

Jahna M. Lindemuth
jlindemuth@hwb-law.com
Scott M. Kendall
smkendall@hwb-law.com
Samuel G. Gottstein
sgottstein@hwb-law.com
John Andrew Leman
jal@khe.com
Erik R. Groves
erg@khe.com

Attorneys for Plaintiffs

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

ALASKA FEDERATION OF NATIVES, FIRST
ALASKANS INSTITUTE, ASSOCIATION OF
VILLAGE COUNCIL PRESIDENTS,
ALEUTIANS EAST BOROUGH, ORGANIZED
VILLAGE OF KAKE, CITY OF SAINT PAUL,
CITY OF ADAK, CITY AND BOROUGH OF
YAKUTAT, CITY OF SAND POINT, ALASKA
VILLAGE ELECTRIC COOPERATIVE, INC.,
INN ELECTRIC COOPERTATIVE, INC.,
INSIDE PASSAGE ELECTRIC
COOPERATIVE, INC., KOTZEBUE
ELECTRIC ASSOCIATION, INC., NAKNEK
ELECTRIC ASSOCIATION, INC.,
NUSHAGAK ELECTRIC & TELEPHONE
COOPERATIVE, INC., UNALAKLEET
VALLEY ELECTRIC COOPERATIVE, INC.,
CORDOVA ELECTRIC COOPERATIVE, INC.,
and TANALIAN ELECTRIC COOPERATIVE,
INC.,

Plaintiffs,

v.

GOVERNOR MICHAEL J. DUNLEAVY in his
official capacity, THE STATE OF ALASKA,
OFFICE OF MANAGEMENT AND BUDGET,
and THE STATE OF ALASKA,
DEPARTMENT OF ADMINISTRATION,

Defendants.

Court No.: 3AN-21-_____ CI

Complaint

Alaska Federation of Natives, et al., v. Governor Michael Dunleavy, et al.,
Case No. 3AN-21-_____ CI

COMPLAINT

Plaintiffs Alaska Federation of Natives (“AFN”), First Alaskans Institute (“FAI”), Association of Village Council Presidents (“AVCP”), Aleutians East Borough (“AEB”), Organized Village of Kake (“Kake”), City of Saint Paul (“Saint Paul”), City of Adak (“Adak”), City and Borough of Yakutat (“Yakutat”), City of Sand Point (“Sand Point”), Alaska Village Electric Cooperative, Inc. (“AVEC”), Cordova Electric Cooperative, Inc. (“CEC”), I-N-N Electric Cooperative, Inc. (“INNEC”), Inside Passage Electric Cooperative, Inc. (“IPEC”), Kotzebue Electric Association (“KEA”), Naknek Electric Association (“NEA”), Nushagak Electric & Telephone Cooperative, Inc. (“NETC”), Tanalian Electric Cooperative, Inc. (“TEC”), and Unalakleet Valley Electric Cooperative Inc. (“UVEC”) (collectively “Plaintiffs”) hereby file this complaint against Defendants Governor Michael J. Dunleavy, the State of Alaska, Office of Management and Budget (“OMB”), and the State of Alaska, Department of Administration (“DOA”; collectively “Governor”), by stating and alleging the following:

I. INTRODUCTION

1. This suit challenges the Governor’s decision to transfer the more than \$1 billion in the Power Cost Equalization (“PCE”) Endowment Fund, a fund located in the Alaska Energy Authority (“AEA”), to the Constitutional Budget Reserve (“CBR”) under article IX, section 17(d) of the Alaska Constitution and AS 37.10.420(b).

2. Because the Governor’s decision to sweep the PCE Endowment Fund into the CBR violates article IX, section 17(d) of the Alaska Constitution, and interferes with

the legislature's appropriation power in violation of the separation of powers doctrine, Plaintiffs are entitled to declaratory and injunctive relief to prevent catastrophic increases in energy costs for tens of thousands of Alaskans.

II. PARTIES

3. Plaintiff AFN is a non-profit and the largest statewide Native organization in Alaska. Its membership includes 168 federally recognized tribes, 166 village corporations, 8 regional corporations, and 12 regional nonprofit and tribal consortiums that contract and compact to run federal and state programs. AFN is governed by a 38-member board, which is elected by its membership at the annual convention held each October. AFN's mission is to enhance and promote cultural, economic, and political voice of the entire Alaska Native community. A major goal of AFN is to advocate for Alaska Native people, their governments and organizations, with respect to federal, state, and local laws.

4. Plaintiff FAI is a non-profit charitable organization whose purpose is to advance Alaska Natives. FAI helps develop the capacities of Alaska Native people and their communities to meet the social, economic, and educational challenges of the future, while fostering positive relationships among all segments of our society. FAI does this through community engagement, information and research, collaboration, and leadership development.

5. Plaintiff AVCP is a nonprofit tribal consortium dedicated to supporting the interests of the 56 federally recognized member tribes of the Yukon-Kuskokwim Delta. AVCP provides community development, education, social services, culturally relevant

programs and advocacy for the people and 56 tribes of Western Alaska. AVCP promotes self-determination, protection, and enhancement of cultural and traditional values.

6. Plaintiff AEB is a borough that includes the communities of Akutan, Cold Bay, False Pass, King Cove, Nelson Lagoon, and Sand Point. All of these communities, except for King Cove, rely on the PCE program.

7. Plaintiff Kake is a federally recognized tribal government located in Kake, Alaska; it serves approximately 480 tribal members, and seeks to strengthen tribal community and culture. An objective of Kake is to enhance the quality of life of tribal members through economic enterprises and social programs. There are approximately 160 households within Kake, Alaska, and Kake and its residents qualify for the PCE program.

8. Plaintiff Saint Paul is an incorporated second-class city located in the central Bering Sea within the Pribilof Islands, and it serves approximately 370 residents. Saint Paul and its residents qualify for the PCE program.

9. Plaintiff Adak is a second-class city, and is the westernmost city in the United States, with a permanent population of between 100 and 250 residents. Adak and its residents qualify for the PCE program.

10. Plaintiff Yakutat is a non-unified Home Rule Borough located in Southeast Alaska, and has approximately 600 residents. Yakutat and its residents qualify for the PCE program.

11. Plaintiff Sand Point is a first-class city located within the Aleutians East Borough, and has approximately 950 residents. Sand Point and its residents qualify for the PCE program.

12. Plaintiff AVEC is a non-profit electric cooperative corporation organized under Alaska Statutes 10.25 et. seq. AVEC provides electric service under a certificate of public convenience and necessity issued by the Regulatory Commission of Alaska (“RCA”). AVEC serves 60 rural communities throughout Alaska. AVEC received \$12,289,277 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

13. Plaintiff CEC is a non-profit electric cooperative corporation organized under Alaska Statutes 10.25 et. seq. CEC provides electric service under a certificate of public convenience and necessity issued by the RCA. CEC serves the rural community of Cordova. CEC received \$394,291 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

14. Plaintiff INNEC is a non-profit electric cooperative corporation organized under Alaska Statutes 10.25 et. seq. INNEC provides electric service under a certificate of public convenience and necessity issued by the RCA. INNEC serves the rural communities of Iliamna, Newhalen, and Nondalton. INNEC received \$356,072 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

15. Plaintiff IPEC is a non-profit electric cooperative corporation organized under Alaska Statutes 10.25 et. seq. IPEC provides electric service under a certificate of public convenience and necessity issued by the RCA. IPEC provides electric service to

the rural communities of Hoonah, Kake, Chilkat Valley, Angoon, and Klukwan. IPEC received \$1,610,437 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

16. Plaintiff KEA is a non-profit electric cooperative corporation organized under Alaska Statutes 10.25 et. seq. KEA provides electric service under a certificate of public convenience and necessity issued by the RCA. KEA provides electric service in the rural community of Kotzebue. KEA received \$970,867 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

17. Plaintiff NEA is a non-profit electric cooperative corporation organized under Alaska Statutes 10.25 et. seq. NEA provides electric service under a certificate of public convenience and necessity issued by the RCA. NEA provides electric service in the rural communities of Naknek, King Salmon, and South Naknek. NEA received \$737,234 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

18. Plaintiff NETC is a non-profit electric and telephone cooperative corporation organized under Alaska Statutes 10.25 et. seq. NETC provides electric service under a certificate of public convenience and necessity issued by the RCA. NETC provides electric service to the rural communities of Dillingham and Aleknagik. NETC received \$863,566 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

19. Plaintiff TEC is a non-profit electric cooperative corporation organized under Alaska Statutes 10.25 et. seq. TEC provides electric service under a certificate of public convenience and necessity issued by the RCA. TEC provides service to the rural

community of Port Alsworth. TEC received \$115,570 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

20. Plaintiff UVEC is a non-profit electric cooperative corporation organized under Alaska Statutes 10.25 et. seq. UVEC provides electric service under a certificate of public convenience and necessity issued by the RCA. UVEC provides service to the rural community of Unalakleet. UVEC received \$223,244 in PCE payments on behalf of its eligible members in the 2020 fiscal year.

21. Defendant Governor Michael J. Dunleavy is the chief executive for the State of Alaska, and is being sued in his official capacity.

22. Defendant OMB is an entity within the Office of the Governor, and acted at the Governor's direction to issue a list identifying new funds subject to a sweep into the CBR, including the PCE Endowment Fund.

23. Defendant Department of Administration is the State agency charged with effectuating the annual CBR sweep.

24. Plaintiffs have standing as citizen taxpayers, and bring this suit of great import in the public interest of all Alaskans. Plaintiffs also bring this suit because of particularized harms to Plaintiffs, their constituents and/or customers, as well as dire impacts for their rural communities.

III. JURISDICTION AND VENUE

25. This court has jurisdiction over this dispute, as well as the ability to enter a declaratory judgment and provide injunctive relief, under AS 22.10.020.

26. Venue is proper in the Third Judicial District as Defendants maintains offices and may be served within Anchorage, Alaska, and the claims arise from actions that will take place, in part, within the Third Judicial District.

IV. RELEVANT FACTUAL ALLEGATIONS

27. Voters approved the creation of the Budget Reserve Fund — commonly referred to as the CBR — in 1990, which now exists in article IX, section 17 of the Alaska Constitution.

28. Article IX, section 17(d) of the Alaska Constitution provides, in full: “If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the budget reserve fund. The legislature shall implement this subsection by law.”

29. Subsection (d) creates the budgetary mechanism commonly referred to as a “sweep,” where any funds that are both “available for appropriation” and “in the general fund” at the end of a fiscal year are “swept” back into the CBR to repay prior appropriations from the CBR.

30. The CBR sweep in subsection (d) has been routinely counteracted through a “reverse sweep” action by the legislature for appropriation bills. A “reverse sweep” requires a three-quarters vote in both houses of the legislature, consistent with article IX, section 17(c) of the Alaska Constitution.

31. The PCE Endowment Fund was established in 2000 “as a separate fund” from the general fund. *See* AS 42.45.070. The PCE Endowment Fund exists within the AEA, a state public corporation, and is an endowment which funds rural utilities for the purpose of power cost equalization.

32. According to the Governor’s proposed FY2022 operating budget documents, the PCE program has the stated goal of “[r]educ[ing] the cost of electricity for residential customers and community facilities in rural Alaska.” The PCE program “serves over 84,000 Alaskans in communities that are largely reliant on diesel fuel for power generation,” and comprised 194 communities in FY2020.

33. The Governor’s proposed FY2022 operating budget documents also explain that the PCE program is designed “to equalize power cost per kilowatt-hour (kWh) statewide at a cost close or equal to the mean of the cost per kWh in Anchorage, Fairbanks, and Juneau.”

34. The legislature has also established the Power Cost Equalization and Rural Electric Capitalization Fund (“PCE-CAP”). *See* AS 42.45.100. The legislature annually appropriates money from the PCE Endowment Fund to the PCE-CAP to fund equalization payments to eligible electric utilities around Alaska.

35. Since 2000, the legislature has appropriated sufficient monies from the general fund into the PCE Endowment Fund so that the fund’s earnings are enough to pay for the legislature’s annual appropriation to the PCE-CAP. For example, the legislature appropriated approximately \$100 million to the PCE Endowment Fund in 2000 (Ch. 133, § 18, SLA 2000), approximately \$182.7 million to the PCE Endowment Fund in 2006

(Ch. 33, § 22, SLA 2006), and approximately \$400 million to the PCE Endowment Fund in 2011 (Ch. 3, § 26(c), FSSLA 2011).

36. The PCE Endowment Fund contained approximately \$1.15 billion as of June 30, 2021, and accrued more than \$150 million in earnings in FY2021. (The Governor introduced legislation in the 2019 legislative session that was intended to terminate the PCE Endowment Fund and to move those funds back into the general fund. That legislation did not pass.)

37. This year, the legislature appropriated \$32.355 million from the PCE Endowment Fund to the PCE-CAP. Importantly, that appropriation was not vetoed by the Governor.

38. For a number of years, the legislature has been spending funds from the CBR to balance the budget. At the same time, the legislature has counteracted the sweep of monies into the CBR with a vote for a reverse sweep accompanying appropriation bills. But the legislature failed to achieve the required three-quarters vote in both houses for the reverse sweep this year.

39. After a legislative budget impasse occurred in 2019, the Governor took a very expansive view of what funds are subject to the annual sweep to repay the CBR. Previous administrations had identified only 32 out of 71 subfunds (and some only partially) as being subject to the sweep. Without any legal explanation or justification, the Dunleavy Administration identified a different, larger list of 54 funds and subfunds as

being subject to the sweep. The PCE Endowment Fund is among the new funds or subfunds that the administration now considers subject to the annual sweep.

40. Former Attorney General Kevin Clarkson authored a letter in 2019 which set forth his opinion that the PCE Endowment Fund is subject to the sweep. That letter incorrectly reasoned that the PCE Endowment Fund satisfies the two-part test outlined in article IX, section 17(d) of the Alaska Constitution — which was also discussed in *Hickel v. Cowper*, 874 P.2d 922 (Alaska 1994) — which provides that monies are “swept” back into the CBR if they are both: (1) “in the general fund” “at the end of the fiscal year,” and (2) “available for appropriation.”

41. OMB, presumably having relied on this incorrect legal opinion, listed the PCE Endowment Fund along with a number of other funds and subfunds as now being subject to the sweep.

42. DOA must, by statute, effectuate the sweep by December 16, 2021, and the Governor has previously indicated that the sweep would occur in mid- to late-August.

43. Although the legislature appropriated \$32.355 million from the PCE Endowment Fund to the PCE-CAP for FY2022, the Governor has taken the position that no funds are available in the PCE Endowment Fund to transfer to the PCE-CAP because all funds in the PCE Endowment Fund are subject to the sweep as of June 30, 2021. By taking this position, the Governor has constructively, but unlawfully, vetoed this year’s FY2022 rural energy subsidies, and beneficiaries of the PCE program are expecting to see their utility rates immediately and dramatically go up.

44. The legislature established the PCE program to lower utility rates in rural and remote areas of Alaska. Intended beneficiaries of the PCE program already face soaring utility costs that are much larger than they expected, and what the legislature intended to allow, prior to the Governor's unlawful action.

45. There are a number of other appropriations in the FY2022 budget that, like PCE, were not officially vetoed by the Governor but that were also effectively vetoed by the Governor's expansive view of the funds and subfunds subject to the sweep. For example, the legislature appropriated monies for student scholarships from the Alaska Higher Education Investment Fund, which the Governor has now identifies as being subject to the CBR sweep even though it was not subject to the CBR sweep prior to 2019.

V. CLAIMS FOR RELIEF

COUNT I

(Violation of Article IX, Section 17(d) of the Alaska Constitution)

46. Plaintiffs reallege and incorporate by reference all previous and subsequent paragraphs as set forth herein.

47. The Governor's interpretation of article IX, section 17(d) of the Alaska Constitution, as set forth in former Attorney General Clarkson's letter, is incorrect as a matter of law.

48. The PCE Endowment Fund is not subject to transfer to the CBR under article IX, section 17(d).

49. Plaintiffs are entitled to a declaration that the PCE Endowment Fund is not subject to the CBR sweep under the Alaska Constitution.

50. Plaintiffs are further entitled to injunctive relief preventing any transfer from the PCE Endowment Fund to the CBR, or reversing said transfer if it has already occurred.

COUNT II
(Improper Re-Appropriation; Violation of Separation of Powers)

51. Plaintiffs reallege and incorporate by reference all previous and subsequent paragraphs as set forth herein.

52. By improperly designating the PCE Endowment Fund as being subject to the CBR sweep, the Governor has impermissibly invaded the legislature's appropriation power in two ways. First, the Governor has had the unconstitutional effect of vetoing validly-appropriated funds that have been made into the PCE Endowment Fund for decades. Second, the Governor will have accomplished a back-door veto of a validly-appropriated transfer of funds from the PCE Endowment Fund to the PCE-CAP for this fiscal year.

53. The Governor's decision to subject the PCE Endowment Fund to the annual CBR sweep infringes on the legislature's powers of legislating and appropriating, and violates the doctrine of separation of powers.

54. Plaintiffs are entitled to a declaration that the PCE Endowment Fund is not subject to the CBR sweep.

55. Plaintiffs are further entitled to injunctive relief preventing any transfer from the PCE Endowment Fund to the CBR, or reversing said transfer if it has already occurred.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request relief as follows:

A. An order declaring that the Governor's decision to sweep the PCR Endowment Fund into the CBR is unconstitutional;

B. An order declaring that any act by the Governor to transfer funds out of the PCE Endowment Fund without an appropriation infringes on the legislature's appropriation power and is unconstitutional;

C. An order setting aside and enjoining any past, current, or future act by the Governor to unlawfully sweep the PCE Endowment Fund into the general fund, and returning all such funds that were unconstitutionally "swept" into the CBR;

D. An order awarding Plaintiffs their full reasonable costs and attorneys' fees as required by AS 09.60.010(c); and

E. An order granting any and all additional relief to which Plaintiffs are entitled that the court deems equitable and appropriate.

Respectfully submitted this 19 day of July 2021

HOLMES WEDDLE & BARCOTT, PC
Attorneys for Plaintiffs AFN, FAI, AVCP,
AEB, Kake, Saint Paul, Adak, Yakutat, and
Sand Point

By: 

Jahna Lindemuth
Alaska Bar No. 9711068
Scott M. Kendall
Alaska Bar No. 0405019
Samuel G. Gottstein
Alaska Bar No. 1511099

KEMPEL, HUFFMAN AND ELLIS, P.C.
Attorneys for Plaintiffs AVEC, CEC,
INNEC, IPEC, KEA, NEA, NETC, TEC, and
UVEC

By: 

John Andrew Leman
Alaska Bar No. 9706034
Erik R. Groves
Alaska Bar No. 1706037

HOLMES WEDDLE & BARCOTT, PC
701 WEST EIGHTH AVENUE, SUITE 700
ANCHORAGE, AK 99501-3408
TELEPHONE (907) 274-0666
FACSIMILE (907) 277-4657