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the Constitutional Convention: "pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, contributions from local government units for state-local cooperative programs, and tax receipts which the state might collect on behalf of local government units." 4/

Some of those examples were specifically mentioned by the court in State v. Alex, 646 P.2d 203 (Alaska 1982), which held that the phrase "proceeds of any state tax or license" was to be broadly construed to include all sources of public revenues. The court noted that the drafters intended to permit the establishment of certain special funds, (e.g., sinking funds for the repayment of bonds), but to prohibit the earmarking of any special tax to such a fund. Alex, supra at 210. The court did not elaborate on the application of the dedicated funds prohibition in these situations.

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4/ The Public Administration Service prepared a publication entitled "Alaska Statehood Commission, Constitutional Studies (1955)" at the request of the Alaska Territorial Legislature for use at the constitutional convention. Ch 108 SLA 1949. This publication collected research papers on other state constitutions. Copies were mailed to all delegates, and it was often referred to in the convention proceedings. Alaska Statehood Committee, "Handbook for Delegates to the Alaska Constitutional Convention" 4 (1955). Referred to in State v. Alex, 646 P.2d 203, 209 n. 5 (Alaska 1982). The memorandum of January 4, 1956 contained comments by the PAS on the proposed draft of the Finance and Taxation article. Constitutional Convention Finance Committee minutes, Jan. 13, 1956.

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II. MEANING OF THE PHRASE "PROCEEDS OF ANY STATE TAX OR LICENSE"

There has been continuing controversy over the proper construction of the phrase "proceeds of any state tax or license." In a number of earlier opinions, this office concluded that the dedicated fund prohibition did not reach all public revenues but, under its plain language, only the actual "proceeds of any state tax or license." See 1969 Op. Atty. Gen. Nos. 3 (Alaska, April 4, 1969) and 5 (Alaska, April 15, 1969); and 1959 Op. Atty. Gen. No. 7 (Alaska, March 11, 1959). This conclusion also was reached by the Division of Legal Services in the Legislative Affairs Agency. See September 1, 1977 memorandum from Bill G. Berrier, Director, to Subcommittee on Alaska Renewable Resources Development Fund of Alaska Permanent Fund (House).

Those opinions all concluded that the prohibition did not reach revenues derived from the disposal of state-owned natural resources. Given this conclusion, it followed that the legislature was free to dedicate all or a certain portion of such revenues to specific purposes. An example of this is found in AS 37.11.020, which requires that not less than five percent of state mineral lease receipts be deposited in the Alaska Renewable Resources Development Fund. (This statutory dedication was the subject of Mr. Berrier's September 1, 1977, memorandum).

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On the other hand, 1975 Op. Atty. Gen. No. 9 at 24  
(Alaska, May 2, 1975) reached the opposite conclusion:

Section 7 of Article IX of the state Constitution can be given its intended effect and serve its repeatedly expressed purpose only if the words "proceeds of any tax or license" are interpreted to mean what their framers clearly intended, i.e., the sources of any public revenues.

Accordingly, it is our conclusion that the dedication of any source of public revenue: tax, license, rental, sale, bonus-royalty, royalty, or whatever is limited by the state Constitution to those existing when the Constitution was ratified or required for participation in federal programs.

(Emphasis added.)

In State v. Alex, 646 P.2d at 210, the Alaska Supreme Court adopted the position set out in 1975 Op. Atty. Gen. No. 9 (Alaska, May 2, 1975). 5/ It now is clear that the term "proceeds of any state tax or license" is to be construed broadly to reach all public revenues, including public revenues from the development of state-owned natural resources, and not just the proceeds of taxes and license fees.

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5/ Alex involved a challenge by commercial fishermen to the collection by a private aquaculture association of a special assessment authorized by statute and imposed on the sale of salmon. The court held that the statute improperly delegated the legislature's taxing authority, and that the assessment constituted "proceeds of a state tax or license" within the meaning of Article IX, section 7. State v. Alex, 646 P.2d at 210, 213.

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After the decision in Alex we can now reach some definite conclusions regarding some of the funds and accounts you have asked us to review. The answers to other questions, however, are not as clear.

### III. IMPLICATIONS OF THE ALEX DECISION

There is no question that the dedicated funds prohibition in Article IX, section 7 flatly prohibits the legislature from dedicating future unrestricted general revenues to any particular purpose unless the dedication is required for participation in a federal program or the dedication existed before ratification of the Constitution. Alex, supra at 208-210. This confirms the view expressed in our April 1, 1981 memorandum opinion to the legislative auditor that the requirement in AS 37.11.020 that not less than five percent of state mineral revenues be placed in the Alaska renewable resources development fund is unconstitutional. This would be true of any statutory requirement that a specified percentage of revenues derived from the development of state-owned resources be deposited in a fund or earmarked for a particular purpose.

The Alex decision, however, does not provide answers to a number of additional questions. For example, does the dedicated funds prohibition apply (1) to money received through the sale of bonds (either general obligation bonds of the state or

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revenue bonds of a public corporation); (2) to receipts from operation of facilities constructed with bond proceeds; or (3) to interest or investment income earned on money appropriated for a specific purpose? In short, are there any exceptions to the prohibition beyond those expressly set out in the Constitution? The section immediately following discusses this question.

IV. POSSIBLE EXCEPTIONS TO THE DEDICATED FUND PROHIBITION

A. Implied Exceptions.

An early draft of what is now Article IX, section 7 (but which was at that time numbered section 8) read as follows: "All public revenues shall be deposited in the state treasury . . ." Subsequent to this early draft, the Committee on Finance and Taxation of the Constitutional Convention requested comments from the Public Administration Service on this wording. The PAS responded with the January 4, 1956 memorandum in which it warned that a strict interpretation of section 7 (then section 8) would prohibit the segregation of state money without regard to the source. The PAS then suggested that certain exceptions be identified in section 7. These exceptions included pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, contributions from local government units for state-local cooperative programs, and tax receipts

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which the state might collect on behalf of local government units.

After considering the PAS memorandum, the committee deleted the phrase "all public revenues shall be deposited ..." and substituted the phrase "The proceeds of any state tax or license ...". 3 Alaska Const. Conv. Proceed. at 2361. The record of the committee debate makes it clear that the purpose of this change was to meet the problems raised by the PAS in its January 4 memorandum. See 1975 Op. Atty. Gen. No. 9 at 8 (Alaska, May 2, 1975).

Given this drafting history, a very good case can be made that the present language of Article IX, section 7 must be read to include certain implied exceptions, such as those that are set out in the January 4 PAS memorandum, i.e., pension contributions, proceeds from bond issues, sinking fund receipts, revolving fund receipts, contributions from local government units for state-local cooperative programs, and tax receipts which the state might collect on behalf of local government units. We believe this implied exception approach is the better interpretation of the dedicated fund prohibition and would be adopted by the Alaska Supreme Court if the question is presented to it.

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B. Dedication of Money to Specific Purposes on a Continuing Basis When Appropriated

A question of the proper application of the dedicated funds prohibition arises when money is appropriated to a revolving loan fund or other special reserve fund or account. Revolving loan funds provide for the return to the fund of repayments by borrowers of the principal (and frequently the interest on that principal) 6/ which was loaned to them from the fund so that new loans can be made on a continuing basis. Special reserve funds involve essentially the setting aside of money for certain specified future needs or conditions which may or may not occur. 7/ When this is done, it might be argued that the legislature has made an impermissible dedication with respect to the future use of the money placed in those funds and accounts.

We believe the better view is that the dedication prohibition does not apply to money once appropriated by the legislature, regardless of whether the appropriation contemplates that the money will be expended. Usually appropriations authorize money to be spent. In other cases, however, the legis:

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6/ We discuss the dedication of interest earned by revolving loan funds and other separate funds and accounts in the next portion of this opinion which begins below at p. 14.

7/ The "Rainy Day Account," AS 37.05.179, is an example of such an account.

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lature may prefer to establish by general law a continuing loan program and finance it through a one-time appropriation or to reserve money in a special fund or account for future use for limited purposes. A strong argument can be made that money once appropriated, regardless of the mechanism utilized, loses its character as revenue for the purpose of the dedicated funds prohibition because the purpose of the prohibition, i.e., that the legislature retain control over state revenues, has been satisfied.

Under this reasoning there would be no unlawful dedication involved in the return to a revolving loan fund of principal payments on loans. The initial appropriation would suffice to authorize the use of that money for other loans until the legislature reappropriates the unobligated assets of the fund or abolishes the fund.

Support for this position is found in the Alaska Supreme Court's analysis in the Alex case. In Alex, the court took note of the drafting change of Article IX, section 7 referred to earlier. This change, said the court, "did not seek to exempt some sources of revenue from the prohibition, but was intended instead to allow necessary dedication of funds once they were received and placed in the general fund." State v. Alex, supra at 210.

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The Alaska Supreme Court has thus recognized that the dedication prohibition of Article IX, section 7 does not operate to prohibit all dedications whatever their nature. Rather, the court seems to be saying that Article IX, section 7 must be read to allow certain necessary dedications of money by the legislature after that money is received and placed in the state treasury (i.e., general fund). This analysis by the Supreme Court gives support to the argument that the dedication prohibition does not apply to money once it has been lawfully appropriated from the general fund and that the legislature can, without violating Article IX, section 7, create "necessary dedications" out of that money.

C. Income Generated by Specific Funds or Accounts

A question separate from that just discussed arises concerning the application of the dedicated fund prohibition to the interest or other income earned by money appropriated to revolving funds and other funds and accounts. Is that derivative income revenue which, under the prohibition, must be deposited in the general fund, or may it accrue directly to the fund or account which "earned" it, increasing the amount of money in that fund or account which may be spent without further appropriation?

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We are advised by the Department of Administration that the National Committee on Governmental Accounting has defined a fund to be:

A fiscal and accounting entity with a self-balancing set of accounts recording cash and other financial resources, together with all related liabilities and residual equities or balances, and changes therein, which are segregated for the purpose of carrying on specific activities or attaining certain objectives in accordance with special regulations, restrictions, or limitations.

Municipal Finance Officers Association of the United States and Canada, "Governmental Accounting, Auditing, and Financial Reporting," 1980, Appendix B.

From the point of view of generally accepted accounting principles, then, income generated by a fund accrues to that fund unless a transfer is authorized. Economic theory also leads to that result, arguing that the interest or investment income on a particular fund is simply an increase in the value of the fund which offsets inflation and reflects the gradual growth of our economy. Under either approach, such derivative income ought not to be considered revenue subject to the dedicated funds prohibition.

Derivative income such as interest and investment income is not a traditional source of public revenue. It is generated by public revenue which has been received and appropriated and would not be generated if the legislature had

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simply spent the money rather than appropriated it to a separate fund. Thus, a statutory dedication of the interest or investment income of a separate fund would not impair the ability of future legislatures to control the spending of general revenues. Rather, it would create a new pool of resources to be used under the statutory guidelines applicable to a particular fund until a future legislature amended or repealed those guidelines. There is no indication in the minutes of the Constitutional Convention that the drafters considered the treatment of separate funds which are endowed in this manner.

A difficulty that arises from the view that the dedicated funds prohibition is not applicable to interest or investment income on separate funds is that it permits steadily increasing amounts of money to be received and used by state departments and agencies without legislative control through the annual budget process. This is precisely the problem posed by the dedication of revenue sources which the drafters sought to avoid. For this reason, while we are not certain about the likely outcome, we doubt that a blanket exception for derivative income would be approved by the courts.

After all, the Alaska Constitution was not written for accountants and economic theorists. Although not expressly addressed by them, the framers were very much aware of the boom-bust cycle of Alaska's economy. In fact, a driving force

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behind statehood was the desire of Alaskans themselves to be able to manage the income derived from those brief periods -- as Prudhoe Bay bears witness -- when the state may receive enormous sums of money which are then immediately available for expenditure or placement, by appropriation, into a variety of funds and accounts for various permissible purposes. Depending on the number and size of those funds and accounts, the interest earned on the money placed in them could itself be substantial and would almost certainly be of a magnitude which is far greater than that likely envisioned by the National Committee on Government Accounting in the above-quoted standard. Moreover, the significance of that interest income in properly managing the state's budget leads us to the conclusion that our framers would have considered it to be within the dedicated fund prohibition. As we have indicated, however, the answer to this question is not free from doubt. Consequently, until the question is ruled on by the courts, we will defend legislative action dedicating, by general law, derivative income to the funds which "earned" them.

In the absence of valid general law dedications of derivative income, we believe there would still be a way to maintain legislative control over revenues through the budgetary process while achieving the efficient accounting organization provided by separate funds. This would be if the legislature appropriated to the separate fund for a fixed period the amount

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of interest or investment income received by that fund. Since each legislature has implicit budgetary authority for a maximum period of only two years, this practice would not impair the ability of future legislatures to dispose of those derivative revenues. Under this line of reasoning, the interest on a loan fund or other separate fund is public revenue which must be transferred to the treasury, unless the fund is authorized by appropriation to retain it for a specific period. Although it may be possible to argue in favor of a longer period, our recommendation is that these appropriations of derivative income to the fund which "earns" them be made annually, for each fiscal year.

D. Appropriations Stated in General Terms, Rather than Specific Amounts.

The annual budget has traditionally included certain appropriations not stated in specific dollar amounts but rather in terms of money to be received from certain sources during the fiscal year. Such an appropriation, for example, would authorize the risk management division of the Department of Administration to spend the anticipated proceeds from any insurance settlement

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or judgment arising from the damage or loss of state property. 8/  
ince This practice ensures effective legislative control over state  
imum finances while, at the same time, it provides for budgeting  
the flexibility which is especially useful for programs like risk  
tive management, the needs of which are necessarily unpredictable.

loan We have consistently advised that an appropriation is  
be valid if it states a public purpose, has a source, states or im-  
by plies a time period, and states an amount which is ascertainable  
it by reference to specified information. Under this view a "revolv-  
our ing" loan fund could be established and operated, even if both  
ome principal and interest payments on loans are considered to be  
cal revenues which may not be dedicated, as long as there is an annu-  
al appropriation to the fund of all principal and interest pay-  
ments received by the fund during the fiscal year. The fund would  
continue to revolve as long as it was included in the budget.

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8/ See, for example, Sec. 7 ch. 113, SLA 1978 which provides:

Amounts equivalent to the amounts to be received  
in settlement of insurance claims for property  
losses are appropriated from the general fund to  
the affected agency for the purpose of replacing  
the facility or service lost as a result of the  
incident giving rise to the insurance claim.

Under this language, the state could undertake immediate  
repair or reconstruction of a school, maintenance facility, or  
other property damaged by fire or other cause covered by  
insurance without having to wait for actual settlement and  
payment by the insurer.

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The practice of appropriating to a separate fund an amount to be ascertained by reference to receipts from a specified source during a definite period accommodates the need and desire of each legislature for budgetary flexibility without impairing the ability of future legislatures to control and dispose of public revenues. In fact, since the legislature maintains control of the appropriation by means of the budget, it could be argued that this practice does not even create a dedication in the first place since a true dedication must function to take control away from the legislature. If legislative control is present, then a dedication does not exist.

We do not think that this practice violates the dedication prohibition.

V. APPLICATION OF DEDICATION PROHIBITION TO SPECIFIC FUNDS,  
ACCOUNTS AND APPROPRIATIONS

We have identified the following categories of funds, accounts, and appropriations which raise dedicated funds questions.

A. Allocation of a revenue source by statute to a fund or account from which it may be withdrawn only for limited purposes by appropriation.

1. Tobacco Tax (School) Fund (AS 43.50.140). This fund existed before ratification of the Alaska

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Constitution and is therefore authorized to continue under Article IX, section 7. This tax and dedication have not been changed, but the legislature has imposed an additional tax on cigarettes which is deposited in the general fund. Although we have issued several opinions on the subject, there has been no judicial review, and it remains unclear to what extent the legislature may change the dedication or the underlying revenue source within the limit of "continuing" the dedication. <sup>9/</sup>

2. Fish and Game Fund (AS 16.05.100 et seq.). The dedication of proceeds of fishing and hunting licenses to the operation of a Department of Fish and Game is required by federal law for participation in federal programs and is therefore authorized by Article IX, section 7. See 16 U.S.C. § 669. However, as discussed earlier, it is not clear whether a dedication of interest

<sup>9/</sup> See Atty. Gen. Op. Nos. 7, 9, and 14; inf. memo (Alaska, March 10, 1966); Atty. Gen. Op. No. 22 (Alaska, June 2, 1978); inf. memo (June 30, 1981).

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earned on investments in a fund such as that made by AS 16.05.110(5) is constitutional.

3. Reserves for Capital Outlay (AS 37.05.157) and Energy Facilities Development (AS 37.05.158).

By statute there is allocated to each of these accounts a fixed percentage of annual receipts from minerals on state land. Both of these funds appear to be unconstitutional dedications to the extent that they restrict the purpose for which money may be spent. We are informed that the Department of Administration has recorded the amounts to be allocated to each account but has not retained that money for expenditures related to capital outlay or energy facilities development. We also understand that the legislature has not made any appropriations from these two accounts. We suggest that AS 37.05.157 and AS 37.05.158 be repealed.

4. Renewable Resources Fund (AS 37.11.010-090). As we advised in our 1975 Attorney General Opinion No. 9, this statutory dedication is unconstitutional. We understand that the Department of Administration has followed our advice and has disregarded AS 37.11.010-090. We suggest that these statutes be repealed.

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B. Allocation by Statute of Revenue to a Fund or Account  
From Which it may be Spent or Used Without Further Ap-  
propriation

1. Public Employees Retirement System Fund (AS 39.35)

This fund receives money from employees and employers who participate in the system. State employer contributions are paid to the fund monthly. AS 39.35.280. State employee contributions are statutorily required to be withheld from wages and transferred to the funds. AS 39.39.170. Participating political subdivisions make similar contributions on behalf of their employees. Benefits are paid to members of the retirement systems according to statute AS 39.35.370 et seq. Expenses of administering the system are also paid from the fund but are specifically required by statute to be included in the annual operating budget. AS 39.35.100(b)(4). The Teacher's Retirement System is accounted for in the same manner.

Although this is clearly a dedication of money received by the state, we believe that it is permissible under the implied exception theory

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discussed earlier. It is our opinion that there is an implied exception to the dedicated funds prohibition for pension fund contributions. <sup>10/</sup>

2. International Airport Funds (AS 37.15.420, 430, 440)

The fund established under AS 37.15.420 contains money received from the sale of general obligation bonds for airport improvements and other grants or money provided for the same purpose for which the bonds were authorized. The fund established under AS 37.15.430 contains revenues received by the state from ownership and operation of its airports. The fund established under AS 37.15.440 contains interest earned on money in the section 420 fund and revenues transferred from the section 430 fund for the purpose of redeeming airport revenue bonds.

Although each fund provides for a dedication of state revenue, we believe that they are permissible under the implied exception theory discussed earlier at pp. 5 and 6. It is our opinion that there is an implied exception to the

<sup>10/</sup> The constitutional provision for state employee retirement systems supports such an implied exception. Alaska Constitution, Article XII, section 7.

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dedicated funds prohibition for revenue derived from bond issues and for revenue derived from facilities constructed with bond proceeds, at least to the extent that it is necessary to satisfy the debt obligation or maintain the facility so that it continues to generate revenues for that purpose. To the extent that revenues are dedicated for purposes which are not related to satisfying the debt or maintaining the facility 11/, we believe that dedication would

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11/ AS 37.15.430(a) authorizes use of funds dedicated to the International Airport Revenue Fund for six purposes providing, in pertinent part, as follows:

The money in the revenue fund shall only be used for the purpose of paying or securing the payment of the principal of and interest on the bonds and of and on any other revenue bonds issued by authorization of the legislature to provide funds to acquire, equip, construct and install additions and improvements to, and extensions of and facilities for, the airports and to be payable out of the revenue fund, the purpose of paying the normal and necessary costs of maintaining and operating the airports and all of the improvements and facilities of them, the purpose of paying the costs of renewals, replacements and extraordinary repairs to the airports and all of the improvements and facilities of them, the purpose of redeeming before their fixed maturities any and all revenue bonds issued for the purposes of the airports, the purpose of providing funds to acquire, construct and install necessary additions and improvements to and extensions of and facilities for the airports and all of their facilities, and the purpose of providing funds to pay any and all other costs relating to the ownership, use and operation of the airports.

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violate Article IX, section 7 unless it either existed prior to ratification of our Constitution or is required by federal law. 12/

3. Continuing Debt Service Appropriation (AS 37.15-.012)

This statute purports to create a continuing annual appropriation from the general fund of the amount necessary to pay debt service on all outstanding general obligation bonds. This may be a dedication of revenues for a specific purpose. 13/ Even if it is, it is our opinion that there would be an implied exception to the dedicated fund prohibition for bond obligations.

4. Rural Electrification Revolving Loan Fund (AS 44-.83.361)

This fund received an initial appropriation from which the Alaska Power Authority is authorized to make loans. Principal and interest

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12/ A dedication of airport revenues did exist prior to ratification. § 32-3A-15 ACLA 1949. However, it was repealed in 1968 by § 2 ch. 14, SLA 1968. On the other hand, it may be that 49 U.S.C. § 1718, adopted in 1970 and amended in 1982 by Section 511 of the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-760, would be interpreted to require dedication of all airport revenues to construction, maintenance and operation of airports.

13/ Our uncertainty on this point arises from the fact that the statute does not purport to dedicate a particular revenue source.

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payments on loans made from the fund are required by law to return to the fund. As we pointed out above, at n. 1, the questions of whether the principal and/or interest payments are revenues which may not be dedicated in this manner is now a matter in litigation in a suit filed by the Trustees for Alaska.

We will be defending the legislature's action in making both those dedications. In doing so, we will present in more detail a number of the arguments discussed above in support of the legislature's action. In addition, we will discuss the presumption of constitutionality of statutes and the deference due to the administrative and legislative interpretation of the dedicated funds prohibition. As indicated above, we believe that the return of principal payments to a loan fund does not offend the Constitution and that the return of interest payments to the loan fund may be permissible. However, we cannot predict with certainty the position that the court will adopt.

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C. Appropriation of an amount from a specific revenue source (e.g., program receipts).

From time to time the legislature, by means of an annual operating budget appropriation, authorizes an agency to spend money that is generated out of one of the agency's programs. The appropriation also sets an upper limit on the amount that can be spent. Although program receipts are clearly state revenues which may not be dedicated, the practice of identifying program receipts as an appropriation source does not in any way limit legislative control over the expenditure of revenues because the legislature maintains control of the appropriation by means of the budget. Therefore, we believe that this practice is not affected by the dedicated funds prohibition.

D. Appropriation of an amount which is ascertainable only by reference to specified information.

Appropriations are regularly made to the risk management division, Department of Administration, of all proceeds during a fiscal year from claims, settlements or judgments arising from damage to or loss of state property. As pointed out above, at 18, this permits the state to repair or replace damaged property without specific appropriations, which would probably be either more or less than the actual property damage in any fiscal year.

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The only difference between this and a typical appropriation is in the determination of the amount appropriated. When a fixed amount is appropriated, obligations incurred against it may be honored as long as there is cash available in the treasury. When an appropriation is made for an amount to be received from a certain source during a specific period, obligations may be honored only if a sufficient amount of money has been received from that source and there is cash available in the treasury. However, the amount of the appropriation remains determinable. Consequently, it is our opinion that these kinds of appropriations do not violate the dedicated fund prohibition. 14/

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14/ The pending litigation discussed earlier (Trustees for Alaska v. State, *supra*) also includes a claim that an appropriation to the Alaska Power Authority of the interest to be received on money separately appropriated to the Power Development Fund violates the dedicated funds prohibition. § 1 ch. 90, SLA 1980, as reenacted by § 69 ch. 92, SLA 1981 and amended by § 236 ch. 141, SLA 1982. The questioned appropriation does not state a specific time period during which the interest is to be accrued. Consideration by the court of this particular question might not occur since, by informal memo dated April 19, 1982, we advised the Treasury Division of the Department of Revenue that the interest must be returned to the general fund because of a specific statutory requirement, AS 44.83.388(b). We are informed that no interest has accrued to the Power Development Fund.

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Honorable Carole J. Burger  
J66-785-81 and J66-649-80

November 30, 1982  
Page 30

E. Other Miscellaneous Dedications

1. Appropriations to the Permanent Fund. Since the constitution (Article IX, section 15) specifically authorizes dedications to the Permanent Fund of "at least" 25 percent of certain revenues, we believe any additional dedication to the fund by statute 15/ or by appropriation is also permissible.
2. Rainy day account. AS 37.05 ~~179~~ creates a reserve fund to which money is appropriated and authorizes it to be spent for certain necessary emergency operating expenses at some future time. It is our opinion that this practice is permissible under the theory discussed above beginning at p. 12 that money once it is appropriated loses its character as revenue for purposes of the dedicated funds prohibition. A contrary view would severely restrict flexibility in state budgeting and accounting, and we doubt that such a view would be adopted by the courts.

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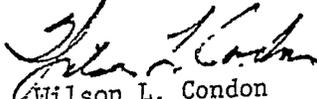
15/ In 1980, the legislature increased the percentage dedication applicable to most new mineral leases to 50 percent.  
AS 37.13.010(a)(2).

Mr. Gerald L. Wilkerson :  
Honorable Carole J. Burger  
J66-785-81 and J66-649-80

November 30, 1982  
Page 31

We hope you find this analysis helpful in determining the nature of the problems presented by the dedicated fund prohibition and the various statutory programs which may or may not run afoul of it. We expect to be able to advise you with greater certainty on some of these questions at the conclusion of the pending litigation described above.

Sincerely,

  
Wilson L. Condon  
Attorney General

WLC:jf

cc: Ron Lehr, Director  
Division of Budget and Management

Jay Hogan, Director  
Division of Legislative Finance  
Legislative Affairs Agency

# MEMORANDUM

State of Alaska

TO: Hon. Lisa Rudd, Commissioner  
Department of Administration

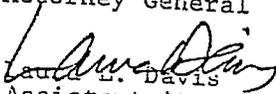
DATE: January 5, 1983

FILE NO: 366-328-83

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch  
Attorney General

SUBJECT: Dedication of per-  
manent fund income  
to longevity bonus  
program

By:   
Laura L. Davis  
Assistant Attorney General  
Governmental Affairs-Juneau

This confirms our oral advice in response to your request of December 20, 1982. You have asked whether permanent fund income may be dedicated to the longevity bonus program, or if not, whether it may otherwise be used to fund that program. Briefly, we believe that permanent fund income may not be dedicated for this purpose. However, such interest may be appropriated to the longevity bonus program. Such an appropriation would probably be counted as part of the operating budget under the spending limit approved by the voters this past fall.

On the first question, our response is based on the fact that the ballot summary of the constitutional amendment establishing the permanent fund did not disclose or explain the possibility that permanent fund income could be dedicated by the legislature. Although the language of the amendment, Alaska Const. art. IX, § 15, might ordinarily be read to permit dedication of the income, we are reluctant to infer what would amount to a very broad exception to another constitutional provision, dedicated fund prohibition, Alaska Const art. IX, § 7, where none was mentioned in the ballot summary or voters' pamphlet. See our memorandum of April 11, 1979 on this point, a copy of which is attached. We subsequently advised that dedication of that income for reinvestment in the fund or for the dividend program might be permissible. AG Opin., Mar 19, 1980, W.L. Condon, copy attached.

In fact, the legislature has dedicated a portion of the fund's income by statute, AS 43.23, to a separate fund for the permanent fund dividend program. This practice has not been challenged and we have opined that it could be defended on the ground that the dividend program was so intimately connected to the establishment of the permanent fund that an exception from the dedicated fund prohibition for that purpose was implied in the dedicated fund constitutional amendment. While we would pre-

Hon. Lisa Rudd, Commissioner  
Department of Administration  
366-328-83

January 5, 1983  
Page #2

sent this line of defense if the practice were challenged, we would recommend amending AS 43.23 so that the dividend program is funded only by appropriation, like all other state programs.

A portion of the fund's income sufficient to offset inflation is dedicated to reinvestment in the fund under AS 37.13.145. This dedication is arguably required to achieve the basic goal for which the fund was established. This may be what the legislature actually intended to permit by adding to article IX, section 15 the sentence requiring that income of the fund be deposited in the general fund unless otherwise provided by law. We believe that this dedication is permissible.

As to your second question, permanent fund income may be appropriated to the longevity bonus program. It could be handled in a manner similar to the municipal assistance program, AS 43.20.016. That statute provides for municipal entitlements to be determined according to a base year entitlement, and adjusted in proportion to municipal population, but the legislature determines the total amount to be distributed each year under the program by appropriation.

Another point to consider is whether such an appropriation would be subject to the recently enacted spending limit. As an appropriation to the longevity bonus program, it does not appear to come within the ambit of any of the exceptions stated in article IX, section 16. We are now working on an opinion addressing the effects of the spending limit. One question we are addressing is the scope of the exception for "appropriations for Alaska permanent fund dividends." It is possible that this exception could apply to appropriations to a program which paid dividends from the permanent fund to older Alaskans, supplanting the present longevity bonus program. We hope to soon advise you more thoroughly regarding the likely application of the spending limit to such a program.

I hope that this brief response to your inquiry is helpful.

LLD/pjg

Enc.

1983 WL 42491 (Alaska A.G.)

Office of the Attorney General

State of Alaska  
File No. 366-484-83  
March 10, 1983

**Appropriation of income from and deposits to the Alaska permanent fund**

\*1 Honorable Don Bennett  
Alaska State Legislature  
Pouch, V  
Juneau, AK 99811

Dear Senator Bennett:

This responds to your letter of March 3, 1983. My views in response to your specific questions are:

1. The **permanent fund** dividend **fund** established under AS 43.23.045 would arguably involve an unconstitutional dedication of state revenue if money were transferred to that **fund** from income of the **permanent fund** without an appropriation. However, this view is not free from doubt since an argument can be made, based on the language of article IX, section 15 establishing the **permanent fund**, that an appropriation for that purpose is not required. Although I understand that in past years money has been transferred to the dividend **fund** pursuant to AS 43.23.045 without an appropriation, I have advised that this practice be discontinued in the future. Senate Bill 149 which was introduced this session at the Governor's request, would appropriate additional money from the **permanent fund** dividend **fund** to pay 1982 dividends under AS 43.23. I would also advise that, if the dividend program is not repealed, AS 43.23.045 be amended to clarify this appropriation requirement in order to avoid any confusion on this point.
2. I believe that the reinvestment of income of the **permanent fund** as principal may be authorized by statute without an appropriation. The reasons for this view are explained below.
3. Yes, it is permissible for the legislature to increase by statute the percentage of certain mineral revenues which are constitutionally dedicated to the **permanent fund**.

The reasons for my responses to your questions follow in reverse order.

The constitutional amendment authorizing the creation of a **permanent fund** dedicates 'at least twenty-five percent' of certain mineral revenues to that **fund**. Alaska Const. art. IX, § 15. This language clearly anticipates that the percentage of revenues so dedicated may be increased. The legislature has increased that amount to 50 percent of revenues from certain sources. AS 37.13.010. I see no question as to the constitutionality of this statute.

With regard to the use of income produced by the **fund**, the constitution provides that it 'shall be deposited in the general **fund** unless otherwise provided by law.' Alaska Const. art. IX, § 15. When this language was adopted by the legislature for submission to the voters, it was accompanied by a 'joint chairman's report on CSSS HJR 39' (1976 H. Jour. at 684-685), which stated that the purpose of this language is 'to give future legislatures the maximum flexibility in using the **Fund's** earnings—ranging from adding to **Fund** principal to paying out a dividend to resident Alaskans.' On its face, the requirement that the income be deposited in the general **fund** 'unless otherwise provided by law' appears to authorize statutory dedication for any public purpose. This office has advised in the past and I concur that this reading of article IX, section 15 would create a tremendous exception to the constitutional dedicated **fund** prohibition, art. IX, § 7, which was not explained to the voters in

Honorable Don Bennett, 1983 WL 42491 (1983)

the ballot materials, election pamphlet, or publicity surrounding the amendment. See 1980 Op. Att'y Gen. No. 3 (March 19) at 7-9 (copy attached).

\*2 For this reason, I favor a narrower interpretation of the last sentence of article IX, section 15. One possible reading would be that the legislature intended that the income could be used without appropriation either for reinvestment or for distributing dividends to Alaskans, as explicitly mentioned in the joint chairman's report, and the attached Attorney General opinion. However, it is difficult to discern from the language of article IX, section 15 why the income could be dedicated for these but not for other important public purposes. Another possible interpretation is that an appropriation is required for any use of the income, including reinvestment as principal of the **permanent fund**. However, this interpretation would render the phrase 'unless otherwise provided by law' meaningless, since the income would then be treated as automatically becoming part of the general **fund** despite any attempted dedication by law. Article IX, section 15 clearly contemplates that the legislature may by law provide for some use of the **fund** other than deposit in the general **fund**.

The interpretation of article IX, section 15 which I find to be most reasonable and compatible with the constitutional prohibition against dedications is that the legislature may provide by law for the income to remain in the **permanent fund** (either through reinvestment as principal or retention in an undistributed income account) without appropriation, but may not transfer income to another **fund** or authorize it to be spent without an appropriation. This view is consistent with the legislation enacted last session providing for reinvestment of an amount sufficient to offset inflation, and retention of the balance in an undistributed income account where it remains available for appropriation. AS 37.13.145, a amended by ch. 81, SLA 1982. Legislation which will soon be introduced at the Governor's request will propose amendments to AS 37.13 which are consistent with this view.

I share your concern that our state government avoid the problems associated with statutory dedications of revenue. I also appreciate that the legal and constitutional provisions regarding governmental finance and their past and present administrative interpretations are sufficiently complex to require careful study and thorough discussion by all involved. A copy of a recent lengthy opinion regarding the meaning and application of the dedicated **fund** prohibition is attached for your information. 1982 Op. Att'y Gen. No. 13 (Nov. 30). Please let me know if I can be of further assistance.

Very truly yours,

Norman C. Gorsuch  
Attorney General

1983 WL 42491 (Alaska A.G.)



# LAWS OF ALASKA

1986

**Source**

HCS CSSB 346 (Fin)

**Chapter No.**

29

**AN ACT**

Relating to the income of the Alaska permanent fund; and providing for an effective date.

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

THE ACT FOLLOWS ON PAGE 1, LINE 9

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY LINE OF EACH BILL SECTION.

Approved by the Governor: May 15, 1986  
Actual Effective Date: July 1, 1986

AN ACT

Relating to the income of the Alaska permanent fund; and providing for an effective date.

\* Section 1. AS 37.13.140 is amended to read:

Sec. 37.13.140. INCOME. Net income of the corporation shall [MUST] be computed annually as of the last day of the fiscal year in accordance with generally accepted accounting principles, excluding any unrealized gains or losses. Income available for distribution equals 21 percent of the [AVERAGE] net income of the corporation for the last five fiscal years, including the fiscal year just ended, but may not exceed net income of the corporation for the fiscal year just ended plus the balance in the earnings reserve [UNDISTRIBUTED INCOME] account described in AS 37.13.145.

\* Sec. 2. AS 37.13.145 is amended to read:

Sec. 37.13.145. DISPOSITION OF INCOME. At the end of each fiscal year, an amount sufficient to offset the effect of inflation on principal of the Alaska permanent fund during that year, as measured by the change in the calendar year average United States consumer price index for all urban consumers [A NATIONALLY RECOGNIZED INDEX,] shall be transferred from net income as defined in AS 37.13.140, excluding income on the earnings reserve [UNDISTRIBUTED INCOME] account in the Alaska Permanent Fund, to the principal of the Alaska permanent fund for reinvestment. The balance of the [NET] income available for distribution under [AS DEFINED IN] AS 37.13.140 shall be

Chapter 28

1 transferred to the earnings reserve [UNDISTRIBUTED INCOME] account in  
2 the Alaska permanent fund. Money in the earnings reserve [UNDISTRI-  
3 BUTED INCOME] account shall be invested in investments authorized  
4 under AS 37.13.120. Income from the investment of the earnings re-  
5 serve [UNDISTRIBUTED INCOME] account shall be treated as an addition  
6 to that account.

7 \* Sec. 3. This Act takes effect July 1, 1986.  
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HCE CSSB 346 (Fin)



# LAWS OF ALASKA

1992

Source  
HCS CSSB 39(FIN)

Chapter No.  
134

## AN ACT

Relating to the permanent fund and the Alaska Permanent Fund Corporation; and providing for an effective date.

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

THE ACT FOLLOWS ON PAGE 1

Approved by the Governor: June 25, 1992  
Actual Effective Date: July 1, 1992

AN ACT

1 Relating to the permanent fund and the Alaska Permanent Fund Corporation; and providing for an  
2 effective date.

3

4 \* Section 1. AS 36.30.850(b)(16) is amended to read:

5 (16) a contract that is a delegation, in whole or in part, of investment powers or  
6 fiduciary duties of the Board of Trustees of the Alaska Permanent Fund Corporation under  
7 AS 37.13;

8 \* Sec. 2. AS 37.13.010(b) is amended to read:

9 (b) Payments due the Alaska permanent fund under (a) of this section shall be made to  
10 the fund within three banking days after the day the amount due to the fund reaches at least  
11 \$3,000,000 and at least once each month.

12 \* Sec. 3. AS 37.13.020 is amended to read:

13 Sec. 37.13.020. FINDINGS. The people of the state, by constitutional amendment, have  
14 required the placement of at least 25 percent of all mineral lease rentals, royalties, royalty sale

Chapter 134

1 proceeds, and federal mineral revenue sharing payments and bonuses received by the state into  
2 a permanent fund. The legislature finds with respect to the fund [ALASKA PERMANENT  
3 FUND CORPORATION] that

4 (1) the fund [CORPORATION] should provide a means of conserving a portion  
5 of the state's revenue from mineral resources to benefit all generations of Alaskans;

6 (2) the fund's [CORPORATION'S] goal should be to maintain safety of principal  
7 while maximizing total return;

8 (3) the fund [CORPORATION] should be used as a savings device managed to  
9 allow the maximum use of disposable income from the fund [CORPORATION] for purposes  
10 designated by law.

11 \* Sec. 4. AS 37.13.030 is amended to read:

12 Sec. 37.13.030. PURPOSE. It is the purpose of this chapter to provide a mechanism for  
13 the management and investment of those [PERMANENT] fund assets by [ALLOCATED TO]  
14 the Alaska Permanent Fund Corporation in a manner consistent with the findings in  
15 AS 37.13.020.

16 \* Sec. 5. AS 37.13.040 is amended to read:

17 Sec. 37.13.040. ALASKA PERMANENT FUND CORPORATION. There is established  
18 the Alaska Permanent Fund Corporation. The corporation is a public corporation and government  
19 instrumentality in the Department of Revenue managed by the board of trustees. The purpose  
20 of the corporation [BOARD] is to manage and invest the assets of the permanent fund and  
21 other funds designated by law [CORPORATION] in accordance with this chapter.

22 \* Sec. 6. AS 37.13.080 is amended to read:

23 Sec. 37.13.080. QUORUM AND VOTING. Four members of the board constitute a  
24 quorum for the transaction of business and the exercise of the powers and duties of the board.  
25 Action may be taken only upon affirmative vote of a majority of the full membership of the  
26 board.

27 \* Sec. 7. AS 37.13.110 is amended to read:

28 Sec. 37.13.110. CONFLICTS OF INTEREST. (a) Members of the board, [AND] the  
29 executive director, and investment officers of the corporation are subject to the provisions of  
30 AS 39.50.

31 (b) If a member of the board or an employee of the corporation acquires, owns, or

1 controls an interest, direct or indirect, in an entity or project in which fund [CORPORATION]  
2 assets are invested, the member shall immediately disclose the interest to the board. The  
3 disclosure is a matter of public record and shall be included in the minutes of the board meeting  
4 next following the disclosure.

5 \* Sec. 8. AS 37.13.120(a) is amended to read:

6 (a) The prudent-investor [PRUDENT-MAN] rule shall be applied by the board in the  
7 management and investment of [ALASKA PERMANENT] fund assets. The prudent-investor  
8 [PRUDENT-MAN] rule as applied to investments of the fund [CORPORATION] means that in  
9 making investments the board shall exercise the judgment and care under the circumstances then  
10 prevailing that an institutional investor of ordinary prudence, discretion, and intelligence exercises  
11 in the management of large investments entrusted to it not in regard to speculation but in regard  
12 to the permanent disposition of funds, considering probable safety of capital as well as probable  
13 income.

14 \* Sec. 9. AS 37.13.120(b) is amended to read:

15 (b) The fund [CORPORATION] assets shall only be used for income-producing  
16 investments.

17 \* Sec. 10. AS 37.13.120(e) is amended to read:

18 (e) The corporation may not borrow money [FUNDS] or guarantee from principal of the  
19 [ALASKA PERMANENT] fund the obligations of others.

20 \* Sec. 11. AS 37.13.120(g) is amended to read:

21 (g) Subject to the limitations contained in this section, the board may invest fund  
22 [CORPORATION] assets at the competitive national market rates or prices that are applicable  
23 to each investment only in

24 (1) obligations of, or obligations insured by or guaranteed by, the United States  
25 or agencies or instrumentalities of the United States;

26 (2) obligations secured by reserves paid in by the United States or agencies or  
27 instrumentalities of the United States or obligations of corporations in which the United States  
28 is a shareholder or member;

29 (3) certificates of deposit and term deposits of United States domestic banks that  
30 are members of the Federal Deposit Insurance Corporation and that may be readily sold in a  
31 secondary market at prices reflecting fair value or that are fully secured at all times as to

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1 payment of principal and interest as described in (m) of this section;

2 (4) certificates of deposit and term deposits of federally chartered savings and  
3 loan associations in Alaska [THAT MAY BE READILY SOLD IN A SECONDARY MARKET  
4 AT PRICES REFLECTING FAIR VALUE OR] that are fully secured at all times as to payments  
5 of principal and interest as described in (m) of this section;

6 (5) [CERTIFICATES OF DEPOSIT AND TERM DEPOSITS OF STATE  
7 CHARTERED SAVINGS AND LOAN ASSOCIATIONS IN ALASKA THAT MAY BE  
8 READILY SOLD IN A SECONDARY MARKET AT PRICES REFLECTING FAIR VALUE  
9 OR THAT ARE FULLY SECURED AT ALL TIMES AS TO PAYMENTS OF PRINCIPAL  
10 AND INTEREST AS DESCRIBED IN (m) OF THIS SECTION;

11 (6) certificates of deposit and term deposits of mutual savings banks in Alaska  
12 [THAT MAY BE READILY SOLD IN A SECONDARY MARKET AT PRICES REFLECTING  
13 FAIR VALUE OR] that are fully secured at all times as to payments of principal and interest as  
14 described in (m) of this section;

15 (6) [(7)] fixed-term certificates of indebtedness of federally insured credit unions  
16 in Alaska [THAT MAY BE READILY SOLD IN A SECONDARY MARKET AT PRICES  
17 REFLECTING FAIR VALUE OR] that are fully secured at all times as to payments of principal  
18 and interest as described in (m) of this section;

19 (7) [(8)] domestic corporate debt securities that are rated A [AA] or better by a  
20 nationally recognized rating service, or nondomestic corporate debt securities of comparable  
21 quality;

22 (8) [(9)] short-term

23 (A) domestic corporate promissory notes of the highest ratings assigned  
24 by a nationally recognized rating service; [,] or

25 (B) nondomestic corporate promissory notes of comparable quality, the  
26 interest on which may be payable in either United States dollars or nondomestic  
27 currencies;

28 (9) [(10)] bankers' acceptances drawn on and accepted by United States banks  
29 each of which has a combined capital and surplus aggregating at least \$200,000,000;

30 (10) [(11)] repurchase agreements, the securities underlying the agreements being  
31 any of the items in (1) - (6) [(1) - (3) AND (8) - (10)] of this subsection;

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~~(11)~~ [(12)] THE GUARANTEED PORTION OF FEDERAL SMALL BUSINESS ADMINISTRATION LOANS;

(13) THE PORTION OF FIRST LIEN REAL ESTATE MORTGAGES GUARANTEED BY THE FEDERAL VETERANS ADMINISTRATION;

(14)] the portions of business and industrial loans made under the Rural Development Act of 1972 that are guaranteed by the Farmers Home Administration;

~~(12)~~ [(15)] the guaranteed portion of Farmers Home Administration loans;

~~(13)~~ [(16)] notes secured by mortgages granting a first lien on [COMMERCIAL OR] residential real estate improved by completed buildings if the mortgages are insured by a private mortgage insurance corporation that is authorized to do business in this state [ALASKA] and has combined capital and surplus aggregating at least \$20,000,000, and if loan-to-value ratios do not exceed [75 PERCENT FOR COMMERCIAL MORTGAGES AND] 90 percent [FOR RESIDENTIAL MORTGAGES]; however,

[(A) MORTGAGE INSURANCE IS NOT NECESSARY FOR COMMERCIAL LOANS HAVING LOAN-TO-VALUE RATIOS OF LESS THAN 50 PERCENT AND THE MINIMUM COVERAGE OF OTHER COMMERCIAL LOANS SHALL BE 10 PERCENT FOR THOSE HAVING A LOAN-TO-VALUE RATIO OF 50 - 60 PERCENT AND 15 PERCENT FOR THOSE HAVING A LOAN-TO-VALUE RATIO GREATER THAN 60 PERCENT BUT NO MORE THAN 75 PERCENT; AND

(B)] mortgage insurance is not necessary for residential loans having a loan-to-value ratio of less than 70 percent and the minimum coverage of other residential loans shall be 10 percent for those having a loan-to-value ratio greater than 70 percent but less than 90 percent and 20 percent for those having a loan-to-value ratio of 90 percent;

~~(14)~~ [(17)] NOTES SECURED BY MORTGAGES GRANTING A FIRST LIEN ON COMMERCIAL REAL ESTATE IMPROVED BY COMPLETED BUILDINGS IF THE ORIGINATING FINANCIAL INSTITUTION RETAINS AT LEAST 25 PERCENT OF THE MORTGAGE UNTIL MATURITY;

(18)] preferred and common stock of corporations incorporated in the United States;

~~(15)~~ [(19)] certificates of deposit, term deposits, or bankers' acceptances, that are

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1 issued by a United States or nondomestic bank or trust company located outside of the United  
2 States and are denominated in United States or nondomestic currency, if either (A) they may be  
3 readily sold in a secondary market at prices reflecting fair value, or (B) the issuing bank or trust  
4 company has capital, surplus, and retained earnings at the date of issue equaling at least  
5 \$500,000,000; investments made under this paragraph are not subject to the collateral  
6 requirements for domestic certificates under (m) of this section;

7 ~~(16)~~ [(20)] equity interests in, and debt obligations secured by mortgages granting  
8 a first lien on, real estate improved by completed and substantially rented buildings and located  
9 in the United States, if these investments are made

10 (A) in a corporation, partnership, trust, or other entity in which, at the  
11 conclusion of each investment transaction, at least 60 percent of the beneficial ownership  
12 interests are held by other institutional investors, and which is organized and operated for  
13 the purpose of making real estate investments by a bank, insurance company, or other  
14 manager of institutional funds that has had at least five years of experience in the  
15 management of real estate investments of institutional investors; or

16 (B) with corporations, partnerships, trusts, or entities in which, at the  
17 conclusion of each investment transaction, at least 60 percent of the beneficial  
18 ownership interests in the co-investing entity or entities as a whole are held by  
19 institutional investors, and if

20 (i) at the time of investment the fund has no more than a 40  
21 percent beneficial ownership interest in the real estate invested in as a whole;

22 (ii) the rights and obligations of the fund are substantially  
23 similar to those of the other institutional investors, except for the percentage  
24 interest in the property; and

25 (iii) the property is managed and operated by an entity that  
26 has had at least five years of experience in the management of real estate  
27 investments of institutional investors [IN CONJUNCTION WITH AND ON  
28 SUBSTANTIALLY THE SAME TERMS AS AN ENTITY DESCRIBED IN (A)  
29 OF THIS PARAGRAPH];

30 ~~(17)~~ [(21)] securities of nondomestic governments and nondomestic government  
31 agencies, the principal of, or interest on, which is payable in either United States dollars or

1 nondomestic currencies;

2 (18) [(22)] securities of nondomestic corporations, including common and  
3 preferred stock, whose dividends, if any, may be payable in either United States dollars or  
4 nondomestic currencies;

5 (19) taxable municipal or state debt securities that are rated A or better by  
6 a nationally recognized rating service;

7 (20) shares in a money market or short-term investment fund that has either  
8 collateral securities of a type authorized elsewhere in this section as acceptable collateral  
9 or securities of similar quality to those authorized elsewhere in this section as acceptable  
10 collateral.

11 \* Sec. 12. AS 37.13.120(i) is amended to read:

12 (i) The [ALASKA PERMANENT] fund may at no time own more than five percent of  
13 the voting stock of a corporation. Domestic stocks, except for bank and insurance company  
14 stocks, must be listed at the date of purchase on an exchange registered with the Securities and  
15 Exchange Commission. At the time of each investment, the aggregate investment of the fund in  
16 each stated category of investment may not exceed the following stated percentage of the total  
17 investments of the fund:

18 (1) mortgages under (g)(13) [(g)(16)] of this section - 15 percent;

19 (2) real estate investments under (g)(16) [(g)(20)] of this section - 15 percent;

20 (3) certificates of deposit, term deposit, or bankers' acceptances under (g)(15)  
21 [(g)(19)] of this section - 20 percent;

22 (4) securities of nondomestic governments, nondomestic government agencies, and  
23 nondomestic corporations under (g)(7), (17), and (18) [(g)(8), (21), AND (22)] of this section,  
24 domestic corporate stocks [AND DEBT SECURITIES] under (g)(14) [(g)(8) AND (18)] of this  
25 section, and short-term nondomestic corporate promissory notes under (g)(8)(B) [(g)(9)(B)] of  
26 this section - 50 percent;

27 (5) domestic corporate debt securities that are rated A and nondomestic  
28 corporate debt securities of comparable quality under (g)(7) of this section, and taxable  
29 municipal or state debt securities that are rated A under (g)(19) of this section - five  
30 percent.

31 \* Sec. 13. AS 37.13.120(j) is amended to read:

Chapter 134

1 (j) The assets of the [ALASKA PERMANENT] fund may not be used for the purchase  
2 of bonds of a corporation, upon which any regular interest payment has been defaulted within  
3 five years before purchase, except bonds never in default but which have been outstanding for  
4 less than five years.

5 \* Sec. 14. AS 37.13.120(k) is amended to read:

6 (k) The board shall establish and from time to time as necessary modify guidelines for  
7 the investment of the assets of the fund [CORPORATION]. Before adoption of any guidelines  
8 the guidelines shall be reported to the Legislative Budget and Audit Committee for review and  
9 comment.

10 \* Sec. 15. AS 37.13.120(l) is amended to read:

11 (l) The board shall invest the assets of the fund [CORPORATION] in in-state  
12 investments to the extent in-state investments are available if the in-state investments

13 (1) have a risk level and expected yield comparable to alternate investment  
14 opportunities; and

15 (2) are included in the list of permissible investments in (g) of this section.

16 \* Sec. 16. AS 37.13.120(m) is amended to read:

17 (m) Certificates of deposit or the equivalent instruments that are not of a quality that may  
18 be readily sold in a secondary market at prices reflecting fair value must be secured by a pledge  
19 as collateral of

20 (1) investments authorized for the [ALASKA PERMANENT] fund under (g)(1),  
21 (2), (4), or (8) - (10) [(8), OR (12) - (17)] of this section;

22 (2) [OR BY A PLEDGE AS COLLATERAL OF] obligations of the state or  
23 instrumentalities of the state that are rated at least "A" by a major bond rating service and have  
24 a demonstrated secondary market;

25 (3) the guaranteed portion of Federal Small Business Administration loans;

26 (4) the portion of first lien real estate mortgages guaranteed by the federal  
27 Department of Veterans Affairs; or

28 (5) notes secured by mortgages granting a first lien on commercial or  
29 residential real estate improved by completed buildings if the originating financial  
30 institution retains at least 25 percent of the mortgage until maturity [ WHICH

31 INVESTMENTS OR OBLIGATIONS HAVE VALUE AT LEAST EQUAL TO THE FACE

1 VALUE OF THE CERTIFICATE OF DEPOSIT. THE BOARD MAY REQUIRE  
2 SUBSTITUTION OF COLLATERAL IN ORDER TO ENSURE CONTINUED SATISFACTION  
3 OF THE REQUIREMENTS SET OUT IN THIS SUBSECTION].

4 \* Sec. 17. AS 37.13.120 is amended by adding a new subsection to read:

5 (n) Investments or obligations pledged as collateral under (m) of this section must have  
6 value at least equal to the face value of the certificates of deposit being secured. The board may  
7 require substitution of collateral in order to ensure continued satisfaction of the requirements set  
8 out in (m) of this section.

9 \* Sec. 18. AS 37.13.140 is amended to read:

10 Sec. 37.13.140. INCOME. Net income of the fund includes income of the earnings  
11 reserve account established under AS 37.13.145. Net income of the fund [CORPORATION]  
12 shall be computed annually as of the last day of the fiscal year in accordance with generally  
13 accepted accounting principles, excluding any unrealized gains or losses. Income available for  
14 distribution equals 21 percent of the net income of the fund [CORPORATION] for the last five  
15 fiscal years, including the fiscal year just ended, but may not exceed net income of the fund  
16 [CORPORATION] for the fiscal year just ended plus the balance in the earnings reserve account  
17 described in AS 37.13.145.

18 \* Sec. 19. AS 37.13.145 is repealed and reenacted to read:

19 Sec. 37.13.145. DISPOSITION OF INCOME. (a) The earnings reserve account is  
20 established as a separate account in the fund. Income from the fund shall be deposited by the  
21 corporation into the account as soon as it is received. Money in the account shall be invested  
22 in investments authorized under AS 37.13.120.

23 (b) At the end of each fiscal year, the corporation shall transfer from the earnings reserve  
24 account to the dividend fund established under AS 43.23.045 50 percent of the income available  
25 for distribution under AS 37.13.140.

26 (c) After the transfer under (b) of this section, the corporation shall transfer from the  
27 earnings reserve account to the principal of the fund an amount sufficient to offset the effect of  
28 inflation on principal of the fund during that fiscal year. The corporation shall calculate the  
29 amount to transfer to the principal under this subsection by

30 (1) computing the average of the monthly United States Consumer Price Index  
31 for all urban consumers for each of the two previous calendar years;

**Chapter 134**

1                   (2) computing the percentage change between the first and second calendar year  
2 average; and

3                   (3) applying that rate to the value of the principal of the fund on the last day of  
4 the fiscal year just ended.

5                   (d) Notwithstanding (b) of this section, income earned on money awarded in or received  
6 as a result of State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial  
7 District), including settlement, summary judgment, or adjustment to a royalty-in-kind contract that  
8 is tied to the outcome of this case, or interest earned on the money, or on the earnings of the  
9 money shall be treated in the same manner as other income of the Alaska permanent fund, except  
10 that it is not available for distribution to the dividend fund, and shall be annually deposited into  
11 the principal of the Alaska permanent fund.

12 \* Sec. 20. AS 37.13.150 is amended to read:

13                   Sec. 37.13.150. CORPORATION BUDGET. The revenue generated by the fund's  
14 [CORPORATION'S] investments must be identified as the source of the operating budget of the  
15 corporation in the state's operating budget under AS 37.07 (Executive Budget Act). The  
16 unexpended balance of the corporation's annual operating budget does not lapse at the end of the  
17 fiscal year but shall be treated as income under AS 37.13.140.

18 \* Sec. 21. AS 37.13.160 is amended to read:

19                   Sec. 37.13.160. AUDITS. The Legislative Budget and Audit Committee may provide  
20 for an annual post audit and annual operational and performance evaluations of the fund's  
21 [CORPORATION'S] investments and investment programs.

22 \* Sec. 22. AS 37.13.170 is amended to read:

23                   Sec. 37.13.170. REPORTS AND PUBLICATIONS. By September 30 of each year, the  
24 board shall publish a report of the fund [CORPORATION] for distribution to the governor,  
25 legislature, and the public. The report shall be written in easily understandable language. The  
26 report must include financial statements audited by independent outside auditors, a statement of  
27 the amount of money received by the [ALASKA PERMANENT] fund from each investment  
28 during the period covered, a statement of investments of the fund [CORPORATION] including  
29 an appraisal at market value, a description of fund [CORPORATION] investment activity during  
30 the period covered by the report, a comparison of the fund [CORPORATION] performance with  
31 the intended goals contained in AS 37.13.020, an examination of the impact of the investment

1 criteria of this chapter on the fund [CORPORATION] portfolio with recommendations of any  
2 needed changes, and any other information the board believes would be of interest to the  
3 governor, the legislature, and the public. The annual income statement and balance sheet of the  
4 fund [CORPORATION] shall be published in at least one newspaper in each judicial district. The  
5 income statement and balance sheet for the two fiscal years preceding the publication of the  
6 election pamphlet under AS 15.58 shall be included in that pamphlet.

7 \* Sec. 23. AS 37.13.180 is amended to read:

8 Sec. 37.13.180. TAX EXEMPTION. The corporation and the fund are [IS] exempt  
9 from all taxes and assessments in the state. All security instruments issued by the corporation  
10 or the fund, their transfer, and their income are exempt from all taxes and assessments in the  
11 state.

12 \* Sec. 24. AS 37.13.190 is amended to read:

13 Sec. 37.13.190. POLITICAL ACTIVITIES. The resources of the corporation or the fund  
14 may not be used to finance or influence political activities.

15 \* Sec. 25. AS 37.13.210 is amended by adding a new paragraph to read:

16 (3) "fund" means the Alaska permanent fund established under art. IX, sec. 15,  
17 Constitution of the State of Alaska.

18 \* Sec. 26. AS 39.50.200(b)(42) is amended to read:

19 (42) Board of Trustees, [AND] executive director, and investment officers of the  
20 Alaska Permanent Fund Corporation (AS 37.13.040);

21 \* Sec. 27. AS 43.23.025(a) is amended to read:

22 (a) By October 1 of each year the commissioner shall determine the value of each  
23 permanent fund dividend for that year by

24 (1) determining the total amount available for dividend payments, which equals

25 (A) the amount of income of the Alaska permanent fund transferred to the  
26 dividend fund under AS 37.13.145(b) [AS 43.23.045(b)] during the current year;

27 (B) plus the unexpended and unobligated balances of prior fiscal year  
28 appropriations that lapse into the dividend fund under AS 43.23.045(d);

29 (C) less the amount necessary to pay dividends from the dividend fund in  
30 the current year under AS 43.23.055(3) and (7);

31 (D) less the amount necessary to pay dividends from the dividend fund

**Chapter 134**

1 due to eligible applicants who, as determined by the department, filed for a previous  
2 year's dividend by the filing deadline but who were not included in a previous year's  
3 dividend computation;

4 (E) less appropriations from the dividend fund during the current year,  
5 including amounts to pay costs of administering the dividend program and the hold  
6 harmless provisions of AS 43.23.075;

7 (2) determining the number of individuals eligible to receive a dividend payment  
8 for the current year; and

9 (3) dividing the amount determined under (1) of this section by the amount  
10 determined under (2) of this section.

11 \* Sec. 28. AS 37.13.145(d), added by sec. 19 of this Act, is repealed on the day that the revisor of  
12 statutes certifies to the legislature that the Alaska Supreme Court has made a final determination that,  
13 in the absence of AS 43.23.045(e), repealed by sec. 29 of this Act, or AS 37.13.145(d), added by sec. 19  
14 of this Act, no judge or juror is disqualified from serving as judge or juror solely because the judge or  
15 juror may qualify to receive a permanent fund dividend.

16 \* Sec. 29. AS 43.23.045(b) and 43.23.045(e), and sec. 4, ch. 18, SLA 1991, are repealed.

17 \* Sec. 30. TRANSITION. Notwithstanding the filing deadline set by AS 39.50.020(a), a person  
18 employed by the Alaska Permanent Fund Corporation as an investment officer on the effective date of  
19 this Act shall file the statement required by AS 39.50.020(a) within 30 days after the effective date of  
20 this Act.

21 \* Sec. 31. This Act takes effect July 1, 1992.

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

WALTER J. HICKEL, Governor  
of the STATE OF ALASKA,  
DARREL J. REXWINKEL,  
Commissioner of the  
Department of Revenue for  
the State of Alaska,  
and the STATE OF ALASKA,

Petitioners,

v.

STEVE COWPER,

Respondent.

*File*  
FILED and ENTERED  
APPELLATE COURTS of the  
STATE OF ALASKA

APR 19 1994

CLERK  
By *Velms* Deputy

Supreme Court Case No. S-6294  
Case No. 3AN-93-6848 Civil

PETITIONERS' REPLY MEMORANDUM  
AND OPPOSITION TO COWPER'S CROSS-PETITION

I. INTRODUCTION

Cowper opposes the State's petition for review largely on separation of powers grounds. As the State argued in superior court, reasonable legislative interpretation of constitutional provisions are entitled to great deference by the courts. Those arguments will not be repeated here.

Cowper's other arguments against AS 37.10.420 can also be easily refuted. His argument is predicated on a misconception that the "amount available for appropriation can shrink as the legislature appropriates within a legislative session. Further, Cowper fails to appreciate that the superior court's decision was based on its subjective analysis that some restricted funds were "political"; the integrity of these funds is a political question that is beyond the court's jurisdiction. In addition, as the superior court recognized, the arguments put forth in Cowper's

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2 cross-petition--such as counting unspent balances of prior year  
3 appropriations, or the assets of public corporations as  
4 "available"--are unworkable and unreasonable.

5 In short, AS 37.10.420 is not just a reasonable  
6 interpretation of Section 17, it appears to be the only reasonable  
7 interpretation. Accordingly, this Court should reverse the  
8 superior court and find AS 37.10.420 constitutional.

9 II. ARGUMENT

10 A. AS 37.10.420 avoids the potential "artificial shortfall"  
11 inherent in the superior court's decision

12 Cowper argues that AS 37.10.420 "confer[s] upon the  
13 legislature the authority to create, on an annual basis, the  
14 "shortfall" necessary to permit a majority vote raid on the budget  
15 reserve fund." "Opposition to Petition for Review," at 20 (April  
16 18, 1994) ("Opp."). Cowper errs. Under AS 37.10.420 a budget  
17 shortfall could not be "created" in a single legislative session.

18 Cowper argues that under AS 37.10.420, "all the  
19 legislature would have to do to create a 'budget shortfall' would  
20 be to appropriate a large amount of funds early in the legislative  
21 session to a restricted fund, and then declare that the 'amount  
22 available for appropriation' was low enough to justify a raid on  
23 the Budget Reserve Fund." Id. at 33. This argument misunderstands  
24 the requirements of Section 17(b).

25 Section 17(b) does not allow a budget shortfall to be  
26 created within one year. Section 17(b) requires that the "amount  
available for appropriation for a fiscal year" be compared to the

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2 "amount appropriated" in the preceding year. No legislature could  
3 reduce the "amount available" by making early appropriations,  
4 whether appropriating to a restricted fund or for other purposes.

5 Alaska Statute 37.10.420 is a simple formula. All money  
6 in the unrestricted general fund is available for appropriation.<sup>1</sup>  
7 Money that has already been appropriated to a reserve account would  
8 no longer be considered "available for appropriation" for purposes  
9 of Section 17; money expended from a reserve fund would not be  
10 counted in the "amount appropriated" for that year.<sup>2</sup>

11 At oral argument, the superior court expressed concern  
12 that a rogue legislature, acting over two consecutive sessions,  
13 could abuse AS 37.10.420, and make access to the budget reserve  
14 fund easier. See Hearing Trans at 31 (April 14, 1994). Under this  
15 hypothetical, a bad-faith legislature could, if it had a surplus in  
16 the general fund, create several sham reserve accounts, thereby  
17 inflating the "amount appropriated" in the base year. The next  
18 session, assuming a decrease in revenue, the "amount available"  
19 would be less than the inflated "amount appropriated," and the  
20 legislature could spend the budget reserve.

21 This Court should not be distracted by this chimerical

22  
23 <sup>1</sup> Alaska Statute 37.10.420 does not limit the "amount  
24 available for appropriation" to unrestricted revenues, but includes  
25 all of the unrestricted general fund. Thus, Cowper misreads the  
statute when he claims that it attempts "to somehow change  
[amounts] to mean 'revenues.'" Opp. at 31.

26 <sup>2</sup> Money expended from a statutory reserve account for a  
purpose other than that designated by law, first is returned by law  
to the unrestricted general fund. These funds would then be  
counted as "available for appropriation."

STATE'S REPLY MEMORANDUM  
AND OPPOSITION TO CROSS PETITION

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2 hypothetical. First, money from reserve funds would be returned to  
3 the unrestricted general fund before being spent on new purposes.  
4 Some affirmative act must be taken by the legislature to remove the  
5 restrictions from the money. Once unrestricted, the money would be  
6 counted as "available for appropriation." This protects against  
7 the creation of sham reserve accounts. Second, this argument  
8 assumes bad-faith on the part of the legislature. Public officials  
9 are entitled to a presumption of regularity in the performance of  
10 the public duties.

11           Moreover, if the legislature creates a statutory reserve,  
12 the wisdom of that action is a political question. If the public  
13 agrees that the restricted account serves a public interest, it may  
14 agree with the legislature that the restricted account should  
15 remain in place while budget reserve funds are spent to make up the  
16 revenue shortfall. If the public or the governor disagree with the  
17 legislative determination of the need for the restricted account,  
18 or believe that the legislature has created sham accounts, they  
19 have adequate remedies. The governor can veto the appropriation.  
20 The public can vote the offending legislators out of office.

21           Indeed, if the most that can be said against AS 37.10.420  
22 is that it gives the legislature too much incentive to create  
23 reserve accounts, then AS 37.10.420 is consistent with the intent  
24 of the budget reserve amendment. Money in a reserve account is, by  
25 definition, money set aside for future use, as was the intent of  
26 the budget reserve fund. If, in the future, the people decide they  
no longer want an oil and hazardous substance release response

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2 fund, they can elect a legislature that will repeal that fund and  
3 deposit the money in the Alaska Permanent Fund or the Budget  
4 Reserve Fund.

5           The risk of abuse is far greater under the scheme adopted  
6 by the superior court. That court required that restricted state  
7 funds be counted as "available for appropriation." It follows that  
8 all appropriations, whether from a restricted fund or unrestricted  
9 fund, would be counted as an "amount appropriated" for purposes of  
10 determining the base.

11           Apparently, the superior court did not realize that the  
12 legislature frequently appropriates money into a fund and then back  
13 out of a fund all within one legislative session. For example, in  
14 Section 1 of Chapter 83, SLA 1993, the legislature appropriated  
15 \$192,408,894 to the Educational Facilities Maintenance and  
16 Construction Fund. Section 2 of that Act appropriated  
17 \$150,970,794 from the Educational Facilities Maintenance and  
18 Construction Fund to the school construction grant fund, with  
19 allocation to specific projects. Section 3 appropriated  
20 \$21,198,500 from the Educational Facilities Maintenance and  
21 Construction Fund to major maintenance grant fund for allocation to  
22 specific projects.

23           Under the superior court's decision, all three  
24 appropriations authorized by Chapter 83 would count in the "amount  
25 appropriated"--inflating that figure almost two-fold. Because only  
26 half that amount was ever "available for appropriation," the double  
counting would make access to the budget reserve easier the

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following year, when the two figures are compared. Alaska Statute 37.10.420, in contrast, accounts for the anomaly that the same pot of money is subject to multiple appropriations by limiting the "amount available" to the unrestricted general fund.<sup>3</sup>

**B. Funds validly restricted by law or held by public instrumentalities are not available for appropriation**

Plaintiff contends that certain statutory funds must be counted as "available" even though, by law, the balances of the funds are committed to special uses. Plaintiff would also require that certain assets of public corporations and other instrumentalities, having a separate and independent existence permitted by law, be counted as "available for appropriation" even if the assets are not in the state treasury.

<sup>3</sup> In both his pleadings, Cowper draws the Court's attention to fund balances identified by the Legislative Finance Division. Rather than constitute amounts "available for appropriation" under Section 17(b), those figures represent money previously appropriated to statutory funds. In each case the fund balance is reserved for the particular purposes of the fund. If the legislature determines that the money is better spent on a purpose other than the one it is reserved for, the legislature will first transfer the money into the unrestricted general fund. Once the money enters the unrestricted general fund, it is "available for appropriation" for the purposes of Section 17(b).

The money remaining in the Educational Facilities Maintenance & Construction Fund represents a different situation. The legislature allocated all of the money appropriated in Section 1 of Chapter 83 by making the appropriations in Sections 2 and 3 of the act. The money in this fund was left when Governor Hickel line-item vetoed one of the allocations made by section 2 of Chapter 83, but did not reduce the appropriation in section 1 by a corresponding amount. Once the initial appropriation lapses or the money is returned to the unrestricted general fund by law, this money will be "available for appropriation." Until that occurs, however, the money should not be counted as "available" under Section 17(b) because it remains reserved for the purposes of the fund--school construction or maintenance.

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Where a fund is created or set aside by statute for a particular purpose or use, executive branch agencies must expend it as provided by the enabling act. Michigan Sheriff's Association v. Michigan Department of Treasury, 255 N.W.2d 666, 670 (Mich. 1977). The fund may be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose. State ex. rel. Douglas v. Nebraska Mortgage Finance Fund, 283 N.W.2d 12 (Neb. 1979). For executive branch agencies, the requirements of statutory funds cannot be ignored. When the governor prepares the executive budget, he may not, without proposing special legislation that makes revenue available through the removal of restrictions on funds committed by law to a specific purpose, anticipate the use of money from statutory funds and accounts.

The legislature has the power to transfer to another fund or appropriate to another purpose any surplus remaining in a special fund established by law after the fund purpose is accomplished. Michigan Sheriff's Association, supra. Even if there is no surplus in a statutory fund, the legislature may divert the balance of a statutory fund to another purpose. As the superior court correctly stated, however, the legislature cannot authorize the diversion of a statutory fund when such diversion would conflict with a controlling constitutional provision of the constitution controlling the use of the fund, impair the obligation of contracts, or constitute a breach of trust. The legislature's power to use existing funds and accounts stems from a recognition that one legislature cannot bind its successor.

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If the this maxim is applied in the extreme, as plaintiff urges, even the minimal protections adopted by the superior court would be invalid. No protection could be afforded appropriations enacted by the previous legislature. The circular effect of making all prior fiscal decisions of no effect for purposes of Section 17(b) destroys the annual budget process mandated by Article 9, Section 12 of the Alaska Constitution. The circular effect is diminished only if previous enactments are given finality. The legislature must have the collective will to undertake some affirmative act before money in a statutory fund can be expended for another purpose. These preconditions stand in the way of immediate availability for use. Under AS 37.10.420, statutory funds become available only to the extent that the legislature determines an amount may be diverted to another use.

The superior court recognized that assets of public corporations should not be considered "available for appropriation." The superior court erred, however, in not extending the same protections to other restricted funds created by law.

Public corporations are created as political subdivisions of the State outside the state treasury. These entities issue and secure debt through pledges of assets and income under the control of the corporation. Public corporations are kept separate to insulate the State from liability for corporate debts. The surplus assets of public corporations are not immediately accessible to the legislature because immediate access would violate the separateness

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2 contemplated by Article IX, Section 11 of the Alaska Constitution  
3 and the enabling Acts for each public corporation or enterprise.  
4 To disgorge assets, the legislature must enact a statute that  
5 orders dissolution of the corporation. Such a statute is subject  
6 to the governor's veto power and therefore is not at the sole  
7 discretion of the legislature.

8           Amounts in a statutory fund are available for general  
9 purposes when money in the fund is no longer needed for the  
10 intended purpose. Some intended purposes continue indefinitely.  
11 In the case of the Earnings Reserve Account, the Alaska Permanent  
12 Fund believes that the entire accumulated balance of the fund will  
13 eventually be needed to inflation proof the principal of the fund.  
14 See Alaska Permanent Fund Monthly Financial Report, February 1994,  
15 at 19, (attached as Ex. B to Hearing Trans. Aff. (April 15, 1994)).  
16 It is not up to the court to second guess whether the future need  
17 for this balance has expired.

18           The same argument applies to all valid reserve accounts.  
19 Creation of the 470 fund, for example, reflects the legislature's  
20 policy determination of what amount was necessary to protect the  
21 public interest in a clean environment. Merely holding an amount  
22 in reserve does not mean that the amount reserved is surplus to the  
23 needs of the State. Yet, that is effectively what the superior  
24 court decided when it refused to respect the validity of some  
25 legislative enactments. This court should reverse the superior  
26 court and hold that AS 37.10.420 is constitutional.

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C. Because determining which funds are "available for appropriation" is not a justiciable question, this Court should reverse the decision of the superior court.

Cowper argues that the State should be estopped from raising the issue of justiciability on appeal. See Cowper's Opposition to Petition for Review, at 37 n.28 (April 18, 1994). Cowper's vociferous argument is not supported by the law or the facts. Synonymous with jurisdiction, justiciability may be raised at any point in the course of a litigation. See, e.g., Abood v. Gorsuch, 703 P.2d 1158, 1160-61 (Alaska 1985); Malone v. Meekins, 650 P.2d 351, 356-57 (Alaska 1982) (lack of jurisdiction due to the separation of powers doctrine). The indestructibility of a jurisdictional challenge reflects the fact that jurisdiction refers to the court's fundamental authority over a matter. See Matter of C.D.M., 627 P.2d 607, 610 (Alaska 1981) ("The question of a court's jurisdiction goes to its power to hear and adjudicate the subject matter in a given case"). For the same reason, a defense of lack of jurisdiction may not be waived by a party. See Wanamaker v. Scott, 788 P.2d 712, 713-14, n.2 (Alaska 1990) (party who invoked a state's jurisdiction could subsequently challenge it in a related case). In fact, if the absence of jurisdiction is not raised by the parties, the court must raise the issue sua sponte. See Burrell v. Burrell, 696 P.2d 157, 162 (Alaska 1984).

In this case, the State argued emphatically that the superior court should defer to the legislature's interpretation of the Constitution. See State's Motion for Declaratory Judgment on the Constitutionality of Alaska Statute 37.10.420, at 33-37 (Mar.

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2 25, 1994).

3 By attempting to draw the line between existing funds  
4 that are available for purposes of section 17(b), the superior  
5 court assumes the role of a lawmaker. In assuming this role, the  
6 court would have to exercise the state's sovereign will as to the  
7 retention or liquidation of amounts that the legislature reserved  
8 for specific purposes. This would be an uncomfortable role for the  
9 court for it must make fiscal policy decisions without a basis in  
10 law for guidance.

11 In effect, if the court chooses among existing funds to  
12 decide what is "available," the court would serve the same function  
13 assigned to the state board of equalization in the State of  
14 Oklahoma. See Draper v. State Board of Equalization, 414 P.2d 276  
15 (Okl. 1966) (an agency of the State of Oklahoma is required by the  
16 state constitution to determine the revenue available for  
17 appropriation; once the agency determines the amount of revenue, an  
18 appropriation made by the legislature exceeding that amount is  
19 void). However, the superior court would not be aided by the  
20 provisions similar to those set out in the Oklahoma Constitution  
21 found controlling in Draper, but would have to determine what  
22 state assets are available for appropriation based on its own  
23 subjective criteria.

24 The court should not assume the role of a super board of  
25 equalization. In the absence of a constitutional provision  
26 defining when money is available, it is for the legislature and the  
governor to determine the amount available under the Alaska

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