



THE STATE
of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

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May 8, 2019

The Honorable Michael J. Dunleavy
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: *FY20 Education appropriation*

Dear Governor Dunleavy:

You have asked for a legal opinion on whether an appropriation of future revenues for K-12 education spending for fiscal year 2020 included in an appropriation bill enacted in 2018 was consistent with the requirements of article IX of the Alaska Constitution.

I. SUMMARY AND SHORT ANSWER

It is the opinion of the Department of Law that the appropriation is unconstitutional because it contravenes the annual budgeting process required by the Alaska Constitution and it is an improper dedication of funds. Over 25 years ago, the Alaska Supreme Court held that the Alaska Constitution mandates an annual budgeting process—"the constitutional framers believed that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented."¹ Less than two years ago the Court again emphasized this annual budgeting process in the legal dispute over whether the permanent fund dividend must be appropriated each year—"[a]bsent another constitutional amendment, the Permanent Fund dividend program must compete for *annual* legislative funding just as other state programs."² As detailed below, we believe last year's appropriation for FY20 K-12 education spending improperly binds a future legislature and future governor in contravention of the annual budgeting process and violates the constitutional prohibition against dedicating state revenues. Absent an appropriation for FY20 K-12 education in the budget bills passed

¹ *Sonneman v. Hickel*, 836 P.2d 936, 938-39 (Alaska 1992).

² *Wielechowski v. State*, 403 P.3d 1141, 1152 (Alaska 2017) (emphasis added).

this legislative session, the only appropriation for education will be one that is unconstitutional in the view of the Department of Law.

II. DETAILED ANALYSIS

A. The FY20 operating budget and education spending.

The FY19 operating budget bill included an appropriation for education spending in FY20.³ Although the legislature’s action in this regard has been referred to as “future funding,” the more appropriate description of the legislature’s action is “future appropriating.”⁴ In essence, in FY19 the legislature future appropriated future FY20 revenue for education in FY20. The three FY20 operating budget submissions (November 30, December 15, and February 15) all included a proposed appropriation for FY20 K-12 spending as well. The legislature, however, did not include these appropriations in the versions of the operating budget recently passed by each house.⁵ Although the legislature has the opportunity to include an appropriation for FY20 K-12 spending in other appropriation bills pending in the legislature, it has not done so as of the time of this opinion.

B. An annual budget has been the norm and Alaska law recognizes an annual budget process.

The Alaska Constitution, court decisions, and historical practice demonstrate that Alaska has a well-established annual budgeting model. The Alaska Constitution mandates that the governor submit a budget “for the next fiscal year” that sets forth “all proposed expenditures and anticipated income of all departments, offices, and agencies of the State.”⁶ The legislature, in turn, has the responsibility to determine how much to

³ HB 287, secs. 4 and 5(c), ch.6, SLA 2018.

⁴ In contrast to what occurred here which is attempting to appropriate future revenues, the legislature and governor in 2014 appropriated current revenues into the public education fund to be used for education funding in a future fiscal year. HB 266, secs. 28(c) and 39, ch. 16, SLA 2014.

⁵ See SCS CSSSHB 39.

⁶ Alaska Const. art. IX, § 12. The budget must be submitted “at a time fixed by law,” which the legislature has established as December 15 in the Executive Budget Act. AS 37.07.020.

spend and on what, and to pass appropriations bills authorizing that spending.⁷

The Alaska Supreme Court at various times has described an annual budget process in which legislators consider the competing demands for state funding. For example, the Court has stated that the legislature and the governor have a “joint responsibility . . . to determine the State’s spending priorities on an annual basis.”⁸ The Court, in its recent Permanent Fund dividend decision, pointed out that “[a]bsent another constitutional amendment, the Permanent Fund dividend program must compete for annual legislative funding just as other state programs.”⁹ Additionally, the Constitution’s framers appear to have envisioned an annual budgeting process for state government where a governor taking office in December would have thirty days to prepare a budget from the material that is made available to him.¹⁰

It is the Department of Law’s opinion that legislative appropriations that attempt to bypass the annual budgeting process by appropriating future revenues for future years violate the annual budgeting process mandated by the Alaska Constitution.

C. The Constitution prohibits dedicating state revenues, and one of the reasons for this provision is to ensure that all funds are available on an annual basis to decide funding priorities.

The Alaska Constitution provides that “the proceeds of any state tax or license shall not be dedicated to any special purpose.”¹¹ This prohibition on the dedication of funds is designed to “preserve control of and responsibility for state spending in the legislature and the governor.”¹² The purpose of the dedicated funds prohibition is to ensure “that the legislature would be required to decide funding priorities annually on the merits of the various proposals presented.”¹³ The Alaska Supreme Court has found that

⁷ Alaska Const. art. IX, § 13 (“No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations at the end of the period of time specified by law shall be void.”).

⁸ *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 93 (Alaska 2016).

⁹ *Wielechowski*, 403 P.3d at 1152.

¹⁰ 3 Proceedings of the Alaska Constitutional Convention 2304 (Jan. 16, 1956).

¹¹ Alaska Const. art. IX, § 7.

¹² *Sonneman*, 836 P.2d at 938.

¹³ *Id.* at 938–39.

the dedicated funds “prohibition is meant to apply broadly”¹⁴ and that it “prohibits the dedication of any source of revenue.”¹⁵

An Alaska Supreme Court decision regarding the Marine Highway System Fund (MHSF) supports the conclusion that the legislature’s forward appropriation for education is an improper dedication. In *Sonneman v. Hickel*, the Court rejected an argument that the MHSF statute violated the prohibition against dedicating funds even though its described purpose was to provide funding for marine highway operations. The Court concluded that the statute was not an improper dedication because it was phrased permissively. Although money was segregated, the statute provided that the legislature “may” appropriate money from the fund for marine highway operations. The statute did not create a legal restraint on the legislature’s ability to spend the fund for other purposes.¹⁶

Significantly, the Court found that a statutory provision limiting the authority of an executive branch department to seek money from the fund violated the prohibition against dedicated funds.¹⁷ The Court emphasized the fundamental importance that the drafters of Alaska’s Constitution placed on preserving maximum freedom for the legislature and the governor to annually determine budget priorities:

The constitutional clause prohibiting dedicated funds seeks to preserve an annual appropriation model which assumes that not only will the Legislature remain free to appropriate all funds for any purpose on an annual basis, but that government departments will not be restricted in requesting funds from all sources. As the debates make clear, all departments were to be in the same position as competitors for funds with the need to sell their viewpoint along with everyone else.¹⁸

The key to the Court’s holding in *Sonneman* is that the anti-dedication clause is violated whenever the legislature attempts to restrict the use of future revenues to a single purpose—thus making the future funds immune from either a future legislature’s

¹⁴ See *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1170 (Alaska 2009); see also, *State v. Alex*, 646 P.2d 203 (Alaska 1982) (holding that salmon assessment violated the dedicated funds prohibition).

¹⁵ *Wielechowski*, 403 P.3d at 1147.

¹⁶ *Sonneman*, 836 P.2d at 939.

¹⁷ *Id.* at 940.

¹⁸ *Id.*

appropriation power or a future executive branch's reach.

Similarly, the Court broadly interpreted the constitutional prohibition against dedicated funds in *Southeast Alaska Conservation Council v. State*.¹⁹ There, the Court concluded that a state law that transferred land to the University of Alaska and then permitted revenues from the land to be deposited in a University trust fund for use only by the University violated the constitutional prohibition against dedicated funds.²⁰ Again, the improper dedication stemmed from the legislature's attempt to restrict the use of future revenues from the land for a single purpose, placing the funds outside the appropriation power of a future legislature and beyond the reach of a future executive branch.²¹

The common theme in these and other dedicated fund cases is that a current legislature may not bind a future legislature and executive's use of future revenues. The Court has gone so far as to say, "Alaska Constitution article IX, section 7 prohibits the legislature from dedicating future revenues directly to any special purpose."²² It is the Department of Law's opinion that legislative appropriations that attempt to bypass the annual budgeting process by appropriating future revenues for future years, thereby binding future legislatures and executives, violates the prohibition against dedicated funds.

D. Making appropriations of future revenues violates the governor's constitutional right to strike or reduce appropriations by veto.

The Alaska Constitution grants the governor the power to veto bills and to strike or reduce by veto individual appropriations contained in a budget bill.²³ The Alaska Supreme Court notes that the governor's line item veto power was granted by the drafters of the Alaska Constitution because they intended "to create a strong executive branch with a strong control on the purse strings of the state."²⁴ Delegate Rivers explained that this special veto power was "a provision in regard to the appropriation and spending of

¹⁹ *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162 (Alaska 2009).

²⁰ *Id.*

²¹ *Id.* at 1170.

²² *Myers v. Alaska Hous. Fin. Corp.*, 68 P.3d 386, 387 (Alaska 2003); *see also Trustees for Alaska v. State*, 3-AN-84-12053 Civ. (Aug. 30, 1985) (holding that continuing appropriations of future revenues from the general fund to various other funds was unconstitutional).

²³ Alaska Const. art. II, § 15.

²⁴ *Thomas v. Rosen*, 560 P.2d 793, 795 (Alaska 1977).

money which would allow somewhat more power to lie in the strong executive.”²⁵ The Alaska Supreme Court has observed that historically the line item veto power originated as a reform measure to prevent legislators from “logrolling” and to give the governor the ability to limit state expenditures.²⁶

It is the Department of Law’s opinion that appropriations by the legislature of future revenues for future years at the end of one governor’s administration in order to side-step the next governor’s line item veto authority violate the Alaska Constitution by improperly circumscribing the governor’s veto power. Otherwise, in anticipation of a new governor, an outgoing legislature could appropriate future revenues for specific purposes for the next four years and negate the incoming governor’s line item veto power over those funds altogether for the entirety of his or her term. This type of end-run around the strong executive contravenes the clearly-expressed intent of the delegates and the structure of the constitution they created.

E. Forward-funding appropriations of future revenues are inconsistent with the Executive Budget Act.

In addition to the constitutional problems outlined above, these appropriations are inconsistent with Alaska statutes. The Executive Budget Act sets forth various responsibilities of the governor and the legislature including the obligation of the governor to submit by December 15 a budget and appropriation bills “for the succeeding fiscal year that must cover all estimated receipts, including all grants, loans, and money received from the federal government and all proposed expenditures of the state government.”²⁷ The proposed budget expenditures “may not exceed estimated revenue for the succeeding fiscal year.”²⁸ Among the expenditures that must be included in the proposed budget are expenditures for each agency’s “annual facility operations, annual maintenance and repair.”²⁹ The Executive Budget Act’s statement of policy includes a requirement that there be public participation “in the development of the annual budget.”³⁰

A legislature’s attempt to appropriate future revenues for future years violates the Executive Budget Act because the future appropriation would eliminate the governor’s

²⁵ 3 Proceedings of the Alaska Constitutional Convention 1741 (Jan. 11, 1956).

²⁶ *Alaska Leg. Council v. Knowles*, 21 P.3d 367, 372 and n.33 (Alaska 2001).

²⁷ AS 37.07.020(a).

²⁸ AS 37.07.020(c).

²⁹ AS 37.07.020(e).

³⁰ AS 37.07.010.

participation in the budgeting process with respect to those future revenues (particularly if there is a new governor coming into office).

III. CONCLUSION

Alaska's constitutional framework is based on each legislature and governor assessing Alaska's yearly needs and the revenues available to meet those needs. Each branch holds power over state spending—the legislature by appropriation and the governor by line-item veto. Moreover, the Alaska Constitution contains a clear prohibition on the dedication of any state revenues “to any special purpose.” Given these basic constitutional rules, it is our opinion that an appropriation that seeks to expend future money (in contrast to an appropriation authorizing revenues that have been received by the state in the current fiscal year to be spent in a future fiscal year) is unconstitutional. Such future appropriations violate the annual budgeting process mandated by the Constitution. Further, such appropriations violate the anti-dedication clause. And, when the future appropriations span from an out-going governor to an incoming new governor, it is our opinion that the future funded appropriations unconstitutionally circumscribe the new governor's line item veto power.

It makes no difference to the constitutional analysis what degree of importance might be placed on education spending. As the Supreme Court pointed out in *Southeast Alaska Conservation Council*:³¹

[D]edicating funds for a deserving purpose or a worthy institution is an attractive idea. Our constitutional founders were aware of the power of the dedication impulse. They decided that the good that might come from the dedication of funds for a particular purpose was outweighed by the long-term harm to state finances that would result from a broad application of the practice.³²

Sincerely,



Kevin G. Clarkson
Attorney General

³¹ 202 P.3d 1162 (Alaska 2009).

³² *Id.* at 1176-77.