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

BILL WIELECHOWSKI, RICK  
HALFORD, and CLEM TILLION,

Case No. 3AN-16-08940 CI

Plaintiffs,

v.

STATE OF ALASKA, ALASKA  
PERMANENT FUND  
CORPORATION,

**REPLY IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

Defendants.

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## ARGUMENT

1  
2 According to the State of Alaska, the Permanent Fund Dividend (“PFD”) program is  
3 no more than an annual handout made at the Legislature’s discretion—“like all other  
4 spending of public revenues.”<sup>1</sup> Nothing could be further from the truth. In 1982 the PFD  
5 program was intended and designed to be an extraordinary exception from the normal  
6 course of government spending. The annual dividend payment linking average citizens with  
7 the management of their sovereign natural resource wealth has been perhaps the most  
8 unique, important, and *exceptional* aspect of Alaska public policy.  
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11 This Court should conclude that the State misunderstands the nature of the PFD  
12 program. First, article IX, section 15 of the Alaska Constitution was specifically intended to  
13 allow the Legislature to dedicate the Permanent Fund’s income to specific uses, including  
14 annual dividend payments. Second, in 1982 the Legislature dedicated a percentage of the  
15 Permanent Fund’s income to annual dividend payments for Alaska residents by enacting the  
16 Permanent Fund statutes. Third, the Legislature’s dedication contained in the Permanent  
17 Fund statutes commands an “automatic[] transfer to the dividend fund each year”<sup>2</sup> and does  
18 not require subsequent annual appropriations, and Section 10 of the 2016 operating budget  
19 was not an appropriation subject to the governor’s line-item veto. Thus, this Court should  
20 grant summary judgment to Plaintiffs and order the Alaska Permanent Fund Corporation  
21 (“APFC”) to transfer the full amount required by Alaska Statute (“AS”) 37.13.145(b) to the  
22 Dividend Fund for distribution as a supplemental 2016 dividend.  
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27 <sup>1</sup> State’s Memorandum in Support of Summary Judgment at 15, *Wielechowski v. State of Alaska, Alaska*  
28 *Permanent Fund Corp.*, No. 3AN-16-08940 CI (Alaska Super. Ct. Oct. 28, 2016) [hereinafter *State’s*  
*Memorandum*].

<sup>2</sup> *Hickel v. Comper*, 874 P.2d 922, 934 (Alaska 1994).

1 I. Article IX, Section 15 Of The Alaska Constitution Authorizes  
2 Dedications Of The Permanent Fund's Income.

3 With their argument in this case, the State has offered its third different  
4 interpretation of article IX, section 15 within the past 36 years.<sup>3</sup> But to reach its newest  
5 conclusion that article IX, section 15 did not authorize the Legislature to dedicate the  
6 Permanent Fund's income to specific uses, the State simply ignored the overwhelming  
7 evidence against it. The State never mentions testimony during the House Finance  
8 Committee hearing on the constitutional amendment explaining that the phrase "unless  
9 otherwise provided by law" was designed to be a "sufficient legal peg so that income from  
10 the permanent fund could . . . permit the legislature to make a dividend payment to citizens  
11 of Alaska from the income of the fund";<sup>4</sup> the State omits the 1976 testimony of the  
12 Commissioner of Revenue implying that the phrase "unless otherwise provided by law"  
13 could be used to dedicate the fund's income "[t]o debt service or whatever purpose the  
14 legislature sees fit";<sup>5</sup> and the State misinterprets the House Joint Committee's Report  
15 making it clear that "[t]he purpose of ['unless otherwise provided by law'] is to give future  
16 legislatures the maximum flexibility in using the Fund's earnings – ranging from adding to  
17 the Fund principal to paying out a dividend to resident Alaskans."<sup>6</sup> Furthermore, the State  
18 attempts to sweep under the rug its past positions on article IX, section 15, chiefly, its 1980  
19 opinion that the phrase "unless otherwise provided by law" "is probably broad enough for  
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25 <sup>3</sup> Compare State's Memorandum, with 2009 Inf. Op. Att'y Gen. (JU-2009-200-509; Jun. 16), 1983 Inf.  
26 Op. Att'y Gen. (366-328-83; Jan. 5), and 1980 Op. Att'y Gen. (No. 3; Mar. 19).

27 <sup>4</sup> Hearing on SSHJR 39 Before the H. Comm. on Finance, 9th Leg., 2d Sess. (Alaska Feb. 21, 1976)  
(quoting Jim Rhodes, staff to Chair Malone).

28 <sup>5</sup> *Id.*

<sup>6</sup> H. JOURNAL, 9th Leg., 2d Sess. 685 (Alaska 1976) (joint report of the House Finance and Judiciary  
Committees).

1 [the Legislature] to prescribe for the distribution of a portion of the income to the people  
2 without annual appropriation”;<sup>7</sup> its January 1983 opinion stating that “[i]n fact, the  
3 legislature has dedicated a portion of the fund’s income by statute . . . to a separate fund  
4 for the permanent fund dividend program” and “it could be defended on the ground that  
5 the dividend program was so intimately connected to the establishment of the permanent  
6 fund that an exception from the dedicated fund prohibition for that purpose was implied  
7 in the permanent fund constitutional amendment”;<sup>8</sup> its March 1983 opinion concluding  
8 that “[a]rticle IX, section 15 clearly contemplates that the legislature may by law provide  
9 for some use of the fund other than deposit in the general fund”;<sup>9</sup> and its 1994 statements  
10 in *Hickel v. Cowper* arguing that the PFD program was designed to continue “indefinitely.”<sup>10</sup>  
11 The State’s current position attempts to disregard to the Permanent Fund amendment’s  
12 history and its own previous interpretations of the constitution and statutes.

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15  
16 **A. The Phrase “Unless Otherwise Provided By Law” Was Meant**  
17 **To Allow Dedications Of The Permanent Fund’s Income.**

18 The State argues that the Permanent Fund amendment “did not explicitly exempt”  
19 the fund’s income from article IX, section 7’s prohibition on dedicated funds.<sup>11</sup> Instead,  
20 the State claims that the amendment created a single exception from the dedicated funds  
21 clause for the state’s oil and mineral revenues going into the Permanent Fund.<sup>12</sup> But the  
22 State ignores the important historical motivations behind the Permanent Fund  
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25 <sup>7</sup> 1980 Op. Att’y Gen. (No. 3; Mar. 19).

26 <sup>8</sup> 1983 Inf. Op. Att’y Gen. (366-328-83; Jan. 5).

27 <sup>9</sup> 1983 Inf. Op. Att’y Gen. (366-484-83; Mar. 10).

28 <sup>10</sup> Reply Brief for Petitioner, *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994) (No. S-6294) (April 19, 1994); *Hickel v. Cowper*, 874 P.2d 922, 934 n. 29 (Alaska 1994).

<sup>11</sup> State’s Memorandum at 21.

<sup>12</sup> *Id.*

1 amendment. In fact, the phrase “unless otherwise provided by law” was added to the draft  
2 amendment specifically to allow dedications of the fund’s income.

3 In 1976 the Legislature concluded that it wanted the flexibility to dedicate the  
4 Permanent Fund’s income to specific uses. At a House Finance Committee hearing on the  
5 constitutional amendment’s original language—which directed all fund income into the  
6 general fund—the House Finance Chair Hugh Malone, asked about the Legislature’s ability  
7 to use the fund’s income “for securities of the state.”<sup>13</sup> Revenue Commissioner Sterling  
8 Gallagher responded that the constitutional amendment as it was introduced by the  
9 governor, would not permit dedications of the fund’s income.<sup>14</sup> Gallagher brought up a  
10 report commissioned by the State by the Morgan Guaranty Trust Company of New York  
11 (“Morgan Report”), recommending that Alaska create a “Permanent Development  
12 Fund.”<sup>15</sup> The Morgan Report concluded that the proposed “Permanent Development  
13 Fund” would increase the State’s financing capacity, but “this can only be done if income  
14 from the investment is available to service debt expense.”<sup>16</sup> In order to accomplish that  
15 goal, the Morgan Report recommended that the fund’s “income cannot automatically go to  
16 the General Fund.”<sup>17</sup>

17 Based in part on the Morgan Report, the Legislature decided to add the phrase  
18 “unless otherwise provided by law” specifically to allow dedications of the fund’s income.  
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25 <sup>13</sup> Hearing on SSHJR 39 Before the H. Comm. on Finance, 9th Leg., 2d Sess. (Alaska Feb. 21, 1976).

26 <sup>14</sup> *Id.*

27 <sup>15</sup> MORGAN GUARANTY TRUST COMPANY OF NEW YORK, A PROSPECTUS OF THE STATE OF  
28 ALASKA’S FINANCES AND ITS DEVELOPMENT OF ECONOMIC DIVERSITY (Jan. 12, 1976) (available in  
SSHJR 39 file) (attached to this Reply Memorandum).

<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Id.*

1 The House Joint Committee Report explained that the phrase was added “to give future  
2 legislatures the maximum flexibility in using the Fund’s earnings – ranging from adding to  
3 the Fund principal to paying out a dividend to resident Alaskans.”<sup>18</sup> Jim Rhodes, staff  
4 member to Chair Malone, explained that the phrase was added to give the Legislature the  
5 ability to dedicate the fund’s income to debt service or to annual dividend payments.<sup>19</sup> To  
6 accomplish that dedication, the Legislature understood that it required an exception to  
7 Article IX, section 7’s prohibition on dedicated funds.  
8

9  
10 The State’s reading of article IX, section 15’s text is overly narrow.<sup>20</sup> The State  
11 effectively renders the phrase “unless otherwise provided by law” meaningless because  
12 there would have been no need for the Legislature to have included that phrase in the  
13 constitutional amendment in order to do what the State contends the phrase authorizes. In  
14 other words, the Legislature could have redirected money back into the Permanent Fund,  
15 and into a special account called the Earnings Reserve Account, without the phrase “unless  
16 otherwise provided by law.” The Legislature is constitutionally permitted to establish  
17 special accounts to hold funds, as long as those funds are treated as essentially part of the  
18 state’s general fund.<sup>21</sup> The Legislature could also have paid dividends through annual  
19 appropriations in exactly the same manner without the phrase “unless otherwise provided  
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24 <sup>18</sup> H. JOURNAL, 9th Leg., 2d Sess. 685 (Alaska 1976) (joint report of the House Finance and Judiciary  
25 Committees).

26 <sup>19</sup> Hearing on SSHJR 39 Before the H. Comm. on Finance, 9th Leg., 2d Sess. (Alaska Feb. 21, 1976)  
(quoting Jim Rhodes, staff to Chair Malone).

27 <sup>20</sup> State’s Memorandum at 21.

28 <sup>21</sup> See *Sonneman v. Hickel*, 836 P.2d 936, 939 (Alaska 1992); Staff Report of Alaska Legislative Council,  
Dedicated and Special Funds, 3d Leg., 1st Sess. (January 1963) (“[T]here is no prohibition against  
appropriating the resources of the ‘special accounts’ for other purposes should the need arise.”).

1 by law” because all the fund’s income would be subject to appropriations. Thus, the State  
2 imparts no independent meaning on the phrase “unless otherwise provided by law.”

3 On the other hand, if the State’s narrow interpretation is correct, the Legislature  
4 would never be able to dedicate the Permanent Fund’s income for “debt service or  
5 whatever purpose the legislature sees fit.”<sup>22</sup> All the fund’s income would go to the general  
6 fund, or remain in the Earnings Reserve Account to be spent in the same manner as the  
7 general fund. But that was not the intent of the Legislature when it added the phrase  
8 “unless otherwise provided by law” and would eliminate the Legislature’s ability to dedicate  
9 the fund’s income in the best interests of the state. Thus, this Court should conclude that  
10 the phrase “unless otherwise provided by law” authorizes the Legislature to dedicate the  
11 fund’s income to specific uses, including annual PFD payments.  
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15 **B. Voters In 1976 Knew That The Permanent Fund’s Income**  
16 **Could Be Dedicated To Specific Uses.**

17 The State erroneously contends that Alaska voters had no notice that the  
18 Permanent Fund amendment authorized the Legislature to dedicate the fund’s income.<sup>23</sup>  
19 The State cites the 1976 Alaska election pamphlet and statements from Governor  
20 Hammond explaining that “income from the Permanent Fund will be available for general  
21 appropriation by the legislature.”<sup>24</sup> But the State’s cited authorities simply do not support  
22 its position. In fact, the amendment’s language and the public debate over the creation of  
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26 <sup>22</sup> Hearing on SSHJR 39 Before the H. Comm. on Finance, 9th Leg., 2d Sess. (Alaska Feb. 21, 1976)  
27 (quoting Commissioner Gallagher).

28 <sup>23</sup> State’s Memorandum at 25.

<sup>24</sup> *Id.* at 26–28 (citing 1976 Ballot Proposition No. 2; Statement in Favor of Proposition No. 2; Gov.  
Jay Hammond, *The Governor’s Point of View*, ANCHORAGE TIMES, Oct. 27, 1976, at 6).

1 the Permanent Fund provided voters with information indicating that the fund's income  
2 would be exempt from the dedicated funds clause.

3         The Legislature held hearings and debated the Permanent Fund amendment  
4 throughout the winter and spring of 1976. The hearings, statements of legislators, and  
5 committee reports were all publically available and part of the public record before the  
6 November 1976 election. This Court should rely on the statements of the Permanent Fund  
7 amendment's drafters, just as it looks to statements from the constitution convention.<sup>25</sup>  
8  
9 Moreover statements in the media prior to the vote made it clear that the amendment  
10 authorized the Legislature to use the fund's income for specific purposes. Representative  
11 Malone stated that the amendment was "a chance to let average Alaskans have a stake in  
12 managing some of the oil wealth"<sup>26</sup>—the public understood that meant through a dividend  
13 from the fund's income. And the Anchorage Daily News wrote that possible uses of the  
14 fund's income included "paying direct dividends to Alaskans [or] using the money to  
15 underwrite such vast projects as hydroelectric dams."<sup>27</sup> Thus, when the voters approved  
16 the Permanent Fund amendment, there was ample evidence to indicate the "plain ordinary  
17 meaning"<sup>28</sup> of the phrase "unless otherwise provided by law" was an exception from the  
18 dedicated funds clause.  
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26 <sup>25</sup> See, e.g., *Groh v. Egan*, 526 P.2d 863, 867 (Alaska 1974) (relying on minutes from the constitutional  
27 convention to interpret constitutional provisions).

28 <sup>26</sup> Editorial, *Permanent Fund Raises Use Issue*, ANCHORAGE DAILY NEWS, Oct. 22, 1976 at 2.

<sup>27</sup> *Id.*

<sup>28</sup> State's Memorandum at 26 (quoting *Hickel v. Halford*, 872 P.2d 171, 176 (Alaska 1994)).

1 The State also emphasizes statements in newspapers explaining that the Permanent  
2 Fund amendment would allow legislative “flexibility” for the fund’s income.<sup>29</sup> But nothing  
3 about the Plaintiffs’ interpretation of the Permanent Fund amendment contradicts those  
4 statements. In fact, the Plaintiffs’ interpretation promotes legislative flexibility while the  
5 State’s arguments would undermine it. By allowing dedications of the fund’s income to  
6 specific uses, the Legislature would enjoy maximum flexibility. For example, one of the  
7 original ideas for the fund’s income was a dedication to debt service or loan guarantees.<sup>30</sup>  
8 That could only be accomplished if the Legislature had the power to dedicate part of the  
9 fund’s income to loan guarantees. The State’s interpretation of the phrase “unless  
10 otherwise provide by law” minimizes flexibility by prohibiting dedications and is  
11 “fundamentally inconsistent” with the amendment’s intent because the State would simply  
12 have the fund’s income be part of the general fund or appropriated in the same manner as  
13 the general fund, without the possibility for dedications.<sup>31</sup> Thus, this Court should  
14 conclude that voters had knowledge that the phrase “unless otherwise provided by law”  
15 authorized the Legislature to dedicate the fund’s income for specific uses.  
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20 **C. A Dedication Of Funds Does Not Offend The Spending And**  
21 **Line-Item Veto Clauses.**

22 The State mistakenly concludes that any dedication of the Permanent Fund’s  
23 income would be inconsistent with the constitution’s spending and line-item veto clauses.<sup>32</sup>  
24 Article II, section 13 provides that “[n]o money shall be withdrawn from the treasury  
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26 <sup>29</sup> *Id.* at 26–27.

27 <sup>30</sup> Hearing on SSHJR 39 Before the H. Comm. on Finance, 9th Leg., 2d Sess. (Alaska Feb. 21, 1976)  
(quoting Jim Rhodes, staff to Chair Malone).

28 <sup>31</sup> *But see* State’s Memorandum at 27.

<sup>32</sup> *Id.* at 16.

1 except in accordance with appropriations made by law”; and article II, section 15 grants  
2 the governor the power to strike or reduce appropriations bills. But dedicated funds,  
3 including the dedication of the Permanent Fund’s income to annual PFD payments, are  
4 not inconsistent with those constitutional provisions. The State fundamentally  
5 misunderstands how dedicated funds work. Here, the dedication of the Permanent Fund’s  
6 income to specific uses was not an “abdication of budgetary controls.”<sup>33</sup> On the contrary,  
7 the Legislature retains full control to modify or repeal the dedication.  
8

9  
10 A dedication of funds involves two aspects: a specific purpose and a restriction on  
11 the use of funds for any other purpose. The Legislature identified the specific purpose as  
12 paying annual dividend payments to Alaska residents. And the Permanent Fund statutes  
13 created a specific formula to determine the amount of the fund’s income that would go to  
14 dividend payments each year—with a clear mandate for the state to pay the dividend  
15 automatically. The Legislature accomplished the dedication in the form of a statutory  
16 appropriation, involving automatic transfers from the Earnings Reserve Account to the  
17 Dividend Fund, and from the Dividend Fund to Alaska residents.<sup>34</sup>  
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20 A statutory appropriation is a recurring appropriation established by the Legislature  
21 in codified law. “Statutory appropriations are often assumed as given . . . [and] considered  
22 so important that the legislature treats its funding as nearly automatic.”<sup>35</sup> Unlike a direct  
23 appropriation that requires an annual “enactment of legislation,” statutory appropriations  
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26 <sup>33</sup> *Id.* at 20.

27 <sup>34</sup> The State is correct that “a dedication may restrict the Legislature’s appropriation power, but it  
28 does not eliminate it.” *Id.* at 37.

<sup>35</sup> MINNESOTA LEGISLATIVE COMMISSION ON PLANNING AND FISCAL POLICY, STATUTORY  
APPROPRIATIONS GUIDELINES (Dec. 5, 2002), available at [http://www.house.leg.state.mn.us/fiscal/  
files/1202stat.pdf](http://www.house.leg.state.mn.us/fiscal/files/1202stat.pdf).

1 recur automatically each year. “A reduction in a statutory appropriation requires an  
2 enactment of legislation,”<sup>36</sup> but nothing prevents the Legislature from changing the  
3 statutory appropriation through new law.

4         Statutory appropriations, like the PFD program, satisfy the constitutional  
5 requirements for spending state funds. In 1982 the Legislature enacted the PFD program  
6 by creating an “automatic” appropriation from the Earnings Reserve Account to the  
7 Dividend Fund. That initial appropriation was validly enacted by the Legislature and signed  
8 by the governor in accordance with article II, section 13 of the Alaska Constitution. The  
9 law was subject to the governor’s veto authority in article II, section 15, and in 1982  
10 Governor Hammond signed the law instead of vetoing or reducing the percentage of the  
11 Permanent Fund’s income dedicated to annual dividend payments.  
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15         The State is correct that dedicated funds and statutory appropriations like the PFD  
16 program are fundamentally different from normal annual appropriations.<sup>37</sup> Alaska’s  
17 founders feared that dedicated funds would curtail “the exercise of budgetary controls”<sup>38</sup>  
18 and pose “obstacle[s] to the scope and flexibility of budgeting.”<sup>39</sup> The purpose of the  
19 Permanent Fund amendment was to take away some of the Legislature’s ability to  
20 squander the state’s oil and mineral revenues. Consequently, the automatic, recurring  
21 payment of PFDs does limit the Legislature’s budgetary control, and requires the  
22 Legislature to act affirmatively to modify or repeal the appropriation. In that sense, the  
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26 <sup>36</sup> *Id.*

27 <sup>37</sup> State’s Memorandum at 36.

28 <sup>38</sup> *Sonneman*, 836 P.2d at 938 (quoting 6 PROCEEDINGS OF THE ALASKA CONSTITUTIONAL  
CONVENTION (PACC) Appendix V at 111 (Dec. 16, 1955)).

<sup>39</sup> *Id.* (quoting ALASKA STATEHOOD COMMISSION, CONSTITUTIONAL STUDIES pt. IX, at 27 (1955)).

1 PFD program is an extraordinary exception from normal appropriations. But the PFD  
2 program's uniqueness does not mean that it violates other constitutional provisions. The  
3 PFD program's exceptionalism is concomitant with its importance in Alaska public policy.  
4 Thus, this Court should conclude that the Legislature's dedication of the Permanent  
5 Fund's income to annual PFD payments through a statutory appropriation is not  
6 unconstitutional.  
7

8 **D. Public Policy Confirms That The Legislature May Dedicate**  
9 **The Permanent Fund's Income.**

10 According to the State, the Plaintiffs' interpretation of the constitution and  
11 Permanent Fund statutes could allow the Legislature to "dedicate all income from the fund  
12 for any purpose it chooses—from supporting the operation of the Division of Motor  
13 Vehicles to financing the Knik Arm Bridge."<sup>40</sup> Although the State's accusation is tongue-  
14 in-cheek, it is fundamentally correct. The Legislature included the phrase "unless otherwise  
15 provided by law" to maximize flexibility in using the Permanent Fund's income.<sup>41</sup>  
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17

18 The Legislature has the authority to pass a law repealing the PFD program and re-  
19 dedicating the Permanent Fund's income to any other use it deems appropriate. For  
20 example, the Legislature could repeal the PFD program and re-dedicate the Permanent  
21 Fund's income to a loan guarantee—securing the financing for state projects. The ability to  
22 use the Permanent Fund's income as a loan guarantee was one of the primary reasons the  
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27 <sup>40</sup> State's Memorandum at 28.

28 <sup>41</sup> See H. JOURNAL, 9th Leg., 2d Sess. 685 (Alaska 1976) (joint report of the House Finance and  
Judiciary Committees).

1 Legislature added the phrase “unless otherwise provided by law” to the Permanent Fund  
2 amendment.

3 But contrary to the State’s assertions, recognizing that the Legislature may dedicate  
4 the fund’s income to specific uses is not the same as having the Permanent Fund’s income  
5 “locked up.”<sup>42</sup> The Legislature is free to change or reduce the dedication, but it must do so  
6 in a subsequent enactment—as “provided by law.” Thus, this Court should conclude that  
7 allowing dedications of the fund’s income is consistent with the intended policy of the  
8 Permanent Fund amendment.  
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11 **II. The Permanent Fund Statutes Dedicated A Percentage Of The**  
12 **Permanent Fund’s Income To Annual PFD Payments.**

13 The State misinterprets the Permanent Fund statutes and erroneously concludes  
14 that the Legislature did not dedicate a percentage of the fund’s income to annual PFD  
15 payments.<sup>43</sup> The State claims that “repeated references to appropriations in other parts of  
16 the statutory scheme” demonstrate that PFD payments require annual appropriations.<sup>44</sup>  
17 Furthermore, the State asserts that the Legislature has “consistently recognized that  
18 permanent fund dividends are paid by appropriations.”<sup>45</sup>  
19

20 But the State overlooks the operative text in the Permanent Fund statutes  
21 establishing a dedication of the fund’s income to annual PFD payments. AS 37.13.145(b)  
22 provides that the APFC “shall transfer from the earnings reserve account to the dividend  
23 fund . . . 50 percent of the income available for distribution.” And AS 43.23.055 states that  
24  
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27 <sup>42</sup> State’s Memorandum at 29.

28 <sup>43</sup> See State’s Memorandum at 34–43.

<sup>44</sup> *Id.* at 39–40.

<sup>45</sup> *Id.* at 41.

1 the Department of Revenue “shall . . . annually pay permanent fund dividends from the  
2 dividend fund.” Thus, the Permanent Fund statutes unambiguously dedicated a part of the  
3 fund’s income to annual PFD payments.

4 **A. The State Misinterprets The Permanent Fund Statutes To**  
5 **Support Its Claim That There Was No Dedication.**

6 The State drew one-sided conclusions from the constitution and Permanent Fund  
7 statutes to bolster its claims that there was no dedication of the Permanent Fund’s income.  
8 First, the State cites two statutes governing the Dividend Fund, which acknowledge that  
9 the Legislature may appropriate funds from the Dividend Fund for other governmental  
10 purposes.<sup>46</sup> AS 43.23.025(a) provides:  
11  
12

13 The total amount available for dividend payments . . . equals . . .  
14 (A) the amount of income of the Alaska permanent fund  
15 transferred to the dividend fund . . . (E) less appropriations  
16 from the dividend fund during the current year, including  
17 amounts to pay costs of administering the dividend program  
18 and the hold harmless provisions of AS 43.23.075.

19 Another part of the Dividend Fund statute requires public notice for reductions resulting  
20 from appropriations for administrative costs and other governmental purposes.

21 AS 43.23.028(a) provides:

22 By October 1 of each year, the commissioner shall give public  
23 notice of the value of each permanent fund dividend for that  
24 year . . . the stub attached to each individual dividend  
25 disbursement advice must . . . (3) disclose the amount by which  
26 each dividend has been reduced due to each appropriation from  
27 the dividend fund, including amounts to pay the costs of  
28 administering the dividend program and the hold harmless  
provisions of AS 43.23.075.

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<sup>46</sup> *Id.* at 39.

1 But those two provisions do not mean that a calculable amount of the Permanent Fund's  
2 income was not dedicated to annual PFD payments or that dividend payments require  
3 subsequent appropriations. When the Legislature created the Dividend Fund it  
4 acknowledged that some of the fund's income could be appropriated for other  
5 governmental purposes, including costs necessary to carry out the PFD program.<sup>47</sup> As the  
6 State noted, the Legislature has done this frequently; the Legislature has funded  
7 Department of Corrections, domestic violence programs, and the Office of Victim's Rights  
8 by specifically appropriating from the Dividend Fund.<sup>48</sup> The formula for calculating PFD  
9 payments recognizes that the Legislature may use some of the Dividend Fund's money for  
10 other purposes and that whatever is left is paid out as the dividend. The statute never  
11 mentions an appropriation from the Dividend Fund to payments to Alaska residents, and  
12 the Legislature has never made such an appropriation out of the Dividend Fund  
13 specifically for PFD payments; PFD payments have always happened automatically.<sup>49</sup>

14  
15  
16  
17 Second, the State suggests that a provision directing unexpended appropriations for  
18 administrative costs of the Permanent Fund program back into the Dividend Fund means  
19 that there was no dedication to PFD payments.<sup>50</sup> AS 43.23.045(d) provides

20  
21 Unless specified otherwise in an appropriation act, the  
22 unexpended and unobligated balance of an appropriation to  
23 implement this chapter lapses into the dividend fund on June 30  
24 of the fiscal year for which the appropriation was made and  
25 shall be used in determining the amount of and paying the  
subsequent year's dividend as provided in AS 43.23.025(a)(1)(B).

26 <sup>47</sup> See AS 43.23.025(a); AS 43.23.028(a).

27 <sup>48</sup> State's Memorandum at 39 (citing Affidavit of Sarah Race (October 27, 2016)).

28 <sup>49</sup> See 1981 Inf. Op. Att'y Gen. (66-260-82; Dec. 22) ("[I]t is our opinion that the payment of  
dividends from the dividend fund established by AS 43.23.050 does not require an appropriation.").

<sup>50</sup> State's Memorandum at 40.

1 But that provision simply recognizes that the Legislature will make appropriations “to  
2 implement” the PFD program—including administrative costs—from the Dividend Fund.  
3  
4 When the Legislature created the PFD program, it knew that there would be costs of  
5 carrying out the program. The Legislature required the Department of Revenue to perform  
6 multiple costly administrative functions, including adopting regulations,<sup>51</sup> providing public  
7 information,<sup>52</sup> and establishing a fraud investigation unit.<sup>53</sup> All of those duties created  
8 administrative costs that the Legislature decided to pay for out of the Dividend Fund.  
9  
10 AS 43.23.045(d) simply specified that any unused money appropriated “to implement”  
11 those administrative functions reverts to the Dividend Fund instead of being redirected  
12 into the general fund.  
13

14 Third, and finally, the State cites the 1982 constitutional amendment adopting an  
15 appropriations limit as evidence that the Permanent Fund’s income was not dedicated to  
16 PFD payments.<sup>54</sup> Article IX, section 16 of the Alaska Constitution provides:  
17

18 Except for appropriations for Alaska permanent fund  
19 dividends, appropriations of revenue bond proceeds,  
20 appropriations required to pay the principal and interest on  
21 general obligations bonds [etc.] . . . appropriations from the  
22 treasury made for a fiscal year shall not exceed \$2,500,000,000  
23 by more than the cumulative change, derived from federal  
indices as prescribed by law, in population and inflation since  
July 1, 1981.

24 The State argues that “[i]f the Legislature had intended to create a dividend program that  
25 existed outside of the normal appropriations process—and believed that Article IX,  
26

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27 <sup>51</sup> AS 43.23.055(6).

28 <sup>52</sup> AS 43.23.055(9).

<sup>53</sup> AS 43.23.055(10).

<sup>54</sup> State’s Memorandum at 42.

1 section 15 authorized such a program—there would have been no need to include this  
2 exception in the appropriations limit amendment.”<sup>55</sup> But the State has confused the history  
3 of the PFD program. The Legislature passed the resolution proposing the appropriations  
4 limit amendment in 1981, before the current PFD law was enacted in 1982.

5  
6 To understand the significance of the phrase “[e]xcept for appropriations for  
7 Alaska permanent fund dividends” in article IX, section 16, this Court must look to the  
8 PFD laws as they existed in 1981, not 1982. In 1981 the original version of the PFD  
9 laws—the Permanent Fund Act of 1980—specifically authorized supplemental  
10 appropriations to ensure the dividend payment was at least \$50: “[T]he Legislature may  
11 annually appropriate money from the general fund to the dividend fund if there is not  
12 enough money in the dividend fund to pay each eligible individual an annual permanent  
13 fund dividend valued at \$50.”<sup>56</sup> Thus, when the Legislature proposed the appropriations  
14 limit amendment, it was widely understood that supplemental appropriations for the  
15 dividend could be made from the general fund. It was those supplemental appropriations  
16 that the Legislature exempted from the appropriations limit amendment. Consequently, the  
17 State is wrong that the appropriations limit amendment means that the Permanent Fund’s  
18 income was not dedicated to automatic, recurring PFD payments.

19  
20  
21  
22 **B. The State Fails To Explain Its Change Of Position From The**  
23 **1980 And 1983 Attorney General Opinions.**

24 Perhaps most importantly, the State fails to mention its previous positions,  
25 including attorney general opinions in 1980 and 1983 concluding that the Permanent  
26

27  
28 <sup>55</sup> *Id.*

<sup>56</sup> Ch. 21, SLA 1980.

1 Fund's income was dedicated to PFD payments. In 1980 Senate President Clem Tillion  
2 wanted to ensure that PFD payments would be made, even if the Legislature did not enact  
3 subsequent appropriations in the future. Attorney General Avrum Gross advised Senate  
4 President Tillion on March 19, 1980, confirming that article IX, section 15 of the Alaska  
5 Constitution granted the authority to dedicate the Permanent Fund's income, and to  
6 provide for "automatic" dividend payments:  
7

8 [T]he legislature probably can provide by law for income from  
9 the fund to be *automatically* deposited back into the fund or  
10 distributed as dividends . . . The legislature's discretionary  
11 power over permanent fund income may be limited, but it is  
12 probably broad enough for it to prescribe for the distribution of  
a portion of the income to people *without annual appropriation*.<sup>57</sup>

13 The 1980 opinion demonstrates that legal experts and legislators at the time the PFD  
14 statutes were passed understood that a percentage of the Permanent Fund's income could  
15 be dedicated to dividend payments without requiring annual appropriations.  
16

17 The State also ignores the January 1983 attorney general opinion acknowledging  
18 that article IX, section 15 "might ordinarily be read to permit dedication of the income."<sup>58</sup>  
19 In response to a request from Commissioner Lisa Rudd, inquiring whether the Permanent  
20 Fund's income could be dedicated to longevity bonus payments for Alaska residents, the  
21 Attorney General's Office concluded,  
22

23 In fact, the legislature has dedicated a portion of the fund's  
24 income by statute, AS 43.23, to a separate fund for the  
25 permanent fund dividend program. This practice has not been  
26 challenged and we have opined that it could be defended on the  
ground that the dividend program was so intimately connected  
27

28 <sup>57</sup> 1980 Op. Att'y Gen. (No. 3; Mar. 19) (emphasis added).

<sup>58</sup> 1983 Inf. Op. Att'y Gen. (366-328-83; Jan. 5).

1 to the establishment of the permanent fund that an exception  
2 from the dedicated fund prohibition for that purpose was  
implied in the permanent fund constitutional amendment.<sup>59</sup>

3 Here, the State has reached the opposite conclusion without explaining how or why its  
4 opinion has changed, and without even acknowledging the 1980 and 1983 attorney general  
5 opinions. Thus, this Court should reject the State's newest theory, and conclude that the  
6 Permanent Fund statutes dedicated a percentage of the Permanent Fund's income to  
7 annual PFD payments.  
8

9  
10 **III. AS 37.13.145(b) And 43.23.055 Do Not Require Subsequent Annual**  
11 **Appropriations.**

12 The State contends that annual PFD payments require subsequent annual  
13 appropriations.<sup>60</sup> As evidence for that conclusion, the State cites appropriations bills from  
14 each year since 1984 that have included provisions acknowledging the transfer from the  
15 Earnings Reserve Account to the Dividend Fund for PFD payments.<sup>61</sup> But the State's  
16 argument ignores the fact that those provisions all referred to the underlying authority for  
17 the transfer contained in AS 37.13.145(b). The transfers and PFD payments are automatic  
18 and would have occurred without the legislative notice included in the annual  
19 appropriations.  
20  
21

22 **A. The Permanent Fund Statutes Unambiguously Provide For An**  
23 **Automatic, Recurring PFD Payment.**

24 This Court should conclude that the State's argument that the PFD payment  
25 requires an annual appropriation contradicts the plain meaning of the PFD statutes.  
26

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<sup>59</sup> *Id.*

28 <sup>60</sup> State's Memorandum at 39.

<sup>61</sup> *Id.* at 42 n. 119.

1 AS 37.13.145(b) provides unambiguously that the APFC “shall transfer from the earnings  
2 reserve account to the dividend fund . . . 50 percent of the income available for  
3 distribution.” If this Court were to accept the State’s conclusion, it would render  
4 AS 37.13.145(b) meaningless because each year the Legislature would decide how much to  
5 appropriate—75, 50, or 25 percent of the fund’s available income. Such an interpretation  
6 violates the rule against legislative surplusage—*verba cum effectu sunt accipienda* (“words are to  
7 be taken as having an effect”)—because it ignores AS 37.13.145(b)’s mandatory command  
8 and the identification of a specific percentage (“50 percent”) to transfer.  
9  
10

11 Furthermore, the State essentially argues that AS 37.13.145(b) is unconstitutional  
12 because it believes that the Legislature had no authority to dedicate “50 percent” of the  
13 fund’s available income to PFD payments.<sup>62</sup> But that conclusion conflicts with the Alaska  
14 Supreme Court’s analysis in *Hickel v. Cowper*.<sup>63</sup> In *Hickel*, the Court determined that “money  
15 in the earnings reserve account never passes through the general fund, and is never  
16 appropriated as such by the legislature,” instead funds are “automatically transferred to the  
17 dividend fund at the end of each fiscal year.”<sup>64</sup> It is clear that the State considers the  
18 Supreme Court’s analysis in *Hickel* to be wrong.<sup>65</sup>  
19  
20

21 This Court should reject the State’s erroneous statutory interpretation. First, *Hickel*  
22 was correctly decided—the transfer from the Earnings Reserve Account to the Dividend  
23 Fund was intended to occur automatically. Second, this Court should not second-guess the  
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25 <sup>62</sup> *See id.* at 42–43.

26 <sup>63</sup> 874 P.2d 922, 936 (Alaska 1994).

27 <sup>64</sup> *Id.* at 934.

28 <sup>65</sup> *See* 2009 Inf. Op. Att’y Gen. (JU2009-200-509; June 16) (“While the Alaska Supreme Court has apparently assumed that the permanent fund dividend transfer is made automatically without an appropriation, this is incorrect.”).

1 Supreme Court's decision; it should give effect to the interpretation of AS 37.13.145(b)  
2 rendered in *Hickel*. Thus, this Court should conclude that the Permanent Fund statutes  
3 dedicated a percentage of the fund's income to an "automatic" PFD payment each year.

4 **B. Section 10 Of The 2016 Operating Budget Was Not An**  
5 **Appropriation.**

6 The State incorrectly believes that Section 10 of the 2016 operating budget—and  
7 identical provisions in appropriations bills since 1984—was an appropriation.<sup>66</sup> The State is  
8 wrong for three reasons. First, the plain meaning of Section 10 demonstrates that it was  
9 meant to provide legislative notice that a significant amount of dedicated funds were  
10 leaving the state's control. Section 10 provided that "[t]he amount authorized under AS  
11 37.13.145(b) for transfer . . . estimated to be \$1,362,000,000, is appropriated."<sup>67</sup> The fact  
12 that the Legislature provided only an "estimate" indicates that the actual amount was  
13 authorized and prescribed by the underlying statute, AS 37.13.145(b).  
14  
15

16  
17 Second, the Legislature's history of including PFD transfers in appropriations bills  
18 is understandable given the doubt cast upon the constitutionality of the PFD program by  
19 the March 1983 attorney general opinion.<sup>68</sup> The March 1983 opinion raised unfounded  
20 doubts about the constitutionality of the dedication and automatic transfers.<sup>69</sup>  
21

22 Consequently, the Legislature exercised an abundance of caution to ensure its statutory  
23 appropriation would be carried out by including a notation in annual operating budgets.

24 The Legislature has included notice of the transfer from the Earnings Reserve Account to  
25

26  
27 <sup>66</sup> State's Memorandum at 43.

<sup>67</sup> § 10, Ch. 3, 4SSLA 2016.

28 <sup>68</sup> See 1983 Inf. Op. Att'y Gen. (366-484-83; Mar. 10).

<sup>69</sup> *Id.*

1 the Dividend Fund in every year's budget to ensure PFD payments are made—a belt-and-  
2 suspenders approach.

3 Third, the process by which the Legislature arrived at the estimated amount in  
4 Section 10 indicates that the Legislature did not intend for Section 10 to be a standalone  
5 appropriation. The House and Senate each passed versions of Section 10 that estimated  
6 the PFD transfer at \$1.405 billion.<sup>70</sup> That estimate was revised in a May 30 Conference  
7 Committee hearing by the Legislative Finance Director, citing his “technical and  
8 conforming powers.”<sup>71</sup> The new estimate was \$1.362 billion, which was “necessary to  
9 fulfill the statutory formula” provided in AS 37.13.145(b).<sup>72</sup> Thus, the Legislature did not  
10 intend Section 10 to have independent significance as an appropriation. The inclusion of  
11 the PFD transfer in annual appropriations bills was a mere accounting notation.<sup>73</sup>  
12  
13  
14

15 **C. The Governor Unconstitutionally Deleted Descriptive Text**  
16 **From Section 10.**

17 The State avers that the governor's line-item veto of the PFD transfer was not  
18 unconstitutional because the governor did not “change the purpose of the appropriation  
19 which was to appropriate a certain amount of money to the dividend fund.”<sup>74</sup> But the State  
20 contradicts itself by admitting that “[w]ithout striking that language, the appropriation  
21  
22  
23

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24 <sup>70</sup> Hearing on CCS HB 256 Before the Conference Committee, 29th Leg., 4th Spec. Sess. (Alaska  
25 May 30, 2016).

26 <sup>71</sup> *Id.*

27 <sup>72</sup> *Id.*

28 <sup>73</sup> It may be that the Legislature's inclusion of a notation that was not an appropriation violates the constitutional requirement that appropriations bills be confined to appropriations. *See* Alaska Const. art. II, § 13.

<sup>74</sup> State's Memorandum at 43.

1 would have been for a sum based on the calculation in AS 37.13.145(b).<sup>75</sup> First,  
2 AS 37.13.145(b) is not just a formula, it is the authority and command for the transfer to  
3 be made. The 2016 Legislature referred to the statutory authority for the transfer instead of  
4 invoking its own contemporaneous power to spend governmental funds. Second, the State  
5 defends the governor's actions by claiming the governor can alter the amount appropriated  
6 in 1982. That cannot stand. In Section 10, the Legislature indicated that it had no intent of  
7 deviating from that statutory appropriation amount specified in AS 37.13.145(b). The  
8 governor deleted substantive phrases, altering Section 10's meaning in violation of his  
9 constitutional authority.<sup>76</sup> Consequently, the governor's line-item veto unconstitutionally  
10 altered the meaning of Section 10. This Court should conclude that the line-item veto was  
11 invalid and reinsert the stricken language.  
12  
13  
14

15 **D. Plaintiffs Requested A Supplemental 2016 PFD Payment As**  
16 **Relief.**

17 The State erroneously claims that Plaintiffs did not request the appropriate relief:  
18 "They do not appear to seek supplemental dividend payment, just transfer of the money  
19 into the dividend fund."<sup>77</sup> In fact, the Plaintiffs did request that this Court order a  
20 supplemental 2016 PFD payment.<sup>78</sup> The relief is appropriate and consistent with Plaintiffs'  
21 prayer for relief seeking "other relief as the Court deems just and proper."<sup>79</sup>  
22  
23  
24

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25 <sup>75</sup> *Id.* at 44.

26 <sup>76</sup> See *Alaska Legislative Council v. Knowles (Knowles III)*, 21 P.3d 367, 369 (Alaska 2001).

27 <sup>77</sup> State's Memorandum at 39–40.

28 <sup>78</sup> Plaintiff's Motion for Summary Judgment, *Wielechowski v. State of Alaska, Alaska Permanent Fund Corp.*, No. 3AN-16-08940 CI (Alaska Super. Ct. Oct. 28, 2016).

<sup>79</sup> Complaint at 23.

1 Since before bringing this lawsuit, the Plaintiffs have been aware of the attorney  
2 general's opinion from December 1981 explaining that PFD payments are automatically  
3 made from the Dividend Fund without any intervening appropriations: "It is our opinion  
4 that the payment of dividends from the dividend fund established by AS 43.23.050 does  
5 not require an appropriation."<sup>80</sup> In fact, there has never been a separate appropriation for  
6 PFD payments from the Dividend Fund to individual Alaskans.<sup>81</sup> The PFD payment from  
7 the Dividend Fund is automatic. Thus, the requested Court order for the payment to be  
8 made is merely to ensure that the State complies with established law and practice.  
9  
10

### 11 CONCLUSION

12 For the foregoing reasons, this Court should reject the State's interpretations of the  
13 constitution and statutes. This Court should grant summary judgment to Plaintiffs and  
14 order the Defendants to comply with AS 37.13.145(b) by transferring the full 50 percent of  
15 the income available for distribution from the Earnings Reserve Account to the Dividend  
16 Fund for disbursement as a supplemental 2016 PFD.  
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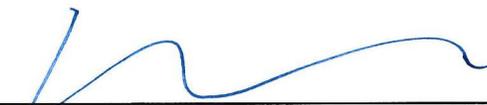
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26 <sup>80</sup> 1981 Inf. Op. Att'y Gen. (66-260-82; Dec. 22).

27 <sup>81</sup> Hearing on SB 5001 Before the S. Comm. on State Affairs, 29th Leg., 5th Spec. Sess. (Alaska July  
28 11, 2016) (an exchange between Sen. Wielechowski and Bill Milks, Assistant Attorney General,  
confirmed that there has never been an appropriation specifically from the Dividend Fund to  
payments to Alaska residents).

1 Respectfully submitted this 10<sup>th</sup> day of November, 2016.  
2  
3

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21 FONT CERTIFICATION

22 I hereby certify that the font used in this filing is Garamond, size 13, and conforms to  
23 Alaska Rule of Civil Procedure 76.

24  
25 s/ Bill Wielechowski

26 Bill Wielechowski  
27  
28

1 CERTIFICATE OF SERVICE

2 This is to certify that on this date a true and correct copy of the foregoing document is being  
3 served electronically to the following:  
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