HB
276

HOUSE COMMITTEE REPORT

(11)
Date Referred: April 27, 1989 FURTHER REFERRALS:

Date of Committee Action: 4/28/89

The FINANCE Committee considered: HB 276

HOUSE BILL NO. 276 [PERMANENT FUND - AMERADA HESS LITIGATION]
"An Act amending the permanent fund dividend fund statutes to permit litigation of State v. Amerada Hess in Alaska courts; and providing for an effective date."

RECOMMENDATIONS:
[X] be replaced with CSHB 276 (Fin.) [ ] the same title [X] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the ________ Committee

ADOPTS: ________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact ________
[ ] zero fiscal note ________
[ ] zero with analysis ________

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) ________
(2) [X] zero fiscal note(s) 4/7/89 (Rev.(2))
[ ] zero fn/analysis ________

SIGNING DO PASS:
Ronald L. Larson
Ramona L. Barnes
[signature]
[signature]
[signature]
Steve Frank

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend
Lyman Hoffman		X	

Ronald L. Larson
Chairman's Signature
Lyman Hoffman

No. 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 276
PUBLISH DATE: HOUSE 4/7/89

FISCAL NOTE

REQUEST

Revision Date:
Title: An Act amending the PFD statutes

Agency Affected: Revenue
BRU: Permanent Fund Dividend Division

Sponsor: Rules/Governor
Requestor: Rules

Components: Permanent Fund Dividend Division

Adopted

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
OPERATING						
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LANDS & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

ANALYSIS: This bill would have no affect on the administration of the dividend program.

Prepared By: Ervin Jones
Division: Permanent Fund Dividend Division
Phone: 465-2323
Date: April 6, 1989

Approved by Commissioner:
Agency: Revenue
Date: 4/6/89

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Item 3
No. 1

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 276
PUBLISH DATE: HOUSE 4/7/89

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Amending the PF dividend fund statutes to permit litigation of State v. Amerada Hess
Sponsor: Rules-Request of Governor
Requestor: Governor

Agency Affected: Revenue-APFC
BRU: _____
Components: _____

Adopted

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact - see attached

Prepared by: _____ Phone: 465-2047
Division: David A. Rose, Exec. Director Date: April 6, 1989
Alaska Permanent Fund Corporation
Approved by Commissioner: _____ Date: 4/6/89
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Continuation of Fiscal Note/Bill Analysis

Permanent Fund Dividend Fund Statute Amendment to Permit Litigation of State v. Amerada Hess in Alaska

This bill would eliminate certain due process arguments currently advanced by the defendants in State v. Amerada Hess, by neutralizing the impact upon Permanent Fund dividends of a decision favorable to the State. The Alaska Permanent Fund's legally mandated share of all funds received in a settlement of the litigation, including associated interest, would be credited to the principal of the Fund at the time of receipt. It is expected that the settlement could range from $400 million to $2.6 billion, the latter number estimated by the defendants.

All future earnings on this portion of Fund principal would be forever excluded from Permanent Fund dividend calculations. In this manner, the bill prevents all income earned from a judgment favorable to the State from entering the Permanent Fund dividend stream, and makes it possible to continue the trial in an Alaska court on schedule.

IN THE HOUSE BY THE FINANCE COMMITTEE

CS FOR HOUSE BILL NO. 276 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to transfers to the dividend fund; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 43.23.045(b) is amended to read:

(b) Notwithstanding any contrary provision of law, 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. <u>However, income earned on money awarded after trial in State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District) 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.</u>

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

Item 2

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 7, 1989

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that amends AS 43.-23.045 by excluding potential revenue from the State v. Amerada Hess case from the permanent fund earnings available for distribution as dividends.

Under current law, the commissioner of revenue must transfer to the dividend fund 50 percent of the income of the Alaska permanent fund which is determined to be available for distribution. Normally this would include income derived from litigation involving the state's royalties. However, in November 1987 three defendants in the State v. Amerada Hess royalty litigation filed suit in federal court to prevent that case from being tried in any court in Alaska. Standard Alaska Petroleum, Exxon, and Chevron USA claim that no judge or jury in Alaska can provide them with a fair trial since all judges and jurors have a financial stake in the outcome and are, therefore, unconstitutionally biased. In particular, the companies assert that these judges and jurors qualify for permanent fund dividends and would financially benefit if the state prevailed in the Amerada Hess case because any money awarded the state would increase the amount available for distribution.

The state Department of Law is vigorously contesting this claim and was successful in having the federal case dismissed in the United States District Court. However, the matter has been appealed to, and is pending before, the Court of Appeals for the Ninth Circuit. Were we to lose this case, the state would be faced with having a non-Alaska court interpreting the meaning of an Alaska lease form and deciding fundamental state policies regarding oil and gas leasing in this state. If the case is still on appeal at the time of trial, now scheduled for April 4, 1990, there would be a cloud hanging over the lengthy proceedings, perhaps compelling enough to lead to further postponements.

This bill would eliminate the due process arguments advanced by the companies, thus making it possible for the trial to stay on schedule in an Alaska court where it belongs. This result is achieved by preventing income earned from any judgment favorable to the state from entering the permanent fund dividend stream. This sacrifice is a small price to pay for assuring that Alaska courts will be the final arbiters of Alaska royalty law.

Sincerely,

Steve Cowper
Governor

Item 5

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STEVE COWPER, GOVERNOR

REPLY TO:

☐ *1031 W 4th AVENUE*
SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 276-3550

☐ *1st NATIONAL CENTER*
100 CUSHMAN ST.
SUITE 400
FAIRBANKS, ALASKA 99701-4679

☒ *P.O. BOX V—STATE CAPITOL*
JUNEAU ALASKA 99811-0300
PHONE: (907) 465-3600

April 10, 1989

The Honorable H. A. Boucher
Chair, House State Affairs Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: Proposed committee substitute for HB 276
Our file: 773-89-0114

Dear Representative Boucher:

It has come to our attention that the title of HB 276 could be made more specific and that it would be helpful to make express a point that is now only implied in the amendment in sec. 1 of the original bill. A proposed committee substitute, drafted for possible adoption by your committee, is attached.

The change in the bill title makes clear that the bill is to prevent amounts received as a result of the State v. Amerada Hess litigation from being used for permanent fund dividends. The current title merely indicates that the effect of the bill will be to permit litigation of that case in Alaska courts and thus make moot the current legal challenge to having that case heard by an Alaska court.

With regard to the change in the text, the original version of the bill relies on the application of existing law with regard to oil and gas income. The change offered by this draft committee substitute makes clear that money received as a result of the State v. Amerada Hess litigation will be treated the same as other income of the Alaska permanent fund, except for

permanent fund dividends. Both versions make clear that that money is not available for distribution to the dividend fund from which permanent fund dividends are paid.

Thank you for your consideration of this matter.

Yours truly,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: Art Peterson
Arthur H. Peterson
Assistant Attorney General

AHP/cb

Enclosure

cc w/encl.: Robert A. Evans
Legislative Liaison
Office of the Governor

Bruce Botehlo
Assistant Attorney General
Juneau

MEMORANDUM

State of Alaska
Department of Law

TO: Members of the Legislature

DATE: April 24, 1989

FILE NO:

TEL NO: 465-3600

SUBJECT: HB 276 and the recent court decision in Standard v. Schaible

FROM: Douglas B. Baily
Attorney General

The recent Ninth Circuit Court of Appeals decision in Standard v. Schaible did not resolve the bias issue -- it only delayed its resolution. Basically, the court ruled that the issue was not "ripe", and that the federal courts would rule on the issue only after the Alaska courts had the initial chance to decide whether there was unconstitutional bias because of the potential impact of the Amerada Hess case on the amount of Permanent Fund dividends. The matter was dismissed "without prejudice" and with the express invitation to the Producers to come back to the federal courts if the State did not provide a fair and unbiased forum for the resolution of the dispute. The Ninth Circuit Court of Appeals stated:

> In dismissing this matter without prejudice, the district court issued a challenge to the State of Alaska to provide a forum which will ensure a fair trial before an unbiased judge and unbiased jurors within a reasonable time. The district court invited the Producers "to reopen this federal case" if the State Officials fail to provide an unbiased forum within a reasonable time. We applaud the district court's wise resolution of a very delicate test of the joint responsiblility of state and federal courts to provide every person with due process.

The burden, therefore, is still on the State to guarantee a fair tribunal. Without passage of legislation, the State would have to convince both the state courts and the federal courts that the effect on Permanent Fund dividends does not raise constitutional problems. Failure to convince either tribuanl would result in losing the state forum. In essence, the Ninth Circuit Court of Appeals merely passed on the issue for the time being, reserving its look at the issue until after the state Superior Court and Supreme Court has a chance to make the initial judgment.

DBB:jf

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ALASKA OIL COMPANY, a general partnership, and Charter Oil (Alaska), Inc., a corporation, Appellants,

v.

STATE OF ALASKA, Appellee.

Civ. A. Nos. A83–128, A83–129.
Bankruptcy Nos. 1–82–0000–1, 1–82–0000–2.

United States District Court, D. Alaska.

Jan. 4, 1985.

On appeal from decision in the United States Bankruptcy Court, David N. Naugle, J., ruling for debtors, but denying attorney fee award, debtors moved for recusal. The District Court, Fitzgerald, J., held that judge's entitlement, as Alaska resident, to Alaska permanent fund dividend was neither "financial interest in the subject matter in controversy" nor "any other interest that could be substantially affected by the outcome of the proceedings" so as to require disqualification from hearing appeal which involved amounts which debtors owed state as royalties under mineral leases.

So ordered.

1. Judges ⇐42

Entitlement of federal judge, as resident of Alaska, to dividends from permanent fund and in which percentage of all mineral lease rentals, royalties, etc., received by state is placed, is not "financial interest," within meaning of statute which governs disqualification of federal judges in Alaska permanent fund, since entitlement to dividend does not confer any ownership interest in permanent fund. 28 U.S.C.A. § 455.

See publication Words and Phrases for other judicial constructions and definitions.

2. Judges ⇐39

Alaska permanent fund, in which percentage of mineral lease rentals, royalties, etc., received by state is placed, was not part of "subject matter in controversy" within statute which governs judge's disqualification, in appeal from decision of bankruptcy court dismissing involuntary bankruptcy proceedings, in which basic issue faced was whether state was entitled to additional payments under royalty oil sale agreement with debtor; rather, on appeal, issues were whether bankruptcy court should have entered findings of fact and conclusions of law and whether bankruptcy court should have awarded attorney fees to debtors. 28 U.S.C.A. § 455.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judges ⇐39

Entitlement of federal judge, as resident of Alaska, to dividend from permanent fund, in which percentage of mineral lease rentals, royalties, etc., received by state is placed, did not warrant disqualification of judge, for having "any other interest that could be substantially affected by the outcome of the proceeding" from presiding over appeal in bankruptcy initiated by state's involuntary petitions against oil companies, in which permanent fund was only indirectly implicated and amount at stake was possible increase in individual dividends of only $1.78 annually. 28 U.S.C.A. § 455(b)(4).

See publication Words and Phrases for other judicial constructions and definitions.

Charles E. Cole, Law Offices of Charles E. Cole, Fairbanks, Alaska, Stuart L. Kadison, Lee L. Blackman, Monica Bachner, Kadison, Pfaelzer, Woodard, Quinn & Rossi, Los Angeles, Cal., Stephen D. Busey, Douglas P. McClurg, Smith & Hulsey, Jacksonville, Fla., Richard B. Levin, Anthony Castanares, members of Stutman, Treister & Glatt, Professional Corp., Los Angeles, Cal., for appellants.

Norman C. Gorsuch, Atty. Gen. of State of Alaska, Juneau, Alaska, Haley J. Fromholz, Jonathan M. Landers, Kenneth M

Glazier, Steven S. Rosenthal, Morrison & Foerster, Los Angeles, Cal., for appellee.

OPINION

FITZGERALD, District Judge.

Background

The original dispute had to do with the sale of oil which the State of Alaska was entitled to receive as "in kind" royalties under its North Slope mineral leases. Appellant Alaska Oil Co. (AOC) succeeded in 1979 to the obligations to purchase the royalty oil under a 1978 contract. Charter Oil (Alaska), Inc. (COA) owns a majority interest in AOC.

A dispute arose as to whether AOC fulfilled its contractual obligations under the agreement. In December 1981, AOC filed suit for declaratory judgment against the state in the state superior court.[1] In February 1982, the state filed involuntary petitions in bankruptcy against AOC and COA seeking payments allegedly due under the contract.[2]

Judge David N. Naugle, Bankruptcy Judge for the Central District of California, was designated by Chief Judge James Browning of the Ninth Circuit to Alaska and was assigned the bankruptcy court proceedings. On January 21, 1983, after five days of trial, Judge Naugle ruled in favor of AOC and COA, and requested that the companies submit proposed findings of fact and conclusions of law. AOC and COA did so on February 11, 1983, and also filed a Motion for an Award of Reasonable Attorneys' Fees. At a post-trial hearing on April 27, 1983, the court denied the award of attorneys' fees. It also settled the findings of fact and conclusions of law, and announced them from the bench.

The state then requested that the court not enter adverse findings, and, at the court's suggestion, the state moved for leave to dismiss the petitions with prejudice without formal entry of findings of fact and conclusions of law. On June 15, 1983, the bankruptcy court granted the state's motions. The Order of Dismissal, entered on June 29, 1983, specifically denied the request for entry of findings and conclusions and the request for attorneys' fees.

On July 7, 1983, AOC and COA appealed to this court. The case was initially assigned to Judge von der Heydt, but later reassigned to me. On appeal, AOC and COA seek reversal of the decision of the bankruptcy court, and a remand with instructions to enter the settled findings of fact and conclusions of law and to determine and enter judgment for the reasonable attorneys' fees incurred by AOC and COA.

On October 25, 1983, appellants AOC and COA filed a Motion for Recusal, requesting that I disqualify myself from hearing the appeal, and that the Chief Judge of the Ninth Circuit designate a nonresident district judge to preside. In support of their motion, AOC and COA cite 28 U.S.C. § 455 (1982) which provides for disqualification if a judge has "a financial interest in the subject matter in controversy ... or any other interest that could be substantially affected by the outcome of the proceeding." AOC and COA observe that a portion of any income the state might recover in this action would be deposited in the state's permanent fund, and that part of the income from the fund would be distributed to all Alaska residents, including resident federal judges, as a permanent fund dividend. This, AOC and COA reason, gives the judge an "interest" in the proceedings, thus requiring disqualification.

Applicable Statutes

Title 28 U.S.C. § 455 (1982) provides for disqualification of federal judges under certain circumstances. In relevant part, this statute reads:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

1. *Alaska Oil Co. v. State of Alaska*, No. 4FA 81-2071 (filed December 17, 1981).

2. *In re Alaska Oil Co.*, No. 1-82-00001 (Bankr.Ct. filed February 26, 1982); *In re Charter Oil (Alaska), Inc.*, No. 1082-00002 (Bankr.Ct. filed February 26, 1982).

(b) He shall also disqualify himself in the following circumstances:

....

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

....

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

....

(4) "financial interest" means ownership of a legal or equitable interest, however small ...;

....

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).

The Alaska permanent fund was created by art. IX, § 15 of the Alaska Constitution which provides:

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.

Alaska Stat. title 43, ch. 23 (1983) provides for permanent fund dividends. Under this statute, 50% of the income from the permanent fund is transferred each year to the dividend fund. Alaska Stat. § 43.23.045(b) (1983). The dividend fund is then distributed each year in equal shares to all eligible Alaska residents. *Id.* § 43.23.025. In general, an individual who has been a state resident for at least six months is eligible to receive a permanent fund dividend. *Id.* § 43.23.005(a).

Issues

(1) Do the federal judges of the District of Alaska have a "financial interest," as that term is defined in 28 U.S.C. § 455, in the Alaska permanent fund?

(2) Is the Alaska permanent fund part of the "subject matter in controversy"?

(3) Does the judge's entitlement to a permanent fund dividend constitute "any other interest that could be substantially affected by the outcome of the proceeding"?

Title 28 U.S.C. § 455 defines "financial interest" as "ownership of a legal or equitable interest however small." I must initially determine whether as an Alaska resident I have a "financial interest" in the Alaska permanent fund.

Alaska Constitution art. IX, § 15 mandates that "[a]t least twenty-five percent of all mineral lease ... royalties [and] royalty sale proceeds" be placed in the permanent fund. In these involuntary bankruptcy proceedings, the state seeks payments allegedly due under a contract for the sale of the state's royalty oil. Thus, if successful, any money recovered by the state would constitute "royalty sale proceeds," and at least 25% would be deposited in the permanent fund. Under the statutes providing for the permanent fund dividend, half of the annual income from these proceeds would be distributed to all eligible residents. Alaska Stat. §§ 43.23.025, 43.23.045 (1983).

[1] I conclude that entitlement to a permanent fund dividend is not a "financial interest" as that term is defined in 28 U.S.C. § 455(d)(4). Entitlement to a dividend does not confer any "ownership" interest in the permanent fund. The commentary on Canon 3(C) of the ABA Code of Judicial Conduct, on which § 455 was based, supports this conclusion:

Not all of a judge's economic interests are defined as "financial interests." ... The "financial interest" of a judge that will disqualify him is his *direct legal or*

equitable ownership no matter how small ... in the subject matter in a proceeding before him.

E. Thode, Reporter's Notes to Code of Judicial Conduct, 69–70 (1973) (emphasis added). The reporter further noted that certain interests were not direct financial interests. These included financial interests as a customer of a public or private utility, as a taxpayer, and as a premium payer in a stock insurance company. *Id.* at 66; *see also New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 719 F.2d 733, 734 (5th Cir.1983) (en banc) (holding that judge's status as rate payer did not require automatic disqualification); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir.1980) (same).

I therefore conclude that I do not, as an Alaska resident, have a "financial interest" in the permanent fund.

[2] Turning to the second part of the statutory requirement for disqualification based on "financial interest," I further conclude that the permanent fund is not a part of the "subject matter in controversy." The case at bar in the district court is an appeal from a decision of the bankruptcy court dismissing the involuntary bankruptcy proceedings. One of the basic issues faced by the bankruptcy court was whether the state was entitled to additional payments under the royalty oil sale agreement. Thus the permanent fund was more directly implicated in the bankruptcy court proceedings.

The same is not true in this court, however. There are two issues before me in this appeal: (1) whether the bankruptcy court should have entered findings of fact and conclusions of law, and (2) whether the bankruptcy court should have awarded attorneys fees to AOC and COA. Whatever decision I make here can have no direct effect on the permanent fund.

AOC and COA argue, however, that the statute's focus on "the subject matter in controversy," rather than on the particular issue to be resolved, requires a broad interpretation of "the subject matter in controversy."[3] The companies suggest that the permanent fund is indeed part of the larger "subject matter in controversy" for these reasons: The merits of the royalty payment dispute are currently before the state superior court in a declaratory judgment action. If the bankruptcy court is ordered to enter findings of fact and conclusions of law, the state court judge may give such findings and conclusions collateral estoppel effect in the state court proceeding. The outcome of the underlying royalty payment dispute, and potential permanent fund revenues, thus may be affected by whether or not I direct the bankruptcy court to enter findings and conclusions.

I conclude otherwise. While the proceedings in bankruptcy court may have had an impact on the amount of revenue obtained by the state for the permanent fund, the issues raised on appeal are otherwise. Permanent fund revenues are not at stake in this appeal. I therefore conclude that the permanent fund is not part of the "subject matter in controversy" before me.

Given my conclusion that entitlement to a permanent fund dividend is not a "financial interest in the subject matter in controversy," I now turn to the second provision of 28 U.S.C. § 455(b)(4). This provision requires disqualification if a judge has "any other interest that could be substantially affected by the outcome of the proceeding." The term "other interest" is not defined in the statute. Whereas the first provision of § 455(b)(4) requires disqualification for any financial interest, "however small," *id.* § 455(d)(4), the second provision applies only to those other interests which could be "substantially affected" by the outcome.

It has been suggested that the outcome of this test should "depend on the interaction of two variables: the remoteness of the interest and its extent or degree." Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv.L. Rev. 736, 753 (1973). To elaborate,

3. *See* Appellants' Reply to the State of Alaska's Opposition to Motion for Recusal at 3–4 (filed November 15, 1983).

> If the interest strongly resembles a direct interest—for example, stock held in a subsidiary (or parent) of the corporate party—any amount should disqualify, just as does any stock held in the party itself. As the interest becomes less direct, such as that in an enterprise carrying on business with the party, only if the extent of the interest is itself substantial can the judge's impartiality reasonably be questioned.

Id.; see also In re Virginia Electric and Power Co., 539 F.2d 357, 368 (4th Cir.1976); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3547 (2d ed. 1984).

[3] Applying this analysis to the facts of the case before me, I conclude entitlement to a permanent fund dividend does not warrant disqualification. First, as discussed above, the permanent fund is only indirectly implicated in this appeal. My decision here will not directly increase or decrease permanent fund revenues. Second, the extent of my interest is very small. AOC and COA themselves estimate that the amount at stake in these proceedings might translate into an increase of $1.78 in the annual permanent fund dividend for each Alaska resident.[4] Thi small amount, coupled with the indirectness of the effect, does not rise to the level of "any other interest that could be substantially affected." This conclusion comports with decisions of the Fourth and Tenth Circuits in which small, indirect, potential benefits were held to not require disqualification. *See In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In re Virginia Electric and Power Co.*, 539 F.2d 357 (4th Cir.1976).

In *In re New Mexico Natural Gas*, the Tenth Circuit identified additional factors to be considered under the "substantially affected" provision of § 455(b)(4). The court observed:

> In view of the statutory requirement that interests must be substantially affected before recusal is required, we believe Congress did not intend to require disqualification in all cases in which the judge might benefit as a member of the general public. We realize that recusal would be required by the statute if the judge owned even one share of stock in a party to the litigation. But an interest shared by the judge in common with the public is distinguishable for at least two reasons. First, the policy to promote public confidence in the impartiality of the judicial system is not served to as great an extent by disqualifying a judge who would receive only such a benefit. It is not simply a question of de minimis effect; a personal benefit or detriment shared in common with the community at large is perceived to have a different psychological effect on a judge than would a benefit or detriment not so shared.
>
> Second, practical problems abound if recusal is required whenever a judge benefits simply as a member of the common populace. There is much litigation today that can have far-reaching effects on large segments of the nation. For instance, an antitrust suit against a major oil company could reduce gasoline prices within the entire United States, and hence affect the transportation costs of every judge. The ratemaking proceedings of public utility commissions throughout the nation are reviewed by the courts in the states involved, where most of the reviewing judges are customers of the telephone, electric, water or gas company; yet there is no suggestion in any cases we have seen that these judges should disqualify themselves. Federal and state judges sit every day on tort, patent or other cases in which potentially large verdicts could affect an insurance or other company's profitability, and the loser is in a position to pass the loss on through higher future costs which increase the judges' cost of living.

620 F.2d at 796–97.

Similar considerations apply here. According to the records of the Clerk of the

4. *See* Affidavit of Charles E. Cole in Support of Motion for Recusal, exhibit 2 at 11-12 (filed October 25, 1983).

Court for this district, 61 cases have been filed here since 1981 which likely involve potential permanent fund revenues. This averages 15 cases per year, and these cases often entail far-reaching and complex litigation. Moreover, I note that the state is entitled to 90% of oil revenues received by the federal government from federal oil leases in the state. Cases involving federal leases thus may also have an impact on the permanent fund. It is readily apparent that frequent assignment of nonresident judges to hear these cases would impair the effective administration of justice in the federal court in the District of Alaska.

For these reasons, I conclude that my entitlement to an Alaska permanent fund dividend does not constitute either a "financial interest in the subject matter in controversy" nor "any other interest that could be substantially affected by the outcome of the proceedings." Accordingly, there are no grounds for disqualification under 28 U.S.C. § 455. The Motion for Recusal is therefore DENIED.

ORDERED ACCORDINGLY.

In re STORAGE TECHNOLOGY CORPORATION, Debtor.

BENDER & TREECE, P.C., Movant,

v.

STORAGE TECHNOLOGY CORPORATION,
Respondent.

Bankruptcy No. 84 B 05377 G.
Motion No. 1130J43.

United States District Court, D. Colorado.

Jan. 7, 1985.

As Amended Jan. 8, 1985.

Former counsel for Chapter 11 debtor moved for relief from automatic stay to perfect and otherwise enforce its attorneys' lien. The District Court, Roland J. Brumbaugh, J., held that lien was statutory and that counsel violated automatic stay when it filed its notice of lien after the bankruptcy filing.

Motion denied.

1. Bankruptcy ⇐191

An attorneys' lien is "statutory" for purpose of avoiding the fixing of a statutory lien. Bankr.Code, 11 U.S.C.A. §§ 101(45), 545(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Attorney and Client ⇐174

Under Colorado law, an attorneys' lien does not exist apart from statute. C.R.S. 12-5-119, 12-5-120.

3. Attorney and Client ⇐174

Attorneys' lien arises solely by force of a statute on specified conditions, i.e., entitlement to the fruits of a suit or settlement accruing to the client.

4. Bankruptcy ⇐659(3)

Attorneys having lien under Colorado law for services rendered Chapter 11 debtor in connection with civil action violated automatic stay by filing notice of attorneys' lien, and perfection of lien as to third parties was not retroactive so as to trigger Bankruptcy Code provision exempting the "act" of filing from the automatic stay and, thus, notice was void and lien was neither enforceable nor perfected against third parties. C.R.S. 12-5-119, 12-5-120; Bankr. Code, 11 U.S.C.A. §§ 101(45), 362, 362(a)(5), (b)(3), 546(b).

5. Bankruptcy ⇐675

Debtor in possession stands in shoes of the trustee and may exercise lien avoidance powers, but such requires filing of an adversary proceeding. Bankr.Code, 11 U.S.C.A. § 545(2); Rules Bankr.Proc.Rule 7001, 11 U.S.C.A.

Paul G. Hyman, Jr., Holme, Roberts & Owen, Denver, Colo., for Storage Technology Corp., debtor.

THE FOLLOWING DOCUMENT HAS

NOT BEEN FILMED BUT IS

AVAILABLE IN THE ORIGINAL

FILE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANDARD ALASKA PRODUCTION COMPANY, EXXON CORPORATION, CHEVRON U.S.A., INC.,
Plaintiffs-Appellants/ Cross-Appellees,

v.

GRACE B. SCHAIBLE, Attorney General of Alaska, JUDITH M. BRADY, Comm'r of Natural Resources of Alaska, MARGARET J. HAYES, Director of Div. of Lands, JAMES E. EASON, Director of Div. of Oil and Gas, and WALTER L. CARPENETI, Judge of Superior Court of Alaska,
Defendants-Appellees/ Cross-Appellants.

Nos. 88-4008: 88-4035
D.C. No. CV 87-521-RCB
OPINION

Appeal from the United States District Court
for the District of Alaska
Robert C. Belloni, District Judge, Presiding

Argued and Submitted
March 7, 1989—Seattle, Washington

Filed April 21, 1989

Before: Eugene A. Wright and Arthur L. Alarcon, Circuit Judges, and Edward Rafeedie*, District Judge

*Honorable Edward Rafeedie, United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Jurisdiction

Affirming the district court's order denying motion to dismiss, the court held that the claim was not ripe.

Standard Alaska Production Co., Exxon Corporation and Chevron U.S.A., Inc. (Producers) filed suit in the District of Alaska for injunctive and declaratory relief. They contended that continuation of an underlying state action filed by the State of Alaska against Producers and other defendants for damages for underpayment of royalties statutorily owed every Alaska resident, was a violation of Producer's fourteenth amendment right to trial before an impartial tribunal. Because of the damages sought in the underlying state action, Producers claimed that every potential judge and juror in Alaska state court had a direct and substantial pecuniary interest in the outcome of the underlying state action. Judge Belloni of the District of Oregon presided over the federal court proceedings and dismissed the Producers' federal cause of action on ripeness grounds.

[1] There was no finding by any court that Alaska could not provide an unbiased trier of fact and appellate court to consider Producers' federal constitutional claims. Merely alleging there was no competent court in Alaska did not demonstrate that Alaska's disqualification procedures were inadequate to resolve the issue of bias. [2] There was no evidence in the record to support any estimated figure by Producers establishing that as a result of a favorable judgment in the underlying state action there would be a substantial financial interest compelling disqualification for cause. [3] Producers' failure to raise their claim of bias before the

Alaska courts denied that state's judges the opportunity to determine whether they must decline to hear this matter because they have a substantial interest in the outcome. [4] Thus, the district court did not err in its determination that Producers' claim of bias could not be resolved until a factual presentation demonstrating bias was made before the state trial judge.

COUNSEL

C. Douglas Floyd, San Francisco, California, for the appellant, Chevron U.S.A., Inc.

Bruce Botelho, Assistant Attorney General, Department of Law, Oil, Gas & Mining Section, Juneau, Alaska, for the appellees/cross-appellants.

OPINION

ALARCON, Circuit Judge:

Standard Alaska Production Company, Exxon Corporation and Chevron U.S.A., Inc. (Producers), appeal from the order granting the motion of Grace R. Schaible, et al. (State Officials) to dismiss this suit on the ground that the claim is not ripe. The State Officials cross-appeal from (1) the denial of their motion to dismiss pursuant to the Eleventh Amendment and (2) the refusal to dismiss this matter under *Younger v. Harris*, 401 U.S. 37 (1971).

I

We review independently, without deference to the district court's rulings, each of the issues raised on this appeal: (1) whether the district court erred in denying the motion to dis-

miss based on the ground that federal jurisdiction was lacking due to the Eleventh Amendment. *South Delta Water Agency v. United States Dept. of Interior*, 767 F.2d 531, 535 (9th Cir. 1985); (2) whether the district court erred in dismissing the case on ripeness grounds, *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation of Montana*, 792 F.2d 782, 787 (9th Cir. 1986); and (3) whether this suit should have been dismissed pursuant to the *Younger* abstention doctrine. *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir. 1987).

II

On September 2, 1977, the State of Alaska (Alaska) filed an action in an Alaskan trial court for injunctive and declaratory relief against Amerada Hess Corporation and eighteen North Slope oil companies including Standard Alaska Production Company, Exxon Corporation, and Chevron, U.S.A., Inc. *State of Alaska v. Amerada Hess Corporation et al.*, Civil No. IJU-77-847, (Hess). Alaska sought a declaration of its rights under certain oil and gas leases negotiated with the Producers.

On July 6, 1983, Alaska filed a second amended complaint in the state action seeking damages for underpayment of royalties pursuant to the leasing agreement. In this pleading, Alaska alleged it had not received all of its royalties because the Producers had been underestimating the value of the oil and gas taken from Prudhoe Bay and Kuparuk River oil fields. The state court proceedings are scheduled for trial on April 4, 1990.

In their amended complaint for injunctive and declaratory judgment, the Producers claim that there would be three basic adjustments to Alaska's share of royalties: (1) the lessees will owe at least $1 billion in royalties on past production; (2) the value of royalties on future production would increase by an additional $1 billion; and (3) Alaska would receive $600

million in contract adjustments on any oil previously received in the form of royalties-in-kind.

The Producers contend that "the monetary recovery sought by the state in *Hess* will substantially increase the Alaska Permanent Fund and, consequently, the annual amount of dividends from the fund that every Alaska resident has a statutory right to receive." Brief for Appellants at 3. Every resident of Alaska who applies and who meets certain residency requirements is entitled to receive an annual dividend from the earnings on the permanent fund investment. (Alaska Statute §§ 43.23.005-.015.) The residency requirements are: (1) that an applicant live in Alaska from October 1st through March 31st of the year preceding disbursement of dividends, and (2) the applicant submit a written statement of intent to remain a permanent resident of Alaska. *Id.* The amount of each year's dividend is determined by a fixed formula. (Alaska Statute 37.13.140).

III

On November 2, 1987, the Producers filed suit in the District Court for the District of Alaska for injunctive and declaratory relief under 42 U.S.C. § 1983 "on the ground that the continuation of [the state] action is a violation of their Fourteenth Amendment right to trial before an impartial tribunal." Brief for Appellants at 2. They claim that with an annual increase in dividends, "every potential judge and juror in Alaska state court has a direct and substantial pecuniary interest in the outcome of *Hess*." *Id.* at 3. The Producers argue that issuance of an injunction "would not prevent the state from pursuing its royalty claims against the *Hess* defendants, but would require it to pursue those claims in an alternative forum where the judges and jurors have no financial interest in the case, such as the court of another state." *Id.*

The State Officials moved to dismiss on the following grounds: (1) The Eleventh Amendment deprives the district

court of subject matter jurisdiction; (2) There is no justiciable case or controversy; (3) Principles of comity and federalism embodied in the rule of abstention require dismissal; and (4) The complaint failed to allege sufficient facts to support a finding of a due process violation.

This matter was assigned to Judge Kleinfeld of the United States District Court for the District of Alaska. Judge Kleinfeld recused himself from presiding over this matter. Judge Kleinfeld advised the parties of the reasons he disqualified himself as follows:

> I don't think we need go so far as to examine a judge's balance sheets and the exact size of his family. Mine is five, as counsel obviously researched when they wrote their memorandum. Some judges have smaller families and they make less money off of dividends, but it doesn't matter a whole lot, it's still substantial. It's substantial enough so that it would make a good hostile headline impairing the appearance of integrity of the judicial process.

As a result of Judge Kleinfeld's recusal, Judge Belloni of the United States District Court for the District of Oregon was designated to preside over the federal court proceedings. The district court dismissed the Producers' federal cause of action on ripeness grounds. The court expressly denied the motions to dismiss based on the Eleventh Amendment and failure to state a claim. The court did not reach the State Officials' abstention arguments.

We first consider the State Officials' contention in their cross-appeal that the district court lacked jurisdiction to hear this matter because they are immune from suit under the Eleventh Amendment.

IV

The State Officials argue that there is no federal court jurisdiction over this matter because the Eleventh Amendment

prohibits a citizen from suing a state. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). Eleventh Amendment immunity extends to an action or a suit filed against a state agency or official. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-102 (1984). The Eleventh Amendment does not, however, preclude a suit to enjoin a state official from violating the federal constitution. *Ex Parte Young*, 209 U.S. at 159-60; *Pennhurst*, 465 U.S. at 101-103.

The Producers allege that the filing of the *Hess* action in an Alaskan state court is a violation of their right under the Fourteenth Amendment to an impartial tribunal. They contend that the monetary recovery sought in the *Hess* matter will increase the annual dividends paid to the Alaska residents. Thus, it is argued, every judge and potential juror in that state "has a direct and pecuniary" interest in the outcome of *Hess*. Brief for Appellants at 3.

The State Officials argue, however, that "the connection between them and the alleged due process deprivation must be deemed too tenuous to permit reliance upon the doctrine of *Ex Parte Young* to avoid the bar of Eleventh Amendment state immunity." Brief for Appellees at 36. They further argue that the essence of the Producers' claim "is directed at the effect of the Permanent Fund dividend program on the *Amerada Hess* judge and jury; their claim does not arise out of any allegation of unconstitutional conduct on the part of any of the defendants named here." *Id.*

The State Officials' argument is unpersuasive. They are the parties responsible for the filing and maintenance of the state court action against *Hess*. Grace B. Schaible is the Attorney General of Alaska. She is responsible for bringing civil suits on behalf of the state. (Alaska Stat., § 44.23.020(b)). Judith M. Brady, the Commissioner of Natural Resources of the State of Alaska, Mary J. Hayes, the Director of the Division of Lands, and James E. Eason, the Director of the Division of Oil and Gas are the officials responsible for collecting the roy-

alty revenues in dispute in the state court proceedings. (*Id.* §§ 44.37.010 -.020, 38.05.035.) The action was assigned for trial before Walter L. Carpeneti of the Superior Court of the State of Alaska. The required connection with the enforcement of the act, under the doctrine announced in *Ex Parte Young*, is therefore present.

We find that the Eleventh Amendment does not bar the Producers from seeking relief in the federal courts and we affirm the district court's denial of appellees' motion to dismiss under Eleventh Amendment state immunity.

V

The Producers contend that the district court erred in granting the state officials' motion to dismiss on the ground that the issue was not ripe for review. The Producers allege that "the district court failed to address the relevant questions governing the ripeness determination." Brief for Appellants at 13.

The doctrine of ripeness is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Ripeness requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Friedman Brothers Investment Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982).

The Producers contend that their due process claim is ripe for review because "there is nothing hypothetical, specula-

tive, remote, or contingent about the denial of due process presently resulting from the pending Alaska state court action in *Hess*." Brief for Appellants at 10. They claim that their action seeks "to enjoin *currently ongoing* proceedings before a financially interested tribunal on the ground that they have an absolute due process right to the adjudication of *Hess* by a disinterested judge and jury." *Id.* (emphasis in original). They argue that "[t]he right to a decisionmaker free of a pecuniary interest is absolute [and] it does not depend on any determination of actual bias." *Id.* at 11. The Producers assert that their "due process claim in this case thus presents a legal issue that 'will not be clarified by further factual development.'" *Id.* (citation omitted). They claim that the financial interest of every Alaskan judge or juror in the outcome of the pending state proceedings supports a ruling that, as a matter of law, Alaska cannot provide an unbiased tribunal.

The Producers argue further that the district court should not have dismissed their claim on ripeness grounds because "the state's disqualification procedures are inadequate to cure the financial bias in *Hess*, which, . . . affects every Alaska resident regardless of subjective belief, and works a per se constitutional disqualification of every judge or juror in Alaska state court." *Id.* at 24. They contend that "[s]uccessful invocation of the state's disqualification procedures would simply result in the appointment of another judge or juror having an identical pecuniary interest." *Id.* at 24-25. The Producers rely on *Gibson v. Berryhill*, 411 U.S. 564 (1973), for the proposition that "an 'adequate opportunity' does not exist where, as in this case, the state tribunal has a financial interest in the outcome of the case:

> '[*Younger*] naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger v. Harris* dismissal was lacking, for appellees alleged, and the District Court con-

> cluded, that the State Board of Optometry was *incompetent by reason of bias to adjudicate the issues pending before it.*" (*Id.* at 577)(emphasis added).' "

Reply Brief for Appellants at 21.

A brief summary of the issue before the Supreme Court in *Gibson* will readily demonstrate that it does not support the Producers' argument. In *Gibson*, the Alabama Optometric Association (Association) filed with the Alabama Board of Optometry (Board) charges against various optometrists (the employee-pharmacists) who were practicing their profession as employees of Lee Optical Co. The Association asked the Board to revoke the licenses of each of the employee-optometrists. The Association alleged that the practice of optometry by individuals employed by a business establishment was unethical conduct. *Id.* at 567-68.

Two days later, the Board filed a suit in state court against Lee Optical Co. "seeking to enjoin the company from engaging in the 'unlawful practice of optometry.' " *Id.* at 568. The state court enjoined Lee Optical from practicing optometry without a license or from employing licensed optometrists. Thereafter the Board scheduled hearings on May 26th and 27th on the unethical conduct charges brought against the employee-optometrists by the Association.

The employee-optometrists filed suit in the United States District Court against the Board, its individual members, and the Association pursuant to the Civil Rights Act, 42 U.S.C. § 1983, for an injunction against the scheduled license revocation proceedings. *Id.* at 569. The employee-optometrists alleged that they could not get a fair and impartial hearing because the Board was biased. *Id.* at 570.

The district court concluded that the Board was so biased by pecuniary interests that it could not conduct the revocation hearings. *Id.* at 578. The district court found that of the

192 licensed optometrists in Alabama, 92 were employed by a business establishment. None belonged to the Association. Each member of the Association was an independent optometrist engaged in private practice for his own accord. Only members of the Association were eligible to be members of the Board. *Id.* at 578. The district court concluded from these facts that revocation of the employee-optometrists licenses "would possibly redound to the personal benefit of members of the Board." *Id.* at 578.

The Supreme Court concluded that the district court's findings were not clearly erroneous. *Id.* at 579. Accordingly, the Supreme Court held in *Gibson* that, based on the district court's findings, "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose." *Id.* at 579. The Supreme Court also concluded that the district court did not err in failing to abstain because the matter was pending before the Board. *Id.* at 577. The Court instructed that the application of *Younger v. Harris* "presupposes the opportunity to raise and have timely decided by a *competent* state tribunal the federal issues involved." *Id.* (emphasis added). The Supreme Court concluded that "the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it." *Id.*

[1] In the matter before this court, there has been no finding by any court that Alaska cannot provide an unbiased trier of fact and appellate court to consider the Producers' federal constitutional claims. The Producers have not presented to the state courts their claim that all Alaskan judges and prospective jurors are biased because of a substantial pecuniary interest in the outcome of the pending proceedings in *Hess*. The simple fact that the Producers claim that there is no competent court in Alaska to preside over the injunctive and declaratory relief action does not demonstrate that Alaska's disqualification procedures are inadequate to resolve the issue of bias. In *Ohio Civil Rights Comm'n v. Dayton Chris-*

tian Schools, Inc., 477 U.S. 619 (1986), the Supreme Court observed:

> [W]e have repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.'

Id. at 628 (citation omitted).

In *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), the appellant obtained an injunction from the District Court of Nevada to bar the remaining unrecused judges of the Supreme Court of Nevada from hearing disciplinary proceedings against an attorney based on affidavits alleging that bias against him by the present members of the court would also taint any substitute judges from the trial court. *Id.* at 947-48. We reversed the order granting the injunction. We distinguished *Gibson* on the ground that the failure of the appellant to utilize Nevada's disqualification procedures makes it impossible for us to determine whether the factual allegations of pervasive bias were true. *Id.* at 950. We held that "Flangas may not simply ignore the disqualification procedures based upon his perception that his chances of success in disqualifying the biased judges 'are not auspicious.' " *Id.* (citation omitted). We also noted in *Flangas* that "[t]here is no indication in *Gibson* that there was a statutory procedure for disqualification of the biased Board members." *Id.*

[2] In Alaska, judges may be challenged for cause upon a showing of financial interest in the matter. (Alaska Statute 22.20.020.) At such a proceeding, the Producers can mount a challenge to the impartiality of the Alaska judges by attempting to show that each of them has a *substantial* pecuniary interest in the outcome of the *Hess* matter. We cannot determine from the present record whether this matter comes within the *Gibson* exception to *Younger* abstention. In

Gibson, a decision to revoke the licenses of all optometrists employed by a business establishment would have reduced competition by almost fifty percent. Because all Board members were in private practice, revocation would mean that it was possible that each Board member could almost double his income through fees obtained from former patients of the employee-optometrists. Here, the Producers argue that a judgment for Alaska would ultimately increase a qualified resident's dividend from the permanent fund by $70 a year. No evidence has been presented, however, that supports this figure. Assuming that it is accurate, we do not have sufficient facts before us to determine whether an increase of $70 in dividends as a result of a favorable judgment for the state in *Hess* would constitute a substantial financial interest compelling disqualification for cause. An evidentiary hearing will also inform a reviewing court whether all Alaska judges and jurors have applied for permanent fund dividends or whether, in order to provide a forum for the trial of this matter, any are willing to waive such benefits.

[3] The Producers' failure to raise their claim of bias before the Alaska courts has denied that state's judges the opportunity to determine whether they must decline to hear this matter because they have a substantial interest in the outcome of this matter. In *Partington v. Gedan*, No. 87-2375, slip op. 2161 (March 13, 1989), we stated that when a party " 'has not attempted to present his federal claims in related state court proceedings, [we will] assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.' " *Id.* at 2177 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)). Here, a prompt due process challenge in the Alaska trial court may result in a factual determination that each Alaska judge and juror is not competent to hear this matter. Such a ruling would eliminate the federal constitutional claim without federal court interference and avoid a needless conflict in this nation's dual court system.

In addition, the Producers have failed to meet their burden of showing that the Alaskan state courts cannot provide a fair tribunal to hear their federal constitutional claims. *See id.* (a litigant bears the burden of showing "that state procedural law bar[s] presentation of [his] claims") (citation omitted). Instead, the Producers have bypassed the Alaska court system on the sensitive issue of its ability to provide a fair and impartial trial in this matter. As a result, critical and dispositive factual questions remain unresolved.

We agree with the explanation by the Eighth Circuit of its disposition of an appeal regarding a similar claim of bias:

> The difficulty here is that the bias claim, unless first presented to the state court, does not reach constitutional ripeness. If requested to do so, some state supreme court justices might well rule under the record presented to them that they should step aside and allow others to be designated in their place. If some recuse themselves, and we in no way suggest that they should or shouldn't, this would obviate the necessity for any court to pass on the federal constitutionality claims. Thus, we rule the constitutional issues are not ripe for decision since all state issues have not been presented to the state court.

Peterson v. Sheran, 635 F.2d 1335, 1341 (8th Cir. 1980) (citation omitted).

[4] The district court did not err in determining that the Producers' claim of bias in the Alaska court system cannot be resolved until a factual presentation demonstrating bias is made before the state trial judge.

The Producers claim that the failure of the district court to decide whether an injunction should issue on ripeness grounds creates a hardship for them. No showing has been made that the Producers will suffer any hardship by present-

ing to the state evidence, if any exists, that the Alaskan judges and potential jurors have a substantial pecuniary interest in the outcome of the *Hess* matter. The Producers argue that "[i]f the state is constitutionally required to seek relief in an alternative forum, that determination should be made at the earliest opportunity to prevent as much needless delay and wasted pretrial and trial preparation as possible." Brief for Appellants at 12. This is a surprising argument for the Producers to assert. They have had several years to present a disqualification motion in the state court regarding the competency of any Alaska judge to try the *Hess* matter. They have not done so. Any injury suffered by the delay in determining the Producers' bias claim has been self-inflicted. The Producers suggest that if they prevail on their disqualification theory, this matter can be tried in an "alternative forum." If so, no time has been wasted in trial preparation.

We are persuaded from our independent review of the meagre record before us, that the question of the capacity of the State of Alaska to provide a fair and impartial trial and appellate review in the *Hess* matter is not ripe. Until a proper motion for disqualification is made in the state court, the disputed factual questions concerning the alleged bias of all Alaska judges and jurors cannot be reviewed by any federal court.

In dismissing this matter without prejudice, the district court issued a challenge to the State of Alaska "to provide a forum which will ensure a fair trial before an unbiased judge and unbiased jurors" within a reasonable time. The district court invited the Producers "to re-open this federal case" if the State Officials fail to provide an unbiased forum within a reasonable time. We applaud the district court's wise resolution of a very delicate test of the joint responsibility of state and federal courts to provide every person with due process.

VI

In their cross-appeal, the State Officials contend that the district court should have dismissed this matter pursuant to

the doctrine of *Younger v. Harris*. We need not address the merits of this issue because we have determined that the district court properly dismissed the federal constitutional issue raised in this matter because it is not ripe for review.

VII

The district court's order denying the motion to dismiss pursuant to the Eleventh Amendment is Affirmed. The order dismissing this matter because it is not ripe is Affirmed.

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