 2001) (confirming that the legislature can amend a prior appropriation in a new appropriation bill); *see also* Alaska Const. art. IX, § 7.

the legislature has the ability decide whether such a fund has monies that will or will not lapse.

The legislature's prior appropriations should not be considered less valid or "true" than the current appropriations for FY2022. Perhaps that is why the Executive Branch now distances itself from language that its own Attorney General emphasized less than five months ago: "monies which already have been validly committed by the legislature to some purpose should not be counted as available."[112] The Governor relied on this very opinion to direct OMB to honor all FY2022 appropriations and not actually effectuate a sweep of the unspent FY2022 appropriations in the general fund at the end of the FY2021 fiscal year.[113] It is now conspicuously absent from the Executive Branch's brief.[114]

IV. The Executive Branch's interpretations would violate separation of powers.

Summarily dismissing Plaintiffs' separation of powers argument,[115] the Executive Branch's proposed interpretation of section 17(d) doubles down on its attack of the legislature's appropriation power.[116] The Executive Branch's argument that the HEIF is

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[112] *See* Taylor Memo at 2 (emphasis omitted) (quoting *Hickel*, 874 P.2d at 930-31) (Exhibit 15 *to* Lindemuth Aff.).

[113] *See* Memorandum from Mike Dunleavy, Governor, to Neil Steininger, Director of OMB (Aug. 25, 2021) (Exhibit 16 *to* Lindemuth Aff.). Fortunately, it appears that the HEIF's monies have not actually been swept at this time. *See* HEIF, Net Asset Value, As of the Month Ending December 31, 2021 (Exhibit 24 *to* Second Lindemuth Aff.).

[114] *See generally* Opposition and Cross-Motion.

[115] *See id.* at 18-20.

[116] *See id.* at 10-18.

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not a valid appropriation under the Alaska Constitution itself disrespects and undercuts article II. This tortured and unfounded interpretation of the Alaska Constitution shows that the Executive Branch *is*, beyond any doubt, attempting to encroach on the legislature's sole power of appropriation.

The Alaska Supreme Court has repeatedly held that the legislature is the sole branch of government with the power to appropriate.[117] And just like the judiciary must continue to serve as the sole branch of government charged with interpreting the Constitution,[118] so too must the legislature be permitted to broadly exercise its appropriation power.[119] Certainly the legislature cannot make appropriations that exceed its constitutional bounds.[120] But absent express language or clear intent to the contrary,

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[117] *See Knowles I*, 21 P.3d at 371 ("[T]he Alaska Constitution . . . gives the legislature the power to . . . appropriate" (citing Alaska Const. art. II, § 13)); *id.* at 372 ("[T]he governor [has] no appropriation power."); *see also Simpson v. Murkowski*, 129 P.3d 436, 446 (Alaska 2006) ("The legislature has the power to pass appropriation bills." (citing Alaska Const. art. II, §§ 1, 13)); *Hickel*, 874 P.2d at 925 ("[T]he power to appropriate is wholly legislative[.]" (citing Alaska Const. art. IX, § 13)).

[118] *Wielechowski*, 403 P.3d at 1142-43 ("[O]f the three branches of our state government, we are entrusted with the 'constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution.' " (quoting *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982))); *see also Hickel*, 874 P.2d at 932 n.24 ("The meaning of the constitution and its application to particular facts are questions squarely within the jurisdiction and inherent power of the judiciary.").

[119] *See Hickel*, 874 P.2d at 925 ("[T]he power to appropriate is wholly legislative[.]" (citing Alaska Const. art. IX, § 13)).

[120] *See Hickel*, 874 P.2d at 925 ("[T]he legislature's role in making appropriations [does not] somehow alter or increase its authority to define constitutional terms merely because the terms contain the word 'appropriation.' ").

any branch of government that restricts the legislature's power to appropriate violates separation of powers.[121]

Article IX, section 17 must be read in harmony with article II and article IX, section 13 of the Alaska Constitution. The Executive Branch's interpretation of section 17(d) violates separation of powers because it unconstitutionally encroaches on the legislature's appropriation power. The Executive Branch asserts that it alone may act as the sole arbiter of what is or is not a "true" appropriation, claiming that the legislature cannot set aside monies in special endowment funds for a public purpose as they have done with the HEIF and countless other funds since statehood.[122] And if the Executive Branch deems an appropriation to somehow be "second class," the money from that appropriation is then at risk of being swept out of existence every year.

The *Hickel* Court did not consider whether section 17(d) had the power to void existing appropriations; indeed, *Hickel* neither changed nor redefined the legislature's general appropriation power.[123] But the Executive Branch's interpretation of

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[121] *See State v. Recall Dunleavy*, 491 P.3d 343, 367 (Alaska 2021) ("[T]he separation of powers doctrine does more than protect each branch's functional existence. We have described the doctrine's purposes as 'to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government.' One branch's threat to the independence of another — well short of its elimination by underfunding — may therefore violate separation of powers." (footnote omitted) (quoting *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007))).

[122] *See* Opposition and Cross-Motion at 14.

[123] *See Hickel*, 874 P.2d at 926-36 (placing a limitation on the ability to appropriate monies from the HEIF).

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section 17(d) in defense of *Hickel* would have that very effect. Because the Executive Branch's opportunity to weigh in on legislative appropriations is constitutionally limited to the governor's veto pen,[124] any attempts by the executive to get a second bite at the apple through what amounts to a back-door veto cannot be constitutional. To safeguard the balance of powers between the branches of government, this court must reject the Executive Branch's interpretation of section 17(d).

V. Conclusion

Because Plaintiffs' interpretation is consistent with the plain language and purpose of article IX, section 17(d), as well as the legislature's article II appropriation power, and because the Executive Branch's interpretation has no basis or support in law, this court should GRANT Plaintiffs' motion for summary judgment, DENY the Executive Branch's cross-motion for summary judgment, and conclude that the HEIF is not subject to the annual CBR sweep provision contained in article IX, section 17(d) of the Alaska Constitution.

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[124] *See* Alaska Const. art. II, § 15; *see also* Alaska Const. art. II, § 17 (giving the governor a limited amount of time to veto bills).

CASHION GILMORE & LINDEMUTH
Attorneys for Plaintiffs

DATE: Jan. 28, 2022

By: _____
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I hereby certify that a copy of the foregoing was served via email on January 28, 2022 on the following:

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FILED
STATE OF ALASKA
THIRD DISTRICT
2022 JAN 28 AM 11: 42
BY DEPUTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Plaintiff, v. GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Defendants.	Court No.: 3AN-22-04028CI

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SECOND AFFIDAVIT OF JAHNA M. LINDEMUTH

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Jahna M. Lindemuth, being first duly sworn and deposed, hereby state as follows:

1. I am counsel for Plaintiff-students Madilyn Short, Riley von Borstel, Kjrsten Schindler, and Jay-Mark Pascua.

2. Attached as Exhibit 21 is a true and correct copy of a handout developed by the Legislative Finance Division, entitled "GF Sub Fund Sweep – FY19," which was presented to the Senate Finance Committee on March 4, 2020.

3. Attached as Exhibit 22 is a true and correct copy of section 20 of FY2012's operating budget (2011 Senate Bill 46), which includes a $400 million appropriation from

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the Alaska Housing Capital Corporation to the later-established Higher Education Investment Fund ("HEIF").

4. Attached as Exhibit 23 is a true and correct copy of the Legislative Finance Division's Fund Source Report for the Constitutional Budget Reserve Fund ("CBR"), last accessed on January 24, 2022, and available at the Legislative Finance Division's website at https://www.legfin.akleg.gov/FundCodes/ShowFundCodes.php.

5. Attached as Exhibit 24 is a true and correct copy of the HEIF Net Asset Value as of December 31, 2021, and the HEIF Schedule of Investment Income (Loss) and Changes in Invested Assets as of December 31, 2021, available on the Department of Revenue website at https://treasury.dor.alaska.gov/home/investments/alaska-higher-education-fund.

6. Attached as Exhibit 25 is a true and correct copy of General Fund and Other Non-Segregated Investments (GeFONSI) through December 31, 2021, available through the Department of Revenue website, and prepared by the Accounting Section within the Treasury Division, at https://treasury.dor.alaska.gov/home/investments/constitutional-budget-reserve.

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FURTHER AFFIANT SAYETH NAUGHT.

Jahna M. Lindemuth
Alaska Bar No. 9711068

SUBSCRIBED AND SWORN to before me this 27th day of January, 2022.

Notary Public in and for Alaska
My Commission Expires: 9/25/24

Notary Public
JOHN P. CASHION
State of Alaska
My Commission Expires September 25, 2024

CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing was served via email on January 28, 2022 on the following:

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GF Sub Fund Sweep - FY19

Fund		Total
1012	Railbelt Energy Fund	3,169,855.45
1019	State Land Reforestation Fund	193.67
1044	Alaska Debt Retirement Fund	29,936.70
1054	Employment Assistance & Training Program	4,128,660.87
1082	AMHS Vessel Replacement	22,127,889.99
1083	Educational Facilities Maintenance & Construction	44.90
1087	Municipal Capital Project Matching Grant	253,498.62
1088	Unincorp Community Capital Project Matching Grant	0.18
1151	Alaska Technical & Vocational Education Program	2,357,023.06
1153	Land Disposal Income Fund	2,985,160.52
1157	Workers' Safety & Compensation Administration	3,900,056.21
1166	Commercial Passenger Vessel Environmental Compliance	9,642,555.79
1168	Tobacco Use Education & Cessation	18,613,962.46
1172	Building Safety Account	521,489.93
1180	Alcohol & Other Drug Abuse Treatment & Prevention	8,417,039.81
1197	Alaska Capital Income Fund	22,965,896.33
1203	Workers' Compensation Benefits Guaranty	3,176,587.88
1220	Crime Victims Compensation Fund	316,693.08
1221	Civil Legal Services Fund	10,380.50
1226	Alaska Higher Education Investment	347,096,462.92
1237	Voc Rehab Small Business Enterprise Revolving	246,561.95
1239	Aviation Fuel Tax Account	2,740.78
1246	Recidivism Reduction Fund	6,652,350.00
1254	Marijuana Education and Treatment Fund	3,799,445.57
3200	Statutory Budget Reserve Fund	177,166,675.05
3211	Prevention Mitigation Account	1,106,796.09
3212	Response Mitigation Account	126,412.01
3221	Originator Surety Fund	995,923.17
3224	Alaska Marine Highway System	23,728,119.03
3225	AMHS Capitalization	2,629,444.40
3388	1 Cent Per Barrel of Oil Produced Surcharge	1,654,059.72
3389	4 Cent Per Barrel of Oil Produced Surcharge	6,612,622.42
		674,434,539.06
1169	AEA - Power Cost Endowment	**1,053,594,529.84**
Total CBR Sweep reported on Note 2 of CAFR:		**1,728,029,068.90**

EXHIBIT 21
Page 1 of 1

000009

LAWS OF ALASKA

2011

FIRST SPECIAL SESSION

Source
HCS CSSB 46(FIN)

Chapter No.
_____

AN ACT

Making and amending appropriations, including capital appropriations, savings deposits in the form of appropriations to the statutory budget reserve fund, and other appropriations; making appropriations to capitalize funds; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

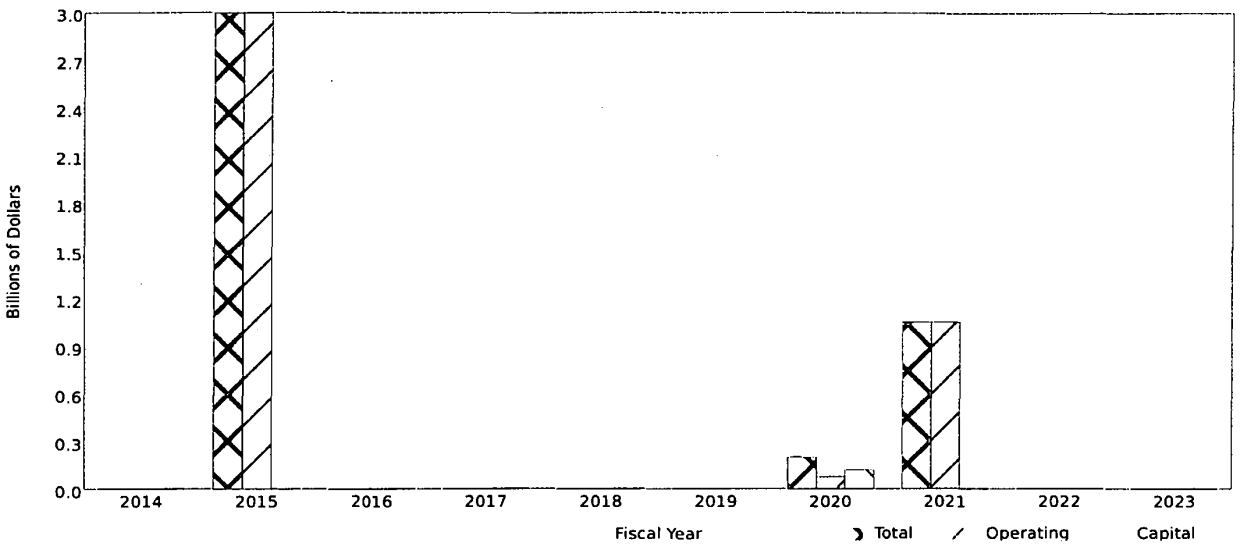
1 with applicable federal statutes.
2 (c) If federal or other program receipts as defined in AS 37.05.146 and in
3 AS 44.21.045(b) fall short of the estimates appropriated by this Act, the affected
4 appropriation is reduced by the amount of the shortfall in receipts.
5 * **Sec. 19.** FUND CAPITALIZATION. (a) The sum of $60,000,000 is appropriated from the
6 general fund to the Alaska Gasline Inducement Act reimbursement fund (AS 43.90.400(a))
7 for the natural gas pipeline project construction inducement under AS 43.90.110(a)(1).
8 (b) The sum of $2,400,000 is appropriated from the general fund to the emerging
9 energy technology fund (AS 42.45.375).
10 (c) The amount of federal receipts from the financial assistance award for emerging
11 energy technology by the Denali Commission established under P.L. 105-277, estimated to be
12 $2,400,000, is appropriated to the emerging energy technology fund (AS 42.45.375) for
13 capital projects.
14 * **Sec. 20.** FUND TRANSFERS. (a) The sum of $2,500,000 is appropriated from the
15 general fund to the alternative energy conservation revolving loan fund (AS 45.88.010).
16 (b) The sum of $30,620,231 is appropriated from the general fund to the renewable
17 energy grant fund (AS 42.45.045(a)).
18 (c) The sum of $200,000,000 is appropriated from the general fund to the Alaska
19 Housing Capital Corporation account.
20 (d) The sum of $400,000,000 is appropriated from the general fund to the Alaska
21 Housing Capital Corporation account.
22 (e) The sum of $200,000,000 is appropriated from receipts of the Alaska Housing
23 Capital Corporation created under AS 18.56.086 to an in-state gas pipeline fund created in
24 AS 18.56 by the Twenty-Seventh Alaska State Legislature.
25 (f) The sum of $400,000,000 is appropriated from receipts of the Alaska Housing
26 Capital Corporation created under AS 18.56.086 to a fund created for the purpose of
27 providing education grants or performance scholarships, or both, by the Twenty-Seventh
28 Alaska State Legislature.
29 * **Sec. 21.** INSURANCE CLAIMS. The amounts to be received in settlement of insurance
30 claims for losses and the amounts to be received as recovery for losses are appropriated from
31 the general fund to the

Fund Source Report

1001 CBR Fund — Constitutional Budget Reserve Fund

Year Authorized	Year Repealed	Active?	Mental Health?	Duplicated?	Fund Group
1990		Yes	No	No	Unrestricted General

Operating and Capital Appropriations



Legal Authority
Art. IX Sec. 17 of the Alaska Constitution

Source of Revenue
Proceeds (except those dedicated to the Permanent Fund) associated with disputes regarding mineral taxes and other mineral revenue.
Income of the fund.

Restrictions on Use
If the amount available for appropriation for a year is less than the amount appropriated in the previous fiscal year, money may be appropriated from the CBRF with a simple majority vote as long as total appropriations do not exceed total appropriations for the prior year.
Money may be appropriated for any public purpose with a 3/4 vote of each house.

Description and History
Article IX, section 17 of the Alaska Constitution became effective on January 2, 1991. It
(1) establishes the constitutional budget reserve as a separate fund in the state treasury,
(2) provides for the deposit of disputed, undedicated mineral tax and mineral revenue into the fund,
(3) establishes limitations on the appropriation of moneys from the fund, and
(4) requires that amounts withdrawn from the fund be repaid from year-end general fund surpluses.

An appropriation from the constitutional budget reserve fund by simple majority is allowed (in limited amounts and under limited circumstances) under section 17(b). The amount projected to be available for appropriation (which includes the Permanent Fund Earnings Reserve Account) in a budget year typically exceeds the amount appropriated in the prior year. This condition precludes access to the CBRF with a simple majority vote. Section 17(b) was applied during the FY04 budget process. Typical access and sweep reversal language was adopted (for FY04) during the FY05 budget process.

A 3/4 vote of each body of the legislature can appropriate money from the CBRF for any purpose under section 17(c). Section (c) allows use of CBRF withdrawals to supplement (or replace) any fund source, but language appropriating CBRF funds (other than for management fees) typically limits withdrawals to "the amount necessary to balance revenue and general fund appropriations."

Money may be borrowed (and repaid) within a fiscal year to meet cash flow requirements of the General Fund (GF). Per DOR policy, withdrawals are in multiples of $50 million and occur whenever the GF balance is below $150 million for three consecutive days. Repayments are made when the GF balance is projected to exceed $300 million for the following four months.

Fund Source Report

Money swept into the CBRF under section (d) has historically (except FY04) been returned immediately to the subaccounts from which it was swept. This has been accomplished by "reverse sweep" provisions incorporated into annual apropriation bills. The reverse sweep requires a 3/4 vote. The FY04 reverse sweep occurred late in the fiscal year as part of the FY05 CBRF supermajority vote negotiations. The reverse sweep typically does not apply to the main account of the GF.

Only direct, specific appropriations from the CBR use fund code 1001; withdrawals that fill GF shortages are reported as general fund appropriations.

September 2011

With the full repayment of the GF liability to the CBR in FY10, GF balances will not be swept to the CBRF at year end unless there is additional borrowing from the fund. Management fees now come from the GF to avoid opening up new liability.

The CBRF will now be reported as Other funds intead of being classified in the GF group. It was classified as GF until a section for transfers was added to the fiscal summary because there was no simple way to show money moving between the CBRF and GF. Open-ended appropriations from the CBRF (to fill a fiscal gap) will now show as transfers from other funds to UGF on a line following the annual surplus/deficit. Direct approprations from the CBRF will be coded to 1001 and appear in the "other funds" column and on page 2 of the fiscal summary as a reduction in savings balances.

June 2014

A $3 billion appropriation from the CBRF in FY15 went to retirement reserves--$2 billion to TRS and $1 billion to PERS. That amount included about $700m in required contributions.

August 2019

Classifying direct CBRF appropriations as other funds while classifying indirect appropriations as UGF is more confusing than informative and distorts comparisons across fiscal years. For example, using the CBRF (as "other funds") for capital projects in the FY20 budget reduces the size of the FY20 UGF budget and will either encourage continued avoidance of UGF for capital projects or distort comparisons of FY20 and FY21 UGF budgets.

Both direct and indirect appropriations from the CBRF have the same impact on reserve balances and, arguably, should have the same impact on the common sense definition of the deficit. Based on the contention that legislators and the public would better understand budgets in which use of the CBR is treated consistently, the CBRF is now classified as a UGF fund code and appropriations from the CBRF will appear as UGF in all reports.

The fiscal summary will now show an increase in the pre-transfer deficit as a result of direct CBRF appropriations--UGF revenue will be unchanged while UGF appropriations increase. The amount of direct appropriations will also appear as a transfer from savings. The reserve balances portion of the fiscal summary will differentiate direct CBRF appropriations from indirect (backfill of UGF) use of the CBRF.

AK Higher Education Investment
Net Asset Value
As of the Month Ending
December 31, 2021

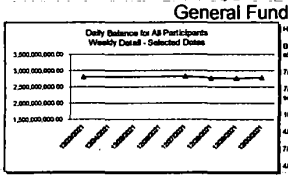
Cash and Cash Equivalents	
Short-term Fixed Income Pool *(Internally Managed)*	$ 4,061,060.34
Total Cash and Cash Equivalents	4,061,060.34
Fixed Income Securities	
Interim-term *(Internally Managed)*	-
Broad-term *(Internally Managed)*	120,825,441.00
High Yield *(Internally Managed)*	-
Total Fixed Income Securities	120,825,441.00
Broad Domestic Equity	
SSgA Russell 3000	171,913,715.93
Total Broad Domestic Equity	171,913,715.93
Global Equity Ex-U.S.	
SOA International Equity Pool	102,604,731.03
Total Global Equity Ex-U.S.	102,604,731.03
Real Assets	
Real Estate Investment Trust Pool *(Internally Managed)*	23,395,312.91
Total Real Assets	23,395,312.91
Receivables and Payables	
Income Receivable/Payable	119.67
Payable To/From	-
Total Receivables and Payables	119.67
Total Assets	**$ 422,800,380.88**

EXHIBIT 24
Page 1 of 2

AK Higher Education Investment
Schedule of Investment Income (Loss) and Changes in Invested Assets
As of the Month Ending
December 31, 2021

	1-Month	Fiscal YTD
Cash and Cash Equivalents		
Short-term Fixed Income Pool *(Internally Managed)*	$ 119.67	$ 962.80
	119.67	962.80
Fixed Income Securities		
Interim-term *(Internally Managed)*	-	-
Broad-term *(Internally Managed)*	(339,457.13)	(176,893.71)
High Yield *(Internally Managed)*	-	-
	(339,457.13)	(176,893.71)
Broad Domestic Equity		
SSgA Russell 3000	6,563,188.58	14,665,822.17
	6,563,188.58	14,665,822.17
Global Equity Ex-U.S.		
SOA International Equity Pool	4,059,686.45	(1,219,374.13)
	4,059,686.45	(1,219,374.13)
Real Assets		
Real Estate Investment Trust Pool *(Internally Managed)*	2,053,750.45	3,132,212.91
	2,053,750.45	3,132,212.91
Total Investment Income (Loss)	**$ 12,337,288.02**	**$ 16,402,730.04**
Payable To/From	-	-
Total Invested Assets, Beginning of Period	**410,549,372.38**	**416,411,393.99**
Net Contribution (Withdrawal)	**(86,279.52)**	**(10,013,743.15)**
Total Assets	**$ 422,800,380.88**	**$ 422,800,380.88**

General Fund and Other Non-Segregated Investments (GeFONSI)



Historically, the operating General Fund has made up about 1/3 of the GeFONSI

Beginning 7/1/00, daily balances shown below include unallocated receipts, some of which may be transferred to non-GeFONSI participants. The daily unallocated balance generally averages about $50 million and doubles at month end

7/3/00 Transfers from CBR through GeFONSI not reflected below

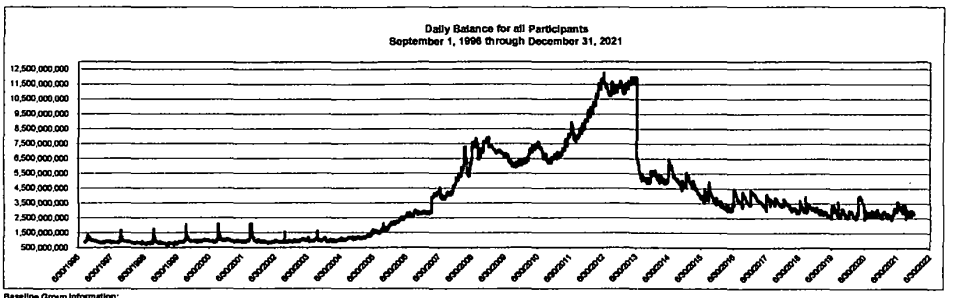
7/25/02 PFD Corporation transferred $357 million to the General Fund for the 2001 dividend. These funds along with $49 million previously invested in the GeFONSI have been invested separately. These balances do not appear on GeFONSI charts.

10/04 Electronic deposits of PFDs were not processed through the GeFONSI.

4/09 The CBR Sub Fund received contributions of $4.1 billion. This was comprised of $1.5 billion from the CBRF main account and $2.6 billion from the General Fund

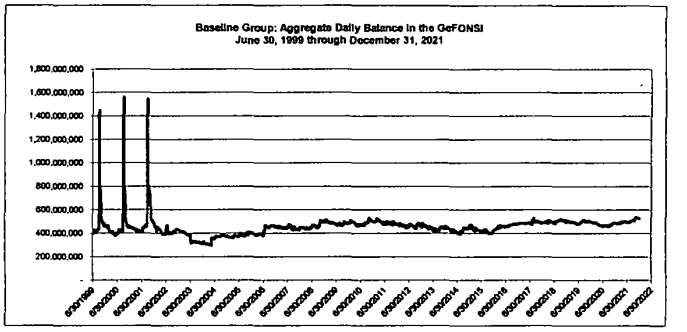
7/13 The $5.4 billion Statutory Budget Reserve Fund was removed from GeFonsi and separately invested.

4/15 The CBR Sub Fund was liquidated in spring of FY15 and all assets transferred into the CBR Main fund.



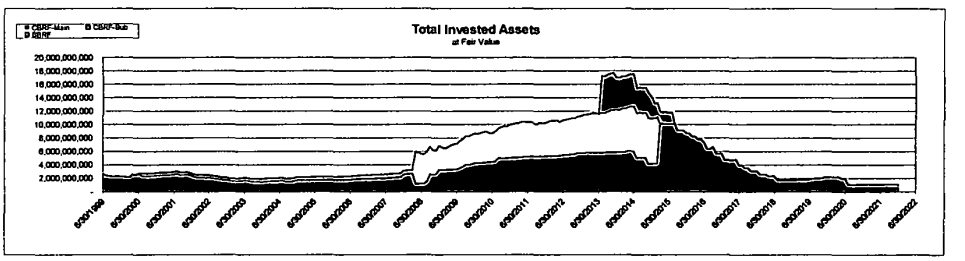
Baseline Group Information:
The baseline group was formed in February 1998 when Treasury considered the creation of a second GeFONSI. The baseline group is composed of participants (funds) which have demonstrated stable balances or predictable trends over time. This group, along with the General Fund, represents the core of the GeFONSI (based on daily balances). The baseline group contains the following participants (additional information is available from Treasury Division, Accounting Section):

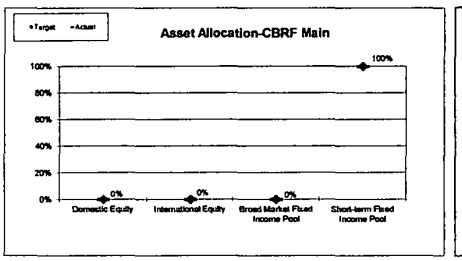
1052 OHSR Substance Prevention*
3208 OHSR Response Account*
1054 Employee Assistance & Training
Storage Tank Assistance
1032 Fishermen's Fund**
1012 Railbelt Energy*
3211 Prevention Mitigation*
3382 OR Restoration*
1087 Municipal CIP Matching Grants**
1088 Unincorporated CIP Matching Grants**
Power Cost Equalization* (Inactive 4/2005)
1030 School Fund
1024 Fish and Game Fund*
3224 AK Marine Highway **
1021 Agricultural Revolving Loan
1036 Commercial Fish Revolving Loan Fund
1079 Alaska Clean Water Fund*
Power Project (Inactive 4/2001)
1026 Highway Equipment Working Capital Fund - Operating
1081 Information Services
3285 Suspense and Deposits
3288 Public Advocacy Trust*
1050 Permanent Fund Dividend
3383 Alyeska Settlement*
1106 Student Loan Corp. - GF Appropriations*

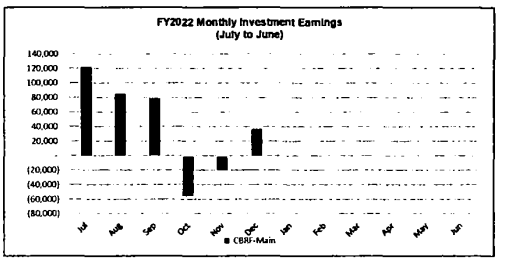


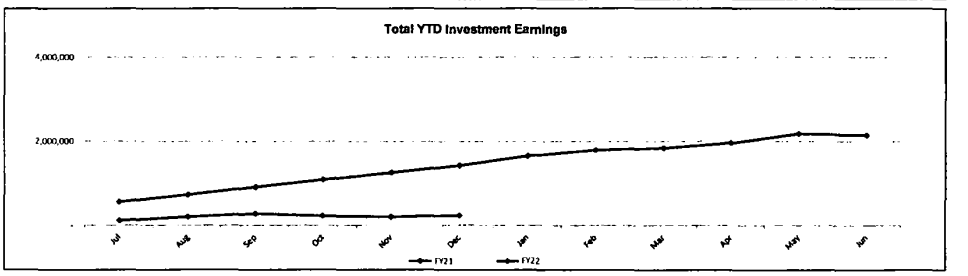
* Indicates that the participant is credited with investment income.
** Indicates that the participant is credited with investment income only if appropriated by the State Legislature.

Constitutional Budget Reserve Fund (CBRF) & Statutory Budget Reserve Fund (SBRF)









Prepared by Treasury Division, Accounting Section
Printed: 1/20/2022 at 8:12 AM

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FILED in the TRIAL COURTS
State of Alaska Third District
JAN 28 2022
Clerk of the Trial Courts
By_____Deputy

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,

Plaintiffs,

v.

GOVERNOR MICHAEL J. DUNLEAVY, in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA DEPARTMENT OF ADMINISTRATION,

Defendants.

Case No.: 3AN-22-04028 CI

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

The Alaska Legislative Council, acting on behalf of the Alaska Legislature, offers this amicus curiae brief to address certain arguments raised by the Defendants regarding the application of article IX, section 17 of the Alaska Constitution to the Higher Education Investment Fund ("HEIF"). Defendants claim that the so-called "sweep" requires the reversal of a decade-old appropriation and the dismantling of existing state services. Defendants are mistaken. Defendants' proposed interpretation fails to take into account the framers' intent and extrinsic indications of the voters' probable understanding of the constitutional provision. This unnecessarily hasty and overbroad imposition of the sweep would undermine the core purpose of the constitutional amendment – stability in budgeting and state services – by disrupting existing state services and second-guessing the wisdom of the Legislature's assessment of particular appropriations. The Legislature made a policy decision more than a decade ago to establish a durable, reliable, non-lapsing investment fund that would serve as an endowment for Alaskan students pursuing higher education. Those funds were appropriated and committed a decade ago for a specific purpose, and they are not "available" to be swept now.

II. INTERESTS OF AMICUS

Article II, section 11 of the Alaska Constitution establishes the Legislative Council as a permanent interim committee of the Alaska Legislature. The Legislature has delegated

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the Council authority to "do all things necessary to carry out legislative directives and law."[1]

Article II, section 13 of the Alaska Constitution vests the power of appropriation of the State of Alaska in the Legislature.[2]

The issues raised in this lawsuit have a direct and immediate impact on the scope of the Legislature's appropriation power, including how that appropriation authority is impacted by article IX, section 17(d) of the Alaska Constitution,[3] and thus the Legislature – appearing through its Legislative Council – has an important interest in being heard in this case. The Court granted the Legislative Council's unopposed motion for leave to participate as amicus curiae on January 21, 2022.

III. FACTUAL BACKGROUND

A. In 1990, the Legislature Drafted Article IX, Section 17 of the Alaska Constitution to Help Provide More Stability to the State's Finances.

In 1990, members of the Legislature were deeply concerned with forecasts of an upcoming "gap" between annual general fund revenues and state spending levels.[4] To address these potential future problems, the Legislature drafted bills for a proposed amendment to the Alaska Constitution that would create the Constitutional Budget Reserve

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[1] AS 24.20.060(4)(E).

[2] *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 371 (Alaska 2001) ("Our analysis begins with the Alaska Constitution. It gives the legislature the power to legislate and appropriate.").

[3] *See, e.g.*, Complaint ¶¶ 34-39.

[4] *See, e.g.*, Affidavit of Jahna M. Lindemuth (filed Jan. 4, 2022) ("Lindemuth Aff."), Exh. 1, at 1-2.

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Fund (the "CBR").[5] That amendment – article IX, section 17 (referred to below simply as "section 17") – was ultimately adopted by the voters later that year. Briefly, the amendment created a savings account with certain funds and allowed the Legislature to access that account under two sets of circumstances.[6] First, if the amount available for appropriation for a fiscal year was less than the prior year, the Legislature could access the fund (up to a cap of the prior year's appropriation) through a simple majority vote.[7] Second, the Legislature could access the fund for any public purpose through a three-fourths affirmative vote of each house.[8] The Legislature was also required to repay appropriations made from the fund:

> If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.[9]

This is the provision at issue in this lawsuit.

As reflected in both the legislative history and in communications to the voting public, one of the chief goals of the constitutional amendment was to "provide some stability" to the State's finances, thus "minimiz[ing] the effects of a 'boom' one year, and

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[5] The primary bills were HJR 66 and SJR 5. The ultimate piece of legislation, HCS CSSSSJR 5 (Fin)am H, was signed by the Governor on July 23, 1990, and placed on the November 1990 ballot.
[6] Alaska Const., article IX, section 17(a).
[7] Alaska Const., article IX, section 17(b).
[8] Alaska Const., article IX, section 17(c).
[9] Alaska Const., article IX, section 17(d).

a 'bust' the next."[10] The CBR would help the Legislature maintain the status quo from year to year, offering a consistent level of appropriations and services to the public without abrupt shifts.

B. The Framers' and Voters' Intent with Respect to Section 17(d).

A leading proponent of the underlying bill, Representative Kay Brown, explained on the House Floor how section 17(d) was intended to work: "And then, if money is borrowed or appropriated from the budget reserve fund in that manner, or any money taken out of it, [the money] would be repaid to the budget reserve fund *out of any general fund surpluses* that remain at the end of the fiscal year."[11] This was reiterated in the election pamphlet distributed to the voters that ratified section 17(d). The summary provided by the Legislative Affairs Agency noted that "[m]oney that is appropriated from the reserve fund must be repaid. *Surplus general fund money* must be deposited in the reserve fund at the end of each year until the reserve fund is repaid."[12] Representative Brown and two other legislators informed voters that "[t]he Legislature will be required to repay any money it appropriates from the Budget Reserve. *If the next year['s] revenues are insufficient [and] the Legislature cannot afford to replenish the Budget Reserve, the 'debt'*

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[10] Lindemuth Aff., Exh. 1 at 2; *see also Hickel v. Cowper*, 874 P.2d 922, 929 (Alaska 1994) ("One of the purposes of the budget reserve amendment, however, was to provide a 'stabilizing mechanism' in the budgetary process." (quoting testimony of budget officer Mary Halloran before the House Finance Committee)).

[11] House Floor session on SJR 5, 16th Leg., 2d Sess., Audio 2, 1:02:51-1:03:08. (http://www.akleg.gov/ftr/archives/1990/HFLR/121-HFLR-900508-2.mp3 (May 8, 1990)) (emphasis added). She went on to explain that there was "broad consensus" that section 17 was necessary to help avoid Alaska's "lumpy" revenue stream and its impact on budgeting. *See id.* at 1:03:10-:19.

[12] Lindemuth Aff., Exh. 1 at 1 (emphasis added).

will carry forward until it is repaid."[13] Taken together, these statements confirm that the Legislature and the voters understood that the repayment (or replenishment) of the CBR would come from annual revenues and any surplus general funds. If those revenues and surpluses were insufficient to satisfy the "debt" to the CBR in any particular year, the debt would be carried over to the next year. It was simply never contemplated that the State would need to sell off assets, de-fund previously established programs, or otherwise undercut existing government services to repay amounts owed to the CBR hastily.

C. The Higher Education Investment Fund.

The HEIF was created in 2012 to operate as an endowment that provides investment income to support the Alaska Education Grant program and the Alaska Performance Scholarship Award program.[14] The Legislature appropriated $400 million in 2011 to create the fund.[15] During this period, it is undisputed that the Legislature was not borrowing any funds from the CBR.[16] While the HEIF is not a dedicated fund,[17] it was created – and funds were appropriated – for a specific purpose: funding scholarships and

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[13] Lindemuth Aff., Exh. 1 at 2 (emphasis added).
[14] *See* §§ 3, 11, 13 ch. 74 SLA 2012; AS 37.14.750. Funds from the HEIF have since been appropriated to support the WWAMI program as well, thereby facilitating medical education for Alaskans. *See* Lindemuth Aff., Exh. 6.
[15] *See* § 20(f), ch. 5 FSSLA 2011.
[16] *See* http://www.akleg.gov/basis/get_documents.asp?session=31&docid=47242 at 9-10 (last visited Jan. 21, 2022) (showing net contributions during FY 11, FY 12, and surrounding years); *see also* Affidavit of Neil Steininger ¶ 6 (stating that fiscal year budget deficits began in FY 2016 and required appropriations from the CBR to the general fund at that time).
[17] AS 37.14.750(b).

grants for Alaska students through the Alaska Commission on Postsecondary Education for a number of years.

The legislative history for the HEIF statute demonstrates that the Legislature intended that its appropriation would be effectuated as a longstanding and durable endowment that would serve students for many years to come. During testimony on the bill that would ultimately create the HEIF, the Executive Director of the Postsecondary Education Commission testified as to the importance of a consistent funding source for the HEIF. Under an earlier scholarship program, many eligible students were not taking advantage of the program because, as confirmed through surveys, these students were wary about the program "given the tentative nature of the funding status."[18] Many of these students left Alaska and pursued educational opportunities in the Lower 48. Thus, in order to be successful, the scholarship program had to have reliable funding. The Legislature responded to this concern by ensuring that "[m]oney in the fund does not lapse"[19] and remains available for future scholarship and grant applicants. When Senator Donny Olson worried aloud that future students may be "left in the lurch" if HEIF's funds were insufficient, a director for the Department of Revenue explained that one way to protect the stability of future funding was to set up a customized asset allocation in an investment portfolio to achieve future expected payments, noting that "this could be set up as an endowment so you pay out X percent per year from the [HEIF] to the other [scholarship or

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[18] http://www.akleg.gov/basis/Meeting/Detail?Meeting=SFIN%202012-01-18%2009:00:00 (testimony of Diane Barrans before the Senate Finance Committee on Jan. 18, 2012 at 9:16:58 - 9:17:45).

[19] AS 37.14.750(a).

grant] fund. And then you could, you know, in a down year – depending on how it's invested – you could have that kind of a mechanism so students wouldn't ever [be left in the lurch]. You'd build up larger fund balances in good years, and feed off the corp . . . utilize some of the corpus in a bad year, as an endowment model is set up."[20]

That is precisely what the Legislature did. The Legislature adopted this endowment model with the HEIF, choosing to fund scholarships and grants by creating an "investment fund" with an appropriate asset allocation and making "seven percent of that amount [] available for appropriation[.]"[21] The HEIF is therefore invested in a range of equities, fixed income securities, real assets, and cash. As of December 31, 2021, total assets in the HEIF were in excess of $422 million. Of that amount, roughly 65% was invested in equities, 29% in fixed income securities, 5% in a real estate investment trust pool, and 1% in cash and cash equivalents.[22] Since its inception, the HEIF has sustainably provided tens of millions of dollars in scholarships and grants to deserving Alaskan students while still preserving the original corpus of the investment.

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[20] http://www.akleg.gov/basis/Meeting/Detail?Meeting=SFIN%202012-01-18%2009:00:00 (9:50:13 – 9:51:42) (testimony of Jerry Burnett, Director, Administrative Services Division, Department of Revenue).

[21] AS 37.14.750(c). Each July the Commissioner of Revenue determines the market value of the HEIF as of June 30 for the immediately preceding fiscal year and identifies seven percent of that amount as available for these grants and scholarships. This past July, Commissioner of Revenue Lucinda Mahoney identified nearly $30 million in scholarships and grants that were to be provided. *See* Exh. 1.

[22] *See* Exh. 2. This information is also available on the Department of Revenue's website. (https://treasury.dor.alaska.gov/docs/treasurydivisionlibraries/investments/alaska-higher-education-fund/fiscal-year-2022/2021_12-alaska-higher-education-fund-financials.pdf?sfvrsn=d43c5898_3). The remaining $119.67 in assets is in the form of income receivable / payable.

Defendants seek to "sweep" the entirety of the HEIF, effectively eliminating this decade-old program and disrupting the academic plans of all those students who are relying on these scholarships and grants to help finance their education.

Through the passage of the HEIF statute, the Legislature determined that educational investments were a significant priority for Alaskans and that this program was deserving of funding. While the Governor previously introduced legislation to repeal the HEIF statutes,[23] the Legislature disagreed with that policy choice and has continued to support Alaskan students with the HEIF program.

IV. APPLICABLE STANDARDS

Questions of constitutional interpretation are legal questions, and the courts "adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[24] "Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. The court should look to the plain meaning and purpose of the provision and the intent of the framers."[25] The Legislature's interpretation of constitutional terms relating to appropriations may be considered more persuasive than otherwise, although it is only one of several tools for use by the courts in interpreting the constitution.[26] Because section 17(d) was ratified by the people, courts "defer to the meaning the people themselves probably placed on the provision. Normally, such

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[23] *See* Lindemuth Aff., Exhs. 10-11.
[24] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (internal quotation omitted).
[25] *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994) (quoting *ARCO Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).
[26] *See id.* at 925 n.7.

deference to the intent of the people requires adherence to the common understanding of words."[27]

V. ARGUMENT

Section 17(d) provides that, when money has been appropriated from the CBR (and not yet been repaid), "the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the [CBR]." The reasonable, practical, and common sense interpretation of this language is that the "sweep" does not apply to a decade-old appropriation to the HEIF, especially when it would disrupt an existing state program and improperly intrude on the Legislature's authority to evaluate the wisdom of appropriations. The Defendants' proposed interpretation of section 17(d) is contrary to the framers' intent, the purpose of section 17, and the plain meaning of the provision.

A. The Framers and Voters Intended to Preserve the Stability of Existing State Programs Through Section 17.

The intent of the framers and the extrinsic indications of the voters' probable understanding of section 17 – and in particular section 17(d) – are clear and have not been disputed by Defendants.[28]

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[27] *Id.* at 926 (quoting *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169 (Alaska 1991) (internal alteration and quotation omitted)).

[28] *See generally* Opposition and Cross-Motion for Summary Judgment ("Opp."). Defendants cite to just one exhibit regarding the voters' understanding and intent, noting that the election pamphlet demonstrated a desire by voters to limit when the CBR could be accessed, and to require repayment of appropriations to the CBR. *See id.* at 19 n.80. No one disputes that repayment is required, however. The key question is *how* repayment is to be accomplished, and Defendants point to no evidence suggesting that the framers or

As shown above, both the Legislature and the voters understood that section 17 would help instill greater predictability, reliability, and stability to Alaska's budgeting process. A drop in state revenues would enable the Legislature to access the CBR with a simple majority vote, ensuring the continuation of vital state services and preserving the status quo without the need to liquidate any state assets: "[B]oth the legislative history of section 17 and extrinsic evidence of the voter's [sic] understanding of the amendment's provisions indicate that elimination of state services and/or liquidation of state assets was not considered a necessary prerequisite to simple majority access to the budget reserve."[29] This would avoid jarring disruptions to existing state programs whenever there was a dip in revenues.

Likewise, the Legislature and the voters recognized that section 17(d)'s repayment obligation may take some time to accomplish, depending on annual revenues and the size of any general fund surpluses that existed at the end of any given fiscal year.[30] If those amounts were not sufficient to cover the outstanding debt to the CBR, the debt would roll over to succeeding years until it was fully repaid. Consistent with the framers' and voters' recognition that section 17 would help stabilize Alaska's budget and avoid the elimination of existing state services (or liquidation of state assets), there is no indication whatsoever that either the framers or voters believed that section 17(d)'s "sweep" must be done rashly so as to require the elimination of existing state services. The two constitutional sections

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voters wanted to dismantle existing state programs in order to repay the CBR as quickly as possible.

[29] *Hickel*, 874 P.2d at 929.

[30] *See supra* at 5-6.

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should be interpreted consistently so as to create a harmonious whole, with neither one requiring the elimination of pre-existing state services.[31] This Court should interpret section 17(d) as intended by the framers and the voters.[32]

B. The Reasonable and Practical Interpretation of Section 17(d) Excludes the HEIF from the "Sweep."

The framers' expressed intent (and the voters' probable understanding) is consistent with the reasonable, practical, and common sense understanding of section 17(d). At its core, section 17 was designed to provide greater stability to state government and year-to-year budgeting.[33] It specifically sought to avoid "boom" and "bust" cycles whereby state assets would be liquidated and existing state services would be dismantled when there was a dip in the State's finances. The *Hickel* Court went on to explain why such drastic steps were inconsistent with a reasonable common sense understanding of section 17:

> [T]he purpose and common understanding of the language in 17(b) allows the budget reserve to be used by a simple majority as necessary *to maintain state appropriations at a constant level.* Although all funds might be available by some means, counting funds already validly appropriated to a specific purpose as still "available" *would disrupt existing state programs and would constitute an inflexible constitutional intrusion on the legislature's authority to evaluate the wisdom of particular appropriations.* Although such a constitutional intrusion is conceivable, we are unwilling to read it into a provision with quite a different purpose.[34]

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[31] *See Forrer v. State*, 471 P.3d 569, 585 & n.164 (Alaska 2020) (noting that constitutional provisions should be read in harmony with one another).
[32] *See Hickel*, 874 P.2d at 927 ("We are unwilling . . . to interpret existing constitutional language more broadly than intended by the framers or the voters.").
[33] *See supra* at 4-5 & n.10.
[34] *Hickel*, 874 P.2d at 930 (emphases added).

Disrupting existing state programs – like the HEIF – is inconsistent with the purpose and common sense understanding of section 17.

It is worth pausing here to consider the implications of the Defendants' preferred interpretation of section 17. According to Defendants, section 17(b) allows for the "borrowing" of funds from the CBR in one year – precisely so that no existing state services would be eliminated – but would then immediately require the elimination of those same services under section 17(d) in order to enable the fastest possible repayment to the CBR. This makes little sense. It effectively precludes any long-term projects or services involving multi-year appropriations if the monies reside in the general fund. This "radically different approach to government financing"[35] would eliminate the stability that section 17 was specifically designed to protect. Under the Defendants' approach, Alaska would be unable to provide any reliable, durable source of funding for these multi-year projects or services if any debt was owed to the CBR.

Hickel is especially instructive here. In that case, Governor Cowper interpreted section 17(b)'s majority access formula to include all net state assets as part of the "amount available for appropriation" that must be expended before a simple majority could reach the CBR. Noting that this would "require a complete restructuring of the established financial system of the state government,"[36] the Supreme Court rejected his reading as inconsistent with the purpose of section 17, the framers' intent, and the voters' probable understanding of section 17's terms. The Supreme Court explained that, even if it only

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[35] *Id.* at 928.
[36] *Id.* at 927.

considered net assets that existed in a cash form (e.g., balances in a revolving loan fund), all "existing state programs dependent on those funds would have to be curtailed if these funds were expended on another purpose."[37] In other words, these existing programs would suddenly be scaled back – or dismantled altogether – if section 17 was interpreted broadly to encompass all net state assets. These proposed "reductions in the level of government service" were inconsistent with section 17's clear stabilizing purpose, and that interpretation was therefore rejected.[38] Defendants' insistence that section 17(d) be interpreted and applied to curtail, reduce, and effectively destroy the HEIF is likewise at odds with section 17's purpose.

C. *Hickel* supports the Legislature's reading of section 17(d).

When defining the scope of section 17(b),[39] the *Hickel* Court laid out several core principles that help guide the Legislature, the Executive Branch, and the courts when assessing which funds are available. Importantly, *Hickel* did not classify the HEIF (which postdated *Hickel*) or many other funds as either "available" or "unavailable" under section 17, leaving that in the first instance to executive and legislative branch officials more

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[37] *Id.* at 928-29.
[38] *Id.* at 929.
[39] *See id.* at 926 ("The *primary* issue in this case is the meaning of the term 'amount available for appropriation' as used in article IX, *section 17(b)* of the Alaska Constitution." (emphases added)). The *Hickel* Court then concluded, without further analysis, that it could see no reason to give that language a different meaning in subsection (d) than it had in subsection (b), even though subsection (d) includes a temporal limitation and serves a different purpose than subsection (b)'s provision regarding access to the CBR. *See id.* at 936 n.32.

familiar with the funds to sort out.[40] These principles confirm that the HEIF is not sweepable.

The *Hickel* Court explained that "monies which already have been validly committed by the legislature to some purpose should not be counted as available."[41] Further, monies are not deemed available if they have been "converted from cash to some other type of asset."[42] This is because "any given sum of money can only be appropriated once during a given time period."[43] It is undisputed that the Legislature did appropriate and commit the HEIF funds to an express purpose: the establishment of an "investment fund" (i.e., an endowment) that would yield investment returns and allow seven percent of the endowment to be used "for the purpose of making grants . . . and scholarship payments."[44] Because the purpose of the appropriation was to create an investment fund that would serve as an endowment, there was and is no need for further appropriation to complete the expenditure that the Legislature intended when it funded the HEIF. The Legislature created this stable, non-lapsing funding source to reassure students that if they worked hard and performed well, funding would be available for scholarships and grants when the time came for them to pursue higher education opportunities. In addition, the appropriation was intentionally converted from cash to other assets (i.e., a well-diversified

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[40] *See id.* at 934 n.27. Prior to the current administration, these officials determined that the HEIF was not sweepable. *See* Lindemuth Aff., Exh. 2 at 2.
[41] *Hickel*, 874 P.2d at 930-31
[42] *Id.* at 930-31 n.20. Even Governor Cowper limited his overbroad argument to cash funds, which the *Hickel* Court found to be "a reasonable limitation." *Id.* at 928 n.14.
[43] *Id.* at 930-31 n.20.
[44] AS 37.14.750(a).

portfolio including equities and real assets), further confirming that it is not "available." This is not a "general fund surplus." Instead, the HEIF is a deliberate commitment of monies to a specific purpose and an expenditure of those monies in obtaining revenue-producing assets to help fund scholarships and grants.

The HEIF is not like other funds cited by Defendants precisely because it operates as an endowment. Certain other funds have been deemed to be "available for appropriation" because initial appropriations were provided to those funds, and the appropriations then sit there until appropriated again for an ultimate expenditure.[45] Analogizing to these funds, Defendants claim that "'appropriations' to the HEIF are not true appropriations [because] [t]hey do not authorize any expenditure of funds out of the state treasury."[46] Defendants are wrong for at least two reasons. First, there is no requirement that any appropriation authorize an expenditure of funds out of the state treasury to be a "true" appropriation, whatever Defendants think that means. An appropriation is an appropriation; there are no second-class appropriations. As described by the *Hickel* Court, "[a]n appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[47] The appropriation to the HEIF was the setting aside from the public revenue of a

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[45] *See Hickel*, 874 P.2d at 933 (citing the Railbelt energy fund, the Alaska marine highway system vessel replacement fund, and the educational facilities maintenance and construction fund); *see also* Opp. at 14 (referencing the same).
[46] Opp. at 14.
[47] *Id.* at 932-33 (quoting *Thomas v. Rosen*, 549 P.2d 793, 796 (Alaska 1977) and *State ex rel. Finnegan v. Dammann*, 264 N.W. 622, 624 (Wis. 1936)).

certain sum of money ($400 million) for a specified object (setting up an investment fund for funding long-term scholarships), in such manner that the Department of Revenue was authorized to use that money, and no more, to set up that investment fund through an appropriate investment portfolio (i.e., expend the money), and no other. Second, Defendants misapprehend the essential nature of the HEIF's endowment structure. Just like any other endowment or annuity, the monies must be invested in revenue-producing assets in order to effectuate their purpose (i.e., so that a percentage of the whole can be drawn from it). This is not merely an "accounting designation" or a "savings account"[48] – it is the Legislature's appropriation for the creation of an investment fund that will make current and future scholarships and grants possible for Alaska's students. The appropriation has been expended in establishing this investment fund and purchasing the assets that comprise it. Defendants thus may not sweep the HEIF under the test articulated by the *Hickel* Court.

D. Subsequent Possible Appropriations from a Portion of the HEIF Do Not Change the Outcome.

Defendants contend that the HEIF as a whole may be swept because some funds in the HEIF are expended (e.g., as scholarships and grants to Alaskan students) through a further appropriation by the Legislature.[49] For the reasons stated above, the HEIF is not available for appropriation. It is properly understood as an excluded, non-sweepable fund because that result is consistent with the framers' and voters' intent, the purpose of section

[48] Opp. at 14, 15.
[49] *See id.* at 11, 14-16.

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17, and the key elements of the *Hickel* test. Even assuming arguendo that any part of the HEIF is vulnerable to the sweep, Defendants overreach when they seek to use certain appropriations as the basis for sweeping the entire fund for two reasons.

First, an appropriation from an otherwise excluded fund does not somehow transform that fund into a sweepable fund. As the *Hickel* Court explained, "if an appropriation lapses or if the legislature does in fact reappropriate money from an excluded fund to another purpose, it is no longer necessary to exclude that money from the 'amount available for appropriation' in order to protect the legislature's authority to make such decisions."[50] Insofar as this finding from *Hickel* as to section 17(b) can be logically applied to section 17(d), which appears unlikely, it would mean that only the appropriated money would be considered "available for appropriation" because it was appropriated from the excluded HEIF to another purpose – but the rest of the HEIF would be unaffected.

Second, as defined in the HEIF statute, the only portion that is regularly made available for appropriation is the seven percent that the Commissioner of Revenue annually identifies as being available for grants and scholarships.[51] By the statutory terms, the rest of the HEIF is not available for grants and scholarships. The HEIF "corpus" (as opposed to the subsequent appropriations) remains "set[ ] aside from the public revenue ... for a specified object, in such manner that the executive officers of the government are

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[50] *Hickel*, 874 P.2d at 930-31 n.20.
[51] AS 37.14.750(c) ("The commissioner shall identify seven percent of [the HEIF's June 30 market value] as available for appropriation [for grants and scholarships.]").

authorized to use that money, and no more, for that object, and no other."[52] Importantly, however, the appropriations for grants and scholarships are not made on or before June 30 of any given fiscal year. Instead, by operation of law, the Commissioner of Revenue determines the market value of the HEIF "[a]s soon as is practicable *after July 1* of each year."[53] In other words, when the sweep occurs at 11:59 p.m. on June 30, it is undisputed that the seven percent of the HEIF (which would eventually fund grants and scholarships) has not been made available for appropriation. That only occurs after July 1. Because that segregated portion of the HEIF has not been made available for appropriation as of June 30, it is not sweepable. After the Commissioner of Revenue identifies the seven percent portion of the HEIF for grants and scholarships in early July, those funds could theoretically be sweepable if they have not been expended by the following June 30. That question, however, is likely beyond the scope of issues that the Court needs to address at this time. For present purposes, it suffices to say that the HEIF is not subject to the sweep.

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[52] *Hickel*, 874 P.2d at 932-33 (quoting *Thomas v. Rosen*, 549 P.2d 793, 796 (Alaska 1977) and *State ex rel. Finnegan v. Dammann*, 264 N.W. 622, 624 (Wis. 1936)). Defendants note that the Legislature has the ability to spend the HEIF for other public purposes, and has done so. *See* Opp. at 8. As explained above, any appropriation from the excluded HEIF to another purpose could render the appropriated funds vulnerable to being swept, but it would not impact the status of the remainder of the HEIF. Appropriations of a portion of the HEIF do not alter the fact that funds were appropriated and committed to HEIF for a particular purpose – establishing a funding source for grants and scholarships – which is continuing to be served to this day.

[53] AS 37.14.750(c) (emphasis added); *see also* Exh. 1 (reflecting a July 7, 2021 determination by the Commissioner of Revenue).

VI. CONCLUSION

Section 17(d) was never intended, nor drafted, to require the dismantling of existing state services like the HEIF in order to allow for expedited repayment of the CBR. Because the HEIF was expressly committed to a specific purpose by the Legislature, and the appropriation has been expended for the creation of an investment fund that serves as an endowment for future scholarships and grants, its funds are not available for appropriation or for expedited repayment of the CBR. The Court should reject the Defendants' misreading of section 17(d) and grant Plaintiffs' motion for summary judgment.

DATED: January 28, 2022

STOEL RIVES LLP

By: /s/ Kevin Cuddy
KEVIN CUDDY BAR NO. 0810062
JAMES E. TORGERSON (Bar No. 8509120)
CONNOR R. SMITH (Bar No. 1905046)

Attorneys for Amicus Curiae
Alaska Legislative Council

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CERTIFICATE OF SERVICE

This certifies that on January 28, 2022, a true and correct copy of the foregoing was served via email on:

Jahna M. Lindemuth Scott M. Kendall Samuel G. Gottstein Cashion Gilmore & Lindemuth 510 L Street, Suite 601 Anchorage, AK 99501 jahna@cashiongilmore.com scott@cashiongilmore.com sam@cashiongilmore.com *Attorneys for Plaintiffs*	Margaret Paton-Walsh Katherine Demarest Department of Law Office of the Attorney General 1031 W. 4th Avenue, Suite 200 Anchorage, AK 99501 margaret.paton-walsh@alaska.gov kate.demarest@alaska.gov *Attorneys for Defendants*

/s/ Karen P. Warne
Karen P. Warne, Practice Assistant

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Amicus Curiae Attorneys
for Alaska Legislative Council

FILED in the TRIAL COURTS
State of Alaska Third District
JAN 28 2022
Clerk of the Trial Courts
By_____Deputy

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Plaintiffs, v. GOVERNOR MICHAEL J. DUNLEAVY, in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Defendants.	Case No.: 3AN-22-04028 CI

AFFIDAVIT OF KEVIN CUDDY IN SUPPORT OF BRIEF OF AMICUS CURIAE

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

KEVIN CUDDY, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 and have personal knowledge of the statements contained in this affidavit.

2. I am an attorney at the law firm of Stoel Rives, LLP, counsel for amicus Alaska Legislative Council, in the above-captioned action.

3. Attached as Exhibit 1 is a true and correct copy of a letter dated July 7, 2021, from Commissioner of Revenue Lucinda Mahoney to Dr. Michael Johnson, Commissioner of the Department of Education and Early Development.

4. Attached as Exhibit 2 is a true and correct copy of the Net Asset Value for the Alaska Higher Education Investment Fund as of December 31, 2021, as obtained from the Alaska Department of Revenue's website on January 27, 2022.

END OF AFFIDAVIT.

DATED this 28th day of January 2022 at Anchorage, Alaska.

/s/ Kevin Cuddy
KEVIN CUDDY

SUBSCRIBED AND SWORN TO before me on this _____ day of _____ 2022 at Anchorage, Alaska.

_____
Notary Public for the State of Alaska
My commission expires _____

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CERTIFICATE OF SERVICE

This certifies that on January 28, 2022, a true and correct copy of the foregoing was served via email on:

Jahna M. Lindemuth Scott M. Kendall Samuel G. Gottstein Cashion Gilmore & Lindemuth 510 L Street, Suite 601 Anchorage, AK 99501 jahna@cashiongilmore.com scott@cashiongilmore.com sam@cashiongilmore.com *Attorneys for Plaintiffs*	Margaret Paton-Walsh Katherine Demarest Department of Law Office of the Attorney General 1031 W. 4th Avenue, Suite 200 Anchorage, AK 99501 margaret.paton-walsh@alaska.gov kate.demarest@alaska.gov *Attorneys for Defendants*

/s/ Karen P. Warne
Karen P. Warne, Practice Assistant

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IN THE ~~DISTRICT~~/SUPERIOR COURT FOR THE STATE OF ALASKA
AT ANCHORAGE
(City or town where the court is located)

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,	)	
Plaintiff/Petitioner, v.	)	
GOVERNOR MICHAEL J. DUNLEAVY, in his official capacity, THE STATE OF ALASKA, et al.	)	Case No. 3AN-22-04028 CI
Defendant/Respondent.	)	**SELF-CERTIFICATION (NO NOTARY AVAILABLE)**

[If a notary public or other person with the power to take oaths is not available to notarize a document that you are filing with the court, you may fill out this form and attach it to your document.]

As allowed by AS 09.63.020, I, *(Name)* Kevin Cuddy, certify under penalty of perjury that the following is true:

1. I am attaching this *Self-Certification* to the following attached document:
   Affidavit of Kevin Cuddy in Support of Brief of Amicus Curiae
   If the attached document is required to be served on another party, I have attached a copy of this *Self-Certification* to the document when I served it.

2. No notary public or other person with the power to take oaths is available to watch me sign because:
   ☐ I live somewhere with no available notary public or other person who can take oaths.
   ☐ I cannot access the courthouse or private notary for medical reasons including quarantine.
   ☒ In light of the global pandemic, the undersigned is unable to gain ready access to a notary. I can provide a notarized version later, if required.

3. I told the truth to the best of my knowledge and belief in the attached document.

Signature: /s/ Kevin M. Cuddy
Signed on: *(date)* 01/28/2022 at: *(city)* Anchorage, *(state)* AK
Mailing Address: Stoel Rives LLP 510 L Street, Suite 500 Anchorage, AK 99501
Cell Phone: _____ Work Phone: 277-1900
Home Phone: _____ Email*: kevin.cuddy@stoel.com
*☒ I authorize the court to email me court documents in this case to the email address above.

THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Revenue

TREASURY DIVISION

Po Box 110405
Juneau, Alaska 99811-0405
Main: 907.465.2300
Fax: 907.465.4397

Date: July 7, 2021

To: Dr. Michael Johnson, Commissioner
Department of Education and Early Development

From: Lucinda Mahoney, Commissioner *lm*

Subject: Alaska Higher Education Fund FY 2022 Budget Information per AS 37.14.750(c)

In accordance with AS 37.14.750(c), as soon as practicable after July 1 of each year, the Commissioner of Revenue shall determine the market value of the Fund as of June 30th of the previous fiscal year. Seven percent of that amount is available for appropriation, of which two-thirds is identified for the Alaska Performance Scholarship and one-third for the Alaska Advantage Educational Grant.

The amounts available for appropriation from the Alaska Higher Education Fund are as follows:

June 30, 2021 market value:	$ 416,411,396
Seven percent to be allocated:	$ 29,148,798
Alaska Performance Scholarship:	$ 19,432,532
Alaska Advantage Educational Grant:	$ 9,716,266

cc: Sana Efird, Executive Director, Alaska Commission on Postsecondary Education
Julie Pierce, Chief Financial Officer, Alaska Commission on Postsecondary Education
Ciara Meek, Department of Administration, Division of Finance
Zachary Hanna, Chief Investment Officer, Department of Revenue
Jesse Blackwell, Cash Manager, Department of Revenue
Pamela Leary, Director, Treasury Division, Department of Revenue

AK Higher Education Investment
Net Asset Value
As of the Month Ending
December 31, 2021

Cash and Cash Equivalents		
Short-term Fixed Income Pool *(Internally Managed)*	$	4,061,060.34
Total Cash and Cash Equivalents		4,061,060.34
Fixed Income Securities		
Interim-term *(Internally Managed)*		-
Broad-term *(Internally Managed)*		120,825,441.00
High Yield *(Internally Managed)*		-
Total Fixed Income Securities		120,825,441.00
Broad Domestic Equity		
SSgA Russell 3000		171,913,715.93
Total Broad Domestic Equity		171,913,715.93
Global Equity Ex-U.S.		
SOA International Equity Pool		102,604,731.03
Total Global Equity Ex-U.S.		102,604,731.03
Real Assets		
Real Estate Investment Trust Pool *(Internally Managed)*		23,395,312.91
Total Real Assets		23,395,312.91
Receivables and Payables		
Income Receivable/Payable		119.67
Payable To/From		-
Total Receivables and Payables		119.67
Total Assets	**$**	**422,800,380.88**

AK Higher Education Investment
Schedule of Investment Income (Loss) and Changes in Invested Assets
As of the Month Ending
December 31, 2021

	1-Month	Fiscal YTD
Cash and Cash Equivalents		
Short-term Fixed Income Pool *(Internally Managed)*	$ 119.67	$ 962.80
	119.67	962.80
Fixed Income Securities		
Interim-term *(Internally Managed)*	-	-
Broad-term *(Internally Managed)*	(339,457.13)	(176,893.71)
High Yield *(Internally Managed)*	-	-
	(339,457.13)	(176,893.71)
Broad Domestic Equity		
SSgA Russell 3000	6,563,188.58	14,665,822.17
	6,563,188.58	14,665,822.17
Global Equity Ex-U.S.		
SOA International Equity Pool	4,059,686.45	(1,219,374.13)
	4,059,686.45	(1,219,374.13)
Real Assets		
Real Estate Investment Trust Pool *(Internally Managed)*	2,053,750.45	3,132,212.91
	2,053,750.45	3,132,212.91
Total Investment Income (Loss)	**$ 12,337,288.02**	**$ 16,402,730.04**
Payable To/From	-	-
Total Invested Assets, Beginning of Period	**410,549,372.38**	**416,411,393.99**
Net Contribution (Withdrawal)	**(86,279.52)**	**(10,013,743.15)**
Total Assets	**$ 422,800,380.88**	**$ 422,800,380.88**

anc.law.ecf@alaska.gov

FILED
STATE OF ALASKA
THIRD DISTRICT
2022 DEC -4 AM 10: 43
BY
DEPUTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT. RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,	)	
Plaintiffs,	)	
v.	)	
GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,	)	
Defendants.	)	Case No. 3AN-22-04028 CI

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4

STATE REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

This is an unusual case. The only question presented is straightforwardly answered by a longstanding and directly-on-point Alaska Supreme Court decision, *Hickel v. Cowper*.[1] Despite this reality, the plaintiffs and the Alaska Legislative Council ("Council"), acting as amicus curiae,[2] have filed more than fifty pages of misdirection and obfuscation in response to the State's motion for summary judgment, in an attempt to circumvent the Alaska Constitution in service of their policy preferences. But their mischaracterizations of *Hickel* and the State's argument are unavailing.

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[1] 874 P.2d 922 (Alaska 1994).

[2] The participation of the Council is puzzling given that the legislature's Finance and Audit Divisions determined in 2019 that the HEIF is subject to the sweep. *See* Affidavit of Ciara Meeks at ¶¶ 2-4 and exhibits A and B to that affidavit.

Hickel held that "funds which require further legislative appropriation before expenditures can be made against them are 'available for appropriation'" as that phrase is used in Article IX, section 17(d) of the Alaska Constitution ("section 17(d)").[3] There is no dispute that the money in the Higher Education Investment Fund ("the HEIF") cannot be spent without a legislative appropriation. Therefore, the HEIF is available for appropriation and subject to section 17(d)'s mandatory deposit into the Constitutional Budget Reserve Fund ("the CBR"). This case is really just that simple.

I. ARGUMENT

The plaintiffs and the Council refuse to accept that *Hickel v. Cowper* controls the outcome of this case. They ask this Court to apply a definition of "available for appropriation" for section 17(d) that is indistinguishable from a statutory definition that the Alaska Supreme Court held unconstitutional in 1994. Their argument zeros in on a single sentence of *Hickel* that declares "monies which already have been validly committed by the legislature to some purpose should not be counted as available."[4] Ignoring *Hickel*'s holding defining appropriation, they argue that the original appropriation of funds to the HEIF "validly committed" that money making it no longer "available for appropriation" for purposes of section 17(d). But the fact remains that the money in the HEIF is not committed at all, because the original appropriation was a transfer of funds not an authorization to spend, so the legislature can appropriate the money in the HEIF for any public purpose. Next, in an argument first made in their

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[3] *Hickel*, 874 P.2d at 933.

[4] *Id.* at 930-31.

reply, the plaintiffs assert that *Hickel*'s definition of "amount available for appropriation" in section 17(b) covers two distinct categories of money and is therefore supposedly unworkable as applied to section 17(d). But their explanation of why the section (d) holding is supposedly unworkable makes no sense. Along the way, the plaintiffs and the Council repeatedly mischaracterize the arguments made by the State, building a series of strawmen that they can rebut. But rebutting irrelevant arguments that the State did not make does nothing to advance their position. Finally, they repeat their empty separation of powers argument, insisting that the executive branch violates the separation of powers by obeying a constitutional directive.

None of these arguments has merit. This Court need only apply the Alaska Supreme Court's controlling case to resolve this litigation.

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A. The Alaska Supreme Court struck down the plaintiffs' definition of "available for appropriation" as unconstitutional in *Hickel*.

The plaintiffs spill a lot of ink attacking the definition of "available for appropriation" that *Hickel* adopted. But they lack a plausible alternative definition for this Court to apply, because their preferred definition was expressly struck down in *Hickel*. The *Hickel* Court considered whether AS 37.10.420(b) was consistent with section 17(d).[5] That statute defined "available for appropriation" under section 17(d) as "the amount comprising the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year...."[6] The State pointed out in its motion for

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[5] *Id.* at 936.

[6] *Id.*

summary judgment that this definition is indistinguishable from the plaintiffs' definition, whether expressed as "only surplus funds—i.e. unobligated monies that are not subject to a legislative appropriation,"[7] or as "leftover unappropriated money that remains at the end of a fiscal year."[8]

The plaintiffs' reply makes no attempt to distinguish their definition from the one held unconstitutional in *Hickel*. Instead, they simply repeat the arguments that the Alaska Supreme Court rejected in that case. And they fail to explain how interpreting "available for appropriation" in subsection (d) to mean "all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure" is inconsistent with either the plain language or the purpose of the repayment provision.

The plaintiffs complain that the State has paid "lip-service" to the standard for constitutional interpretation, even as they acknowledge that "there is very little history" to explain the legislature's intent when it added subsection (d) to the CBR amendment.[9] Of course, the reason the State did not present a detailed interpretation of the constitutional language here is because the Alaska Supreme Court has already answered the question.[10] Parties need not endlessly relitigate the meaning of constitutional

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7 Pl. Mot. SJ at 19.

8 Pl. Reply at 7.

9 Pl. Reply at 3-4, 8.

10 *See* Order on S.J. in *AFN v. State* at 9 ("Whether the PCE Endowment Fund is 'available for appropriation' within the meaning of article IX, section 17(d) is governed by the Alaska Supreme Court's decision in *Hickel v. Cowper*.").

provisions that have already been interpreted by the Alaska Supreme Court; instead, the analysis is critical when the Court is "presented with a question of constitutional law *not squarely addressed by precedent*."[11]

Moreover, the little contemporaneous evidence the plaintiffs have mustered about what the drafters and voters believed subsection (d) meant simply does not lead to the answer they want. Their evidence boils down to the use of the phrase "general fund surplus"[12] by Representative Kay Brown, and language presented to voters referring to "[s]urplus general fund money" and "money left in the treasury's general fund."[13] But the conclusion that the HEIF—an endowment that significantly exceeds the sum that is needed to support current legislative appropriations for higher education grants and scholarships[14]—would not be seen as "surplus general fund money" by 1990 voters (if that was even a possible thought-experiment) is far from the self-evident proposition that the plaintiffs apparently think it is. Indeed, it makes little sense to think the legislature intended, or the voters understood, that the repayment provision would apply

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[11] *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020). The State provided extensive constitutional analysis in the power cost equalization case, because that case *did* address an open question of constitutional interpretation: the meaning of the term "general fund." *See* Order on S.J. in *AFN v. State* at 12. This case presents no such novel question.

[12] Reply at 11.

[13] *Id.* at 12.

[14] As the plaintiffs noted in their Motion for Summary Judgment, the FY22 operating budget contained nearly $18.5 million for Alaska Education Grants and Alaska Performance Scholarships, the statutory programs, and $3.258 million for the WWAMI program, *see* Pl. Mot. SJ at 12-13, while the net asset value of the HEIF at the end of November 2021 was over $410 million.

only to funds for which the legislature could think of no possible future purpose.

In *Hickel*, the Court acknowledged that the statements of legislators and the explanation presented to voters about when the CBR could be accessed by a simple majority "appear[ed] to support the State's interpretation of 'amount available for appropriation' as including only revenues received by the State within the fiscal year."[15] *But it nevertheless rejected that interpretation* as "plainly inconsistent with the language of section 17(b)."[16] The Court reasoned that the subsection (b) could easily have been drafted to compare revenues from year to year if that had been the intent.[17]

The same is true for subsection (d). If the drafters had meant that only undesignated, unappropriated, surplus funds should be swept, as the plaintiffs claim, they could have said that. But they did not. And the Court invalidated AS 37.10.420(b)'s definition of funds available for appropriation as "the unreserved, undesignated general fund balance to be carried forward as of June 30" expressly because it "excludes restricted funds within the general fund from the calculation of the amount available to pay back appropriations from the budget reserve fund."[18] In other words, the Court invalidated the statutory definition *expressly because* it excluded funds like the HEIF.

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15 *Hickel*, 874 P.2d at 930.

16 *Id.*

17 *Id.*

18 *Id.* at 936.

B. "Appropriation" as used in Article IX, Section 17(d) means authority to spend money.

As the Alaska Supreme Court explained in *Hickel*: "The key question in applying our interpretation of the term 'amount available for appropriation' to particular funds is *what constitutes a valid appropriation such that the funds involved are no longer available*."[19] Because this Court must decide whether a particular fund—the HEIF—is available for appropriation, that same question is "key" here. Both the plaintiffs and amicus, the Alaska Legislative Council ("the Council"), attempt to distract this Court from the indisputable reality that *Hickel* answered this question: "a valid appropriation such that the funds involved are no longer available" is one that "*authorizes governmental expenditure without further legislative action*."[20] Applying this definition to the HEIF compels the conclusion that the HEIF is "available for appropriation" under section 17, and is therefore subject to the sweep.

Ignoring the *Hickel* definition, and scolding the State for daring to apply it,[21] both the plaintiffs and the Council assert that "appropriation" is instead best defined to mean "the setting aside from the public revenue of a certain sum of money for a specified object, in such a manner that the executive officers of the government are

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[19] *Id.* at 932.

[20] *Id.* at 933.

[21] Reply at 22 (complaining that the State "attempts to redefine what an appropriation is under the Alaska Constitution"); Amicus at 16 (asserting, erroneously, that "there is no requirement that any appropriation authorize an expenditure of funds out of the state treasury to be a 'true' appropriation, whatever Defendants think that means.")

authorized to use that money, and no more, for that object, and no other."[22] Presumably, they like this sentence from *Hickel* because it does not use the words "spending" or "expenditure," and thus plausibly includes the transfer of state funds between subaccounts in the general fund, like the appropriation that initially funded the HEIF.[23] And that would allow the plaintiffs to argue that the money in the HEIF had already been appropriated for purposes of the section 17(d) analysis.

Of course, the plaintiff's chosen language from *Hickel* does include the phrase "*use* that money," and the "use" of money typically involves expenditure. Moreover, the plaintiffs and the Council have cherry-picked this single definition from a longer list of definitions quoted by the *Hickel* Court,[24] ignoring clear language in that and other cases demonstrating the Alaska Supreme Court's understanding that even the plaintiffs' preferred definition describing "use" of money means *spending*.

The Alaska Supreme Court first quoted this language—drawn from a 1936 Wisconsin case[25]—in *Thomas v. Rosen*, a case in which the central issue was whether a general obligation bond was an appropriation subject to the governor's veto power.[26] In *Rosen*, the Court was focused on the source of the money in this definition, noting that "[f]or our purpose [in this case], the operative phrase 'public revenue' is critical since it

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22 *Id.* at 20 (citing *Knowles*, quoting *Rosen*); amicus at 16 (citing *Hickel*).

23 *See* Reply at 20 ("The HEIF's initial appropriation unquestionably meets the definition for an appropriation:...")

24 *See Hickel*, 874 P.2d at 932-33 (quoting additional definitions from Webster's Third New Int'l Dictionary 106 (1969), Black's Law Dictionary 101-02 (6th ed. 1990)).

25 *State el rel. Finnegan v. Dammann*, 264 N.W. 622, 624 (Wis. 1936).

26 569 P.2d 793 (Alaska 1977).

is the basis of the general fund and special funds from which the legislature may allocate money."[27] Notably, *Rosen* did not hold that this was the controlling definition of appropriations in Alaska law. On the contrary, in *Thomas v. Bailey* and *McAlpine v. University of Alaska*, the Court explained that "*Rosen* did not 'purport[ ] to offer a general definition of appropriations.'"[28]

This is doubtless why the *Hickel* Court offered a number of different definitions alongside the *Rosen* language, including:

- "[A] sum of money set aside or allotted by official or formal action for a specific use (as from public revenue by a legislative body that stipulates the amount, manner, and purpose of items of *expenditure*)."[29]
- "In governmental accounting, an *expenditure* authorized for a specified amount, purpose, and time."[30]
- "The act by which the legislative department of government designates a particular fund...to be applied to some general object of governmental *expenditure*, or to some individual *purchase* or *expense*."[31]
- "[S]et[ting] aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action."[32]

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27 *Id.* at 796.

28 *Thomas v. Bailey,* 595 P.2d 1, 6 n. 21 (Alaska 1979); *McAlpine v. University of Alaska*, 762 P.2d 81, 87 (Alaska 1988) (quoting *Bailey*, 595 P.2d at 6 n.21).

29 *Hickel*, 874 P.2d at 932 (quoting *Webster's Third New Int'l Dictionary*, 106 (1969)).

30 *Id.* (emphasis added) (quoting *Black's Law Dictionary* 101-02 (6th ed. 1990).

31 *Id.*

32 *Id.* (quoting *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991)).

Not only do most of these definitions expressly include the idea that appropriations *spend* money, it is also clear that the Alaska Supreme Court reads the *Rosen* definition as referring to spending. In *Alaska Legislative Council ex rel. Alaska State Legislature v. Knowles (Knowles III)*—the very case that the plaintiffs cite for their preferred definition[33]—the Court noted that both *Alaska Legislative Council v. Knowles (Knowles II)*[34] and *Rosen* "recognized that an act must *authorize the expenditure* of an ascertainable sum of money in order to qualify as an appropriation."[35] And in *Hickel*, after quoting the *Rosen* definition and the definitions above, the Court concluded "[*u*]*nder these definitions*, it is clear that one of the *fundamental characteristics* of an appropriation, in the public law context, is that *it authorizes governmental expenditure without further legislative action*."[36]

Thus, for purposes of applying Article IX, Section 17, an appropriation authorizes expenditure of funds. And the "appropriation" of money into the HEIF—a fund which undisputedly cannot be spent without further legislative action—does not meet this definition.

This does not mean, of course, that appropriations that merely transfer funds from one state account to another are "defective or illegitimate,"[37] or "not

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33 Reply at 20, n. 71.

34 21 P.3d 367, 373 (Alaska 2001).

35 86 P.3d 891, 898 (Alaska 2004).

36 *Hickel*, 874 P.2d at 933 (emphasis added).

37 Reply at 2, 18 (falsely stating that the State characterized the initial appropriation to the HEIF as "illegitimate.")

constitutionally valid."[38] These are the plaintiffs' words, not the State's. The State has never argued that the legislature cannot create a fund like the HEIF and transfer money into it. Rather, the State simply followed the *Hickel* Court's distinction between appropriations that transfer funds between accounts—which the State has described as "soft" or "accounting" appropriations and *Hickel* called "initial appropriations"[39]—and appropriations that *actually authorize spending money*. Accounting appropriations are valid directions to the executive branch to transfer state money between different accounts. But they are not the same as spending appropriations, for the simple—and here most relevant—reason that the money is still available to the legislature to spend on whatever it wants, by making a spending appropriation.

The plaintiffs and amicus feign umbrage at the suggestion that a fund transfer is distinct from spending authorization,[40] but they cannot be sincere in denying that these are two quite different kinds of appropriations. Both types—accounting transfers and expenditures—are valid exercises of the legislature's authority over state funds. But

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38 *Id.* at 22.

39 *See Hickel*, 874 P.2d at 933 (noting the existence of variety of funds which "consist[] of money 'appropriated' to [them] by the legislature," characterizing these appropriations as "initial appropriations" and recognizing that they "are not sufficient to support any expenditure.")

40 Reply at 19 ("The initial HEIF appropriation was precisely that—an appropriation. Nothing contained in that appropriation bill...shows that the HEIF appropriation was somehow less of an appropriation than any other."); Amicus at 16 ("An appropriation is an appropriation; there are no second-class appropriations.")

Hickel leaves no room for doubt that the accounting, fund-transfer type of appropriation that funded the HEIF leaves the money "available for appropriation" under section 17.[41]

C. The plaintiffs misunderstand how the Court's analysis of section 17(b) applies to section 17(d).

The plaintiffs argue for the first time in their reply that there are two types of money that fall within the *Hickel* definition of "amount available for appropriation" under Article IX, section 17(b)[42]: (1) "all funds over which the legislature has retained the power to appropriate and which are not available to pay expenditures without further legislative appropriation;"[43] and (2) "all amounts which the legislature actually appropriates for the fiscal year."[44] As an initial matter, this observation is of little help to them, because the HEIF clearly falls within the scope of the first part of this definition, and is therefore "available for appropriation" under *Hickel*.

But their point is not that the HEIF does not fall within the *Hickel* definition. Instead, they hope to persuade this Court that the meaning of "available for appropriation" in subsection (b) is "unworkable" if applied to subsection (d),[45] thereby undercutting *Hickel*'s holding and, they hope, persuading this Court to ignore that definition and craft a new one that would not include the HEIF. This argument, however

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41 *Hickel*, 874 P.2d at 933 ("Because the initial 'appropriations' to these funds cannot support any expenditure, the money in these funds remains 'available for appropriation' until further appropriations are made.").

42 Reply at 16-17.

43 *Hickel*, 874 P.2d at 927.

44 *Id.*

45 Reply at 16.

creative, leads nowhere.

In *Hickel*, the Court included the second category of funds—"amounts which the legislature actually appropriates for the fiscal year"—in order to make the apples-to-apples comparison that subsection (b) requires. But subsection (d) does not require this—or any other—comparison. Nothing in *Hickel* suggests that this second category of money has any relevance to subsection (d).

Subsection (b) calls for a comparison of the amount of money the State spent in one fiscal year to the amount that the State has available to spend in the next fiscal year. The *Hickel* Court reasoned that if funds were available to the legislature to spend on any public purpose, even if those funds were in accounts with a specified purpose, then that money was "available for appropriation" under subsection (b).[46] But the Court recognized that some state funds—which it called "trust receipts"—did not fall within this definition, because their use was restricted by law,[47] even though the legislature appropriated from them each year.[48] As an example, the Court cited the Public Employees Retirement Fund, a trust account from which the legislature appropriated money each year to cover the cost of administering the trust.[49] This creates a problem for the comparison required by subsection (b), especially because these "trust receipts"

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46 *Hickel* at 931-32.

47 *Id.* at 931 n.22 ("'Trust receipts' include all funds, whatever the source, which the State can only use for a specific stated purpose under applicable law. The largest 'trust receipt' category is federal funding, which may only be appropriated by the State for the purpose prescribed by the federal government.")

48 *Id.*

49 *Id.*

include federal funding, which makes up a significant part of the State's annual budget.[50] The "amount appropriated for the previous fiscal year" necessarily includes the money appropriated from "trust receipts." And those receipts are available for appropriation for trust purposes in the current fiscal year also, so excluding them entirely from the "amount available for appropriation" would mean that the current budget would always appear underfunded compared to the previous year's budget, effectively guaranteeing annual access to the CBR. But, as the Court noted, "[t]he language of section 17 and the purposes behind the establishment of the [CBR] fund do not support such easy access."[51] To restore the apples-to-apples comparison required to give subsection (b) meaning, the Court added to the basic definition of "amount available for appropriation" an adjustment to include any amounts actually appropriated from restricted funds containing "trust receipts."[52]

In contrast, subsection (d) does not require a comparison. It asks only how much money is available for appropriation at the end of the fiscal year, so that that available money can be used to repay the debt to the CBR. Trust receipts cannot be used for this purpose, so, unlike under subsection (b), no adjustment to the basic definition of "available for appropriation" is necessary to account for the unique circumstances of those funds. The plaintiffs suggest that the definition that the *Hickel* Court employed for

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[50] A breakdown of the revenue sources for the current budget can be found in the Legislative Finance Division's Fiscal Summary. *See* https://www.legfin.akleg.gov/FisSum/FY23-GovReq.pdf at 2.

[51] *Hickel*, 874 P.2d at 930.

[52] *Id.* at 931-932.

subsection (b) cannot be applied to subsection (d) because of this, but they do not explain how the inapplicability of the second part of the definition to (d) somehow renders the first part invalid.

The plaintiffs also argue that the "temporal component" of (d) is critical to its proper interpretation. That is true, and this truth clarifies why their argument about the second part of the subsection (b) definition is meritless. The "amount appropriated for the previous fiscal year" component of subsection (b) is irrelevant to subsection (d), which makes no comparison but rather, looks at the general fund at one snapshot in time: the end of the fiscal year.

Section 17(d) provides that "the amount of money in the general fund available for appropriation *at the end of each succeeding fiscal year* shall be deposited in the budget reserve fund."[53] As the plaintiffs note, this language specifies the moment "when the analysis of what money remains 'available for appropriation' must be considered."[54]

But the subsection (b) adjustment has no meaning when considering what funds are "available for appropriation" at the end of the fiscal year. The "amounts which the legislature actually appropriates for the fiscal year"—the *Hickel* Court's adjustment for the subsection (b) comparison—will typically have been spent by June 30, and thus will no longer be in the general fund. Therefore, that money cannot be swept. And even if the second category of money included appropriations for the *coming* fiscal year—despite the fact that that makes no sense—much of the funding for the following fiscal

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[53] Alaska Const. art. IX, § 17(d) (emphasis added).

[54] Reply at 6.

year will not yet be in the general fund or is otherwise not sweepable because it is restricted.[55] Thus, the plaintiffs' purported concern that applying the *Hickel* definition to subsection (d) would "mean that the legislature would not be able to fund state government" is empty catastrophizing, reflecting a surprising failure to understand state finances.

In sum, the plaintiffs' argument that the second category of money the Court included in the definition of "amount available for appropriation" in subsection (b) makes that definition "unworkable" if applied to subsection (d) is an unavailing distraction. *Hickel*'s definition of "available for appropriation"—without the section (b) specific adjustment—is perfectly workable and clearly includes the money in the HEIF.

D. The plaintiffs' and the Council's other arguments either mischaracterize the State's position or the impact of the sweep or both.

Again, applying the holding of *Hickel* to the HEIF does not require this Court to find that the original appropriation to the HEIF was "invalid under the constitution," or that the legislature "cannot create special funds."[56] The State has never made that argument. Recognizing the difference between a spending appropriation and an

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[55] The vast majority of the State's current budget is funded from three sources, none of which is subject to the sweep: annual revenues which are received and spent during the fiscal year and cannot be swept because they are not in the general fund at the end of any fiscal year; federal funding, which cannot be swept because its use is restricted to the purpose for which it was provided by the federal government; and money in the Permanent Fund's Earnings Reserve Account ("ERA"), which is not in the general fund. *Hickel*, 874 P.2d at 936 n.32. *See also* https://www.legfin.akleg.gov/FisSum/FY23-GovReq.pdf at 2.

[56] Reply at 26.

accounting appropriation—and following *Hickel*'s direction to assign a different constitutional significance to each—does not equate to arguing that an accounting appropriation is "invalid under the Constitution," nor is it "effectively" an argument that the legislature "cannot create special funds—including endowment funds—with appropriations that do not lapse."[57] Concluding that the HEIF is sweepable does not imply that the legislature acted improperly by creating and funding it.

Nor does *Hickel*'s interpretation of section 17(d) "render...meaningless" the direction in AS 37.10.750(a) that "[m]oney in the fund does not lapse."[58] The HEIF was created approximately ten years ago with a $400 million transfer of funds from the receipts of the Alaska Housing Capital Corporation.[59] And in the ten years since then, those words have had meaning—that $400 million has not lapsed. Even now, the money has not "lapsed," it has been swept into the CBR—this is not the same thing.

Perhaps what the plaintiffs mean to say is that the sweep frustrates the legislature's purpose in creating special funds like the HEIF. But that is not a legal argument about the correct interpretation of section 17(d). It is a complaint that in plaintiffs' view, the sweep is bad policy. The plaintiffs believe maintaining funds like the HEIF should be a higher priority than repaying the CBR. But section (d)—especially as *Hickel* interprets it—leaves no doubt that repaying the CBR is the top constitutional priority for a fund like the HEIF. Plaintiffs' preference to relegate the

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57 *Id.*

58 *Id.* at 24.

59 *See* ch. 5, § 20(f) FSSLA 2011.

CBR to the lowest priority for unspent general funds cannot be realized without deleting section 17(d) from the Constitution.

For its part, the Council repeatedly claims that the sweep required by *Hickel* will "disrupt[] existing state services,"[60] "de-fund previously established programs,"[61] "require the elimination of existing state services,"[62] and "dismantle existing state programs."[63] The Council suggests that such "'reductions in the level of government service' [are] inconsistent with section 17's clear stabilizing purpose."[64] This is not just a bad argument; it is also simply false.

The HEIF is an investment account, not a state program. As the statute creating the fund makes clear, the legislature *must still appropriate money* into different accounts to pay student grants and scholarships.[65] And the legislature is free to continue to appropriate money from other sources to fund grants and scholarships, whether or not there is money in the HEIF. In other words, the sweep does not de-fund any program. It is simply a constitutionally-mandated transfer of funds from one account to another. The legislature retains its power to fund state programs with the money available to it for the fiscal year. The legislature can even use the money that has been swept into the CBR if the required three-fourths majority supports that spending.

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60 Amicus at 2.

61 *Id.* at 6.

62 *Id.* at 11.

63 *Id.* at 10-11 n.28.

64 *Id.* at 14 (citing *Hickel*, 874 P.2d at 929).

65 *See* AS 37.14.750(a).

In the same vein, the Council claims that applying *Hickel*'s definition would "allow[] for the 'borrowing' of funds from the CBR in one year—precisely so that no existing state services would be eliminated—but would then immediately require the elimination of those same services under section 17(d) in order to enable the fastest possible repayment to the CBR[,]...effectively preclud[ing] any long-term projects or services involving multi-year appropriations if the monies reside in the general fund."[66] This, too, is nonsense. Because funds like the HEIF are "available for appropriation" under subsection (b), if there was any money in the HEIF to sweep the legislature would not have been able to access the CBR in the first place. And long-term projects involving multi-year appropriations are accomplished through the enactment of *spending appropriations*. Those take funds out of the pool of money that is "available for appropriation" under the *Hickel* definition.

Finally, the Council offers an entirely new argument, which the plaintiffs do not make, that AS 37.14.750(c)'s direction that the Commissioner of Revenue "shall identify seven percent of [the HEIF's June 30 market value] as available for appropriation [for grants and scholarships]" controls the application of section 17(d) to the HEIF. But the Council's argument reveals that it does not really believe that this statutory language has any application to the constitutionally mandated sweep. In effect, the Council argues that under the statute, only seven percent of the fund's year end value is available for appropriation, and that even that sum is not sweepable because it

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[66] Amicus at 13.

"has not been *made available* for appropriation" until the amount can be determined, which is after the sweep occurs.

Of course, the question is not whether the funding "has been made available" but whether it is actually available to the legislature. The Council cannot deny that the legislature retains the authority to appropriate as much of the HEIF as it wants to spend on *any public purpose*, regardless of whether that purpose is related to the grant and scholarship programs the HEIF was created to pay for. That undisputed fact compels the conclusion that the HEIF is available for appropriation under *Hickel*.

E. A constitutional provision cannot violate the separation of powers.

In defense of its separation of powers argument, the plaintiffs assert that the State has made arguments that it did not make[67] and claimed an authority that it did not claim.[68] Particularly desperate is their allegation that "[t]he Executive Branch asserts that it alone may act as the sole arbiter of what is or is not a 'true' appropriation, claiming that the legislature cannot set aside monies in special endowment funds for a public purpose as they have done with the HEIF and countless other funds since statehood."[69] Of course, the State made no such assertions or claims.

The plaintiffs' real argument is that *the constitution*, through Article IX, section 17, imposes limitations on the legislature's power of appropriation that they do not like.

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[67] Reply at 29-30 ("The Executive Branch's argument that the HEIF is not a valid appropriation [sic] under the Alaska Constitution itself disrespects and undercuts article II.").

[68] *Id.* at 31

[69] *Id.*

They want to blame the "Executive Branch" for this so that they can accuse the governor of violating the separation of powers. But the legislature drafted the CBR amendment, the voters approved it, and the Alaska Supreme Court has directed how that amendment should be interpreted. The executive branch cannot ignore that direction.

As the State pointed out in its motion, limiting the legislature's power of appropriations was the point of the CBR amendment. The Alaska Supreme Court confirmed this in *Hickel v. Halford*, with language that the plaintiffs themselves quote: "The purpose of the amendment...was to remove certain unexpected income from the appropriations power of the legislature..."[70] The plaintiffs' claim that the drafters of the amendment could not have intended to limit the legislature's appropriations power has no merit and provides no grounds for rejecting *Hickel*'s interpretation of section 17(d).

The plaintiffs' separation of powers argument fails because it relies on the erroneous contention that the executive branch is exercising some kind of discretion in executing the sweep. This is not true. The sweep is mandated by a provision of the constitution; and the executive branch does not violate the separation of powers when it follows a constitutional mandate.

II. CONCLUSION

This case requires the Court to determine whether the HEIF is subject to the sweep required by Article IX, section 17(d) of the Alaska Constitution. The Alaska

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[70] *Hickel v. Halford*, 872 P.2d 171, 177 (Alaska 1994); *see* Reply at 10 n.35 (quoting this language and other language stating that "the amendment seeks to hold down current spending levels, *by preventing the legislature from appropriating* certain 'windfall receipts..." *Halford*, 872 P.2d at 177 n.9 (emphasis added)).

Supreme Court has held that a fund is sweepable under section 17(d) if the legislature is free to appropriate it for any public purpose and it cannot be spent without further legislative action. It is undisputed both that the legislature can appropriate the money in the HEIF for any public purpose and that that money cannot be spent without further legislative action. Because this compels the conclusion that the HEIF is sweepable, the State respectfully asks this Court to deny the plaintiffs' Motion for Summary Judgment and grant the State's Cross-Motion.

DATED February 4, 2022.

TREG R. TAYLOR
ATTORNEY GENERAL

By: /s/ Margaret Paton Walsh
Margaret Paton Walsh
Alaska Bar No. 0411074
Katherine Demarest
Alaska Bar No. 1011074
Assistant Attorneys General

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT. RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,	)	
Plaintiffs,	)	FILED in the TRIAL COURTS State of Alaska Third District
v.	)	FEB 08 2022
GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,	)	Clerk of the Trial Courts By_____Deputy
Defendants.	)	Case No. 3AN-22-04028 CI

#4 AFFIDAVIT OF CIARA MEEK

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I Ciara Meek, being duly sworn, states as follows:

1. My name is Ciara Meek. I am an Accountant V in the Division of Finance, where I have worked since August 5, 2019. My job responsibilities include managing accounting functions with respect to the sweep of money from the general fund to the Constitutional Budget Reserve Fund at the end of the fiscal year when that is required by Article IX, section 17(d) of the Alaska Constitution.

2. In January of 2020, as part of the review of funds for sweepability, I met with Eileen Donahue, Karen Buchkoski, and Melanie Wernert from the Division of

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Legislative Audit, who expressed their belief that the Alaska Higher Education Investment Fund was subject to the sweep. I understood that the fund might be only partially sweepable because it can receive donations intended to support grants and scholarships and the use of any such donations would be restricted.

3. Following our meeting, I received an email from Karen Buchkoski, which is attached to this affidavit as Exhibit A, indicating that they had researched the fund, determined that no donations had been deposited into the fund, and were therefore going to include the entire balance of the fund as sweepable in their audit adjustment. I also reviewed the fund and made the same determination.

4. Legislative Finance and Legislative Audit published their analysis of the sweepable funds on their website. Both agreed that the Alaska Higher Education Investment Fund should be subject to the sweep. A spreadsheet showing their analysis is attached to this affidavit as Exhibit B. This document can also be found using the following link:

http://www.akleg.gov/basis/get_documents.asp?session=31&docid=47425.

DATED this 4 day of February 2022, at Anchorage, Alaska.

Ciara Meek

SUBSCRIBED AND SWORN TO before me this 4 day of February, 2022.

ELIZABETH FORKAN NOTARY PUBLIC STATE OF ALASKA Commission Expires with Office

Notary Public in and for Alaska
My Commission Expires: with office

ATTORNEY GENERAL, STATE OF ALASKA
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From: Karen Buchkoski
To: Vrabec, Tara J (DOA); Wernert, Melanie S (LEG)
Cc: Meek, Ciara L (DOA); Donahue, Eileen S (LEG)
Subject: RE: CAFR - GFBS Sub-Funds AC 1498
Date: Thursday, January 23, 2020 2:20:21 PM

Hi,

Yes, they will be included in our audit adjustment. Just a follow-up to our meeting yesterday regarding fund 1226. We did more research on our end as well and did not identify any donations going into the fund. Therefore, we will include the $347,096,463 as sweepable in our audit adjustment.

Karen L. Buchkoski, CPA
Audit Manager
Division of Legislative Audit
(907)465-4377

From: Vrabec, Tara J (DOA) <tara.vrabec@alaska.gov>
Sent: Thursday, January 23, 2020 2:10 PM
To: Karen Buchkoski <Karen.Buchkoski@akleg.gov>; Melanie Wernert <Melanie.Wernert@akleg.gov>
Cc: Meek, Ciara L (DOA) <ciara.meek@alaska.gov>; Eileen Donahue <Eileen.Donahue@akleg.gov>
Subject: CAFR - GFBS Sub-Funds AC 1498

Hi Karen,

Could you please confirm the following funds did not have the reserve for prepaid expenses, account 1498, and that they will be included in an audit adjustment:

FU 1151	$396.40
FU 1153	$938.22
FU 1172	$207.69
FU 1180	$15,000
FU 1237	$179.00

Thank you, Tara Vrabec
907-321-8835

Funds Subject to CBR Sweep--FY17-FY19

	A	B	C	D	E	F	G	H	I
1								LFD believes should not be on list	
2								LFD believes should be on list	
3								LFD believes should not be on list, and sweep is problematic	
4									
5									
6					On Sweep List for End of Year				
7	Added by LFD	Fund Code	Name	Reference	FY17	FY18	FY19	Legislative Finance Notes	Legislative Audit Notes
8		1005	General Fund/Program Receipts	AS 37.05.142-.146, AS 37.10.050-.060			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Agree based on notes in Column H
9	Y	1012	Railbelt Energy Fund	AS 37.05.520	Y	Y		Sweepable; specific mention in Hickel v Cowper	We state sweepable
10	Y	1019	State Land Reforestation	AS 41.17.300	Y	Y		Includes private donations so partially sweepable	We state sweepable
11		1044	AK Debt Retirement Fund	AS 37.15.011	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
12		**1049**	**Training and Building Fund**	AS 23.20.130	N	N	Y	"special fund separate and apart from all public funds of the state"- --but the fund is regularly appropriated, so sweepable	Disagree - not sweepable. Is a GF subfund.
13		1052	Oil and Hazardous Substance Release Prevention Mitigation Account	AS 46.08.010-.040, AS 43.55.201&.300 AS43.40.005-.007	N	Y	Y	Response account is non-sweepable; prevention and mitigation accounts are sweepable. Consider adding new fund codes	Agree with note in column H. There are different fund codes in IRIS to address.
14		1054	State Employment & Training Program	AS 23.15.625 AS 37.05.146	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
15		1076	Marine Highway System Fund	AS 19.65.060, AS 37.05.550	Y	Y	Y	Sweepable; specific mention in Hickel v Cowper	Agree
16		1082	Vessel Replacement Fund	AS 37.05.550	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
17	Y	1083	Educational Facilities Maintenance and Construction	AS 37.05.560	Y	Y		Sweepable; specific mention in Hickel v Cowper	We state sweepable
18	Y	1087	Municipal Capital Project Matching Grant	AS 37.06.010	Y	Y		Sweepable; in GF and subject to appropriation	We state sweepable
19	Y	1088	Unincorporated Community Capital Project Matching Grant	AS 37.06.020	Y	Y		Sweepable; in GF and subject to appropriation	We state sweepable
20		1109	Test Fisheries Receipts	AS 16.05.050(a)(14)			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
21	Y	**1134**	**Fish and Game Civil Fines & Penalties**				Y	These are simply GF receipts. OMB lists this as account code 3233	Disagree - not sweepable. Is not a GF subfund.
22		1139	AHFC Dividend				Y	Dividends are appropriated for capital projects; any surplus is appropriated to the capital Income Fund or the GF, both of which are sweepable. There is no reason to list dividends as sweepable because there is never a balance.	Not a fund based on review of IRIS for FY 19 funds.

Exc. 300

Funds Subject to CBR Sweep–FY17-FY19

	A	B	C	D	E	F	G	H	I
7	Added by LFD	Fund Code	Name	Reference	FY17	FY18	FY19	Legislative Finance Notes	Legislative Audit Notes
23		1140	AIDEA Dividend				Y	Dividends are appropriated for capital projects; any surplus is appropriated to the capital Income Fund or the GF, both of which are sweepable. There is no reason to list dividends as sweepable because there is never a balance.	Not a fund based on review of IRIS for FY 19 funds.
24		1141	RCA Receipts	AS 37.05.146(c)(22), AS 42.05.254			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
25		1150	ASLC Dividend				Y	Dividends are appropriated for capital projects; any surplus is appropriated to the capital Income Fund or the GF, both of which are sweepable. There is no reason to list dividends as sweepable because there is never a balance.	Not a fund based on review of IRIS for FY 19 funds.
26		1151	Technical Vocational Education Program Account	AS 23.15.830 AS 37.10.200	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
27		1153	State Land Disposal Income Fund	AS 38.04.022(a), AS 37.05.146(b)	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
28		1154	Shore Fisheries Development Lease Program	AS 38.05.082 AS 37.05.146(b)			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
29		1155	Timber Sale Receipts	AS 38.05.110 AS 37.05.146(b)			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
30		1156	Receipt Supported Services	AS 37.05. 142 through 146			Y	Often carried forward	Not a fund based on review of IRIS for FY 19 funds.
31		1157	Workers Safety and Compensation Administration Account	AS 23.05.067(e) AS 18.60, AS 23.30	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
32		1162	Alaska Oil & Gas Conservation Commission Rcpts	AS 31.05.093, AS 37.05.146(c)(23)			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
33		1166	Commercial Passenger Vessel Environmental Compliance Fund	AS 46.03.460-.490	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
34		1168	Tobacco Use Education and Cessation Fund	AS 37.05.580	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
35		**1169**	**PCE Endowment Fund**	AS 42.45.070-.085	N	N	Y	If statute placing the fund outside the GF is insufficient to avoid being swept, then the ERA should also be sweepable	Agree with note in column H.
36		1172	Building Safety Account	AS 44.31.025 AS 37.05.146(c)(53)	Y	Y	Y		Agree
37		1173	Miscellaneous Earnings	-			Y	Sweepable; in GF and subject to appropriation	Not a fund based on review of IRIS for FY 19 funds.
38		1180	Alcohol & Other Drug Abuse Treatment & Prevention Fund	AS 43.60.050	Y	Y	Y		Agree
39		1181	Veterans Endowment	AS 37.14.700	N	N		a trust fund–not sweepable	Agree not sweepable. Is a GF subfund.

Funds Subject to CBR Sweep--FY17-FY19

	A	B	C	D	E	F	G	H	I
7	Added by LFD	Fund Code	Name	Reference	FY17	FY18	FY19	Legislative Finance Notes	Legislative Audit Notes
40		1195	Snow Machine Registration Receipts	AS 28.39.010-250			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
41		1197	Alaska Capital Income Fund	AS 37.05.565	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
42		1200	Vehicle Rental Tax Receipts	AS 43.52.080			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
43		1201	Commercial Fisheries Entry Commission Receipts	AS 16.43, AS 16.05.490, AS16.05.530, AS 37.05.146(c)(29)			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
44		1203	Workers' Compensation Benefits Guaranty Fund	AS 23.30.082	Y	Y	Y		Agree
45		1211	Cruise Ship Gambling Tax	-	Y		Y	This is UGF inside a dedicated fund, but sweepable	**Agree sweepable - zero fund balance in FY 18; our previous reporting denotes funding source. Fund 1211 name is Large Passenger Vessel Gambling Tax Account.**
46		**1213**	**Alaska Housing Capital Corporation Receipts**	-			Y	held by a corporation	Unsure how we reported on final. Is a fund in the SRF with the name AHFC - Alaska Capital Fund
47		**1214**	**Whittier Tunnel Toll Receipts**	23 USC 129(a)(3)			Y	There are federal restrictions on tolls--must be spent for a purpose allowable under Title 23	Not a fund based on review of IRIS for FY 19 funds.
48		1218	146(c)code	AS 37.05.146(c)			Y	Program Receipts that are not part of the unrestricted general fund. Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
49	Y	1220	Crime Victim Compensation Fund	AS 18.67.162	Y	Y		Includes private donations so partially sweepable	Agree
50		1221	Civil Legal Services Fund	AS 37.05.590	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree
51		1226	Alaska Higher Education Investment Fund	AS 37.14.750 (fund) AS 14.43 (program)	N	N	Y	Sweepable; in GF and subject to appropriation	Agree but partially sweepable due to donations.
52		1234	License Plates	AS 28.10.421	N	N	Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
53		1237	Vocational Rehabilitation Small Bus. Enterprise Revolving Fd	AS 23.15.130	Y	Y	Y		Agree
54		1243	Statutory Budget Reserve Fund	AS 37.05.540	Y	Y	Y	Sweepable; in GF and subject to appropriation	Agree - IRIS fund # 3200
55		1246	Recidivism Reduction Fund	AS 43.61.010		Y	Y	Sweepable; in GF and subject to appropriation	Agree

Funds Subject to CBR Sweep--FY17-FY19

	A	B	C	D	E	F	G	H	I
7	Added by LFD	Fund Code	Name	Reference	FY17	FY18	FY19	Legislative Finance Notes	Legislative Audit Notes
56		1247	Medicaid Monetary Recoveries	37.05.146(c)(59) and AS 09.58 and AS 47.05.210			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30	Not a fund based on review of IRIS for FY 19 funds.
57		1248	Alaska Comprehensive Health Insurance Fund	AS 21.55.430(a)	Y	Y	Y		Agree
58		1249	Motor Fuel Tax Receipts	AS 43.40.010(f)(g)(j)			Y	Unspent receipts that are not carried forward lapse to the GF at year end; no reason to sweep because all unspent balances are in the GF on 6/30. Aviation fuel tax receipts are dedicated and should not sweep	Not a fund based on review of IRIS for FY 19 funds.
59		1254	Marijuana Education and Treatment Fund	AS 43.61.010(f)			Y	new fund in FY19. Sweepable; in GF and subject to appropriation	Agree
60									
61	Accounting Codes								These are not accounting codes they are fund code #s!
62	1243	3200	Statutory Budget Reserve Fund		Y	Y	Y	see code 1243	Agree; however OMB list uses FU 1243 which is not an IRIS fund #.
63		3205	Alaska Historical Commission Receipts Account (Partially Sweep)		Y		Y	Includes private donations so partially sweepable	Agree
65		3221	Originator Surety Fund		N	Y	Y		Agree
66		3222	Trauma Care Fund (Partially Sweep)		Y	Y	Y	Partial	Agree
67		3223	Abandoned Vehicle Fund		Y		Y		Agree
68		3225	AMHS Capitalization		Y	Y	Y		Agree
69		3388	$.01 Per Barrel of Oil Produced Surcharge			Y	Y		Agree
70		3389	$.04 Per Barrel of Oil Produced Surcharge			Y	Y		Agree
71		N/A	Reappropriations of FY19 Operating Appropriations				Y	Reappropriations and carryforward of operating appropriations are effective June 30; valid appropriations should not be swept, and excess balances lapse to the GF and are swept from there	Appropriations effective June 30 occur before the sweep.

Exc. 303

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Plaintiffs, v. GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Defendants.	FILED in the TRIAL COURTS State of Alaska Third District FEB 07 2022 Clerk of the Trial Courts By_____Deputy Court No.: 3AN-22-04028CI

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CITATION OF SUPPLEMENTAL AUTHORITIES

Before tomorrow's scheduled oral argument, Plaintiffs wish to provide citations to two supplemental authorities — *Brutin v. Schlumberger Technology Corp.*[1] and *Joseph v. State*[2] — pursuant to Alaska Civil Rule 77(*l*).[3] These citations should be considered

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[1] 487 P.3d 595, 601 (Alaska 2021) (quoting *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 922 (Alaska 1999)) (defining dicta).

[2] 26 P.3d 459, 468-69 (Alaska 2001) (finding two prior cases were dicta as to the issue before the Court).

[3] Alaska Civ. R. 77(*l*) ("When pertinent authorities come to the attention of a party after the party's memorandum has been filed, or after oral argument but before decision, the party may promptly advise the court, by letter, with a copy to adversary counsel, setting forth the citations. There must be a reference either to the page of the memorandum or to a point argued orally to which the citations pertain, but the letter may not contain argument or explanations. Any response must be made promptly and must be similarly limited.").

as additional support to Plaintiffs' Motion for Summary Judgment at pages 28-30, and Plaintiffs' Reply and Opposition to the Executive Branch's Cross-Motion for Summary Judgment at pages 5-6.

CASHION GILMORE & LINDEMUTH
Attorneys for Plaintiffs

DATE: February 7, 2022

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CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing was served via email on February 7, 2022 on the following:

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By: s/Colleen McGovern
Colleen McGovern

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MADILYN SHORT, RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA, Plaintiffs, v. GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, Defendants.	Case No. 3AN-22-04028CI

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS-MOTON FOR SUMMARY JUDGMENT

Plaintiffs brought this lawsuit challenging Defendants' decision to sweep all of the Higher Education Investment Fund into the Constitutional Budget Reserve pursuant to article IX, section 17(d) of the Alaska Constitution. Both parties have moved the Court for summary judgment on this issue. The Alaska Legislative Council, acting on behalf of the Alaska Legislature, filed a Brief of Amicus Curiae effectively opposing Defendants' Cross-Motion for Summary Judgment. As will be explained below, the Higher Education Investment Fund is "in the general fund" and is "available for appropriation," making it

subject to the sweep by Defendants. Therefore, the Court **DENIES** Plaintiffs' Motion for Summary Judgment and **GRANTS** Defendants' Cross-Motion for Summary Judgment.

Background

I. The Congressional Budget Reserve

In 1990, the Alaska Legislature drafted a proposed amendment to the Alaska Constitution, article IX, section 17, (section 17) which would create the Congressional Budget Reserve (CBR).[1] Section 17 was placed on the November 1990 ballot after being approved by legislative resolution.[2] The voters ultimately voted in favor of section 17 and the CBR was created.[3] Section 17 contains four sections which reads in full:

> (a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under Section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. Section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.
>
> (b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the

[1] *Hickel v. Halford*, 872 P.2d 171, 172 (Alaska 1994).
[2] *Id.*
[3] *Id.*

> amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.
>
> (c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.
>
> (d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.[4]

In short, section 17 created a government savings account accessible by the legislature under two circumstances; however, any money withdrawn from the CBR must be repaid. Section 17(a) established the CBR, its funding sources, and also directs how the CBR can only be appropriated pursuant to section 17(b) and (c).[5] Section 17(b) authorizes appropriations from the CBR by a simple majority vote of the members of each house of the legislature "[i]f the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year[.]"[6] Section 17(c) authorizes appropriations from the CBR "for any public purpose" upon affirmative vote of three-fourths of the members of each house of the legislature.[7] Section 17(d) directs how any funds withdrawn from the CBR must be repaid. When an appropriation is made out of the

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[4] ALASKA CONST. art. IX, § 17.
[5] ALASKA CONST. art. IX, § 17(a).
[6] ALASKA CONST. art. IX, § 17(b).
[7] ALASKA CONST. art. IX, § 17(c).

CBR, the "money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited" into the CBR by the Executive Branch.[8] This is known as the "sweep" or "CBR sweep."

Pursuant to section 17(c), the legislature may—and has in the past—offset the sweep of 17(d) by using a "reverse sweep."[9] But the legislature did not achieve the three-fourths vote in both houses to effectuate the reverse sweep for the FY2022 operating budget.[10]

II. The Higher Education Investment Fund

In 2012, the legislature established the Higher Education Investment Fund[11] (HEIF) for the purpose of making grants to support the Alaska Education Grant (AEG) program[12] and the Alaska Performance Scholarship Award (APS) program.[13] The legislature made an initial appropriation of $400 million in 2011 to create the HEIF, but no money was borrowed from the CBR to originally fund the HEIF.[14] Recently, the legislature appropriated money from the HEIF to also support the Washington-Wyoming-Alaska-Montana-Idaho (WWAMI) medical school program.[15]

The HEIF consists of the following: (1) money appropriated to the fund; (2) income earned on investment of fund assets; (3) donations to the fund; and (4) money redeposited

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[8] ALASKA CONST. art. IX, § 17(d).
[9] Complaint ¶ 16 (Jan. 4, 2022).
[10] Motion for Summary Judgment at 13 (Jan. 4, 2022) (hereinafter Motion).
[11] AS 37.14.750; *See also* ch. 74, SLA 2012.
[12] AS 14.43.915(a).
[13] AS 14.43.915(b).
[14] Motion at 6.
[15] Motion at 9-10; Exhibit 6 to Lindemuth Affidavit (Jan. 4, 2022); *See* AS 14.43.510.

under AS 14.43.915(c).[16] Money in the HEIF does not lapse,[17] but the HEIF is not a dedicated fund.[18] "As soon as is practicable after July 1st of each year, the commissioner of revenue must determine the market value of the" HEIF as of June 30th for the immediately preceding fiscal year.[19] Then the commissioner must identify 7% of the HEIF's market value as "available for appropriation" to fund the grant and scholarship programs the HEIF was created for.[20] As of December 31, 2021, the HEIF consisted of $422 million, with 65% invested in equities; 29% in fixed income securities, 5% in a real estate investment trust pool, and 1% in cash and cash equivalents.[21]

III. Defendants history of determining whether the HEIF is subject to the CBR sweep

In April 2019, Governor Dunleavy introduced legislation to repeal the HEIF's enabling statue, but the legislature did not advance or pass the proposed legislation.[22] In July 2019, the legislature failed to achieve the required three-fourths vote in both houses to complete the reverse sweep of the FY2020 operating budget.[23] Subsequently, the Office of Management and Budget (OMB) Director Donna Arduin issued a memorandum to the legislature providing an analysis of which funds the OMB intended to sweep into the CBR

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[16] AS 37.14.750(a).
[17] *Id.*
[18] AS 37.14.750(b).
[19] AS 37.14.750(c).
[20] *Id.*
[21] Brief of Amicus Curiae at 8 (Jan. 28, 2022); Exhibit 2 to Cuddy Affidavit (Jan. 28, 2022) (The $119.67 remaining in the HEIF is in the form of income receivables/payables.)
[22] Motion at 12; *See* Exhibits 10, 11 to Lindemuth Affidavit.
[23] Motion at 10.

pursuant to section 17(d). The HEIF in its entirety was included as being subject to the sweep.[24] After the OMB determined that the HEIF was subject to the sweep, the legislature achieved the three-fourths vote of both houses to reverse sweep the funds at the end of July 2019.[25]

In 2021, the FY2022 operating budget passed by the legislature included approximately $21 million appropriated from the HEIF to fund the relevant scholarship and grant programs, but for the first time in the HEIF's existence, the legislature failed to achieve the required three-fourths vote to reverse the forthcoming sweep.[26] Immediately after the FY2022 operating budget was passed, the Executive Branch confirmed that it intended to sweep the entirety of the HEIF and that the $21 million appropriated from the HEIF to its supported programs would not be honored.[27]

In August 2021, the Anchorage Superior Court[28] issued Order on Motion for Summary Judgment and Cross-Motion for Summary Judgment analyzing section 17(d) and its application to the Power Cost Equalization Endowment Fund (PCE Fund)—finding the PCE Fund was not subject to the sweep because it was not in the general fund.[29] Following this decision, Attorney General Treg Taylor issued a memorandum on August 25, 2021, recommending that the Executive Branch release the swept funds that were validly

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[24] *Id.* at 10-11; Exhibit 7 to Lindemuth Affidavit.
[25] *Id.* at 12.
[26] *Id.* at 13.
[27] *Id.*; Exhibit 12 to Lindemuth Affidavit.
[28] The Honorable Josie Garton.
[29] Motion at 14; *See Alaska Federation of Natives, et al. v. Dunleavy, et al.*, No. 3AN-21-06737CI, 2021 WL 6288659, *6-7 (Alaska Super. Aug. 11, 2021).

appropriated out of the HEIF and placed into the relevant grant and scholarship programs for FY2022.[30] Based on this recommendation, Governor Dunleavy then directed the OMB to honor the FY2022 appropriations that were originally directed to be swept, including appropriations made out of the HEIF.[31] This action ensured that the scholarship and grant programs were fully funded for FY2022.

On December 15, 2021, Attorney General Taylor indicated in a letter to the University of Alaska that its interpretation of section 17(d) leaves the Executive Branch bound to sweep all monies which are in the "general fund" and "available for appropriation," and the HEIF is subject to sweep because of the language of its enabling statute.[32] Attorney General Taylor clarified that the memorandum issued on August 25, 2021 only spoke to monies (the $21 million to fund the scholarships and grants) which were already appropriated out of the HEIF and placed into the relevant programs, but any money left in the HEIF was subject to the sweep.[33]

IV. Proceedings

On January 4, 2022, Plaintiffs filed their Complaint alleging Defendants' decision to sweep the HEIF into the CBR is in violation of article IX, sections 13 and 17(d) of the Alaska Constitution.[34] Plaintiffs seek declaratory and injunctive relief in order to protect

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[30] *Id.*; Exhibit 16 to Lindemuth Affidavit.
[31] *Id.* at 14-15.
[32] Exhibit 17 to Lindemuth Affidavit.
[33] *Id.*
[34] Complaint ¶ 2.

the programs the HEIF helps fund.[35] Filed simultaneously with the Complaint, Plaintiffs moved the Court for summary judgment and argue as a matter of law that the HEIF is not subject to the CBR sweep.[36]

On January 19, 2022, Defendants filed their Opposition to Plaintiffs' Motion and Cross-Motion for Summary Judgment.[37] Defendants argue as a matter of law that the HEIF is subject to the CBR sweep.[38] The parties filed a joint motion for expedited briefing and decision on both summary judgment motions, which was granted by this Court.[39] On February 8, 2022, oral argument was held for both motions.

Legal Standard

Summary judgment is warranted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[40] "Questions of constitutional and statutory interpretation . . . are questions of law to which we apply our independent judgment."[41] When interpreting a constitutional provision, the court "should look to the plain meaning and purpose of the provision and the intent of the framers."[42]

Lower courts, such as this Court, are obligated to apply precedent set by higher courts, like the applicable holdings of the Alaska Supreme Court. Plaintiffs argue this

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[35] *Id.*
[36] Motion at 1.
[37] Opposition and Cross-Motion for Summary Judgment (Jan. 19, 2022) (hereinafter Cross-Motion).
[38] *Id.* at 2.
[39] *See* Joint Motion for Expedited Briefing and Decision Schedule (Jan. 5, 2022).
[40] *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) (quoting Alaska R. Civ. P. 56(c)).
[41] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016) (footnote omitted) (citations omitted)).
[42] *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994).

Court does not need to apply the holding of *Hickel v. Cowper*[43] for section 17(d) because *Hickel* was primarily concerned with section 17(b) and any application to 17(d) is dicta, and this Court is not bound by dicta of higher courts.[44] Defendants argue the definition and analysis of "available for appropriation" set forth in *Hickel* is not dicta and is binding on this Court for its section 17(d) analysis.[45]

Dicta are comments expressed in a judicial opinion, but which are not necessary to the holding of the case, rendering the comments not precedential.[46] The Alaska Supreme Court in *Hickel* defined what "available for appropriation" means within section 17(b) and applied it to AS 37.10.420(a)—which the Court held to be unconstitutional.[47] But the Court also held AS 37.10.420(b) to be unconstitutional when analyzing it against section 17(d).[48] The Court expressly applied the same definition of "available for appropriation" in section 17(d), as it did in section 17(b), to come to its holding. Stating, "[w]e see no reason to give 'available for appropriation' a different meaning in subsection (d) than we did in subsection (b)."[49] The Court performed an exhaustive analysis defining what "available for appropriation" means within section 17(b) and then made a conscious decision to apply the

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[43] 874 P.2d at 936.
[44] Motion at 28-30.
[45] Cross-Motion at 12-15.
[46] *VECO, Inc. v. Rosebrock*, 970 P.2d 906, 922 (Alaska 1999) (holding statement in previous opinion not dictum because it "was necessary for our holding"); *Obiter dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)").
[47] *Hickel*, 874 P.2d at 935-36.
[48] *Id.* at 936.
[49] *Id.* at 936, n. 32.

same meaning to section 17(d). This decision was not superfluous, but rather a part of the Court's overall conclusion in *Hickel*. As such, this Court is bound by the holding of *Hickel* as to what "available for appropriation" means under section 17(d) when analyzing the HEIF.

Hickel also affirmed the Alaska Constitution's plain-language two-part test for determining which funds are susceptible to the CBR sweep under section 17(d).[50] A fund is susceptible to the sweep and is to be deposited into the CBR if the fund is both: (1) in the general fund; and (2) available for appropriation at the end of each succeeding fiscal year.[51]

Therefore, the Court must determine whether the HEIF is "in the general fund" and "available for appropriation at the end of [this] fiscal year."[52]

Discussion

I. The HEIF is in the general fund

There is no dispute between the parties that the HEIF is in the general fund.[53] The HEIF's enabling statute states in part, "[t]he Alaska higher education investment fund is established in the *general fund*."[54]

This is where this case differs from *Alaska Federation of Natives, et al. v. Dunleavy,*

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[50] *Id.* ("[T]he payback provision in section 17(d) is limited to only those funds which are 'available for appropriation' *and* 'in the general fund.'"); ALASKA CONST. art. IX, § 17(d).
[51] *Id.*
[52] *Id.*
[53] Motion at 22; Cross-Motion at 11.
[54] AS 37.14.750(a) (emphasis added).

et al. (*AFN*).[55] In *AFN*, the Superior Court applied the section 17(d) analysis to the PCE Fund and concluded the PCE Fund was "available for appropriation" but *not* "in the general fund," exempting it from the CBR sweep.[56] The PCE Fund is not in the general fund because its enabling statute establishes it in a fund outside of the general fund. "The power cost equalization endowment fund is established as a separate fund[.]"[57] But here, the HEIF is established in the general fund according to its enabling statute.

Therefore, under the plain language of AS 37.14.750(a), the HEIF is in the general fund.

II. The HEIF is available for appropriation within the meaning of section 17(d)

The main issue of this case is what does "available for appropriation" mean within section 17(d), and does the HEIF fall within section 17(d)'s definition of "available for appropriation." Plaintiffs argue that "available for appropriation," within the meaning of section 17(d), means "only excess monies in the general fund that have not been appropriated for some purpose, are vetoed appropriations, or have since lapsed."[58] This would mean "only surplus funds—i.e., unobligated monies that are not subject to a legislative appropriation—are subject to the annual CBR sweep."[59]

Defendants argue the definition set forth in *Hickel* for "available for appropriation"

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[55] 3AN-21-06737CI, 2021 WL 6288659.
[56] *Id.* at *4-6.
[57] AS 42.45.070(a).
[58] Motion at 19.
[59] *Id.*

is the appropriate and binding definition the Court must apply here.[60] The Court agrees with Defendants. As stated above, the language in *Hickel* is not dicta and its holding as to the definition of "available for appropriation" is binding for the section 17(d) analysis of the HEIF.

Under *Hickel*, "available for appropriation" for section 17 "includes all monies over which the legislature has retained the power to appropriate, and which require further appropriation before expenditure."[61] *Hickel* provided examples as to what funds were "available for appropriation" at the time the case was decided. For example, the Railbelt energy fund,[62] the Alaska marine highway vessel replacement fund,[63] and the educational facilities and construction fund,[64] all are "restricted funds" within the general fund, and each consist of money appropriated to the fund by the legislature.[65]

But these initial appropriations establishing the respective funds do not support any expenditure and a further appropriation is necessary before the money in the fund can be spent, and because of this, the funds remain "available for appropriation."[66] The current language of these statutes either remain unchanged or are substantially similar to the language when cited by the Supreme Court in *Hickel*.[67]

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[60] Cross-Motion at 12-13.
[61] *Hickel*, 874 P.2d at 935.
[62] AS 37.05.520.
[63] AS 37.05.550.
[64] AS 37.05.560.
[65] *Hickel*, 874 P.2d at 934.
[66] *Id.*
[67] *See* AS 37.05.520 ("There is established in the general fund the Railbelt energy fund. The fund consists of money appropriated to it by the legislature and interest received on money in the fund. The department of revenue shall

The HEIF did not exist at the time the Court decided *Hickel*. However, the Court held that "[t]he availability of funds not specifically discussed in this opinion *must* be determined in accordance with this opinion."[68] The HEIF's enabling statute follows a similar structure compared to the funds in *Hickel* mentioned above. "The Alaska [HEIF] is established in the general fund for the purpose of making grants . . . *by appropriation* to the account established under AS 14.43.95(a) and making scholarship payments . . . *by appropriation* to the account established under AS 14.43.915(b)."[69] "Money in the fund does not lapse."[70] The commissioner of revenue "shall identify seven percent" of the HEIF's market value "*as available for appropriation*."[71]

Funds which were initially appropriated to create the HEIF do not support any further expenditure without more legislative action because the plain language of the statute shows further appropriations are necessary before the money in the HEIF can be spent. The legislature must appropriate the money out of the HEIF and into the relevant programs it supports for it to fall outside the definition of "available for appropriation."

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manage the fund. The legislature may appropriate money from the fund for programs, projects, and other expenditures to assist in meeting Railbelt energy needs, including projects for retrofitting state-owned buildings and facilities for energy conservation."; AS 37.05.550(a) ("There is in the general fund the Alaska marine highway system vessel replacement fund. The fund consists of money appropriated to it by the legislature. Money appropriated to the fund does not lapse. . . . The legislature may appropriate money from the fund for refurbishment of existing state ferry vessels, acquisition of additional state ferry vessels, or replacement of retired or outmoded state ferry vessels."); AS 37.05.560(a) ("The educational facilities maintenance and construction fund is established as a separate fund in the general fund."); AS 37.05.560(b) ("Money in the fund may be appropriated (1) to finance the design, construction, and maintenance of public school facilities; and (2) for maintenance of University of Alaska facilities.")

[68] *Hickel*, 874 P.2d at 935 (emphasis added).

[69] *Compare* AS 37.14.750 (emphasis added) *with* AS 37.05.520, AS 37.05.550(a), AS 37.05.560(a) *and* AS 37.05.560(b).

[70] AS 37.14.750(a).

[71] AS 37.14.750(c) (emphasis added).

And, the legislature has in fact taken this additional step in order to fund the various scholarship, grant, and WWAMI programs out of the HEIF. Without further legislative action, the funds in the HEIF stay in the general fund. This interpretation of the HEIF follows *Hickel's* binding definition of "available for appropriation" and its examples of other funds which are also considered to be "available for appropriation."[72]

Additionally, Plaintiffs argue *Hickel* failed to consider section 17(d)'s temporal distinction in contrast to section 17(b) for the analysis of "available for appropriation."[73] Section 17(d) states in part, "available for appropriation at the end of each succeeding fiscal year." Plaintiffs argue "at the end of each succeeding fiscal year" goes to when the analysis of what money remains "available for appropriation" must be considered, and the analysis is at a different time than under section 17(b).[74] The Court does not believe the temporal component of section 17(d) changes the meaning of "available for appropriation," or how it is applied; and the *Hickel* Court had the opportunity to apply a different meaning in section 17(d) but chose to explicitly apply the same definition it set out for section 17(b).[75]

Therefore, the HEIF is "available for appropriation" within the meaning of section 17(d).[76]

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[72] *Hickel*, 874 P.2d at 933-35.
[73] Reply in Support of Motion for Summary Judgment and Opposition to Cross-Motion for Summary Judgment at 5-8 (Jan. 28, 2022) (hereinafter Reply to Motion).
[74] *Id.* at 6; ALASKA CONST. art. IX, § 17(b) ("If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund.").
[75] *Hickel*, 874 P.2d at 936, n. 32.
[76] Plaintiffs also argue there is a separation of powers issue pursuant to Article IX, section 13 of the Alaska Constitution based on Defendants interpretation of section 17(d). Section 17(d) is a constitutional directive which was approved by Alaska voters. The *Hickel* Court had every opportunity to address a separation of powers issue, but

III. Appropriations already made out of the HEIF and into its related programs are not subject to the CBR sweep under section 17(d)

The legislature, for the FY2022 operating budget, appropriated approximately $21 million out of the HEIF and into the APS, AEG, and WWAMI programs.[77] The money which was appropriated out of the HEIF and into the programs must be honored. The money was appropriated out of the general fund, and the money is no longer available for appropriation because the money can now be expended without further legislative action. Defendants appear to agree with this interpretation and did honor the approximate $21 million appropriations.[78] Additionally, any donations made into the HEIF should not be subject to the sweep. Defendants do not dispute this but have stated in their briefing and during oral argument that there is no evidence any donations have been made into the HEIF.[79]

Conclusion

Although this case would not be before the Court if the legislature achieved the required three-fourths vote for the reverse sweep of the FY2022 operating budget, the programs the HEIF currently helps fund—APS, AEG, and WWAMI—do not have to become obsolete following the Court's decision here today. If the legislature believes these

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did not. The Court's silence on any possible conflict of section 17(d) with the separation of powers shows there is no conflict. Section 17(d) does not create a separation of powers issue. Any statutes which apply to section 17(d) must conform to the language and directive of the constitutional provision. Because the Executive Branch performed a valid sweep of funds, there cannot be a conflict creating a separation of powers question.

[77] Motion at 13; Exhibit 7 to Lindemuth Affidavit.

[78] Exhibits 15, 16 to Lindemuth Affidavit.

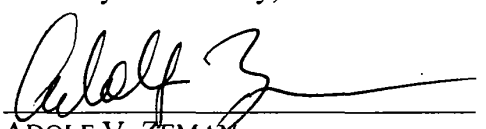
[79] Cross-Motion at 10; Steininger Affidavit ¶ 18(c) (Jan. 19, 2022).

programs should be funded, it possesses the power to establish the HEIF as a separate fund outside the general fund or to appropriate money from other sources—for example, a reverse sweep of the CBR—to fund the programs in the future.[80] However, this is not within the Court's power. The power of appropriation belongs solely to the Legislative Branch. The Court's decision here today stems from its interpretation of legal precedent, precedent it must follow and apply.

Defendants have shown they are entitled to judgment as a matter of law. As such, Defendants' Cross-Motion for Summary Judgment is **GRANTED** and Plaintiffs' Motion for Summary Judgment is **DENIED**. In accordance with this Order, the HEIF is subject to the CBR sweep pursuant to article IX, section 17(d) of the Alaska Constitution. Defendants shall file a proposed final judgment within 20 days of service of this decision.[81]

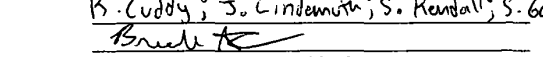
IT IS SO ORDERED.

DATED at Anchorage, Alaska this 17th day of February, 2022.



ADOLF V. ZEMAN
Superior Court Judge

I certify that on 17 *February, 2022, a copy was mailed to:*
K. Cuddy; J. Lindemuth; S. Kendall; S. Gottstein; M. Paton-Walsh



Brandon Smith, Law Clerk

[80] *See* AS 14.43.915(a)-(b); The APS and AEG programs enabling statute expressly states the programs may be funded from the HEIF "and from other sources." The WWAMI program has not always received HEIF funding and was recently appropriated funds by the legislature out of the HEIF.
[81] Alaska R. Civ. P. 56(c).

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

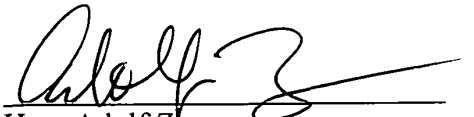
MADILYN SHORT. RILEY VON BORSTEL, KJRSTEN SCHINDLER, and JAY-MARK PASCUA,	)	
Plaintiffs,	)	
v.	)	
GOVERNOR MICHAEL J. DUNLEAVY in his official capacity, THE STATE OF ALASKA, OFFICE OF MANAGEMENT AND BUDGET, and THE STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,	)	
Defendants.	)	Case No. 3AN-22-04028 CI

[PROPOSED] FINAL JUDGMENT

The parties filed cross-motions for summary judgment. On February 17, 2022, the Court denied Plaintiffs' motion for summary judgment, and granted Defendants' cross-motion for summary judgment.

IT IS ORDERED that final judgment is entered for Defendants and against Plaintiffs pursuant to Alaska Civil Rule 54. This Court declares that the Alaska Higher Education Investment Fund (AS 37.14.750) is subject to the annual Constitutional Budget Reserve "sweep" pursuant to article IX, section 17(d) of the Alaska Constitution.

DATED this 22nd day of February, 2022.



Hon. Adolf Zeman
Superior Court Judge

I certify that on 2/22/22 a copy of the following was mailed/faxed/hand-delivered to each of the following at their addresses of record.
J. Lindemuth; S. Kendall; S. Gottstein; M. Paton-Walsh
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