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Date: March 18, 2009
To: Ken Rocco
From: Joan Robinson
Subject: Legal Justification for Fund Sweeps

You asked for a discussion of the legal justification for the fund sweeps in enrolled SB 581. A “fund sweep” is a transfer of moneys to the General Fund from an account that is statutorily “dedicated” to a specific purpose.¹ The moneys, when transferred to the General Fund, are available for general governmental purposes.

1. Power of the Legislative Assembly.

Section 1, Article IV of the Oregon Constitution provides:

“(1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.”

The legislative power is the power to make laws. “Making laws” means enacting laws, amending laws or repealing laws. The Oregon legislature may enact any law that is not specifically prohibited by the constitution. That is, the power of the legislature to legislate is plenary and the state constitution is a limitation on that power.²

The accounts from which moneys are transferred under enrolled SB 581 were all created by the Legislative Assembly by law. The Legislative Assembly decided what moneys would be put into the accounts and the Legislative Assembly decided what those moneys should be used for. If the Legislative Assembly had not, at some time, enacted a law establishing the accounts mentioned in SB 581, the accounts would not exist. If the Legislative Assembly had not enacted laws directing moneys from specified sources to be deposited into the accounts, there would be no moneys in the accounts. The Legislative Assembly did not reach into private bank or brokerage or other accounts and extract money. It enacted laws that: (1) transfer moneys in possession of the state from one state

¹ There were also a couple of “sweeps” into the Administrative Services Economic Development Fund. They do not affect the analysis in this memo.

² The United States Constitution and federal law may also limit the authority of the Oregon legislature but that is not relevant for purposes of this discussion.

account to another state account; and (2) authorize using the transferred moneys for governmental purposes other than those originally authorized. But it is still state money and is still being used for governmental purposes. “Within constitutional limitations, the legislature may dispose of the assets of a statutory fund in any manner that it sees fit.” *Eckles v. State of Oregon*, 306 Or 380 (1988).

2. Constitutional limitations on legislative power.

There are both procedural and substantive provisions in the Oregon Constitution that limit the absolute authority of the legislature to enact laws relating to money and budgeting. Perhaps the most commonly encountered procedural limitations are in sections 8 and 25 of Article IV. Those sections provide that bills for raising revenue must originate in the House and must pass both houses by a 3/5 majority. Senate Bill 581 is not a bill for raising revenue so these provisions do not apply.

I will discuss briefly five provisions in the constitution that limit the substance of a bill dealing with money. These are not the only provisions but they are illustrative.

1. Section 5, Article I, prohibits using or appropriating money for certain religious purposes. SB 581 does not authorize any money to be used for religious purposes.
2. Section 2, Article VIII, limits use of moneys in the Common School Fund. SB 581 makes no changes in the Common School Fund.
3. Section 3a, Article IX, limits the ways in which moneys derived from taxes and fees on motor vehicles and motor vehicle fuel may be used. This provision would prohibit the legislature from transferring moneys to the General Fund to be used for any purposes other than those specified in the constitution. However, SB 581 does not have any provisions regarding moneys derived from those taxes or fees.
4. Sections 4, 4a and 4b, Article XV, limit the uses to which lottery moneys may be put. SB 581 transfers some moneys to the Administrative Services Economic Development Fund, but that is the repository for lottery moneys and so the transfers do not violate the lottery provisions of the constitution.
5. Section 21, Article I, prohibits laws “impairing the obligation of contracts.” There has been some suggestion that some of the transfers in enrolled SB 581 “break faith” with people who made payments into certain funds – especially, perhaps, payments into the Trust for Cultural Preservation. The only legal provision that could be argued to prohibit “breaking faith” with people is the impairment of contracts clause. As I will explicate in the next paragraph, enrolled SB 581 does not have any provision that impairs the obligations of a contract.

The Legislative Assembly may create a statutory contractual obligation, but in order to do so, the legislature has to unambiguously express an intention to create the obligation. A statutory directive that moneys in a particular fund be used for specific purposes is not an unambiguous expression of intent never to repeal or amend the statute. That is, it does not express an intent to make the statute into a contract that binds the state forever. In *Eckles v. State of Oregon*, 306 Or 380 (1988), the Oregon Supreme Court considered whether a

transfer of moneys from the Industrial Accident Fund to the General Fund constituted an impairment of the obligations of a contract. First, of course, they had to determine whether there was a contract.

The Court found that the following statutory language showed legislative intent to create a contract between the state and employers who insured with SAIF:

656.634 (1) The Industrial Accident Fund is a trust fund exclusively for the uses and purposes declared in [this chapter], except that this provision shall not be deemed to amend or impair the force or effect of any law of this state specifically authorizing the investment of moneys from the fund.

(2) The State of Oregon declares that it has no proprietary interest in the Industrial Accident Fund or in the contributions made to the fund by the state prior to June 4, 1929. The state disclaims any right to reclaim those contributions and waives any right of reclamation it may have had in that fund.

By contrast, here is the language of the statute that creates the Trust for Cultural Development Account (ORS 359.405):

359.405 (1) The Trust for Cultural Development Account is established in the State Treasury, separate and distinct from the General Fund. Interest earned by the Trust for Cultural Development Account shall be credited to the account. The primary purpose of the account is to serve as a repository for both public and private moneys designated to fund specific arts, heritage and humanities programs.

(2) All moneys in the Trust for Cultural Development Account are appropriated continuously to the Economic and Community Development Department for the Arts Program for the purposes of ORS 359.400 to 359.444.

There is no indication in ORS 359.405 that the Legislative Assembly intended to create a contractual trust account. Yes, the statute specifies that moneys in the account are to be used for specific purposes. But it is a statute; the legislature can change it in any way it wants to.

3. Summary.

The power of the Legislative Assembly to enact laws (which includes the power to repeal, amend or ignore laws) is restricted only by the state and federal constitutions.³ There is nothing in the Oregon or United States Constitutions that generally prohibits the Legislative Assembly from “sweeping” funds from one statutorily created account into another and there is nothing that specifically prohibits any of the sweeps done in enrolled SB 581.

³ Strictly speaking, federal statutes can preempt state statutes but that is because of a provision in the federal Constitution.