

AMENDMENT #3

OFFERED IN THE HOUSE

BY REPRESENTATIVE GARA

TO: HB 52

1 Page 4, following line 10:

2 Insert a new subsection to read:

3 "(g) After an otherwise eligible individual has been absent from the state as  
4 allowed under AS 43.23.008(a)(1)-(16) for more than 180 days in each of the 10  
5 preceding qualifying years, the department shall hold the dividend in trust for the  
6 individual. The department shall pay the amount held in trust to the individual when  
7 the individual has been present in the state for at least 250 days in a qualifying year."

# LEGAL SERVICES

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## MEMORANDUM

February 22, 2013

**SUBJECT:** Permanent fund dividends held in trust after 10 years  
(HB 52; Work Order No. 28-LS0170\A.8)

**TO:** Representative Les Gara

**FROM:** Hilary Martin   
Legislative Counsel

Enclosed is the amendment you requested to HB 52. The amendment adds a new subsection to AS 43.23.008 that would hold the permanent fund dividends (PFDs) in trust for an individual who has been allowably absent from the state for the past 10 qualifying years. The dividends held in trust would earn interest at a rate equal to the Consumer Price Index for Anchorage. The dividends held in trust would be paid after the individual has been present in the state for at least 250 days in a qualifying year.

The amendment raises equal protection concerns because it creates two different classes of people - those who are eligible and who receive the dividend each year, and those who are eligible to receive the dividend but are allowably absent for at least 10 years and do not receive the accumulated dividends until they return to the state for at least 250 days. A court would probably find that the amendment is constitutional.

The Alaska Supreme Court analyzes equal protection cases on a sliding scale basis:

We have adopted a flexible "sliding scale" test for reviewing equal protection claims. First, we determine what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review. Second, we examine the purposes served by a challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest. Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken.

We have previously held that PFDs are not basic necessities or a fundamental right. Instead, a PFD is merely an economic interest and therefore is entitled only to minimal protection under our equal protection

analysis. Restrictions on economic interests are reviewed at the low end of the sliding scale. Our review is therefore limited to considering whether this regulation was designed to achieve a legitimate governmental objective and whether it bears a fair and substantial relationship to accomplishing that objective. At this level of review, we do not determine whether a regulation is perfectly fair to every individual to whom it is applied.<sup>[1]</sup>

The first step is to look at whether the amendment would achieve a legitimate governmental objective. In *Zobel v. Williams*, the Supreme Court of the United States identified three purposes for enacting the PFD program:

(1) to provide a mechanism for equitable distribution to the people of Alaska at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans; (2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and (3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund.<sup>[2]</sup>

A court could find that the amendment "encourages persons to maintain their residence in Alaska and reduces population turnover in the state" by holding PFDs after a person is allowably absent for 10 years, and then paying the accumulated dividends when the person returns to the state for at least 250 days in a qualifying year. A court could also determine that the objective of the amendment is to reduce fraud by preventing people who have no intent to return to Alaska from receiving a PFD after they have been absent from the state.

If a court found that the amendment achieves a legitimate governmental interest, the next step is to determine whether the amendment bears a fair and substantial relationship to that purpose. A court could find that the amendment passes this step, because by holding PFDs until a person returns to the state, the state is ensuring that those who receive the dividend are actually state residents. This amendment would also reduce fraud by preventing those who leave the state and do not intend to return from receiving a PFD. A court would probably find that the amendment does not violate the state equal protection clause.

As the Court noted in *Ross*, "minimal scrutiny under the Alaska Constitution is more demanding than rational basis review under the U.S. Constitution; thus, if the rule does

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<sup>1</sup> *Ross v. State, Dep't of Revenue*, 286 P.3d 495, 498-499 (Alaska 2012) (quoting *Harrod v. State, Dep't of Revenue*, 255 P.3d 991, 1001 (Alaska 2011)).

<sup>2</sup> 457 U.S. 55, 61 n.7 (1982) quoted in *Ross*, 286 P.3d at 499.

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not violate Alaska's Equal Protection Clause, it does not violate the federal Equal Protection Clause."<sup>3</sup> Therefore, if the amendment does not violate the Alaska Equal Protection Clause, it would be found to not violate the federal Equal Protection Clause.

Note that in this amendment, all allowable absences are treated equally; a person who is allowably absent for any reason for 10 years is subject to delayed payment of the PFD. If certain allowable absences were exempted from the delayed payment requirements, it would change the equal protection analysis.

If I may be of further assistance, please advise.

HVM:Ind

13-103.Ind

Enclosure

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<sup>3</sup> 286 P.3d at 499.

**From:** Bitney, Deborah M (DOR) [<mailto:debbie.bitney@alaska.gov>]  
**Sent:** Friday, April 13, 2012 4:05 PM  
**Subject:** Intent to Return Statistics - PFD

I was asked to provide estimates for the number of people who return to Alaska after 5 or more years of absence.

We found 3,420 people who:

- filed for a 2011 dividend
- did not declare an allowable absence in 2010 (qualifying year for the 2011 dividend)
- had 5 or more years of absences at some point in their history (not necessarily consecutive)

Out of 11,085 people since 1995 with absences of 5 or more years - 3,420 returned = approximately **30%** return rate.

Out of 900 people since 1995 with absences of 10 or more years – 81 returned = approximately **9%** return rate.

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