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

BILL WIELECHOWSKI, RICK HALFORD, AND CLEM TILLION, Plaintiffs, v. STATE OF ALASKA AND THE ALASKA PERMANENT FUND CORPORATION, Defendants.	Case No.: 3AN-16-08940CI

STATE'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. Introduction

In 1976, the people of Alaska amended the state constitution to create a savings account called the permanent fund. The plaintiffs now argue that the amendment process necessary to create the savings account also covertly enabled a *spending* account that is exempt from constitutionally-mandated annual budgetary controls. Because nothing in the constitutional or statutory history creates such a yawning gap in the government's ability to control annual state spending, and because constitutional amendments cannot rewrite the constitution in secret, the Court should grant the State's summary judgment motion and deny the plaintiffs' cross-motion.

The Court should interpret the Governor's reduction of an appropriation in fiscal year 2017's operating budget as being exactly what it looked like—a reduction of an appropriation—rather than what plaintiffs theorize it to be—a meaningless veto of language that erroneously referred to itself as an appropriation but was in fact just an "accounting notation" about an "automatic" transfer of vast sums of money that the Legislature and Governor have no annual control over.

The plaintiffs erroneously suggest that the only way to give meaning to the constitutional language that permanent fund income may either be deposited in the general fund or dealt with as "otherwise provided by law" is to allow the income to be dedicated and "automatically" appropriated by law. This ignores the more logical reading that "unless otherwise provided by law" simply allows the legislature to do something other than deposit permanent fund income into the general fund—such as depositing it to a subaccount within the permanent fund—as the legislature has, in fact,

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chosen to do. The plaintiffs likewise incorrectly suppose that the dividend statutes would have no meaning if the formula for dividends did not have the force of an automatic appropriation. This ignores the constitutional law segregating appropriations from other types of bills, and the statutory language anticipating annual appropriations. The dividend statutes set expectations for future legislatures without usurping their constitutionally-assigned power to appropriate more or less depending on the financial circumstances and priorities of the State in a given year.

Finally, the plaintiffs argue that allowing the veto of an appropriation impermissibly allows the Governor to "act by fiat" and "decide unilaterally the annual PFD amount." [Pl. MSJ 3] In reality, it merely allows the Governor to act as the constitution intended, as a strong executive with a role in controlling the purse strings of the State.

II. Argument

A. The history of the permanent fund amendment contradicts the plaintiffs' claim that Article IX, section 15 permits dedication of permanent fund income.

The plaintiffs assert that the Legislature intended to permit the dedication of permanent fund income when it added the phrase "unless otherwise provided by law" to the last sentence of article IX, section 15. [Pl. MSJ 13-14, 16] But they offer remarkably little support for this claim; and the history of the permanent fund amendment shows otherwise. Moreover, even if the plaintiffs could offer more evidence of the Legislature's alleged intent to dedicate fund income, the amendment still could not be interpreted as the plaintiffs wish because Alaska voters were simply not informed that

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fund income would be exempt from the dedicated funds prohibition, much less the appropriations and veto clauses. And although the plaintiffs suggest that in 1980 "legal experts and legislators understood that a percentage of the Permanent Fund's income could be dedicated to dividend payments without requiring annual appropriations," [Pl. MSJ 18] in fact, from 1976 to 1983, legal opinions were contradictory and tentative.

1. The legislative history of the permanent fund amendment does not establish that the Legislature intended to dedicate fund income.

The plaintiffs mischaracterize the history of the permanent fund amendment to support their claim that it permits dedication of permanent fund income. They suggest that the initial proposal was to create "an exception to the dedicated funds clause to allow revenues from Alaska's oil and mineral wealth to be saved and then directed to certain purposes." [Pl. MSJ 18] But the first version of House Joint Resolution 39, introduced in June 1975, amended only article IX, section 7 of the Alaska Constitution, adding a new exception to the dedicated funds prohibition for "the dedication of the proceeds of mineral lease bonuses."[1] It did not yet create a savings account, much less provide for the dedication of income from such an account.

Nor did the second version of HJR 39, introduced in January 1976, "propos[e] amending article IX, section 7 to allow dedications to *and from* the permanent fund," as the plaintiffs claim. [Pl. MSJ 13 (emphasis added)] Instead, in this draft the amendment to section 7 simply excepted the provisions of section 15 from the prohibition against dedicated funds; and at that time, section 15 provided that fund income would be

[1] Exh. B (Exhibit References A-Q refer to Exhibits to the State's MSJ) at 1.

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deposited in the general fund. Thus, this second version also showed no sign of any intent to dedicate fund income.

The plaintiffs assert, without citation, that "the idea that *all* income from the permanent fund would be deposited into the general fund raised concerns." [Pl. MSJ 14] They claim that "[t]he Legislature wanted the constitution to authorize dedications of the Permanent Fund's income for specific purposes." [Pl. MSJ 14] But their only support for this claim is a brief exchange between Representative Hugh Malone, and the Commissioner of Revenue, Sterling Gallagher, about whether fund income could be dedicated to debt service, and a statement by one of Malone's aides that the phrase "unless otherwise provided by law" was considered to 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 ... it could also permit the legislature to make a dividend payment to citizens of Alaska from the income of the fund." [Pl. MSJ 15]

According to the plaintiffs, the Legislature "amended proposed article IX, section 15 to include the phrase 'unless otherwise provided by law,'" and then "adopted" the amendment. [Pl. MSJ 15] But this ignores significant parts of the legislative history. Although on March 25, 1976, the House passed CSSSHJR 39 (JUD)—with the "unless otherwise provided by law" language—the proposal was substantially revised by the Senate State Affairs Committee in early April. The revised version provided:

> Fifty per cent of all the proceeds from mineral lease rentals, royalties, royalty sales, revenue sharing payments and bonuses received by the state and *ten per cent of the income from the permanent fund shall be placed in a permanent fund*, the principal of which shall be used only for those income producing investments specifically designated by law as eligible

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> for permanent fund investments. *The legislature may dedicate additional proceeds both as to source and percentage* which shall become a part of the principal of the fund. Any additional dedication may be revoked by the legislature, but revocation may not make the principal amount in the permanent fund subject to appropriation. Other income from the permanent fund shall be deposited in the general fund.[2]

This version shows that legislators knew how to expressly dedicate permanent fund income and how to expressly permit other dedications. It also deleted the phrase at issue here—"unless otherwise provided by law"—undermining the plaintiffs' suggestion that the brief exchange in the House Finance committee settled the issue of including the phrase and established its meaning. Instead, the draft progression demonstrates a substantially less monolithic intent with respect to the use of permanent fund income than the plaintiffs acknowledge.

The Senate State Affairs Committee version was next referred to the Senate Resources Committee, where there was not a lot of support for its altered language.[3] In particular, the committee made changes after hearing administration comments opposing the new language because it provided too much undefined dedication power:

> it brings before the people of the state, next November, a very odd situation where they're asked to consider several specific dedications and then empowering the legislature to make essentially omnibus dedication thereafter. And we think that's perhaps just a typographical or conceptual mistake on the part of the drafter. Not something that was fully intended. In any case we do not support that as it's simply not an appropriate issue to bring before the people.[4]

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2 Exh. B at 8-9 (emphasis added).

3 Exh. P (Senate Resources Comm. 1, May 15, 1976 at 9:15—9:50); 1976 Senate J. 735, attached as Exh. R.

4 Exh. P. (Senate Resources Comm. 2, May 15, 1976 at 11:20—11:50).

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Although this commentary addressed the committee substitute's authorization for the legislature to "dedicate additional proceeds both as to source and percentage," its hesitation is instructive and weighs strongly against the plaintiffs' claim that "unless otherwise provided by law" was intended to "empower the legislature to make essentially omnibus dedication[s]" of fund income. And at least the grant of authority to make omnibus dedications was plain on the face of the Senate State Affairs Committee Substitute. Despite this evidence that the Legislature knew how to clearly provide for a dedication, the plaintiffs would have this court read into the vaguest of phrases a dramatic expansion of legislative power to dedicate state revenue. The court should decline to do this, especially because the plaintiffs have not identified—and the State defendants have not found—a single occasion on which any legislator stated that the purpose of this language was to allow the Legislature to dedicate fund income.[5]

Moreover, if the Legislature as a whole wanted to be able to dedicate fund income, it is remarkable how little discussion there was about it during the legislative debate over the amendment, even when the language allegedly authorizing such dedications was stripped out by the Senate State Affairs Committee. When the Senate Resources Committee heard the bill on May 15, 1976, Senator Orsini specifically asked Representatives Malone and Gruening which aspects of the House version of the bill, if any, were particularly important to House members. Neither one identified the provision

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[5] For example, when the bill was presented to the Senate Resources Committee, the purpose of the phrase "unless otherwise provided by law" was described as "broadening" the use of the fund income, not as an authorization to dedicate the income. Exh. P (Senate Resources Comm. 1, May 15, 1976 at 6:40—7:10).

regarding the use of fund income as a central component of the bill.[6] Indeed, although the Resources Committee readopted the House version, including the "unless otherwise provided by law" language, there was very little discussion of the income at all; the committee's attention was almost entirely focused on which sources of revenue to place in the permanent fund and what percentage was appropriate.[7]

Thus, the legislative history simply does not support the plaintiffs' claim that the Legislature intended to amend the Alaska Constitution so that the dedicated funds prohibition would not apply to permanent fund income. And even if there was more evidence of such a legislative intent, this Court may not interpret a constitutional amendment in a way that does not reflect the information provided to voters about the meaning of the amendment.[8]

2. The voters were not informed that the phrase "unless otherwise provided by law" created a second broad exception to the dedicated funds prohibition.

Although caselaw makes the information available to voters crucial, the plaintiffs spend barely a paragraph describing the public debate over the permanent fund amendment. Instead, they simply assert it was "clear that the Permanent Fund's income could be set aside for PFD payments." [Pl. MSJ 16] But, to the contrary, very little of the public debate focused on fund income and *nothing* informed voters that the language

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6 Exh. P (Senate Resources Comm. 2, May 15, 1976 at 25:50—26:50; at 1:14:00—1:15:12).

7 *See* Exh. P (Senate Resources Comm., May 15, 1976 and May 20, 1976).

8 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007) (The court should "look to any published arguments made in support or opposition to determine what meaning voters may have attached to the initiative.")

"unless otherwise provided by law" was intended to allow the Legislature to dedicate any or all of the income to any purpose it favored, as the plaintiffs contend.

The plaintiffs quote an editorial noting that the payment of "direct dividends to Alaskans" was a "possible fund use," but they do not explain why they believe that this informed voters that dividends would be paid through a dedicated fund outside of the appropriations process. [Pl. MSJ 16] To the contrary, because a dividend program does not require a dedicated fund, much less spending outside the appropriations process, the discussion of possible dividend payments from permanent fund income could not notify Alaska voters that the permanent fund amendment would allow either of these things. Indeed, there is nothing in the mere use of the word "dividend" to convey that income can be spent outside of traditional constitutional restraints and irrespective of economic conditions.[9]

The plaintiffs' other quotation—from the same editorial—characterizes the amendment as "a chance to let average Alaskans have a stake in managing some of the oil wealth." [Pl. MSJ 16] But this comment is not even about a possible dividend, and thus offers no support to the plaintiffs' claims. [Pl. MSJ 16][10] Lacking even one clear public statement that the proposed amendment would permit fund income to be

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[9] Whether corporate dividends are paid and at what amount is decided by a corporation's Board of Directors; dividends are not generally guaranteed. *See e.g.*, http://www.accountingtools.com/definition-dividend

[10] The article the plaintiffs quote continues, "Malone says that if the fund is used, for example, to make business loans available to Alaskans, that will be, in effect, letting them personally manage part of the state revenue." Thus, the quoted comment was not a reference to possible dividend payments.

dedicated in contravention of the prohibition against dedicated funds and spent without appropriation, the plaintiffs' claims must fail.[11]

3. After early conflicting opinions, the Attorney General's office concluded that an appropriation is required to pay permanent fund dividends.

In place of evidence that Alaska voters understood and intended that fund income could be dedicated by the Legislature, the plaintiffs offer selective quotations from some Attorney General opinions written four years and more after the amendment passed in an attempt to establish that "at the time the first PFD law was passed, legal experts and legislators understood that a percentage of the Permanent Fund's income could be dedicated to dividend payments without requiring annual appropriations." [Pl. MSJ 18] A more comprehensive review, however, reveals contradictory advice, reflecting the paucity of cases interpreting the dedicated funds clause and the appropriations clause at the time the amendment and the dividend statute were enacted. Moreover, the view of the Attorney General regarding the need for an appropriation to pay dividends has now been clear for over thirty years.[12]

When the permanent fund amendment passed the Legislature, the Attorney General provided a bill review letter to Governor Hammond. The letter noted that the Legislature had:

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11 *Alaskans for a Common Language, Inc.*, 170 P.3d at 193-94 ("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.")

12 2009 Inf. Op. Att'y Gen., 2009 WL 1719849 (June 16, 2009) at 8.

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> added a proviso allowing itself to provide by law that the income from the fund may be deposited in other than the general fund. However, since the only exception to the dedicated-fund prohibition in sec. 7 is the new sec. 15, it would appear that the only other place the income may be deposited is in the permanent fund.[13]

Thus, the initial view was that the phrase "unless otherwise provided by law" permitted only the deposit of fund income into the permanent fund.

In 1979, the Attorney General's office offered advice on whether the Legislature could "provide for the use of the income from the Permanent Fund to guarantee bonds, notes, and other indebtedness issued to finance public power projects."[14] The opinion noted that the purpose of the phrase "unless otherwise provided by law" was "*not* discussed in the ballot summary or voter's pamphlet," and that "[t]he title of the joint resolution by which the legislature proposed the amendment makes no reference to the disposition of the Permanent Fund's income."[15] The opinion reasoned that because

> disposing of [the income] so as to establish still another dedicated fund probably encompasses a whole new and different subject from establishing the Alaska Permanent Fund [and a]s a general rule, separate subjects must be treated separately in adopting constitutional amendments and each must be summarized for the voters,...the clause does not exempt the fund's income from the prohibition against dedicated funds.[16]

Despite this conclusion, the opinion suggested that fund income could be used as security for debt because "neither repaying debts nor guaranteeing their repayment

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13 Avrum Gross to Jay Hammond, June 28, 1976, attached as Exh. S.

14 1979 Inf. Op. Att'y Gen. (April 11; J-66-614-79) at 1.

15 *Id.* at 1 (emphasis in original).

16 *Id.* at 1-2.

comes within the constitution's prohibition against dedicated funds."[17] Having concluded that debt repayment was outside the scope of the dedicated funds clause, the opinion expressed the tentative view that "*our best guess* is that a continuing appropriation [for debt repayment] would probably be upheld."[18]

The plaintiffs ignore these opinions in favor of a March 1980 letter to Senator Clem Tillion, which they claim "confirmed that article IX, section 15 of the Alaska Constitution did indeed grant the Legislature the power to dedicate the Permanent Fund's income to dividend payments." [Pl. MSJ 18] But the opinion was far too cautious to *confirm* any such thing. Instead, it noted that "the legislature *probably* can provide by law for income from the fund to be automatically deposited back into the fund or distributed as dividends," and it contradicted the 1979 opinion by suggesting "[u]se of the income without annual appropriations for other purposes, say for loan programs or guarantees, has no close relationship to the fund itself and *probably would not* pass constitutional muster."[19]

This view was repeated in a two-paragraph December 1981 opinion, also cited by the plaintiffs, [Pl. MSJ 20] which stated that "it is our opinion that the payment of dividends from the dividend fund established by AS 43.22.050 does not require an appropriation," but also noted that

[i]n the light of the general constitutional prohibition against dedicated

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17 *Id.* at 2. *See also Thomas v. Rosen* 569 P.2d 793, 795-97 (Alaska 1977) (discussing ways in which debt obligations are outside ordinary appropriations process).

18 *Id.* at 3 (emphasis added).

19 1980 Op. Att'y Gen. No. 3 at 8 (Mar. 19).

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> funds, art. IX, § 7, it may be proper to interpret the exception for the permanent fund narrowly. A broad interpretation of that exception to allow the use of income of the fund without appropriation for any purpose . . . could create a very large gap in our governmental finance system, particularly as the balance of the fund and its income increase.[20]

Although the plaintiffs assert that "the State's current position is the opposite of its previous interpretations of the constitution and Permanent Fund statutes," [Pl. MSJ 27] this claim ignores both the inconsistency and uncertainty in the advice and the reality underlying it—that in 1981, there had not yet been a single Alaska case interpreting the scope and meaning of the dedicated funds clause.[21]

The plaintiffs also ignore the role of the Attorney General's office when they complain that "[t]he State claimed it would defend the dedication of the Permanent Fund's income to PFD payments." [Pl. MSJ 28] Not only is it the job of the Attorney General's office to defend the constitutionality of statutes where at all possible,[22] but the plaintiffs also mischaracterize the defense offered. The opinion did not assert that "the statute and practice was consistent with the constitution's and Legislature's intent." [Pl. MSJ 28] To the contrary, it noted "the ballot summary of the constitutional amendment establishing the permanent fund did not disclose or explain the possibility that permanent fund income could be dedicated by the legislature," and expressed "reluctan[ce] to infer what would amount to a very broad exception to another constitutional provision, dedicated fund prohibition...where none was mentioned in the

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20 1981 Inf. Op. Att'y Gen. (Dec. 22; J-66-260-82).

21 The first dedicated funds case was *State v. Alex*, 646 P.2d 203 (Alaska 1982).

22 AS 44.23.020(a)(3).

ballot summary or voters' pamphlet."[23] The opinion also recommended "amending AS 43.23 so that the dividend program is funded only by appropriation, like all other state programs,"[24] presumably to avoid unconstitutionality.

But even if the Attorney General's office had actually endorsed the plaintiffs' view of the dividend program in the early 1980s before holding the contrary view for the next 30 years, this would not alter this Court's analysis, which is informed by the since-developed caselaw interpreting the dedicated funds prohibition broadly, and the evidence of what voters were actually told.

4. The phrase "unless otherwise provided by law" is not meaningless unless it permits the dedication of fund income and the payment of dividends without appropriations.

The plaintiffs argue that because depositing fund income into the earnings reserve account "would have been constitutionally permissible even without" the "unless otherwise provided by law" provision, the Legislature must have intended that language to authorize dedication of income. [Pl. MSJ at 25][25] But this is not so. As the variety of legal opinions from the late 1970s and early 1980s demonstrates, there are a number of plausible interpretations of this language which do not suffer from the same

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23 1983 Inf. Op. Att'y Gen. (Jan 5; 366-328-83) at 1.

24 *Id.* at 1-2.

25 The plaintiffs cite as support *Sonneman v. Hickel*'s statement that "the Legislature may direct state revenues to a fund or account without violating the dedicated funds clause so long as there is no 'legal restraint on the appropriation power of the legislature.'" 836 P.2d 936, 939 (Alaska 1992). But, of course, the Legislature could not—in 1976—have relied on an interpretation of the scope of its authority issued in 1992; and, indeed, it was not until the 1994 case, *Hickel v. Cowper*, that the Alaska Supreme Court held that the earnings reserve account was "available for appropriation." 874 P.2d 922, 934 (Alaska 1994).

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constitutional infirmities. For example, the language could authorize deposit of fund income back into the principal,[26] or appropriation directly into a reserve fund to serve as security against repayment of debt.[27] Although the plaintiffs suggest that a reserve fund that relies on appropriation would be worthless as a guarantee for loan repayment, in fact, there is a well-established market for bonds backed by appropriations.[28]

There are also two simple ways to interpret this language which permit the payment of dividends without providing for an enormous exception to the constitutional rules regarding spending of public funds. First, the language "unless otherwise provided by law" permits the Legislature to pay dividends directly from permanent fund income simply by passing an appropriation bill—i.e., "provid[ing] by law"—authorizing the payment of dividends.

Second, the language authorizes the Legislature to deposit fund income in a fund other than the general fund, which it has done by creating the earnings reserve account within the permanent fund. The Legislature can and has exercised its authority to appropriate money from this fund for the purpose of paying dividends. Far from being "meaningless," as the plaintiffs suggest, [Pl. MSJ 25] the ability to retain the money in a separate fund within the permanent fund has allowed the money to continue to be

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[26] *See e.g.*, Exh. S (Avrum Gross to Jay Hammond, June 28, 1976); 1983 Inf. Op. Att'y Gen. (Jan 5; 366-328-83); 1983 Inf. Op. Att'y Gen. (Mar. 10; 366-484-83).

[27] *See e.g.*, 1979 Inf. Op. Att'y Gen. (Apr. 11; J-66-614-79).

[28] *See generally Lonegan v. State,* 176 N.J. 2 (2003) (reviewing wide variety of debt issued by New Jersey agencies that is supported by security pledges that are subject to annual appropriation); *see also*, Alaska Public Debt Report 2015-16 at 3, 5 available at http://treasury.dor.alaska.gov/Portals/0/docs/Debt%20book%202015-2016%20FINAL%202.3.2016.pdf?ver=2016-02-03-093221-493

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invested while it awaits appropriation and has created an expectation among the public and the Legislature resulting in continued annual dividend payments. The history of the dividend program makes clear that it is possible to have such a program without also abandoning Alaska's constitutional framework for annual spending by appropriation subject to veto.

Of course, this Court need not determine the precise contours of the authority created by the phrase "unless otherwise provided by law" to decide this case. It need only decide whether that language permits the dedication of fund income to pay dividends outside of the constitutional appropriations process. And that question is answered conclusively by the lack of any reference to such power in the plain language of the amendment or in its presentation to Alaska voters in 1976.

B. The permanent fund amendment did not create any exemptions from the appropriations or veto clauses.

1. Alaska's appropriations and veto clauses do not contain any exemptions for the spending of permanent fund income.

The plain language of the permanent fund amendment did not exempt fund income from the appropriations or veto clauses; the backers did not agree on or advertise any such exemption; and subsequent legislatures and governors have not acted as if such exemptions exist. Yet the plaintiffs assert that the lawfully passed and lawfully reduced appropriation for this year's dividend was not an appropriation because of a hidden loophole exempting permanent fund income from the appropriations and veto clauses. [Pl. MSJ 34-42] Because the plaintiffs' claim is without basis and their proposed statutory appropriation concept is inconsistent with the Alaska

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Constitution, this Court should recognize that the appropriation for this year's dividend was what it appeared to be: a lawful appropriation subject to veto.

Outside of the context of constitutional obligations, no Alaska precedent permits unappropriated spending of state money once it is within the state treasury,[29] and the dividend fund is unquestionably within the state treasury.[30] The plaintiffs have not explained why the plain words of the appropriations clause should not apply here to a dividend that is a legislative, not constitutional, entitlement.[31]

Unsurprisingly, when analyzing the breadth of the appropriations and veto clauses, the Alaska Supreme Court's analysis "begins with the Alaska Constitution" not with the wording of a particular statute discussing spending, as the plaintiffs urge.[32] [Pl. MSJ 35] This is because no legislative intent will excuse the dividend fund statutes from constitutionally imposed requirements. In looking at the Constitution, the Alaska Supreme Court has emphasized that the Legislature has distinct powers of legislating

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29 *See Alaska Legislative Council v. Knowles (Knowles II),* 21 P.3d 367, 378 (Alaska 2001) ("[L]egislatures do not have to fund or fully fund any program (except, possibly, constitutionally mandated programs)."); *Simpson v. Murkowski*, 129 P.3d 435, 447 (Alaska 2006) (noting lack of a viable claim that a constitutional right was violated by the veto); *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 101 (Alaska 2016) (holding required local contributions paid by local communities directly to local schools never enters state treasury and thus does not need to be appropriated from it); *Thomas v. Rosen* 569 P.2d 793, 795-97 (Alaska 1977) (discussing debt obligations).

30 AS 43.23.045 (establishing dividend fund "as a separate fund *in the state treasury*") (emphasis added).

31 *Ross v. State, Dept. of Revenue*, 292 P.3d 906, 910 (Alaska 2012) (holding "PFDs are not basic necessities or a fundamental right;" they are "a matter of grace, a governmental 'benefit' indistinguishable from other forms of social welfare").

32 *Knowles II*, 21 P.3d at 371; *see also*, *Ketchikan Gateway Borough*, 366 P.3d at 101.

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and appropriating.[33] Under the Alaska Constitution's confinement clause, "[b]ills for appropriations are confined to appropriations," and are thus apart from, and governed by different rules than, bills "enacting substantive policy."[34] Under the confinement clause, appropriation bills cannot extend beyond the appropriation to "administer the program of expenditures" and "must not enact law."[35]

The plaintiffs do not address this constitutional law on appropriations when they suggest that Alaska law should permit "statutory appropriation" whereby dedicated funds can be appropriated through a substantive bill and removed from annual controls, including the governor's veto. [Pl. MSJ 35]. The plaintiffs import the statutory appropriation concept from Minnesota, [Pl. MSJ 35] but do not find support for this concept in Alaska law. Despite the existence of certain permitted dedicated funds, Alaska does not have any caselaw equating dedicated funds with an exemption from annual appropriations. Indeed, as the plaintiffs concede, Alaska's Fish and Game Fund, although a dedicated fund, nonetheless requires annual appropriation.[36] [Pl. MSJ 37]

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33 *Knowles II*, 21 P.3d at 371 (citing Alaska Const., art II § 1 and Alaska Const., art. II, § 13).

34 Alaska Const., art II, § 13; *Knowles II*, 21 P.3d at 377 (discussing differences between substantive bills and appropriations including the single subject rule for substantive bills, the three readings requirement, and ability of legislators to make floor amendments).

35 *Knowles II*, 21 P.3d at 377 (quoting *Alaska State Legislature v. Hammond*, No. 1JU–80–1163 CI (Alaska Super., May 25, 1983)).

36 And as the State noted in its opening memorandum, the State likewise appropriates money from the permissibly dedicated tobacco fund money. *See* HB 256, sec. 24(k)(1) (2016) (appropriating "$18,300,000 from the School Fund (AS 43.50.140)"), *available at* Exh. D. [State's MSJ 37]

Moreover, because the dividend act is programmatic in nature, if it did constitute an appropriation it would have violated the confinement clause by doing more than spending money.[37]

The biggest problem with the statutory appropriation idea is that it impermissibly divorces the concept of appropriations from their periodic and time-limited nature. [Pl. MSJ 35] This is directly contrary to Alaska constitutional law on appropriations. The Alaska Supreme Court has recognized that "[t]he constitutional delegates intentionally established a system in which both the legislature and the governor would consider how to spend state money each year."[38] The plaintiffs do not identify anything in the constitutional debate on the dedicated funds clause or appropriations clause designed to enable perpetual state spending based on a prior year's statutes. In addition to diluting legislative control over state finances, this approach would also violate the balance of powers by depriving the governor of the ability to veto or reduce state spending in a particular year.

2. The Supreme Court's decision in *Hickel v. Cowper* does not alter the appropriations clause analysis.

The plaintiffs cite *Hickel v. Cowper*[39] as support for the proposition that permanent fund income can be dedicated for dividends and spent without appropriation. [Pl. MSJ at 29-33] But the meaning of the permanent fund amendment was not at issue in *Hickel*. Instead, the Court considered the meaning of "available for appropriation" in

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37 *Knowles II*, 21 P.3d at 377.

38 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 101 (Alaska 2016).

39 874 P.2d 922 (Alaska 1994).

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a wholly separate constitutional amendment creating the budget reserve fund.[40] In that context, the Court characterized money as being "automatically" transferred from the earnings reserve account to the dividend fund each year and automatically transferred from the earnings reserve account for inflation-proofing,[41] apparently unaware that the money was annually included in appropriations bills. This factual mis-description of State spending practice does not determine what the permanent fund amendment means, because the Court was not asked that question. Indeed, the Court spoke more directly about the power involved in paying dividends in *Williams v. Zobel*, when it described the first effort to establish a permanent fund dividend program as an effort by the legislature to exercise "its appropriations power" over permanent fund earnings.[42]

Moreover, the *Hickel* court acknowledged that "[t]here are no statutory or constitutional prohibitions against direct appropriations from [the earnings reserve] account."[43]And the plaintiffs "do not contest" that the Legislature can appropriate from the earnings reserve account. [Pl. MSJ 32] But permanent fund income cannot simultaneously be dedicated to a particular purpose, and also be free to be appropriated for any public purpose. Thus, the only relevant holding of *Hickel*—that the earnings reserve account is "available for appropriation"—is inconsistent with the plaintiffs' claim that permanent fund income has been dedicated to pay dividends.

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40 *See* Alaska Const. art. IX, sec. 17; *Hickel v. Cowper*, 874 P.2d at 923.

41 *Hickel v. Cowper*, 874 P.2d at 934.

42 *Williams v. Zobel*, 619 P.2d 448, 453 (Alaska 1980), rev'd, 457 U.S. 55 (1982).

43 *Hickel v. Cowper*, 874 P.2d at 934.

Equally unavailing is the plaintiffs' attempt to bind the State's position in this suit based on statements made at oral argument in *Hickel*. The State's arguments on a different issue—particularly arguments that were not accepted by the Court—simply do not constrain this Court's interpretation of the constitution.

3. The statutory dividend formula has meaning even when subject to appropriation.

Finally, there is no need to go to such unconstitutional lengths to give meaning to the formula within the dividend statute. The Legislature enacted a formula that specified a "calculable percentage" of the permanent fund to be spent on dividends to provide a starting point and soft (non-binding) pledge of money. The plaintiffs' conclusion that a statutory formula for an expenditure is mere surplusage if the money is subsequently annually appropriated is startlingly dismissive of longstanding Alaska practice in a number of arenas, including state funding for public schools, retirement payments, power cost equalization payments and more.[44] These formulas carry the same weight with or without the reminder that the Legislature is bound by its constitutional obligations to appropriate the money before it can be spent. These formulas help frame the debate and enable consistency from year to year. They also are effective: within the dividend context, until this year's fiscal crisis, appropriations to the dividend fund have been sufficient to fully cover the formula spending. Likewise, the constitutionality of the instruction to APFC to transfer funds from the earnings reserve account to the

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[44] *See* AS 14.17.410(a) (school funding formula); AS 14.25.085 and AS 39.35.280 (contributions to pension plans based on formula); AS 42.45.085(a) (power cost equalization formula).

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dividend fund is not called into doubt by the enforcement of the appropriations clause; instead the Court should simply read the statute in harmony with the constitution and understand that the language is directory rather than mandatory.[45]

The plaintiffs attempt to distinguish *Simpson v. Murkowski*,[46] which held that the continued existence of legislation authorizing a statutory entitlement program does not mean that the Legislature and Governor are powerless to reduce or eliminate funding for the program. [Pl. MSJ 42-44] The plaintiffs' incorrectly characterize the court's analysis as "premised" on the statute's inclusion of the notation that it was subject to appropriation. [Pl. MSJ 42] In fact, the court only mentioned the statute's appropriations language in the fact section and in its description of the superior court decision; the Court's holding was derived from its analysis of the Alaska Constitution.[47]

C. The dividend statutes do not demonstrate an intent to dedicate fund income without appropriation.

The plaintiffs also overlook the myriad evidence that the statute does not purport to authorize automatic dividend payments. The plaintiffs focus almost exclusively on AS 37.13.145—which creates the earnings reserve account—because it includes language providing that "the corporation shall transfer from the earnings reserve account to the dividend fund" and does not use the word "appropriation."[Pl. MSJ 20-21] But they ignore that the statute creating the dividend fund—AS 43.23.045—

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45 *See, e.g., S. Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage Bd. of Adjustment*, 172 P.3d 768 (Alaska 2007) (holding statutory provision to be directory rather than mandatory despite use of "shall").

46 129 P.3d 435 (Alaska 2006).

47 *Id.* at 446-47.

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explicitly references "an appropriation to implement this chapter" and "the fiscal year in which the appropriation was made."[48] Likewise, plaintiffs offer no explanation for how the Legislature could simultaneously intend that dividends be paid without appropriations and pass AS 43.23.025(a)(1)(B) providing that the amount available to pay dividends includes "the unexpended and unobligated balances of prior fiscal year appropriations that lapsed into the dividend fund under AS 43.23.045(d)."[49]

Nor do the plaintiffs acknowledge that as far back as 1982 the Legislature unequivocally communicated to the voters its expectation that permanent fund dividends would be paid through appropriations: the 1982 constitutional amendment limiting appropriations contained a proviso that the limit did not apply to "appropriations for Alaska permanent fund dividends."[50]

Likewise, the plaintiffs give no explanation for the actual appropriation actions of the Legislature in the early 1980s, and since, which directly contradict their claim that the Legislature either intended to, or believed it had, created a dividend plan that would operate outside of the traditional appropriations process. Although railing against surplusage at various other points in their brief, the plaintiffs appear to conclude that the appropriations for the dividend conveyed no legal import at all.

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48 AS 43.23.045(d). As noted in the State's memorandum in support of summary judgment, when AS 43.23.045(d) was added to the dividend fund statute in 1987, Governor Cowper's transmittal letter noted that "[a]n appropriation has been the vehicle for the 'transfer' of permanent fund income to the dividend fund." 1987 House J. 103-104, *available at* Exh. Q. [State's MSJ 40]

49 AS 43.23.025(a)(1)(B).

50 Alaska Const., art. IX, § 16.

The plaintiffs implausibly assert that the Legislature took the highly unusual act of deciding to order the automatic payment of money without the need for normal appropriation, and did so without mentioning it. They do not claim that appropriation-free government spending is a common practice in Alaska—indeed, they provide no other examples of such spending and theorize that such "automatic" spending of money is only allowed for some fraction of Alaska's few dedicated funds. [Pl. MSJ 38] Given the novelty of the alleged dividend spending plan, why did the Legislature not mention that (1) the dividend fund was a dedicated fund and (2) permanent fund income would be transferred into it and spent without the need for annual appropriation? Presumably, the Legislature did not state in plain language that they were creating a new type of government spending mechanism because they were not doing so.

Finally, the plaintiffs suggest that "important public policy" will be served by this Court's finding that the dividend exists outside of the traditional constitutional framework for state spending. [Pl. MSJ 44] Otherwise, they argue, Alaskans will be subject "to the ephemeral whims of the governor, who would possess the unilateral power to set the PFD each year." [Pl. MSJ 44] But this concern simply ignores the basic constitutional rules for spending state money. As the Supreme Court noted in *Knowles II*, "[t]he governor's item veto power is thus one of limitation. The governor can delete and take away, but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature."[51] Thus, the veto power

[51] *Knowles II*, 21 P.3d at 371.

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simply does not give the Governor "unilateral power" to set the dividend amount each year, or indeed, the amount of any item of spending.

In fact, it is the plaintiffs' position that threatens to upset the constitutional balance of power—not the State's—because they propose that the Legislature may enact "statutory appropriations" that circumvent the executive branch and operate entirely outside the traditional constitutional appropriations process. Although they argue that "[t]he constitution does not permit the governor to 'save' the state through fiat in cases of perceived fiscal emergency," [Pl. MSJ 45] this is actually *precisely what the constitution does permit.* Indeed, as the Alaska Supreme Court has explained "Alaska's constitutional convention delegates intended to 'create a strong executive branch with a *strong control on the purse strings of the state.*'"[52] Thus, the Governor's use of the veto to in a fiscal emergency is entirely consistent with the intent of the framers of the Alaska Constitution.

D. The Governor did not unconstitutionally delete descriptive language from the operating budget

The plaintiffs fail to support their claim that the Governor unconstitutionally deleted descriptive language from the appropriation for permanent fund dividends. The plain language of the appropriation provides for an expenditure of public revenues for the payment of permanent fund dividends.[53] The Governor properly exercised his line item veto authority to reduce the appropriation as permitted under art. II, sec. 15.

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52 *Id.* at 372 (quoting *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977)).

53 HB 256, Section 10 (2016), *available at* Exh. D.

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Despite these clear facts, the plaintiffs argue that the veto was improper because it wrongly struck descriptive language. But this is not so: the operating budget included an appropriation for the payment of dividends; the appropriation was written to authorize an expenditure of funds based on a calculation to be made by reference to a statute, AS 37.13.145(b); and in order to reduce the appropriation by veto it was necessary for the Governor to strike the language identifying the appropriation as based on the statute and instead to insert a number for the appropriation. The purpose of the appropriation—the expenditure of public funds on permanent fund dividends—was never changed.[54] Accordingly, there is no basis to conclude that the veto was improper.

V. CONCLUSION

For the reasons set forth above and in the State's opening memorandum, none of the plaintiffs' claims have merit, and the State is entitled to summary judgment.

DATED November 10, 2016.

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54 *See Knowles II*, 21 P.3d at 372.

HCS SCR 90 — Senator Kerttula moved and asked unanimous consent that the Senate concur in the House amendment to SENATE CONCURRENT RESOLUTION NO. 90. Senator Miller objected, then withdrew his objection. There being no further objection, the Senate concurred in the House amendment.

HOUSE COMMITTEE SUBSTITUTE FOR SENATE CONCURRENT RESOLUTION NO. 90 was referred to the Secretary for enrollment.

HCS SB 272 (Fin) am H — Message of April 6 was read stating the House has failed to recede from its amendment to SENATE BILL NO. 272 amended (operation of food service and concession stands by blind and handicapped persons) namely, HOUSE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 272 (Finance) amended by the House, and the Speaker has appointed the following members to a conference committee (with powers of free conference) to meet with a like committee from the Senate to consider the above bills:

Representative Itta, Chairman
Representative Sullivan
Representative H. Beirne

The President appointed the following Senate members to the above free conference committee:

Senator Chance, Chairman
Senator Ferguson
Senator Colletta

The Secretary was requested to so notify the House.

Message of April 6 was read stating the House has passed the following and transmitting same for consideration:

FIRST READING AND REFERENCE OF HOUSE BILLS

CS HB 442 (Jud) — COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 442 (Judiciary) by the Judiciary Committee, entitled:

"An Act relating to game refuges and sanctuaries."

was read the first time and referred to the Resources Committee.

CS HB 725 — COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 725 by the Community and Regional Affairs Committee, entitled:

"An Act relating to exemptions from municipal property tax; and providing for an effective date."

was read the first time and referred to the Community and Regional Affairs Committee. CS HB 725

STANDING COMMITTEE REPORTS

The State Affairs Committee has had COMMITTEE SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 1 amended (proposing amendments to the Constitution of the State of Alaska providing for a unicameral legislature) under consideration and a majority of the committee recommends it do not pass. The report was signed as follows: Senator Huber, Chairman, signed "do pass", Senators Ferguson, Miller, Meland and Colletta signed "do not pass." CS HJR 1 am

COMMITTEE SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 1 amended was referred to the Judiciary Committee.

The State Affairs Committee has had COMMITTEE SUBSTITUTE FOR SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 39 amended (amending Alaska Constitution, establishing Alaska Permanent Fund) under consideration and the committee recommends it be replaced with SENATE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 39. The report was signed as follows: Senator Huber, Chairman, signed "do pass"; Senator Colletta signed "do pass if amended"; Senator Ferguson signed "do not pass unless amended"; Senator Miller signed "do not pass" and Senator Meland signed "no recommendation." CS SS HJR 39 am

COMMITTEE SUBSTITUTE FOR SPONSOR SUBSTITUTE FOR HOUSE JOINT RESOLUTION NO. 39 amended was referred to the Resources Committee.

The Community and Regional Affairs Committee has had COMMITTEE SUBSTITUTE FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 65 amended (assessment of real property for local taxation) under consideration and a majority of the committee recommends it be replaced with SENATE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 65 and that the Senate committee substitute do pass. The committee further recommends the bill be referred to the Finance Committee. The report was signed by Senator Rodey, Chairman, and concurred in by Senator Tillion. Senator Orsini signed "do not pass unless amended." CS SS HB 65 am

The Chair stated that COMMITTEE SUBSTITUTE FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 65 would be referred to the Finance Committee.

Exhibit R
Page 1 of 1

June 28, 1976

The Honorable Jay S. Hammond
Governor
State of Alaska
Pouch A, State Capitol
Juneau, Alaska 99811

Re: SCS CSSS HJR 39 (Resources)
am S (amending the Alaska
Constitution to provide
for a permanent fund)

Dear Governor Hammond:

The subject resolution proposes two amendments to art. IX of the Alaska Constitution (amending sec. 7 and adding sec. 15) which, taken together, will establish a permanent fund from the proceeds of mineral lease rentals, royalties, royalty sales, federal mineral revenue sharing payments and bonuses.

As adopted, the resolution differs substantially from your proposal in that tax proceeds are not included and the amount to be dedicated is increased from 10 percent of the proceeds to 25 percent. In the second section, the legislature also added a proviso allowing itself to provide by law that income from the fund may be deposited in other than the general fund. However, since the only exception to the dedicated-fund prohibition in sec. 7 is the new sec. 15, it would appear that the only other place the income may be deposited is in the permanent fund.

Sincerely,

Avrum M. Gross
Attorney General

AMG:db:RWP

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

BILL WIELECHOWSKI, RICK HALFORD AND CLEM TILLION, Plaintiffs, v. STATE OF ALASKA, ALASKA PERMANENT FUND CORPORATION, Defendants	)	Case No. 3AN-16-08940 CI

CERTIFICATE OF SERVICE

I certify that on this date true and correct copies of the **State's Answering Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [and in Further Support of State's Summary Judgment Motion], Exhibits R, Exhibit S** and this **Certificate of Service** were served via email on the following:

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