IN THE SUPREME COURT OF THE STATE OF ALASKA

BILL WIELECHOWSKI, RICK HALFORD, and CLEM TILLION, Appellants, v. STATE OF ALASKA, ALASKA PERMANENT FUND CORPORATION, Appellees.	Supreme Court No. S-16558

Superior Court Case No. 3AN-16-08490 CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT ANCHORAGE,
THE HONORABLE WILLIAM F. MORSE, PRESIDING

BRIEF OF APPELLANTS BILL WIELECHOWSKI, RICK HALFORD, AND CLEM TILLION

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the State of Alaska,

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MARILYN MAY, CLERK
BY_____

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AUTHORITIES PRINCIPALLY RELIED ON

ALASKA CONST. article II, section 15. Veto.

The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return any vetoed bill, with a statement of his objection, to the house of origin.

ALASKA CONST. article IX, section 7. Dedicated Funds.

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 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. article IX, section 15. Alaska Permanent Fund.

At least twenty-five percent 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, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

AS 37.13.140. Income.

Net income of the fund includes income of the earnings reserve account established under AS 37.13.145. Net income of the fund 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. Income available for distribution equals 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.

AS 37.13.145. Disposition of Income.

(a) 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. Money in the account shall be invested in investments authorized under AS 37.13.120.

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

(c) After the transfer under (b) of this section, the corporation shall transfer from the earnings reserve account to the principal of the fund an amount sufficient to offset the effect of inflation on principal of the fund during that fiscal year. However, none of the amount transferred shall be applied to increase the value of that portion of the principal attributed to the settlement of State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District) on July 1, 2004. The corporation shall calculate the amount to transfer to the principal under this subsection by

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

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

(3) applying that rate to the value of the principal of the fund on the last day of the fiscal year just ended, including that portion of the principal attributed to the settlement of State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District).

(d) Notwithstanding (b) of this section, income earned on money awarded in or received as a result of State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District), including settlement, summary judgment, or adjustment to a royalty-in-kind contract that is tied to the outcome of this case, or interest earned on the money, or on the earnings of the money shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund or for transfers to the principal under (c) of this section, and shall be annually deposited into the Alaska capital income fund (AS 37.05.565).

AS 43.23.025. Amount of dividend

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

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

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

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

(C) less the amount necessary to pay prior year dividends from the dividend fund in the current year under AS 43.23.005(h), 43.23.021, and 43.23.055(3) and (7);

(D) less the amount necessary to pay dividends from the dividend fund due to eligible applicants who, as determined by the department, filed for a previous year's dividend by the filing

deadline but who were not included in a previous year's dividend computation;

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

(2) determining the number of individuals eligible to receive a dividend payment for the current year and the number of estates and successors eligible to receive a dividend payment for the current year under AS 43.23.005(h); and

(3) dividing the amount determined under (1) of this subsection by the amount determined under (2) of this subsection.

AS 43.23.045. Dividend Fund.

(a) The dividend fund is established as a separate fund in the state treasury. The dividend fund shall be administered by the commissioner and shall be invested by the commissioner in the same manner as provided in AS 37.10.070.

(b) [Repealed, Sec. 29 ch 134 SLA 1992].

(c) [Repealed, Sec. 24 ch 99 SLA 1985].

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

TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

The superior court issued a final written order and judgment disposing of all claims on November 22, 2016. The Alaska Supreme Court has jurisdiction under AS 22.05.010.

STATEMENT OF THE ISSUES FOR REVIEW

1. The Superior Court erred by not ordering the Appellees to transfer from the Permanent Fund Earnings Reserve Account to the Dividend Fund established under AS 43.23.045, 50 percent of the income available for distribution under AS 37.13.140.

2. The Superior Court erred by not finding the Appellees violated AS 37.13.145(b), which was enacted pursuant to Alaska Const. article IX, section 15.

3. The Superior Court erred in denying Appellants' Motion for Summary Judgment and in granting the Appellees' Motion for Summary Judgment.

I. STATEMENT OF THE CASE

This case presents an important legal question meriting a ruling by the Alaska Supreme Court regarding whether Alaska Permanent Fund Dividends, distributed annually to individual Alaskans, are protected as a special dedication. The issue of fully funding dividends according to an enacted statute had never arisen until 2016 when Governor Bill Walker, concerned about Alaska's fiscal crisis, vetoed nearly half of the dividend funding appearing in the legislature's budget, resulting in 2016 dividend payments of $1,022. If this Court overturns the superior court's decision, there is more than sufficient funding available to provide the people of Alaska their due permanent fund dividends.[1]

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[1] The account from which the payments would be drawn contains $10.3 billion today. Alaska Permanent Fund Corporation, *Permanent Fund Up 4.50% for Fiscal Year 2017* (2/7/17),

On November 2, 1976 Alaska voters passed Ballot Proposition No. 2, which changed the Alaska Constitution to (1) add article IX, section 15, permanently setting aside a portion of the state's natural resource revenues into the "Alaska Permanent Fund," and (2) create an exception to the dedicated funds clause of ALASKA CONSTITUTION article IX, section 7 for article IX, section 15.[2] [Exc. 240] The permanent fund principal is the corpus of the fund established by section 15. Section 15 requires at least 25 percent of certain revenues produced from oil and mineral development in the state be placed in the permanent fund.[3] The permanent fund principal is invested in "income-producing investments" and cannot be withdrawn by the state except by constitutional amendment.[4]

The income produced from investing the principal is deposited into a separate account within the permanent fund called the earnings reserve account.[5] The funds in the earnings reserve account are also invested.[6] The permanent fund's net income each year equals the income generated by returns on investments from both the principal and the earnings reserve.[7] As of December 31, 2016 the principal contained about $45 billion while

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available at
http://www.apfc.org/home/Media/pressroom/20170201_APFC%20Q2%20FY17.pdf

2 Ballot Proposition No. 2, Permanent Fund From Non-Renewable Resources Revenue, Constitutional Amendment (1976).

3 ALASKA CONST. art. IX, § 15.

4 *Id.*; AS 37.13.120(a).

5 AS 37.13.145(a) ("[t]he 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.").

6 *Id.*

7 AS 37.13.140.

the earnings reserve contained $10.3 billion.[8] Twenty-one percent of the net income for the previous five fiscal years is considered "income available for distribution" from the principal.[9] The income available for distribution in 2016 was about $2.724 billion.[10]

In 1980 the legislature enacted a program that would pay eligible Alaskans a dividend from the permanent fund.[11] The U.S. Supreme Court struck down that program's residency requirements in 1982.[12] In 1982 the legislature revised the program to conform with the Supreme Court decision and provide Alaska residents am annual permanent fund dividend (PFD).[13] Since 1982 the substance of the law has remained mostly unchanged.

Pursuant to AS 37.13.145(b), each year the Alaska Permanent Fund Corporation (the corporation) must calculate "50 percent of the income available for distribution" and then perform a transfer of that money to the dividend fund, from which PFDs are paid.[14] The dividend fund is a separate account in the state treasury that is administered by the commissioner of revenue for the purpose of disbursing dividends to eligible Alaska residents.[15] Once the funds are transferred from the earnings reserve account to the

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8 Alaska Permanent Fund Corporation, *Permanent Fund Up 4.50% for Fiscal Year 2017* (2/7/17), *available at* http://www.apfc.org/home/Media/pressroom/20170201_APFC%20Q2%20FY17.pdf

9 AS 37.13.140.

10 CCS HB 256, 29th Leg., 4th Spec. Sess., § 10, Ch. 3, 4SSLA 2016 (demonstrating amount for dividends, which is 50% of the amount available for distribution).

11 Ch. 21, SLA 1980.

12 *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

13 Ch. 102, § 1, SLA 1982.

14 AS 43.23.025.

15 AS 43.23.045(a).

dividend fund, the Department of Revenue issues PFD payments to eligible Alaska residents based on a statutory formula.[16]

On June 28, 2016 the governor used his veto authority to reduce certain items in the state operating budget, including the transfer of funds from the earnings reserve account to the dividend fund.[17] The legislature did not convene in joint session to override any of the governor's vetoes.[18] On August 10 Senator Bill Wielechowski sent a letter to Angela Rodell, Executive Director of the Alaska Permanent Fund Corporation, requesting that the corporation transfer the additional vetoed funds.[19] [Exc. 31] On August 12 the director responded that the corporation would not transfer the funds.[20] [Exc. 313]

The Appellants filed a Complaint for Declaratory and Injunctive Relief on September 16, 2016.[21] [Exc. 1] The First Claim for Relief alleged the corporation was required under AS 37.13.145(b) to transfer an estimated $1,362,000,000 from the earnings reserve account to the dividend fund at the end of Fiscal Year 2016, which ended on June 30, 2016. [Exc. 21] Notwithstanding this statutory obligation, the corporation transferred only $695,650,000. [Exc. 21] The Second Claim for Relief alleged that the corporation's reliance upon the

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16 AS 43.23.025.

17 *See* Transmittal Letter from Bill Walker, Governor, State of Alaska, to Kevin Meyer, President of the Senate, Alaska State Legislature (June 28, 2016).

18 An override would require a three-fourths majority vote. ALASKA CONST. article II, section 16.

19 Letter from Senator Bill Wielechowski, Alaska State Legislature, to Angela Rodell, Executive Director, Alaska Permanent Fund Corporation (Aug. 10, 2016).

20 *See* Letter from Angela Rodell, Executive Director, Alaska Permanent Fund Corporation, to Senator Bill Wielechowski, Alaska State Legislature (Aug. 12, 2016).

21 Complaint at 1, *Wielechowski v. State of Alaska, Alaska Permanent Fund Corp.*, No. 3AN-16-08940 CI (Alaska Super. Ct. Sept. 16, 2016).

governor's veto of these funds in its decision to not transfer these funds was in error because this transfer of funds did not constitute an appropriation, and was thus not subject to veto. [Exc. 21-22] The Third Claim alleged that the governor unconstitutionally deleted language when he vetoed descriptive language in the budget bill, which had the effect of vetoing a statute. [Exc. 22-23]

The parties agreed that in lieu of an answer each side would file simultaneous cross summary judgment briefs and would answer briefs simultaneously.[22] Oral argument was held on November 17, 2016 after which Judge Morse ruled from the bench, orally dismissing the Appellants' Motion for Summary Judgment and granting the Appellees' Motion for Summary Judgment. [Tr. 91-93] On November 22, 2016, Judge Morse issued a written decision dismissing the Appellants' Motion for Summary Judgment and granting the Appellees' Motion for Summary Judgment and entered a Final Judgment dismissing the Appellants' case. [Exc. 178, 190] On December 20, 2016, the Appellants filed this appeal.

II. STANDARD OF REVIEW

This Court "review[s] a grant or denial of summary judgment de novo."[23] "Questions of constitutional and statutory interpretation . . . are questions of law to which [this Court] appl[ies] [its] independent judgment[,]. . . adopt[ing] the 'rule of law that is most

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22 Joint Motion for Scheduling Order with Expedited Consideration of Cross Summary Judgment Motions at 1, *Wielechowski v. State of Alaska, Alaska Permanent Fund Corp.*, No. 3AN-16-08940 CI (Alaska Super. Ct. Oct. 4, 2016).

23 *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 90 (Alaska 2016) (citing *State v. Schmidt*, 323 P.3d 647, 654 (Alaska 2014)).

persuasive in light of precedent, reason, and policy.' "[24] "Legislative history and the historical context, including events preceding [a] ratification, help define [a] constitution[al] provision."[25]

III. ARGUMENT

A. The Policy Rationale Underlying The Dividend Program Provides Compelling Justification For Its Continued Protection.

The legislature's rationale for enacting the permanent fund dividend program was guided by Alaska's article IIX, section 2 constitutional mandate: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people."[26] There are arguably fewer other means to better effect a "maximum benefit" for the people than providing those people a *direct benefit*.[27] Thus motivated by a belief that "some system must be effected whereby everyone gets a portion of the state's oil wealth,"[28] and empowered by its constitutional authority to provide so by law,[29] the legislature sought to devise a statutory dividend program

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24 *Id.* (citing *State v. Schmidt*, 323 P.3d 647, 654 (Alaska 2014); quoting *Se. Alaska Conservation Council v. State*, 202 P.3d 1162, 1167 (Alaska 2009)).

25 *Id.* (citing *State v. Alex*, 646 P.2d 203, 208 (Alaska 1982)).

26 See the "Policy, Purposes and Findings" section of the first dividend distribution statutes, pronouncing: "It is the duty and policy of the state with respect to the natural resources belonging to it and the income derived from those natural resources to provide for their use, development, and conservation for the maximum benefit of the people of the state." Ch. 21, § 1, SLA 1980.

27 *C.f. id.*; Minutes of Senate Finance Committee, Senate Bill 842, at 130-31 (testimony of Rep. Terry Gardiner) (Apr. 8, 1982) (explaining the purpose of 1982 enactment to avoid excessive government spending that does not benefit all Alaskans equally).

28 Minutes of Senate Finance Committee, Senate Bill 842, at 131 (testimony of Rep. Terry Gardiner) (Apr. 8, 1982).

29 *See* ALASKA CONST. art. IX, § 15.

drawing from the earnings of the Alaska Permanent Fund. The enactment was to ensure the "equitable distribution" of a portion of Alaska's energy wealth—already rightfully "belonging to them as Alaskans"—would flow directly to the people.[30] The legislature's sense of duty entrusted to it guided its goal of "fairly compensate[ing] . . . state resident[s]"[31] for their share of the "tremendous wealth bestowed upon Alaska by development of [its] oil and mineral resources."[32]

Central to the implementation of the dividend distribution plan was the legislature's concern that Alaskans received "first call" on the available permanent fund earnings "*regardless of what other uses the income is put to*."[33] This feeling that Alaskans deserved to be the *primary benefactors* of the available fund income before any other government purposes stemmed from the realization that state spending at the time was becoming massive yet "does not benefit all residents equally."[34] Observing that "[g]overnment spending trickles down to citizens as though processed through a sieve," the legislature was concerned with a risk of increased income "disparity" often resulting from amassing oil wealth—like that occurring in other

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30 Ch. 21, § 1, SLA 1980. The Appellants respectfully request this Court take judicial notice of certain legislative facts of this case. "[W]henever a tribunal is engaged in the creation of law or of policy, it may need to resort to legislative facts, whether or not those facts have been developed on the record." *State v. Erickson*, 574 P.2d 1, 4 n.14 (Alaska 1978) (emphasis added) (quoting K. C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L.R. 364, 402-10 (1942)).

31 Ch. 21, § 1, SLA 1980.

32 *Williams v. Zobel*, 619 P.2d 448, 453 (Alaska 1980), *rev'd on other grounds* in *Zobel v. Williams*, 457 U.S. 55, 64 (1982).

33 House Finance Committee, Committee Letter of Intent HCS CSSB 842, Minutes of House Finance Committee, Senate Bill 842, at 736 (May 14, 1982).

34 Minutes of Senate Finance Committee, Senate Bill 842, at 130-31 (testimony of Rep. Terry Gardiner) (Apr. 8, 1982).

countries where only those of more moderate and affluent income levels tended to reap benefits.[35] Other programs already attempted by the legislature had resulted in "upper incomes continu[ing] to rise, [while] those in lower levels remain[ed] in place."[36] The dividend was seen as a means of ensuring that "everyone gets something," and as empowering "individuals to make their own decisions as to how the money would be spent."[37] As if foretelling the future, in 1982 the House Finance Committee advised that income inequality in unprosperous economic times was a significant reason it urged the enactment:

> Economists . . . have predicted an economic slowdown in Alaska resulting from a decline in state spending and lending caused by recent drops in world oil prices. Economists appearing before the Legislature and other public forums in Alaska have argued that direct distribution of a portion of state revenues to all Alaskans—such as that embodied in the Permanent Fund dividend program—is the most efficient method of increasing Alaskans' incomes.[38]

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35 *Id.*

36 *Id.*

37 *Id.*

38 House Finance Committee, Committee Letter of Intent HCS CSSB 842, Minutes of House Finance Committee, Senate Bill 842, at 736 (May 14, 1982).

The legislature also felt that because Alaska's natural resources belonged to them, the people "need[ed] to see how they have an interest in the [permanent] fund." Minutes of House Finance Committee, Senate Bill 684, at 713 (comments of Rep. Oral Freeman) (May 11, 1982). To avoid "siphoning" the fund out through usual government expenditures to the point that "the public will see there is nothing in it for them," it was important to create a "direct interest" and "personal stake" in the fund. *Id.*; Minutes of Senate Finance Committee, Senate Bill 842, at 134 (testimony of Tom Williams, Commissioner of Revenue) (Apr. 8, 1982); *Id.* at 133 (testimony of Susan Burke, Gross & Burke, and former Assistant Attorney General, Department of Law). "Giving individuals back their money" was a way to encourage engagement in the management and investment of the fund itself. If the PFD funding could be reduced or eliminated through veto or failure to appropriate—the people would have *no* stake in the permanent fund; this policy rationale would be fully undermined.

The policy concerns leading to the PFD program are as valid today as they were nearly four decades ago. A reduction in dividend payments disproportionately affects Alaskans of lesser means, modest fixed incomes, and larger families who rely on multiple dividends. A flat reduction acts as a tax by which those of lower income naturally suffer a burden worse than Alaska's wealthier citizens. A recent report by the University of Alaska's Institute of Social and Economic Research (ISER) even explained that in 2015, permanent fund dividends "lifted about 25,000 Alaskans out of poverty."[39] In 2000 the distribution to Alaskans reduced the number of its residents in poverty by almost 40%.[40] Not surprisingly then, "reducing or eliminating PFDs to help fill [Alaska's] budget gap will significantly increase the number of Alaskans below the poverty threshold."[41]

In light of the historic policy rationales underlying the dividend program, there seems special irony to a veto of a funding transfer that results in a reduction of PFD disbursements to individual Alaskans. If a predominant rationale of the program was to ensure Alaskans—especially those in need—acquired part of the state's oil wealth ahead of any other government expenditures, then a veto of the funding to free up money for general spending purposes subverts that goal. In the same vein, if the legislature could refuse or fail to appropriate those funds as statutorily commanded in order to spend the money on other things, the same frustration of policy would occur.

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39 Matthew Berman & Random Reamey, Institute of Social and Economic Research, University of Alaska Anchorage, *How PFDs Reduce Poverty in Alaska*, at 1 (December 2016), *available at* http://www.iser.uaa.alaska.edu/Publications/2016_12-PFDandPoverty-Summary.pdf.

40 *Id.* at 3.

41 *Id.* at 4.

It is no secret that Alaska is confronting a fiscal crisis of alarming proportions.[42] But as of now, at $10.3 billion plus another $3.43 billion in 2017 expected income, there are plenty of funds in the earnings reserve to restore Alaskans the remainder of the $666,350,000 they may be rightfully owed.[43] But if the governor's veto stands, and if the legislature is deemed authorized to discretionarily appropriate the funding—then either of those two branches of government could conceivably exercise authority to reduce the dividend payments by up to 100%. Doing so because it is easy, merely to gain access to appropriable funds without a sound fiscal plan, could quickly result in exhaustion of those freed up funds as well—and a complete deprivation of PFDs altogether. Considering the enacting legislature's express policy to divert funds *away* from government spending directly into the hands of Alaskans, such spending and depletion appears an incongruous, harsh punishment on the people due to the *government's* errors in management of the state treasury.

Moreover Alaskans have been asked their view before of accessing the earnings reserve for government spending that might risk their PFDs, and overwhelmingly rejected the idea. Voters in 1999 were asked by an advisory vote: "After paying annual dividends to residents and inflation-proofing the permanent fund, should a portion of permanent fund investment

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42 *See* Becky Bohrer, *Alaska Governor Urges Action to Address Fiscal Crisis*, DAILY NEWS MINER (Jan. 18, 2017), *available at* http://www.newsminer.com/news/alaska_news/alaska-governor-urges-action-to-address-fiscal-crisis/article_d4d726a4-de08-11e6-a551-1777f7a6ccd1.html.

43 Alaska Permanent Fund Corporation, *Permanent Fund Up 4.50% for Fiscal Year 2017* (2/7/17), *available at* http://www.apfc.org/home/Media/pressroom/20170201_APFC%20Q2%20FY17.pdf; Alaska Permanent Fund Corporation, *Alaska Permanent Fund – Fund Financial History & Projections* (1/30/17) (reflecting projected mid-range "accounting net income"), *available at* http://www.apfc.org/_amiReportsArchive/Proj%20201701.pdf.

earnings be used to help balance the state budget?"[44] In an official opposition statement, Jay Hammond—who served as governor at the time of the permanent fund constitutional amendment and during the creation of the PFD program—explained that the proposal amounted to a "dividend tax" that was "regressive, unfair and economically imprudent," for which "[c]hildren and other Alaskans with only [dividend] income would pay the same amount as mulitmillionaires."[45] He stressed that pressures "to extract new sources of wealth to offset [dividend cuts]" and "to cut spending" would disappear."[46] He declared: "Make no mistake, the existing law *sets your current dividend amount*."[47] He emphasized that a "yes" vote would "only decrease your dividend," a reduction anticipated then to be by $516.[48] And he urged, "please consider other than your self interest and place statewide interests paramount."[49]

The people overwhelmingly rejected the proposal; 83% sent the clear message to the legislature not to jeopardize their PFDs.[50] In addition to its potential illegitimacy then, the

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44 Official Election Pamphlet, Special Advisory Vote – Ballot Language (1999), *available at* http://www.elections.alaska.gov/doc/oep/1999/ballang.htm.

45 Jay S. Hammond, Official Election Pamphlet, Statement of Opposition (1999), *available at* https://www.elections.alaska.gov/doc/oep/1999/constmt.htm.

46 *Id.*

47 *Id.* (emphasis added).

48 *Id.*

49 *Id.* Proponents of an affirmative result on the vote claimed it would "guarantee your dividend for decades to come and put Alaska back on the road to financial responsibility," while a negative result would mean a "los[s] of your dividend, [as] [i]t will quickly disappear and the Permanent Fund will shrivel in value." Steve Cowper, Walter J. Hickel, & Bill Sheffield, Official Election Pamphlet, Statement in Support (1999), *available at https://www.elections.alaska.gov/doc/oep/1999/prostmt.htm*. Today, we know that these statements were proved wrong.

50 Election Summary Report, State of Alaska Special Election, Official Results, September 17, 1999.

governor's 2016 veto operates both to avoid seeking the people's input today and essentially as an end run around the message they have already once expressed.

As this Court has acknowledged, it has "not rule[d] out the possibility that [particular] statutes [are] exempt from the dedicated funds clause."[51] Because the governor had never before vetoed the dividend funding, and the legislature's budget always reflected the statutory funding in full, the fundamental issue of this case has never been adjudicated. But if the PFDs warrant protection by virtue of a constitutionally and statutorily authorized dedication, there may be no more meritorious exception to the dedicated funds clause in Alaska's history.

B. The Superior Court Erred In Not Ruling The Alaska Constitution Authorizes The Dedication Of Permanent Fund Income.

The plain language, voter understanding and intent, and the legislative intent of the permanent fund amendment demonstrate that Alaska Constitution article IX, section 7 and article IX, section 15 together allow the special dedication of the fund earnings for permanent fund dividends. When interpreting the Alaska Constitution, this Court has conveyed that "provisions should be given a reasonable and practical interpretation in accordance with common sense," and that "words are to be given their natural, obvious, and ordinary meaning" unless context indicates otherwise.[52] This Court has also cautioned it is "not vested with the authority to add missing terms or hypothesize differently worded provisions in order to reach

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51 *State of Alaska v. Ketchikan Gateway Borough*, 366 P.3d 86, 100 (Alaska 2016).

52 *Hickel v. Halford*, 872 P.2d 171, 176 (Alaska 1994) (citing *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992).

a particular result," advising that the analysis of a constitutional term "begins with, and remains grounded in, the words of the provision itself."[53]

The Court further examines "the plain meaning and purpose of the provision and the intent of [its] framers," with special "concern for interpreting the constitution[al] [provision] as the people ratified it."[54] "[The Court's] task is to identify the meaning that the people probably placed on the term."[55] "Normally . . . deference to the intent of the people requires '[a]dherence to the common understanding of words.' "[56] Consequently, the Court is "generally reluctant to construe abstrusely any constitutional term that has a plain ordinary meaning."[57]

1. The plain language of the Alaska Constitution enabled the legislature's special dedication of permanent fund income.

With the passage of the amendment creating the permanent fund in the Alaska Constitution, an exception to the dedicated funds clause was carved out, permitting the dedication of the fund income. Examining the "ordinary meaning" of the amendments verifies they enabled the legislature to do so. In 1976 the Alaska Constitution was amended by the people to establish the Alaska Permanent Fund and provide for the use of its earnings under a new section, article IX, section 15.[58] [Exc. 240] To avoid its interference with section

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53 *Hickel v. Cowper*, 874 P.2d 922, 927 (Alaska 1994)

54 *Id.* at 926 (citing *Arco Alaska*, 824 P.2d at 710).

55 *Id.* at 928 (citing *Halford*, 872 P.2d at 176).

56 *Id.* at 926 (citing *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169 (Alaska 1991).

57 *Id.* There is an exception when a term "has acquired a peculiar meaning by statutory definition or judicial construction." *Id.*

58 *See* Ballot Proposition No. 2, Permanent Fund From Non-Renewable Resources Revenue, Constitutional Amendment (1976). Article IX, section 15 provides in full:

15, the voters simultaneously amended article IX, section 7, the dedicated funds clause.[59] [Exc. 240]. That clause, otherwise prohibiting dedications, was amended to include the exception: "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 . . . .*"[60]

The "natural, obvious, and ordinary meaning" of the words "except as provided in section 15 of this article" is that the *entirety* of article IX, section 15 is excluded from the section 7 prohibition against dedicating funds—including the express ability to "otherwise provide[ ] by law" for the disposition of permanent fund income.[61]

The State argued below that the exception applies *only* to the first sentence of section 15—the pledge of revenue into the permanent fund—and not to the second sentence providing for the use of the fund income. [Exc. 99] But there is no indication that the exception applies to only *part* of section 15. That reading defies the plain meaning of section

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> At least twenty-five percent 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, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

59 *Id.* Article IX, section 7 states:

> 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 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.

60 ALASKA CONST. art. IX, § 7 (emphasis added).

61 ALASKA CONST. art. IX, § 15.

7; had the drafters intended the exception language to apply only the first sentence of section 15, section 7 would have clearly stated that. Interpreting the section 7 exception as only referencing the first sentence of section 15 requires construing the words "except as provided" *abstrusely*, deviating from the "plain ordinary meaning."

Moreover to interpret the dedicated funds clause exception as pertaining merely to the first sentence of section 15 would require this Court to add explicitly excluded "missing terms" and to "hypothesize differently worded provisions"—terms or provisions declaring the exception applicable solely to the designation of funds *into* the permanent fund—which this Court will not do.[62] Accordingly by its natural language, section 7 imparts its dedicated funds exception to the entirety of the article IX, section 15 permanent fund provision.[63] With the

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[62] *See Hickel* at 927 (explaining the Court is "unwilling to add 'missing terms' to the Constitution or to interpret existing constitutional language more broadly than intended").

[63] The parties had not disputed that the permanent fund income is state revenue that without article IX, section 15's exemption, would be subject to the dedicated funds prohibition of article IX, section 7. In *State v. Alex*, this Court interpreted the "proceeds of any tax or license" to mean "the sources of any public revenues," including a "tax, license, rental, sale, bonus royalty, [or] royalty," as well as "special assessments." 646 P.2d 203, 210 (Alaska 1982) (quoting Op. Atty. Gen. No. 9 at 24 (May 2, 1975)). *See also Southeast Alaska Conservation Council v. State*, 202 P.3d, 1162, 1170-72 (Alaska 2009) (construing dedicated funds prohibition as applying to revenue from the sale of land held by the University of Alaska).

But another "reasonable and practical" plain reading of the exception to section 7 would construe it as expressly exempting section 15's "income" from the *meaning* of section 7's "proceeds" of the state taxes or licenses, so that the income could be dedicated. This would not work an unnatural reading of section 7 because arguably it is ambiguous whether investment income—as in earnings or interest—generated from section 15's "mineral lease rentals, royalties, royalty sale proceeds, federal mineral sharing payments and bonuses" would be considered "[t]he proceeds of any state tax or license" under section 7.

The term "proceeds" of section 7 is susceptible to different meanings; the exception could help clarify it in the permanent fund context. In other words, if the definition of proceeds might *include* the income derived from the section 15 state taxes or licenses—the exception applies. But in a likewise manner, if proceeds would *preclude* such income, the exception conclusively resolves that. Therefore, to any extent such income *are* proceeds, the

exception, the legislature was expressly authorized to "otherwise provide[ ] by law" for the dedication of the permanent fund income, avoiding the general fund and bypassing the appropriations process.[64]

2. The voters assuredly recognized the constitutional amendments would permit the legislature to dedicate the permanent fund income for a special purpose and avoid appropriations.

But even more compelling than the plain reading of article IX, sections 7 and 15—and more important to the analysis—is the examination of the probable intent of the voters. The

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exception would apply. This reading is not strained when considering two important things: (1) By placing the Alaska Permanent Fund in the Constitution in the first place, conceivably the section 15 state taxes or license proceeds directed to the fund themselves are already protected, not requiring an explicit exception as a "dedicat[ion] to a[ ] special purpose," and (2) At the time, this Court had never been asked to construe the meaning of the term "proceeds"—which was not first done until *Alex* in 1982. For any concern whether the income derived from the permanent fund would be considered "proceeds" that could not be dedicated, creating the exception would avoid that possibility.

It is possible that the segregated interest from the permanent fund is already not the "proceeds of any state tax or license." This Court has acknowledged that constitutional delegates considered the phrase "all revenues" in lieu of "proceeds of any state tax or license" before adopting the latter because "any prohibition on dedicated funds required reasonable limits," and quoted one delegate as observing that the framers had "go[ne] to the *tax itself* and sa[id] the *tax shall not be earmarked*." *State v. Ketchikan Gateway Borough*, 366.P.3d 86, 93 (Alaska 2016) (emphasis added) [hereinafter *KGB*].

[64] A contrary reading risks rendering "unless otherwise provided by law" nugatory. This Court has stated that "(t)he general rule in constitutional construction is to give import to every word and make none nugatory." *Hootch v. Alaska State Operated School System*, 536 P.2d 793, 801 (Alaska 1975). If the only option for providing "by law" was to create accounts or funding mechanisms that would still be subject to appropriation, those accounts and funding mechanisms could simply draw from the general fund under the section 15 default term; it would be wholly unnecessary to have permitted anything to be "provided by law."

election on the constitutional amendments occurred November 2, 1976.[65] The amendments were approved by the electorate, with 66% voting in support.[66]

Likely the best way to "identify the meaning that the people probably placed on" [67] the amendments would be to consider materials known to them at the time of the proposition election. [68] And arguably the best, most pure evidence giving insight into voter intent is the information supplied to them *in the poll booth*. "As the people ratified"[69] the amendments in the polls, they were provided with only a ballot summary—not the constitutional language—and the summary (1) did not manifest any section 7 and 15 phrasing uncertainty, and (2) definitively demonstrated that permanent fund income could be dedicated.

The voters at the polls were given a narrative appearing on the ballot itself, where a voter would mark a box "FOR" or "AGAINST" ratification. [70] For "Ballot Proposition No. 2," the ballot summary provided in full:

> This proposal would amend the Constitution of the State of Alaska by amending Article IX, Section 7 (Dedicated Funds) and add a new Section to Article IX (Alaska Permanent Fund) of the Alaska Constitution. It would establish a constitutional permanent fund into which at least 25 percent of all

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65 *See* State of Alaska Official Election Pamphlet, General Election November 2, 1976.

66 *See id.*

67 *Hickel*, 874 P.2d at 926 (citing *Arco Alaska, Inc. v. State*, 824 P.2d at 710).

68 *See Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 193 (Alaska 2007) ("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.").

69 *Hickel*, 874 P.2d at 927.

70 *See* Sample General Election Ballot, State of Alaska Official Election Pamphlet, General Election November 2, 1976 at 67. Before the superior court, the State provided a different ballot summary that had also been included in the State Election Pamphlet for informational purposes. [Exc. 240] Although similarly phrased and also helpful to the Appellants' argument, there are nuanced differences to what appeared on the actual ballot, and the actual ballot demonstrates language even more beneficial for the Appellants.

> mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State would be paid. The principal of the fund would be used only for income-producing investments permitted by law. The income from the fund would be deposited in the State's General Fund and be available to be appropriated for the State unless law provided otherwise.[71] [Exc. 314A]

First, because the voters were not given the language of the constitutional amendments at the polls, either article IX, sections 7 or 15, a typical voter likely would have been unaware of the phrasing of the exception language or how to interpret it in relation to section 15. And as demonstrated, the summary presents only that changes would "amend Article IX, Section 7 (Dedicated Funds)" then simply "add a new Section" for the "Alaska Permanent Fund."[72] Relying on this summary, the people would have anticipated that any dedicated funds restrictions would be rendered ineffective against the entirety of section 15, the Alaska Permanent Fund clause.

Second, the substance of the information provided actually leaves far less doubt that the funds could be dedicated for a special purpose like dividends. The ballot narrative is critical to the "meaning the people probably placed"[73] on the amendments. By the summary, the voters were informed of essentially two options for the use of permanent fund income: It could be "deposited in the State's General Fund *and be available for appropriation for the State*," or in the alternative, the use would be determined as "*law provided otherwise*."[74]

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71 Sample General Election Ballot, State of Alaska Official Election Pamphlet, General Election November 2, 1976 at 67

72 *Id.*

73 *Hickel*, 874 P.2d at 928 (citing *Halford*, 872 P.2d at 176).

74 Sample General Election Ballot, State of Alaska Official Election Pamphlet, General Election November 2, 1976 at 67.

This Court has advised that as for a ballot summary, while "details may be omitted or in many instances covered by broad generalizations," a proper summary is "complete enough to serve its purpose of giving the voter . . . present in a polling booth a fair and intelligent conception of the main outlines of the measure."[75] As used in the ballot summary here, average persons would "common[ly] understand[ ]"[76] concepts like government "general funds" and "appropriations" made "for the state." Those average persons would, by inference, recognize that the governor's veto authority would attach to such appropriations.[77] Average persons also likely understand that "law provid[ing] otherwise" implicates lawmaking procedures, as by the legislature.[78] And average persons would understand that "unless" sets up a distinction, signaling that a change of conditions could lead to a different result.

In this case then, the narrative did generalize that one possibility for use of the fund income was, broadly, the prospect of *providing* for its use by *law*. But what is most apparent about the ballot phrasing giving voters an "intelligent conception of the main outlines of the measure" was that it effected the logical inference that the income—if not "deposited in the

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75 *Alaskans for Efficient Gov't v. Alaska*, 52 P.3d 732, 735 (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 275 n.6 (Alaska 1982)) (addressing ballot summary in context of a ballot initiative).

76 *Hickel*, 874 P.2d at 926 (citing *Citizens Coalition for Tort Reform, Inc. v. McAlpine*, 810 P.2d 162, 169 (Alaska 1991).

77 See ALASKA CONST. art. II, § 15 ("The governor . . . may, by veto, strike or reduce items in appropriations bills.").

78 *Cf. Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1171 (Alaska 2009) (explaining that "according to law" under ALASKA CONST. article VII, section 2 of the constitution "refer[s] to the legislature's power to make laws"); Sample General Election Ballot, State of Alaska Official Election Pamphlet, General Election November 2, 1976 at 67.

State's General Fund and . . . available for appropriation for the State"[79]—could be used in other ways *unrelated to general funds or unconnected to appropriations for the State*.[80] Accordingly, the summary clearly identifies two potential actions providing a contrast to one another for the fund income use; the earnings could be appropriated for state spending, as normal, or something else could occur—they could *avoid* becoming appropriated for state use as normal, if and when law provides otherwise.

The people therefore understood that by approving of the amendments, they would be entrusting the uses of the income to the legislature. But specifying the possibility for special uses of the earnings through legislative process was also likely an attractive prospect to the voters, because unlike for usual appropriations and government spending, enacting particularized laws could more so "engender a responsible legislative process worthy of the public trust."[81] Measures in place for legislative procedure "guard against inadvertence, stealth and fraud in legislation."[82] The mechanics of the process further permit public participation and embody transparency and accountability by "ensur[ing] an opportunity for the expression

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79 Sample General Election Ballot, State of Alaska Official Election Pamphlet, General Election November 2, 1976 at 67.

80 The Appellants do not contend that an option providing for normal government appropriations outside of the general fund is also permissible. In fact the creation of the earnings reserve reflects just that, and this Court has held the earnings reserve, after automatic transfers for dividends and inflation-protection, is available for appropriation. *Hickel v. Cowper*, 874 P.2d 922, 934 (Alaska 1994). The more significant aspect of the ballot summary in this analysis context is the explanation of the default *availability* "for the State" though *appropriations*.

81 *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 772 (Alaska 1980) (quoting *Plumley v. Hale*, 594 P.2d 497, 500 (Alaska 1979)).

82 *Id.* (*quoting Suber v. Alaska State Bond Committee*, 414 P.2d 546, 557 (Alaska 1966)) (citing ALASKA CONST. article II, section 13).

of public opinion and due deliberation."[83] Identifying in the ballot summary that determinations for the income use could be made through legislative process then not only apprised voters of that eventuality—including, potentially, for special dedications that were not "appropriation[s] for the State"[84]—but may have helped garner support for the permanent fund creation.

Alaskans probably understood through other sources too that lawmaking processes would allow public influence over the uses of the fund income if Ballot Proposition No. 2 passed.[85] For example, in an October 27, 1976 published editorial—just six days before the November election—Governor Hammond emphasized: "[M]ake no mistake, it is for the people, not the governor, nor the legislature singly to determine how your savings are invested and the interest used."[86] [Exc. 237] The governor's sentiments informed Alaskans that they

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83 *Id.* (quoting 3 Proceedings of the Alaska Constitutional Convention 1751-54 (January 11, 1956)).

84 Sample General Election Ballot, State of Alaska Official Election Pamphlet, General Election November 2, 1976 at 67.

85 The "Statement in Favor of Proposition No. 2," written by the Alaska State Chamber of Commerce and provided to the people in the official election pamphlet, similarly told voters that approval of the Alaska Permanent Fund in fact would result in "provid[ing] *needed time* for the press and the public to . . . be aware of [a] pending project and its merit, *instead of being out of the public view and hidden in the spending pattern of normal day-to-day operations*." [Exc. 241] State of Alaska Official Election Pamphlet, General Election November 2, 1976 at 57 (emphasis added). While the statement was meant to encourage setting aside the permanent fund monies so they would not be wasted, forcing other spending to be more deliberative, its association with the proposal would have given voters an understanding that approval would lead to different, more thoughtful legislative choices than spending-as-usual.

86 Governor Jay Hammond, *The Governor's Point of View*, Anchorage Times, October 27, 1976, at 6. Governor Hammond also noted that "[t]he income from the permanent fund will be available for general appropriation by the legislature."[86] *Id.* [Exc. 241] However the statement must not mean that that *all income* from the permanent fund *must* be appropriated, but rather refers to the fact that the income from the permanent fund would be "available to be appropriated"—unless provided by law.

would help shape the uses of the permanent fund income, and the people would have recognized that in voting to assign the legislature the ability to decide the uses, such could implicate lawmaking for special purposes—not merely general government spending as usual.

The public also received other notice that specially dedicating the earnings was possible. At a public hearing of the 27-member State Investment Advisory Committee on August 26, 1976, a key proponent of the proposition advised it could take years for the legislature to decide how to manage the permanent fund.[87] [Exc. 315A-16A] Representative Clark Gruening then noted:

> There is also another area that is interesting. What do you do with the income that it says will go into the general fund, that was how it came down from the governor, *unless otherwise provided by law*, *which would enable the legislature to either dedicate those revenues for the specific purpose* or to require them to go back into the permanent fund, *or to have a dividend check to every Alaskan*.[88] [Exc. 315A-16A]

The statement made shortly before the election not only clarified the legislative intent of the joint resolution behind the fund creation, but also advised the public that the proposition would enable the legislature to dedicate permanent fund income—potentially as by dividends.

Similarly, an Anchorage Times article explained, "There are a number of possibilities for uses of the earnings—and *the legislature will decide those uses*."[89] [Exc. 318A-319A] Representative Hugh Malone, a chief designer of the amendment, informed voters that it was "a chance to let average Alaskans have a stake in managing some of the oil wealth."[90] [Exc.

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87 State Investment Advisory Committee, Minutes at p. 27. Anchorage, Alaska (August 26, 1976) (quoting Rep. Clark Gruening).

88 *Id.* (quoting Rep. Clark Gruening) (emphasis added).

89 Susan Andrews, *Lawmakers Would Shape Permanent Fund*, Anchorage Times, at A-3 (Oct. 24, 1976) (emphasis added).

90 *Permanent Fund Raises Use Issue*, ANCHORAGE DAILY NEWS (Oct. 22, 1976).

317A] The article also mentioned: "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."[91] [Exc. 317A] In fact, the Anchorage Times article observed that Governor Hammond saw the permanent fund as a way to "make possible large projects such as dams, which couldn't otherwise be financed."[92] [Exc. 318A-19A]

The expressions communicated to the people that their affirmative vote would charge the legislature with determining the fund uses; that the people could expect their own participation; and the scope of considerations for the uses were wide and varied—and included the prospect of dedications to special projects and special purposes, like individual dividends. These public statements, along with the ballot summary giving definitive notice that uses other than appropriations for the State were possible, would have educated voters on their decision to entrust their legislature to decide on special, dedicated uses for the income.

3. The legislative resolution history demonstrates intent for special dedications of permanent fund earnings.

Looking to the "the intent of the framers"[93] of the article IX, section 7 and 15 amendments indicates the legislature specifically designed them to permit dedication of funds, including for dividends. In June 1975 Governor Hammond requested the introduction of House Joint Resolution 39 (HJR 39), which proposed merely to amend section 7 to exempt from the dedicated funds clause "the dedication of the proceeds of mineral lease bonuses."[94]

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91 *Id.*

92 Susan Andrews, *Lawmakers Would Shape permanent fund*, Anchorage Times, at A-3 (October 24, 1976) (emphasis added).

93 *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992).

94 HJR 39, 9th Leg., 1st Sess. (June 6, 1975).

[Exc. 194] On January 15, 1976, the House Rules Committee introduced a sponsor substitute for HJR 39 at the request of the governor, proposing amending section 7 to create the exception for section 15 and adding section 15 as a new clause.[95] [Exc. 195]

Important to this analysis, the initial draft of section 15 provided only that "[a]ll income from the permanent fund shall be deposited in the general fund."[96] [Exc. 195] In Governor Hammond's January 15, 1976, transmittal letter to the legislature supporting the resolution, the governor explained, "[t]he income of the fund would be deposited into the general fund without any permanent fund restrictions."[97] [Exc. 191]

But the idea that *all* income from the permanent fund would be deposited into the general fund exclusively sparked discussion,[98] prompting the legislature to substantively change the governor's phrasing to read: "All income from the permanent fund shall be deposited in the general fund *unless otherwise provided by law*."[99] The first time that constitutional language appeared in a written version of the resolution was March 24, 1976.[100] [Exc. 198]

The deliberations process on the phrase evinces it was added specifically to give the legislature "maximum flexibility" with the permanent fund's income[101]—flexibility that

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95 SSHJR 39, 9th Leg., 2d Sess. (Jan. 15, 1976). This version of the section 15 proposal would direct 10% of all mineral lease rentals, royalties, revenue sharing payments, bonuses, and mineral production taxes to the permanent fund. *Id.*

96 *Id.*

97 House Journal, 9th Leg., 2d Sess. 38-40 (Jan. 15, 1976).

98 *See, e.g.,* Audio Recording, Hearing on SSHJR 39 before the H. Comm. on Finance, 9th Leg., 2d Sess. (Feb. 21, 1976); Hearing on SSHJR 39 before the H. Comm. on Finance, 9th Leg., 2d Sess. (Mar. 6, 1976).

99 ALASKA CONST. art. IX, § 15 (emphasis added).

100 CSHJR 39 (Judiciary), 9th Legis., 2d Sess., § 2 (Mar. 24, 1980))

101 House Journal, 9th Leg., 2d Sess. 685 (Mar. 24, 1976).

included the possibility of dedications of the income for specific purposes. The Committee meeting history demonstrates multiple instances discussing dedicating the income from the permanent fund. Holding the first hearing on HJR 39 on February 21, 1976, the House Finance Committee discussed whether the "unless otherwise provided by law" phrase should be added to allow the legislature to direct income from the permanent fund to specific purposes.[102] Testimony reveals the committee's desire to explore language that would let the legislature dedicate the permanent fund's income to certain uses:

> HOUSE FINANCE CHAIR MALONE: What about the question 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.[103]

Later in the hearing, the committee took up the issue of fund dedication again. Commissioner Gallagher stated that in his reading, the governor's original language did not

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102 *See* Audio Recording, Hearing on SSHJR 39 before the H. Comm. on Finance, 9th Leg., 2d Sess. (Feb. 21, 1976) (a portion of the audio recording is missing).

103 *Id.* Audio found at [Time 02:53:30-02:54:07] http://www.akleg.gov/ftr/archives/1976/HFIN/H76R31-HFIN-760000.mp3

allow fund income to be pledged.[104] Testifying staff for the House Judiciary Committee, Jim Rhode,[105] explained the legal significance of possibly adding the "unless otherwise provided by law" language:

> I discussed this matter with representatives of White Weld[106] 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.*[107]

A committee member then noted that by placing the income into the general fund, the State could already make dividend payments.[108] Mr. Rhode continued, explaining adding the extra phrasing permitted the "pledge" of income toward specific purposes:

> [I]f 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.[109]

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104 *Id.* Audio found at [Time 00:02:32-00:02:40] *http://www.akleg.gov/ftr/archives/1976/HFIN/H76R32-HFIN-760000.mp3*

105 Jim Rhode has been recognized for his "valuable knowledge" regarding the creation of the permanent fund. *See* Alaska Permanent Fund Corporation, *Resolution of the Board of Trustees of the Alaska Permanent Fund Corporation Honoring James B. Rhode*, Resolution 91-12 (May 10, 1991).

106 White, Weld & Co, Inc., was an Investment Banking and Securities firm based in New York City. *See* House Special Committee on the Permanent Fund, Microfiche #143 (1977-78).

107 Audio Recording, Hearing on SSHJR 39 before the H. Comm. on Finance, 9th Leg., 2d Sess. (Feb. 21, 1976) (emphasis added). Audio found at [Time 00:02:42-00:03:16] *http://www.akleg.gov/ftr/archives/1976/HFIN/H76R32-HFIN-760000.mp3*

108 *Id.* Audio found at [Time 00:03:16-00:03:24] *http://www.akleg.gov/ftr/archives/1976/HFIN/H76R32-HFIN-760000.mp3*

109 *Id.* (emphasis added). Audio found at [Time 00:03:24-00:03:56] *http://www.akleg.gov/ftr/archives/1976/HFIN/H76R32-HFIN-760000.mp3*

These discussions evidence that legislators knew they c*ould have paid out a dividend through the general fund*—as by a general appropriation—without adding the "unless otherwise provided by law" language, but later rejected that approach in favor of adding language to the amendment to grant future legislature's the flexibility to specially dedicate the income.

On March 6 the House Finance Committee considered HJR 39 again. The committee again specifically discussed dedicating permanent fund income.[110] The minutes reflect the committee addressed:

> [D]edication of income, to the debt service, or any other thing the legislature might wish to establish. But the concept of keeping flexibility remained foremost in the theme of discussion in prophecying (sic) what the state will do with the money.[111] [Exc. 214]

The minutes reveal the committee continued discussing "flexibility and permanent fund designation with the [attorney general's] wording 'as provided by law', a sufficient legal peg, they thought."[112] [Exc. 214] The committee members discussed whether to insert intent language to make clear their desire to give future legislatures the "maximum flexibility."[113] On March 9, a motion was made and passed in House Finance to add the words "unless otherwise provided by law" to HJR 39.[114]

The House Journal contains a special March 24 document produced by the Chairs of the House Finance and Judiciary Committee titled the "Joint Chairman's Report on CS SSHJR

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110 Hearing on SSHJR 39 before the H. Comm. on Finance, 9th Leg., 2d Sess. (Mar. 6, 1976). According to the Alaska Legislative Library the audio file from this hearing is missing.

111 *Id.*

112 *Id.*

113 *Id.*

114 Hearing on SSHJR 39 before the H. Comm. on Finance, 9th Leg., 2d Sess. (Mar. 9, 1976).

39."[115] [Exc. 233-34] The chairs filed the report "so that the intent of the constitutional amendment proposed by the resolution is clear."[116] [Exc. 233] The report pronounces:

> The 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.[117] [Exc. 234]

Without the "unless otherwise provided by law" language of section 15, future legislatures could still have used permanent fund earnings to do such things as augment the principal or pay out dividends. But without the "unless otherwise provided by law" language, future legislatures would have needed to appropriate from the general fund for such purposes—exposing those appropriations to the governor's veto. As also demonstrated by the preceding committee discussions then, the chairs' intent language here reflects the conception of dedications for certain purposes *without appropriations*.[118]

4. The dedication of income to dividends does not offend the purpose of the dedicated funds clause.

In addition to its protected existence under a clear constitutional exception, the unique character of the dividend program also does not harmfully affront the policy rationale of the

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115 House Journal, 9th Leg., 2d Sess. 685 (Alaska Mar. 24, 1976).

116 *Id.* In *Starr v. Haglund*, 374 P.2d 316, 319 (Alaska 1962), the Court stated, "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."

117 *Id.*

118 The State argued below that changes to HJR 39 in the Senate State Affairs Committee reveal a lack of legislative intent to dedicate fund income. [Exc. 155-59] While no minutes or audio for this committee were provided to help understand the context of that debate, these changes were wholly rejected by the Senate Resources Committee, who readopted the House version of SSHJR 39. [Exc. 159] The Senate then passed HJR 39 by an 18-1 vote [Exc. 240]

dedicated funds clause. For instance, the PFD program does not itself represent the sort of "fiscal evil" embodied by a dedicated fund established as a result of persons or interests who "seek the dedication of revenues for their own projects"[119] to the detriment of others, because the PFD is meant to accrue to "all equally."[120] While the state constitutional convention delegates were concerned with earmarking that "curtailed the exercise of budgetary controls" and "amounted to abdication of legislative responsibility" in spending,[121] a major rationale for the PFD plan was providing the people with a direct benefit *because government spending programs were not benefitting individuals.*[122] And even for a fear with dedications that "neither the governor nor the legislature [would] ha[ve] any real control over the finances of the state"[123]—the PFDs ensure the arguably superior tradeoff that citizens make "their own decisions" in spending, altogether circumventing government decision making.[124] The exceptionally fair and benevolent nature of the PFD dedication does not appear to offend the sensible purposes for which Alaska adopted the dedicated funds clause.

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119 *State v. Alex*, 646 P.2d at 209 (Alaska 1982) (quoting Cmty. 6 Alaska Const. Conv. Proceed., app. V, at 111).

120 Minutes of Senate Finance Committee, Senate Bill 842, at 131 (testimony of Rep. Terry Gardiner) (April 8, 1982).

121 *Alex*, 646 P.2d at 209 (citing 3 Alaska Statehood Commission, Constitutional Studies pt. IX, at 229-30 (1955)).

122 *See supra* notes 33-38 and accompanying text.

123 *Alex*, 646 P.2d at 210 (quoting Cmty. 6 Alaska Const. Conv. Proceed., app. V, at 111).

124 Minutes of Senate Finance Committee, Senate Bill 842, at 131 (testimony of Rep. Terry Gardiner) (April 8, 1982).

C. The Superior Court Erred By Upholding The Governor's Veto Reducing The PFD Distributions Because The Required Transfer Is A Special Dedication Not Subject To The Governor's Veto Authority.

Empowered by the constitutional exception to the dedicated funds clause, the legislature had two options for the dividend program: It could have established disbursements conditioned on appropriations, or it could have enacted a dedication of PFD funds that would avoid the appropriations process. The legislature chose to effect a direct dedication to the people of Alaska that bypasses the appropriations procedure and obviates the governor's veto authority.

Under the Alaska Constitution, the appropriations clause provides that "[n]o money shall be withdrawn from the treasury except in accordance with appropriations made by law."[125] The term "appropriation" has specific meaning in legislative procedure; this Court has defined it as a "setting aside from the public revenue of a certain sum of money for a specified object."[126] The Constitution authorizes the legislature to enact bills appropriating money for state expenditures.[127] An appropriation bill passes on simple majority vote of the legislative membership.[128] When the legislature passes an appropriation bill, the governor may, by veto authority, "strike or reduce" items contained in the bill.[129] But the governor's

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125 ALASKA CONST. art. IX, § 13.

126 *State Legislative Council v. Knowles*, 86 P.3d 891, 898 (Alaska 2004) (quoting *Thomas v. Rosen*, 569 P.2d 793, 796 (Alaska 1977)).

127 ALASKA CONST. art. II, §§ 13, 14, 16 (providing collectively for form, passage, and override of governor's veto of appropriation bills).

128 ALASKA CONST. art. II, § 14.

129 ALASKA CONST. art. II, § 15. The legislature can only override a veto of an appropriation bill by three-fourths of the votes of the legislative membership, meeting in joint session. ALASKA CONST. art. II, § 16.

appropriations veto authority applies only to *appropriations* of monetary expenditures.[130] Therefore funds that are specially dedicated by their constitutional authority and statutory character can neither be appropriated nor subject to the governor's veto.[131]

1. The language of AS 37.13.145(b) is unambiguous that the transfer is automatic, establishing a special dedication that the governor cannot veto.

By the plain language of AS 37.13.145(b), the legislature has no discretion to appropriate the dividend funds, and legislative history only confirms that the automatic transfer language was deliberate. A statute is interpreted according to "reason, practicality, and common sense" and in light of "[its] language, its legislative history, and its purpose."[132] Under Alaska's sliding scale approach to statutory interpretation, "the plainer the statutory language is, the more convincing evidence of contrary legislative purpose or intent must be."[133]

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130 *See* ALASKA CONST. art. II, § 15. *See also Alaska Legislative Council v. Knowles*, 86 P.3d 891, 895 (Alaska 2004) (holding that Article II appropriations are monetary in nature and that the governor's appropriations veto applies only to such liquid asset appropriations).

In *KGB* this Court explained that while the governor's appropriations veto is exercised over bills for appropriations, "the appropriations clause, per its plain language, applies to withdrawals from the state treasury." *KGB*, 366 P.3d 86, 101 (Alaska 2016). This Court concluded that as for funds which never enter the state treasury—in that case, a local school funding contribution—the governor's veto authority cannot pertain. *Id.* But *KGB* does not stand for the prospect that *all funds* of the state treasury may be legislatively appropriated. *KGB* would suggest simply that when an appropriation is made pursuant to art. IX, § 13, the governor's veto can apply. The governor may veto funds withdrawn from the state treasury "in accordance with appropriations made by law." ALASKA CONST. art. IX, § 13. Because the PFD funds are not appropriable by law, a legislative attempt to appropriate them is void and negates applicability of the governor's veto.

131 *Cf. Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1173 (Alaska 2009) (indicating that a "non-dedicated fund" is one "from which the legislature could make appropriations").

132 *State v. Fyfe*, 370 P.3d 1092, 1095 (Alaska 2016) (quoting *State, Div. of Workers' Comp. v. Titan Enters., LLC*, 338 P.3d 316, 320 (Alaska 2014)).

133 *Id.* (quoting *Adamson v. Municipality of Anchorage*, 333 P.3d 5, 11 (Alaska 2014)).

"[W]here a statute's meaning appears clear and unambiguous, . . . the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent."[134] Even when there may be "somewhat contrary" legislative history, this "does not overcome the plain meaning" of the statutory text.[135]

a. The plain language expresses the transfer as automatic.

Alaska Statute 37.13.145(b) establishes: "At the end of each fiscal year, the *corporation shall transfer* from the earnings reserve account to the dividend fund established under AS 43.23.045,[136] 50 percent of the income available for distribution under AS 37.13.140.[137]" Under the common sense, practical interpretation the plain language is unequivocal that the corporation has no discretion in either the action of the transfer or the amount to transfer.

Two related and similar provisions confirm the dedicated character of the dividend funds and shed light on the meaning of the transfer statute.[138] Foremost, in AS 37.13.145(a): "The earnings reserve account is established as a separate account in the fund. Income from

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134 *Id.* (alteration in original) (quoting *Univ. of Alaska v. Geistauts*, 666 P.2d 424, 428 n.5 (Alaska 1983)); *see also State v. Alex*, 646 P.2d 203, 208 n.4 (Alaska 1982) (expressing "the plainer the language, the more convincing contrary legislative history must be").

135 *Oels v. Anchorage Police Dep't Emples. Ass'n*, 279 P.3d 589, 597 (Alaska 2012).

136 AS 43.23.045(a) provides: "The dividend fund is established as a separate fund in the state treasury [and] shall be administered by the commissioner and . . . invested . . . in the same manner as provided in AS 37.10.070 [(the statute establishing the commissioner's duty to invest and manage money in the state treasury)]."

137 AS 37.13.140 defines the "net income" of the permanent fund and supplies that the formula for the income available for distribution "equals 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 [of AS 37.13.145(a)]."

138 A statutory phrase "gathers meaning from the words around it" and must be "read in context." *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

the fund *shall be deposited* by the corporation into the account as soon as it is received." (Emphasis added.) Instead of reverting the income of the permanent fund to the general fund then, the earnings reserve was created pursuant to the legislature's ability to "otherwise provide[ ] by law" for the income.[139] The earnings reserve—as established by law—receives protection from the article IX, section 7 exception to the dedicated funds clause. In fact the deposit into the earnings reserve is done automatically; no appropriation is required or attempted.[140] Yet if the earnings reserve is a special dedication authorized by section 7, so too must be any other fund created pursuant to the legislature's ability to provide by law for a special dedication—like the PFDs.

Further here, the directive for the corporation to "*deposit*" the permanent fund income into the earnings reserve is akin to AS 37.13.145(b)'s command for the corporation to *transfer* funds from the earnings reserve to the dividend fund. Because the earnings reserve receives all of the fund income, periodically and continually, and because it would be difficult to estimate—the State would likely not argue that the legislature must appropriate the earnings reserve deposit. But if the transfer of the dividend funds were a mere discretionary appropriation, the deposit into the earnings reserve would also be a discretionary appropriation. Not only would this be impractical, but such could risk legislature's refusal or reduction of the funds, and vulnerability to a veto—an unreasonable result defying common

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139 *See* ALASKA CONST. art. IX, § 15. *See also Hickel v. Cowper*, 874 P.2d 922, 934 (Alaska 1994) (observing that the permanent fund income may be addressed as "otherwise provided by law," and that, in fact, "AS 37.13.145(a) provides otherwise").

140 *See* ch. 3, SLA 2016 (demonstrating no appropriation of the income of the permanent fund to the earnings reserve).

sense,[141] considering the legislature's express ability to provide by the law for the use of the income. The existence of the earnings reserve and the design of its statute validates that the dividend funding must also be protected as a non-appropriable, special dedication.[142]

Second, under AS 37.13.145(c), "the corporation *shall transfer* from the earnings reserve account to the principal of the fund an amount sufficient to offset the effect of inflation on principal of the fund during that fiscal year." (Emphasis added.) This statute is enlightening to the meaning of the command language. The enacting legislature of AS 37.13.145(c) was motivated to maintain the value of the principal through prudent inflation proofing. Inflation-protection of the corpus was initially provided in 1982 under former AS 37.13.145[143] because the permanent fund trustees reported a "weakness" of the then-operative 1980 act's "inability to safeguard against inflation."[144] Notably the provision was silent on whom would perform the transfer until 1992, when the corporation was assigned the duty—but the duty merely codified automatic transfers historically occurring. A 1992 senate bill 39 (SB 39) backup document explained that "[f]rom FY83 through FY89, [in inflation-protection] was transferred '*automatically*,' " but that for fiscal year 1991, the governor decided to propose a

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141 *See State v. Fyfe*, 370 P.3d 1092, 1095 (Alaska 2016).

142 Most of the funds in the earnings reserve are yet appropriable, however, as "no regular provision is made for amounts in the earnings reserve account in excess of that necessary to fund dividends and inflation proof the permanent fund principal." *Hickel*, 874 P.2d at 934.

143 Ch. 81, § 9, SLA 1982 ("[A]n amount sufficient to offset the effect of inflation on [the] principal of the Alaska permanent fund that year . . . shall be transferred.").

144 Minutes of Senate Finance Committee, Senate Bill 684, at 99 (testimony of Elmer Rasmussen, Chairman of the Board of Trustees for the Alaska Permanent Fund Corporation) (Apr. 1, 1982).

budget amendment providing for an *appropriation* of those funds.[145] [Exc. 320A-22A] Another SB 39 document transmitted in the bill packet stated: "Inflation-proofing transfers used to occur automatically under AS 37.13.145, but arguably require an appropriation."[146] [Exc. 320A-22A] Having awareness of the commissioner's past automatic practices, as well as the confusion, the 1992 enacted term yet dictated that the "*corporation shall transfer*" the inflation-proofing funds. The inflation-protection provision provides insight into the similarly phrased dividend fund transfer provision—specifically, that it too functions automatically.

b. AS 37.13.145(b)'s legislative history supports the plain language of the transfer provision, creating a non-vetoable dedication.

(1) During consideration of the 1980 act, the appropriation term was considered but deliberately omitted—and the commissioner automatically transferred the funds.

Alaska Statute 37.13.145(b)'s legislative history indicates the legislature explicitly meant the expression binding the Corporation to transfer the funds which are then directly disbursed as dividends.[147] An "overarching principle" of statutory interpretation "is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent."[148]

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145 Office of the Governor, *Permanent Fund Policy Issues*, at 1, 11 (Apr. 1990) (emphasis added).

146 *Id.*

147 *See* AS 43.23.025(a)(1)(A)-(E) (confirming that the entirety of the transferred funds are used toward the dividend payments, less appropriations only for administration of the program).

148 *L.A. Unified Sch. Dist. v. Garcia*, 741 F.3d 922, 929 (9th Cir. 2014) (quoting *City of Alhambra v. County of Los Angeles*, 288 P.3d 431, 438 (Cal. 2012)).

In the first instance, it is clear that the possibility of PFDs premised on appropriations, rather than on the automatic transfer, was considered—and specifically rejected. This Court assumes that "the legislature cho[o]se[s] its words deliberately . . . and omit[s] words it intended to omit."[149] A Rules Committee substitute for senate bill 122 (SB 122), as offered on February 25, 1980 under the first iteration of the creation of the dividend program would have established that "the commissioner shall make all payments for dividends required to be made under [the provision establishing the entitlement formula] from an *annual appropriation* for that purpose."[150] By March 18, the language had evolved into "[t]he *legislature shall appropriate* at least 50 percent of the annual income of the Alaska permanent fund for residency payments."[151] That language was repeated in a March 20 version of the bill.[152] By April 15 the language of the first transfer statute, former AS 43.23.050(b), appeared: "Each year, the *commissioner [of revenue] shall transfer* to the dividend fund 50 percent of the income of the Alaska permanent fund which was earned during the fiscal year ending on June 30 of the preceding year and which is available for distribution under AS 37.13.140[153]."[154] It is obvious from the bill's evolution over time that the legislature expressly considered the action of "appropriating"

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149 *State v. Fyfe*, 370 P.3d 1092, 1100 (Alaska 2016).

150 CSSB 122 (Rules), 11th Legis., 2d Sess., § 1 (Feb. 25, 1980)) (emphasis added).

151 HCS CSSB 122 (Finance), 11th Legis., 2d Sess., § 2 (Mar. 18, 1980)) (emphasis added).

152 HCS CSSB 122 (Rules), 11th Legis., 2d Sess., § 2 (Mar. 20, 1980)); *see also* HCS CSSB 122 (Rules) am H, 11th Legis., 2d Sess., § 2 (Mar. 20, 1980)).

153 Former AS 37.13.140 provided for the definition of the permanent fund income, which was generally "[t]he interest received in a year," and also established the formula for determining the "income available for disbursement." Ch. 18, SLA 1980, Cumulative Supp., at 308.

154 HCS CSSB 122 (Free Conference), 11th Legis., 2d Sess., § 2 (Mar. 18, 1980)); a*ccord* ch. 21, § 2, SLA 1980. (Emphasis added.)

the funds, but *deliberately chose* instead to command the commissioner's transfer act, *omitting* the appropriation language.[155]

The reason for the modification is evident when examining an attorney general letter in the legislative history.[156] On March 19, 1980, the attorney general had advised Senate President Clem Tillion that interpretation of constitutional amendment decisional law "leads us to the conclusion . . . 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*" because "[b]oth are part of the amendment's history and both are closely related to the fund itself."[157] [Exc. 247-50] The attorney general explained that legislative authority over the fund income "is probably broad enough for it to prescribe for the distribution of a portion of the income to the people *without annual appropriation*."[158] [Exc. 248] Thus the SB 122 change of language providing for the transfer instead of appropriations likely resulted from consideration of this attorney general's opinion.

In addition, when the language of AS 43.23.050(b) was codified in 1980, the legislature simultaneously provided the companion provision AS 43.23.050(c):

> The legislature *may annually appropriate* money from the general fund to the dividend fund if there is not enough money in the dividend fund valued at $50. One-fifth of the amount *transferred to the dividend fund each year under (b)* of

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155 The Free Conference Committee apparently left no notes or minutes discussing the modification.

156 Letter from Avrum Gross to Clem Tillion, President of the Senate, Opinion No. 3, Re: CSSB 122 (Rules), tax, refunds and permanent fund dividends, at 32-33 (Mar. 19, 1982).

157 *Id.* at 34 (emphasis added).

158 *Id.* at 35 (emphasis added). But the attorney general also warned: "[I]t is possible that the Alaska Supreme Court could find that an appropriation is required under article IX, section 13, even for deposits to the fund and distributions of income," but that "[w]e doubt this would occur." *Id.* at 34.

> this section *shall be annually withdrawn* from the dividend fund *by the commissioner* and deposited in the general fund to repay *appropriations* made under this subsection.[159]

This statute gives critical insight into the deliberate nature of the selection of the term "transfer." Examining the overall scheme of the 1980 act, recognizing "a phrase 'gathers meaning from the words around it,' "[160] it is clear that in contrast to the transfer under (b), the legislature decided that if the PFD would be less than $50, actual *appropriations* could be made from the general fund. The provision also references subsection (b) as providing for transferred funds when—if those funds were to be appropriated—the language would have expressed that. It further refers to the action of the transfer in past tense, acknowledging that a precondition to the legislature's ability to act would be *only once the transfer is completed by another*. Finally, this provision also gives meaning to the commissioner's expressly intended transfer duty—it likewise commands the commissioner "shall" perform an action, and that action of withdrawing dividend fund amounts to repay a certain one-fifth sum of any general fund appropriations similarly requires no further direction and no appropriation.

Then perhaps the most dispositive proof that the 1980 act established an automatic transfer of dedicated funds is the fact that between 1980 and 1982, the commissioner effected transfers to the dividend fund without legislative appropriations. As a 1983 attorney general opinion stated: "I understand that in past years money has been transferred to the dividend

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159 Ch. 21, § 2, SLA 1980.

160 *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

fund . . . without an appropriation . . . ."[161] [Exc. 293] Because the legislature serving during the 1980 act made no PFD appropriations, and the commissioner acting under the original transfer provision performed the transfer even so, this is nearly conclusive evidence that those dividend funds were not intended as appropriable.

(2) The 1982 act also clearly demonstrates by its phrasing and legislative history that the funds are automatically transferred.

That the transfer was intended to be performed according to the unambiguous text is supported by other historic provisions and legislative history. The legislative history of the PFD program's 1982 enactment—history also extremely probative here[162]—demonstrates the legislature's continued, profound intent to ensure individual Alaskans received a protected, personal benefit derived from the state's natural resource development. The 1982 act included a new statute concerning the automatic transfers.[163]

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161 Op. Atty. Gen. File No. 366-484-83 (Mar. 10, 1983) (advising the legislature that to be cautious, it should add an appropriation item for PFD funding for the budget).

162 The legislature's prior attempt with the 1980 dividend regime was held up due to a challenge to its residency requirements that became the subject of the U.S. Supreme Court case, *Zobel v. Williams*. *See* 457 U.S. 55, 56-57 (1982). The Court stayed the distribution of PFDs during that time. *Id.*

While the case was pending, the legislature amended the provisions. *See* Ch. 102, SLA 1982. The 1982 act changed much of the 1980 scheme. *See generally* Ch. 102, SLA 1982 (identifying new provisions and amendments). AS 37.13.145(b)'s 1980 predecessor, AS 43.23.050(b), was repealed as of August 13, 1982. *See* ch. 102, §§ 1, 12, 22 & "Effective Date," SLA 1982 (demonstrating amended AS 43.23.050(b) effective June 17, 1982, then repeal and new provision of similar phrasing, AS 43.23.045(b), effective August 13, 1982).

Because AS 43.23.050(b) was apparently amended then operable for only two months, and due to the substantive changes made to the law in 1982, the legislative history of the 1982 enactment is very significant of legislative intent underlying the transfer provision.

163 *See* Ch. 102, § 1, SLA 1982 (exhibiting language of former statute 43.23.045(b) and that the commissioner of revenue was charged with the duty per former AS 43.23.095(2)).

Alaska Statute 43.23.045(b), the 1982 predecessor to AS 37.13.145(b), provided that "each year the *commissioner shall transfer* to the dividend fund 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending on June 30 of the current year and available for distribution."[164] Alaska Statute 43.23.095, codified by the legislature at that time, defines "permanent fund dividend" as "a *right* to receive a payment from the dividend fund."[165] The PFD definition informs the legislature's reason for enacting an automatic transfer. The legislature intended the transfer executed—by another, without appropriation—to the dividend fund as an Alaskan's *right* to procure benefit directly from that transfer. The clear language of AS 37.13.145(b) accordingly evidences the secure nature of the benefit the legislature sought.

Beyond the transfer, the full amount of the transferred funds were disbursed to the people of Alaska under the following formula:

> The commissioner shall determine the value of a permanent fund dividend by (1) determining *the amount of income of the Alaska permanent fund transferred to the dividend fund* under AS 43.23.045(b) during the current year; (2) determining the number of individuals eligible to receive a dividend payment for the current year; and (3) dividing the amount determined in (1) of this section by the amount determined in (2) of this section.[166]

That the transfer—on its face—was both automatic and represented the *full funds* for consideration in determining the PFD payout are testaments to the strength the legislature

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164 Ch. 102, § 1, SLA 1982. The 1982 enactment became effective August 13, 1982. *See* Ch. 102, "Effective Date," SLA 1982.

165 Ch. 102, § 1, SLA 1982 (emphasis added); AS 43.23.095(5). The definition was renumbered from its original AS 43.23.095(6) in 1992. *See* ch. 168, § 38, SLA 1990. *See also* Ch. 21, § 2, SLA 1980 (demonstrating similar definition of "a right to receive a payment of money from the dividend fund").

166 Ch. 102, § 1, SLA 1982 (emphasis added) (exhibiting language of former AS 43.23.025).

believed Alaskans' entitlement to be. While slightly different formula applies today, the full amount of the transfer—excepting administration of the dividend fund—is retained for the dividend payments.[167]

Secondly, the history of the legislature's undertaking of the enactment decisively supports that the transfer was meant to be special, an automatic occurrence not reliant on appropriations. The transfer provision's passage was part of senate bill 842 (SB 842), "An Act Providing for Permanent Fund Dividends," which was introduced in March 9, 1982 as a committee bill at the request of Governor Hammond.[168]

On January 26, 1982, Governor Hammond had transmitted a letter to Senate President Jalmar Kerttula pertaining to another requested bill, senate bill 684 (SB 684), relevant legislation concerning investment and management of the permanent fund itself.[169] The letter explained that under SB 684, 50% of the permanent fund's income would be "reinvested" in the principal, while "[t]he other half will remain available for distribution."[170] This "distribution" the governor envisioned was apparently that for the PFDs, as he clarified the reinvestment aspect of the bill would be achieved "without disturbing the *flow* of income to the Dividend Fund established under [1980 transfer statute] AS 43.23.050."[171] The governor not only identified the dividend funding as a "distribution" when he would have more readily—if true—described it as an appropriation, but he also alluded to the transfer as a

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167 *See* AS 43.23.025(a)(1)(A)-(E).

168 *See* SB 842, 12th Legis., 2d Sess. § 2 (Mar. 9, 1982)).

169 Transmittal Letter from Governor Hammond to Jalmar Kerttula, President of the Senate, 1982 Senate Journal 132-33 (Jan. 26, 1982).

170 *Id.* at 132.

171 *Id.* (emphasis added).

"flow," as if not under legislative control. He further recognized that a selling point to the legislature of his management and investment bill would be that the dividend payouts would be adequately funded.

On the same day that SB 842 was introduced, Governor Hammond transmitted a second SB 684 letter to President Kerttula also extremely important to this legislative history analysis.[172] At that time, what the governor proposed would have seen 50% of the income of the permanent fund transferred back to the principal for "reinvestment" and the other 50% transferred to a separate "undistributed income account."[173] Thus the governor's March 9 plan would have had the PFD funds drawn from the new undistributed income account before transfer to the dividend fund.[174] Despite this structuring, the governor's letter tried to reassure legislators that his plan would be "accomplished without amending the [1980] dividend [transfer] statute, AS 43.23.050(b), or diminishing *the flow of income to the dividend fund under that statute* which provides that 50 percent of the income available for distribution *is transferred to the dividend fund*."[175] The governor's expression in this letter even more strongly manifests these key things: (1) That the dividend disbursement program was of such primary importance to the legislature that the governor needed to instill confidence in its preservation, and (2) That in the eyes of the governor—the person urging passage of SB 842 along with the transfer

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172 Transmittal Letter from Governor Hammond to Jalmar Kerttula, President of the Senate, 1982 Senate Journal 494-96 (Mar. 9, 1982) [Hereinafter Hammond Letter II].

173 *See id.* This plan proposed by the governor was not the one precisely adopted. *Compare* SSSB 684, 12th Legis., 2d Sess., § 10-11, (Mar. 9, 1982), *with* ch. 81, §§ 8-9, SLA 1982.

174 *See* Hammond Letter II at 695.

175 *Id.* (emphasis added).

provision—the *transfer* meant a direct *flow* of the funds, as something distinctly different than an appropriation.

But the governor continued to provide more insight into the transfer provision. He stated that money sitting in his proposed undistributed income account would be invested by the corporation "until it is *transferred to the dividend fund or appropriated by the legislature*."[176] The governor therefore precisely signaled that the transfer would be *directly executed*—that it was not to be appropriated—and even made clear that the legislature could choose to *appropriate* those funds *instead of* enacting the PFD transfer under SB 842. He next explained that his plan would *retain* the existing method for determining the income available for PFDs that was "designed to provide an *even flow* of revenue *to the dividend fund*."[177] Again here, he acknowledged the importance to the legislature of maintaining the dividend program and emphasized preserving the 1980 income-to-dividend-funding formula that was created to supply the "even flow," direct transfer to the dividend fund. He then reiterated that money in the undistributed income account "will retain its character as income . . . and [will] be invested to yield additional income, all of which will be available *for transfer* to the dividend fund *or for appropriation*."[178] And again, he stressed that the income formula used to pay out PFDs "is retained in order to avoid any effect of [SB 684] on the *flow of money to the dividend fund*."[179] The governor's repeated attention to the PFD funding mechanism overwhelmingly demonstrates the concern he and the legislature had for its protection. But even further, the

176 *Id.*
177 *Id.*
178 *Id.* (emphasis added).
179 *Id.* (emphasis added).

governor's careful, exacting selection of verbiage strictly identifying the transfer as a "flow" of funds not within the legislature's control, and clearly intimating that the transfer *was not* commensurate with *and does not require* an appropriation, supplies decisive evidence on the issue.[180] Of necessity to the examination of legislative intent—both letters confirming the governor's view of the transfer principle were disseminated to the lawmaking body, educating it on the meaning of the term, so the legislature is presumed to have known and understood the premise of the word "transfer" it enacted.

Third, delving into the act's other significant legislative history confirms the enacting legislature's view of the nature of the dividends and its intent to provide a protected right—expressly, as an entitlement fortified *against government spending*. The transfer language supports the practical purpose of ensuring the people would be the primary benefactors the distributable fund portion derived from the state's oil wealth: As the House Finance Committee SB 842 letter of intent proclaimed, Alaskans "shall have *first call* on the 50 percent of the income of the permanent fund available for distribution, *regardless of what other uses the income is put to*."[181] This statement underscores the legislature's desire to grant Alaskans an enduring, dedicated entitlement—as embodied by the automatic, recurring transfer.

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[180] The governor's belief about the transfer provision however, is not surprising, given the legislature's 1980 enactment of the provision pursuant to the advice of the attorney general that PFDs likely could be dedicated and need not be appropriated. *See supra* notes 156-58 and accompanying text.

[181] House Finance Committee, Committee Letter of Intent HCS CSSB 842, Minutes of House Finance Committee, Senate Bill 842, at 736 (May 14, 1982) (emphasis added); *see also id.*, at 731 (statement of Chairperson Adams) (May 14, 1982) (acknowledging letter of intent as attachment #1 to the minutes).

Further, as first introduced to the Senate Finance Committee, there was a concern for moving the SB 842 quickly because of "the need to distribute oil wealth to the people of the state."[182] As earlier related,[183] Representative Terry Gardiner initially testified to the purpose of the legislation, expressing that while "the magnitude of state spending is great compared to the average income of its citizens . . . *state spending does not benefit all residents equally*."[184] He observed that "experience in other countries has shown that oil wealth does not always ensure that everyone receives economic benefits," that "[i]n some instances, it increases the disparity between the 'have's and the have not's.' "[185] The State had "tried every other form of state funding imaginable" to impart funds to its people, such as through loan programs and construction programs that did not seem to benefit those of lower income, "but . . . some system must be effected whereby everyone gets a portion of the state's oil wealth."[186] Unlike "[g]overnment spending [which] trickles down to citizens as though processed through a sieve," the representative articulated, "[a] permanent fund dividend would accrue to all equally . . . allow[ing] *individuals to make their own decisions as to how the money will be spent*."[187] The permanent fund dividend was meant to "*ensure that everyone gets something*"—a "something" specifically designed to flow directly to residents, entirely averting the possibility of usual

182 Minutes of Senate Finance Committee, Senate Bill 842, at 130 (testimony of Rep. Terry Gardiner) (Apr. 8, 1982).

183 *See supra* notes 33-38 and accompanying text.

184 *Id.* at 131 (emphasis added).

185 *Id.*

186 *Id.*

187 *Id.* (emphasis added).

government expenditure where individuals typically experience no direct value. [188] Or as the House Finance Committee deemed it, giving Alaskans "first call" on the available earnings, before subjecting the remainder to spending.[189]

If the people were meant to gain *primary* access to the earnings through dividend payouts, then evading normal spending procedures of the typical appropriations which compete with one another for placement in the budget would accomplish that goal. The professed policy reasoning validates the legislature's passage of the unambiguous, definitive transfer term, creating a statutory dedication directing funding not vulnerable to appropriations authority or to veto.

Nothing in the legislative history suggests the 1982 legislature meant something other than an automatic transfer resulting in a dedication of funds; the absence of evidence that the legislature expected appropriations of the dividend funding is telling. [190] Because the language

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188 *Id.* (emphasis added). *See also id.* at 132 (testimony of Sen. Victor Fischer) (recognizing and "strongly favoring" the "concept of sharing state oil wealth with all Alaskans," though expressing concern about poorer Alaskans' potential loss of public assistance due to the added income); *id.* at 137 (statement of Senator Richard Eliason) (observing former Senate President Clem Tillion's "feeling that it was important each resident got 'a piece of the cash.' "); *id.* at 134 (testimony of Tom Williams, Commissioner of Revenue) ("The purpose of the permanent fund is to provide Alaska residents a *direct interest* in the fund." (emphasis added)).

189 House Finance Committee, Committee Letter of Intent HCS CSSB 842, Minutes of House Finance Committee, Senate Bill 842, at 736 (May 14, 1982).

190 One piece of legislative history may appear to contradict that the transfer would place the dividend funds beyond legislative reach, but in reality supports the Appellants' position. During the 1982 SB 684 discussion Senator Dankworth expressed concern that the proposal to provide 50% of the permanent fund earnings' reversion to the principal with the remainder to the undistributed income account would mean "no more income going to the General Fund from the permanent fund." Minutes of Senate Finance Committee, Senate Bill 684, at 100 (comments of Senator Edward Dankworth, Co-Chair of Senate Finance Committee) (Apr. 1, 1982). He suggested, "Originally, when the people of Alaska voted on it, they wanted the money to go for the operation of state government." *Id.*

of the transfer statute is unequivocal by its ordinary meaning and as read in context with related provisions; the legislative history of the dividend enactment overwhelmingly supports the plain reading of the provision; and the act's policy and purposes reinforce that interpretation, the term must be strictly construed. If Governor Hammond wanted to ensure the legislature maintained appropriations control and left intact his veto authority over the funds, his remedy was to veto the 1982 PFD disbursement bill. Similarly, if the legislature wanted to re-empower

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The testifying board of trustees chair indicated "no"—as if untrue that funds would not return to the general fund. *Id.* (testimony of Elmer Rasmussen, Chairman of the Board of Trustees for the Alaska Permanent Fund Corporation). Rasmussen tried to elaborate that the "other [50%] would go into the undistributed income account and would be available for legislative control." *Id.* But he clarified that "[t]he legislature has already said this money would go out as dividends." *Id.* Rasmussen explained "there would still be 50% available for distribution according to the determination of the legislature." *Id.* Dankworth, for his part, seemed to acknowledge that the dividends would lock up 50% of the earnings, which is why he was concerned with the SB 684 proposal for the other 50%: He was "worried that since 50% might be distributed to the people of the state, with the other going back to the principle, there might not be money left to benefit the State . . . in future generations." *Id.* at 100 (comments of Senator Edward Dankworth, Co-Chair of Senate Finance Committee). Reiterating the importance of sending 50% of the earnings back to the principal, Rasmussen observed though, "it [is] up the legislature to decide what to do with the other 50%." *Id.* at 101 (testimony of Elmer Rasmussen, Chairman of the Board of Trustees for the Alaska Permanent Fund Corporation).

The exchange does not exhibit that the dividend funds were to be left to legislative control. Rasmussen's initial reaction, suggesting that funds would not necessarily return to the general fund, displays the testifier may not have understood the details of SB 842. But further, he clarified his belief, explaining several times that the legislature had the authority to decide the fate of the funds under the constitution, which Dankworth also appeared to understand. Moreover the discussion was centered on SB 684 and its impact on 50% of the earnings—not on a precision examination of the 50% to be distributed as dividends. Rasmussen's testimony went toward his motivation to secure the 50% reversion to the principal, regardless of the legislature's prospects for the other 50%. And Rasmussen's understanding of SB 842 was not as an enacting lawmaker.

The committee discussion on SB 684 more obviously evidences the position that the policy makers at that time recognized that the legislature was constitutionally authorized to determine how to treat the permanent fund income, as by the special dedication of a distribution to the people of Alaska.

itself with appropriations authority over the PFD funds, it could do so by amending the existing law.[191]

(3) The 1982 transfer provision's interplay with a related provision clearly manifests the intended meaning of the term "transfer."

Finally, as likely conclusive of the fact that the dividend funds are meant to be automatically transferred is that the enacting legislature of 1982 anticipated the 1982 and 1983 transfers to occur automatically, untethered from any appropriation, in accordance with an express special provision.

The residency requirements of the original 1980 dividend scheme had been challenged on equal protection grounds; during the 1982 legislative session, the residency qualifications awaited a U.S. Supreme Court ruling in *Zobel v. Williams*.[192] The Supreme Court stayed the dividend payments in the meantime.[193] In part to ensure a PFD payout in 1982 irrespective of the *Zobel* outcome, the legislature amended the statutory regime to establish certain new provisions and repeal others.[194] One provision, entitled "1982 Permanent Fund Dividend Distribution," explicitly provided: "The amount of each dividend for 1982 is $1000."[195] In its letter of intent, the House Finance Committee confirmed that the provision "intends that

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191 The attorney general in 1983 in fact advised such a revision: "I would . . . advise that, if the dividend program is not repealed, AS 43.23.045 be amended to clarify [an] appropriation requirement in order to avoid any confusion on this point." Op. Atty. Gen. File No. 366-484-83 (Mar. 10, 1983). The legislature so far has never taken the advice to either amend or repeal the PFD program.

192 *See* 457 U.S. 55, 56, 64 (1982).

193 *Id.* at 56.

194 *See* ch. 102, §§ 1, 2-5, 14, 19, 22, 23, 24, 25, 27, 28 SLA 1982 (displaying 1982 payout provisions and possible effective dates for differing *Zobel* outcomes).

195 Ch. 102, § 19, SLA 1982.

Permanent Fund dividends in the amount of $1,000 per capita be paid in 1982 to eligible applicants if the United States Supreme Court either rules the . . . program invalid . . . or if the Court has not made a determination by [October 19, 1982]."[196] The 1982 special PFD provision became operative on June 17, 1982.[197]

What is most significant about this 1982 special dividend is the legislature's specific concurrent statutory treatment of 1982 transferred funds and the 1983 PFD funding mechanism. First, as background, the 1980 transfer statute was reenacted by the 1982 act,[198] resulting in the language: "Each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund which was earned during the fiscal year ending on June 30 of the preceding year and which is available for distribution under AS 37.13.140."[199] That reenacted 1980 transfer provision was effective from June 17, 1982 until August 13, 1982—only two months—when the new 1982 transfer term took effect, providing again that "the commissioner shall transfer" the funds each year.[200]

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196 House Finance Committee, Committee Letter of Intent HCS CSSB 842, Minutes of House Finance Committee, Senate Bill 842, at 736 (May 14, 1982). The House Finance Committee bill was the enacted version of the law. *See also* Ch. 102, SLA 1982 (exhibiting enactment of "HCSCSSB842(Fin)amH"). *Zobel* ultimately invalidated the residency requirement two days before the official enactment. *See Zobel*, 457 U.S. at 55 (reflecting decision date of June 14, 1982), 64; ch. 102, SLA 1982 (reflecting action date of June 16, 1982).

197 Ch. 102, § 19 & "Effective Date," SLA 1982.

198 The 1982 act purports to *amend* the language of AS 43.23.150(b), but the language appears the same as in 1980. *Compare*, ch. 102, § 12, SLA 1982, *with* ch. 21, § 2, SLA 1980.

199 *See* ch. 102, § 12, SLA 1982 (exhibiting language, as amended, of former AS 43.23.050(b)). Though the exact transfer date is unclear by this text, in context of other provisions analyzed here, it is likely the term meant to require the commissioner's transfer after June 30 for income generated prior to June 30 of calendar year 1982.

200 *See supra* note 164 & accompanying text (supplying the text of former 1982-enacted transfer provision AS 43.23.045(b)); *see also* ch. 102, §§ 1, 12 & "Effective Date," SLA 1982

An act's "overall scheme" is important to interpretation of words and phrases as "[s]tatutory language must be read in context [because] a phrase 'gathers meaning from the words around it.' "[201] The relevancy of the two transfer provisions and their effective dates becomes apparent when observing an additional provision of the 1982 act, also effective June 17, 1982,[202] and recognizing that the legislature meant what it said—that the commissioner was to perform the transfer annually and automatically:

> Income of the Alaska permanent fund *for fiscal year 1982 transferred to the dividend fund* may not be used for payment of permanent fund dividends during 1982, but *must remain* in the dividend fund and be used for payment of permanent fund dividends during 1983 *along with the fiscal year 1983 earnings* of the Alaska permanent fund *transferred to the dividend fund*.[203]

This 1982-83 special transfer provision is significant to the statutory interpretation issue for many reasons. On its face it reflects the same "transfer" term specifically in reference to the two statutes which would cause the commissioner to perform the action for both the 1982 and 1983 fiscal year earnings. The use of the same word "transfer" reinforces both that the meaning of the word itself is important and that its selection is deliberate.[204] The provision also distinctly does not use the term *appropriation*, and in contrast to the $1000 special PFD

(reflecting language of new 1982 transfer provision, language of amended 1980 transfer provision, and effective dates of each).

201 *Jones v. United States*, 527 U.S. 373, 389 (1999) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

202 Ch. 102, § 19 & "Effective Date," SLA 1982. A slight discrepancy occurs by § 30 of the act, which would have provided § 19 an effective date of the day of an adverse *Zobel* outcome, which was June 14, 1982. Ch. 102, § 19, SLA 1982; *Zobel v. Williams*, 457 U.S. 55 (1982) (demonstrating decision date).

203 Ch. 102, § 19, SLA 1982 (emphasis added).

204 "Technical words and phrases and those that have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning." *Arctec Servs. v. Cummings*, 295 P.3d 916, 922 (Alaska 2013).

provision that year, which was silent,[205] the 1982-83 special transfer provision affirmatively establishes the means of enabling the fund transmission to the dividend fund. Furthermore, the language of this provision acknowledges that—*in addition to the specially-created 1982 PFD payments*—there would *also* be funds separately and independently transferred to the dividend fund in 1982, funds that would *remain* in the dividend fund until the 1983 disbursements. The clear import of this statute evinces that the legislature assumed—because it intended so—that the operation of a transfer in 1982, as well as 1983, would automatically occur requiring no appropriation. If the 12th legislature in 1982 who enacted the PFD distribution scheme anticipated automatic transfers, then subsequent recurring transfers were also intended to be automatic.

Moreover the 1982 special, exact $1000 PFD disbursements *did* require an appropriation.[206] That year, the legislature made that actual appropriation.[207] The 1982 operating budget demonstrates that the necessary funds were in part "reappropriated" from prior year appropriations *from the general fund* in 1979, 1980, and 1981, and in part directly appropriated *from the general fund* in 1982.[208] The legislature had to use general funds between

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205 *See* ch. 102, § 19, SLA 1982 (indicating the legislature omitted any phrasing concerning how to effect the 1982 PFD funding).

206 *See* ch. 101, §§ 17, 18, SLA 1982 (reflecting the appropriations).

207 Ch. 101, §§ 17, 18, SLA 1982.

208 *Id.*; *see also* ch. 120, § 52, SLA 1980; ch. 82, § 28, SLA 1981; ch. 92, §§ 42, 50, SLA 1981 (demonstrating prior years' general fund appropriations). Recall that the U.S. Supreme Court had stayed the distributions while *Zobel* was pending. *See supra* note 162 and accompanying text.

1979 and 1982 because the permanent fund income had not yet accumulated.[209] The total of all appropriated funds for the 1982 dividend was $442,192,100.[210] No appropriations were attempted from the income of the permanent fund.[211]

The explanation of the funding for this first $1000 dividend is critical to probing the legislative history and giving effect to the transfer provision as the enacting legislature intended. The very first PFD payouts, specially appropriated by the 12th legislature, were consequently unconnected to the automatic transfer statute. Yet the explicit 1982-83 special transfer provision, according to the 12th legislature, was expected to operate automatically in 1982 and 1983 on action of the commissioner, irrespective of the $1000 PFDs and without an appropriation. And the 1982 budget in fact expresses *no appropriation of those transferred funds* from the permanent fund.[212]

The following year, in 1983, the PFD disbursements appeared in the budget as though appropriated.[213] But in 1983 the 13th legislature was sworn in,[214] a new commissioner of

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209 *See* ch. 21, § 2, SLA 1980 (demonstrating the legislature's recognition that if the dividend fund were underfunded for payouts, the legislature could appropriate "from the general fund to the dividend fund").

210 Ch. 101, §§ 17, 18, SLA 1982.

211 *See* ch. 101, §§ 17, 18, SLA 1982 (displaying omission).

212 *Id.* (demonstrating dividend fund appropriation sections but no "appropriated" transferred funds for 1982).

213 *See* Ch. 107, § 32, SLA 1983. It is unclear why there is a designation for "65 positions" attached to the "appropriation" of the dividend funds. *Id.* But because page 7 of chapter 107 shows the funding source as "permanent fund income," it is assumed the figure represented PFD payments. *See id.*

214 *See* State of Alaska Official Returns, General Election, November 2, 1982. The later legislature is not presumed to have as robust an understanding for the intent of the 1982 act. *Cf. Central Recycling Srvs., Inc. v. Municipality of Anchorage*, No. 7150 Supreme Court of Alaska, S-16036, 2017 Alas. LEXIS 13, *15 (decided February 10, 2017) (observing that, for examining

revenue was installed,[215] and a new governor had taken office.[216] In March 1983, at the request of a legislator, the state attorney general produced an opinion advising that, although transfers *had been made automatically* "in past years," he thought the dividend funding should be appropriated from then on, to be safe.[217] The 1983 attempt at an appropriation should be accorded little weight as evidence of the appropriable nature of the dividend funds. The first legislature after enactment apparently introduced the PFD funding into the budget on the advice of the attorney general because of uncertainty on the exact appropriation question.[218]

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legislative intent, enacting assemblyman's notion of policy underlying ordinance four years after enactment date is *not* highly probative of enacting assembly's intent).

[215] A February 1983 government directory shows the revenue commissioner was no longer Tom Williams but Robert D. Heath. Alaska State Government Miscellaneous Directories Vol. 8, 1983-84 (February 1983).

[216] *See* State of Alaska Official Returns, General Election, November 2, 1982.

[217] Op. Atty. Gen. File No. 366-484-83 (Mar. 10, 1983) (suggesting while the transfer "would arguably involve an unconstitutional dedication . . . without an appropriation," that "an argument can be made, based on the language of article IX, section 15 establishing the permanent fund, that an appropriation for that purpose is not required").

[218] Notably, while supplying the other specific portions of the 1980-82 appropriations bills, the State did not furnish the following in its exhibits provided below:

> Sec. 16 Section 2, ch. 61, SLA 981, as amended by sec. 68, ch. 92, SLA 1981, is amended to read:
>
> Sec. 2. Beginning July 1, 1981, the *commissioner of revenue shall make monthly deposits* to the Alaska permanent fund of the appropriation made by sec. 1 of this Act. . . . Ch. 101, § 16, SLA 1982 (emphasis added).

"Sec. 1" of the act, as mentioned there, provided: "The sum of $1,800,000,000 is appropriated from the general fund to the Alaska permanent fund (art. IX, sec. 15, Constitution of the State of Alaska, AS 37.13.010)." Ch. 61, § 1, SLA 1981.

Thus, here again, the 12th legislature in 1981 signified its intent that when using the term "shall" respecting the commissioner's duty to perform an act, it was meant as a command. The commissioner's act of making monthly deposits of appropriated general funds to the permanent fund of funds beginning July 1, 1981 did not necessitate the legislature to give any additional direction; the commissioner was required to perform that act.

The practice of the subsequent legislature cannot change the character of the dividend funds.[219]

2. The governor's appropriations veto power applies only to appropriations, but under *Hickel v. Cowper*, the dividend funds are already committed and not "available for appropriation."

Not all funds within the State's control are available for legislative appropriation and subject to the governor's veto; the PFD funding thwarts the appropriations process because by its terms it is not available for appropriation. The legislative power to appropriate funds operates over "all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure."[220] On the other hand, "monies

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219 A 1987 modification to AS 43.23.045 added subsection (d), which provides:

> Unless specified otherwise in an appropriation act, the unexpended and unobligated balance of an appropriation to implement this chapter lapses into the dividend fund on June 30 of the fiscal year for which the appropriation was made and shall be used in determining the amount of and paying the subsequent year's dividend . . . .

The State argued in the superior court that enactment of this provision "clearly demonstrate[d] that the legislature understood the dividend program would be effectuated by appropriations." [Tr. 76: 6-77:19] The argument is untenable; a later legislature's enactment based on a mistaken belief of an earlier law's operation cannot change the first law's intent. As explained, the practice of adding the dividend funds to the budget as if an appropriation was advised by the 1983 attorney general irrespective of past automatic transfers. *See supra* note 161. The 1987 legislature's modification merely references that practice, but more so concerns disposition of the unexpended funds.

Furthermore, Governor Cowper, addressing the addition of subsection (d), stated: "An appropriation has been the *vehicle* for the 'transfer' of permanent fund income to the dividend fund that is required by current AS 43.23.045(b)." Transmittal Letter from Governor Cowper, 1987 House Journal 103-04 (Jan. 30, 1987) (emphasis added). The governor's statement acknowledges his uncertainty that the appropriations are necessary, but that due to the practice of doing so, the unexpended funds must be addressed.

220 *Hickel v. Cowper*, 874 P.2d 933, 935 (Alaska 1994).

which already have been validly committed by the legislature to some purpose *should not be counted as available [for appropriation]*."[221]

Constitutional provisions that "deal with the same subject matter" are read in *pari materia* and "should be construed together" in harmony.[222] When "the same term [is used] in two closely related [constitutional provisions]," this Court normally assumes consistent use by "presum[ing] that the [adopting body] intended that term to mean the same thing in both cases."[223]

In this case, the word "appropriation" carries the same meaning in several sections of the Constitution—such as under the appropriations clause of article IX, section 13; for the legislative appropriations process governed by article II, sections 13, 14, and 16; and for the applicability of the governor's appropriations veto in article II, section 15.[224] That same

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221 *Id.* at 930-31 (emphasis added).

222 *See Underwater Constr. v. Shirley*, 884 P.2d 150, 155 (Alaska 1994) (citing *State v. Eluska*, 724 P.2d 514, 517 (Alaska 1986) (Compton, J., dissenting)); *State v. Frazier*, 719 P.2d 261, 262 (Alaska 1986) (citing 2A C. Sands, Sutherland Statutory Construction § 51.01 at 449 (4th ed. 1973)).

223 *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 180 (Alaska 1986). *See also Brooks v. Wright*, 971 P.2d 1025, 1028 (citing *Thomas v. Bailey*, 595 P.2d 1, 4 (Alaska 1979)) (articulating that "when interpreting the Alaska Constitution," this Court "appl[ies] [the] basic rules of statutory construction.").

224 *See supra* notes 125-31 and accompanying text.

However, the State argued below that based on another section of the Constitution, funds for the PFDs were contemplated as appropriations. Article IX, section 16 states:

> Except for appropriations for Alaska permanent fund dividends, appropriations of revenue bond proceeds, appropriations required to pay the principal and interest on general obligation bonds, and appropriations of money received from a non-State source in trust for a specific purpose, including revenues of a public enterprise or public corporation of the State that issues revenue bonds, appropriations from the treasury made for a fiscal year shall not exceed $ 2,500,000,000 by more than the cumulative change, derived from federal indices as prescribed by law, in population and inflation since July 1, 1981.

meaning of "appropriation" must also extend to the article 9, section 17 budget reserve fund.[225] Accordingly, monetary funds that, by their statutory terms, are not available for appropriation under the constitutional budget reserve must not be appropriable. When funds are not available for the legislative act of appropriation, they cannot come within operation of the governor's veto.

Hickel v. Cowper provides the controlling analytical principles needed to determine whether certain funds within the State's purview may be legitimately expended as *appropriations*. In *Hickel* this Court examined the meaning of the phrase "amount available for appropriation"

The provision is unhelpful to the State's contention. In the first place, it only references the PFD funding in passing; it cannot itself enact an appropriation. Second, and critically, the constitutional provision that was ratified by Alaskans on November 2, 1982 was pursuant to the 12th legislature's resolution signed by the governor on July 15, 1981. *See* History of Legislation, SJR 4 (7/29/82). In 1980-82, the legislature *had* appropriated funds for the PFD's—from the general fund—so this provision merely reflects the fact that those appropriations were made and how those funds must be treated under section 16. *See* ch. 101, §§ 17, 18 (reflecting "reappropriations" of 1979-81 general fund appropriations for PFD payments), ch. 120, § 52, SLA 1980; ch. 82, § 28, SLA 1981; ch. 92, §§ 42, 50, SLA 1981 (demonstrating 1979-81 original general fund appropriations for PFD payments) & *supra* notes 206-10 and accompanying text.

And the 1982 transfer term specifically bypassing legislative appropriation authority was not enacted until June 16, 1982, after passage of SJR 4. *See* ch. 102, SLA 1982. Finally, the State's assertion that section 16 is indicative of appropriations authority over the PFD funds is undermined by the substance of the section: It explains that unlike other generic appropriations that will be aggregated and subject to the constitutional appropriations limit—*permanent fund dividend funding will not be*.

[225] While there are instances where the word "appropriation" may engender different meanings even within the Alaska Constitution, *compare Alaska Legislative Council v. Knowles*, 86 P.3d 891, 894-897 (Alaska 2004) (establishing that the governor's article II, section 15 appropriations veto authority applies only to "appropriations" that are monetary in form), *with Thomas v. Bailey*, 595 P.2d 1, 7-8 (determining that the article XI, section 7 restriction against "appropriations" through popular initiative must include propositions that would give away real property), the term's meaning for this appeal in light of the particular provisions implicated as well as for the CBR specifically relates to *liquid assets* and the *legislative ability to expend them*; the term must be construed in harmony for these provisions.

under article IX, section 17 of the Alaska Constitution, providing for the constitutional budget reserve fund (CBR) as ratified by the voters in 1990.[226] The CBR is a separate fund within the State treasury holding certain of the state's liquid assets, which are invested to yield income retained in the fund.[227] Under the CBR provisions, if the amount available for appropriation in a fiscal year is less than the amount appropriated for the prior fiscal year, the legislature may access the CBR by a simple majority vote to make up the difference.[228]

The legislature in *Hickel* tried to statutorily define which funds were considered CBR "amount[s] available for appropriation," but limited that definition to only four sources.[229] The governor challenged the statute's constitutionality, contending the legislature's

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226 *Hickel*, 874 P.2d at 923-25, 926-935. *See also* Legislative Resolve No. 129 of the 16th Alaska Legislature, section 2 (1990). Article IX, section 17 of Alaska Constitution provides in pertinent part:

> (b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

227 *See id.* at 923-24 & n.1; ALASKA CONST. art. IX, § 17(a). Money received by the State after July 1, 1990 resulting from terminations, settlements, administrative proceedings, or litigation involving such subjects as mineral lease bonuses, rentals, royalties, and taxes imposed on mineral income, production, or property are deposited in the CBR. ALASKA CONST. art. IX, § 17(a).

228 *Hickel*, 874 P.2d at 923; ALASKA CONST. art. IX, § 17(b). On three-fourths majority vote in each house, the legislature can use CBR funds for any public purpose. ALASKA CONST. art. IX, § 17(c).

229 The four sources were: "(1) unrestricted revenue accruing to the general fund during the fiscal year; (2) general fund program receipts as defined in AS 37.05.146; (3) unreserved, undesignated general fund balance carried forward from the preceding fiscal year; and (4) the balance in the statutory reserve fund, AS 37.05.540." *Id.* at 926-27 (citing AS 37.10.420(a)(1)) (citation omitted).

interpretation of section 17(b) was too narrow.[230] This Court rejected the legislature's overly limiting statutory definition of *amount available for appropriation*.[231] Looking to the plain language of the constitutional amendment, and exploring the probable understanding that voters placed on the phrase and the intent of the drafters, the Court observed that the CBR was meant to act as a "stabilizing" force, to help "maintain 'equal' appropriation levels from year to year."[232] Before accessing the CBR by simple majority then, other funds must be counted which the legislature had not included in its attempted definition.[233] In identifying the section 17(b) fund sources available for appropriation, "focus[ing] on the legal status of the various funds implicated in relationship to the legislative power of appropriation" was necessary.[234]

The Court observed, "[I]t is clear that one of the fundamental characteristics of an appropriation, in the public law context, is that it authorizes governmental expenditure without further legislative action."[235] The Court reasoned that the "key question" in interpreting the phrase "amount available for appropriation" respecting particular fund sources is "what constitutes a valid appropriation such that *the funds involved are no longer available*."[236] Therefore, this Court held that the amount available for appropriation under the CBR "includes all

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230 *Id.* at 924-26.

231 *Id.* at 927-928. The Court also rejected the governor's expansive interpretation of amounts available for appropriation, observing that his reading "would require all net assets held by the State, however liquid, be considered available" for CBR purposes, which would "in effect require reductions in the level of government service until no liquid funds remained before a simple majority could reach the budget reserve." *Id.* at 928, 929.

232 *Id.* at 927-28, 929, 931.

233 *Id.* at 935.

234 *Id.* at 927.

235 *Id.* at 933.

236 *Id.* at 932 (emphasis added).

monies over which the legislature *has retained the power to appropriate* and which *require further appropriation before expenditure*."[237] As a corollary, this Court enunciated: "[F]unds established by the legislature which may be used to pay state expenditures *without further legislative action* are *not available for appropriation*, to the extent that they are authorized."[238]

In light of its pronounced *Hickel* test, the Court explored specific fund sources within the State's control, analyzing their availability under section 17(b). The Court noticed there were certain statutory state funds—restricted in their spending function—having "the same general structure," and where "each consists of money 'appropriated' to it" by the legislature—but where their "initial appropriations, however, are not sufficient to support any expenditure."[239] These funds, this Court explained, "require further legislative appropriation before expenditures can be made against them"—making them "available for appropriation" under the test.[240] Sources the Court identified as available demonstrate language empowering the legislature to appropriate funds from those sources[241]: The Railbelt energy fund, establishing that "the legislature *may appropriate money from the fund*" for programs, projects, and other Railbelt energy needs expenses;[242] the Alaska marine highway system vessel replacement

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237 *Id.* at 931, 935. The Court further concluded that, "In addition, all amounts *actually appropriated*, whether or not they would have been considered available prior to appropriation, are available within the meaning of section 17." *Id.* (emphasis added). This aspect of the holding is incidental to legislative appropriation practice and specific to CBR interpretation only; it does not undermine the Appellants' argument because the legislature cannot actually appropriate the dedicated dividend funds.

238 *Id.* at 933 (emphasis added).

239 *Id.*

240 *Id.*

241 *Id.* at 933-34.

242 AS 37.05.520 (emphasis added).

fund, also providing that "the legislature *may appropriate money from the fund*" for such functions as state ferry vessel refurbishment, acquisition, or replacement;[243] and the educational facilities maintenance and construction fund, establishing that "money in the fund *may be appropriated*" to finance public school design, construction, and maintenance or for University of Alaska facility maintenance.[244] Because the mere legislative creation of these funds, "cannot support any expenditure," the Court determined that "the money in these funds remain[ ] 'available for appropriation.' "[245]

In contrast, when the Court examined the text of the oil and hazardous substance release response fund,[246] the analysis revealed the fund amounts were *unavailable* for appropriation.[247] AS 46.08.040(a) authorizes the commissioner of environmental conservation to use the funds to, among other things, "contain, clean up, and take other necessary action, such as monitoring and assessing, to address a release or threatened release of oil or a hazardous substance that poses an imminent and substantial threat to the public health or welfare, or to the environment."[248] The Court recognized that with this fund, "[t]he entire balance . . . could potentially be used by the commissioner . . . without further

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243 AS 37.05.550(a) (emphasis added).

244 AS 37.05.560(b) (emphasis added).

245 *Hickel*, 874 P.2d at 934.

246 AS 46.08.010. The fund was later renamed the "oil and hazardous release prevention and response fund" and amended to create separate prevention and response accounts. *See* Ch. 128, § 21, SLA 1994.

247 *Hickel*, 874 P.2d at 933, 935. This fund appears in the state operating budget. *See* ch. 3, § 1, SLA 16 2016 (demonstrating that "Spill Prevention and Response" appears as an appropriation in the operating budget).

248 *Hickel*, 874 P.2d at 933 (quoting AS 46.08.040(a)).

authorization by the legislature."[249] "Because the legislature . . . made the entire balance of th[e] fund available for expenditure [by the commissioner], the *amounts deposited into the fund are validly appropriated* and therefore *no longer available for appropriation*."[250]

Of particular import, the Court also applied the *Hickel* test to the AS 37.13.145(a) earnings reserve account.[251] The Court first described article IX, section 15's establishment of the permanent fund.[252] Because section 15 enabled the mechanism to "provide[ ] by law" for use of the income other than deposit into the general fund,[253] the Court explained that AS 37.13.145(a) "provides otherwise" by establishing the earnings reserve.[254] Dissecting the AS 37.13.145 scheme, this Court stated:

> A percentage of the money in the reserve account is automatically transferred to the dividend fund at the end of each fiscal year. After that transfer has been made, an additional amount is transferred from the earnings reserve account to the principal of the permanent fund in order to offset the effect of inflation on principal of the fund. No regular provision is made for amounts in the earnings reserve account in excess of that necessary to fund dividends and inflation proof the permanent fund principal.[255]

The Court noted that, "absent an appropriation, th[e] excess [of the earnings reserve] accumulates from year to year."[256] Observing that "[t]he balance remaining in the earnings

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249 *Hickel*, 874 P.2d at 933.

250 *Id.* (emphasis added). The appropriation availability analysis for this fund is instructive; the Appellants take no position whether or not this fund is violates the dedicated funds clause.

251 *Id.* at 934.

252 *Id.* (quoting ALASKA CONST. art. IX, § 15).

253 "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).

254 "Therefore, money in the earnings reserve account never passes through the general fund, and is never appropriated as [general funds] by the legislature." *Id.* at 934.

255 *Id.* (citing AS 37.13.145(b), (c)) (citations omitted) (internal quotation marks omitted).

256 *Hickel*, 874 P.2d at 934. The Court observed that the earnings reserve balance in February 1994 was $1.087 billion; as of December 16, 2016, that balance is now much greater

reserve . . . after the dividend and inflation-proofing transfers have been made is liquid," the Court further recognized that under the *Hickel* test, this liquid balance "is not subject to expenditure without further legislative action."[257] Finally the Court noted the importance that "[t]here are no statutory or constitutional prohibitions against direct appropriations from this account."[258] Based on its reasoning, this Court concluded that "[t]he earnings reserve is therefore available for appropriation."[259]

Thus this Court has actually addressed the statutory *availability for appropriation* of the dividend transfer before. While closely scrutinizing the earnings reserve scheme—to which the dividend funding is inexorably appurtenant—the Court was confronted with the express opportunity to decide if the funds were available for appropriation under the *Hickel* test.[260] Rather, acknowledging the statute's mandate requiring the Corporation to effect the transfer, the Court methodically and deliberately *excluded* those funds from consideration.[261] And moreover, the Court definitively declared that the percentage of the earnings reserve allocated for dividends each year is "*automatically transferred*" to the dividend fund, while yet

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at $10.3 billion. Alaska Permanent Fund Corporation, *Permanent Fund Up 4.50% for Fiscal Year 2017* (2/7/17), *available at* http://www.apfc.org/home/Media/pressroom/20170201_APFC%20Q2%20FY17.pdf

257 *Hickel*, 874 P.2d at 934.

258 *Id.*

259 *Id.* The Court correctly observed by its reasoning that funds transferred to the separate dividend fund and to the separate permanent fund for inflation-proofing are no longer part of the earnings reserve that was held available for appropriation.

260 *Id.*

261 *Id.*

determining—through an inherently comparative analysis—that the "excess" remaining in the earnings reserve *is* available for appropriation.[262]

Furthermore, to the extent that the transfer funds were not squarely addressed in *Hickel*, this Court decreed: "The availability of funds not specifically discussed in this opinion must be determined in accordance with this opinion."[263] Even directly applying the *Hickel* test to the transfer amount manifests the funds are not available for appropriation. The PFD distributions initially depend on the statutory transfer from the earnings reserve to the dividend fund.[264] Alaska Statute 37.13.145(b) charges the corporation with that duty.

Unlike the Railbelt energy fund, the Alaska marine highway system vessel replacement fund, or the educational facilities maintenance and construction fund in *Hickel*, AS 37.13.145(b)'s language demonstrates that the legislature had *not* "retained the power to appropriate"[265] the funds comprising the "50 percent of the income available for distribution"[266] passing to the dividend fund. Nor does AS 37.13.145(b) "require further appropriation before expenditure";[267] the expenditure—the *transfer*—as this Court observed, is "automatic."[268] In contrast to the *available Hickel* funds—those which, as demonstrated by their statutory text, "cannot support any expenditure"[269]—AS 37.13.145(b) specifically details

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262 *Id.*
263 *Id.* at 935.
264 AS 37.13.145(b). *See also* AS 43.23.045(a) (explaining establishment of the dividend fund as a separate fund of the state treasury).
265 *Hickel*, 874 P.2d at 935.
266 AS 37.13.145(b).
267 *Hickel*, 874 P.2d at 935.
268 *Id.* at 934.
269 *Id.*

the expenditure amount to be transferred, and it expressly directs the means of achieving that expenditure.

That AS 37.13.145(b) confers to the corporation—a third party removed from the appropriations process—the obligation to execute the designated transfer is significant. The legislature could have easily assigned itself that duty, *retaining itself the power to appropriate* the funds as for any routine appropriation act,[270] but it did not. The legislature could have also used phrasing maintaining discretionary authority or otherwise referencing a form of the term "appropriation" within the language of AS 37.13.145(b), yet it did not. Instead the legislature chose to enact an implementation device that, as in *Hickel*, "authorizes government expenditure without further legislative action."[271]

In fact examining other statutes the legislature enacted prior to the AS 37.13.145(b) language vesting the transfer duty with a third party reveals that the legislature knew how to construct statutes concerning funds over which it intended to preserve discretionary appropriations authority. For one valuable instance of this, in 1980 the legislature created the older Alaskans service programs account and provided that "[a]n amount to carry out the provisions of this chapter *may be appropriated annually by the legislature* to the account," and further established that such appropriation "shall be fully distributed by the Older Alaskans Commission to sponsors of . . . service programs [under] this chapter."[272] The 1980 legislature could have similarly structured AS 37.13.145(b) to extend *appropriated* funds to a third party

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270 *See id.* at 935.
271 *Id.* at 933.
272 *See* ch. 152, § 1, SLA 1980.

who would then "fully distribute" that amount as PFDs, but instead placed even the initial transfer onus on the third party.[273] In enacting a provision relinquishing its own appropriation power—making no reference at all to the word "appropriation"—the legislature is presumed to have intended a meaningful variation.[274]

But to fully perform the *Hickel* analysis, what transpires with the funds beyond the transfer must be considered. After the transfer Alaskans' individual PFD entitlements are calculated by a formula under AS 43.23.025.[275] It is clear that reading AS 37.13.145(b) in

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[273] While the language of AS 37.13.145(b) has evolved in time, the transfer obligation of a third party has persisted. *Compare* ch. 21, § 2, SLA 1980. (reflecting "the commissioner shall transfer" language), *with* AS 37.13.145(b) (exhibiting "the corporation shall transfer" language). Other examples of statutes demonstrating pre-1982 legislatures' understanding of retaining their appropriations authority abound. For instance, in 1980 the legislature's first establishment of the transfer provision also codified a related provision permitting "the legislature may annually appropriate money from the general fund to the dividend fund if there is not enough money in the dividend fund to pay each eligible individual an annual [PFD] valued at $50." Ch. 2, § 2, SLA 1980. *See also* ch. 147, § 8, SLA 1978 ("[S]tate funds appropriated for a public works project which is the subject of the assumption or the agreement shall be transferred to a special account in the state treasury."); ch. 10, § 2, SLA 1976 ("Appropriations for carrying out secs. 10-140 of this chapter shall be set forth in a general appropriation bill or such other bills as may be necessary."); ch. 249. § 1, SLA 1970 ("Funds to carry out the provisions of this section may be appropriated annually by the legislature to the account."); ch. 152, § 1, art. IV, tit. III, SLA 1957 ("Each public work shall be constructed in a completed manner within the appropriation limits imposed by the legislature.").

[274] "[A] legislative body generally uses a particular word with a consistent meaning in a given context." *See Erlenbaugh v. United States*, 409 U.S. 239 (1972); "[C]ourts ordinarily apply a presumption that variations in statutory language are meaningful." *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 419 (9th Cir. 2011) (citing *Corley v. United States*, 556 U.S. 303, 315 (2009)). That the legislature recognized how to maintain appropriation control over the transfer amount and yet choose not to is especially clear given the express constitutional *appropriations* power of the legislature. ALASKA CONST. art. 2, §§ 13, 14, 16.

[275] This statute requires the commissioner to determine the dividend payment using the full transfer and then from it, adding or subtracting items like unexpended prior year balances and administration of the dividend fund, then dividing the amount by those who are eligible to receive a PFD. *See* AS 43.23.025(a).

tandem with AS 43.23.025 evidences that the legislature never intended to construct a dividend scheme over which it would retain appropriation authority of the PFD funds—as for a purpose of manipulating Alaskans' dividend payments or maintaining funds within, or reverting funds back to, the earnings reserve for eventual State spending elsewhere. Rather, under AS 43.23.025(a)(1)(A), the commissioner of revenue must determine the total for the dividend disbursements by taking the *entire* "amount of income . . . transferred to the dividend fund under AS 37.13.145(b)" and either adding to or subtracting from that amount other sum certain items over which the legislature also has no meaningful appropriation authority.[276] That total is then simply divided by the number of Alaskans eligible to receive the dividend for the year.[277] The structure and substance of AS 43.23.025, read in conjunction with AS 37.13.145(b), exhibits conclusively that the legislature intended to "validly commit[ ]" the transferred funds "to some purpose"—the PFDs—making those funds "no longer available for appropriation."[278] The only post-transfer exception allowing for an appropriation merely addresses administrative costs of the dividend fund itself,[279] and this exception cannot sustain the supposed appropriation act of the fund transferal that resulted in the governor's veto.[280]

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276 *See* AS 43.23.025(a)(1)(A)-(D). The dividend fund may be used to pay the costs of its own administration through appropriations, however. *See* AS 43.23.025(a)(1)(E).

277 AS 43.23.025(a)(1)(2), (3).

278 *See Hickel*, 874 P.2d at 930-31, 933.

279 The dividend fund, like all state funds, must be managed. Alaska Statute 43.23.045(a) provides "[t]he dividend fund shall be administered by the commissioner [of revenue] and shall be invested by the commissioner" in the same manner as other amounts in the state treasury. Accordingly funds from the dividend fund itself may be appropriated for expenses like the costs "of administering the dividend program" and for the PFD "hold harmless" provisions concerning public assistance eligibility. *See* AS 43.23.025(a)(1)(E); AS 43.23.075.

280 Incidentally, the only aspect of the transferred dividend funds that would be considered available for appropriation for 17(b) CBR access is the discretionary portion paying for the

The term "appropriation" carries the same meaning for the CBR as elsewhere in the constitutional provisions relevant here. *Hickel* provides the analysis to determine whether state monetary funds are available for appropriation under the CBR, and that same analysis applies to the availability for appropriation of statutorily-authorized funds more universally. Accordingly, under the *Hickel* test, neither the AS 37.13.145(b) transfer nor those transferred funds as utilized in the AS 43.25.025(a)(1)(A) dividend distribution formula are available for the appropriation attempted by the 29th legislature. Because they are not available for appropriation, the legislature cannot appropriate the AS 37.13.145(b) funds; the corporation must transfer the funds, and the governor's appropriations veto cannot apply.[281]

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administration. *See* AS 43.23.025(a)(1)(E). As discussed, the funds do not meet the requirements for availability under the *Hickel* test. The policy of the CBR is to provide a stabilizing, equalization force for the state's budget expenses that will alieve shortfalls from year to year. *Id.* at 927-28, 929, 931. Because the transferred dividend funds are distributed directly and absolutely to individual Alaskans no matter how great the amount "available for distribution" is, there would be no legitimate reason to include that sum in the comparison to the prior year to ensure the policy of stability and equalization is met. The dividends also could not be augmented by a draw from the CBR. Therefore, the purpose of the CBR does not support availability for appropriation specifically in the CBR 17(b) context either, further demonstrating dividend funding unavailability.

[281] If the State were to argue that *Hickel* stands for the proposition that funds first must be "appropriated," a "valid appropriation," or "validly appropriated" in order to be deemed unavailable—thereby bringing them within appropriation authority—the assertion must fail. *See supra* notes 236, 239, & 250 and accompanying text. First, as those terms are used in *Hickel*, their expressions are perfunctory, referencing forms of the word "appropriation" but meaning only to describe the general occurrence of a legislative act of devoting funds to a particular purpose and not the technical legislative act of appropriation. Second, because the enacting legislature effected a dedication of the dividend funds, those funds were never appropriated.

D. The Governor's Veto Struck Descriptive Language, Violating The Legislature's Authority To Enact Laws.

When the governor vetoed the PFD funding he struck descriptive language, resulting in an infringement on legislative power. The ability of the governor to "strike or reduce" items under article II, §15 applies to the "amount" of an appropriation; the governor can "delete or destroy" the monetary item, or reduce it as by "diminution."[282] The governor's appropriations veto is "intended only to limit the legislature's appropriation power, not . . . grant the executive a quasi-legislative appropriation power."[283] The veto authority "does not give . . . the power to rewrite appropriation bills except by striking or reducing items."[284] "Altering the purpose of [an] appropriation by striking descriptive words interferes with th[e] unity [between the appropriation's amount and purpose] because the result is no longer the item the legislature enacted."[285] The appropriation veto "[must] not distort the legislative intent, . . . effect[ively] creat[ing] legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences."[286]

In *Alaska Legislative Council v. Knowles*, the legislature had included language in appropriations that made funding contingent on conditions first being met.[287] The governor had struck the conditional language, unfettering the appropriated funds.[288] The Court

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282 *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 372, 373 (Alaska 2001).

283 *Id.* at 372 (indicating that the governor's impermissible exercise of such quasi-legislative appropriation power would "permit[ ] appropriations the legislature never enacted").

284 *Id.*

285 *Id.* at 372.

286 *Id.* at 373 (quoting *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 981 (N.M. 1974)).

287 *Id.* at 369.

288 *Id.*

reasoned that "public policy disfavors a reading of 'item' that would permit the executive branch to substantively alter the legislature's appropriation bills."[289] Otherwise, such would "effectively result[ ] in appropriations passed without the protections our constitution contemplates" and "create legislation inconsistent with that enacted by the Legislature."[290] The conditional clauses struck by the governor in *Knowles* were "not . . . 'item[s].' "[291] The Court concluded that "[b]y striking th[at] language" the governor had not vetoed by "striking or reducing"; rather his veto amounted to "editing."[292]

Similarly here, the governor's striking of language from the PFD appropriation amounted to a "quasi-legislative" act. The governor here attempted his veto authority to reduce the transfer to the dividend fund.[293] As vetoed by the governor, section 10 of the legislature's 2016 appropriation bill became:

> (b) The amount ~~authorized under AS 37.13.145(b)~~ for transfer by the Alaska Permanent Fund Corporation on June 30, 2016, ~~estimated~~ to be ~~$1,362,000,000~~ **$695,650,000**, is appropriated from the earnings reserve account (AS 37.13.145) to the dividend fund (AS 43.23.045(a)) for the payment of permanent fund dividends and for administrative and associated costs for the fiscal year ending June 30, 2017.[294]

Two problems result from the governor's attempted appropriation veto. First, the governor's strikeouts substantively altered the section 10(b) transfer by deleting important

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289 *Id.* at 373 (citing ALASKA CONST. art. II, § 14 (establishing certain procedures for passage of bills by the legislature)).

290 *Id.* at 373 (quoting *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 981 (N.M. 1974)).

291 *Id.* at 374.

292 *Id.*

293 *See* CCS HB 256, 29th Leg., 4th Spec. Sess., § 10, Ch. 3, 4SSLA 2016.

294 *See id.*

non-monetary text "descriptive" in nature. The governor's "careful striking" of the phrase "authorized under AS 37.13.145(b)" as well as the word "estimated" resulted in a change "inconsistent with [the appropriation] enacted by the Legislature."[295] The governor did not simply "[r]educe an item appear[ing] to be a lesser form of [the original] item" as the constitution authorizes.[296] The governor impermissibly "distort[ed] . . . legislative intent,"[297] because the legislature specifically meant to describe the basis for its estimated appropriation as corresponding with the absolute requirement of funding under AS 37.13.145(b).[298]

Second, it is clear that this instance of an impermissible veto is particularly unique, because the alteration was not one of usual words used to explain or condition an appropriation. Here, even if the legislature's express descriptive language were merely left in place, neither term would then correlate with the governor's reduction to the appropriated amount. This is because the language the governor vetoed referenced the operation of a statute requiring a certain sum of money to be automatically transferred. The governor "alter[ed] the purpose of the appropriation by striking descriptive words" and interfered with the "unity" between the *amount and purpose* of the appropriation—and the result was "no longer the item the legislature enacted."[299]

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295 *See id.* at 373. (quoting *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 981 (N.M. 1974)).

296 *Id.*

297 *Id.*

298 *Knowles* also explained that "[p]ermitting a governor to strike descriptive language would not limit expenditures or help balance a budget." *Id.* at 373. In this case, it is arguable that striking the descriptive language could limit the expenditure—but that action only follows in this instance because the descriptive language had given the *purpose* for the *amount* expended. *Knowles* clearly admonishes there must be no interference with the unity between amount and purpose. *Id.* at 372.

299 *Id.*

But the reality of why the governor's veto does not function properly here is because the relevant stricken "item" was actually a fixed statutory dedication that the legislature has assigned to *another entity*—the corporation—the specific duty to execute. The language the governor vetoed would *compel the corporation* to "transfer from the earnings reserve account to the dividend fund" the specific and mathematically calculable amount.[300] In fact, even the legislature's attempted appropriation "estimating" the transfer amount cannot determine the correct amount because it would always only be that—an estimation. The legislature could *never* correctly *appropriate* the exact amount that the corporation is under statutory duty to calculate and then transfer.[301] Moreover if, for instance, the legislature's estimated amount was wildly incorrect due to a stock market fluctuation, or the legislature had made a significant math error in calculating the amount, the corporation would *still be statutorily obligated* to follow

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300 AS 37.13.145(b).

301 The fact that funds appearing in section 10(b) could not effect an appropriation of the required *statutory dedication* is further evidenced by the process in which the estimate—$1.362 billion—was determined. The legislature did not reach that amount deliberatively. The legislature adopted the amount that was reported by the corporation as 50 percent of the income available for distribution. Both houses passed versions of HB 256 that provided an estimate of $1.405 billion. On May 30 the Conference Committee changed the amount to $1.362 billion. As Legislative Finance Division Director David Teal explained, "As part of our technical and conforming powers, we intend to modify the following estimated amounts in the operating bill: . . . $1.362 billion (replacing $1.405 billion)." (Hearing on CCS HB 256 before the Conference Committee, 29th Leg., 4th Spec. Sess. (Alaska May 30, 2016)).

Teal further explained, "the amount was *necessary to fulfill the statutory formula*, and was a conforming or technical change to reflect the current estimates." *Id.* (emphasis added). The conference committee did not vote on the changes, instead accepting the "technical" change as simply a revised estimate. The legislature clearly did not intend to appropriate an amount separately and independently from the statutory transfer requirement.

the law and compute the correct amount then transfer it—regardless of whatever number appeared in the budget.[302]

The governor's veto was not constitutionally authorized for section 10(b) and impinges on the lawmaking authority of the legislature. But even if the veto were applicable as to a reduction of amount, the appropriation provision would be unintelligible. The anomaly is irreconcilable because in actuality, the relevant statute independently obligates the corporation to transfer the PFD funds, irrespective of any attempted appropriation or alleged veto thereof.[303] The governor's veto is inapplicable; the corporation must perform the full transfer.

The State argued below that, in essence, because the legislature has been placing the dividend fund transfer in the appropriation bill, that itself could effect an appropriation. [Tr. 52] The argument is unsound; the mistaken act can neither effect nor interfere with the corporation's duty, and cannot result in a vetoable appropriation. This becomes obvious when examining section 10(a) of the 2016 appropriation bill, which provided: "The amount required

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302 The effect of the governor striking these words was as if to inform the corporation that it no longer had a legal obligation to comply with its transfer duties. But the governor cannot strike the corporation's statutory duty assigned by the legislature with his veto pen; this would violate separation of powers. Nor can the corporation ignore its statutory duty simply because the governor has allegedly struck this duty from an appropriation bill. The corporation is a public corporation with an independent board of trustees appointed by the governor and with its own bylaws. AS 37.13.040; AS 37.13.050; ALASKA PERMANENT FUND BYLAWS (February 25, 2011). According to the corporation's governance procedures, it is required to comply with all applicable laws and regulations, specifically with respect to Alaska Statutes at Title 37, Chapter 13. ALASKA PERMANENT FUND CORPORATION BOARD OF TRUSTEES CHARTERS AND GOVERNANCE POLICIES 38 (February 2014). The governor's action of simply striking through the words of the valid statute would nullify it by cancelling the explicit duty of the public corporation.

303 Similarly, if the legislature were to omit the PFD "appropriation" altogether from the appropriation bill, the corporation must transfer the funds.

to be deposited under AS 37.13.010(a) (1) and (2),[304] estimated to be $333,0000,000 . . . is appropriated to the principal of the Alaska permanent fund . . . ."[305] While the language references statutes for providing the calculation of required deposits, the fact remains that the funds deposited into the permanent fund are guaranteed and protected by the Alaska Constitution.[306] The governor may not strike or reduce those funds. Therefore, that funds merely appear in an appropriation bill cannot spawn an unquestionable appropriation that is vulnerable to veto.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the superior court, grant summary judgment to the Appellants and order the State to comply with AS 37.13.145(b) by transferring the full 50 percent of the income available for distribution from the earnings reserve account to the dividend fund for disbursement as a supplemental 2016 PFD.

Respectfully submitted this 10th day of March 2017.

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304 These statutes provide for calculating the certain amounts for deposit.
305 CCS HB 256, 29th Leg., 4th Spec. Sess., § 10, Ch. 3, 4SSLA 2016.
306 ALASKA CONST. art. IX, § 15.