Constitution. In sum, rather than represent an "unconscionable change in position," the State's argument for nonjusticiability is supported by the law and the facts.

D. **Cowper's argument that assets of state corporations, enterprise funds, and trust funds, and unencumbered prior year appropriations, be considered "available" is unworkable and in opposition to the intent of Section 17**

In his Cross-Petition, Cowper urges this Court to reverse the superior court's decision that the assets of state corporations and enterprise funds, unencumbered prior appropriations, and the balances of trust funds or federal funds, are not "available for appropriation." See "Steve Cowper's Cross-Petition for Review," at 2 (April 18, 1994) ("Cross-Petition"). The superior court's decision in this regard recognizes that the budget reserve fund was never intended to require consideration of these funds. Accordingly, Cowper's arguments fail; this aspect of the superior court's decision should be upheld.

Cowper notes that some public corporations must review their assets and report to the legislature. Cross-Petition at 5. Cowper's advocacy here is confusing. He appears to continue his argument that all assets of public corporations should be considered "available" because the legislature could, in theory, dissolve the corporation and appropriate those assets. On the other hand, by focussing on monies identified by state corporations as available, Cowper appears to have abandoned this far reaching argument for a more limited one.

Neither argument works. Even if a corporation reports

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that some of its assets were "available," the legislature may decide not to withdraw those funds from the corporation; instead, the legislature may keep them within the corporation so the corporation may continue it statutorily mandated mission. Moreover, the legislature may not agree with the corporation's estimate: it could find that the corporation has over- or under-estimated the assets available.[4] In short, the "amount available for appropriation" for purposes of Section 17 is not a decision that may be made by the corporation or by the judiciary. A decision to spend funds in a public corporation is committed to legislative discretion. Accordingly, assets of a public corporation should not be considered "available for appropriation" for purposes of Section 17, until those assets are deposited in the unrestricted general fund.

Cowper's also argues in his Cross-Petition that all unencumbered balances of prior appropriation are "available for appropriation." Adopting this formula would force all capital projects to encumber the full amount of their funds immediately. Nothing in the history of the amendment suggests that the framers or the voters intended to change established governmental processes.

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[4] Cowper reports that $400,000,000 is "available" from the Alaska Housing Finance Corporation. Opp. at 5 n. 6. The report from AHFC, however, shows a zero balance as "available." 1994 H.J. at 2002 (Ex. A). Cowper may be citing to an audit performed by legislative budget and audit; this discrepancy only makes the State's point that the formula advocated by Cowper cannot be meaningfully applied by State officials.

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The legislature recently appropriated as substantial sum of money from the budget reserve fund for fiscal year 1994. Under Cowper's reading of the amendment, all unspent and unencumbered capital money from prior years would have to be transferred into the budget reserve fund at the end of this fiscal year to pay back the appropriation. This will shut down projects that are underway but have not encumbered sufficient funds to complete the project. The long-term effect of this interpretation is that recipients will immediately encumber all capital money upon receipt. Recipients of capital money may be forced to accept disadvantageous or unresponsive contracts. This result is contrary to the public interest and not within the intent of the amendment. The superior court correctly rejected the arguments behind Cowper's Cross-Petition, and this Court should uphold that decision.

III. CONCLUSION

AS 37.10.420 is a reasonable interpretation of Section 17 entitled to judicial deference. This Court should reserve the superior court and find AS 37.10.420 constitutional.

DATED this 19th day of April, 1994, in Anchorage, Alaska.

BRUCE M. BOTELHO
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June 16, 2009

Steve Frank, Chair
Board of Trustees
Alaska Permanent Fund Corporation
P.O. Box 110410
Juneau, Alaska 99811-0410

Re: Review of 2003 Attorney General Opinion
A.G. file no: JU2009-200-509

Dear Mr. Frank:

In 2003, the Board of Trustees of the permanent fund requested Law to answer the following three sets of questions relating to accounting for principal and income of the Alaska permanent fund:

1. Is the corporation's policy that only the realized income of the permanent fund is available for expenditure from the permanent fund under AS 37.13.145 correct? If not, how should this amount be determined?

2. Is the corporation's practice that both realized and unrealized income of the permanent fund should be taken into account in determining the amount that is available for appropriation, *i.e.,* distribution under AS 37.13.140, correct? If not, how should the amount available for distribution from the permanent fund be determined? Should unrealized income of the Fund be excluded in determining the amount that is available for distribution?

3. Do the constitution and statutes require that income of the fund not be appropriated when doing so would bring the total value of the permanent fund including all unrealized gains and losses below the sum of the amounts deposited or appropriated to principal? If not, are there any other limitations with respect to the use of principal that are applicable in determining the amount that is available for expenditure or appropriation from the permanent fund?

You have asked us to review the responses we provided to these three questions. 2003 Op. Att'y Gen. (June 18) ("2003 Opinion"). Additionally you have asked for an opinion as to whether permanent fund dividends may be paid in 2009. Finally, you have asked for an opinion as to the appropriate accounting treatment of unrealized gains and losses on the investments of the earnings reserve account.

Here are the short answers to your five questions.

1. Only realized earnings are to be deposited in the earnings reserve account. The earnings reserve account should, however, retain the unrealized gains and losses attributable to the investments of the earnings reserve account. The entire balance of the earnings reserve account is subject to appropriation, and thus available for expenditure.

2. For purposes of computing the amount "available for distribution" under AS 37.13.140, the unrealized gains and losses of the fund should be excluded. The amount available for distribution under AS 37.13.140 is different than the amount constitutionally available for appropriation – which is the entire balance of the earnings reserve account.

3. Nothing in law prohibits an appropriation from the earnings reserve account, even if doing so would reduce the total value of the permanent fund to less than the amounts deposited or appropriated to the principal.

4. Nothing in law prohibits the payment of permanent fund dividends this year. A valid appropriation for 2009 permanent fund dividends has been enacted into law, funds are currently available for this appropriation in the earnings reserve account, and therefore these dividends can be paid.

5. The earnings reserve account is a government investment account established by AS 37.13.145(a) which will naturally have unrealized gains and losses on its investments. While AS 37.13.145 does not expressly address how to account for the unrealized gains and losses on the investments of the earnings reserve account, AS 37.13.170 requires the Corporation to include in its annual report "an appraisal at market value" of the investments of the fund. We think AS 37.13.170 reasonably contemplates that the Corporation should report on the market value of the investments of the principal as well as the market value of the investments of the earnings reserve account. Thus, the unrealized gains and losses attributable to the earnings reserve account should be accounted for in the earnings reserve account.

The questions you have asked are prompted by two developments.

First, as discussed in our 2003 Opinion, in 1997 the Governmental Accounting Standards Board adopted a new standard for reporting income. This new accounting standard, GASB Statement No. 31 ("GASB 31"), required that investment income include changes in the fair value of investments of government entities. GASB 31 defines fair value to mean "the amount at which a financial instrument could be exchanged in a current transaction between willing parties, other than in a forced or liquidation sale." For publicly traded securities, fair value is the same as market value. Thus, GASB 31 raised the question as to whether the net income of the permanent fund calculated under AS 37.13.140 should include the unrealized gains and losses that accrue on investments. We observed in our 2003 Opinion that this accounting change had been anticipated when the legislature repealed and reenacted AS 37.13.140 in 1982, and that the legislature intended to exclude unrealized gains and losses from the calculation of statutory net income. 2003 Opinion at 14 n.22, 23-26.

Second, because of unrealized investment losses incurred during FY 2009, the fair value of the principal of the permanent fund has been "underwater," in other words, the fair value has declined below the original dollar value of the amounts deposited to or appropriated to principal. As a consequence, some observers have suggested that 2009 permanent fund dividends should not be paid.

As discussed more fully in this opinion, neither accounting changes nor investment losses can change a fundamental fact about the permanent fund: the earnings reserve account is subject to the constitutional prohibition against dedicated funds. Therefore, if there are funds in the earnings reserve account, and those funds have been appropriately deposited in that account, they can be appropriated for any public purpose, including the payment of permanent fund dividends. Accordingly, we re-affirm our conclusions from the 2003 Opinion.

Because the answers to these questions turn in large part upon the extent to which the constitutional prohibition against dedicated funds applies to the permanent fund, we begin with a background discussion of that prohibition. Next, we show how the legislature may always appropriate funds from the earnings reserve account by analyzing the following issues: (a) how the constitutional prohibition against dedicated funds applies to the permanent fund; (b) whether the framers and voters expressed an intent to not permit the expenditure of income when the value of the permanent fund is underwater; and (c) whether the modern law of endowments permits the expenditure of

income when the value of an endowment fund is underwater. Finally, we consider the issue of the appropriate accounting treatment of the unrealized gains and losses on the investments of the earnings reserve account.

I. Background: The Constitutional Prohibition Against The Dedication Of Funds

Generally speaking, a dedication of funds occurs when the legislature sets aside the proceeds of a certain state revenue source for a special purpose. 1975 Op. Att'y Gen. No. 9 at 24 (May 2); 1982 Op. Att'y Gen. No. 13 at 8 (Nov. 30).[1] The framers of the Alaska Constitution referred to this concept as "earmarking" and considered it a serious problem. *See, e.g.,* 6 Proceedings of the Alaska Constitutional Convention ("P.A.C.C.") 111 (Commentary on the Article on Finance and Taxation); 3 P.A.C.C. 2364, 2368. Accordingly, the framers decided to prohibit this practice, with certain exceptions. The Alaska Constitution provides:

> The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in Section 15 of this article[2] or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

Alaska Const. art. IX, § 7. Alaska is one of two states that prohibits the dedication of revenue for a particular purpose.[3]

The Alaska Supreme Court has frequently observed that the framers of the Alaska Constitution adopted this prohibition for two reasons: (1) to ensure the legislature has flexibility in exercising its power of appropriation, and (2) to ensure that the legislature

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[1] We have also opined that a dedication additionally requires that the legislature relinquish any further control over the funds. 1982 Op. Att'y Gen. No. 13 at 20 (Nov. 30).

[2] Article IX, section 15 of the Alaska Constitution pertains to the permanent fund.

[3] Georgia is the only other state with a constitutional prohibition against dedicated funds. *Myers v. Alaska Hous. Fin. Corp.,* 68 P.3d 386, 389 (Alaska 2003).

does not abdicate its responsibility for budgeting. *State v. Alex,* 646 P.2d 203, 209 (Alaska 1982); *Fairbanks v. Convention & Visitors Bureau,* 818 P.2d 1153, 1158 (Alaska 1991); *Sonneman v. Hickel,* 836 P.2d 936, 938-39 (Alaska 1992); *Southeast Alaska Conservation Council v. State,* 202 P.3d 1162, 1169 (Alaska 2009) ("*SEACC*"). The prohibition protects each legislature's power of appropriation from encroachment by a prior legislature. *See, e.g., Sonneman,* 836 P.2d at 940 ("The constitutional clause prohibiting dedicated funds seeks to preserve an annual appropriation model which assumes that . . . the legislature remain[s] free to appropriate all funds for any purpose on an annual basis.").

Because of the framers' intent, the Alaska Supreme Court has held that "the prohibition is meant to apply broadly." *SEACC,* 202 P.3d at 1170. The Court has interpreted the language "proceeds of state tax or license" broadly so as to include not only taxes and licenses, but almost all public revenues including salmon royalty assessments (*Alex*[4]), litigation settlement revenue (*Myers*[5]), and the proceeds of sales of state lands (*SEACC*[6]). The Court, however, has not been offended by accounting structures, such as a general fund subaccount, that are merely intended to track the revenues and expenses of a particular state agency, so long as there is no restriction on the legislature's ability to appropriate money attributed to the subaccount for any public purpose, and no restriction on the executive branch's ability to request an appropriation from the subaccount. *Sonneman,* 836 P.2d at 939-40.[7]

Finally, the Court has recently suggested, without directly so holding, that there is "sufficient doubt as to the constitutionality" of a statutory dedication of income generated

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[4] *Alex,* 646 P.2d at 210.

[5] *Myers,* 68 P.3d at 390-91.

[6] *SEACC,* 202 P.3d at 1167-70.

[7] We note that the Court in *SEACC* observed that "the reach of the dedicated funds clause might be extended to statutes that, while not directly violating the clause by dedicating revenues, in some other way undercut the policies underlying the clause." *SEACC,* 202 P.3d at 1170. We do not know what kinds of statutes the Court has in mind, but we are aware of the extensive practice of fund and account designations that give certain recipients a "'talking point,' that is, a possible advantage over other agencies, when seeking the funds from the legislature." *Id.* at 1174.

by the investments of assets in a state account. *SEACC,* 202 P.3d at 1175. In casting doubt, the Court relied upon an opinion from this office in which we opined that investment income from state accounts is probably subject to the prohibition against dedicated funds, and that such investment income should be annually appropriated to the state account that generated the income. 1982 Op. Att'y Gen. No. 13 at 18 (Nov. 30).[8]

II. Analysis: The Legislature May Always Appropriate Funds from the Earnings Reserve Account

In this section, we show why the legislature may always appropriate funds from earnings reserve account. To show this, we analyze three issues: (a) how the constitutional prohibition against dedicated funds applies to the permanent fund; (b) whether the framers and voters expressed an intent to not permit the expenditure of income when the value of the permanent fund is underwater; and (c) whether the modern law of endowments permits the expenditure of income when the value of an endowment fund is underwater.

As noted above, the answers to your questions turn in large part upon the extent to which the constitutional prohibition against dedicated funds applies to the permanent fund. In particular, as discussed below, the corpus of the earnings reserve account is subject to the prohibition, and therefore always subject to appropriation.

A. How the Constitutional Prohibition Against Dedicated Funds Applies to the Permanent Fund

Created by amendment to the Alaska Constitution in 1976, the permanent fund is a state fund into which certain mineral proceeds are placed for purposes of investment. Alaska Const. art. IX, § 15.[9] Like many trust or endowment funds, the accounting framework of the permanent fund is a variation on the "principal and income" model.

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[8] This office has recognized certain implied exceptions to the broad interpretation of "proceeds of state tax or license," including pension contributions, bond proceeds, sinking fund receipts, and revolving fund receipts because the Alaska Constitutional Convention clearly intended to exempt these types of revenues from the scope of the prohibition against dedicated funds. 1982 Op. Att'y Gen. No. 13 at 10-11 (Nov. 30). We continue to believe that the Court would recognize these implied exceptions.

[9] The legislature has also made a number of special appropriations to principal from the general fund or earnings reserve account over the history of the permanent fund.

The accounting framework of the permanent fund has a number of unique elements, some of which are established by constitution (the mineral revenue earmark, restricted principal, and alternative income use authorization), and others by statute (earnings reserve account, permanent fund income dedication, permanent fund dividend transfer, and inflation-proofing transfer). We analyze here how the constitutional prohibition against dedicated funds applies to the accounting elements of the permanent fund.

1. The Constitutional Framework of the Permanent Fund

Article IX, § 15 of the Alaska Constitution establishes three elements of the accounting framework of the permanent fund: the mineral revenue earmark, the restricted principal, and the alternative income use authorization. The first two of these elements must be established in the Alaska Constitution, otherwise they would be void, and in the case of the alternative income use authorization—probably void if used to dedicate income, under the constitutional prohibition against dedicated funds.[10]

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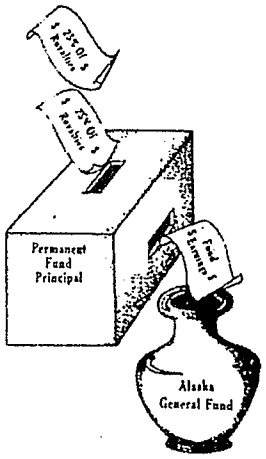
[10] The constitutional framework of the permanent fund was graphically depicted prior to the vote of the people in 1976 as follows:



Anchorage Times, October 24, 1976, A-3. This depiction, however, does not show the alternative income use authorization.

i. Mineral Revenue Earmark

The first accounting element of the permanent fund is the mineral revenue earmark. "At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund . . . ." Alaska Const. art. IX, § 15. As seen above, revenue earmarks are impermissible under the constitutional prohibition against dedicated funds. *Alex,* 646 P.2d at 207-210. Thus, establishing the mineral revenue earmark in the Alaska Constitution is necessary in order to ensure its validity.

ii. Restricted Principal

The next accounting element of the permanent fund is the restricted principal. The proceeds from the mineral revenue earmark are placed in the permanent fund, "the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments." Alaska Const. art. IX, § 15. Because the principal may only be used for income-producing investments, it is not subject to legislative appropriation.[11] As discussed above, placing funds in a separate state account is permissible, but only if the legislature retains its power of appropriation. *Sonneman,* 836 P.2d at 939-40. Thus, to restrict an account from appropriation, as this clause does, the restriction must be set forth in the constitution.

iii. Alternative Income Use Authorization

The final accounting element in the constitution is the authorization for an alternative use of permanent fund income: "All income from the permanent fund shall be deposited in the general fund *unless otherwise provided by law.*" Alaska Const. art. IX, § 15 (emphasis added). As noted above, the Alaska Supreme Court has expressed doubts as to whether the prohibition against dedicated funds would permit the retention of income in a statutory fund. *SEACC,* 202 P.3d at 1175. Accordingly, to the extent that this language is intended to authorize a statutory dedication of permanent fund income,

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[11] The legislative history of HJR 39, the constitutional resolution establishing the permanent fund, establishes that the framers intended this language to restrict the principal from appropriation. The principal "could not be used to fund the general operating expenditures or capital improvements of the State." Letter from Gov. Hammond to Speaker Bradner (Jan. 15, 1976), *reprinted in* 1976 House J. 39-40.

its placement in the constitution is probably required in order for the dedication to survive scrutiny under the prohibition against dedicated funds.

Review of the legislative history of HJR 39 reveals that the framers of the permanent fund intended the language "unless otherwise provided by law" to maximize the legislature's flexibility with respect to use of the fund's income, including the pledging of permanent fund income. In January 1976, Governor Hammond introduced a sponsor substitute for HJR 39. SSHJR 39, 9th Legislature (1976). This version of the resolution simply provided that "[a]ll income from the permanent fund shall be deposited in the general fund." *Id.* At the first hearing on HJR 39, the House Finance Committee discussed whether this language should be changed to permit a pledge of permanent fund income:

> House Finance Chair Malone:
> What about the question of pledge or dedication of fund income for securities of the state? Would that be allowable under the language of the resolution as drawn?
>
> Revenue Commissioner Gallagher:
> The dedication of income?
>
> Malone: Not the way it's drawn right now. It wouldn't be I guess.
>
> Gallagher: As you have seen the Morgan report, they feel it would be, could be, a great enhancement to be able to dedicate that income to whatever purpose the legislature so feels. And I also, personally, feel it would be a great enhancement. It's one of the things I've gotta talk to the governor about. I would hope also a week or so to get back to you on that one.
>
> Representative Cowper: You mean like a dedication of debt service?
>
> Gallagher: To debt service or whatever purpose the legislature sees fit.

Hearing on HJR 39 Before the House Finance Comm., 9th Legislature (Feb. 21, 1976).[12] Later in the hearing, Jim Rhodes, staff to Chair Malone, reported as follows:

> Rhodes: Mr. Chair, I discussed this matter with representatives of White Weld in New York who felt that if the phrase "unless otherwise directed by the legislature" appeared in the constitution that would be a sufficient legal peg so that income from the permanent fund could be pledged in the bond covenants for the security of state agencies or general obligation bonds or, they said, it could also permit the legislature to make a dividend payment to citizens of Alaska from the income of the fund. . . . and also if you put "unless otherwise directed" it would permit the fund to go into joint ventures with private corporations and pledge income from the fund as partial security of that debt. So it would give you maximum flexibility, they felt, by just adding the phrase "unless otherwise directed by the legislature" or words to that effect.

Hearing on HJR 39 Before the House Finance Comm., 9th Legislature (Feb. 21, 1976) (tape in State Archives Box 18461). At the next committee of referral, the House Judiciary Committee amended the last sentence of the joint resolution to read: "All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law." CS SSHJR 39 (JUD). The joint report of the chairs of House Finance and House Judiciary stated, "[t]he purpose of the language in the last sentence of the resolution 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." 1976 House J. 685 (Mar. 24).[13] The legislative history thus suggests that the

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[12] Tape in State Archives Box 18460. Because the condition of the tapes referred to in this opinion have significantly deteriorated, the State Archives has made digitized copies of them. The disks are identified by archive box number and date.

[13] Staff Jim Rhodes later described this element of the permanent fund: "Perhaps the most important break with the past may have been the language dispersing the earnings of the fund to the general fund 'unless otherwise provided by law.' This opened numerous possibilities, including the pledging of earnings as security for state and local debt (or debt of the fund itself), increased municipal revenue sharing, and cash payments to specified Alaskan residents (the seed of the Alaska, Inc. proposals)." Jim Rhodes, A Short History of the Alaska Permanent Fund at 4-5, Folder S-1, State Archives Box 7862 (unpublished manuscript, circa 1977-1980).

legislature intended the language "unless otherwise provided by law" to allow permanent fund income to be used in a variety of ways, including a pledge to pay debt service.

This office has been reluctant to endorse statutory dedications of permanent fund income for purposes outside of the permanent fund (*i.e.*, the principal or earnings reserve account). 1983 Inf. Op. Att'y Gen. (366-484-83; Mar. 10) (transfers of funds to the permanent fund dividend fund should be made by appropriation). We have based our reluctance on the view that the voters were not advised in 1976 that the "unless otherwise provided by law" language could be used to create a "tremendous exception" to the prohibition against dedicated funds. *Id.* at 2. In any event, to the extent that this alternative income use language is intended to authorize a statutory dedication of permanent fund income, its placement in the constitution is probably required in order for the dedication to survive scrutiny under the prohibition against dedicated funds.

2. The Statutory Framework of the Permanent Fund

The legislature has fleshed out the constitutional framework of the permanent fund by adding a number of statutory elements: the earnings reserve account, permanent fund income dedication, permanent fund dividend transfer, and inflation-proofing transfer. The extent to which the constitutional prohibition against dedicated funds applies to these elements varies.

i. The Earnings Reserve Account

The earnings reserve account is established by AS 37.13.145(a) as a separate account in the permanent fund. Income from the permanent fund must be deposited into the earnings reserve account "as soon as it is received." AS 37.13.145(a).

Nothing in law restricts the earnings reserve account from appropriation. In *Hickel v. Cowper,* 874 P.2d 922 (Alaska 1994), the Alaska Supreme Court held: "There are no statutory or constitutional prohibitions against direct appropriations from [the earnings reserve] account. The earnings reserve account is therefore available for appropriation." *Id.* at 934. Thus, the prohibition against dedicated funds applies to the balance in the earnings reserve account. Under *Hickel* and *Sonneman,* all funds in the earnings reserve account are subject to appropriation by the legislature. This office has held this view for at least 25 years. *See* 1984 Inf. Op. Att'y Gen. (366-405-84; Feb. 6) ("nothing in law prevents the unallocated part of the permanent fund income from being appropriated by the legislature").

ii. The Permanent Fund Income Dedication

By statute, "[i]ncome from the fund shall be deposited" into the earnings reserve account "as soon as it is received." AS 37.13.145(a). The income deposited into the earnings reserve account comes from two sources: (1) investments of the principal, and (2) investments of the earnings reserve account.

Since the balance in the earnings reserve account is subject to appropriation, the automatic deposit of income to the earnings reserve account is arguably not a dedication, since such income remains subject to the appropriation power of the legislature. *See* 1982 Op. Att'y Gen. No. 13 at 20 (Nov. 30). But we remain mindful that the objective of the prohibition against dedicated funds is to maintain legislative budgeting flexibility and control. As a practical matter, any deposit of funds into the earnings reserve account arguably decreases the legislature's flexibility and control over such funds because of the public and political pressure to use such funds only for permanent fund dividends or inflation-proofing. Accordingly, a court may conclude that in this context the deposit of investment income into the earnings reserve account is for all practical purposes a dedication.

The dedication, however, is authorized by the Alaska Constitution: "[a]ll income from the permanent fund shall be deposited in the general fund unless otherwise provided by law." Alaska Const. art. IX, § 15; Alaska Const. art. IX, § 7 (allowing dedications "as provided in section 15"). Alaska Statute 37.13.145(a) implements this provision by requiring permanent fund investment income to be automatically deposited in the earnings reserve account.

The AS 37.13.145(a) dedication of income from investments of the permanent fund's principal and earnings reserve account to the earnings reserve account has been in place since 1982.[14] In our opinion, the doubts recently expressed by the Alaska Supreme Court in *SEACC* regarding the statutory dedication of income from an investment fund are addressed by the constitutional language permitting the legislature to otherwise provide for the income from the permanent fund. We understand that in reliance on this language, such income has always been automatically deposited to the earnings reserve

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[14] This account was known as the undistributed income account from 1982 to 1986, when it was re-named the earnings reserve account. *See* sec. 9, ch. 81, SLA 1982; sec. 2, ch. 28, SLA 1986.

account without an appropriation. We have approved of this practice since 1983. *See* 1983 Inf. Op. Att'y Gen. 3 (366-484-83; Mar. 10).

iii. The Permanent Fund Dividend Transfer

By statute, certain funds in the earnings reserve account are to be transferred to the permanent fund dividend fund at the end of each fiscal year. AS 37.13.145(b). The amount of the transfer is 50 percent of "*income available for distribution* under AS 37.13.140." *Id.* "Income available for distribution" is defined in AS 37.13.140 as "21 percent of the *net income of the fund* for the last five fiscal years, including the fiscal year just ended, but may not exceed *net income of the fund* for the fiscal year just ended plus the balance in the earnings reserve account described in AS 37.13.145." "Net income of the fund" includes "income of the earnings reserve account" and "shall 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." AS 37.13.140.

While the Alaska Supreme Court has apparently assumed that the permanent fund dividend transfer is made automatically without an appropriation,[15] this is incorrect. These funds have been annually appropriated from the earnings reserve account to the permanent fund dividend fund since our opinion in 1983 advising that such transfers should be made by appropriation. 1983 Inf. Op. Att'y Gen. (366-484-83; Mar. 10). We expressed the view that the best way to harmonize the "unless otherwise provided by law" language in article IX, section 15 with the constitutional prohibition against dedicated funds "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." *Id.* at 3.

iv. The Inflation-Proofing Transfer

Finally, AS 37.13.145(c) provides for a transfer of funds from the earnings reserve account to principal in the amount necessary to offset the effect of inflation on principal. While our 1983 opinion would permit such an automatic transfer pursuant to this statute, the practice since fiscal year 1991 has been to appropriate amounts for inflation-proofing from the earnings reserve account to principal. *See* sec.13, ch. 209, SLA 1990.

* * * *

[15] *Hickel,* 874 P.2d at 934.

In sum, the permanent fund is only partly exempt from the application of the prohibition against dedicated funds. In particular, the corpus of the earnings reserve account is not exempt. Thus, any funds in the earnings reserve account are fully subject to appropriation by the legislature.

We next consider the issue of what, if anything, the framers and the voters intended with respect to spending from earnings of the permanent fund when the value of the permanent fund is underwater.

B. The Framers and Voters Did Not Express an Intent to Limit Spending When the Value of the Permanent Fund Is Underwater

The legislature has found that "the [permanent] fund should be used as a savings device managed to allow the maximum use of disposable income from the fund for purposes designated by law." AS 37.13.020(3). For most of the history of the permanent fund, there has not been a conflict between these goals of saving and spending. As a consequence of positive investment returns, the permanent fund has been able to preserve the "purchasing power"[16] of the deposits of the earmarked mineral revenues and the additional appropriations, and still have money left over to fund a healthy permanent fund dividend program.

For much of FY 2009, however, the fair value of the permanent fund principal has been underwater. Thus, the expressed goals of savings and spending are in seeming conflict. We characterize this as a "seeming conflict" because as set forth above, the amounts in the earnings reserve account are constitutionally subject to appropriation regardless of whether the fair value balance of the principal is underwater. Unless otherwise required by the Alaska Constitution, legislative goals or statutes must give way to the constitutional prohibition against dedicated funds.

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[16] By preserving purchasing power, we mean that the real value of the deposit is preserved over time. In an inflationary economic environment, the real value of a monetary unit (such as a dollar) will decline over time, while the nominal or face value stays the same. Thus, to maintain real value or purchasing power, the deposit needs to be invested in assets that will appreciate in value in order to keep up with inflation. For example, in order to preserve the purchasing power of a deposit of $1 in 1977, the fair value of the investments of that deposit would need to be worth approximately $3.51 in 2008.

Accordingly, we must examine whether there is any constitutional requirement that the principal retain income and stop further deposits into the earnings reserve account until such time as the fair value of the principal is restored to a level above original dollar value. There is no such requirement in the plain text of the Alaska Constitution. As discussed above, the text of article IX, § 15 is limited to establishing the revenue earmark, the restricted principal and the alternative income use authorization. The text of the constitution sets out no limitations or restrictions on the expenditure of income, nor does it require retention of income when the value of principal is underwater.

Thus, we turn to intent.

The framers' intent for the permanent fund is sometimes invoked in the ongoing public discussion regarding the extent to which the Alaska Constitution prohibits the payment of permanent fund dividends when the fair value of the fund is underwater. The intent of the framers is considered by the courts in determining the meaning of the Alaska Constitution. *Hickel,* 874 P.2d at 926. Additionally, the Court will consider the extrinsic evidence of the voter's understanding of a constitutional amendment's provisions. *Id.* at 929.[17] Accordingly, we review the framers' intent as well as the extrinsic evidence of the voter's understanding regarding the permanent fund amendment to the Alaska Constitution.[18]

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[17] In the initiative context, the Court will attempt to discern the intent of the voters by looking at "published arguments" relating to the initiative. "To the extent possible, we attempt to place ourselves in the position of the voters at the time the initiative was placed on the ballot, and we try to interpret the initiative using the tools available to the citizens of this state at that time." *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007).

[18] While the Court frequently refers to the minutes of the constitutional convention when addressing issues of constitutional construction, its older cases recognized the pitfalls of undue reliance on minutes as evidence of framers' intent: "This court has previously held that opinions of individual members of the convention generally are not considered to be a safe guide in ascertaining the purpose of a majority of the convention when adopting a particular provision. But reports of committees and statements of chairmen of such committees stand on a more solid footing, and may be resorted to in determining the intent of the enacting body." *Starr v. Haglund,* 374 P.2d 316, 319 (Alaska 1962) (citing *Matthews v. Quinton,* 362 P.2d 932, 944 (Alaska 1961)). The *Starr* Court also observed that it would be "purely a matter of conjecture" to determine the

As set forth below, following review of the entire record of HJR 39, as well as the public record from 1976, we find no evidence that the framers or the voters expressed an intent for article IX, § 15 of the Alaska Constitution to require retention of income as principal when the fair value of principal is underwater. We start with the framers' intent.

1. Framers' Intent

From January to May 1976, the legislature debated Governor Hammond's proposal for a constitutional permanent fund and made a number of significant changes. During the course of these deliberations, a representative from the Hammond Administration (Department of Revenue Commissioner Sterling Gallagher), and the primary legislative proponents of HJR 39 (Representative Hugh Malone and Representative Clark Gruening) described the intent and vision of the permanent fund proposal.

During the hearings, Representative Malone and Representative Gruening articulated a three-part vision for the permanent fund. The first objective was to save a portion of the state's non-renewable mineral income for the future. The second objective was to preserve the legislature's flexibility with respect to how the principal of the permanent fund was to be invested, and how the income was to be used. The third objective was to use the permanent fund to diversify the Alaska economy.

The first objective—savings—was accomplished simply by restricting the use of principal to income-producing investments. As discussed above, this meant that the principal could not be appropriated. Representative Gruening testified: "none of that principal could be used under the . . . governor's concept for operating expenses." Hearing on HJR 39 Before the House Judiciary Comm., 9th Legislature (Mar. 15, 1976) (tape in State Archives Box 18287).

The second objective—flexibility—was accomplished by not specifying the types of investments (beyond "income-producing") or how the income was to be used. The flexibility objective was reiterated multiple times.[19]

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understanding of the voters. *Id.* at 321. We review the record with these cautionary but older statements in mind.

[19] *See* Hearing on HJR 39 Before the House Finance Comm., 9th Legislature (Feb. 21, 1976) (adding "unless otherwise directed by the legislature" with respect to the

The third objective—diversification of Alaska's economy—was repeatedly emphasized by Representatives Malone and Gruening both during the legislative hearings and in their comments in the media. *See* Appendix A (collected statements). Representative Malone in particular envisioned that the fund would be used to make business loans to all Alaskans. *Id.*[20] Of course, this particular objective was necessarily subsidiary to the flexibility objective and depended on the manner in which future legislatures would chart the course of the permanent fund.

* * * *

Representative Malone summarized the framers' three-part vision in his statement to the House Judiciary Committee:

> I'd like to make a couple of general statements . . . . We're talking about preserving a percentage or portion of income or wealth that is not renewable. That's the main item in the legislation—is that this sort of income we're talking about here and these benefits the state derives, the mineral sources are not, in so far as we know, renewable

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deposit of income to the general fund will give "maximum flexibility" to the use of income) (tape in State Archives Box 18461); Hearing on HJR 39 Before the House Judiciary Comm., 9th Legislature (Mar. 15, 1976) (Representative Gruening statement that the permanent fund concept was "much more flexible" than the tobacco tax dedication) (tape in State Archives Box 18287); Joint Chairman's Report on CS SSHJR 39 (maximum flexibility" for the use of income); Debate on HJR 39 on the House Floor (Mar. 25, 1976) (Representatives Malone and Gruening statements regarding need to preserve flexibility of the fund) (tape in State Archives Box 18385); Hearing on HJR 39 Before the Senate Resources Comm., 9th Legislature (May 15, 1976) (Representative Malone statement that the investments will be decided by future legislatures) (tape in State Archives Box 18290).

[20] During the House floor debate on HJR 39, Representative Urion attempted to amend the resolution to require that the principal be invested in guaranteed rate of return investments. Representatives Malone and Gruening opposed the amendment on the grounds that it would limit the ability to use the permanent fund to diversify the economy of the State. 1976 House J. 698-99; Debate on HJR 39 on the House Floor (Mar. 25, 1976) (tape in State Archives Box 18385).

and that's one thing that makes this permanent fund different from a lot of other permanent funds that exist in other places. That's one thing.

The other thing that makes this sort of permanent fund different from permanent funds that exist in other laws and maybe other constitutions, state constitutions, is that the income from the fund as well as the principal of the fund is not limited to specific uses—to certain uses . . . it's not limited at all in the constitutional amendment. The income would go to the state's general fund or as otherwise provided by law which could also be changed whatever the provision is there or might be adopted by law. So we're not talking about a permanent fund like some places have set up, you set up a fund, taking the income from a specific source and then turning around and using it for a specific purpose that locks the state into something that maybe is completely inflexible. The income could be used wherever the legislature thought it needed to be used or where the governor though it needed to be used or if it goes someplace else. Same thing on the investments. Really the idea of putting in "which shall be established by law" [with respect to income-producing investments] is to provide for public debate and participation in what the investment program is going to be.

I think that the idea is to as much as possible, so far as the Alaska economy can provide good and reasonable investments within the state, that's where we would want to invest the money at least finally if not initially, and that that's something that's sort of the case where you can have your cake and eat it too. You can put the money out in sound investment programs, some of which could be loan programs that benefit the people of the state in the form of capital and the same time derive an income from. And when those loans are returned new loans will be made. So it's the situation where the wealth stays basically in the state, stays at work in the state, and continues to provide both direct and indirect benefits to the people.

It's not like other permanent funds that people might be used to compare this one with limited to the very narrow area . . . this is something very broad.

Hearing on HJR 39 Before the House Judiciary Comm., 9th Legislature (Mar. 15, 1976) (tape in State Archives Box 18287).

In sum, the legislative record demonstrates an express intention to (1) preserve principal for the future, (2) preserve legislative flexibility for how the fund is to be invested and the income spent, and (3) subject to future legislative authorization, preserve the option for investing the fund for the purposes of in-state economic development. But there is nothing in the legislative record that expresses an intent that expenditure of income must be restricted, or income retained, when the value of the principal is underwater.

2. Voters' Intent

Following the passage of HJR 39 by the legislature on May 31, 1976, the discussion regarding the permanent fund shifted to the public. In our 2003 Opinion we identified a number of statements made during the public discussion of HJR 39 prior to the vote of the people in November 1976. 2003 Opinion at 6-8.

Review of the public materials from the June – November 1976 time period demonstrates that the three-part vision articulated by the framers (savings, flexibility and economic development) was effectively communicated to the voters prior to the November election. *See* Appendix B.

As noted above, in older cases the Alaska Supreme Court has expressed concerns about the difficulties inherent in discerning voter intent. *Starr v. Haglund,* 374 P.2d at 319, 321. In the case of the permanent fund, however, discerning voter intent is made easier by the fact that a number of surveys were conducted immediately following the 1976 election. These surveys reflect that the voters understood and agreed with the vision articulated by the framers.

In early 1977, Governor Hammond commissioned a statewide policy issue survey. Some of the questions pertained to the use of the permanent fund. The survey found that "[w]ith the exception of a few percent who would either save the money outright [5%], or reduce present taxation with it [5.3%], the public is thinking about ways of investing the money wisely in Alaska, and almost always the idea sounds a lot like most of the capital improvement concepts emerging from the government itself." Rowan Group, Citizen Feedback No. 2—A Survey of Alaskan Citizens on the Major Policy Questions of the Day 11 (July 1977). The survey also found that 72 percent of the participants agreed with the following statement: "The permanent fund should be managed to assist Alaska

directly through low-interest loans for such things as community development, fisheries enhancement, and so on." *Id.* at 12. The survey found no consensus on the use of permanent fund earnings, and concluded that "*[t]he public has not yet made up its mind about what the permanent fund is*; only that it should exist. The purposes of the fund, the purposes of the earnings, and the relationship of the size of the fund to the size of the operating budget, are unsettled points." *Id.* at 15 (emphasis in original).

The Alaska Public Forum conducted statewide policy issue surveys in 1977 and 1978. These surveys also included questions about the permanent fund. The results were similar to the Rowan Group survey. In 1977, the survey showed that 36 percent of participants wanted to use the permanent fund for loans for renewable resources, and 26 percent wanted to "save it." The Alaska Public Forum, Year End Report 10 (1977). In 1978, the survey showed that 79 percent wanted to use the permanent fund to promote renewable resource industries. The Alaska Public Forum, Year End Report 36 (1978). "The support for these industries was so strong that 68 percent of Forum respondents this year were willing to sacrifice a substantial return on Permanent Fund investments in order to promote renewable resource industries, which are considered a risky investment." *Id.* at 37.

3. Summary

There is no question that the record from 1976 demonstrates that the intention of the framers and the voters was to save a portion of mineral revenue for the future. Moreover, the framers repeatedly expressed their desire that the permanent fund would be invested in diversifying the Alaska economy. But of the three-part vision set forth above, the dominant objective appears to be preservation of legislative flexibility. Under the flexibility objective, the framers and the voters expressed the intent that the legislature would decide how to invest the principal of the permanent fund and how to use the income.[21]

The record from 1976 reflects a considerable spectrum of views as to how the permanent fund would be invested and how the income would be spent. One proposal

[21] An early historian of the permanent fund put it this way: "The reason for much confusion was that the legislature had created the permanent fund before it had come to any consensus about what the fund was. After the success of the constitutional amendment, there was a general understanding of what the permanent fund was not; that is, that it was not the general fund." Mike Doogan, Permanent Fund History, ch. 7, p. 2, unpublished manuscript (1982) (Alaska State Archives, Box 7862, Folder S-2).

was to pledge permanent fund income to secure state bonds. Hearing on HJR 39 Before the House Finance Comm., 9th Legislature (Feb. 21, 1976) (tape in State Archives Box 18460). Such a pledge would be required to be paid from income even if the value of the principal were to decline. Another proposal was to invest the principal in huge infrastructure assets the value of which depreciate over time – such as hydroelectric dams. Yet at the same time, the framers envisioned that the income from such investments would continue to be available for expenditure by the legislature. Hearing on HJR 39 Before the Senate Resources Comm., 9th Legislature (May 15, 1976) (tape in State Archives Box 18290). In yet another proposal, the permanent fund would be invested in potentially risky in-state economic development investments—but there is no suggestion that the income from the permanent fund could not be spent if such investments were to lose value. Debate on HJR 39 on the House Floor, 9th Legislature (Mar. 25, 1976) (tape in State Archives Box 18385).

It is difficult to overstate the framers' radical vision for the permanent fund, particularly when it was conveyed to the public on the front page of the Anchorage Daily News: "People always talk about return on the dollar. The priorities always get based on the value of money. Well, I don't think that should be the main concern for this investment program. . . . I don't think the managers—and that's what the legislature will be—should just look at return in dollars; we have to talk about the quality of life in Alaska." Howard Weaver, *Permanent Fund is Biggest Project*, Anchorage Daily News, June 2, 1976, at 1. Given the nature of framers' vision, the notion that income should be retained when the value of principal is underwater is a concept that was arguably foreign to the framers.

Taking into consideration the plain text of the Alaska Constitution, the tenor of the framers' testimony and comments to the media, the three-part vision for the permanent fund that was presented to and understood by the voters, the answer to the question whether the framers and the voters expressed an intent for the Alaska Constitution to require the retention of income in the principal of the permanent fund is underwater is

evident. They did not.[22] Nothing in the record from 1976 would compel, or even suggest, that such an intent exists.[23]

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[22] We note that under modern endowment law, discussed below, the mere use of the words "principal" and "income" in connection with the creation of an endowment fund, unless expressly stated otherwise, are interpreted only to intend the creation of an "endowment fund of permanent duration." *Uniform Prudent Management of Investment Funds Act*, § 4, 7A Pt. III U.L.A. 17 (2008).

[23] We note that in 1980, four years after the creation of the permanent fund, a statutory framework for administering the permanent fund was enacted. Ch. 18, SLA 1980. By this time, the concept of protecting permanent fund principal had more fully evolved in the minds of legislators and the public. The legislative history characterizes the principal as an "inviolate trust" (1980 H. Journal 461-62) and explicit provisions were made to protect principal: no investment in equities (AS 37.13.120(g)) and any capital losses were to be recouped from income (AS 37.13.130). Capital gains were credited to principal. *Id.* (These particular protections, however, were abandoned in 1982 in favor of inflation-proofing in order to facilitate the permanent fund dividend program. *See* secs. 5 (amending AS 37.13.120(g) to permit investment in equities), 8 (net income is computed to include capital gains), 9 (inflation-proofing) and 13 (repealing AS 37.13.130), ch. 81, SLA 1982).

In 1979, one of the framers described the evolution of thinking regarding the permanent fund:

> I recall writing an article in which I enumerated various worthy things the Permanent Fund could do. Principal among these was the opportunity to use Permanent Fund money to diversify the economy and to replace absentee ownership of certain industries, particularly renewable resource industries, with Alaskan ownership. Now that I'm older and wiser, or at least older, I see the Permanent Fund cannot reasonably be expected to accomplish all our goals at once. One reason for a modification in my view is that the fund didn't turn out to be as big a pot of gold as anticipated. Another fact was the realization that many of the "development banking" investments would be at risk levels generally incompatible with the concept of a savings trust.

This result is consistent with the modern law of endowments as articulated by the Uniform Law Commission. We examine that law next.

C. The Law of Endowments Permits the Expenditure of Income from an Underwater Fund in Certain Situations

In this section we analyze whether the law of endowments would permit spending from an underwater fund. Such spending is permitted in certain situations.[24]

The origin of modern endowment law has been traced to *St. Joseph's Hosp. v. Bennett,* 22 N.E.2d 305 (N.Y. 1939), where the New York Court of Appeals defined an endowment to mean "the bestowment of money as a permanent fund, the income of which is to be used in the administration of a proposed work." *Id.* at 306. In 1969, the Ford Foundation commissioned a study on the developing law of endowments. The result was the seminal work by William Cary and Craig Bright, *The Law and the Lore of Endowment Funds* (1969).[25] This work in turn prompted the Uniform Law Commission in 1972 to draft the Uniform Management of Institutional Funds Act ("UMIFA").[26] In 2006, the Uniform Law Commission recommended replacement of UMIFA with the Uniform Prudent Management of Institutional Funds Act (UPMIFA).

Hearing Before House Special Permanent Fund Comm., 11th Legislature, (Mar. 30, 1979) (written testimony of Clark Gruening at 10-11).

[24] In past opinions, we have questioned whether the permanent fund is subject to trust law. Our view has generally been that the permanent fund is not a true "trust" but that courts might apply trust principles. *See* 1977 Inf. Op. Att'y Gen. at 2 (J-66-106-78; Aug. 31); 1977 Inf. Op. Att'y Gen. at 1-5 (J-66-106-78; Sept. 16); 2003 Op. Att'y Gen. at 9-10, 18-19 (June 18). In addition to applying trust principles, we think the courts may also at least consider the law of endowments.

[25] The Ford Foundation also commissioned a blue ribbon panel to review this work. The blue ribbon panel was comprised of many leading lawyers of the day including Lewis F. Powell, Jr., Eli Whitney Debevoise, and Alan Stroock. William Cary and Craig Bright, The Law and the Lore of Endowment Funds at vii (1969). For a discussion of Cary & Bright, see Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act,* 41 Ga. L. Rev. 1277, 1284-88 (Summer 2007).

[26] *UMIFA*, Prefatory Note, 7A U.L.A. 3 (2006).

Alaska has not adopted either UMIFA or UPMIFA.[27] To the extent that UMIFA and UPMIFA embody the common law of endowments, or at least a principled understanding of what the law should be, we think courts in Alaska would at least consider modern endowment law in resolving legal issues related to the permanent fund.[28]

Cary and Bright discussed whether spending of income was permitted from an underwater endowment fund:

> Assume that the college realizes a net loss of $60,000 from the sale of securities, and that the balance in its reserve for gains and losses from the sale of securities is only $30,000. Must it retain $30,000 of income from dividends and interest to make up the deficit? We believe not, even if the market value of the endowment falls below the book value as adjusted for inflation. There is no authority under existing law and practice for the imposition of such a requirement, and we submit that it would be unwise and undesirable to include such a requirement . . . .

Cary & Bright, The Law and the Lore of Endowment Funds at 45. Imposing a requirement to make up a deficit could impair the flexibility of endowments. But Cary and Bright also thought a primary goal of endowments should be preservation of purchasing power. *Id.* at 46-47.

The Uniform Law Commission partially adopted the Cary and Bright view when it drafted UMIFA in 1972. The Uniform Law Commission distinguished, however, between appreciation (*i.e.*, realized and unrealized capital gains) and income (interest, dividends and rents). At that point in time, the law was in flux as to whether capital appreciation should be credited to principal, as opposed to income. The Uniform Law Commission adopted a hybrid approach. Under UMIFA, income as defined can always be spent, regardless of the value of principal. Appreciation, however, could only be spent when the fair value of the endowment exceeded the historic dollar value (*i.e.*, original

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[27] A bill for the adoption of UPMIFA was introduced this year. S.B. 134, 26th Legislature (2009).

[28] For instance, the Alaska Supreme Court routinely considers the American Law Institute's Restatements of the law of various subjects.

dollar value), unless otherwise specified by the rules governing the endowment. *UMIFA*, § 2, 7A U.L.A. 19-20 (2006).

UMIFA commentators have repeatedly recognized an endowment's power to spend income, as defined by UMIFA, when the endowment is underwater. For instance, in the view of the New York Department of Law:

> [T]he assets [of an endowment fund] must be invested, and the income – traditionally, interest, dividends, rents and royalties – is available for expenditure, even if the value of the principal drops below historic dollar value, whether because of specific investment losses or general decline in market values.[29]

Under New York law, however, appreciation cannot be appropriated when fund value is below historic dollar value, unless such appreciation was appropriated prior to the decline in value:

> If the board properly appropriates net appreciation, the corporation may expend such appreciation even if at the time of expenditure endowment fund value drops below historic dollar value. However, like appropriation, such expenditure must be prudent under [New York UMIFA].

New York Dep't, Advice for Not-for-Profit Corporations on the Appropriation of Endowment Fund Appreciation (undated).

One commentator, however, has observed that appreciation can be spent from an underwater endowment fund if the donor has permitted it:

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[29] New York Dep't of Law, Advice for Not-for-Profit Corporations on the Appropriation of Endowment Fund Appreciation (undated); *see also,* Pietrina Scaraglino, Restricted Gifts, Practicing Law Inst. No. 8571 at 144 (2006) ("Importantly, income on an endowment can always be expended [under New York law], regardless of whether a fund falls below its historic dollar value. Of course, consistent with the applicable gift instrument, a nonprofit board may determine that it is prudent not to expend income when a fund is below its historic dollar value; however, there is no statutory prohibition against the appropriation and expenditure of income").

> [A] charity may *always* spend the fund's income – that is interest, dividends, and other classic forms of income such as rents and royalties – if three conditions are met: (a) if the gift instrument does not prohibit spending income when the fund is underwater, (b) if the fund is underwater due to asset depreciation rather than appropriations that dipped into historic dollar value, and (c) if the expenditure of the income meets the standard of prudence . . . . Capital gains in an underwater endowment fund are not considered income for this purpose, unless, again, the donor has stipulated otherwise.

John Sayre, *United States: Underwater Endowments: Understanding Your Options*, Patterson Belknap Webb & Tyler Client Advice Publication (Mar. 29, 2009) (emphasis in original).

In 2006, the Uniform Law Commission recommended that UMIFA be replaced with the Uniform Prudent Management of Institutional Funds Act (UPMIFA). The reason for the revision was the Commission's recognition that the prudence standards that governed the investment of institutional funds had evolved to govern all aspects of fund management, including expenditure of fund income. *UPMIFA*, Prefatory Note, 7A Pt. III U.L.A. 4 (2008).

One of the most significant changes advanced by UPMIFA was the elimination of the rule prohibiting expenditure of appreciation when fund value is less than historic dollar value. The Commission was concerned about the impact of this historic dollar value rule on investment strategy:

> A fund that [drops below historic dollar value] is commonly called an "underwater" fund. Conflicting advice regarding whether an organization could spend from an underwater fund has led to difficulties for those managing charities. If a charity concluded that it could continue to spend trust accounting income until a fund regained its historic dollar value, the charity might invest for income rather than on a total-return basis. Thus, the historic value dollar rule can cause inappropriate distortions in investment policy and can ultimately lead to a decline in a fund's real value. If, instead, a charity with an underwater fund continues to invest for growth, the charity may be unable to spend anything from an underwater endowment fund for several years. The inability of a charity to

> spend anything from an endowment is likely to be contrary to donor intent, which is to provide current benefits to the charity.

Id. at 5. Thus, the Commission adopted a rule of prudent expenditure: "[s]ubject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established." *UPMIFA*, § 4, 7A Pt. III U.L.A. 16-17 (2008). The rule then provides a number of factors to consider in determining whether a particular expenditure is prudent, including consideration of the duration and preservation of the endowment. One commentator observed that "UPMIFA emphasizes the long-term nature of the fund, and the need to maintain not only the original dollar value of the fund, but the purchasing power of the fund . . . . but without a bright-line determination of what maintaining the purchasing power means." Gary, *Charities, Endowments, and Donor,* 41 Ga. L. Rev. 1277 at 1310.

In sum, under modern endowment law there is no absolute bar to spending income from an underwater endowment fund. Under UMIFA, fund income (not including capital gains) can always be spent from an underwater fund. Under UPMIFA, the distinction between principal and income is abandoned and funds can be spent if it is prudent to do so.[30]

Neither UMIFA nor UPMIFA are the law in Alaska. But they provide a useful body of law to which courts can turn for guidance in the permanent fund context. In this case, they are useful because they demonstrate that in certain situations spending may continue from an endowment fund even when the value of the fund is underwater.

III. Accounting for the Unrealized Gains and Losses of the Investments of the Earnings Reserve Account

The final issue we have been asked to consider is the appropriate accounting treatment of unrealized gains and losses on the investments of the earnings reserve account. Prior to the adoption of GASB 31, the Corporation generally recorded the value

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[30] A subjective prudent spending rule in the permanent fund context could be difficult to administer. To the extent that the legislature or the people wish to consider a UPMIFA-like law to govern the permanent fund, it may be worth considering an objective spending limitation, such as a maximum expenditure ceiling, rather than a subjective rule of prudency.

of the permanent fund investments at cost and the market values were reported in the footnotes. *See, e.g.,* Alaska Permanent Fund, 1993 Annual Report at 29-37. After the adoption of GASB 31, the Corporation recorded all of the unrealized gains and losses of the permanent fund in the earnings reserve account. *See, e.g.,* Alaska Permanent Fund, 2000 Annual Report at 26. Following our 2003 Opinion, the Corporation recorded all of the unrealized gains and losses in the principal. *See, e.g.,* Alaska Permanent Fund, 2008 Annual Report at 23. Our 2003 Opinion did not specifically address the issue of accounting for the unrealized gains and losses on the investments of the earnings reserve account.

We think that the appropriate treatment of the unrealized gains and losses on the investments of the earnings reserve is to account for them in the earnings reserve account. The earnings reserve account is an account that is established in law. AS 37.13.145(a). This statute requires that fund income[31] be deposited to this account, and that such funds be invested. *Id.* Any state investment account will have unrealized gains and losses on its investments. Accordingly, we think the Corporation should state the value of the earnings reserve account with an entry adjusting that value to reflect the unrealized gains and losses of the investments of the earnings reserve account. This is consistent with AS 37.13.170, which requires "an appraisal at market value" of the permanent fund's investments.[32]

By their very nature, unrealized gains and losses represent economic value that is attributable to the investments from which they are generated. For example, if the earnings reserve account is invested in 100 shares of Company X, and those shares

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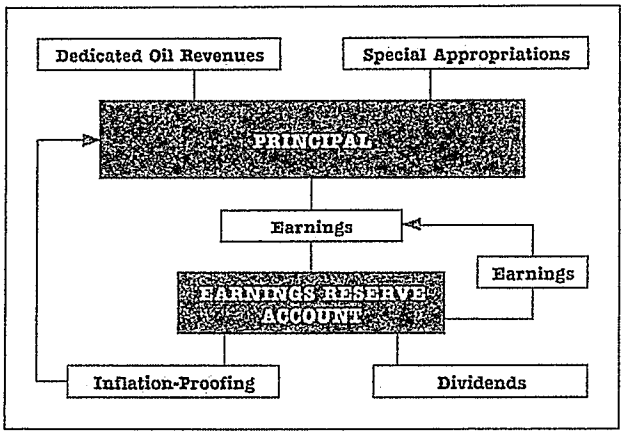
[31] The "income" to be deposited in the earnings reserve account is the net income of the permanent fund, computed according to generally accepted accounting principles, excluding any unrealized gains or losses. AS 37.13.140. Thus, the definition of income includes traditional components of income, such as interest, dividends, royalties and rents, and also includes net realized appreciation, that is, net realized capital gains and losses.

[32] It follows that the Corporation should state the value of principal at original dollar value (as it currently does) with an entry adjusting that value to reflect the unrealized gains and losses of the investments of the principal. Thus, only the unrealized gains and losses attributable to principal should be accounted for in the principal. The term "principal" simply means the amount deposited to principal. Because investment value changes over time, there are two ways to describe principal: original dollar value and current fair value.

appreciate in value from $100 to $200, that increase in value belongs to the earnings reserve account. Moreover, we think the legislature has the right to appropriate that value as it sees fit, including appropriating it to principal. Conversely, if those shares decrease in value from $100 to $50, an appropriation by the legislature of the balance of the earnings reserve account, unadjusted for unrealized loss attributable to the earnings reserve account, would arguably result in an impermissible appropriation of principal.

The legislative history indicates that the legislature intended for the earnings reserve account to retain the earnings produced by the investments of the earnings reserve account. This was explicitly stated in the law from 1982 to 1992: "[i]ncome from the investment of the earnings reserve account shall be treated as an addition to that account." *See* Sec. 2, ch. 28, SLA 1986; sec. 9; ch. 81, SLA 1982 (former AS 37.13.145). This language was repealed in 1992, but the legislative history for the 1992 changes reflects an intention to conform the statute to the accounting practices in place since 1982.[33] The Alaska Permanent Fund Corporation historically retained the earnings reserve account income in the earnings reserve account:

How the Alaska Permanent Fund Works



[33] The legislative history states that the purpose of rewriting this statute was to "clarify original legislative intent and Corporation practice regarding the annual disposition of Fund income." Memo from David Rose to Sen. Pat Pourchot at 2 (Feb. 1, 1991), S.B. 39 Bill File, 17th Legislature (1991).

Alaska Permanent Fund Corporation, 1987 Annual Report at 10. Accordingly, we believe that the unrealized gains and losses attributable to the investments of the earnings reserve account should be booked in the earnings reserve account. [34]

IV. Conclusion

In summary, our answers to your questions are as follows.

A. First Question

Question. Is the corporation's policy that only the realized income of the permanent fund is available for expenditure from the permanent fund under AS 37.13.145 correct? If not, how should this amount be determined?

Answer. Under AS 37.13.140 only realized net income from the investments of the principal is considered income for purposes of depositing funds into the earnings reserve account in AS 37.13.145. As discussed above, income consists of interest, dividends, royalties, rents, and net realized capital gain.

Once deposited, such income must be re-invested. AS 37.13.145(a). In our view, the entire balance of the earnings reserve account, including the unrealized gains on the investments of the earnings reserve account, is subject to appropriation. If the legislature were to appropriate the entire balance of this account, the unrealized gains or losses would be recognized in the process of appropriation.

B. Second Question

Question. Is the corporation's practice that both realized and unrealized income of the permanent fund should be taken into account in determining the amount that is available for appropriation, i.e., distribution under AS 37.13.140, correct? If not, how should the amount available for distribution from the permanent fund be

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[34] The APFC may wish to consider the use of unitized pooling, where a common pooling account holds and invests the assets of multiple participating government accounts and each government account owns units in the common pooling account. Unitized pooling is commonly used by endowments. Unrealized gains and losses are accurately tracked because the unit values reflect the net asset values of the investments of the underlying unitized pooling account.

determined? Should unrealized income of the Fund be excluded in determining the amount that is available for distribution?

Answer. Only the balance of the earnings reserve account is available for appropriation. The balance of the earnings reserve account consists of the realized net income from the investment of principal, as well as all income, including unrealized gains and losses, from the investment of the earnings reserve account.

C. Third Question

Question. Do the constitution and statutes require that income of the fund not be appropriated when doing so would bring the total value of the permanent fund including all unrealized gains and losses below the sum of the amounts deposited or appropriated to principal? If not, are there any other limitations with respect to the use of principal that are applicable in determining the amount that is available for expenditure or appropriation from the permanent fund?

Answer. The entire balance of the earnings reserve account may be appropriated by the legislature, even if the fair value balance of the principal is underwater, that is, below original dollar value. This result is required because the balance of the earnings reserve account is subject to the prohibition against dedicated funds, and therefore not restricted from appropriation. As discussed above, this result is not contrary to the expressed intent of the framers and voters. This result is also permitted by UMIFA, if the donor instrument permits it, and by UPMIFA, if the expenditure is prudent.

Under Alaska law, no amount of permanent fund principal may be appropriated. But the fair value of the principal is not a fixed notional number – it may increase and decrease.

D. Fourth Question

Question. May permanent fund dividends be paid in 2009?

Answer. Permanent fund dividends for 2009 were appropriated in the 2009 operating budget. *See* sec. 9(a), ch. 27, SLA 2008. There is currently a balance in the earnings reserve account that is sufficient to pay dividends. The Alaska Permanent Fund Corporation is authorized by law to make the transfer, and the Permanent Fund Dividend Division is authorized by law to issue the dividend checks.

E. Fifth Question

Question. What is the appropriate accounting treatment of unrealized gains and losses in the earnings reserve account?

Answer. Because the earnings reserve account is a state investment account established in law, the unrealized gains and losses on the investments of the earnings reserve account should be accounted for in the earnings reserve account. Accounting for the unrealized gains and losses of the investments of the earnings reserve account in the earnings reserve account will ensure that the legislature has accurate information as to the full amount of funds that are available for appropriation from the earnings reserve account.

* * * *

In conclusion, spending from the earnings reserve account when the principal is underwater is a question that is firmly committed to the legislature's exercise of its appropriation power.

We also note that as both statutory net income and the balance of the earnings reserve account decrease, the dividend calculation for future dividends is trending downward. As it does so, the amount of money transferred to pay permanent fund dividends will likewise trend downward. We anticipate that even though 2009 dividends will be paid, the dividends for future years may be small in comparison to recent dividends. Thus, the design of the existing statutes will limit expenditures from the permanent fund, perhaps significantly so, as a consequence of the decline in the market.

Sincerely,

RICHARD A. SVOBODNY
ACTING ATTORNEY GENERAL

By:
Michael A. Barnhill
Senior Assistant Attorney General

MAB/cmc

APPENDIX A

Framers' Statements Regarding Use of the
Permanent Fund for Economic Development

I. Excerpts from Legislative Deliberations on HJR 39, 1976

"I think the idea is to as much as possible so far as the Alaska economy can provide good and reasonable investments within the state that's where we would want to invest the money at least finally if not initially and that that's something that's sort of the case where you can have your cake and eat it too. You can put the money out in sound investment programs some of which could be loan programs that benefit the people of the state in the form of capital and the same time derive an income from it and when those loans are returned new loans will be made. So it's the situation where the wealth stays basically in the state; stays at work in the state and continues to provide both direct and indirect benefits to the people." Hearing on HJR 39 Before the House Judiciary Comm., 9th Legislature (Mar. 15, 1976) (Representative Malone statement) (tape in State Archives Box 18287).

"The very purpose for which we're asking that this become part of our constitution that is to start building a reserve fund to build a more viable economic base for the state." Debate on HJR 39 on House Floor, 9th Legislature (Mar. 25, 1976) (Representative Gruening statement) (tape in State Archives Box 18385).

"A permanent fund at the 25 percent level would result in an accrual of capital investment available for investment within Alaska in homes and in businesses for the good of the people in the state of approximately $2.8 billion by 1985. It's an alternative approach to using state money rather than filtering it through the state bureaucracy. It's an approach that provides direct tangible benefits to the people of the state." Debate on HJR 39 on House Floor, 9th Legislature (Mar. 25, 1976) (Representative Malone statement) (tape in State Archives Box 18385).

"Sometimes you can do as much or more good for people by making some capital available to them as individuals, groups and corporate organizations, both public and private, as you can by having the state perform those types of services . . . . The purposes of this fund are much broader than any narrow dedication of taxes. It's a fund that would be available for the diversification of the economy of

the state and be available to the citizens of the state as individuals and groups. It would lend some economic stability, I believe, once the fund is established." Hearing on HJR 39 Before the Senate Resources Comm., 9th Legislature (May 15, 1976) (Representative Malone statement) (tape in State Archives Box 18290).

"[Unless there is a significant attitude change by a future legislature], we're pretty well assured that the [implementing] legislation will be written and the laws enacted to provide for maximum possible investment within the state." Hearing on HJR 39 Before the Senate Resources Comm., 9th Legislature (May 15, 1976) (Representative Malone statement) (tape in State Archives Box 18290).

"The [Hammond] administration has that same commitment." Hearing on HJR 39 Before the Senate Resources Comm., 9th Legislature (May 15, 1976) (Commissioner Sterling Gallagher statement referring to Representative Malone's statement regarding maximum possible investment within the state) (tape in State Archives Box 18290).

"I think this is the primary purpose of the permanent fund and that is to retain capital in Alaska . . . . I think the permanent fund can provide for more capital leverage for the state. . . . I think the permanent fund of course can provide I think greater control or greater development by Alaska capital in the areas than say even outside capital would not develop in. An example of course and this would be taken up after the constitutional amendment is, either, if it is approved, the Susitna dam project is one, the hatchery projects are another example." Hearing on HJR 39 Before the Senate Resources Comm., 9th Legislature (May 15, 1976) (Representative Gruening statement) (tape in State Archives Box 18290).

II. Comments in the Media Regarding HJR 39, 1976

"This concept makes portions of the oil revenue available to citizens on a more direct level. By establishing the program, we will be able to allow Alaskans a direct hand in managing part of the money." Howard Weaver, *Permanent Fund is Biggest Project*, Anchorage Daily News, June 2, 1976, at 1 (quoting Representative Malone).

"People always talk about return on the dollar. The priorities always get based on the value of money. Well, I don't think that should be the main concern for this investment program. . . . I don't think the managers—and that's what the legislature will be—should just look at return in dollars; we have to talk about the

quality of life in Alaska. . . .This legislature now has given people a chance to let the average Alaskan get a piece of all this (oil) action. That's more important than government programs, or return on the dollar or any of that. It can give the people a chance to start a business, or live in a decent home. . . .Think about hydroelectric projects. Some of them, the big ones, are open to question, sure. But when you get down to providing an eternal supply of electric power to some small community, maybe you've done something with no terrific return on the dollar, but you've sure improved the quality of people's lives. And you let them manage it; it's a loan, an investment. It's not just another government project . . . . The wealth that those resources represent belongs to the people of this state, and that shouldn't be exported . . . . The main concerns of this fund ought to be diversifying the economy of Alaska, of developing the resources first of all for the people of Alaska. Agriculture, timber, fish, businesses—we've got to put the emphasis on things owned and operated for the people of the state. The resources in the state ought to be used in the state, or at least for the state. We have to have first call on the use. If the resource leaves the state, the value shouldn't." Howard Weaver, *Permanent Fund is Biggest Project*, Anchorage Daily News, June 2, 1976, at 1 (quoting Representative Malone).

APPENDIX B

Public Statements Regarding the Objectives of the Permanent Fund

I. Savings

"The permanent fund indeed would be a trust, held inviolate for prescribed uses. It also would have much to offer the state's heritage for it would preserve for future Alaskans some of the benefits of oil wealth." *Editorial, A Future Fund,* Anchorage Daily News, April 20, 1976, at 4.

"It also would give the state an important alternative: instead of spending oil revenues automatically for more bureaucracy, the state would be allowed to open a sound 'savings account.'" *Editorial, 2 Plans, 1 Fund,* Anchorage Daily News, April 21, 1976, at 6.

The permanent fund "will be a kind of savings account where we will be able to sock some of this revenue away and preclude long-fingered politicians from picking the public pocket." *Alaska's Portrait in Oil: "A Crazy Quilt Economy,* U.S. News & World Report, Aug. 2, 1976, at 33 (quoting Gov. Hammond).

"The idea of a 'savings account' type arrangement has been advocated by many." *Permanent Fund,* Alaska Department of Revenue Journal, Oct. 1976, at 7.

"Politicians could spend the interest, but never the principal." *Permanent Fund Raises Use Issue,* Anchorage Daily News, Oct. 22, 1976, at 2.

The permanent fund will be a "lasting savings account from some of the oil revenues." *Editorial, It's Permanent,* Anchorage Daily News, Oct. 24, 1976, at 4.

"The object is to prevent future legislatures from doing what previous legislatures did with the $900 million bonanza received by the state from the sale of Prudhoe Bay leases in 1969. That gigantic sum ran through the legislators' fingers like water, to the alarm of many who had pleaded at the time that the $900 million be invested, the principal preserved and the state spend only that money derived from interest." *Editorial, No Easy Choice,* Anchorage Times, Oct. 24, 1976, at A-4.

"[Those promoting the permanent fund, including Gov. Jay Hammond] also view it as a savings account, to keep some of the state's income from oil and gas out of the

general fund so it can't be spent." Susan Andrews, *Lawmakers Would Shape Permanent Fund,* Anchorage Times, Oct. 24, 1976, at A-3.

"The income from the Permanent Fund will be available for general appropriation by the legislature, but the principal of the fund may not be touched. It could only be removed from the fund by another constitutional amendment." Gov. Jay Hammond, *The Governor's Point of View*, Anchorage Times, Oct. 27, 1976, at 6.

"The principal of the fund would be used only for income-producing investments permitted by law." Legislative Affairs Agency, *Summary of Proposition*, 1976 Official Election Pamphlet, at 56.

"Just as a wise and prudent family sets aside money in a savings account for the future, so should Alaska's state government set aside a rainy day fund to benefit this and future generations of Alaskans." Alaska State Chamber of Commerce, *Statement in Favor of Proposition No. 2*, 1976 Official Election Pamphlet, at 57.

II. Flexible Use

"Exactly how the permanent fund is set up would be the job of future legislatures. Our elected representatives, by law, would prescribe how the money is to be invested. That may demand a different application of the fund from one year to the next, but flexibility to meet changing demands is guaranteed by current legislation. Likewise, future legislators would be able to decide what to do with the considerable earnings of the fund." *Editorial, 2 Plans, 1 Fund,* Anchorage Daily News, April 21, 1976, at 6.

"[T]he legislature would supervise [the permanent fund] as a 'board of directors' and designate investments for which it could be used." *Demos Hear Gruening, Sassara*, Anchorage Daily News, July 16, 1976, at 6 (quoting Representative Gruening).

"Nobody knows exactly how the fund will be used; that decision will be made by legislative action in the future. Although the fund is protected against certain kinds of usage, its precise organization and management have been left flexible by designers. . . . [t]he flexibility of allowing future legislatures to decide on precise uses will prevent the 'locked up' circumstance. . . .There have been many proposals for possible fund uses. They range from paying direct dividends to Alaskans to using the money to underwrite such vast projects as hydroelectric dams." *Permanent Fund Raises Use Issue,* Anchorage Daily News, Oct. 22, 1976, at 2.

"[Representative] Malone said the fund could go for all three of those uses [economic development, savings, and community development]. The legislature would decide what per cent of the fund would go to each use." Susan Andrews, *Lawmakers Would Shape Permanent Fund,* Anchorage Times, Oct. 24, 1976, at A-3.

"Consultants have told the state's Investment Advisory Committee that the "income-producing requirement" [for investments of the principal] of the fund gives the state broad latitude." Susan Andrews, *Lawmakers Would Shape Permanent Fund,* Anchorage Times, Oct. 24, 1976, at A-3.

"There are a number of possibilities for uses of the earnings – and the legislature will decide those uses." Susan Andrews, *Lawmakers Would Shape Permanent Fund,* Anchorage Times, Oct. 24, 1976, at A-3.

III. Economic Development

"It would allow Alaskans to directly share from the oil revenues because the permanent fund would offer loans to businessmen, builders and fishermen. This would pump money to Alaskans who, in turn, would pump it back into the state's economic mainstream. The state would be investing in itself." *Editorial, A Future Fund,* Anchorage Daily News, April 20, 1976, at 4.

"A percentage of the permanent fund would go for direct use by Alaskans—loans to businessmen, fishermen and builders." *Editorial, 2 Plans, 1 Fund,* Anchorage Daily News, April 21, 1976, at 6.

"What sort of enterprises? The fund could help put a viable state agricultural industry on its feet. It could provide loans to Alaskans who want to build their own homes, but can't obtain conventional financing. It could also be utilized in revitalizing the state's depleted fishing industry by helping individual fishermen finance and construct new boats. And it could simultaneously encourage the development of aquaculture corporations to rebuild the fish stocks." *Editorial, The Permanent Fund,* Fairbanks Daily News-Miner, April 26, 1976, at A-4.

"We'll be plowing it [the permanent fund] into the economy, all right, but using it for investment purposes—not to balloon the economy. . . .[t]he most critical goal is to strengthen our renewable resource industries—such as fishing and timber—for the day

when nonrenewable resources run out." *Alaska's Portrait in Oil: "A Crazy Quilt Economy,* U.S. News & World Report, Aug. 2, 1976, at 33 (quoting Gov. Hammond).

Economist Bob Richards of Alaska Pacific Bank "presented a paper addressing the possible investment options for the proposed fund . . . . Richards indicated that bolstering Alaska's traditional industries of fishing and forest products along with creating a more broadly based economy 'would most effectively satisfy the intent of the Alaska voters . . .'" *Experts Discuss Permanent Fund,* Anchorage Daily News, Aug. 30, 1976, at 2.

"The concept of 'controlled economic diversification' is being broached by many as one that merits the attention of the populace. If the State can 'wisely' funnel money into good investments within its borders, then several goals may be achievable. . . .The funds could thus immensely aid Alaska's citizenry." *Permanent Fund,* Alaska Department of Revenue Journal, Oct. 1976, at 6.

"This fund can become a tool whereby Alaska can take some of today's mineral wealth and prepare for the future by investing in the development of human and material resources that will remain productive for many generations." *Permanent Fund Raises Use Issue,* Anchorage Daily News, Oct. 22, 1976, at 2 (quoting Revenue Commissioner Sterling Gallagher).

"This is a chance to let average Alaskans have a stake in managing some of the oil wealth. It's more than a bank account; it's a way to change some basic patterns." *Permanent Fund Raises Use Issue,* Anchorage Daily News, Oct. 22, 1976, at 2 (quoting Representative Malone).

A portion of the permanent fund "would go for direct use by Alaskans – for loans to businessmen, fishermen and builders." *Editorial, It's Permanent,* Anchorage Daily News, Oct. 24, 1976, at 4.

"Those promoting the permanent fund, including Gov. Jay Hammond, see it as a way of providing development capital to diversify the state's economy, strengthen renewable resources such as fisheries, timber and tourism, and make possible large projects such as dams, which couldn't otherwise be financed." Susan Andrews, *Lawmakers Would Shape Permanent Fund,* Anchorage Times, Oct. 24, 1976, at A-3.

"Others see the fund as a source of loans for community development, such as home mortgages, small business loans, for power development, ports, utilities, roads . . .

." Susan Andrews, *Lawmakers Would Shape Permanent Fund,* Anchorage Times, Oct. 24, 1976, at A-3.

"The Permanent Fund won't be simply a giant bank savings account/--it will be a pool of cash available for business investments either in Alaska or outside the state. If these investments are approved wisely by the state, we'll not only have continued earnings from our one-time oil resources but we'll also have a new spur to the economy of our state through loan programs which could extend from the largest businessman to the smallest homeowner." *Editorial, Some Serious Propositions,* Fairbanks Daily News-Miner, Oct. 29, 1976, at A-4.

"Projects invested in with sources from the 'Permanent Fund' could help broaden Alaska's narrow based economy and bring more stability to our State." Alaska State Chamber of Commerce, *Statement in Favor of Proposition No. 2*, 1976 Official Election Pamphlet, at 57.

"Because of the constitutional requirement that the permanent fund be used only for income-producing projects, it is likely the fund will be designed to provide loans to Alaskan individuals or businesses." Paul Nussbaum, *The Issues in '77*, Anchorage Daily News, Nov. 11, 1976, at 1.

ALASKA STATE LEGISLATURE

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Resources Committee

State Affairs Committee

Joint Armed Services Committee

Judiciary Committee

SENATOR BILL WIELECHOWSKI

10 August 2016

Angel Rodell
Executive Director
Alaska Permanent Fund Corporation
801 W 10th St #302
Juneau, AK 99801

Dear Ms. Rodell,

I write to you today on behalf of my constituents and the people of Alaska regarding the statutory obligation of the Permanent Fund Corporation (Corporation) to transfer funds from the Permanent Fund Earnings Reserve Account to the Dividend Fund sufficient to pay a full Permanent Fund Dividend (PFD) to every eligible Alaskan. In conversations I have had with you and spokespeople for the Corporation, and in your legislative testimony you have indicated the Corporation intends to instead transfer only enough funds to pay eligible Alaskans a PFD of $1,000, rather than the expected amount which is approximately $2,100. You have indicated you intend to rely on Governor Bill Walker's veto of funds in the state operating budget as legally binding the Corporation to transfer less than the full statutorily-required amount.

I believe an analysis of the Alaska Constitution, legislative history, Alaska Supreme Court case law and relevant statutes leads to the conclusion that the transfer of money from the Earnings Reserve to the Dividend Fund is, in fact, automatic - and that the Corporation is legally obligated to transfer the amount necessary to pay a full PFD. With that in mind, I respectfully request the Permanent Fund Corporation make the necessary transfer of money from the Earnings Reserve to the Dividend Fund to accommodate the current statutory formula for dividend payouts in October.

The Permanent Fund is a unique idea. Governor Jay Hammond fought for the program, which has survived him in its current incarnation, because he believed the only way we could live up to the Constitutional principle of "managing the resource to the maximum benefit of the people," was "to grant each citizen an ownership share in Alaska's resource." Pursuant to that ideal, a Constitutional amendment was proposed and passed by the legislature and the people of Alaska creating the Permanent Fund.

The last sentence of the Permanent Fund section in the Alaska Constitution states that the income generated from the Permanent Fund "shall be deposited in the general fund unless otherwise provided by law." The law the legislature enacted pursuant to that Constitutional directive is AS 37.13.145. The statute states that income from the fund resides in the earnings reserve and, critically, that "the corporation shall transfer from the earnings reserve account to the dividend fund established under AS 43.23.045" the amount necessary to pay the Permanent Fund Dividend. Accordingly, the statutory law is crystal clear that the Permanent Fund Corporation *is required to initiate the transfer of the amount of funds necessary to pay the full Permanent Fund Dividend.*

A legal opinion from the Attorney General in 1980 supports this interpretation, noting that the "legislature...can provide by law for income from the fund to be automatically deposited back into the fund or distributed as dividends." While it is true that a later Attorney General opinion came to an opposite conclusion, the Supreme Court has analyzed AS 37.13.145 and made the following statement:

> A similar analysis applies to the permanent fund earnings reserve account (earnings reserve account), AS 37.13.145. This fund is established as a separate account within the permanent fund under the authority of the last sentence of Article IX, 15 of the Alaska Constitution: "All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law." AS 37.13.145(a) provides otherwise: The earnings reserve account is established as a separate account in the fund. Income from the fund shall be deposited by the corporation into the account as soon as it is received. Therefore, money in the earnings reserve account never passes through the general fund, and is never appropriated as such by the legislature.
>
> A percentage of the money in the reserve account is automatically transferred to the dividend fund at the end of each fiscal year. AS 37.13.145(b).[i]

Moreover, according to recent legislative testimony, for decades there has been no appropriation from the Dividend Fund to the people of Alaska – these funds have been automatically transferred.

In light of the fact that the statute is clear, and that the Supreme Court has analyzed this statute and acknowledged this transfer is to occur "automatically," it is incumbent on the Permanent Fund Corporation to follow state law and initiate the transfer of funds from the Earnings Reserve Account to the Dividend Fund sufficient to pay Alaskans the full amount of their Permanent Fund Dividends, as the law requires. I respectfully request the Corporation follow the law and immediately make this full transfer.

Please let me know if you have any questions, and kindly advise me when the Permanent Fund Corporation makes the transfer from the Earnings Reserve Account to the Dividend Account.

Cordially,

Bill Wielechowski

Senator Bill Wielechowski

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

Alaska Permanent Fund Corporation
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Tel: (907) 796-1500 Fax: (907) 586-2057

August 12, 2016

The Honorable Bill Wielechowski
Alaska State Senate
716 W. 4th Ave., Ste. 409
Anchorage, Alaska 99501

Dear Senator Wielechowski,

Please let this letter serve as a response to your letter dated August 10, 2016, requesting that I inform you when the Alaska Permanent Fund Corporation had completed the transfer of funds appropriated in the FY 17 budget bill (HB 256 Chapter 3 4SSLA 16) from the earnings reserve account to the dividend fund. That transfer was completed on August 1, 2016. The total amount transferred was $695,650,000.

Regarding our justification for transferring the amount authorized in the appropriation bill, after consulting with the Department of Law, we refer you to the third sentence of Article IX, Section 15 of the Alaska Constitution, which provides, "[a]ll income from the permanent fund shall be deposited in the general fund unless otherwise provided by law." We interpret this language as authorizing the Legislature to re-direct the deposit of permanent fund income into an account other than the general fund, which the Legislature did in 1982 by directing permanent fund earnings in to the Earnings Reserve Account (*See* AS 37.13.145). We do not, however, interpret this constitutional language as exempting the net income of the permanent fund from the dedicated fund prohibition contained in Article IX, Section 7 of the Alaska Constitution. Thus, the expenditure of funds in the Earnings Reserve Account requires an appropriation authorized by law as provided in Article IX, Section 13 of the Alaska Constitution.

Sincerely,

Angela Rodell
Executive Director