



THE STATE
of **ALASKA**
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
Main: (907) 269-5100
Fax: (907) 276-3697

April 29, 2020

Via Email

Kris Curtis, Director
Division of Legislative Audit
P.O. Box 113300
Juneau, AK 99811
Email: legaudit@akleg.gov

Re: *Your April 23, 2020 letter to APFC Board of Trustees regarding FY19 audit finding*

Dear Ms. Curtis:

I received a copy of your recent letter to the Alaska Permanent Fund Corporation Board of Trustees referenced above. Your letter addresses two related subjects: (a) your legal conclusion as to the amount of royalties that must be deposited into the permanent fund with your acknowledgement that you issued qualified financial statement opinions because they did not comply with your legal conclusion; and (b) your suggestion that the Board of Trustees may have a fiduciary obligation to seek an opinion from a private attorney rather than to follow the advice of Alaska's Attorneys General.

You must seriously reconsider your course of action. The Department of Law recognizes the important role of the Legislative Auditor. But it is also absolutely clear under Alaska law that the Attorney General is the legal advisor for state agencies. In fact, any contract by an executive branch department or the APFC for outside legal counsel, as you have suggested for APFC, must be approved and supervised by the Attorney General. The agencies to which you gave qualified financial statement opinions relied on a legal determination made by successive Attorneys General—Attorney General Lindemuth and myself. Your office was previously provided the Department of Law's analysis as to how it reached its legal conclusion.

There is no sound basis for you to issue qualified financial statement opinions for the state based solely on your personal legal interpretations. It is irresponsible for you, given the current fiscal conditions facing the state, to issue qualified audit opinions that are premised solely on questionable legal conclusions you solicited for the sole purpose of questioning the advice of two successive Attorneys General. It is paramount that the statutorily assigned role of the Attorney General be respected. Attorney General opinions should not be second-guessed by an auditor who lacks any legal training. It is an abuse of your position for you to misuse the legislative audit process, potentially creating fiscal difficulties for the state, in order to advance your personal opinions and objectives.

1. The Legislative Auditor performs a valuable service when carrying out the auditor’s statutory responsibility, but it is the Attorney General who advises state agencies on the requirements of the law.

The Legislative Auditor works with the executive branch under AS 37.05.210 to complete the comprehensive annual financial report (“CAFR”). The Legislative Auditor’s role is to audit the State’s financial transactions “in accordance with generally accepted audit standards.” As stated in the CAFR, “The goal of the independent audit is to provide reasonable assurance that the financial statements of the State [in a particular fiscal year] is free of material misstatement.” To ensure there are no material misstatements, the auditor needs to understand the laws that apply to the financial transactions under audit and ensure there are no errors or fraud. Under Alaska’s legal framework, the role of providing that understanding of the law is assigned to the Attorney General. Nothing in state statutes or the scope of the audit grants the auditor authority to interpret the law—and in particular the Alaska Constitution—independently and contrary to the advice of the Attorney General.

2. The Attorney General is the officer under Alaska law who provides legal advice to state agencies about how to properly comply with the law.

Under AS 44.23.020(a), the Attorney General is “the legal advisor of the governor and other state officers.” The Attorney General also “administer[s] state legal services” and “draft[s] legal instruments for the State.”¹ The Alaska Supreme Court has broadly interpreted the Attorney General’s powers when it comes to the legal business of the State and the disposition of litigation.² The Attorney General and his subordinate attorneys within the Department of Law perform the role of legal advisors to the State by complying with the Rules of Professional Conduct, which includes providing “competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”³

With few exceptions not applicable here, all executive branch agencies receive legal advice from the Attorney General and have no independent authority to ignore the advice of the Attorney General or to choose to follow the legal interpretations of the Legislative Auditor, an official who is outside the executive branch and not authorized to provide legal advice.

¹ AS 44.23.020(b).

² *Public Defender Agency v. Superior Court, Third Judicial Dist.*, 534 P.2d 947, 950 (Alaska 1975).

³ Rule 1.1.

3. **The Attorney General advised state agencies including the APFC on the legal issues raised by the Legislative Auditor, and the Legislative Auditor is aware that the state agencies relied on that advice.**
 - a. **The Department of Law determined that the Alaska Constitution requires an appropriation for any deposit into the permanent fund of royalties beyond 25 percent.**

Former Attorney General Lindemuth and myself both have concluded that a statute such as AS 37.13.010(a)(2) cannot compel the deposit of royalties beyond the constitutional minimum of 25 percent into the permanent fund without an appropriation. On November 9, 2018, the Department of Law provided your office a written analysis explaining the Department's legal conclusion. Early last year I confirmed the opinion reached by General Lindemuth.

Your April 22, 2020 letter to the APFC unreasonably continues to challenge the Department of Law's conclusion. You assert that prior Attorneys General have reached a conclusion more in line with your own—in support of your assertion you cite a 1982 attorney general opinion. To put it succinctly, a lot has happened since 1982. In summary, as detailed in earlier communications with your office, after 1982 the Alaska Supreme Court clarified the matter and rejected your view. The Court has issued several decisions regarding the constitutionality of efforts to set aside state revenues through statutory provisions that attempt to dedicate revenues to a single purpose.⁴ The most recent decision, addressing the dedicated funds clause,⁵ was the Court's 2017 decision in *Wielechowski v. State, Alaska Permanent Fund Corporation*.⁶ This case holds that a statute cannot dedicate a portion of permanent fund earnings to a particular purpose and be expended outside of the appropriations process. In *Wielechowski* the Court specifically held that despite the existence of a statute establishing a formula for the calculation and payment of permanent fund dividends, money cannot be transferred from the Earnings Reserve Account to pay dividends except via the legislative appropriation process. At this time, Alaska Supreme Court decisions foreclose your contrary opinion about Permanent Fund deposits above the constitutionally mandated 25 percent.

⁴ See e.g. *Wielechowski v. State, Alaska Permanent Fund Corporation*, 403 P.3d 1141 (Alaska 2017) (statute cannot dedicate permanent fund income revenues to a particular purpose or authorize their expenditure outside of appropriations process); *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162 (Alaska 2009) (constitutional prohibition against dedicating revenues is to be broadly applied, is not limited to taxes or license fees but applies to all revenues, and thus statute requiring that proceeds from land be placed into a university trust fund was an unconstitutional dedication); *Sonneman v. Hickel*, 836 P.2d 936, 940 (Alaska 1992) (“The constitutional clause prohibiting dedicated funds seeks to preserve an annual appropriation model that assumes that ... the legislature remains free to appropriate all funds for any purpose on an annual basis.”).

⁵ Alaska Const. art. IX, sec. 7.

⁶ 403 P.3d 1141 (Alaska 2017).

b. Any suggestion that the APFC Board of Trustees' fiduciary responsibility includes collecting royalties is baseless.

The Department of Law has informed state agencies and your office several times about the percentage of money constitutionally required to be deposited into the permanent fund. The Department has also advised the APFC and your office that the APFC's sole responsibility under AS 37.13.040 is to manage and invest the assets of the permanent fund in accordance with AS 37.13.010-37.13.190. The APFC does not collect royalties—nor does it have any responsibility to collect more royalties than are appropriated to the fund. Instead, the APFC's only responsibility is to invest state revenues initially received by the Department of Natural Resources (DNR) and the Department of Revenue that are then transferred by appropriation to the APFC for investment and management.

4. The Legislative Auditor should not issue further qualified audit opinions on this legal issue in reference to any state agency, including the APFC.

The APFC followed the legal advice of successive Attorneys General to the effect that its statutory responsibilities do not involve collection of revenues, but instead involve only the investment and management of revenues deposited into the permanent fund. Any notion that the APFC Board of Trustees could somehow breach its fiduciary obligations by following this advice, is without merit. Also meritless is any notion that the Board's fiduciary obligations could be questioned for having followed the advice of the Attorney General that 25 percent of royalties is the legal sum that must be deposited into the fund without further appropriation.

You may disagree with the conclusion reached by the Attorney General. You may believe that state revenues in the form of royalties beyond the constitutional minimum of 25 percent can be legally dedicated and deposited into the permanent fund without an appropriation under AS 37.13.010(a)(2). But your opinion has no legal standing.

Not only have you ignored and disagreed with the advice given by two successive Attorneys General, you apparently also decided that the other attorneys knowledgeable on these issues—Legislative Legal Services—would not provide you an answer you liked. Thus, you skipped their advice and contracted with outside legal counsel to obtain an opinion consistent with your personal views. Although it is not uncommon for the legislature to engage outside counsel for advice on specialized and unique issues, your retention of counsel here is particularly troublesome because, aside from the Department of Law, the legislature's attorneys have the legal expertise to offer an opinion on appropriation and budget matters. The use of Legislative Legal Services would not, in the end, address the foundational issue of the role of the Attorney General. But your use of outside legal counsel in this circumstance emphasizes the pre-determined agenda you had in this matter. As discussed above, your personal view of what you believe the constitution or statutes mean—as a legally untrained auditor—is ultimately immaterial to your determinations as an auditor. And to seek out opinions that best fit your personal view is, at the very least, unreasonable and inappropriate.

Any effort to pressure the executive branch to acquiesce to your opinion by continuing to issue qualified audit opinions—with potentially resulting harm to the state—is improper and raises serious separation of powers issues. As noted above, the Attorney General advises

executive branch agencies on compliance with the law that the executive branch is tasked with administering. The judicial branch is granted the authority to interpret Alaska law and the Alaska Constitution. Under our legal system, the Legislative Auditor has the power to do neither of these things. It is improper for you to try to leverage your limited power by issuing qualified audit opinions.

You have no basis to issue a qualified opinion to state agencies that follow reasonable legal interpretations made by two successive Attorneys General. Your continued refusal to accept that legal determination reflects your fundamental misunderstanding of your limited role under Alaska law. It is not the prerogative of the Legislative Auditor to make a legal determination. Your continued approach in these respects not only oversteps your authority; it also does a serious disservice to the State of Alaska as it is facing an unprecedented fiscal crisis.

Your continued reliance on your own interpretation of the law is seriously damaging the State's ability to navigate its way through the difficult fiscal problems that it faces at this time. Consequently, I respectfully but firmly insist that you terminate this practice immediately.

Sincerely,

Kevin G. Clarkson
Attorney General

cc: Senator Bert Stedman
Senate President Cathy Giessel
Speaker of the House Bryce Edgmon
Angela Rodell, APFC Chief Executive Officer
Valerie Mertz, APFC Chief Financial Officer
Chris Poag, APFC General Counsel