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FEB 28 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, v. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBERG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	No. A82-307 Civ.

MOTION FOR SUMMARY JUDGMENT

Defendants Fred J. Baxter et al., move this court for entry of a summary judgment in their favor under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

This motion is based on the pleadings, deposition, the accompanying memorandum in support, and on the attached Affidavit of Kerry Romesburg. These materials establish that there is no

genuine issue as to any material fact and that defendants are entitled to judgment in their favor as a matter of law.

DATED this 8th day of September, 1982.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, v. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBERG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	No. A82-307 Civ.

DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION AND SUMMARY

The question before this court is whether Alaska's student loan program, which is by far the most generous program in the nation, can require two years residency as a condition of application in order "to make virtually certain that students who are not, in fact, bona fide residents of the State, cannot take

advantage of in-state rates." Vlandis v. Kline, 412 U.S. 441, 454 (1973) ("Vlandis") (emphasis added).

Judith Andress contends that the two-year requirement violates the Federal Constitution's Due Process Clause, Equal Protection Clause, Privileges and Immunities Clause, and the Citizenship Clause. Of these challenges, only the equal protection question merits any detailed response.

Denial of a student loan is not the denial of either a fundamental political right (such as voting), or a basic necessity of life (such as welfare or access to medical treatment). Consequently, the equal protection standard to be used is the rational basis test. Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981) ("Hawaii Boating").

The courts have upheld one-year residency requirements for reduced tuition rates at state schools where all students actually remain in the state to attend school. E.g., Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd mem. 401 U.S. 985 (1971). It is not irrational to require two years of residency where the state is paying out cash and where the recipients may then take the money to attend out-of-state schools for up to eight years.

The rationality of the requirement is further enhanced by the incentive created by the Alaska loan program to come to Alaska solely to take advantage of this state benefit. Unlike loan programs in the rest of the nation, an Alaskan resident does not have to pass a needs test, nor is there a family income

limitation for recipients of loans for waiver of interest while in school. Alaska's loans are available on the same terms to all regardless of either need or family income. In addition, other states' loan programs lend only $2,500 per year to undergraduates, and $5,000 to graduates. Alaska lends $6,000 and $7,000, respectively. The maximum total allowed in other states is $12,500 for undergraduates and $25,000 for graduates (including any undergraduate loans); Alaska's totals are $30,000 for undergraduates, $35,000 for graduates, and $53,000 combined. The interest rate in other states is 9%; Alaska's is 5%. Affidavit of Dr. Romesburg. (Attached as Appendix I.)

Given the tremendous disparity between other states and Alaska, it is not irrational to require two years as a test for the bona fides of a student's residence. The state is lending large amounts of money at extremely preferential rates. It wishes that money to go to persons who presently intend to make Alaska their home after completing their education. It is reasonable to require a two-year residency requirement when money is being lent to students who previously resided out-of-state, where those students will be receiving up to $53,000 of state money, and when those students can spend that money while attending school out-of-state for up to the next eight years. The state can rationally and constitutionally require a student to meet a two-year residency test in order to show that student's bona fides and to assure the state that this money is going to persons

who intend to return upon completion of their education and make Alaska their home.

II. DESCRIPTION OF THE PROGRAM

AS 14.40.751--14.40.806 sets forth the conditions for the Alaska student loan program. Undergraduates may receive up to $6,000 per year (AS 14.40.759), while graduates may receive up to $7,000 per year (AS 14.40.763). Undergraduate students may receive loans for five years (or $30,000); graduate students may receive loans for five years (or $35,000); and total undergraduate and graduate loans may be received for eight years ($53,000). AS 14.40.763(d). The loan is to be repaid at an interest rate of 5% per year for up to ten years. AS 14.40.763(f) and (g). There is no needs test or family income limit.

As the Affidavit of Dr. Kerry Romesburg shows, the Alaska program is the most liberal program in the nation. All other states use the Federal Guaranteed Student Loan (GSL), which requires that students meet a needs test and have family incomes of less than $30,000 per year for waiver of interest while in school. The GSL lends only $2,500 per year to undergraduates, and a total of only $12,500. Graduate students under the GSL can receive $5,000 per year for a total of $25,000, but that total includes undergraduate loans. GSL's are to be paid back at an interest rate of 9% per year.

Only four other states have loan programs in addition to the GSL: Alabama, Georgia, Kansas, and Oregon. All of those

programs, however, are at least as restrictive as the GSL. Alabama provides loans for medical and dental study at a 7% interest rate and has no residency restriction. Georgia provides 9% loans for up to $1,500 per year for study in "critical fields" of study. Kansas provides "loans of last resort" to students. If a student can not qualify for a GSL, loans of up to $1,500 for a first-time freshman, $2,500 for other undergraduates, and $5,000 for graduate students are made available at 9% interest. Oregon provides loans for medical and dental study at 9% interest. The loans are for up to $2,500 per year. Affidavit of Dr. Romesburg.

In order to qualify for an Alaskan loan, an applicant must: (1) be either a full-time college student, a high school student, or scheduled to graduate from a high school within the next six months; and (2) be a resident of the state for two years at the time of application. AS 14.40.765. AS 14.40.765(b) further provides that:

> For purposes of this subsection, a person qualifies as a resident of the state if at the time he applies for the loan the person
>
> (1) has been present in the state for at least two years unless his absence from the state during any part of the two years was due to military service; or
>
> (2) is a person who is dependent on a parent or guardian for his care, and the parent or guardian has been present in the state for at least two years.

It is this two-year requirement which is challenged by Judith Andress as violating the Federal Constitution under the Equal Protection, Privileges and Immunities, Due Process, and

Citizenship Clauses. Since the only serious question arises under the Equal Protection Clause, that issue will be discussed first.

III. ARGUMENT

A. SUMMARY JUDGMENT IS APPROPRIATE.

Rule 56 of the Federal Rules of Civil Procedures provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Although defendants deny a number of Ms. Andress' allegations, even if all of Ms. Andress' factual allegations are correct, defendants are entitled to judgment as matter of law.

The only disputed fact which requires some explanation is Ms. Andress' allegation that her "application is disadvantaged by the priority given applications based on the applicant's length of residency in Alaska as required by AS 14.40.767(a)(2)." That statute provides for the award of points in order to allocate priority among late applications, with some points going for length of residency in Alaska. The Alaska Commission on Postsecondary Education has never applied that statute and will not be applying that statute with this year's applications. Affidavit of Kerry Romesburg. Instead, as Dr. Romesburg's affidavit points out, if because of limited funds priorities were to be

awarded, the awards will go to applications on a first come, first served basis. This course of action has been taken with the advice of the Department of Law. Therefore, the only question before this court is whether or not the two-year durational residency requirement contained in AS 14.40.765(b) is constitutional. For that issue, there are no material issues of fact in dispute, and summary judgment is appropriate.

B. THE TWO-YEAR RESIDENCY REQUIREMENT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

There is no question "length of residence may . . . be used to test the bona fides of citizenship." Zobel v. Williams, __ U.S. __, 50 U.S.L.W. 4613, 4617 (concurring opinion of Justice Brennan). In addition, the state has a legitimate interest in assuring that state money and its preferential interest rates are actually received by students who intend to make Alaska their home. The United States Supreme Court's pronouncements on resident tuition are equally applicable to student loans:

> The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

Vlandis v. Kline, 412 U.S. 441, 453-454 (1973) ("Vlandis").

Similarly, the issue here is whether a two-year requirement is a reasonable way to make "virtually certain" that an applicant has a present intent to return to the state after completing his or her education. The first inquiry in the equal

protection analysis is whether the requirement is to be analyzed under strict scrutiny or the rational basis test.

. . . The rational basis standard applies since neither a fundamental political right or access to a basic necessity of life is involved. Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). Strict scrutiny is involved only when genuinely significant deprivations are involved:

> Deprivations which are only uncomfortable are not enough, such as conditioning lower tuitions at state institutions of higher education upon a one-year residency requirement.

Hawaii Boating Ass'n at 665, quoting from Fisher v. Reiser, 610 F.2d 629, 639, n.5 (9th Cir. 1979), cert. denied, 447 U.S. 930 (1980) (Judge Hufstedler dissent). Like student tuition, denial of the right to a state funded student loan is at best an "uncomfortable deprivation." Therefore, the two-year residency requirement need only be rationally related to its purpose of assuring that student loans go only to bona fide residents.

The rational basis test was explained by the United Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485 (1970):

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be,

> and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426.

That rational basis exists here. First, it should be noted that the choice of the level of scrutiny usually determines the outcome of the analysis. This is particularly evident in durational residency cases. For a period of time there was substantial confusion concerning whether strict scrutiny was always required in durational residency cases or was limited to only those instances where significant deprivations resulted from failure to meet the residency requirements. E.g., Memorial Hospital v. Maricopa County, supra, 415 U.S. at 257; Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970); Fisher v. Reiser, supra. As a result, various courts ruled differently on almost identical issues. E.g., compare Larsen v. Gallogly, 361 F.Supp. 305 (D. Rhode Is. 1973) (two-year residency requirement for divorce subject to strict scrutiny; held unconstitutional) with Mendez v. Heller, 380 F.Supp. 985 (E.D. N.Y. 1974) aff'd on other grounds, 530 F.2d 457 (2d Cir. 1976) (two-year requirement for divorce subject to rational basis test; held constitutional); Bolanewski v. Raich, 330 F. Supp. 724 (D.C. Mich. 1971) (three-year residency requirement for mayor subject to strict scrutiny; held unconstitutional) with Walker v. Yucht, 352 F.Supp. 85 (D.C. Del. 1972) (three-year residency requirement for candidates for General Assembly subject to rational basis test; held constitutional); State v. Wylie, 516 P.2d 142 (Ak.

1973) (one-year residency requirement for state employment subject to strict scrutiny; held unconstitutional) with Ostendorf v. Turner, 411 So.2d 330 (D.C. App. 1982) (five-year residency requirement for homestead exemption subject to rational basis; held constitutional). It is extremely rare for a durational residency requirement to be overturned under the rational basis test, and usually will only occur in outrageous cases. E.g., Antonio v. Kirkpatrick, 579 F.2d 1147 (8th Cir. 1978) (ten-year residency requirement in order to run for state auditor); Massey v. Appollonio, 387 F.Supp. 373, 376-377 (D. Me. 1974) (three-year residency requirement in order to be licensed as a lobsterman). 1/

Establishing bona fide residence, or domicile, occurs when a person both (1) is physically present within the state; and (2) intends to remain and make a home. E.g., State v. Adams, 522 P.2d 1125 (Alaska 1974); Restatement (Second) of Conflict of Laws, §§ 15, 16, 18 (1971). Applying these principles, however, is often extremely difficult -- particularly the determination of intent:

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1. The Alaska Supreme Court, for one, until recently held that durational residency requirements always required a compelling state interest. See, Williams v. Zobel, 619 P.2d 449, 451-452 (1980). The Alaska Supreme Court now analyzes durational residency requirements under its intensified scrutiny test, which is an intermediate balancing approach between strict scrutiny and the rational basis test. Id. This "intensified scrutiny" test was set forth in State v. Erickson, 574 P.2d 1 (Alaska 1978). In a May 5, 1981 informal opinion to Representative Don Clocksin, Assistant Attorney General Bruce Botelho stated that he believed that the Alaska Supreme Court would overturn the two-year residency requirement, primarily applying the Erickson balancing test. Upon closer review, this office now believes that the two-year requirement would meet even the stricter Erickson test.

> [I]t is known jurisprudential fact that these requisites are deceptively simple, and are much more easily stated than applied. In particular, whether an individual possesses the necessary intent is often a very difficult question to answer.

Stottlemyer v. Stottlemyer, 329 A.2d 892, 899 (Pa. 1974).

Moreover, as the United States Supreme Court has expressly recognized, there are particular problems in determining the bona fides of college students "since those students are characteristically transient." Memorial Hospital, supra, 415 U.S. at 260, n.15; Vlandis v. Kline, supra, 412 U.S. at 452. Thus even during the period of uncertainty as to whether strict scrutiny always applied to durational residency cases, it was recognized that one-year residency requirements for in-state tuition were constitutional. E.g., Coleman v. Housing Authority of City of Newport, supra, 435 F.2d at 810, n.9. (D. Me. 1974).

Consequently, it is evident that a one-year residency requirement for student loans would easily pass constitutional muster under the rational basis test. The state can condition the grant of preferential rates for tuition on a one-year residency requirement. Vlandis v. Kline, supra; Hooban v. Boling, 503 F.2d 648 (6th Cir. 1974); Sturgis v. State of Washington, 368 F.Supp. 38 (D.C. Wash. 1973), aff'd mem., 414 U.S. 1057 (1973); Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd mem., 401 U.S. 985 (1971). Kirk v. Board of Regents of the University of California, 279 Cal App. 2d 430, 78 Cal. Rptr. 260 (Cal App. 1967) app. dismissed, 396 U.S. 554 (1970); Padgar v. Indiana University, 381 N.E.2d 1274 (Ind. App. 1978). The actual transfer

of cash to a student is at least on par to the tuition cases, if not a more compelling reason in and of itself for the application of a more stringent requirement. In any event, the issue before this court could also be cast as whether it is irrational for the State of Alaska to require two years of residence instead of one year in order to be eligible for a student loan.

The two-year requirement is reasonable. It is not irrational or outrageous. The Alaska student loan program does not require that the student remain in-state to attend school (unlike the resident tuition cases). The student can spend up to $53,000 in state loan funds for up to eight years attending school in California, Washington, Arizona, or any other state in the Union. Given the judicially recognized "special problems" involved in determining the bona fide residence of college students even when the students will be physically located in the state for their years of school (Memorial Hospital, supra, 415 U.S. at 260, n.15; Vlandis 412 U.S. at 452), even greater problems attend such a determination when an out-of-state student comes in, gets money, and then leaves the state for a substantial period of time. Thus, even if the Alaska loan program were the same as all other states' programs a two-year residence requirement would not be irrational.

In addition, however, the Alaska program is far and away the most attractive education loan program in the United States. All other states use the Federal Guaranteed Student Loan Program (GSL), which is substantially inferior and much more

restrictive than the Alaska program. As pointed out earlier, the GSL is limited to $2,500 per year for undergraduate, and $5,000 per year for graduates. Alaska lends $6,000 and $7,000 respectively. The maximum total allowed under GSL is $12,500 for undergraduates and $25,000 for graduates (including undergraduate loans). Alaska's respective totals are $30,000 and $35,000; in addition, combined graduate and undergraduate loans could total up to $53,000 for eight years of study. The interest rate for GSL's are 9%; Alaska's are 5%. Further, in order for a student who has a family income of $30,000 or more to receive a fully subsidized GSL loan, that student must demonstrate substantial financial need based upon a standardized needs test. Alaska's loans are open to all irrespective of need or income. Affidavit of Dr. Romesburg.

In short, it is not irrational to believe that a two-year residency requirement, rather than a one-year requirement, is a "reasonable criteri[on] for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state ..... cannot take advantage" of the enormous benefits of Alaska's loan program. Vlandis v. Kline, supra, 412 U.S. at 455 (emphasis added). The two-year residence requirement meets the rational basis test, and does not violate equal protection.

C. THE TWO-YEAR RESIDENCY REQUIREMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE, THE CITIZENSHIP CLAUSE, OR THE PRIVILEGES AND IMMUNITIES CLAUSE.

Ms. Andress also challenges the two-year residency requirement under the Due Process Clause, the Privileges Immunities Clause, and the Citizenship Clause. These assertions are without merit.

Vlandis settled the due process issue by holding that only "a permanent irrebuttable presumption of non-residence . . . is violative of the Due Process Clause." Vlandis, 214 U.S. at 453. In Vlandis the Court overturned a scheme where if a student was not a resident by a certain date (the date of admission to school), that student could never achieve resident status thereafter. The Court contrasted that scheme with plans that allowed the rebuttal of that presumption after a period of residence:

> Minnesota's one-year durational residency requirement, however, differed in an important respect from the permanent irrebutable presumption of issue in the present case. Under [Minnesota's requirement], a student who applied to the University from out of State could rebut the presumption of non-residency, after having lived in the State for one year, by presenting sufficient other evidence to show bona fide domicile within Minnesota.

Vlandis, 492 U.S. at 453, n.9. In other words, durational residency requirements, since they can be rebutted by a period of residence, do not violate the Due Process Clause.

Ms. Andress' challenges under the Privileges and Immunities Clause and the Citizenship Clause are also without support. Because Ms. Andress claims to be a bona fide Alaska

resident, the Privileges and Immunities Clause is inapplicable. Hawaii Boating, 651 F.2d at 666. Nor does the state see how Ms. Andress' claim falls within the accepted ambit of the Citizenship Clause. E.g., Slaughter-House Cases, 83 U.S. 36 (1873).

Instead, it appears that Ms. Andress is attempting to argue a violation of a fundamental right to interstate travel based upon these clauses, an approach recently argued by Justice O'Connor in her concurrence in Zobel v. Williams, supra, 50 U.S.L.W. at 4616-4620. Whatever the future of that analysis, it is clear that eight out of the nine justices presently reject that approach. Id., at 4615, n.4, 4616-4617 (J. Brennan concurring), 4621, n.3 (J. Rehnquist, dissent). Ms. Andress' arguments on these points will have to await another day -- they are not meritorious under the present state of the law.

IV. CONCLUSION

For the reasons stated in the brief, defendants respectfully request this court to grant their motion for summary judgment.

DATED this 8th day of September, 1982.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, v. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBERG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	)	No. A82-307 Civ.

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

MARGARET RAMOS, being first duly sworn upon her oath, deposes and says:

That she is employed as a legal secretary with the Attorney General's Office, Pouch K, Juneau, 99811, and that on

the 8th day of September, 1982 she mailed the 1) Motion for Summary Judgment, 2) Defendants' Memorandum in Support of Summary Judgment, and 3) Affidavit of Kerry Romesburg by DHL Courier Express Service to the following:

Ronald G. Zobel
Hellen and Partnow
425 "G" St., Suite 710
Anchorage, Alaska 99501

DATED this 8th day of September, 1982.

Margaret Ramos

Subscribed and sworn to me this 8th day of September, 1982.

Paula Stark
Notary Public, State of Alaska
My commission expires 9/8/82

Wilson Condon
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, vs. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBURG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	No. A82-307 Civil

DEFENDANTS' REPLY BRIEF

INTRODUCTION

Ms. Andress' opening brief makes a number of errors. This reply brief will only concentrate on the five most important general errors made by Ms. Andress. The first general error made

by Ms. Andress is her attempt to characterize the issue before this court as one concerning the validity of a two-year residency requirement in the abstract. Rather, the issue before this court is whether a two-year residency requirement is rational for the specific purpose of applying for the Alaska Student Loan Program. Ms. Andress ignores the problem of student mobility, the attractiveness of this particular loan program, and the ability of a student to take this cash subsidy anywhere in the world to go to school. These known, established facts are directly relevant to rationality of the residency requirement; they are ignored by Ms. Andress.

Second, Ms. Andress either states or implies that all durational residency requirements are subject to an intensive equal protection review. This is incorrect. Unless a significant deprivation, like access to medical treatment, welfare, or voting is involved, the normal "rational basis" test is used. Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981). Under at least this minimal review, the two-year standard is rational.

Third, under the impression that the two year requirement was imposed in 1981, Ms. Andress relies extensively on statements made in the twelfth legislature 1981 session for the purposes underlying the two year requirement. Ms. Andress is wrong. The two-year requirement has been in existence since 1971. The 1981 session only added a clarification to the term "resident" to clarify the meaning of physical presence; the two-year residency requirement came much earlier. The 1981 floor statements are

only relevant to that clarification, and not to the rationality of using a length of two years.

Fourth, Ms. Andress states or implies that by moving to Alaska she has become disqualified from receiving any other significant financial aid. As a result, she argues, there is the spectre of some "absolute deprivation" of an education. This theme underlies most of her arguments. Again, Ms. Andress is incorrect. By moving to Alaska Ms. Andress has lost nothing. Alaska residents of less than two years are still eligible for the Federal Guaranteed Student Loan (GSL), as well as other federal and institutional loans. See Second Affidavit of Kerry Romesburg (attached). The GSL, as pointed out in our opening brief, is the only local loan program available to students in 45 states, including California (Ms. Andress' previous residence). The GSL is also available in Alaska in addition to Alaska's own student loan program. Ms. Andress and all less than two-year residents are qualified for the Alaska GSL program. Ms. Andress has lost nothing by moving to Alaska. Furthermore, if the Alaska Student Loan Program did not have a stringent test for bona-fide residents, then loan shoppers, too, would lose nothing by temporarily moving to Alaska. This, again, underscores the need for an effective and stringent "bona fide" residency test for Alaska's Student Loan Program.

Finally, Ms. Andress mischaracterizes the residency requirement as intending to deter or inhibit interstate migration. The state has the right to grant its subsidies only to bona fide residents: those persons physically present in the

state who intend to make Alaska their home. Even a totally accurate test of that intent would have the same effect of preventing "loan shoppers" from coming to Alaska solely to get student loans. This is the effect of all valid tests of bona fide residency: to prevent some state benefits from going to those who do not intend to be citizens of that state. As a result, the intent of all bona fide residency requirements could also be characterized as intending to prevent those who do not intend to make that state their home from coming to that state solely to take advantage of a state benefit. Ms. Andress' restatement of the intent to determine bona fide residency as a deterrence to "loan shoppers" does not render the requirement an unlawful interference with interstate migration.

Alaska wants students to come to Alaska; it wants to give money to persons who, upon completion of their education intend to make Alaska their home. Alaska does not want to give money to persons who do not intend to make Alaska their home. Those goals are legitimate, and the two-year residency requirement is, for the Alaska Student Loan Program, a rational test to determine the bona fides of residency.

ARGUMENT

A. The Two Year Requirement Must Be Viewed In Relation to this Particular Program

The question before this Court is whether a two-year residency requirement is an irrational tool to use in determining

the bona fide's of a student's Alaskan citizenshi, for the purpose of qualifying for Alaska's Student Loan Program. Defendants agree that some bona fide residents, like Ms. Andress, will be denied a student loan because of this requirement. Defendants wish that there was a magic test to determine intent to remain in Alaska; a test that could exactly sort those applicants who do and do not intend to make Alaska their home.

Unfortunately, that magic test does not exist. Just as unfortunately, it is known that without an effective bona fide residency test, students would come to this state and apply for loans with no intention of returning after their education is completed. As Dr. Romesburg stated during his deposition:

> [D]on't forget, the loans are totally portable. These loans can be used anywhere, and in fact, not in the nation, anywhere in the world as long as its an approved institution. And students are very mobile as a class of people. I am sure you are aware of that. Certainly I am, and certainly anyone involved in financial aid is, or higher education today, is aware of the mobility of the modern student. They will travel between states if they can find a better opportunity for loans or aid. In fact, in the west, they shop--they shop quite blatantly between states under different areas of support.

Dandridge v. Williams, 397 U.S. 471, 485 (1970) (Citations omitted).

Given both the known mobility of students and the incentive for students who do not intend to remain to come to Alaska for a student loan, the two-year requirement is rational. The people affected by the requirement are those who previously resided outside the state. These recent arrivals are applying for up to $53,000 of state funds. They may take that money back out of state for up to eight more years. It is surely reasonable to require some substantial residence test as an element in checking the bona fides of these new arrivals. The question is whether two years is irrational for this student loan program. We urge this Court to hold that it is a rational requirement; that even though it has an unfortunate effect on some individuals, like Ms. Andress, it is not an irrational method of assuring that Alaska student loan money goes to those persons who intend to make Alaska their home.

B. Ms. Andress Misstates the Standard of Review.

Ms. Andress also mischaracterizes the applicable standard of review by implying or stating that some intensified review is or should be applied in this case. Recent case law establishes that the normal "rational basis" equal protection test applies.

As was mentioned in our opening brief, until Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), there was substantial confusion concerning whether strict scrutiny was always required in durational residency cases, or was limited to only those instances where significant deprivations (like denial of

Romesburg Deposition at 16.

Because of the magnitude of the subsidy, the state wished to make "virtually certain that students who are not, in fact, bona fide residents of the state, cannot take advantage" of this generous program. Vlandis v. Kline, 412 U S. 441, 454 (1973). And, like the residency requirement for in-state student tuition, a durational residency requirement is a traditional tool for sorting student residents from those who do not intend to make Alaska their home. Because of the mobility of students, the ability to take the loan out of state, and the magnitude of the state benefit (up to $53,000 over eight years), a stricter test for determining residency than that in use for qualifying for in-state student tuition was believed by the Legislature to be necessary. Unlike the subsidy given for instate tuition, not only was the amount of the subsidy given much greater, and not only was the award given in cash, but also the student did not have to remain in state in order to receive the benefit.

The period chosen was two years. It is recognized that some number of bona fide residents, like Ms. Andress, may be denied student loans as a result of this requirement. But,

> "[a] state does not violate the Equal Protection Clause because the classifications made by its laws are imperfect . . . "or because in practice it results in some inequality." "The problems of government are practical ones and may justify, if they do not require, rough accommodations."

welfare, medical treatment, or voting) resulted from failure to meet the residency requirements. E.g., Memorial Hospital, supra, 415 U.S. at 257, Cole v. Housing Authority of City of Newport, 435 F.2d 807, 810, n.9 (First Circuit 1970); Williams v. Zobel, 619 P.2d 448 (1980). As a result, for a period of time many courts assumed that strict scrutiny always applied regardless of the right infringed or the deprivation involved.

It was not until Memorial Hospital that the present test evolved -- a two tier test which depended upon the nature of the deprivation caused by the denial of "bona fide" resident status. As a result, the rational basis test applies to most durational residency requirements. Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir 1981) ("Hawaii Boating").

Ms. Andress fails to recognize this period of confusion. Consequently, Ms. Andress misstates the applicable test when she asserts that a state must always have "an especially weighty interest in an objective proof of bona fide residency" [Plaintiff's Memorandum at 14], that "[a]ny durational residency requirement brought to a court for constitutional scrutiny will carry a heavy burden" [Id. at 10], or otherwise implies that all durational residency requirements require the application of some intensified test.

Also, as a result, Ms. Andress is able to make such statements as "No court has upheld a two-year durational residency requirement in these circumstances [referring to the statutes at issue in this case]." Id. at 15. That is true. It is also true

that no court applying the rational basis test has struck down a two-year durational residency requirement in these circumstances. Since the test was clarified eight years ago, there simply have not been any cases directly on point one way or the other.

Again, this is not to say that the two-year requirement is valid for all programs, or that the two-year requirement would be valid under strict scrutiny. But that is not the test nor the question before this court. The test is the rational basis test, and the question is whether or not this particular program can rationally require a two-year residency requirement for its applicants.

Because of the apparent confusion on Ms. Andress' part, the Ninth Circuit Court of Appeal's most recent statement on the applicable test bears some extended quotation:

> The right to travel is a fundamental right, and it has been recognized that durational residency requirements - because they disadvantage a class of persons who have recently exercised the right to travel - may, in certain circumstances, unduly infringe upon this right. In Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), the Court held unconstitutional a one-year durational residency requirement for welfare assistance. The Court stated, however:
>
> > "We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote,

eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." [Id. at 638, n. 21]. The Court held, in Dunn v. Blumstein, 405 U.S. 330, (1972), and Memorial Hospital v. Maricopa County, [415 U.S. 250 (1974)], that durational residency requirements which involved deprivations of the right to vote and free nonemergency medical care triggered strict scrutiny. In Maricopa County, however, the Court noted that "The amount of impact required to give rise to the compelling-state-interest test [has] not been made clear." [Id. at 256-7] (Footnote omitted). In Fisher v. Reiser, 610 F.2d 629 (CA9 1979) cert. denied, [447 U.S. 930 (1980)], we noted the importance of the "nature of the benefit denied." Id. at 635. In fact, Judge Hufstedler, dissenting in Fisher, after reviewing the right to travel cases, commented that "The Court [has] indicated that the 'penalty' required to invoke strict scrutiny involves a genuinely significant deprivation, such as a denial of the basic 'necessities' (as in

Shapiro), or the denial of a 'fundamental political right' (as in Dunn)." Id. at 639 (footnote omitted) (emphasis added). Judge Hufstedler also noted that "Deprivations which are only uncomfortable are not enough; such as conditioning lower tuition at state institutions of higher education upon a one-year residency requirement." Id. at 639, n. 5.

The district judge found that strict scrutiny was not applicable because the durational residency requirement for preferential rates for mooring privileges in recreational boat harbors was not a significant penalty on the right to travel. To use Judge Hufstedler's terminology, this "deprivation" was merely "uncomfortable." The district judge found that this case was more like the college tuition cases, which stand for the proposition that "conditioning lower tuition at state institutions of higher education upon a one-year residency requirement" does not impose a "penalty" on the right to travel justifying invoking strict scrutiny. We agree with the district judge that the "deprivation" involved in this case - the failure to provide a berth in a recreational boat harbor at the same rate as a resident - does not operate as a significant "penalty" on the right to travel.

Hawaii Boating Ass'n at 664-665 (emphasis in original).

Like in-state tuition, and unlike the right to vote, denial of a student loan is not a significant enough deprivation to trigger intensified review. Consequently, the rational basis test is the appropriate test.

C. The Two-Year Residency Requirement Has Been In Existence Since 1971.

Ms. Andress relies extensively on quotes from the Senate and House floor during the 1981 session in attempting to establish the purpose behind the two year length. Ms. Andress claims that those debates are relevant because she believes that

> In 1981 the Twelfth Legislature amended the Alaska Student Loan Program to include the two year durational residency requirement . . .

Plaintiffs-Memorandum at 7.

Ms. Andress is wrong. The two-year requirement has been in effect since 1971. § 1, Ch 98 SLA 1971 established the loan program, provided that an applicant must be "a resident of Alaska" and, in the original AS 14.40.773, defined "resident" as meaning

> a person domiciled in Alaska who has resided in Alaska for at least two years before making an application for a student loan.

What the Twelfth Legislature did do was move the two year requirement from the definitional section (AS 14.40.773) to the qualification section itself (AS 14.40.751). § 10, Ch 89 SLA

1981. But the 1981 Legislature did not impose the two year length. Therefore, the statements of the 1981 Legislature are not relevant to the issue of the purpose or the intent of picking two years as the required length of residence rather than some other test or some other period of time.

The Twelfth Legislature did add a clarification to the two year requirement by providing for types of actual physical presence as the means for determining whether somebody had been a resident for two years. § 10 Ch 89 SLA 1981. The reason for this clarification was that the legislature had received evidence that persons who did not intend to make Alaska their home had come up for summer jobs two years in a row, applied for student loans, and had then taken the money out of state for school. Dr. Romesburg explained this statutory clarification and the reasons for the action in his deposition:

A. The Statute that was changed, again, it was -- I think it was two years ago that the change went through, says that the person has to be physically present for two years before filing.

Q. The applicant can have all of these other indicators of residency --

A. Right.

Q. -- uniformly.

A. That's correct.

Q. They have not been present for two years, they're disqualified.

A. That's correct, unless they are a minor and their parents have been physically present for two years. There are some things like that. But even if they've been outside to school -- and I'm giving you what the Statute says now -- if you've been outside to school you have to have been physically present for two years before you went to school. If you're in the military, you have to have been physically present for two years before you entered the military. This was an attempt by the legislature to tighten down what they meant by physically present, and I'll even go beyond that to tell you who they were aiming at. They weren't aiming at the general person here. They were aiming at a group of people that were purportedly obtaining student loans that were, in fact, not residents, and those were individuals that would come to Alaska, work in the summer, go outside to school during the fall, to a school that didn't have a tuitional differential so they didn't have to declare themselves as a resident or non-resident at the particular

institution, come back, work a second summer, go out again to school and then they said, "I am a resident. I've put in, in fact, maybe six months, two summers, but I have been there -- I 've been in school the rest of the time. I've only been outside the state except for educational purposes. I qualify under the loan program," and we were giving them loans.

The senate got very upset about this when they were informed. And they were informed, you could go back and check the senate records. Some students appeared and testified, students from the University of Alaska testified that this was happening and they got upset and said, "We don't want you giving those people those loans, and we want to tighten this thing down," and that's when they put two years.

Romesburg Deposition at 13-15.

Therefore, the Twelfth Legislature did not impose the two-year durational residency requirement. Instead, that legislature only clarified the definition of residence to take care of a problem that was brought to their attention. That problem

reemphasized the rationality of the original purpose of the program -- to assure that Alaska student loans went to students who intended to make Alaska their home. Simply stating that two years residence was required had not been enough; a further definition of residence to include certain types of physical presence was required in addition. The legislature, both in 1971 and 1981, was not reacting to a hypothetical fear - they were taking a course of action based on real and present problems. Their solutions were rational.

D. Ms. Andress Has the Same Loan Programs Available to Her as are Available to Students in 45 Other States.

Ms. Andress bases many of her arguments on the assumption that the Alaskan Student Loan Program is the sole source of funds for persons who are physically present in Alaska from one day to two years. For example, she states that

> If the plaintiff is to get any governmental assistance from the State of Alaska to get a legal education, it is going to have to be through the Alaska Graduate Student Loan Program. (Romesburg Deposition at 9-11). The plaintiff's bona-fide Alaska residency prevents her from getting any financial assistance from any other state and makes it necessary for her to pay-out-of-state tuition in California.

Plaintiff's Memorandum at 3. It is on that assumption that Ms. Andress asserts, for example, that

defendant Romesburg makes it very clear that the denial of assistance from the State of Alaska through the Alaska Student Loan Program is an absolute denial of any State assistance for a wide range of graduate education. The plaintiff and all others like her are going to have to get assistance from the State of Alaska or not get a graduate education at all.

Plaintiff's Memorandum at 6 (emphasis added). This "absolute denial" argument underlies many of Ms. Andress' arguments. E.g., Id. at 39.

Ms. Andress is, again, incorrect. Although Ms. Andress is not qualified for the Alaska Student Loan Program, she is qualified for the Alaska version of the Federal Guaranteed Student Loan (GSL) Program. Second Affidavit of Kerry Romesburg. The funding and terms available under this program were described in our opening brief at page 4 and in the (First) Affidavit of Kerry Romesburg.

Although it is technically true that Ms. Andress is not qualified for any other state-funded programs, there are only four other non-GSL state programs in the nation. These are the more restrictive programs in Alabama, Georgia, Kansas and Oregon. (First) Affidavit of Kerry Romesburg at 5. All other states participate in the Graduate Student Loan Program, and, unlike Alaska, do not offer any independently funded state loans.

In particular, Ms. Andress is no worse off than if she had remained in California, since California is not one of the

four states with a separate state-funded student loan program. In addition, Ms. Andress, like all other students nationwide, is eligible for National Direct Student Loans (a federally administered loan program, loaning up to $2,500 at five percent interest) or the much smaller institutional loans (available at specific colleges). Second Affidavit of Kerry Romesburg.

Therefore, except for students in four other states, Ms. Andress is eligible for the exact same loan programs as are available to any other student in the nation. Remaining equal to almost all other students can hardly be termed "an absolute denial of a graduate education." Plaintiff's Memorandum at 39.

Instead, Ms. Andress is simply being prevented from receiving an additional benefit: the benefit of the much more generous Alaska Student Loan program. She has lost nothing by moving to Alaska.

Further, this again emphasizes the rationality of the fear of "loan shoppers"--those who temporarily come to Alaska solely to receive a student loan and do not have the present intent of making Alaska their home. If there was not a stringent residency test, then the "loan shoppers" would also remain eligible for those federal loans by coming to Alaska. They, too, would have nothing to lose. It is necessary to have some substantial and effective test for determining which of the recently arrived students have the present intent to remain in Alaska. The two-year residence requirement is rationally related to that purpose.

E. The Purpose of the Two Year Residency Requirement is not to Deter In-State Migration.

Finally, Ms. Andress consistently mischaracterizes the residency requirement as a deterent to interstate migration. She repeatedly states that the "intent is to prevent people from coming to Alaska." Plaintiff's Memorandum at 19. Ms. Andress is mistaken. The purpose of the program is not to prevent students who intend to remain in Alaska from coming to Alaska. Rather, it is to prevent persons who do not intend to remain and make Alaska their home from receiving student loans. The only effect hoped for is to deter "loan shoppers" - persons who do not intend to make Alaska their home, and who are not bona fide residents - from receiving student loan money.

The requirement is not intended to prevent those wishing to make Alaska their home from coming to Alaska. In fact, as explained above, newly arrived students will remain eligible for some loans as are available in most of the rest of the nation (the GSLs). Thus it is doubtful that the two year requirement for the Alaska Student Loan Program will deter any student wishing to make Alaska his or her home from coming to the state.

Ms. Andress misstates the record when she makes statements like the following:

> The concern in this record is not whether a person is a bona fide resident, because defendant Romesburg admits that there are many bona fide residents who would otherwise be qualified. The concern in this record is with

stopping migration and Romesburg's testimony shows that is exactly the effect that the statute has.

Id. at 23.

First, the purpose of any test of bona fide residence is to prevent people who do not intend to remain in the state from receiving a state benefit. Even if there were an exact test, one which could unerringly classify bona fide residents from transients, even that test would still deter those person who do not intend to make Alaska their home from traveling here solely to take advantage of the state benefit. This result would not render a totally accurate test unconstitutional. It does not render this residency requirement unconstitutional, either.

It is the intent of these statutes, shown in the record, to only sort out those persons who want to take the money and run. For example, the following exchange occurred during the deposition, beginning with a question from Ms. Andress' attorney, Mr. Zobel:

> Q. So this two year durational residency requirement is enforced to deter people from coming to the state, claiming Alaska residency, taking up residence here and applying for a loan.
>
> A. I would disagree. I would disagree with some of the terms you used, if I can.
>
> Q. Sure.

A. I think it's -- the two year durational residency now, the physical presence residency, the senate and the house went along with it, the legislature passed a couple years ago, was to deter people from coming to Alaska for the sole purpose of obtaining a student loan. The way you posed it, you said, coming up here, establishing residency and so on. If residency means two years residency, then I'd have to disagree. What the purpose of that was to make sure that people didn't come up here just to get a student loan and then take that loan -- don't forget, the loans are totally portable. These loans can be used anywhere, and in fact, not in the nation; anywhere in the world as long as it's an approved institution. And students are very mobile as a class of people. I'm sure you're aware of that. Certainly I am, and certainly anyone involved in financial aid is, or higher education today, is aware of the mobility of the modern student. They will travel between states if they can find a better opportunity for loans or aid. In fact, in the west, they shop --

they shop quite blatantly between states under different areas of support.

Q. So you want to deter those people from coming to Alaska to participate in the program?

A. I think the true -- the true wording that should be used, and I guess you could -- if you want to interpret this as deterring, I guess that's up to you, but the purpose was, to insure that the loans were used by the people that were truly eligible; that were truly Alaska residents and were residents and not just for loan purposes, but were residents of Alaska, and the loans were directed to help those residents. Remember those two reasons they had the program; access and an educated populace. It's to help the residents in Alaska, not an Oregonian or a Washingtonian that happens to come up here and put in a couple of months in the summer or maybe one year or a short period of time, take the money and go south and maybe never return.

So I'm not sure -- in fact, I would say that the program is not used in a way to

> deter anyone from coming here. I don't think that's the intent at all.. It's to -- that residency isn't a deterrent. it's more, I think, an encouragement for those people that are truly Alaskans and. it's just a test to make sure that in fact, they are Alaskan and qualify...And by "Alaskans." I mean truly a resident of Alaska, not just someone here to qualify for a loan and leave. I don't know if we're saying the same thing in different ways or not.

Romesburg Deposition at 15-17.

Therefore, the loan program cannot be characterized as an intent to prevent in-state migration. Again, it's purpose is solely to assure that only bona fide residents receive a generous state subsidy.

Second, simply because the test is inexact, and will deny benefits to some bona fide residents, does not mean that its purpose must be something other than a test for bona fide residency. As stated earlier, it is unfortunate that there is no magic test to exactly sort those who have the requisite intent from those who do not. In addition, the state is not required to employ massive armies of bureaucrats to perform individualized intent tests on all applicants for all programs. Absent such a test or requirement, there will always be, for any test, many bona fide residents who will be included within the assumed class

of non-bona fide residents. But the existence of that inherent inexactness does not mean that the purpose of the program is something other than to assure that only bona fide residents will receive student loan money.

We have stipulated that Ms. Andress is a bona fide resident. But because she is denied a student loan does not mean that the purpose is to deter persons who wish to reside in Alaska for making Alaska their home. This point was clearly made at Dr. Romesburg's deposition. In fact, the following exchange presents the heart of this whole dispute:

Q. You've stated that you have no reason to believe that my client came to Alaska for the purpose, the sole purpose of participating in the loan program.

A. Correct.

Q. Is it designed to make persons such as my client, who is a -- You've said, am I not correct, that she is a bona fide resident?

A. I said, I have no reason to believe she's not.

Q. Okay.

And you said you have no reason to believe that she came to Alaska solely for the purpose of participating in the graduate student loan program?

A. Correct.

Q. Is the durational residency requirement designed to deter persons such as my client from coming to Alaska?

A. No.

Q. But it will deny her a loan.

A. Yes.

Q. And for what reason? What -- what purpose does the classification, the requirement serve in that instance?

A. If you're asking, is your client a victim of a two year residency requirement, when for all purposes she might otherwise be eligible, the answer would be yes, she is a victim of that residency requirement. When you impose any kind of a requirement -- I'm not a legislature -- legislator -- when you impose any kind of a requirement on a class of people you're going to treat all those people within the class as if they're the same, and I think quite often the outcome can be unfortunate. In her case it may be unfortunate. But if the legislature says we have to pick -- somehow -- again, let's go back to the beginning. We have a very mobile class of people, students, very mobile. Look at the age of them. Look at the income.

it's a mobile group of people. We know they shop. We know they shop in the Northwest, I know they do. I can give you testimony from other states that students shop. They shop loan programs; they shop WICHI support; they shop tuitions; they'll move around. But we're saying, in this state what the legislature's been saying for years is, "We are willing to support our students. We want to support them to pursue their educational goals and we want to have an educated populace." The State of Washington, the State Oregon, Idaho, don't support their students at the level we do. They don't. They don't have the same kind of program, and they seem to be unwilling to, or maybe unable to, but the point is, they don't. So the Alaska Legislature says, "We want to do this for our people."

Now we have to make sure, though, that they are, indeed, our people. We don't want to create a loan program and given -- and by all means, when you're talking five percent you're talking about a

subsidized program. We don't want to have a five percent program for Washington students, residents of Oregon, we want it for Alaskans. And we think two years is reasonable. That's what the legislature has said through statute to us.

Romesburg Deposition at 43-45.

The legislature was correct. The two year requirement is reasonable test for determining the bona fides of residency for applicants for the Alaska Student Loan Program. It should be upheld.

DATED this 15th day of September, 1982.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, vs. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBURG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	No. A82-307 Civil

OPPOSITION TO DEFENDANTS
MOTION FOR SUMMARY JUGMENT

The plaintiff has covered most of the issues raised by the defendants in their motion for summary judgment in plaintiff's memorandum in support of plaintiff's motion for summary judgment and therefore will not repeat those arguments.

The defendants have attached to their memorandum in support of defendants' motion for summary judgment an affidavit of Kerry Romesburg which only reinforces the arguments made by plaintiff in support of her motion for summary judgment. On pages five through eight of that affidavit, the defendant Romesburg states that Alaska has the most generous student loan program and that in view of reduced student loan opportunities in

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attractive may migrate to Alaska and take up residency in the state because of the student loan program. Romesburg goes on in his affidavit on pages eight through eleven to describe the effect of reducing the durational residency requirement imposed for this program. Defendants are presenting the argument that the generosity of the program justifies an overly restrictive durational residency requirement to inhibit migration to this state that may be caused by the attractiveness of the program. Such an argument is not a defense of the statute but a reason for the statute to be struck down. The State of Alaska is not permitted to set up generous programs and then create legal walls between this state and the rest of the United States that are allegedly necessary to stop migration caused by the attractiveness of those programs. Solving the "problems" caused by free movement cannot justify a classification based on recent travel. As the Supreme Court said in Edwards v. California:

> [T]he State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions which are staggering. . . .But this does not mean that there are no boundaries to the permissible area of state legislative actitivites. There are. And none is more certain than the prohibition against attempts on the part of any single state to isolate itself from difficulties common to all of them by restraining the transportion of persons and property across its borders. It is frequently the case that a state may gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world but in the

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framed under the dominion of a political philosophy less parochial in range. It was framed on the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

314 U.S. 173-74. The argument put forth by the defendants is proof that the statute promotes an illegitimate purpose.

Defendant Romesburg's affidavit on pages eight through eleven demonstrates that the durational residency requirement has an actual deterrent effect on migration. Once an actual deterrent effect is admitted by the defendants, it is not necessary to decide whether the denial of the benefit involved is a "penalty" on interstate migration. Penalty analysis focuses on the denial of the benefit to create a presumption or the lack of a presumption that interstate migration is effected. None of the cases that dealt with the problems of durational residency requirements in terms of "penalty" analysis were presented with actual proof of deterrence of interstate migration. The low level scrutiny advocated by the defendants is not justified when there is an admitted impact upon interstate migration. Defendants are admitting that this statute burdens migration and therefore greater scrutiny is demanded.

On page three of defendants' memorandum it is stated that, "Given the tremendous disparity between other states and Alaska, it is not irrational to require two years as a test for the bona fides of a student's residence." The defendants do not explain what the disparity between programs in this state and other states has to do with proof of whether a person is in fact a resident of this state. Factors which determine whether a person is a bona fide resident of this state do not change

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programs offered in higher education. Those factors are constant, and a greater or lesser disparity between states of the Union and programs offered would not change those factors. Comparisons between Alaska's programs and the programs available in other state are not relevant in determining whether the classification burdens the right of interstate migration. Strong v. Collatos, 593 F.2d 420, 422 (1st Cir. 1979); Barnes v. Board of Trustees, 369 F.Supp. 1327, 1337 (W.D. Mich. 1973) (three-judge court).

The defendants' citation to Vlandis v. Kline, 441 U.S. at 453-454 for the proposition that a state can establish such "reasonable criteria for in-state status" so as to make "virtually certain" that non-residents do not receive the benefits of the student loan program should not lead the court to the conclusion that a two year durational residency requirement is therefore permissible. The example of a reasonable residency requirement which is given immediately after this statement is one which focuses legitimately upon the factors that determine domicile and not upon a durational period. 444 U.S. at 454. The emphasis given by the defendants to the "virtually certain" language ignores the gross underinclusiveness of a definition of residency which makes large numbers of bona fide residents into non-residents. It could be argued that a 10 year or even a 20 year durational residency requirement would make it "virtually certain" that no aid was given to a non-resident. Such a definition of residency would, however, be struck down because of its underinclusiveness and the unreasonable length of the waiting period. A two year period of time is not a short period of time and is unreasonable in its relationship to the fact of bona fide residence.

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The first, and most obvious alternative to the defendants' insistence upon a two year durational residency requirement is a one year durational residency requirement. A one year requirement would identify true "transients" as well as a two year period but would not have the effect of defining many bona fide residents, including the plaintiff, as non-residents. The state could also use the two year period as a rebuttable presumption that would put the burden upon the applicant, but would yet give that applicant the opportunity to show factors clearly bearing upon the issue of domicile. The Supreme Court has recently noted in Elkins v. Moreno, 435 U.S. 647, (1978), that Vlandis applies to "those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue." 435 U.S. at 660, quoting Weinberger v. Salfi, 422 U.S. at 771. The State of Alaska in this case purports to be concerned with domicile and the plaintiff should be able to prove her domicile by showing that she is a bona fide resident despite the durational period.

The defendants have completely ignored plaintiff's other arguments because it is only to their advantage to ignore the substantive limits for the way in which durational residency requirements can be used. Those substantive limits are provided by the Citizenship Clause[1/] and the Privileges and Immunities

---

1/ Cf: Toll v. Moreno, 102 S.Ct. 2977 (1982) (State University could not deny in-state status to non-immigrant aliens because of supremacy clause) It is more than interesting that aliens must be granted in-state tuition because of the protection given them by the federal immigration laws. A U.S. citizen cannot be said to have a lesser right to "enter and abide" in a state of the Union unless it is going to be argued that the federal immigration laws provide more protection to an alien than the Citizenship Clause provides to a citizen of the United

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Clause of both the Fourteeth Amendment and Article IV. The statement by the defendants that nine Justices of the Supreme Court have rejected Justice O'Connor's analysis of Privileges and Immunities found in her concurrence in Zobel v. Williams is incorrect. Only Justice Rehnquist rejects Justice O'Connor's arguments. The appellants in Zobel v. Williams had made no Privileges and Immunities Article IV claim, it was not briefed, and it was not argued. It is therefore quite understandable that seven of the eight Justices who voted to strike down the Alaska Permanent Fund Dividend law did not find it necessary to base their decision on the Privileges and Immunities Article IV claim. That does not mean that it is invalid or that it has been rejected by the Court.

The defendants defense of the two year durational residency requirement is insubstantial and should be rejected. The plaintiff's motion for summary judgment should be granted.

Dated this 16th day of September, 1982, at Anchorage, Alaska.

Ron Zobel
Attorney for Plaintiff

I HEREBY CERTIFY that a copy of the foregoing was mailed to the following on 16th September, 1982:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, vs. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBURG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	No. A82-307 Civil

AFFIDAVIT OF KERRY ROMESBURG

Kerry Dean Romesburg, being duly sworn, states as follows:

I. Qualifications

I am executive director of the Alaska Commission on Postsecondary Education, Pouch FP, 400 Willoughby Avenue, Juneau, Alaska 99811. As executive director I serve as the chief administrative official for the Alaska commission charged with: administration of the state Division of Student Financial Aid, coordination and planning of the State's postsecondary educational resources including facility and program expansion, review and recommendation of the annual budget requests of public higher education in all institutions, authorization and licensure of institutions to operate in the state, administration of the state's participation in the Western Interstate Commission for Higher Education, administration of the state's veteran's educational program approval, administration of a number of federally-funded programs, and general advisement and counsel to the executive branch and legislature on higher educational matters. The commission has a staff of 59 and an operating budget of 55.3 million dollars (including student loan funds). I received my B.A. from Arizona State University in June of 1967 in Mathematics and Education, I received my M.A. from Arizona State University in June 1968 in Mathematics and Education, and my Ph.D. in Education from Arizona State University in June of 1972. Prior

to being executive director of the Alaska Commission, I was executive director of the Arizona Commission on Postsecondary Education in 1974 to 1975. I am a member of the American Association for Higher Education, the American Association of Professors of Higher Education, the Association for Institutional Research, the National Education Association Higher Education, and the State Higher Education Executive Officers.

I am presently chairman of the Western Interstate Commission on Higher Education, and am a member of the National Advisory Council for United Student Aids Funds. Through my job and my professional associations, I am intimately familiar with both the Alaska Student Loan Program and student loan programs nationwide.

II. Introduction

The Alaska Student Loan Program was established by the Alaska State Legislature in 1971. Prior to that, a loan program did exist, but it was substantially different from the current program, which is based upon the 1971 program. Since 1971, the State of Alaska has awarded nearly 35,000 loans totaling over $94 million to Alaska borrowers. During the 1981-82 school and loan year 9,898 loans were made, totaling over $40 million. Of these loans, 45.0 percent were for attendance in Alaska and 55.0 percent were for out-of-state.

III. Terms of Loans

Alaskans can borrow up to $6,000 per year for undergraduate or vocational study and up to $7,000 per year for graduate study at any approved postsecondary education institution (including foreign institutions). The loans carry a 5% interest rate, and the borrower has ten years to repay the debt. While a borrower is in school, during the first year after ceasing full-time study (grace year), and during approved deferment periods, the borrower makes no payments and interest is paid by the state on behalf of the borrower. These periods of deferment do not count toward the ten-year repayment cycle. Additionally, if a person encounters difficulty making the regular monthly installments, the repayment period may be extended for up to five more years, for a total of fifteen.

In order to qualify for a loan, an applicant must have been a resident of Alaska (which requires physical presence) for at least two years, and must attend an approved institution.

Although AS 14.40.765(b) sets forth a point system based in part on length of residence, that system has never been used because enough money has been available in the past to fund all students. That point system will not be used either this year or in the future, even if there are insufficient monies to fund all students. Instead, in part on advice from the Department of Law, the Commission will award loans, if necessary, on a first-come first-served basis.

IV. Other States' Programs

During July 1982 each state was surveyed as to the type of student loan program available in that state. It was found that all states participated in the Federal Guaranteed Student Loan Program (GSL), and only the states of Alaska, Alabama, Georgia, Kansas, and Oregon had other student loans available at the state level. Nearly all individual institutions have short-term emergency loans available for students in attendance.

Of those states having programs in addition to the GSL, only Alaska's is non-restrictive by student need and field of study. Alabama provides loans for medical and dental study at a 7% interest rate and has no residency restriction. Georgia provides 9% loans for up to $1,500 per year for study in "critical fields" of study. Residency is one year. Kansas provides "loans of last resort" to students. If a student can not qualify for a GSL, loans of up to $1,500 for a first-time freshman, $2,500 for other undergraduates, and $5,000 for graduate students are made available at 9% interest. No residency restriction exists. Oregon provides for loans for medical and dental study at 9% interest. The loans are for up to $2,500 per year and residency required is one year.

Comparing the GSL programs in each of the states becomes difficult, since individual lenders (usually banks) can set individual restrictions on loans. For instance, some lenders require that a borrower be a regular bank customer, others

require a specific grade point average, and some require varying lengths of residency. Since these are private lenders, with only a state and federal guarantee, the terms can be quite restrictive or quite generous depending upon the attitude of the lender.

A comparison of the Alaska program and the general terms of the GSL is provided below. It can be seen that in all ways other than residency and part-time attendance, the Alaska program is more generous to the borrower than the GSL program.

	Terms/Conditions	GSL	Alaska Student Loan
1.	Amount of Loan, per year		
	Undergraduate	$2,500	$6,000
	Graduate	$5,000	$7,000
2.	Total indebtedness		
	Undergraduate	$12,500	$30,000
	Graduate	$25,000 including undergraduate loans	$35,000 but, for a combined total of no more than 8 years of loans undergraduate and graduate
3.	Needs test required	Yes	No
4.	Income cap	$30,000	None
	(a) Effect	loss of interest waiver while in school	N.A.
5.	Interest rate	9%	5%
6.	Institutional restrictions	Accredited	Accredited or approved by Commission

7.	Residency required	Varies, usually 1 year	2 years
8.	Partial Cancellation	None	Up to 50%
9.	Loans to part-time students	Yes, Half-time students, or more	No, must be full-time
10.	Scholastic restrictions	Varies, usually "C" average - undergraduate "B" graduate	"C" average - undergraduate "B" average - graduate

V. Other Factors Affecting Loans

The federal program is becoming more restrictive under the current administration. Proposals are to lower the income cap to $16,000, to charge interest while in school and in deferment, to raise interest to commercial rates, and to eliminate loans to graduate students. This trend toward a more restrictive federal program is creating a new clientele for Alaska loans. Increasingly, prospective students from other states are moving to Alaska to establish residency and borrow under the Alaska Student Loan Program. For many, this is the only way of obtaining access to desired postsecondary education and training.

Additionally, other federal programs such as Basic (Pell) Grants, Supplement Grants (SEOG), Incentive Grants (SSIG or SEIG), and College Work Study have all been targeted for reduction or elimination. This means students must increasingly turn to loans as the only form of financial aid available. When

this is coupled with the federal loan restrictions and fund reductions, Alaska's loan program becomes even more attractive.

VI. Alaska Student Loan Volumes

The Alaska Student Loan Program has experienced dramatic growth the past few years, and this growth is expected to continue. Table 1 below reflects that growth.

TABLE 1
ALASKA STUDENT LOAN ACTIVITY
1979-80 through 1988-89*

Year	Awards	Amount
1979-80	3,918	$ 9,373,949
1980-81	6,460	$ 15,957,717
1981-82	9,898	$ 40,559,499
1982-83	15,000	$ 59,000,000
1983-84	17,500	$ 80,500,000
1984-85	19,000	$ 97,500,000
1985-86	21,000	$121,800,000
1986-87	23,100	$136,290,000
1987-88	25,600	$151,040,000
1988-89	28,500	$168.150,000

* 1982-83 through 1988-89 are projected.

These totals are based upon projections including current and projected Alaska population, secondary school attendance rates, and in-migration.

VII. Effect of Changing Residency

Should the two-year residency be reduced, the number of

eligible applicants would increase. Certainly, the more the reduction the larger the pool. There are two factors at work: one, those persons already living in Alaska, but having been here for less than two years would be added to the potential borrowing pool; and two, as the residency is reduced, the desirability of moving temporarily into the state for the sole purpose of obtaining a student loan is increased.

Estimates of the increased applicants are listed in Table 2. These estimates are based upon an increased in-migration during the 1983-84 year and a leveling from then on.

The effects are quite far-reaching, but the inescapable conclusion is that the program will not be fully funded. Even in the first year of such a residency change, the program will be from six to nine million dollars underfunded. This translates to from 1,500 to 2,200 people who do not receive loans. In future years the number of persons turned away could reach 6,000, 7,000, or more.

If a needs test is employed, the true Alaskan resident will be at a decided disadvantage because of the inflated salaries of the state. This is the problem already encountered with federal programs. Alaskans can not qualify for many programs because of family income, even though the cost-of-living in Alaska is so much higher than other areas of the nation. If an Alaskan resident who has lived and worked in the state for a

number of years, or whose parents have lived or worked in the state for a number of years, is compared on a needs test with an Oregon or Washington resident who has come to the state for only six months or a year, possibly not even worked, the Alaskan must lose. The short-term "resident" would have a distinct advantage with a needs test.

If first-come first-served is used as a criterion, the individual moving to Alaska for the sole purpose of obtaining a loan would probably be wise enough to meet all application dates. Hence, first-come first-served would only result in everyone filing early except that person whose career is suddenly ended and new skills are unexpectedly needed. Again, this would most likely be the long-term resident and the individual that may need assistance most.

In general, opening the loan program to the short-term resident will result in a large number of persons coming to Alaska for the sole purpose of obtaining loans to finance their education. Those persons for whom this program was designed and has operated and served over the last eleven years will be squeezed out by residents of other states, states unwilling to commit resources to education of their citizens in the manner of Alaska.

TABLE 2
PROJECTED ALASKA STUDENT LOAN RESIDENCY EFFECTS
1982-83 through 1988-89

Two-Year Residency

Loan Year	Awards	Amount
1982-83	15,000	$ 59,000,000
1983-84	17,500	$ 80,500,000
1984-85	19,000	$ 97,850,000
1985-86	21,000	$121,850,000
1986-87	23,100	$136,290,000
1987-88	25,600	$151,040,000
1988-89	28,500	$168,150,000

One-Year Residency

Loan Year	Additional* Awards	Additional* Amount	Total Program
1982-83	1,560	$ 6,396,000	$ 65,396,000
1983-84	2,783	$12,801,800	$ 93,301,800
1984-85	2,926	$15,068,900	$112,918,900
1985-86	3,759	$21,802,200	$143,602,200
1986-87	4,712	$27,800,800	$164,090,800
1987-88	5,862	$34,585,800	$185,625,800
1988-89	7,239	$42,710,100	$210,860,100

Six-Month Residency

Loan Year	Additional* Awards	Additional* Amount	Total Program
1982-83	2,496	$10,233,600	$ 69,233,600
1983-84	4,453	$20,482,880	$100,982,880
1984-85	4,828	$24,864,200	$122,714,200
1985-86	6,202	$35,971,600	$157,771,600
1986-87	7,539	$44,480,100	$180,770,100
1987-88	9,379	$55,336,100	$206,376,100
1988-89	11,582	$66,333,800	$236,483,800

* Additional over two-year residency.

DATED at Juneau, Alaska, this 1st day of September, 1982.

Kerry Dean Romesburg

SUBSCRIBED AND SWORN to before me this 1st day of September, 1982.

Notary Public, State of Alaska
My commission expires: 7/21/85

FINAL REPORT
TO THE
HOUSE COMMITTEE ON STATE AFFAIRS:

ALASKA STATUTES CONTAINING
DURATIONAL RESIDENCE REQUIREMENTS

By

William R. Hudson

March 28, 1983

HOUSE COMMITTEE ON STATE AFFAIRS

Honorable Mitch Abood, Chairman
Honorable Mike Miller
Honorable Anthony Vaska
Honorable John Cowdery
Honorable Walt Furnace
Honorable Ronald L. Larson
Honorable Dick Schultz

ACKNOWLEDGEMENTS

I wish to express my appreciation for the cooperation and support of the chairman's excellent staff in the conduct and preparation of this study.

I wish further to thank former Attorney General Avrum Gross and Attorney Ron Zobel for offering freely their counsel on ways to fashion laws in Alaska that will meet the test of the U.S. Constitution and minimize the chances of costly litigation and disruption of programs affecting the citizens of the State of Alaska.

I would also like to express my gratitude to the Legislative Information Offices for participating in this program, and to their teleconference personnel for tallying the questionnaire returns at the first residency teleconference on March 2', 1983.

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INTRODUCTION

The U.S. Supreme Court's Zobel decision and the subsequent court challenges to the Alaska Longevity Bonus Program placed a serious burden on the legislature to find solutions to all programs where residence requirements are or may be constitutionally unacceptable.

By far the most significant of these programs is the unique Alaska Longevity Bonus Program, followed by the Pioneers' Home Program. Changes to these programs could have, literally, life and death impacts on many of the almost 10,000 older Alaskans involved in them.

Solutions to these problems must be more than constitutional; they must consider the additional cost factors to the state, the potential of increased migration to Alaska, and the often overlooked question of program administration and manageability.

I have assembled and reviewed all of the existing written materials and statutes concerning programs which contain residence requirements. Included in this research was a study of past, pending, and current litigation. At the direction of the Chairman of the House State Affairs Committee, I consulted with former Attorney General Avrum Gross and his partner Susan Burke, as well as with Attorney Ron Zobel. These attorneys gave freely of their time and expertise and their input was an important tool in obtaining the needed perspective to recommend guidelines for Committee action. They spoke constructively on their feelings of how we should approach and resolve this complex issue. To my knowledge, this was the first time that these attorneys, who only recently argued opposing sides before the U.S. Supreme Court regarding the original Permanent Fund dividend distribution plan, were asked on behalf of our state to assist in correcting the problems brought about by that Supreme Court decision.

Input from the general public was seen as a necessity. Due to the time constraints under which we were working, we thought it best to prepare a set of questionnaires and distribute them to groups and individuals having a vested interest in the major programs affected by the residence question. Accordingly, questionnaires on the state's special old age programs, student loan program, land disposal program, and fisherman's loan programs were mailed on March 15, 1983 to 180 groups and individuals in Alaska. In addition to our targeted mailing,

we also made these questionnaires available to the Legislative Information Offices across the state. They tallied returns from persons who filled out questionnaires while attending the first residency teleconference on March 21, 1983.

I will compile the results of these questionnaires and present them to the Committee at a later date. A copy of each questionnaire is included in this report (Appendix III). The distribution list is on file in the Chairman's office.

In addition to my position as consultant to the Committee, Attorney Susan Burke has recently been retained under separate contract to prepare draft legislation which will define bona fide residence. I feel that it is my responsibility, after the completion of Attorney Burke's draft, to report on the potential administrative problems and cost-effectiveness of implementing a bona fide residence statute as it applies to the specific programs which will be impacted by a change in the number of years of residence currently required. This report will also be submitted to the Committee.

DURATIONAL RESIDENCE REQUIREMENTS

"Durational" residence occurs as a requirement in over 53 Alaska statutes and authorities. This requirement affects, among others, holding a public office; participation in numerous loan programs; membership on some regulatory and advisory boards and commissions; obtaining some occupational licenses; the right to vote in Alaska; obtaining a resident hunting and fishing license; selling alcoholic beverages; obtaining and gaining preference for low-cost housing; participation in land lotteries; receipt of partial forgiveness of debt owed the state for loans on land purchased and student aid given; obtaining residence in one of the five Pioneers' Homes and receiving the Longevity Bonus; and, finally, receiving a dividend from the earnings of the Permanent Fund.

The length of residence required in these statutes varies from 30 days to 30 years. Benefits that citizens of Alaska are authorized to receive by these laws represent millions of dollars and affect the lives of thousands of people.

The complete list of durational residence requirements set by state law as of March 1983 is provided in the following pages.

Durational Residence Requirements in Alaska State Law

TITLE	DURATION	AUTHORITY
PUBLIC OFFICE		
GOVERNOR	7 years	AK Constitution, Art. III, § 2
LIEUTENANT GOVERNOR	7 years	AK Constitution, Art. III, §§ 2, 7
LEGISLATOR	3 years	AK Constitution, Art. II, § 2
SUPREME COURT JUSTICE	5 years	AS 22.05.070
COURT OF APPEALS JUDGE	5 years	AS 22.07.040
SUPERIOR COURT JUDGE	5 years	AS 22.10.090
DISTRICT COURT JUDGE	5 years	AS 22.15.160(a)
MAGISTRATE	6 months	AS 22.15.160(b)
OMBUDSMAN	3 years	AS 24.55.030
BOROUGH MAYOR	to 3 years	AS 29.23.130(b)
BOROUGH ASSEMBLYMAN	to 3 years	AS 29.23.050
CITY MAYOR	to 3 years	AS 29.23.250(a)
CITY COUNCIL	to 3 years	AS 29.23.200(b)
MUNICIPAL CHARTER COMMISSION	3 years	AS 29.13.010
BOARD OF EDUCATION MEMBER	3 years	AS 14.07.075
BOARDS AND COMMISSIONS		
GENERAL:		
RURAL AFFAIRS COMMISSION	5 years	AS 44.19.102
FISHERIES BOARD	1 year	AS 16.05.221
GAME BOARD	1 year	AS 16.05.940
COMMISSION ON JUDICIAL QUALIFICATIONS	10 years practice in Alaska	AK Constitution, Art. IV, § 10
MUNICIPAL BOND BANK BOARD	30 days	AS 44.85.030
PERSONNEL BOARD	30 days	AS 39.25.060
ALASKA POWER AUTHORITY	30 days	AS 44.83.020

Durational Residence Requirements in Alaska State Law (Continued)

TITLE	DURATION	AUTHORITY
OCCUPATIONAL:		
PUBLIC ACCOUNTANCY BOARD	1 year	AS 08.04.020
CHIROPRACTIC EXAMINERS BOARD	2 years	AS 08.20.020
DENTAL EXAMINERS BOARD	5 years	AS 08.36.010
ARCHITECTS, ENGINEERS, AND LAND SURVEYORS REGISTRATION BOARD	3 years	AS 08.48.031
GUIDE LICENSING AND CONTROL BOARD	10 years	AS 08.54.010
PHARMACY BOARD	3 years practice in Alaska	AS 08.80.010
OPTOMETRY EXAMINERS BOARD	3 years	AS 08.72.040
VETERINARY EXAMINERS BOARD	5 years practice in Alaska	AS 08.98.010
LICENSES		
OCCUPATIONAL LICENSES:		
PUBLIC ACCOUNTANT	1 year	AS 08.04.280
ATTORNEY	Residence	Bar Rule 5(1)(a)
COLLECTION AGENCY	1 year	AS 08.24.110
MORTICIAN	1 year in-state apprenticeship	AS 08.42.110
GUIDES		
MASTER GUIDE	Residence plus 10 years hunting experience	AS 08.54.100
REGISTERED GUIDE	Resident	AS 08.54.110
CLASS A ASSISTANT	20 yr experience in district	AS 08.54.120
ASSISTANT	Resident	AS 08.54.140
TRANSPORTER	Resident	AS 08.54.142
JUNK DEALER, ETC.	Resident defined but not required	AS 08.60.030
REAL ESTATE BROKER, AGENT, & SALESMAN	Resident	AS 08.88.171
INSURANCE BROKER, AGENT, & SOLICITOR	1 year	AS 21.27.050 AS 21.06.250 AS 21.27.220
OTHER LICENSES:		
ALCOHOLIC BEVERAGE LICENSE	1 year	AS 04.11.390
RESIDENT FISH AND GAME LICENSE	12 consecutive months	AS 16.05.940

Durational Residence Requirements in Alaska State Law (Continued)

TITLE	DURATION	AUTHORITY
PUBLIC RIGHTS AND BENEFITS		
VOTING	30 days	AS 15.05.010 AK Constitution, Art. V, § 1
ANNULMENT OF MARRIAGE	1 year	AS 09.55.130
LOW-COST HOUSING PREFERENCE	1 year	AS 18.55.330 AS 18.55.470(4)
VOCATIONAL SUBSTITUTION PROGRAM	1 year	AS 39.25.155(g)
INDUSTRIAL INCENTIVE TAX CREDIT	Percent of one year residence	AS 43.26.095(b)(3)
BOUNTIES FOR CERTAIN ANIMALS	1 year abode in game unit, plus continuous residence in Alaska	AS 16.35.130
LAND DISPOSAL PROGRAMS		
LOTTERY PROGRAM	1 year	AS 38.05.057(b)(2)
PRICE DISCOUNT PROGRAM	5% discount per yr of residence	AS 38.05.058
HOMESITE ENTRY PROGRAM	3 yr immediately prior to entry, or 20 yr cumulative residence	AS 38.08.030(a)(2)
HOMESITE ENTRY PRIORITY CLAUSE	Priority to longest residence	AS 38.08.040(b)
REMOTE PARCEL LEASING PROGRAM	1 year	AS 38.08.077(i)(2)
SPECIAL OLD AGE PROGRAMS		
ALASKA LONGEVITY BONUS PROGRAM	25 years, with residence established before statehood	AS 38.08.030(a)(2)
PIONEERS' HOME PROGRAM	15 yr immediately before application, or 30 yr cumulative	AS 47.25.020(a) AS 47.25.035
SENIOR CITIZEN SPECIAL ASSESSMENT EXEMPTION	12 months	AS 29.63.065(d)(1)
FISHING LICENSE EXEMPTION	30 years total residence	AS 16.05.400
LOAN AND GRANT PROGRAMS		
FISHERMAN NOTE AND MORTGAGE	5 years	AS 16.10.680(a)
COMMERCIAL FISHING LOAN	5 years	AS 16.10.310(a)
LIMITED ENTRY PERMIT LOAN	5 years	AS 44.81.220(a)(20)
AGRICULTURE AND FISHING (CFAB)	1 year	Policy Requirement
AHFC VETERANS 1% RATE REDUCTION	1 year	AS 18.56.101

Durational Residence Requirements in Alaska State Law (Continued)

TITLE	DURATION	AUTHORITY
MINING BUSINESS LOAN	Residency and 5 years mining experience in Alaska	AS 27.09.020
MEMORIAL SCHOLARSHIP	No durational residence required, 1/5 of loan forgiven for each year employed in special field	AS 14.40.825(e)
STUDENT LOAN PROGRAM		
ELIGIBILITY TO APPLY	2 years	AS 14.40.765(b)
FORGIVENESS	10% off for each yr of residence after completing education; maximum 50% forgiven	AS 14.40.763(i)
PREFERENCE (SYSTEM OF AWARDING PRIORITY)	1 point, 2-5 yr residence 2 points, 5-10 yr residence 3 points, 10 plus yr	AS 14.40.767(a)(2)
ALASKA EDUCATIONAL INCENTIVE GRANT	2 years	Application Form
OTHERS		
CHILD CARE EXPENSE REFUND	30 days	Form DR600
POLITICAL CAMPAIGN CONTRIBUTION CREDIT	30 days	Form DR600

CURRENT LITIGATION

The Committee should be aware of three law suits currently in the courts that either involve the State of Alaska directly as a defendant or indirectly through other challenges, and could affect existing state programs. All three cases involve durational residence requirements and are mentioned here to alert the Committee so that they may wish to abstain from public comment or action on these matters pending their outcome in the courts.

Andress v. Baxter
Alaska District Court No. A82-307 civil

Judith Andress has challenged the two-year durational residence requirement for student loan eligibility (AS 14.40.765(b)) and the selection criteria that award priority to applicants based on the number of continuous years of residence in Alaska (AS 14.40.767(a)(2)).

Status: Pending in the court.

Vest v. Schaefer
Superior Court No. 1JU-82-1103 civil

This suit challenges the 25-year pre-statehood residence requirement contained in the Alaska Longevity Bonus Program (AS 38.08.030(a)(2)).

Status: Court action resulted in a settlement agreement that stayed all actions and proceedings through and including the date of adjournment of the first regular session of the 13th Alaska Legislature or until June 30, 1983, whichever comes first. In this agreement the court ordered the Legislative Council to use its best efforts to secure the enactment of legislation that would, in effect, open the program to all bona fide one-year residents during this legislative session.

Gilman v. Martin
Alaska Supreme Court No. 5937

This suit involves a challenge to the Kenai Peninsula Borough's land disposal program. Its resolution could affect the state's land lottery program, the one-year residency provision to qualify for the lottery (AS 38.05.057(b)(2)), and the discount of 5 percent for every year of residence for up to 50 percent of the total price (AS 38.05.058).

Alaska has filed an amicus curiae brief defending the Kenai Peninsula Borough's program as being constitutional. The outcome of this will be seen as a ruling on similar land distribution plans operated by the state.

Status: A ruling is expected at any time.

THE CONSTITUTIONAL TEST

The most difficult task of this study has been the development of standards or tests that could logically be applied to present and future statutes where a durational residence requirement is to be used.

The question, "What is a resident?" has never been satisfactorily answered in Alaska. Although durational residence requirements run from 30 days to 30 years, in many cases I could find no relationship between the purpose of the statute and the duration specified.

Analysis of the 53 statutes requiring some use of residence or durational residence demanded that I first determine what tests or standards should be used. The treatise which follows is the result of my efforts, and became my guide for measuring those statutory references against the requirements imposed by the U.S. Constitution. I could find no other tests that I could use to conduct this review.

Obviously there is no master that will apply in each and every case. Were that to be so, the state would not be in litigation over the student loan and longevity bonus programs at this time. Most of the laws enacted involve a great deal of judgement on the part of their authors. I hope my analysis of the subject will help future lawmakers in that process.

This treatise should also be a good guide for others who must deal with legislation that hinges on some form of residence as a requirement. I have attempted to establish some basic guidelines for the average person, who is not an attorney or student of our Constitution, to use in setting policy or enacting legislation that uses residence or durational residence as one of the requirements.

I have been told that no definition or statement on this matter will guarantee satisfaction with our U.S. Constitution; and I totally agree! This treatise is only a layman's guide, and not a legal instrument, but I trust it will stimulate further investigation and prove useful to anyone who must approach this very complex subject.

The Constitution of the United States of America

The U.S. Constitution serves as our master authority on the uses of residency as a requirement in state law. It is right for us to begin with this document.

What follows are quotations that apply to this subject matter:

> Article 6, Clause 2: The Constitution and the laws made in pursuance thereof, and all treaties made or shall be made, by the United States, shall be the supreme law of the land.
>
> Article 6, Clause 2: All officers, legislative, executive, and judicial, of the United States, and of the several States, shall be bound by an oath to support the Constitution.
>
> Article 9: Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.
>
> Article 6, Clause 2: Judges in every State shall be bound by the Constitution.
>
> Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside.
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.
>
> Nor shall any State deprive any person of life, liberty, or property without due process of law.
>
> Nor deny to any person within its jurisdiction the equal protection of the law.
>
> Article 4, Section 2: The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.

Article 1, Section 2: Members of the House of Representatives shall be 25 years of age, seven years a citizen of the United States and an inhabitant of the State which chosen.

Article 1, Section 3: Senators shall be 30 years of age, nine years a citizen of the United States and an inhabitant of the State which chosen.

Article 2, Section 1: Neither shall any person be eligible to the office of President who shall not have attained the age of 35 and been 14 years a resident within the United States.

Article 1, Section 10: States shall not grant any title of nobility.

Article 1, Section 7 [summarized]: The right to vote shall not be denied on account of race, color, or previous servitude.

Articles 15, 19, and 24 [summarized]: States shall not deny a person the right to vote.

The authorities above clearly lay out the intentions of the Constitution as it applies to equal treatment of all citizens of our nation. The use of residence as a requirement to receive a benefit, reward, or other privilege will normally be measured against one or more of the above authorities.

Pertinent Court Cases

Since the U.S. Constitution can only provide us the basic intentions of its authors, and would leave a great deal to individual interpretation of its meaning, we must go to the rulings and findings of our courts for specific applications and explanation of the document's true meaning.

Court cases that refer to residence or durational residence include the following:

Dunn v. Blumstein, 405 U.S. 330 (1972).

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

Moore v. State, 553 P.2d 8 (Alaska 1979).

Plumley v. Hale, 594 P.2d 497 (Alaska 1979).

Rose v. Commercial Fisheries Entry Commission, __ P.2d __, Op. No. 2515 (Alaska, June 11, 1982).

Shapiro v. Thompson, 394 U.S. 618 (1969).

Sosna v. Iowa, 419 U.S. 393 (1975).

Starns v. Malkerson, 326 F.Supp. 234 (Minn. 1970).

State v. Adams, 522 P.2d 1125 (Alaska 1974).

State v. Erickson, 574 P.2d 1 (Alaska 1978).

State v. Van Dort, 502 P.2d 453.

Vlandis v. Kline, 412 U.S. 441 (1973).

Warwick v. State ex rel chance, 540 P.2d 384 (Alaska 1976).

Williams v. Zobel, 619 P.2d 422 (Alaska 1980) (Zobel I).

Williams v. Zobel, 619 P.2d 448 (Alaska 1980) (Zobel II).

Zobel v. Williams, __ U.S. __, Op. No. 80-1146 (June 14, 1982) (Zobel III).

The findings of our courts are construed to have the full force of law. Lawmakers fashioning new laws, therefore, must comply with these court rulings if the statutes are to be considered constitutional. I have only the common terms in my references, and the interpretation is general in context.

Sosna v. Iowa: The judges granted the use of a one-year durational residence requirement to obtain a divorce.

Starns v. Malkerson: Granted the use of a one-year durational residence requirement to be eligible to obtain a less expensive tuition as a resident. The court found that a state could charge higher fees for nonresidents attending a college in that state.

Shapiro v. Thompson,
Vlandis v. Kline,
Memorial Hospital v. Maricopa County: All three of these cases established clearly that states could not require duration of residence as a requirement in fundamental political rights or when basic necessities of life are involved. These two areas are considered sacred by the courts and only in the rarest of cases will they permit any durational requirement to apply.

Vlandis v. Kline: In this case, as well as others, it was held that length of residence could be used as an objective test or reasonable and legitimate tool for determining the genuineness or bona fides of residence, when used for the administration of a program or for other compelling public interests.

The test is to determine if a state's interests outweigh the interests of the individual. As stated previously, in cases where the law relates to fundamental political rights or basic necessities the courts have applied strict scrutiny and normally will not let durational residence stand.

Zobel I, II, III: These court cases are perhaps the most widely known in Alaska because of the wide press coverage and notoriety they were afforded. Following are relevant opinions or other statements that bear on the use of durational residence as a requirement in law:

Justice Brennan said that the length of residence may be a valid test of the bona fides of residence or citizenship.

Justice Diamond in Zobel II provided some insight into the legitimacy of using length of residence as a fair measurement of hardships that might be caused by disrupting one's ties to the state and for instilling allegiance and attachments to the state.

The Supreme Court in Zobel III found that income distributed to the citizens of the state based on duration of residence, where the amount of reward was to be disbursed in set but different amounts solely on the basis of how long a person had resided in the state, was a violation of the Equal Protection Clause of the Constitution, where no compelling public interests were shown for those distinctions.

They found that rewarding citizens for prior contributions, real or intangible, was a violation of the Constitution; that citizens of one state shall enjoy the same privileges which citizens of another state enjoy; that freedom to travel between states and to receive benefits of citizenship must be preserved; that the Constitution does not allow differing degrees of citizenship or residence on the basis of length of residence; and that the business of a state is not with the past, but with the present.

A statement was made that sets the tone of the courts quite well: "The Constitution places the newest naturalized citizen from a foreign shore on equal footing as a citizen born here in America."

Noll v. Alaska Bar Association: This relatively recent Alaska Supreme Court decision found the use of any duration of residence in obtaining a license as an attorney to be unconstitutional. Further, in Ward v. Maryland, we found that "The Constitution secures and protects the right of a citizen of one state to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business; and to acquire personal property and hold real estate without molestation."

From the above statements we begin to see the mind of those entrusted with the interpretation of our Constitution. Though we may prefer to restrict our resources unto ourselves or occasionally bar someone from outside our state from receiving benefits or from participating in our market with his or her skills, surely we can see that, given challenge, the courts will require we show overriding public interests to be evident.

We are all citizens of the one great union. We can be different, we can compete for excellence and a better way of life; but we cannot discriminate one citizen from another.

Questions

What is residence?

Residence is a term often used in law to apply to persons who have established residence or domicile in a state and who have intentions to remain in that state on a permanent or long term basis.

When a person claims residence in one state he or she forfeits the right to claim residence in another state.

Residence requires that one be a citizen of the United States in normal application as used in the laws to distribute benefits or to hold public office, etc. It implies some degree of attachment and allegiance to the state one claims for his or her residence.

How can residence be used in state law?

First, residence is usually only one criterion or requirement used to determine eligibility for reward or benefit. It will be found as follows:

To seek and hold public office and membership on boards, etc.
To establish qualifications for citizens to receive in-state tuition.
To protect public and human resources.
To encourage new residents to settle in Alaska.
To share a part of the state's wealth.
To encourage the development of our industries or resources.
To qualify for housing, medical care, welfare, or other needs.
To encourage its citizens to seek an education.
To settle lands and distribute state lands to private ownership.
To assure protection for the public from quacks.
To measure by time in the state one's knowledge.
To disburse monies to the elderly.
To qualify for entry into one of our unique Pioneers' Homes.
Finally, to promote any other compelling public interest.

What is bona fide residence?

Bona fide residence is residence made in good faith. It is a very personal commitment that is difficult to attach a length of time to. It can occur the instant a person sets foot on Alaska soil, or it may occur months or years after one arrives.

Can we establish a duration that we can use?

Simple residence has been generally accepted to be 30 days or more. For voting and access to the basic necessities of life, no duration is normally permitted by the courts.

The probable duration that most courts will accept is no longer than one year, and that for cases where political rights or basic necessities are not involved. One year has held up for in-state student tuition and for divorces.

Are there acceptable durations beyond the one year mentioned above?

Some believe we can use varying durations so long as they are realistic requirements due to any compelling state interest. In Alaska the uses have generally been established without documented reasons and so far the courts have not upheld any duration beyond one year.

The state is holding to a view that two years of residence is necessary to test the bona fides of residence of persons securing student loans, and more for persons securing the fishing loans made available by the state. The justification is that these two groups of residents are more migratory than the average citizen of our state and, therefore, it takes two years to make an objective test of their intent to remain.

What are subjective and objective tests as applied to bona fides of residence?

A subjective test would simply be to ask the person if he or she is a citizen, and to look to other signs of attachment as well. Among these other signs are: registered to vote in Alaska; purchased or leased a home; enrolled his children in our schools; seeking public office; joining a church, clubs, or other societies; and licensing one's automobile.

An objective test would be to substitute a duration of residence as a measure of one's bona fides in lieu of asking directly. Where a state is administering programs to thousands of its citizens, it is unreasonable to try to contact each one individually, so the courts have permitted an objective test to be used.

What other requirements may be used to assure proper program administration?

First, it is well to say here that every state has a right to restrict some of its more costly benefits to its own bona fide citizens or residents. No state is expected to foot the bill for citizens from all over the USA. Each state is sovereign unto itself yet a part of the greater union of the United States of America.

Other requirements include professional qualifications, age, income level, handicap, experience in the field, local familiarity, creditability, veteran status, education, and, of course, always to be a U.S. Citizen.

FINDINGS AND RECOMMENDATIONS

Public Office

Findings: Substantial reasons exist to justify using terms of residence longer than one year in determining the qualifications for holding major public offices. Both the statutes and constitutional references are likely to be held in compliance with the U.S. Constitution.

Recommendation: Take no action at present.

Boards and Commissions

Findings: Substantial reasons exist to justify using terms of residence longer than one year in determining the qualifications for membership on the numerous state regulatory and advisory boards and commissions. Both the statutes and constitutional references are likely to be held in compliance with the U.S. Constitution.

Recommendation: Take no action at present.

Licenses

Findings: The courts have already ruled against the use of any duration of residence as a requirement for an attorney's license (Noll v. Bar Association). A thorough review of the records indicated little tolerance by the courts for the use of any specific length of residence that might bar the employment of an individual's occupational skill between different states.

The only occupational license not requiring residence is that for morticians; rather, it requires in-state apprenticeship for a duration of one year. In my review of the various cases on record, I concluded that the apprenticeship period probably was defensible.

Recommendations: Amend the statutes dealing with the occupations listed below, repealing the various residence requirements and making no substitutions:

Public Accountant (AS 08.04.280).
Attorney (Bar Rule 5(1)(a)).
Collection Agency (AS 08.24.110).
Master Guide (AS 08.54.100).
Registered Guide (AS 08.54.110).
Class A Assistant Guide (AS 08.54.120).
Assistant Guide (AS 08.54.140).
Transporter (AS 08.54.142).
Junk Dealer (AS 08.60.030).
Real Estate Broker and Salesman (AS 08.88.171).
Insurance Broker, Agent, and Solicitor (AS 21.27.090, AS 21.06.250, AS 21.27.220).

The in-state apprenticeship requirement for a Mortician License (AS 08.42.110) should be left in the law.

I recommend no change in the durational residence requirements for an Alcoholic Beverage License (AS 04.11.390) or a Resident Fish and Game License (AS 16.05.940).

Public Rights and Benefits

Findings: The 30-day requirement to vote in Alaska is constitutional.

The one-year residence requirement for annulling a marriage and participating in the low-cost housing and vocational substitution programs appears excessive. This is especially so for the Low-Cost Housing Preference Program which the courts would likely construe as a "basic necessity of life" wherein no durational residence requirement has ever been permitted by the courts. The one-year residence requirement for being able to claim an industrial incentive tax credit and bounties on animals are likewise excessive, but the point may be academic because neither of these programs have been active in years.

Recommendations: No change is necessary in the residence requirement for Voting (AS 15.05.010), unless the Committee chooses to substitute simple residence and require 30 days in which to handle the registration process.

The one-year residence requirement for Annulment of Marriage (AS 09.55.130), the Low-Cost Housing Preference Program (AS 18.55.330, .470(4)), and the Vocational Substitution Program (AS 39.25.155(g)) should be modified to simple residence.

In addition, the legislature should consider the repeal of the Industrial Incentive Tax Credit (AS 43.26.095(b)(3)) and Bounties for Certain Animals (AS 16.35.130).

Land Disposal Programs

Findings: Alaska is awaiting the court ruling on the Kenai Peninsula Borough's land disposal program, which may affect the state's land lottery and price discount programs.

The requirement of three years of residence immediately prior to participation in the Homesite Entry Program, or 20 years of earlier residence, clearly is not defensible. The Priority Clause, giving priority to persons having the longest residence, is also not defensible and most likely unconstitutional.

The one-year residence requirement for participating in the Remote Parcel Leasing Program appears to be constitutional.

Recommendations: No action should be taken on the residence requirements for Land Disposal by Lottery (AS 38.05.057(b)(2)) or the Price Discount Program (AS 38.05.058), pending the decision of the court in the Kenai case.

The durational residence requirement in the Homesite Entry Program (AS 38.08.030(a)(2)) should be amended to repeal the existing requirements and you should substitute residence of one year's duration. I recommend repeal of the priority clause (AS 38.08.040(b)).

The residence requirement for the Remote Parcel Leasing Program (AS 38.08.077(i)(2)) should be left alone.

Special Old Age Programs

Findings: The greatest problem concerning durational residence before the legislature this session is how to handle the very sensitive Alaska Longevity Bonus Program. The Vest v. Schaefer settlement reached last fall clearly mandates a change in how the program has been handled thus far. The questions surrounding this program involve much more than the requirements for durational residence. Policies on funding, extent of application, life of the program, and other matters require that this statute be given exclusive treatment as an issue and

not be lumped into the Omnibus Bill (Attachment 1) that we are proposing for the other statutory changes.

I would be pleased to work with the House on this matter, as I believe this issue will involve some hard administrative questions and not simply residence requirements.

I concur with former Attorney General Wilson Condon's assessment of the Pioneers' Home Program. The 15-year residence requirement is defensible and related to compelling public interest. The exceptional time is necessary to measure the exceptional attachments a resident must have to receive a room in the homes. A lesser duration would not apply in my judgement.

I believe that the one year of residence required to be eligible for the Senior Citizen Special Assessment Exemption is too close to the "basic necessity" question and would not hold up under challenge.

Similarly, I believe the 30-year residence requirement for exemption from fishing license requirements is too severe and probably unconstitutional.

Recommendations: I strongly recommend that the Alaska Longevity Bonus Program (AS 38.08.030(a)(2)) be set aside and dealt with as a single issue; with full participation from the public, both houses of the legislature, and the administration. The organizational and structural changes that are tied to whatever residence solution is found are totally intertwined.

I recommend no changes in the Pioneers' Home Program residence requirement statutes (AS 47.25.020(a), .035).

The Senior Citizen Special Assessment Exemption residence requirement (AS 29.63.065(d)(1)) should be amended to simple residence.

The 30-year residence requirement for obtaining a free license to fish (AS 16.05.400) should be amended to one year of residence.

Loan and Grant Programs

Findings: The various residence requirements in the state loan and grant programs are inconsistent and not well founded.

The fisherman's loan programs now require five-year durational residence and I can find nothing to support that length of time. A standard one-year period, however, may not serve as a bona fide test for fishermen due to their unusually migratory lifestyle. I agree with current efforts to set a two-year period as an objective test of bona fide residence and believe it will stand up under challenge.

The difference in the durational residence requirements for a veteran's loan (five years) and AHFC's 1% rate reduction to veterans (one year) is not well justified.

The Mining Business Loan and Memorial Scholarship Loan Fund do not stipulate durations of residence and I believe are satisfactory as written.

The two-year residence requirement for student loans and the point preference system based on number of years of residence are being litigated. The point preference system is clearly flawed.

Recommendations: I recommend changing the fishing loan program requirements (AS 16.10.680(a), .310(a); AS 44.81.220(a)(20)) from five years to two years.

The residence statute in the Veterans Loan Program (AS 26.15.130(1)) should be amended to replace the five-year requirement with a standard one-year requirement.

No changes should be made in the residence requirements for the Mining Business Loan (AS 27.09.020) or Memorial Scholarship Loan (AS 14.40.825(e)) programs.

The Student Loan Program residence requirement (AS 14.40.765(b)) should be left alone, pending court settlement. The point preference system (AS 14.40.767(a)(2)) should be done away with, and I recommend outright repeal.

The Educational Incentive Grant falls in the same category as the Student Loan Program and action should await the court decisions.

CLOSING STATEMENT

In closing, Mr. Chairman, permit me to say that I am prepared to work with Susan Burke, your staff, or anyone else to help prepare legislation needed to effect these statutory changes. I remain available at your call for hearings or other meetings you may require.

I am in the process of compiling the responses to our four questionnaires and will present a synopsis of the public input near the April 2, 1983 deadline for return specified in those forms.

I received only one set of the references used in this report, and since they are quite lengthy I will attach copies only to your report. Should any of the Committee members desire a copy, we will need to secure them from the Department of Law or make copies.

One of the requirements in my contract was to look at all the changes that would be necessary in present statutes and provide you with an overview of what additional costs and problems were evidenced in making these changes. At this time I see no significant costs or management problems should the Legislature agree with the actions we have recommended. I am certain that the final solution to fix the Longevity Bonus Program will involve major administrative and management considerations. Since this is the one program you have chosen to set aside to deal with by itself, I am prepared to work with whatever committee is given this responsibility. In many ways, that program is more in line with my background than the performance rendered thus far. I do have several germane ideas on alternative funding, and management of the program.

I have enjoyed working with you on this project, Mr. Chairman, and believe this effort will aid future legislators in their deliberation on residence-based matters.

Respectfully Submitted

William R. Hudson

March 28, 1983

APPENDIX I

TEN ALASKA LONGEVITY BONUS OPTIONS

Appendix I

TEN ALASKA LONGEVITY BONUS OPTIONS

From Jon K. Tillinghast Report Dated March 8, 1983

Alternatives submitted by the Administration and Jon Tillinghast to the Senate Judiciary Committee:

1) Expand the Alaska Longevity Bonus Program to include all elderly Alaskans with one year of residency. (Admin.)

2) Phase out the Alaska Longevity Bonus Program by gradually reducing the benefits. (Admin.)

3) Phase out the Alaska Longevity Bonus Program by gradually reducing benefits, while contemporaneously raising the eligibility limits for general state assistance. (Admin.)

4) Provide a minimal base payment under the Alaska Longevity Bonus Program based solely on one year of residency, with supplemental payments made on the basis of need. (Admin.)

5) Phase out the Alaska Longevity Bonus Program by increasing the age for eligibility each year. (Admin.)

6) Create an annuity plan, with the annuity corpus consisting of Permanent Fund distributions. This option would necessitate a transition program for persons 40 years and older. (J. T.)

7) Fund the Alaska Longevity Bonus Program through a "pay as you go" social security system, using approximately 25% of the existing Permanent Fund distribution. (J. T.)

8) Replace the Longevity Bonus Program with a comprehensive health insurance program for elderly Alaskans. (J. T.)

9) Condition eligibility for a longevity bonus upon a demonstration of hardship which would be suffered by being unable to continue Alaska residency. (J. T.)

10) Open the Alaska Longevity Bonus Program to all one-year residents, and terminate the program -- giving FY84 recipients a grandfather right to continued bonuses. (J. T.)

APPENDIX II

HUDSON CONTRACT

Contract Between

State of Alaska
Legislative Affairs Agency
Pouch Y
Juneau, Alaska 99811

and

William R. Hudson
3379 Meander Way
Juneau, Alaska 99801
phone 789-7376

CONTRACT AMOUNT $7,500.00

The parties to this agreement are the Legislative Affairs Agency on behalf of Representative Mitch Abood, Chairman, House Committee on State Affairs, hereinafter referred to as the "Agency," and William R. Hudson, hereinafter referred to as the "Consultant."

THE PURPOSE OF THIS AGREEMENT is to provide the Contractor with a thorough analysis of the numerous residency requirements that are now deemed to be, or suspected to be, unconstitutional with regards to State programs, along with proposed alternatives to make all such programs constitutional.

IT IS THEREFORE MUTUALLY AGREED THAT:

Clause I - Statement of Work

(a) The Consultant shall assemble all existing written materials on these numerous programs where residency requirements now exist, and display same in a format that can be easily understood and identified by specific topic.

The above display will be amplified to reflect current and projected costs; persons affected; policy affected; a statement of manageability and pertinent commentary on each.

(b) The Consultant shall seek input from representative individuals and groups that represent persons affected by the various laws or regulations surrounding these "residency required" programs.

(c) The Consultant shall present, in written form, a Final Report that shall reflect the existing program criteria and, where possible, changes to each program to make them constitutional, cost effective, manageable, and to the extent possible, preservative of original legislative intent.

(d) The Consultant will make himself available throughout the period of this contract for discussion, amplification of subject, alternatives proposed or other instructions, research, etc. requested by the Chairman of the House Committee on State Affairs on matters that pertain to subject programs.

(e) The Chairman of the House Committee on State Affairs shall provide the Consultant all reasonable and necessary administrative support such as secretarial, copy service, telephone use, and public documents that are required in this report.

(f) The Consultant will provide office space and supplies for the conduct of this contract.

(g) The Consultant shall assist the Chairman of the House Committee on State Affairs in the preparation of new legislation to affect the changes needed to make programs constitutional.

Clause II - Period and Dates of Performance

(a) The work under this contract shall be performed from March 1, 1983 to March 31, 1983.

(b) Unless extended by written agreement, this contract expires on March 31, 1983.

Clause III - Project Director

The Project Director shall be Representative Mitch Abood, Chairman of House Committee on State Affairs, acting on behalf of the Committee.

Clause IV - Compensation and Method of Payment

(a) For the work specified in this contract, the Consultant shall be paid a flat fee of $7,500.00, with 20% of the fee paid in advance, and the balance upon completion of the contract requirements as specified by the Chairman of the House Committee on State Affairs.

Clause V - Office Space, Equipment, Clerical Support

(a) Office space, equipment and clerical support of the Consultant that will be necessary to carry out his obligations under this contract shall be supplied as specified in Clause I of this contract.

Clause VI - Records, Documents, Audit

(a) The Consultant shall maintain accurate records as may be required by the Chairman of the House Committee on State Affairs. The records are subject to inspection by the Agency or by the Chairman of the House Committee on State Affairs at all reasonable times. All documents, reports and writings generated as a consequence of work done under this contract shall become the property of the State of Alaska and, on completion of the work or at the termination of this contract, shall be delivered to the (Agency/Chairman of the House Committee on State Affairs) for disposition under Rule 23 of the Uniform Rules of the Alaska State Legislature.

Clause VII - Disputes

(a) Any dispute arising about the terms or conditions of this contract shall be reduced to writing and delivered to the consultant. Every effort to dispose of any such disagreement by informal, reasonable means shall be undertaken.

(b) A dispute concerning a question of fact arising under this contract which is not disposed of by agreement between the Agency and the Consultant shall be decided by the Chairman of the House Committee on State Affairs; the decision shall be reduced to writing and delivered to the consultant at the address specified in Clause VIII, Paragraph (a) of this contract. The decision of the Chairman of the House Committee on State Affairs is final and conclusive.

Clause VIII - Termination

(a) This contract may be terminated by the Chairman of the House Committee on State Affairs at any time, upon delivery of written notice to the Consultant delivered to William Hudson, 3379 Meander Way, Juneau, Alaska 99801.

(b) If this contract is terminated, the Consultant shall be compensated for services provided under the terms of this contract to the date of termination if the Consultant provides the Agency and Chairman of the House Committee on State Affairs with a written report containing a description of any research or analyses performed, a statement of the result or conclusions formed based upon the research or analyses and a copy of all data acquired by the Consultant or his agents in conjunction with this contract.

Clause IX - Venue

(a) In the event that the parties to this contract find it necessary to litigate the terms of the contract, venue shall be the Superior Court of the State of Alaska, First Judicial District, at Juneau and the contract shall be interpreted according to the laws of Alaska.

Clause X - Assignment, Transfer and Subcontracting

(a) No assignment, transfer, or subcontracting of this contract may be made unless all parties agree in writing.

Clause XI - Reports

(a) The Consultant shall provide progress reports, either in writing or verbally, as requested by the Chairman of the House Committee on State Affairs and is reasonable within the short time frame of this contract.

Clause XII - Modifications and Previous Agreements

(a) This contract contains the entire agreement between the parties. A statement, promise, or inducement made by a party or an agent of a party is not valid or binding unless the statement promise, or inducement is contained in this written contract. This conract may not be enlarged, modified, or altered except upon written agreement signed by all parties to the contract.

Clause XIII - Certification

(a) Execution of this contract by the Executive Director of the Legislative Affairs Agency, or his designee, hereby constitutes a certification that funds have been appropriated and encumbered for the amount of this contract.

IN WITNESS WHEREOF, the parties have executed this agreement on the dates noted.

CONSULTANT

W.R. Hudson 3/1/83

WILLIAM R. HUDSON Date
Ak Bus Lic No. 034043
SSN # 518-30-5617

PROJECT DIRECTOR

Rep Mitch Abood 3/2/83

REPRESENTATIVE MITCH ABOOD Date
CHAIRMAN, HOUSE COMMITTEE ON
STATE AFFAIRS

ALASKA STATE HOUSE OF REPRESENTATIVES

Joe L Hayes 3/1/83

REPRESENTATIVE JOE HAYES Date
SPEAKER OF THE HOUSE

LEGISLATIVE AFFAIRS AGENCY

M.R. Charney 3/4/83

MR. R. CHARNEY Date
EXECUTIVE DIRECTOR

Billy G Berrier 3/3/83

BILLY G. BERRIER Date
AGENCY LEGAL COUNSEL

APPENDIX III

RESIDENCE QUESTIONNAIRES

RESIDENCY QUESTIONNAIRE

GENERAL DISCUSSION:

Last year the United States Supreme Court heard arguments on the controversial Permanent Fund dividend distribution plan proposed by the Governor and the Legislature of Alaska (Zobel II & III).

That Court found the proposed legislation to be unconstitutional on several key grounds. First, the dividend plan violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that it would have distributed unequal dividends to citizens based soley on the number of years each citizen had resided in Alaska.

Secondly, the Supreme Court decision clearly stated that any reward or benefit that was based upon a citizen's contribution to his/her state made in past years, would be in conflict with the U.S. Constitution; regardless of whether that contribution was tangible or intangible.

Taking it one step further, the Court also ruled that no law is acceptable which acts as a bar to free travel between the States or that denies any citizen full access to every privilege or benefit afforded to another citizen.

Finally, the Court did allow that a State may extend certain benefits to its bona fide citizens when a reasonable public purpose for the benefit exists and is so stated in the law.

HOW THE SUPREME COURT DECISION ON THE PERMANENT FUND DIVIDEND AFFECTS OTHER ALASKAN PROGRAMS

Soon after the nationwide publicity and notoriety of the Supreme Court decision regarding residency requirements, attention was focused on numerous other Alaska statutes that contained durational residency requirements. There are currently 53 programs containing some kind of provision based on residency The most critical of these programs deals with key loan plans such as the Student Loan Program and Fisherman's loans as well as the twin pioneer's programs: the Alaska Longevity Bonus and the Pioneer's Home Program.

FACTORS TO CONSIDER

Every public program administered in Alaska is based on statutes established through the legislative process. Every statute should consider the following factors:

Does the program serve a valid public purpose?
Does it meet the test of law and does it conform to the constitutions of the United States and Alaska?
What are the long-term costs and other potential liabilities?

Some proof of residency is appropriate; however, it is generally-repeat-generally conceeded that one (1) year of residency constitutes a valid intent to remain in the state and to be a citizen of it.

Some state benefits or requirements may justify more than one year's residency, but it must be clearly proven that the public purpose is served by a residency requirement exceeding one year. Some benefits or privileges such as for driver's licenses, voting, etc. cannot be justified for even one year.

With this brief information in mind, will you now review the attached questionnaire and give us your ideas and answers. Please don't worry about using a handwritten response. As long as I can read it, all will be well. Use additional paper as you may require. Thank you for your comments.

ALASKA LONGEVITY BONUS

Currently, over 9,000 older Alaskans receive a $250 monthly bonus check, if they have continuously resided in the State for 25 years or more, are 65 years of age or older, and have established their first residency in the State on or before January 3, 1959 (Statehood).

A class-action suit filed by attorneys for Mr. Rodney Vest in the First Superior Court of Alaska charged that these requirements violated the constitutional rights of Mr. Vest and other older Alaskans. By mutual agreement, the court action has been suspended until the Alaska State Legislature can act during this current legislative session to correct this residency problem.

The Longevity Bonus Program in 1983 will cost the State of Alaska approximately $28 million dollars. If the 25-year pre-statehood provision is dropped, the program would add about 4,000 more older Alaskans to the current roles. That would in turn swell the yearly cost of the program from $28 million to almost $40 million.

Clearly, in light of the U.S. Supreme Court's decision regarding residency and the permanent fund dividend distribution program, the State of Alaska will have to drop its 25-year residency requirement. When this happens, the program will cost almost $12 million more to operate. Several serious questions need to be addressed.

QUESTIONS

1. Should we continue the longevity bonus program for all persons over the age of 65 who have lived in Alaska at least one year?

   Yes _____ No _____

2. Shall we attempt to phase out the program ?

   Yes _____ No _____

3. Should we establish a limit on the amount of money to be appropriated by the Legislature, and set the monthly bonus amount on total funds available, divided by the number of applicants?

   Yes _____ No _____

4. Would you support a new funding source? For example; if we were to use the permanent fund dividend monies as a funding source to establish a major new trust fund for the longevity bonus program. If it were properly invested, where the earnings (interest) could then be distributed to any citizen 65 years of age or older in whatever amounts were permitted by these earnings?

Yes _____ No _____

Comments: _____

_____

5. Other ideas or comments? _____

_____

_____

ALASKA PIONEER'S HOMES

Over 600 Alaskans can be housed in the five Pioneer's homes now currently operating in Alaska. A sixth home, to be built in Juneau, will add another 50 beds or more.

Current requirements call for an applicant to have resided in Alaska for 15 or more consecutive years. The Pioneer home program does not require a resident to be destitute, and it has no needs test.

Monthly costs for residents in the homes are $225 per month and $275 per month, depending on the level of care required. Costs to the state to provide the care have been stated as approximately $1,800 per month. Annual costs to the State now exceed $20 million dollars.

It is possible that the program as it is now administered, including the 15 year residency requirement may be all right , and left alone. We are leaning toward that position at this time. However, we should think about a fall back position, should the program be adversely affected or found to be at fault with the law.

QUESTIONS

1. Would you support the Pioneer's Home program if the one-year residency requirement is used?

   Yes _____ No _____

2. What priorities should be used, if the costs of the program were to increase dramatically because of the lower requirements?

   a. Only on physical need? Yes _____ No _____.

   b. Only serve the most needy? Yes _____ No _____.

   c. Serve all, regardless of needs; first come, first served?

   Yes _____ No _____

3. Should the low monthly costs to residents of the home continue as they are now?

   a. Yes _____ No _____

   or should we:

   b. Charge more? Yes _____ No _____

   c. Charge less? Yes _____ No _____

4. Any other ideas? _____

   _____

   _____

Thank you for your cooperation.

WE ASK YOU TO PLEASE RETURN THIS QUESTIONNAIRE TO US BEFORE

APRIL 2, 1983.

Send to: House State Affairs Committee
Pouch V
Juneau, Alaska 99811

STUDENT LOANS

A challenge to the student loan program which is currently under litigation (Andress v. Baxter); is the two (2) year durational residence required to be eligible for a loan of either $6,000 (undergraduates) or $7,000 (graduates) maximum each school year.

The student loan program was established in 1971 and since that time has issued over 35,000 loans with a current average per student/year of over $4,000. These loans carry a 5 per cent interest rate, to be repaid in 10 years, with one five-year extension available.

Added to this, is a significant forgiveness clause that can reduce an applicant's debt by up to 50 percent if he or she returns to Alaska or resides in our state for up to five years after graduation.

QUESTIONS

1. Do you support the Alaska Student Loan Program as it exists now?

   Yes _____ No _____

2. Do you believe it is good public policy to forgive or eliminate up to 1/2 of the total amount of the loan in return for having these students back in Alaska?

   Yes _____ No _____

3. Do you believe the five (5) percent interest rate on these loans is:

   Okay _____,

   Low _____

   High _____

   It should be _____ percent.

4. Since the two-year residency requirement is now being challenged in the courts, what should we do?

   a. Keep it as it is until the Courts act? Yes_____ No _____.

   b. Reduce the residency requirement to one year? Yes_____ No_____.

   c. Other alternative?_____

   _____

5. Please tell us what methods of control and administration you believe is needed and proper in administering these loans.

_____

_____

_____

Thank you for your cooperation.

WE ASK YOU TO PLEASE RETURN THIS QUESTIONNAIRE TO US BEFORE

APRIL 1, 1983.

Send to: House State Affairs Committee
Pouch V
Juneau, Alaska 99811

LAND DISPOSAL

Many Alaskans have always favored a liberal land distribution plan, and seem to favor some requirements and restrictions that are based on the length of residency.

The current Alaska land distribution plan has not yet been challenged in the courts, but it is indirectly under fire, since it is closely related to the Kenai land disposal plan, which is now under litigation.

QUESTIONS

1. Do you favor continuation of the distribution of public lands to Alaska citizens?

   Yes _____ No _____.

2. How would you like to see the land distributed? _____

   _____

   _____

3. Should the present discount plan be continued?

   Yes _____ No _____.

4. Since there may not be enough suitable land for everyone, what priorities do you favor?

   _____

   _____

   _____

Thank you for your cooperation.

WE ASK YOU TO PLEASE RETURN THIS QUESTIONNAIRE TO US BEFORE APRIL 2, 1983.

Send to: House State Affairs Committee
Pouch V
Juneau, Alaska 99811

FISHERMAN'S LOANS

Several low-interest loan plans now exist that were designed to foster the growth and development of our fisheries. Most of these loans have stipulated a five-year residency requirement.

QUESTIONS

1. Do you support loan plans as an incentive to develop a particular industry, such as fishing, mining, tourism, etc.?

   Yes _____ No _____

2. If the five-year residency is declared unconstitutional, what time period do you believe is a proper length of residency, given the migratory lifestyle of commercial fisherman?

   _____ Number of years

3. Please tell us what methods of control and administration you believe are needed and proper in administering these various fisheries loans?

   _____

   _____

   _____

Thank you for your cooperation.

WE ASK YOU TO PLEASE RETURN THIS QUESTIONNAIRE TO US BEFORE APRIL 2, 1983.

Send to: House State Affairs Committee
Pouch V
Juneau, Alaska 99811

ATTACHMENT 1

Attorney Burke's Report and Omnibus Bill

LAW OFFICES
GROSS & BURKE
A PROFESSIONAL CORPORATION
424 NORTH FRANKLIN STREET
JUNEAU, ALASKA 99801

AVRUM M. GROSS
SUSAN A. BURKE

(907) 586-2777

March 22, 1983

MEMORANDUM

TO: Honorable Mitch Abood
Chairman, House State Affairs Committee

FROM: Susan A. Burke SAB

RE: Residency Requirements

You have asked me to review the Alaska statutes that presently impose residency requirements and to recommend to the Committee the amendment or repeal of those residency requirements that more than likely would be held unconstitutional if challenged in court. You have also asked me to draft a statute defining "bona fide" residence. That draft is attached, along with comments.

In reviewing the residency requirements imposed under current law, I was primarily concerned with two questions -- first, whether it is constitutionally permissible to impose any kind of residency requirement having the effect of excluding nonresidents, and second where the statute imposes a durational residency requirement longer than 30 days, whether the period of residency specified is within

constitutional limits.[1] The statutes which contain residency provisions fall into several broad subject matter categories. Attached is a chart prepared by the Department of Law which lists all of the statutes containing residency requirements, with the statutes organized according to subject matter. The chart also includes an assessment of the constitutional problems, if any, presented by each statute. Rather than duplicate this work, I have used this chart as the basis for my review. The review will discuss the statutes listed in each subject matter category in the chart prepared by the Department of Law.

I. Residency Requirements for Eligibility to Hold Public Office

The durational residency requirements established for public office holding range from six months in the case of magistrates (AS 22.15.160(b)) to 10 years for members of the Judicial Qualifications Commission (Alaska Const. art IV, sec. 10; AS 22.30.010). Durational residency requirements for public

---

1/ In general, a person is entitled to claim residency in Alaska if the person is physically present in the state with the intent to remain here indefinitely and make a home here. With rare exceptions, a durational residency requirement will be valid only if it used as a way of testing whether the person actually has the necessary "residential" intent. For some programs, like welfare or medical care, and for fundamental rights such as voting, the state may impose only the shortest durational period necessary to make residency determinations. This period has been held to be no more than 30 days for voting and welfare. For other programs, as discussed below, a longer period of residency is permissible to require.

office holding have been challenged both in Alaska and elsewhere.[1a/] These durational residency requirements have almost universally been upheld (even fairly lengthy ones), on the theory that they are a legitimate way to measure whether a person has sufficient knowledge of local problems and concerns to be qualified for public office and to insure that the voters have had a sufficient period of time in which to become familiar with the candidate. This same rationale would apply with equal force to durational residency requirements imposed for eligibility to serve on certain boards and commissions. While some questions

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1a/ Gilbert v. State, 526 P.2d 1131 (Alaska 1974); Chimento v. Start, 414 U.S. 802 (1973).

might be raised as to the reasonableness of the length of residency required in a particular instance, it is probable that none would be struck down if challenged. I do not recommend that any amendments be made to these statutes.

II. Residency Requirements for Occupantional Licensing

With only a few exceptions, I agree with the conclusions contained in the Department of Law's survey as to the serious constitutional problems presented by the statutes which require persons to be residents in order to be licensed to engage in certain professions. The recent Alaska Supreme Court decision in Noll v. Alaska Bar Association, 649 P.2d 241 (Alaska 1982), makes it almost certain that these requirements would be struck down if challenged. Close review of the statutes, however, suggests that in some instances, the residency requirements may have been prompted by perfectly legitimate concerns -- such as the difficulty or added expense of disciplining nonresident practitioners. Further, it appears that in some instances residency requirements may have been imposed as a "quick" way of insuring that persons who practiced certain professions in the state had some degree of "local" knowledge. After Noll, it seems likely that even though these are legitimate problems, they may not be solved by simply barring nonresidents from licensure. By the same token, there may be ways of dealing with these problems that do not raise constitutional questions. For instance, in the case of disciplining nonresidents, a higher fee could be charged to nonresidents to

offset additional costs that may be associated with disciplining nonresidents. "Local knowledge" concerns could be addressed through additional testing procedures. In any event, despite the serious constitutional problems with these statutes, it may be undesirable simply to repeal the residency requirements without providing solutions to whatever problems may be posed by granting licenses to nonresidents. The Committee might want to consider repealing the residency requirements, but having a delayed effective date until perhaps June 30 of 1984. Persons who wish to recommend alternative ways of addressing the kinds of concerns I have suggested would then have time to bring their recommendations to the legislature next year before the repeal of the residency requirements took effect.

III. Public Rights and Benefits

A. General

I agree with the Department of Law's conclusion that a one year durational residency requirement for annulment of marriage may be unconstitutional, though I would rate this as "probably" rather than "maybe" unconstitutional. The Alaska Supreme Court in 1974 struck down a one year durational requirement for obtaining a divorce. State v. Adams, 522 P.2d 1125 (Alaska 1974). The state's interests in requiring one year residence to obtain an annulment of a marriage are more than likely identical to those advanced in support of the one year requirement for divorce. The court did not find

those interests sufficiently important to justify a one year requirement for divorce. Although the Alaska Supreme Court seems to be moving toward a much less restrictive view of durational residency requirements,[2/] it is unlikely that it would overrule its earlier decision in Adams, if the annulment statute were challenged. I would recommend that this statute be amended to require that a person simply be a resident.

I also agree with the Department's assessment of the other statutes listed in the "General" category, which impose one year durational requirements, and recommend that these statutes be amended to require that a person simply be a resident.

B. Loan and Grant Programs

The statutes governing the various loan programs impose durational residency requirements ranging from one to five years. I agree that the five year requirements are almost

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2/ In State v. Adams, 522 P.2d 1125, 1131 (Alaska 1974), the Alaska Supreme Court stated:

> . . . all such [durational residency] requirements are prima facie invalid and will be countenanced only when they serve a compelling state interest.

However, in Williams v. Zobel, 619 P.2d 448 (Alaska 1980) (permanent fund dividends), the court retreated from its earlier view in Adams, and indicated that unless the requirement affected fundamental rights (such as voting) or basic necessities of life (like welfare or medical care), the court would henceforth use a "balancing" approach to durational residency statutes. The importance of the state's interests will be weighed against the importance of the benefit denied or delayed by the durational requirement.

certainly unconstitutional.[3] The question is whether a durational requirement beyond 30 days would be constitutional, and if so, what is the maximum length that could be imposed within constitutional limits. Apart from public office holding, the United States Supreme Court has upheld durational residency requirements of up to one year in two cases -- eligibility for preferential resident tuition at state universities, and as a prerequisite to filing for divorce.[4] These cases were decided under the United States Constitution, and the Alaska Supreme Court may, and has, interpreted the Alaska Constitution in similar cases as imposing stricter requirements.[5] As noted above, the Alaska Supreme Court has until recently maintained the view that any durational residency requirement will be struck down unless the state can demonstrate that the requirement is necessary to further a compelling state interest. This is an extremely difficult burden to meet, and except in very rare instances it is an impossible burden. Because it appears that the Alaska court

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3/ A different question is presented by the five year local mining experience requirement for mining loans under AS 27.09.020. This may be a permissible requirement, particularly if it is demonstrated that it does not operate as a practical matter to exclude persons who are currently residents, but who gained their Alaska mining experience as nonresidents.

4/ Vlandis v. Kline, 412 U.S. 441 (1973) (university tuition); Sosna v. Iowa, 419 U.S. 393 (1975) (divorce).

5/ For example, the Alaska court struck down a one-year residency requirement for divorce under the Alaska constitution, State v. Adams, 522 P.2d 1125 (Alaska 1974). One year later the U.S. Supreme Court upheld an identical requirement in Iowa's statute. Sosna v. Iowa, supra, note 4.

is moving toward a less restrictive approach toward durational residency, our court would probably uphold durational residency requirements of reasonable length for loan programs.

Under this less restrictive approach, the Alaska Court would balance the state's interests in imposing a durational residency requirement for a state loan against the importance of the challenger's interest in obtaining a loan before the requirement had been met. In the case of the loan programs, the state's interest is in assuring that state funds are not used to benefit nonresidents. Since resident status depends in large part on a person's state of mind, it is extremely difficult to know with certainty whether a recent arrival in fact has the requisite "residential" intent, and it is extremely difficult to disprove a false claim of residency. Further, it is costly to require the state to make individualized determinations of residency. There are in most instances alternative sources of loan funds through commercial lenders, and it is likely that our court would find that the state's interest in assuring that its benefits are not granted to persons who are not bona fide Alaska residents outweigh the slight inconvenience that a newly arrived resident might suffer by having to wait for some period of time in order to qualify for a state loan.

A more difficult question is what period of residency would be permissible. The state is currently in litigation in the Federal District Court in Alaska, defending the two

year durational residency requirement under the student loan program. The state has argued that the two year requirement is reasonable in light of the transience of student populations, the generous loan amounts under the Alaska program and the fact that there is no requirement that the loan funds be used at an Alaska institution. The plaintiff in that case has conceded that a one year requirement would be reasonable. Assuming the Alaska Supreme Court continues in its present trend in durational residency cases, a one year durational residency requirement for the loan programs would more than likely be upheld.[6/] A two year requirement might be upheld, but it carries a much higher risk of being struck down than would a one year requirement. The Committee may want to defer proposing any amendments to the two year residency requirement for student loans until the pending litigation is resolved. The Committee may also want to defer action on the other loan programs until after the Alaska Supreme Court renders its decision on the one year residency requirement for participation in the Kenai land disposal lottery (Gilman v. Martin). That decision may provide some indication as to how our court would rule on a one year residency requirement for state loans.

6/ The one loan program for which a one year residency requirement would most likely not be upheld is the AHFC program for home mortgages -- at least as long as there continues to be a requirement that the loans will be made only for owner-occupied dwellings. As has been noted earlier in this memorandum, with rare exceptions, durational residency requirements may be used only as a way of measuring whether a person has the intent to remain in the state and make his or her home there. Purchasing a dwelling under a loan program requiring owner occupancy as a condition of the loan is such a strong indication that a person's claimed residential intent actually exists, that a court would most likely find that there was no valid state purpose in imposing an additional one year residency requirement.

I would, however, recommend that the sliding scale preference for accepting student loan applications that is based on years of residency be repealed, even though it has apparently never been applied. This provision is so similar to the dividend plan struck down in Zobel v. Williams that it is virtually certain to be struck down on the same constitutional grounds. On the other hand, the provisions of AS 14.40.763(j), providing for graduated forgiveness of portions of student loans based on continued residence in Alaska after graduation seem to be based on an entirely different rationale. Those provisions are not based on past residency, but seek to affect future behavior. Providing graduated loan forgiveness seems closely tied to the purpose of encouraging students to return to or remain in Alaska after they have received their educations. I believe that that provision would most likely be upheld if it were to be challenged, and that there is no need to repeal it because of constitutional vulnerability.

C. Land Disposal Programs

As mentioned above, the Alaska Supreme Court now has under consideration a case in which the Kenai land disposal program has been challenged. (Gilman v. Martin.) The Kenai ordinances governing its program are almost identical to the state's land lottery provisions in AS 38.05.057 and AS 38.05.058. Thus, the decision in Gilman will almost

certainly answer any constitutional questions that might be raised concerning the state's program. I agree with the assessment of the constitutional problems with these statutes contained in the Department of Law's chart. I believe that a one year residency requirement to participate in either the land lottery or the homesite entry program would probably be upheld. I have serious doubts about the constitutionality of the provision under which discounts of the purchase price are granted based on years of residency in the state. The committee may, however, wish to defer proposing amendments to this provision until after the decision in Gilman is rendered, since the residency based discounts are also at issue in that case.

D. Special Old Age Programs

I also agree with the assessment made by the Department of Law as to the durational residency requirements contained in the programs providing benefits or preferences to older residents of the state. With respect to the one year residency requirement for the senior citizen special assessment exemption under AS 29.63.065(d)(1), I have doubts about whether that requirement would be upheld, for the same reasons I outlined concerning a one year residency requirement for AHFC loans in footnote 6, above. A one year requirement for the senior citizen exemption from the fishing license requirement would probably be upheld; a 30 year requirement is clearly unconstitutional.

I also agree that the residency requirements for the longevity bonus are almost certainly unconstitutional. There are arguments that could be made in defense of the Pioneers' Home residency provisions, but it is far from certain that those requirements would be upheld. (The arguments in support of the Pioneers' Home residency requirements are contained in the November 26, 1982 opinion by Wilson Condon, a copy of which is among the Committee's files.) However, any recommendation as to how the residency requirements for these two programs might be amended to meet constitutional requirements necessarily has tremendous fiscal implications. The residency questions in these two programs are so intertwined with the structure and operation of the programs, that they cannot be dealt with separately, but can be addressed only as part of a total structural and operational review of those programs. That kind of review is, as I understand it, beyond the scope of the work that the Committee has asked me to perform.

SAB:yw

DRAFT
3/22/83
Susan A. Burke

A BILL

For an Act entitled: "An Act relating to residency and residency requirements; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA

* Section 1. AS 01.10 is amended by adding a new section to read:

Sec. 01.10.055. RESIDENCY. (a) A person establishes residency in the state by being physically present in the state with the intent to remain in the state indefinitely and to make his or her home in the state.

(b) A person demonstrates the intent required under (a) of this section

(1) by maintaining his or her principal place of abode in the state for at least 30 days or for a longer period if a longer period is required by law or regulation; and

(2) by providing other proof of intent as may be required by law or regulation; including but not limited to proof that the person is not claiming residency outside the state or obtaining benefits under a claim of residency outside the state.

(c) A person who establishes residency in the state remains a resident during a period of absence from the state unless during the absence the person establishes or claims residency in another state, territory or country, or performs other acts or is absent under circumstances that are inconsistent with the intent [redacted] to remain a resident of this state.

[*Sec. 2 and following sections would contain amendments and repeals of specific residency provisions.]

RESIDENCY LEGISLATION

Comments to 3/22/83 Draft

This draft is intended to provide first a basic definition of residency. This definition is contained in section 1. The remaining sections of the draft would contain amendments to or repeals of the particular statutes containing residency provisions. These amendments will be prepared by the Legislative Affairs Agency.

The residency definition in section 1 of the draft is intended to be a very general definition. The basic definition is contained in subsection (a), and represents the constitutionally approved definition of the requirements for establishing residency, which largely depend on a person's state of mind. It is thus possible for a person to become a resident of Alaska the moment he or she first arrives. When the person wishes to apply for a state benefit, privilege or license, the only permissible inquiry the state may make is whether the person actually has the intent required to be a resident.

Subsection (b) addresses the question of how a person demonstrates that "residential intent." At a minimum a person must have resided in the state for 30 days. There are some state programs for which it is permissible to require a longer period of residence as proof of intent, and subsection (b) provides that particular statutes may impose longer durational periods. Subsection (b) also contemplates that some statutes or regulations will include specific proof requirements such as those contained in the permanent fund dividend statutes.

In other instances, such as driver's license applications, requiring elaborate proof would only bog down the bureaucracy.

Subsection (c) is intended to clarify the question of when a person loses Alaska residency by an absence from the state. As with subsection (b), it is contemplated that a more detailed listing of "allowable" absences would, where appropriate or necessary, be included in the statute governing a particular program or in regulations adopted to administer the program.

As with any draft, I would anticipate that it will need refinement as others review it and suggest possible "loopholes" that I may have overlooked in preparing the draft.

ATTACHMENT 2

Department of Law's List with Commentary

DRAFT

Norman C. Gorsuch
Attorney General

Ronald W. Lorensen
Deputy Attorney General

Robert M. Maynard
Assistant Attorney General
Oil and Gas-Juneau

December 10, 1982

Legislation to cure problems in residency

Of the numerous residency requirements that are probably or almost certainly unconstitutional, most of them can only be justified as an attempt to determine whether or not a person is a "bona fide" resident. Therefore, a general bona fide resident statute should be drawn up. If a durational requirement is to be used, it would be safest to use a period of no longer than one year as the outside limit. Otherwise, additional criteria such as voter's registration, drivers license, or similar indicia of residency could be used in this general provision.

The following list includes all residency requirements which we have previously said were more likely than not to be unconstitutional. Many of these requirements can be defended, although probably unsuccessfully. Therefore, they are prime candidates for legislative change.

LICENSES

The present statutes concerning occupational licenses contain many residency requirements. After Noll v. Alaska Bar

Association __ P.2d __, Op. no. 2546 (Alaska Supreme Court, August 13, 1982), it is clear that any residency requirement for licensure would almost certainly be struck down as unconstitutional. Therefore, the following requirements in the statutes and regulations should be eliminated with no new legislation concerning residency substituted in their place: public accountant (12 AAC 04.170); attorneys (Bar Rule 5(1)(a)); morticians (AS 08.42.110); guides (AS 08.54.100, AS 08.54.110, AS 08.54.120, AS 08.54.140, AS 08.54.142) (although the requirements of hunting experience are defensible); real estate brokers and salesmen (AS 08.88.171); and insurance solicitor (AS 21.27.220).

In eliminating these residency requirements, it may be possible in some instances to retain a residency requirement (or a bona fide residency requirement) as a means of distinguishing between the fees to be paid in order to be licensed. Those fees could only be justified, however, if they are directly related to the increased costs of monitoring the activities of out-of-state or nonresident licensees.

PUBLIC RIGHTS AND BENEFITS

General

Low-cost housing preference (AS 18.55.330, 470(4)); vocational substitution program (AS 39.25.115(g)). These two programs require a one-year durational residency requirement in order to qualify for the preference or the program. Instead, a bona fide residency requirement should be substituted.

To the extent that these programs can be seen to be similar to "welfare" or "basic necessities of life," even a one-year residency requirement would be challengable. Consequently, these two programs should have a bona fide residency test that does not have a durational residency element, but rather depends on other indicia of residency [such as election registration, short-term residency (i.e., 30 days), etc.].

Industrial incentive tax credits (AS 43.26.095(b)(3)); bounties for certain animals (AS 16.35.130). These two programs give preference to one-year residents or, concerning the bounties, one year's residence in the game unit. Both these programs are for all practical purposes not operating, and probably should be eliminated anyway. If they are decided to be continued

the requirements should be eliminated (although our chart of September shows the industrial incentive tax credit to be "probably" unconstitutional, it is not exactly clear to me what the basis of this unconstitutionality is).

LOAN AND GRANT PROGRAMS

The following loan programs contain five-year residency requirements which should be changed to a bona fide residency requirement: fisherman's mortgage program (AS 16.10.680(a)); commercial fishing loan (AS 16.10.310(a)); limited entry permit loans (AS 44.81.220(a)(20)); Alaska Housing Finance Corp. veterans preference (AS 18.56.101); veterans loans (AS 26.15.130(1)). Fishing loans may possibly be defensible with a residency requirement of up to two years because of special problems that would occur because of the transient nature of fisherman.

The Alaska student loan and the Alaska educational grant program have two-year residency requirements imposed by AS 14.40.765(b) and the application forms. This issue is presently being litigated in Andress v. Baxter, and probably should not be changed until that case is decided. Backup legislation should, however, be drafted for rapid action in case the court rules adversely during the upcoming legislative session. The

point preference system for loan applicants in AS 14.40.767, however, is unconstitutional and should be eliminated. This point system has never been utilized by the commission in any event.

LAND DISPOSAL PROGRAMS

Both the one-year residency requirement to qualify for the program and the 5% per year discount for each year of residency up to ten years (AS 38.05.057(b)(2) and .058) have both been challenged in Gilman v. Martin, a case before the Alaska Supreme Court. The court will almost certainly rule on these issues prior to or during the upcoming legislative session. Backup legislation for at least the 5% per year discount portion of the program should be drafted.

The homesite entry program requires three years residency in order to apply and gives an absolute priority to the longest resident. AS 38.08.030(a)(2), 040(b). These should be replaced with simple bona fide residency requirements.

SPECIAL OLD AGE PROGRAMS

The longevity bonus program (AS 47.45.010(a)); the pioneers' home program (AS 47.25.020(a), 035); and the senior

citizen exemption from fishing license requirement (AS 16.05.400) all require lengthy residency requirements as conditions for qualification. Although preference for senior citizens is not unconstitutional, attaching a lengthy residency requirement raises severe constitutional problems. The longevity bonus program has already been settled and requires immediate attention by the legislature. Although we are have ruled that the pioneers' home program is defensible, attention may be directed towards this program (although it is difficult to see how the program could be restructured without the residency requirements). The senior citizens exemption for the fishing license requirement could simply become a senior citizen program with the bona fide residency requirement.

RMM:mr

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600

February 24, 1983

RECEIVED
FEB 28 1983

The Honorable Joe L. Hayes
Speaker of the House
of Representatives
State of Alaska
Pouch V
Juneau, AK 99811

FEB 24 1983

Dear Speaker Hayes:

In your letter of February 10, 1983, you requested that I provide you an update on our analysis of [redacted]ts in the following areas: longevity bonus program and the settlement reached in Vest v. Schafer; the pioneers home program; requirements for registered guides; the student loan program and the case of Andress v. Baxter challenging the program; and the State land disposal programs in the case of Gilman v. Martin challenging various aspects of these programs.

PIONEER'S HOME PROGRAM

On November 26, 1982, this office issued a comprehensive opinion on the Pioneer's Home. Basically, the opinion concluded that although there were numerous, serious and potentially fatal attacks that could be mounted against the program, this office could defend the Pioneer's Home program if it was challenged. A copy of this opinion is attached to this letter.

STUDENT LOAN PROGRAM - ANDRESS V. BAXTER

The constitutionality of the two-year residence requirement for the student loan program was challenged in Andress v. Baxter. The briefing in the case is complete and we are waiting for the Federal District Court to set a date for oral argument. We are defending the two-year residency requirement and believe that it is a constitutional provision. We cannot, of course, guarantee that the court will agree with our position. A copy of our brief before the Federal District Court is attached.

STATE LAND DISPOSAL PROGRAM - GILMAN V. MARTIN

In Gilman v. Martin, a challenge was mounted against the Kenai Land Disposal program that contained features similar to the state land disposal program; namely, a one-year residency requirement for qualification, and discounts that increased based

on length of residency. The Alaska Supreme Court requested the state to file an amicus brief concerning those provisions. The state filed such a brief, defending the programs as being constitutional. A copy of that brief is attached. We also asked the court for an expedited decision, and the court granted our motion. We are waiting the Supreme Court's decision.

Since both the student loan program and the state land disposal program are in active litigation, I am constrained from giving a full and frank evaluation of the potential chances of success or failure in a written public document. I would, however, be pleased to give you or your staff a more detailed oral briefing of our views of these two cases if such a briefing would be helpful.

REQUIREMENTS FOR REGISTERED GUIDES

The Alaska Supreme Court has recently made it clear that residence requirements for occupational licensing are invalid under the privileges and immunities clause of the U.S. Constitution. Noll v. Alaska Bar Association, P2d (AK 1982). We therefore anticipate that the governor will soon introduce legislation deleting all these residence requirements including those for guides. However, the bill will leave local experience requirements unchanged.

LONGEVITY BONUS PROGRAM - VEST V. SCHAFER

The longevity bonus program presently requires that a person have resided in the state 25 years commencing prior to statehood in order to be eligible for the program. The constitutionality of that requirement was challenged in Vest v. Schafer and a settlement agreement was signed last August by our office, the plaintiff, and the Legislative Council. That agreement provides that the Council shall use its best efforts to secure legislation which treats equally all bona fide Alaska of the age of 65 or older. "Bona fide residents" are defined in the agreement as those who have resided in the state for one year. The settlement also states that any benefits enacted this session shall be retroactive to July 1, 1982 for the plaintiff and others in the class. If legislation which meets these criteria is passed, the suit will be dismissed. Again, since the program is the subject of litigation, a more thorough evaluation would be

inappropriate herein. I would be happy to meet with you or your staff to give a more detailed oral evaluation. A copy of the settlement agreement is attached.

Sincerely,

Norman C. Gorsuch
Attorney General

Enclosure

RM/NCG/rm

DURATIONAL RESIDENCE IN ALASKA

After an exhaustive review we have come up with the attached eight page table and accompanying appendix setting forth the durational residence requirements imposed by Alaska State law. The table is organized into three main parts, I PUBLIC OFFICE HOLDING, II LICENSES, and III PUBLIC RIGHTS AND BENEFITS. The five columns in the table speak for themselves. With respect to the column "Constitutional Problem" some explanation is required. If "No" appears under Constitutional Problem, it is the opinion of the Department of Law that the durational residence requirement is constitutionally sound. Where the word "Maybe" appears in that column, it is the opinion of the Department of Law that that durational residence requirement is also constitutionally sound; however, we believe that it is possible someone might initiate litigation challenging the requirement. Where the term "Probably" appears in the Constitutional Problem column, we believe there is more than a remote possibility a court might find this durational residence requirement unconstitutional. Where "Yes" appears in the Constitutional Problem column, we believe it is highly likely that a court would find the durational residence requirement unconstitutional.

Because of the Alaska Supreme Court's recent ruling in the case of Noll v. Alaska Bar Association, ___ P.2d ___, Op. No. 2546 (August 13, 1982), we have also included all residence requirements, whether durational or not, which apply to eligibility for entrance into regulated occupations in Alaska. After the Noll decision it would appear that any residence requirement for entrance into a regulated occupation in Alaska will be held unconstitutional except in the most unusual circumstances. 1

I PUBLIC OFFICE HOLDING

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
A. General				
1. Governor	7 Years	Ak. Const. art. III, § 2	No	--
2. Lieutenant Governor	7 Years	Ak. Const. art. III, §§ 2 & 7	No	--
3. Board of Education Member	3 Years	AS 14.07.075	No	--
4. Legislator	3 Years	Ak. Const. art. II, § 2 AS 24.05.030	No	--
5. Supreme Court Justice	5 Years	AS 22.05.070	No	--
6. Court of Appeals Judge	5 Years	AS 22.07.040	No	--
7. Superior Court Judge	5 Years	AS 22.10.090	No	--
8. District Court Judge	5 Years	AS 22.15.160(a)	No	--
9. Magistrate	6 Months	AS 22.15.160(b)	No	--
10. Ombudsman	3 Years	AS 24.55.030	No	--
11. Borough Mayor	Up to 3 Years	AS 29.23.130(b)	No	--
12. Borough Assembly	Up to 3 Years	AS 29.23.050	No	--
13. City Mayor	Up to 3 Years	AS 29.23.250(a)	No	--
14. City Council	Up to 3 Years	AS 29.23.200(b)	No	--
15. Municipal Charter Commission	3 Years	AS 29.13.010	No	--

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
B. Boards and Commissions other than Occupational Licensing Boards. There are 98 Boards and Commissions, other than Occupational Licensing Boards, which are a part of or affiliated with state government. There is a durational residence requirement for membership on seven of those boards and commissions. */				
1. Rural Affairs Commission	5 Years	AS 44.19.102	Maybe **/	None
2. Board of Fisheries	1 Year	AS 16.05.221 AS 16.05.940	No	--
3. Board of Game	1 Year	AS 16.05.221 AS 16.05.940	No	--
4. Judicial Qualifications Commission	10 years practice in Alaska	Ak. Const. art. IV, § 10 AS 22.30.010	Maybe **/	--
5. Municipal Bond Bank Authority	30 days (qualified voter)	AS 44.85 030	No	--
6. Personnel Board	30 days (qualified voter)	AS 39.25.060	No	--
7. Alaska Power Authority	30 days (qualified voter)	AS 44.83.020	No	--

*/ This list includes only boards and commissions which have express durational residency requirements. Many boards have ex officio members who must meet residency requirements for those offices or positions. These boards include:

(1) Alcohol Beverage Control Board (certain licensees); (2) Capital Site Planning Commission (borough mayors); (3) Coastal Policy Council (mayors, assembly and council members); (4) Code Revision Commission (members of legislature); (5) Citizens Advisory Commission on Federal Management Areas in Alaska (governor and other public officers); (6) Commission on Conference of the Law of the Sea (members of legislature); (7) Rural Development Council (members of legislature); (8) Teacher's Retirement Board (resident who is receiving retirement benefits); (9) Tourism Advisory Board (members of legislature); and (10) Governor's Commission on the Administration of Justice (judicial officers, legislators and municipal officials)

**/ It is difficult to imagine someone complaining about any possible constitutional problems here.

II. LICENSES

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
A. Occupational Licenses. The State of Alaska requires occupational licenses in [illegible] occupational areas. Residence requirements are imposed for the receipt of these licenses in seven of these occupational areas [illegible]ons set forth in Appendix A, we believe any residence requirement, even of zero durational length, will in most cases be [illegible]nal.				
1. Public Accountant	1 Year (rebuttable)	AS 08.04.280 12 AAC 04.170	Yes	None
2. Attorney	Residence	Bar Rule 5(1)(a)	Yes	Declared unconstitutional in Noll v. Alaska Bar Ass'n 8/13/82
3. Collection Agencies	1 Year, but non-resident may receive license on same basis as resident, except fee for branch offices is higher	AS 08.24.110 AS 08.24.370	No	- -
4. Morticians	1 Year in-state apprenticeship	AS 08.42.110	Yes	None
5. Guides				
Master Guide	Residence plus hunted 10 years	AS 08.54.100	Yes	None
Registered Guide	Resident	AS 08.54.1[illegible]	Yes	None
Class A Assistant Guide	20 years experience in guide district in which he is to be employed although not a specific residence requirement.	AS 08.54.120	Yes	None
Assistant Guide	Resident	AS 08.54.140	Yes	None
Transporter	Resident	AS 08[illegible].14[illegible]	Yes	None

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
Occupational Licenses (Cont.)				
6. Junk Dealer & Metal Scrapper	No resident requirement, but defines "resident" as present for one year.	AS 08.60.030	No	--
7. Real Estate Brokers and Salesmen	Resident	AS 08.88.171	Yes	None
8. Insurance Brokers, Agents and Solicitors				
Resident Insurance Salesmen or Broker (non residents can be licensed but may pay a higher fee)	1 year	AS 21.27.090 AS 21.06.250	No	-- --
Insurance Solicitor	1 year	AS 21.27.220	Yes	None
B. Other Licenses				
1. Alcoholic Beverage License	1 year	AS 04.11.390	Maybe	None
2. Resident Fish and Game License (resident license costs less than non-resident license)	12 consecutive months	AS 16.05.940	Maybe	None
III. PUBLIC RIGHTS AND BENEFITS				
A. General				
1. Voting	30 days	AS 15.05.~~510~~ .010 ?	No	--
2. Annullment of Marriage	1 Year	AS 09.55.130	Maybe	None

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
C. Occupational Licensing Boards. There are 23 Occupational Licensing Boards in Alaska. There is a durational residence requirement for membership on eight of those Boards. They are listed below. Of the other 15, eight have no residence requirement whatsoever and seven require simple residence.				
1. Public Accounting Board	1 Year	AS 08.04.020	No	--
2. Board of Chiropractic Examiners	2 Years	AS 08.20.020	No	--
3. Board of Dental Examiners	5 Years	AS 08.36.010	Maybe */	None
4. State Board of Registration for Architects, Engineers, and Land Surveyors	3 Years	AS 08.48.031	No	--
5. Guide Licensing and Control Board	10 Years	AS 08.54.010	Maybe */	None
6. Board of Pharmacy	3 Years in-state practice although not a specific residence requirement	AS 08.80.010	No	--
7. Board of Examiners in Optometry	3 Years	AS 08.72.040	No	--
8. Board of Veterinary Examiners	5 Years in-state practice although not a specific residence requirement	AS 08.98.010	Maybe */	None

*/ It is difficult to imagine someone complaining about any constitutional problem here, however.

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
General (Cont.)				
3. Low-Cost Housing Preference	1 Year	AS 18.55.330 AS 18.55.470(4)	Probably	None
4. Vocational Substitution Program	1 Year	AS 39.25.155(g)	Probably	None
5. Industrial Incentive Tax Credits	Depends on % of 1-year residents	AS 43.26.095(b)(3)	Probably	Program is for all practical purposes no longer operating.
6. Bounties for Certain Animals	1 year abode in Unit plus "continually maintained residence in the state . . ."	AS 16.35.130	Yes	The program is a dead letter because it has not been funded for several years.

B. Loan and Grant Programs. Approximately 41 loan programs are provided for under Alaska Statutes. 35 of these are currently active programs. Of these 35, seven have some sort of durational residency feature. The dormant programs are inactive because of lack of funding. The state has one grant program requiring a period of residency for eligibility.

1. Fisherman's Note and Mortgage Program	5 Years	AS 16.10.680(a)	Yes	AG opinion pending
2. Commercial Fishing Loan	5 Years	AS 16.10.310(a)	Yes	AG opinion pending
3. Limited Entry Permit Loans (CFAB)	5 Years	AS 44.81.220(a)(20)	Yes	Program inactive pending Court determination of legality of limited entry program in State v. Ostrosky.
4. Agriculture and Fishing Loan (CFAB)	1 Year	Board Policy	Maybe	None
5. Alaska Housing Finance Corp. One Percent Veterans' Housing Loan Rate Reduction	5 Years	AS 18.56.101	Yes	AG opinion 7/14/82 instructed agency not to enforce.
6. Veterans Loans	5 Years	AS 25.15.130(1)	Yes	Inactive because not currently funded.

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING, IF APPLICABLE
Loan and Grant Programs (Cont.)				
7. Mining Business Loans	Residency and 5 Years Mining Experience in State.	AS 27.09.020	Maybe	None
8. Memorial Scholarship Loan Fund	No durational requirement to apply. 1/5 loan forgiven for each year employed in specialized field in Alaska.	AS 14.40.825(c)	No	- - -
9. Student Loan Program				
(a) eligibility to apply	2 Years	AS 14.40.765(b)	Probably	Issue pending in Andress v. Baxter
(b) 1/10 forgiven for each year of residency after education up to 50% of loan.	- -	AS 14.40.763(i)	Maybe	May be covered by Gilman v. Martin which is now pending in Alaska Supreme Court
(c) Point Preference System for loan applicants	1 Point; 2-5 Years 2 Points; 5-10 Years 3 Points; 10+ Years	AS 14.40.767	Yes	Point system has not previously been utilized as Legislature has always funded all applicants.
10. Alaska Educational Incentive Grant	2 Years	Application form	Probably	Issue will be decided by result in Andress v. Baxter
C. Land Disposal Programs				
1. Land Disposal by Lottery	1 Year	AS 38.05.057(b)(2)	Maybe	Should be decided by Gilman v. Martin.
2. Land Purchase Price Discount Program	5% per year discount for each year of residency	AS 38.05.058	Probably	Should be decided by Gilman v. Martin.

TITLE	DURATIONAL RESIDENCE REQUIREMENT	AUTHORITY	CONSTITUTIONAL PROBLEM	ACTION TAKEN OR PENDING IF APPLICABLE
Land Disposal Programs (Cont.)				
3. Homesite Entry Program	3 years (or 20 years of earlier residency) to apply	AS 38.08.030(a)(2)	Yes	AG opinion pending
	Priority given longest resident	AS 38.08.040(b)		
4. Remote Parcel Leasing Program	1 Year	AS 38.08.077(i)(2)	Maybe	Should be decided by Gilman v. Martin.
D. Special Old Age Programs				
1. Longevity Bonus Program	25 years and presence in State at or before statehood.	AS 47.45.010(a)	Yes	Issue Pending in Vest v. Schafer
2. Pioneers' Home Program	15 years immediately before application; or 30 years cumulative	AS 47.25.020(a) AS 47.25.035	Yes	None
3. Senior Citizen Special Assessment Exemption	12 months	AS 29.63.065(d)(1)	Maybe	None
4. Senior Citizen Exemption from Fishing License Requirement	30 years total residence	AS 16.05.400	Yes	None

Appendix A

The federal constitution's Privileges and Immunities Clause seeks to prevent discrimination against nonresidents, to further the concept of federalism, and to create a national economic unit. Shelv v. Alaska Bar Ass'n, 620 P.2d 640, 642 (Alaska 1980) ("Shelev"). Although the Clause does not preclude some disparity of treatment between residents and nonresidents, it does protect activities which are "fundamental rights": i.e., "basic and essential activities, interference with which would frustrate the purposes of the formation of the Union." Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978).

One such "fundamental right" is the right to engage in "common callings" and to pursue "ordinary livelihoods." Toomer v. Witsell, 334 U.S. 385, 403 (1948). This includes "professional occupations" Shelev, 620 P.2d at 643.

In order to discriminate against nonresidents when a fundamental right is involved, there must be: (1) some showing that nonresidents are "a peculiar source of the evil" which the residence requirement is meant to remedy; and (2) the discrimination against nonresidents must "bear a substantial relationship to the particular 'evil' they are said to present." Hicklin v. Orbeck, 437 U.S. 518, 526-527 (1978). For example, there cannot be less restrictive means to combat the problems attempted to be solved by the residency requirement. Shelev, 620 P.2d at 645.

A good example is the recent Alaska Supreme Court case Noll v. Alaska Bar Ass'n, ___ P.2d ___, Op. No. 2546 (August 13, 1982). In Noll, a nonresident challenged the constitutionality of Alaska Bar Rule 5(1)(a), which required that an applicant for admission to the state bar be domiciled in Alaska when he or she was actually admitted. The bar association argued that the residency requirement was needed:

(1) to assure the competency of the members of the bar;

(2) to assure familiarity with local practice and local issues;

(3) to facilitate service of process and communication with other attorneys; and

(4) to assure that members of the state bar are readily amenable to discipline and fee arbitration and are available for service on the committees that administer those procedures.

The Alaska Supreme Court rejected each and every reason offered. Although recognizing the legitimacy of those goals, the court either found these goals were not "substantial" enough to justify the discrimination, could be attained by other nondiscriminatory means, or were not furthered by the discrimination. As can be seen, this constitutional test is difficult to meet. Consequently, all residency requirements for occupational licensing are called into substantial doubt.

ATTACHMENT 3

U.S. Supreme Court Report on Zobel III

RONALD M. ZOBEL and PATRICIA L. ZOBEL, Appellants,

v

THOMAS WILLIAMS, Commissioner of Revenue, and ALASKA

— US —, 72 L Ed 2d 672, 102 S Ct —

[No. 80-1146]

Argued October 7, 1981. Decided June 14, 1982.

Decision: Alaska statute distributing income derived from state's natural resources to state's citizens in varying amounts based on length of each citizen's residency, held to violate equal protection clause.

SUMMARY

Alaska adopted a constitutional amendment establishing a fund into which the state must deposit at least 25 percent of its mineral income each year. The Alaska legislature enacted a dividend program to distribute annually a portion of the fund's earnings directly to the state's adult residents. Under the plan, each citizen 18 years of age or older would receive one dividend unit for each year of residency subsequent to 1959, the first year of statehood. Plaintiffs, residents of Alaska since 1978, brought suit challenging the dividend distribution plan. The Superior Court for Alaska's Third Judicial District granted summary judgment in favor of the plaintiffs, holding that the plan violated the rights of interstate travel and equal protection. The Supreme Court of Alaska reversed and upheld the statute (619 P2d 448).

On appeal, the United States Supreme Court reversed and remanded. In an opinion by BURGER, Ch. J., joined by BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., it was held that the Alaska dividend distribution plan violated the equal protection clause of the Fourteenth Amendment, since the state had shown no valid state interests which were rationally served by the distinction it made between citizens who established residency before 1959 and those who have become residents since then.

BRENNAN, J., joined by MARSHALL, BLACKMUN, and POWELL, JJ., concurred, expressing the view that the right to travel—or, more precisely, the federal interest in free interstate migration—was affected by the Alaska dividend-distribution law, and that this threat to free interstate migration provided an independent rationale for holding that law unconstitutional.

O'CONNOR, J., concurred in the judgment, expressing the view that the Alaska law should be measured against the principles implementing the privileges and immunities clause, and that this analysis supplies a needed foundation for many of the "right to travel" claims discussed in the court's prior opinions.

REHNQUIST, J., dissented, expressing the view that the Alaska distribution scheme was rationally based, and that the Fourteenth Amendment gives the federal courts no power to impose upon the states their view of what constitutes wise economic or social policy.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 326 — equal protection — benefits based on length of residency

1a-1c. A state statute by which a state distributes income derived from its natural resources to the adult citizens of the state in varying amounts, based on the length of each citizen's residency, violates the equal protection clause of the Fourteenth Amendment, where the state has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residency before a certain year and those who have become residents since then, and where the only apparent justification for the retrospective aspect of the program, favoring established residents over new residents, is constitutionally unacceptable, the state's objective to reward citizens for past contributions not being a legitimate state purpose. (Rehnquist, J., dissented from this holding.)

Constitutional Law § 349 — privileges and immunities — benefits based on length of residency

2a, 2b. A state statute by which a state

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16A Am Jur 2d, Constitutional Law § 773
USCS, Constitution, 14th Amendment
US L Ed Digest, Constitutional Law § 326
L Ed Index to Annos, Domicil or Residence; Equal Protection of the Laws; Travel
ALR Quick Index, Equal Protection of Law; Travel
Federal Quick Index, Domicil and Residence; Equal Protection of the Laws; Travel

ANNOTATION REFERENCE

Federal constitutional right of interstate travel. 27 L Ed 2d 967

distributes income derived from its natural resources to the adult citizens of the state in varying amounts, based on the length of each citizen's residency, does not involve the kind of discrimination which the privileges and immunities clause of the United States Constitution (Art IV, § 2, cl 1) was designed to prevent, that clause being designed to insure to a citizen of one state who ventures into another state the some privileges which the citizens of the second state enjoy.

Constitutional Law § 316 — equal protection — unequal distribution of benefits — scrutiny

3. When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the equal protection clause of the Fourteenth Amendment; generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose, but some particularly invidious distinctions are subject to more rigorous scrutiny.

Constitutional Law § 326 — equal protection — right to travel — residency requirements

4a, 4b. The right to travel protects persons against the erection of actual barriers to interstate movement and, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer-term residents; in reality, right to travel analysis refers to little more than a particular application of equal protection analysis.

Statutes § 38.5 — invalidation of portion of statute — effect on validity of whole statute

5. Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion; the United States Supreme Court need not speculate as to the intent of a state legislature where the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid.

SYLLABUS BY REPORTER OF DECISIONS

After Alaska amended its Constitution to establish a Permanent Fund into which the State must deposit at least 25% of its mineral income each year, the state legislature in 1980 enacted a dividend program to distribute annually a portion of the Fund's earnings directly to the State's adult residents. Under the plan, each adult resident receives one dividend unit for each year of residency subsequent to 1959, the first year of Alaska's statehood. Appellants, residents of Alaska since 1978, brought an action in an Alaska state court challenging the statutory dividend distribution plan as violative of, inter alia, their right to equal protection guarantees. The trial court granted summary judgment in appellant's favor, but the Alaska Supreme Court reversed and upheld the statute.

Held: The Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment.

(a) Rather than imposing any threshold waiting period for entitlement to dividend benefits or establishing a test of bona fides of state residence, the dividend statute creates fixed, permanent distinctions between an ever-increasing number of classes of concededly bona fide residents based on how long they have lived in the State. Sosna v. Iowa, 419 US 393, 42 L Ed 2d 532, 95 S Ct 553; Memorial Hospital v Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076; Dunn v Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995; and Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322, distinguished. When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause, and generally a law will survive that scrutiny if the distinctions rationally further a legitimate state purpose.

(b) Alaska has shown no valid state interests that are rationally served by the distinctions it makes between citizens who established residence before 1959 and those who have become residents since then. Neither the State's claimed interest in creating a financial incentive for individuals to establish and maintain residence in Alaska nor its claimed interest in assuring prudent management of the Permanent Fund is rationally related to such distinctions. And the State's interest in rewarding citizens for past contributions is not a legitimate state purpose. Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency, and would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

619 P2d 448, reversed and remanded.

Burger, C. J., delivered the opinion of the Court, in which Brennan, White, Marshall, Blackmun, Powell, and Stevens, JJ., joined. Brennan, J., filed a concurring opinion, in which Marshall, Blackmun, and Powell, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Rehnquist, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

Mark A. Sandberg argued the cause for appellants.

Avrum M. Gross argued the cause for appellees.

OPINION OF THE COURT

Chief Justice Burger delivered the opinion of the Court.

[1a] The question presented on this appeal is whether a statutory scheme by which a State distributes income derived from its natural resources to the adult citizens of the State in varying amounts, based on the length of each citizen's residence, violates the equal protection rights of newer state citizens. The Alaska Supreme Court sustained the constitutionality of the statute. Williams v Zobel, 619 P2d 448 (Alaska 1980). We noted probable jurisdiction and stayed the distribution of dividend funds, 450 US 908 (1981), 67 L Ed 2d 331, 101 S Ct 1344. We reverse.

I

The 1967 discovery of large oil reserves on state-owned land in the Prudhoe Bay area of Alaska resulted in a windfall to the State. The State, which had a total budget of $121 million in 1969, before the oil revenues began to flow into the state coffers, received $3.7 billion in petroleum revenues during the 1981 fiscal year.[1] This income will continue, and most likely grow for some years in the future. Recognizing that its mineral reserves, although large, are finite and that the resulting income will not continue in perpetuity, the State took steps to assure that its current good fortune will bring long-range benefits. To accomplish this, Alaska in 1976 adopted a constitutional amendment establishing the

1. Alaska Department of Revenue, Revenue Sources FY 1981-1983 (1981). Includes General Fund unrestricted petroleum revenues of $3.3 billion and petroleum revenues directly deposited in the Permanent Fund in the amount of $400 million. An additional $900 million was transferred from the General Fund to the Permanent Fund in the 1981 fiscal year.) The 1980 census reports that Alaska's adult population is 270,276, so that its 1981 oil revenues amount to $13,652 for each adult resident. Petroleum revenues also amount to 89% of the State's total revenue. Ibid.

Permanent Fund into which the State must deposit at least 25% of its mineral income each year. Alaska Const, Art IX, § 15. The amendment prohibits the legislature from appropriating any of the principal of the fund but permits use of the fund's earnings for general governmental purposes.

In 1980, the legislature enacted a dividend program to distribute annually a portion of the Fund's earnings directly to the State's adult residents. Under the plan, each citizen 18 years of age or older receives one dividend unit for each year of residency subsequent to 1959, the first year of statehood. The statute fixed the value of each dividend unit at $50 for the 1979 fiscal year; a one-year resident thus would receive one unit, or $50, while a resident of Alaska since it became a State in 1959 would receive 21 units, or $1,050. The value of a dividend unit will vary each year depending on the income of the Permanent Fund and the amount of that income the State allocates for other purposes. The State now estimates that the 1985 fiscal year dividend will be nearly four times as large as that for 1979.

Appellants, residents of Alaska since 1978, brought this suit in 1980 challenging the dividend distribution plan as violative of their right to equal protection guarantees and their constitutional right to migrate to Alaska, to establish residency there and thereafter to enjoy the full rights of Alaska citizenship on the same terms as all other citizens of the State. The Superior Court for Alaska's Third Judicial District granted summary judgment in appellants' favor, holding that the plan violated the rights of interstate travel and equal protection. A divided Alaska Supreme Court reversed and upheld the statute.[2]

II

[1b] The Alaska dividend distribution law is quite unlike the durational residency requirements we examined in Sosna v Iowa, 419 US 393, 42 L Ed 2d 532, 95 S Ct 553 (1975); Memorial Hospital v Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974); Dunn v Blumstein, 405 US 330, 31 L Ed 2d 274 92 S Ct 995 (1972); and Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969). Those cases involved laws which required new residents to reside in the State a fixed minimum period to be eligible for certain benefits available on an equal basis to all other residents.[3] The asserted purpose of the durational residency requirements was to assure that only persons who had established bona fide residence received rights and benefits provided for residents.

The Alaska statute does not impose any threshold waiting period on those seeking dividend benefits; persons with less than a full year of residency are entitled to share in the distribution. Alaska Stat § 43.23.010.[4] Nor does the statute purport to establish a test of the bona fides of state residence. Instead, the dividend statute creates fixed, permanent distinctions between an ever increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State.

[2a] Appellants established residence in Alaska two years before the dividend law was passed. The distinction they complain of is not one which the State makes between those who arrived in Alaska after the enactment of the dividend distribution law and those who were residents prior to its enactment. Appellants instead challenge the distinctions made within the class of persons who were residents when the dividend scheme was enacted in 1980. The distinctions appellants attack include the preference given to persons who were residents when Alaska became a State in 1959 over all those who have arrived since then, as well as the distinctions made between all bona fide residents who settled in Alaska at different times during the 1959 to 1980 period.[5]

[3, 4a] When a State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[6] Generally,

2. The infusion of Permanent Fund earnings into state general revenues also led the Alaska legislature to enact a statute giving residents a one-third exemption from state income taxes for each year of residence; this operated to exempt entirely anyone with three or more years of residency. The Alaska Supreme Court again by a 3-2 vote, held that this statute violated the State Constitution's equal protection clause. Williams v Zobel, 619 P2d 422 (Alas 1980). Chief Justice Rabinowitz, the only justice in the majority in both cases, found that the tax exemption statute, but not the dividend distribution plan, could "be perceived as a penalty imposed on a person who chooses to exercise his or her right to move into Alaska." 619 P2d, at 458.

3. In the durational residency cases, we examined state laws which imposed waiting periods on access to divorce courts, Sosna v Iowa, supra; eligibility for free nonemergency medical care, Memorial Hospital v Maricopa County, supra; voting rights, Dunn v Blumstein, supra; and welfare assistance, Shapiro v Thompson, supra.

4. Section 43.23.010(b) provides:

"For each year, an individual is eligible to receive payment of the permanent fund dividends for which he is entitled under this section if he

(1) is at least 18 years of age; and

(2) is a state resident during all or part of the year for which the permanent fund dividend is paid.

The remainder of § 43.23.010 establishes the number of dividend units residents are entitled to receive and the method of payment. Section 43.23.010(c) provides that a resident entitled to benefits under subsection (b) who was a resident for less than a full year is entitled to a dividend prorated on the basis of the number of months of state residence.

5. The Alaska statute does not simply make distinctions between native born Alaskans and those who migrate to Alaska from other states; it does not discriminate only against those who have recently exercised the right to travel, as did the statute involved in Shapiro v Thompson, supra. The Alaska statute also discriminates among long-time residents and even native born residents. For example, a person born in Alaska in 1962 would have received $100 less than someone who was born in the State in 1960. Of course the native Alaskan born in 1962 would also receive $100 less than the person who moved to the State in 1960.

[2b] The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art IV was designed to prevent. That Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v Witsell, 334 US 385, 395, 92 L Ed 1460, 68 S Ct 1156 (1948). The Clause is thus not applicable to this case.

6. [4b] The Alaska courts considered whether the dividend distribution law violated appellants' constitutional right to travel. The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right has remained obscure. See Jones v Helms, 452 US 412, ——, —— and nn 12 and 13, 69 L Ed 2d 118, 101 S Ct 2434 (1981). Shapiro v Thompson, supra, 394 US, at 629-631, 22 L Ed 2d 600, 89 S Ct 1322; United States v Guest, 383 US 745, 757-759, 16 L Ed 2d 239, 86 S Ct 1170 (1966). See also Z. Chafee, Three Human Rights in the Constitution of 1787 111

973), we noted that "apportionment] of tuition rates on the basis f old and new residency . . . would ive rise to grave problems under ie Equal Protection Clause of the ourteenth Amendment." 412 US, at 49–450 and n 6, 37 L Ed 2d 63, 93 S t 2230.[10]

If the States can make the amount a cash dividend depend on length residence, what would preclude rying university tuition on a slid- g scale based on years of residence or even limiting access to finite ublic facilities, eligibility for stu- nt loans, for civil service jobs, or r government contracts by length domicile? Could States impose dif- rent taxes based on length of resi- ence?" Alaska's reasoning could pen the door to state apportion- ent of other rights, benefits and rvices according to length of resi- ency.[11] It would permit the states to vide citizens into expanding num- rs of permanent classes.[12] Such a result would be clearly impermissible.[13]

B

[5] We need not consider whether the State could enact the dividend program prospectively only. Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion. Buckley v Valeo, 424 US 1, 108, 46 L Ed 2d 659, 96 S Ct 612 (1976); United States v Jackson, 390 US 570, 585, 20 L Ed 2d 138, 88 S Ct 1209 (1968); Champlin Rfg. Co. v Commission, 286 US 210, 234, 76 L Ed 1062, 52 S Ct 559 (1932). Here, we need not speculate as to the intent of the Alaska legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid:

"Sec 4. If any provision enacted in sec 2 of this Act [which included the dividend distribution plan in its entirety] is held to be invalid by the final judgment, decision or order of a court of competent jurisdiction, then that provision is nonseverable, and all provisions enacted in sec 2 of this Act are invalid and of no force or effect."

1980 Alaska Sess Laws Chap 21, § 4. However, it is of course for the Alaska courts to pass on the severability clause of the statute.

III

[1c] The only apparent justification for the retrospective aspect of the program, "favoring established residents over new residents," is constitutionally unacceptable. Vlandis v Kline, supra, 412 US, at 450, 37 L Ed 2d 63, 93 S Ct 2230. In our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then.

We hold that the Alaska dividend distribution plan violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the judgment of the Alaska Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

SEPARATE OPINIONS

Justice Brennan, with whom Justice Marshall, Justice Blackmun, and Justice Powell join, concurring.

I join the opinion of the Court, and agree with its conclusion that the retrospective aspects of Alaska's dividend-distribution law are not rationally related to a legitimate state purpose. I write separately only to emphasize that the pervasive discrimination embodied in the Alaska distribution scheme gives rise to constitutional concerns of somewhat larger proportions than may be evident on a cursory reading of the Court's opinion. In my view, these concerns might well preclude even the prospective operation of Alaska's scheme.

I

I agree with Justice O'Connor that these more fundamental defects in the Alaska dividend-distribution law are, in part, reflected in what has come to be called the "right to travel."[1] That right—or, more precisely, the federal interest in free interstate migration—is clearly, though indirectly, affected by the

10. Even if the objective of rewarding past ntributions were valid, it would be ironic to ply that rationale here. As Representative ndolph noted during debate in the state gislature on the dividend statute.

he pipeline is the entity that has allowed all this latitude to do all the things we're nsidering doing, not only today but throughout the session. And without . . . newcomers, couldn't have built that pipeline . . . . ithout their skill, without their money, the peline wouldn't be there. So I get a little bit ed of—and I've got a bunch and awful lot people who have been here five or six or ven or ten years, whatever we knock off as wcomers, get a little bit tired of being astized and penalized and discriminated nust for having not been born here or not en here 30 or 40 or 50 years."

11. Apportionment would thus be prohibited only when it involves "fundamental rights" and services deemed to involve "basic necessities of life." See Memorial Hospital v Maricopa County, supra, 415 US, at 259, 39 L Ed 2d 306, 94 S Ct 1076.

12. "Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it." The Passenger Cases, 7 How 283, 492, 12 L Ed 702 (1849) (Chief Justice Taney, dissenting).

13. Starns v Malkerson, 326 F Supp 234 (D Minn 1970), affirmed, 401 US 985, 28 L Ed 2d 537, 91 S Ct 1231 (1971) cannot be read as a contrary decision of this Court. First, summary affirmance by this Court is not to be read as an adoption of the reasoning supporting the judgment under review. Fusari v Steinberg, 419 US 379, 391, 42 L Ed 2d 521, 95 S Ct 533 (1975) (concurring opinion). See also Colorado Springs Amusement Ltd. v Rizzo, 423 US 913, 920–921, 49 L Ed 2d 1222, 96 S Ct 3228 (1976) (Brennan, J., dissenting); Edelman v Jordan, 415 US 651, 671, 39 L Ed 2d 662, 94 S Ct 1347 (1974). Moreover, as we pointed out in Vlandis v Kline, supra, at 452–453, n 9, 37 L Ed 2d 63, 93 S Ct 2230, we considered the Minnesota one-year residency requirement examined in Starns a test of bona fide residence, not a return on prior contributions to the commonweal.

1. What is notably at stake in this case, and what clearly must be taken into account in determining the constitutionality of this legislative scheme, is the *national* interest in a fluid system of interstate movement. It may be that national interests are not always easily translated into individual rights, but where the "right to travel" is involved, our cases leave no doubt that it will trigger intensified equal protection scrutiny. See, e.g., Memorial Hospital v Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974); Dunn v Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995 (1972); Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969). As the Court notes, the "right to travel" is implicated not only by "actual barriers to interstate movement," but by "state distinctions between newcomers and longer-term residents." Ante, at [illegible] n 6, 72 L Ed 2d 677, 678.

law will survive that scrutiny if he distinction it makes rationally urthers a legitimate state purpose. ome particularly invidious distinc- ons are subject to more rigorous crutiny. Appellants claim that the istinctions made by the Alaska law hould be subjected to the higher vel of scrutiny applied to the dura- onal residency requirements in hapiro v Thompson, supra and Me- orial Hospital v Maricopa County, upra. The State, on the other hand, serts that the law need only meet he minimum rationality test. In ny event, if the statutory scheme annot pass even the minimal test roposed by the State, we need not ecide whether any enhanced scru- ny is called for.

A

The State advanced and the laska Supreme Court accepted ree purposes justifying the distinc- tions made by the dividend program: (a) creation of a financial incentive for individuals to establish and maintain residence in Alaska; (b) encouragement of prudent manage- ment of the Permanent Fund; and (c) apportionment of benefits in rec- ognition of undefined "contributions of various kinds, both tangible and intangible, which residents have made during their years of resi- dency," 619 P2d, at 458.[7]

As the Alaska Supreme Court apparently realized, the first two state objectives—creating a financial incentive for individuals to establish and maintain Alaska residence, and assuring prudent management of the Permanent Fund and the State's natural and mineral resources—are not rationally related to the distinctions Alaska seeks to make between newer residents and those who have been in the State since 1959.[8] Assuming arguendo that granting increased dividend benefits for each year of continued Alaska residence might give some residents an incentive to stay in the state in order to reap increased dividend benefits in the future, the State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment.[9]

Nor does the State's purpose of furthering the prudent management of the Permanent Fund and the state's resources support retrospective application of its plan to the date of statehood. On this score the state's contention is straightforward:

> "[A]s population increases, each individual share in the income stream is diluted. The income must be divided equally among increasingly large numbers of people. If residents believed that twenty years from now they would be required to share permanent fund income on a per capita basis with the large population that Alaska will no doubt have by then, the temptation would be great to urge the legislature to provide immediately for the highest possible return on the investments of the permanent fund principal, which would require investments in riskier ventures."

Williams v Zobel, supra, 619 P2d, at 462. The State similarly argues that equal per capita distribution would encourage rapacious development of natural resources. Ibid. Even if we assume that the state interest is served by increasing the dividend for each year of residency beginning with the date of enactment, is it rationally served by granting greater dividends in varying amounts to those who resided in Alaska during the 21 years prior to enactment? We think not.

The last of the State's objectives—to reward citizens for past contributions—alone was relied upon by the Alaska Supreme Court to support the retrospective application of the law to 1959. However, that objective is not a legitimate state purpose. A similar "past contributions" argument was made and rejected in Shapiro v Thompson, supra, 394 US, at 632-633, 22 L Ed 2d 600, 89 S Ct 1322:

> "Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contributions they have made to the community through the payment of taxes. . . . Appellant's reasoning would permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens. *The Equal Protection Clause prohibits such an apportionment of state services.*" (Emphasis added.)

Similarly, in Vlandis v Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230

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956). In addition to protecting persons ainst the erection of actual barriers to in- state movement, the right to travel, when plied to residency requirements, protects w residents of a state from being disadvan- ed because of their recent migration or em otherwise being treated differently from nger-term residents. In reality, right to avel analysis refers to little more than a rticular application of equal protection alysis. Right to travel cases have examined, equal protection t os, state distinctions tween newcomers and longer-term resi- nts. See Memorial Hospital v Maricopa unty, supra; Dunn v Blumstein, supra; Sha- ro v Thompson, supra. This case also in- olves distinctions between residents based on hen they arrived in the State and is there- re also subject to equal protection analysis.

7. These purposes were enumerated in the st section of the act creating the dividend tribution plan, 21 Alaska Sess Laws § 1(b):
"(b) The purposes of this Act are
(1) to provide a mechanism for equitable stribution to the people of Alaska of at least 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 (art IX, sec 15, state constitution)."
Thus we need not speculate as to the objectives of the legislature.

8. In response to the argument that the objectives of stabilizing population and encouraging prudent management of the Permanent Fund and of the State's natural resources did not justify the application of the dividend program to the years 1959 to 1980, the Alaska Supreme Court maintained that the retrospective aspect of the program was justified by the objective of rewarding state citizens for past contributions. 619 P2d, at 461-462 n 37. See also dissenting opinion of Justice Dimond, 619 P2d, 469-471.

9. In fact, newcomers seem more likely to become dissatisfied and to leave the State than well-established residents, it would thus seem that the State would give a larger, rather than a smaller, dividend to new residents if it wanted to discourage emigration. The separation of residents into classes hardly seems a likely way to persuade new Alaskans that the State welcomes them and wants them to stay.

Of course, the State's objective of reducing population turnover cannot be interpreted as an attempt to inhibit migration into the State without encountering insurmountable constitutional difficulties. See Shapiro v Thompson, supra, 394 US, at 629, 22 L Ed 2d 600, 89 S Ct 1322.

Alaska dividend-distribution law, and this threat to free interstate migration provides an independent rationale for holding that law unconstitutional. At the outset, however, I note that the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proven both inconclusive and unnecessary. Justice O'Connor plausibly argues, post, at ———, 72 L Ed 2d 699-690, that the right predates the Constitution and was carried forward in the Privileges and Immunities Clause of Article IV. But equally plausible, I think, is the argument that the right resides in the Commerce Clause, see Edwards v California, 314 US 160, 173, 86 L Ed 119, 62 S Ct 164 (1941), or in the Privileges and Immunities Clause of the Fourteenth Amendment, see id., at 177-178, 86 L Ed 119, 62 S Ct 164 (Douglas, J., concurring). In any event, in light of the unquestioned historic recognition of the principle of free interstate migration, and of its role in the development of the Nation, we need not feel impelled to "ascribe the source of this right to travel interstate to a particular constitutional provision." Shapiro v Thompson, 394 US 618, 630, 22 L Ed 2d 600, 89 S Ct 1322 (1969). It suffices that:

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

". . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." Id. at 630-631, 22 L Ed 2d 600, 89 S Ct 1322, quoting United States v Guest, 383 US 745, 757-758, 16 L Ed 2d 239, 86 S Ct 1170 (1966).

As is clear from our cases, the right to travel achieves its most forceful expression in the context of equal protection analysis. But if, finding no citable passage in the Constitution to assign as its source, some might be led to question the independent vitality of the principle of free interstate migration, I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation. A scheme of the sort adopted by Alaska is inconsistent with the Federal structure even in its prospective operation.

A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addition, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry. It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation. But a State cannot *compound* its offer of direct benefits in the inventive manner exemplified by the Alaska distribution scheme: For if each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one State would thereby forfeit his accrued seniority, only to have to begin building such seniority again in his new State of residence, then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive.

II

The Court today reaffirms the important principle that, at least with respect to a durational-residency discrimination, a State's desire "to reward citizens for past contributions" is "clearly not a legitimate state purpose." Ante, at ———, 72 L Ed 2d 679. I do not think it "odd," post, at —, 72 L Ed 2d 695, that the Court disclaims reliance on the "right to travel" as the source of this limitation on state power. In my view, the acknowledged illegitimacy of that state purpose has a different heritage—it reflects not the structure of the Federal Union but the idea of constitutionally protected equality. See Shapiro v Thompson, 394 US, at 632-633, 22 L Ed 2d 600, 89 S Ct 1322 ("The Equal Protection Clause prohibits such an apportionment of state services."); Vlandis v Kline, 412 US 441, 450, n 6, 37 L Ed 2d 63, 93 S Ct 2230 (1973). The Constitution places the recently naturalized immigrant from a foreign land on an equal footing with those citizens of a State who are able to trace their lineage back for many generations within the State's borders. The eighteen year old native resident of a State is as much a citizen as the fifty-five year old native resident. But the Alaska plan discriminates against the recently naturalized citizen, in favor of the Alaska citizen of longer duration; it discriminates against the eighteen year old native resident, in favor of all residents of longer duration. If the Alaska plan were limited to discriminations such as these, and did not purport to apply to migrants from sister States, interstate travel would not be noticeably burdened—yet those discriminations would surely be constitutionally suspect.

The Fourteenth Amendment guarantees the equal protection of the law to anyone who may be within the territorial jurisdiction of a State. That Amendment has not expressed by its terms that equal treatment might be denied a person depending upon how long that person *has been* within the jurisdiction of the State. The Fourteenth Amendment does, however, expressly recognize one elementary basis for distinguishing between persons who may be within a State's jurisdiction at any particular time—by setting forth the requirements for state citizenship. But it is significant that the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence.[2] That

[2] "[A] citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." Slaughter-House Cases, 16 Wall 36, 80, 21 L Ed 394 (1873). See id., at 112-113, 21 L Ed 394 (Bradley, J., dissenting) ("A citizen of the United States has a perfect constitutional right to go to and to abide in any State

Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.[2] And the Equal Protection Clause would not tolerate such distinctions. In short, as much as the right to travel, equality of citizenship is of the essence in our republic. As the Court notes, States may not "divide citizens into expanding numbers of permanent classes." Ante, at —, 72 L Ed 2d 680.

It is, of course, elementary that the Constitution does not bar the States from making reasoned distinctions between citizens: Insofar as those distinctions are rationally related to the legitimate ends of the State, they present no constitutional difficulty, as our equal protection jurisprudence attests. But we have never suggested that duration of residence vel non provides a valid justification for discrimination. To the contrary, discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself. To be sure, allegiance and attachment may be rationally measured by length of residence—length of residence may, for example, be used to test the bona fides of citizenship—and allegiance and attachment may bear some rational relationship to a very limited number of legitimate state purposes. Cf. Chimento v Stark, 353 F Supp 1211 (D NH), affirmed, 414 US 802, 38 L Ed 2d 39, 94 S Ct 125 (1973) (seven year citizenship requirement to run for governor); U. S. Const, art I, § 2, cl 2, § 3, cl 3; art II, § 1, cl 4. But those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare.

Permissible discriminations between persons must bear a rational relationship to their *relevant* characteristics. While some imprecision is unavoidable in the process of legislative classification, the ideal of equal protection requires attention to individual merit, to individual need. In almost all instances, the business of the State is not with the past, but with the present: to remedy continuing injustices, to fill current needs, to build on the present in order to better the future. The past actions of individuals may be relevant in assessing their present needs; past actions may also be relevant in predicting current ability and future performance. In addition, to a limited extent, recognition and reward of past public service has independent utility for the State, for such recognition may encourage other people to engage in comparably meritorious service. But even the idea of rewarding past public service offers scarce support for the "past contribution" justification for durational residence classifications since length of residence has only the most tenuous relation to the *actual* service of individuals to the State.

Thus, the past contribution rationale proves much too little to provide a rational predicate for discrimination on the basis of length of residence. But it also proves far too much, for "it would permit the State to apportion all benefits and services according to the past . . . contributions of its citizens." Shapiro v Thompson, 394 US, at 632 633, 22 L Ed 2d 600, 89 S Ct 1322. In effect, then, the past-contribution rationale is so far-reaching in its potential application, and the relationship between residence and contribution to the State so vague and insupportable, that it amounts to little more than a restatement of the criterion for discrimination that it purports to justify. But while duration of residence has minimal utility as a measure of things that are, in fact, constitutionally relevant, resort to duration of residence as the basis for a distribution of state largesse does closely track the constitutionally untenable position that the longer one's residence, the worthier one is of the State's favor. In my view, it is difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others." We rejected that premise and, I believe, implicitly rejected most forms of discrimination based upon length of residence, when we adopted the Equal Protection Clause.

Justice O'Connor, concurring in the judgment.

The Court strikes Alaska's distribution scheme, purporting to rely solely upon the Equal Protection Clause of the Fourteenth Amendment. The phrase "right to travel" appears only fleetingly in the Court's analysis, dismissed with an observation that "right to travel analysis refers to little more than a particular application of equal protection analysis." Ante, at —, n 6, 72 L Ed 2d 677-678. The Court's reluctance to rely explicitly on a right to travel is odd, because its holding depends on the assumption that Alaska's desire "to reward citizens for past contributions . . . is not a legitimate state purpose." Ante, at —, 72 L Ed 2d 679. Nothing in the Equal Protection Clause itself, however, declares this objective illegitimate. Instead, as a full reading of Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969), and Vlandis v Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230 (1973), reveals, the Court has rejected this objective only when its implementation would abridge an interest in interstate travel or migration.

I respectfully suggest, therefore, that the Court misdirects its criticism when it labels Alaska's objective illegitimate. A desire to compensate citizens for their prior contributions is neither inherently invidious nor irrational. Under some circumstances, the objective may be wholly reasonable.[1] Even a generalized de-

he chooses, and to claim citizenship therein, and an equality of rights with every other citizen.")

3. The American aversion to aristocracy developed long before the Fourteenth Amendment and is, of course, reflected elsewhere in the Constitution. See art I, § 9, cl 8 ("No title of Nobility shall be granted by the United States."). See also Virginia Bill of Rights (1776), Rutland, The Birth of the Bill of Rights, App A ("No man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services").

1. A State, for example, might choose to divide its largesse among all persons who previously have contributed their time to volunteer community organizations. If the State graded its dividends according to the number of years devoted to prior community service, it could be said that the State intended "to reward citizens for past contributions." Alternatively, a State might enact a tax credit for citizens who contribute to the State's ecology by building alternative fuel sources or establishing recycling plants. If the State made this credit retroactive, to benefit those citizens who launched these improvements before they became fashionable, the State once again would be rewarding past contributions. The Court's opinion would dismiss these objectives as wholly illegitimate. I would recognize them as valid goals and examine only whether the

sire to reward citizens for past endurance, particularly in a State where years of hardship only recently have produced prosperity, is not innately improper. The difficulty is that plans enacted to further this objective necessarily treat new residents of a State less favorably than the longer-term residents who have past contributions to "reward." This inequality, as the Court repeatedly has recognized, conflicts with the constitutional purpose of maintaining a Union rather than a mere "league of States." See Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869). The Court's task, therefore, should be (1) to articulate this constitutional principle, explaining its textual sources, and (2) to test the strength of Alaska's objective against the constitutional imperative. By choosing instead to declare Alaska's purpose wholly illegitimate, the Court establishes an uncertain jurisprudence. What makes Alaska's purpose illegitimate? Is the purpose illegitimate under all circumstances? What other state interests are wholly illegitimate? Will an "illegitimate" purpose survive review if it becomes "important" or "compelling"?[2] These ambiguities in the Court's analysis prompt me to develop my own approach to Alaska's scheme.

Alaska's distribution plan distinguishes between long-term residents and recent arrivals. Stripped to its essentials, the plan denies non-Alaskans settling in the State the same privileges afforded longer-term residents. The Privileges and Immunities Clause of Article IV, which guarantees "[t]he Citizens of each State . . . all Privileges and Immunities of Citizens in the several States," addresses just this type of discrimination.[3] Accordingly, I would measure Alaska's scheme against the principles implementing the Privileges and Immunities Clause. In addition to resolving the particular problems raised by Alaska's scheme, this analysis supplies a needed foundation for many of the "right to travel" claims discussed in the Court's prior opinions.

implementation infringed any constitutionally protected interest.

2. The Court's conclusion that Alaska's scheme lacks a rational basis marks a puzzling aspect of its analysis. By refusing to extend any legitimacy to Alaska's objective, the Court implies that a program designed to reward prior contributions will never survive equal protection scrutiny. For example, the programs described in n 1, supra, could not survive the Court's analysis even if the State demonstrated a compelling interest in rewarding volunteer activity or promoting conservation measures. The Court's opinion, although purporting to apply a deferential standard of review, actually secures that any governmental program depending upon a "past contributions" rationale will violate the Equal Protection Clause.

3. While the Clause refers to "Citizens," this Court has found that "the terms 'citizen' and 'resident' are 'essentially interchangeable' . . . for purposes of analysis of most cases under the Privileges and Immunities Clause." Hicklin v Orbeck, 437 US 518, 524, n 8, 57 L Ed 2d 397, 98 S Ct 2482 (1978) quoting Austin v New Hampshire, 420 US 656, 662, n 8, 43 L Ed 2d 530, 95 S Ct 1191 (1975). This opinion, therefore, will refer to "nonresidents" of Alaska, as well as to "noncitizens" of that State.

It is settled that the Privileges and Immunities Clause does not protect corporations. See Paul v Virginia, 8 Wall 168, 19 L Ed 357 (1869). The word "Citizens" suggests that the Clause also excludes aliens. See, e.g., Id., at 177, 19 L Ed 357 (dictum); L. Tribe, American Constitutional Law § 6-34, at 411, n 10 (1978). Any prohibition of discrimination aimed at aliens or corporations must derive from other constitutional provisions.

I

Our opinions teach that Article IV's Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v Witsell, 334 US 385, 395, 92 L Ed 1460, 68 S Ct 1156 (1948). The Clause protects a nonresident who enters a State to work, Hicklin v Orbeck, 437 US 518, 57 L Ed 2d 397, 98 S Ct 2482 (1978), to hunt commercial game, Toomer, supra, or to procure medical services, Doe v. Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739 (1973).[4] A fortiori, the Privileges and Immunities Clause should protect the "citizen of State A who ventures into State B" to settle there and establish a home.

In this case, Alaska forces nonresidents settling in the State to accept a status inferior to that of old-timers. In its first year of operation, the distribution scheme would have given $1050 to an Alaskan who had lived in the State since statehood. A resident of ten years would have received $500, while a one-year resident would have received only $50. In effect, therefore, the State told its citizens: "Your status depends upon the date on which you established residence here. Those of you who migrated to the State cannot share its bounty on the same basis as those who were here before you." Surely this scheme imposes one of the "disabilities of alienage" prohibited by Article IV's Privileges and Immunities Clause. See Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869).

It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents. This argument, however, misinterprets the force of Alaska's distribution system. Alaska's scheme classifies citizens on the basis of their former residential status, imposing a relative burden on those who migrated to the State after 1959. Residents who arrived in Alaska after that date have a less valuable citizenship right than do the oldtimers who preceded them. Citizens who arrive in the State tomorrow will receive an even smaller claim on Alaska's resources. The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause. Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the State on less favorable terms than those who arrived earlier. The circumstance that some of the disfavored citizens already live in Alaska does not negate the fact that "The citizen of State A who ventures into [Alaska]" to establish a home labors

4. See generally Ward v Maryland, 12 Wall 418, 430, 20 L Ed 449 (1870) ("The Clause" plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; and to take and hold real estate.").

der a continuous disability.[5]

If the Privileges and Immunities clause applies to Alaska's distribution system, then our prior opinions describe the proper standard of review. In Baldwin v Fish & Game Commission, 436 US 371, 56 L Ed 2d 354, 98 S Ct 1852 (1978), we held that States must treat residents and nonresidents "without unnecessary distinctions" when the nonresident seeks to "engage in an essential activity or exercise a basic right." Id., at 387, 56 L Ed 2d 354, 98 S Ct 1852. On the other hand, if the nonresident engages in conduct that is not "fundamental" because it does not bea[r] upon the vitality of the Nation as a single entity," the Privileges and Immunities Clause affords no protection. Id., at 387, 388, 56 L Ed 2d 354, 98 S Ct 1852.

Once the Court ascertains that discrimination burdens an "essential activity," it will test the constitutionality of the discrimination under a two-part test. First, there must be "something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed." Hicklin v Orbeck, 437 US 518, 525-526, 57 L Ed 2d 397, 98 S Ct 2482 (1978) (quoting Toomer v Witsell, 334 US 385, 398, 92 L Ed 1460, 68 S Ct 1156 (1948)). Second, the Court must find a "substantial relationship" between the evil and the discrimination practiced against the noncitizens. Id., at 527, 57 L Ed 2d 397, 98 S Ct 2482.

Certainly the right infringed in this case is "fundamental." Alaska's statute burdens those nonresidents who choose to settle in the State.[6] It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes.[7] Alaska's encumbrance on the right of nonresidents to settle in that State, therefore, must satisfy the dual standard identified in Hicklin.

Alaska has not shown that its new residents are the "peculiar source" of any evil addressed by its disbursement scheme. The State does not argue that recent arrivals constitute a particular source of its population turnover problem. Indeed, the State urges that it has a special interest in persuading young adults, who have grown to maturity in the State, to remain there. Brief for Appellees 35, n 24. Nor is there any evidence that new residents, rather than old, will foolishly deplete the State's mineral and financial resources. Finally, although Alaska argues that its scheme compensates residents for their prior tangible and intangible contributions to the State, nonresidents are hardly a peculiar source of the "evil" of partaking in current largesse without having made prior contributions. A multitude of native Alaskans—including children and paupers—may have failed to contribute to the State in the past. Yet the State does not dock paupers for their prior failures to contribute, and it awards every person over the age of 18 dividends equal to the number of years that person has lived in the State.

Even if new residents were the peculiar source of these evils, Alaska has not chosen a cure that bears a "substantial relationship" to the malady. As the dissenting judges below observed, Alaska's scheme gives the largest dividends to residents who have lived longest in the State. The dividends awarded to new residents may be too small to encourage them to stay in Alaska. The size of these dividends appears to give new residents only a weak interest in prudent management of the State's resources. As a reward for prior contributions, finally, Alaska's scheme is quite ill-suited. While the phrase "substantial relationship" does not require mathematical precision, it demands at least some recognition of the fact that persons who have migrated to Alaska may have contributed significantly more to the State, both before and after their arrival, than have some natives.

For these reasons, I conclude that Alaska's disbursement scheme violates Article IV's Privileges and Immunities Clause. I thus reach the same destination as the Court, but along a course that more precisely identifies the evils of the challenged statute.

II

The analysis outlined above might apply to many cases in which a litigant asserts a right to travel or migrate interstate.[8] To historians

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5. See Note, A Constitutional Analysis of State Bar Residency Requirements under the Interstate Privileges and Immunities Clause of Article IV, 92 Harv L Rev 1461, 1464-1465, n 17 (1979) (labeling contrary argument "technical").

As the Court points out, ante, at ———, n 5, 72 L Ed 2d 677, Alaska's plan differentiates even among native Alaskans, by tying their benefits to date of birth. If the scheme merely distributed benefits on the basis of age, without reference to the date beneficiaries established residence in Alaska, I doubt it would violate the Privileges and Immunities Clause. Under these circumstances, a 25-year-old Texan establishing residence in Alaska would acquire the same privileges of citizenship held by a 25-year-old native Alaskan. The scheme would not treat the citizen who moves to the State differently from citizens who already reside there. The Court does not explain whether it would find such an age-based scheme objectionable.

6. The "burden" imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new State that he lacked completely in his former State. The Clause addresses only differences in treatment; it does not judge the quality of treatment a State affords citizens and noncitizens.

7. See also Baldwin v G.A.F. Seelig, Inc., 294 US 511, 523, 79 L Ed 1032, 55 S Ct 497 (1935) (the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"); Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869) ("Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists"); Edwards v California, 314 US 160, 173, 86 L Ed 119, 62 S Ct 164 (1941) ("constitution prohibits "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders").

8. Any durational residency requirement, for example, treats nonresidents who have exercised their right to travel to a State differently from longer term residents. This is not to say, however, that all such requirements would fail scrutiny under the Privileges and Immunities Clause. The durational residency requirement upheld in Sosna v Iowa, 419 US 393, 42 L Ed 2d 532, 95 S Ct 553 (1975) (one year to obtain divorce for example) would

ily would come as no surprise. Article IV's Privileges and Immunities Clause has enjoyed a long association with the rights to travel and migrate interstate.

The Clause derives from Article V of the Articles of Confederation. The latter expressly recognized a right of "free ingress and regress to and from any other State," in addition to guaranteeing "the free inhabitants of each of these states . . . the privileges and immunities of free citizens in the several states."[9] While the Framers of our Constitution omitted the reference to "free ingress and regress," they retained the general guaranty of "privileges and immunities." Charles Pinckney, who drafted the current version of Article IV, told the Convention that this Article was "formed exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, Records of the Federal Convention 112 (1934). Commentators, therefore, have assumed that the Framers omitted the express guaranty merely because it was redundant, not because they wished to excise the right from the Constitution.[10]

Early opinions by the Justices of this Court also traced a right to travel or migrate interstate to Article IV's Privileges and Immunities Clause. In Corfield v Coryell, 6 F Cas 546, 552 (No. 3,230) (CC ED Pa 1823), for example, Justice Washington explained that the Clause protects the "right of a citizen of one state to pass through, or to reside in any other state." Similarly, in Paul v Virginia, 8 Wall 168, 180, 19 L Ed 357 (1869), the Court found that one of the "undoubt[ed]" effects of the Clause was to give "the citizens of each State . . . the right of free ingress into other States, and egress from them. . . ." See also Ward v Maryland, 12 Wall 418, 430, 20 L Ed 449 (1871). Finally, in United States v Wheeler, 254 US 281, 297–298, 65 L Ed 270, 41 S Ct 133 (1920), the Court found that the Clause fused two distinct concepts: (1) "the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from" their own States, and (2) the right to exercise the same privileges in other States.

History, therefore, supports assessment of Alaska's scheme, as well as other infringements of the right to travel, under the Privileges and Immunities Clause. This Clause may not address every conceivable type of discrimination that the Court previously has denominated a burden on interstate travel. I believe, however, that application of the Privileges and Immunities Clause to controversies involving the "right to travel" would at least begin the task of reuniting this elusive right with the constitutional principles it embodies. Because I believe that Alaska's distribution scheme violates the Privileges and Immunities Clause of Article IV, I concur in the Court's judgment insofar as it reverses the judgment of the Alaska Supreme Court.

Justice Rehnquist, dissenting.

Alaska's dividend distribution scheme represents one State's effort to apportion unique economic benefits among its citizens. Although the wealth received from the oil deposits of Prudhoe Bay may be quite unlike the economic resources enjoyed by most States, Alaska's distribution of that wealth is in substance no different from any other State's allocation of economic benefits. The distribution scheme being in the nature of economic regulation, I am at a loss to see the rationality behind the Court's invalidation of it as a denial of equal protection. This Court has long held that state economic regulations are presumptively valid, and violate the Fourteenth Amendment only in the rarest of circumstances.

"When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., Lehnhausen v Lake Shore Auto Parts Co. 410 US 356 [35 L Ed 2d 351, 93 S Ct 1001] (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." New Orleans v Dukes, 427 US 297, 303, 49 L Ed 2d 511, 96 S Ct 2513 (1976).

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have survived under the analysis outlined above. In Sosna the State showed that nonresidents were a peculiar source of the evil addressed by its durational residency requirement. Those persons could misrepresent their attachment to Iowa and obtain divorces that would be susceptible to collateral attack in other States. Iowa adopted a reasonable response to this problem by requiring nonresidents to demonstrate their bona fide residency for one year before obtaining a divorce. I am confident that the analysis developed in Hicklin v Orbeck, supra, will adequately identify other legitimate durational residency requirements.

9. Even before adoption of the Articles, a few of the colonies explicitly protected freedom of movement. The Rhode Island Charter gave members of that colony the right "to pass and repasse with freedome, into and through the rest of the English Collonies, upon their lawfol and civill occasions." 7 Charters and Organic Laws of the United States, p 3217 (1909) (hereinafter Charters). The Massachusetts Body of Liberties provided: "Every man of or within this Jurisdiction shall have free libertie, notwithstanding any civill power, to remove both himselfe and his familie at their pleasure out of the same, provided there be no legall impediment to the contrarie." Id., at 178. Massachusetts showed some of the same liberality to foreigners entering the colony:

"Every people of other Nations professing the true Christian Religion shall flee to us from the Tiranny or oppression of their persecutors, or from famyne, warres, or the like necessary and compulsarie cause, They shall be entertayned and succoured among us, according to that power and prudence god shall give us." Ibid.

These attitudes contrasted with the more restrictive views prevailing in seventeenth century Europe. See generally id., at 163–171.

10. See, e.g., Chafee, supra, at 185; Note, The Right to Travel and Exclusionary Zoning, 26 Hastings LJ 849, 858–859 (1975); Comment, The Right to Travel: In Search of a Constitutional Source, 55 Neb L Rev 117, 119–120, n 14 (1975); Comment, A Strict Scrutiny of the Right to Travel, 22 UCLA L Rev 1120, 1130, n 7 (1975).

See also Austin v New Hampshire, 420 US 656, 661, 43 L Ed 2d 530, 95 S Ct 1191 (1975) (Article IV of the Articles of Confederation was "carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation"); United States v Wheeler, 254 US 281, 294, 65 L Ed 2d 270, 41 S Ct 133 (1920) ("The text of Article IV, § 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and . . . that view has been so concisely embodied as to leave no room for controversy").

also Minnesota v Clover Leaf Creme y Co. 449 US 456, 66 L Ed 2d 659, 101 S Ct 715 (1981); United States Railroad Retirement Board v Fritz, 449 US 166, 66 L Ed 2d 368, 101 S Ct 453 (1980); Hughes v Alexandria Scrap Corp. 426 US 794, 49 L Ed 2d 220, 96 S Ct 2488 (1976).

Despite the highly deferential approach which we invariably have taken toward state economic regulations, the Court today finds the retroactive aspect of the Alaska distribution scheme violative of the Fourteenth Amendment. The Court concludes that the State's first two justifications are not rationally related to the retroactive portion of the distribution scheme, and that the third justification—the reward of citizens for their past contributions—is not a legitimate state objective But the illegitimacy of a State's recognizing the past contributions of its citizens has been established by the Court only in certain cases considering an infringement of the right to travel,[1] and the majority itself rightly declines to apply the strict scrutiny analysis of those right-to-travel cases. See ante, at -- and n 6, 72 L Ed 2d 677-678. The distribution scheme at issue in this case impedes no person's right to travel to and settle in Alaska; if anything, the prospect of receiving annual cash dividends would encourage immigration to Alaska. The State's third justification cannot, therefore, be dismissed simply by quoting language about its legitimacy from right-to-travel cases which have no relevance to the question before us.

So understood, this case clearly passes equal protection muster. There can be no doubt that the state legislature acted rationally when it concluded that dividends retroactive to the year of statehood would "recognize the 'contributions of various kinds, both tangible and intangible,' which residents have made during their years of state residency." Williams v Zobel, 619 P2d 448, 458 (Alas 1980). Nor can there be any doubt that Alaska, perhaps more than any other State in the Union, has good reason for recognizing such contributions.[2] Because the distribution scheme is thus rationally based, I dissent from its invalidation under the guise of equal protection analysis.[3] In striking down the Alaskan scheme, the Court seems momentarily to have forgotten "the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their view of what constitutes wise economic or social policy." Dandridge v Williams, 397 US 471, 486, 25 L Ed 2d 491, 90 S Ct 1153 (1970).

1. The Court relies upon Shapiro v Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969), and Vlandis v Kline, 412 US 441, 37 L Ed 2d 63, 93 S Ct 2230 (1973), in holding that Alaska may not justify its dividend distribution scheme by a desire to reward its citizens for their past contributions. In Shapiro, however, the Court found that the classification at issue "touche[d] on the fundamental right of interstate movement" and therefore could be justified only if it promoted a *"compelling* state interest." 394 US, at 638, 22 L Ed 2d 600, 89 S Ct 1322 (emphasis in original). Similarly, Vlandis concerned the right to move to and establish residency in Connecticut, and noted only in dicta that rewarding citizens for their past contributions was an impermissible state objective. See 412 US, at 449-450, n 6, 37 L Ed 2d 63, 93 S Ct 2230.

Although I have expressed my disagreement with this holding even in the right-to-travel cases, see Memorial Hospital v Maricopa County, 415 US 250, 286-287, 39 L Ed 2d 306, 94 S Ct 1076 (1974) (Rehnquist, J., dissenting); Vlandis v Kline, 412 US, at 468-469, 37 L Ed 2d 63, 93 S Ct 2230 (same), there is no need to rely upon that dissenting position here. The majority does not analyze this as a right-to-travel case. Compare ante, at — and n 6, 72 L Ed 2d 677-678, with Memorial Hospital v Maricopa County, 415 US, at 261-262, 39 L Ed 2d 306, 94 S Ct 1076, and Shapiro v Thompson, 394 US, at 634, 636, 22 L Ed 2d 600, 89 S Ct 1322.

2. As the Alaska Supreme Court noted, those who have lived in Alaska from the year of its statehood have borne unusual expenses and hardships:

"'A government such as the one embodied in the Alaska constitution, . . . with its complete range of governmental services, was extensive for a State with limited sources of taxation. Alaska could only boast a couple of pulp mills . . . The State's business enterprises were small and catered mostly to local needs. In addition, Alaska's population was modest and hardly amounted to more than that of a medium-sized city in the continental United States.

Accordingly, revenues were small. Yet, the demands were great. The State government had to provide all the governmental services and social overhead required by modern American society. For instance, it would have been relatively simple to build a few roads, furnish normal police protection, and establish the customary school facilities. But nothing was normal in Alaska; it was and remains a land of superlatives. Subarctic engineering is relatively new, but the State would have to face the problem of permafrost conditions that frequently cause the roadtop to buckle and heave. Police protection would have to be provided for an area one-fifth the size of the forty-eight United States but with very few roads available. Flying would become a way of life for law enforcement officials as well as other Alaskans—an expensive way of life. "Bush schools" scattered along the Aleutian chain, through the Yukon Valley, and on the Seward Peninsula and the islands of southeastern Alaska were expensive to maintain. It was not until the discovery of oil on a large scale that the picture changed.'" Williams v Zobel, 619 P2d 448, 462, n 37 (1980) (quoting C.M. Naske, An Interpretive History of Alaskan Statehood 169-170 (1973)).

3. I also disagree with the suggestion of Justice O'Connor that the Alaska distribution scheme contravenes the Privileges and Immunities Clause of Art IV of the Constitution. That Clause assures that *nonresidents* of a State shall enjoy the same privileges and immunities as residents enjoy: "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v Witsell, 334 US 385, 396, 92 L Ed 1460, 68 S Ct 1156 (1948). We long ago held that the Clause has no application to a citizen of the State whose laws are complained of. "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the State. It threw around them no safeguard; it only secured to the citizen of the State such rights as the laws or constitution of the State conferred or created. Nor did it profess to control the power of the State governments over the rights of its own citizens." The Slaughter-House Cases, 16 Wall 36, 77, 21 L Ed 394 (1873).

ATTACHMENT 4

Will Condon on Pioneers' Home Issue

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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November 26, 1982

Gerald L. Wilkerson
Legislative Auditor
Division of Legislative Audit
Legislative Affairs Agency
Pouch W
Juneau, Alaska 99811

RECEIVED
FEB 28 1983

The Honorable Carole J. Burger
Commissioner
Department of Administration
Pouch C
Juneau, Alaska 99811

Re: Pioneers' Homes; Our files:
366-138-83 and J99-101-80

Dear Mr. Wilkerson and Ms. Burger:

I. INTRODUCTION

The Division of Legislative Audit has posed to this department two interpretation questions concerning the statutes establishing the Alaska Pioneers' Homes program. The Department of Administration has sought the assistance of this department with administrative regulations that raise fundamental questions as to the validity of the program.

The Alaska Pioneers' Homes program is one of the oldest Alaska institutions. It was established by the First Territorial Legislature in 1913 and has continued uninterrupted for nearly 70 years. Its operation was continuously approved by Congress until 1959, when Alaska became a state and congressional review of

territorial actions was no longer necessary (Organic Act, §§ 9, 20). Originally geared to prospectors, the program has always had as its goal the housing and care of persons who have lived in Alaska a significant period of time.

Relatively recent United States Supreme Court opinions have placed that fundamental element of the program in severe jeopardy -- the Court has ruled that discriminations between persons based on length of residency are often unconstitutional. The opinions of the Court leave only a few narrow arguments available to save the program.

II. SUMMARY

In a September 20, 1982, letter, the Division of Legislative Audit posed two questions regarding the legislative intent behind AS 47.25.030, one of the statutes governing the Pioneers' Homes program. AS 47.25.030 provides, in relevant part:

> A citizen of the United States over 65 years of age who is a resident of the state and has been a resident for not less than 15 years continuously immediately preceding his application, but who is not destitute, may on application be admitted to the home upon his agreement to pay to the state a sum for each day as the Department of Administration considers sufficient to compensate the state for the cost of care and support of the person at the home.

The division wished to know the intent behind the "sufficient to compensate the state" language and whether the legislature wanted destitute persons (those eligible for admission to the Homes

under AS 47.25.020) to have priority in admission over those able to pay.

In addition, the Department of Administration has requested our assistance in drafting and reviewing proposed regulations for the Pioneers' Homes. These regulations include implementation of the statutory standards for admission set forth in AS 47.25.020, AS 47.25.030 and AS 47.25.035. Briefly, these standards are that persons of any age who are "destitute and in need of the aid or benefit of the home because of physical disability or other cause" and have continuously resided in the state for 15 years may be admitted to the home without payment. Non-destitute persons over the age of 65 who have continuously resided in the state for 15 years may also be admitted upon payment of a certain sum to the state which is "sufficient to compensate" the state for their care. The 15-year continuous residency requirement may be forgiven if the applicant has otherwise resided in the state for 30 years.

Under AS 44.62.060(b), this department must review each regulation and make a written statement concerning a regulation's "legality, constitutionality, and consistency with other regulations." AS 44.62.060(b)(1). The lieutenant governor may not accept regulations for filing unless there is such a statement from this office approving the regulations. This opinion sets out our constitutional analysis of these regulations.

The courts analyze residency requirements under different standards of review, depending on whether the right or benefit denied is a "fundamental political right" or "a basic necessity of life." Memorial Hospital v. Maricopa County, 415 U.S. 20 (1974); Hawaii Boating Association v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981); Williams v. Zobel, 619 P.2d 448, 453 (Alaska 1980), rev'd on other grounds; Zobel v. Williams, __ U.S. __, 72 L.Ed 2d 672 (1982). If access to the Pioneers' Homes is considered to be access to a "basic necessity of life," then the state must show that a distinction based on length of residence is "absolutely necessary to promote a compelling state interest" -- a test that is rarely met. Williams v. Zobel, 619 P.2d at 453. The Pioneers' Homes residency requirement would not survive this analysis.

On the other hand, if the Pioneers' Homes program does not involve access to a "basic necessity of life," then a much less strict standard of review is used, and arguments can be advanced for the constitutionality of the program.

We believe that the Pioneers' Homes program arguably does not involve access to a "basic necessity of life" so as to invoke the strict standard of review. Consequently, there are defenses or the constitutionality of the entire program.

Finally, it is our opinion that the destitute and disabled have priority in admission to the Pioneers' Homes and

the statutory requirement that non-destitutes pay an amount "sufficient to compensate the state" was not intended to mandate the recovery of all costs of a person's care.

Our conclusion that the Pioneers' Homes program can possibly be sustained does not mean that we believe a court would, if faced with the question, necessarily rule that it is constitutional. In other words, while there are legitimate arguments to defend it, we cannot guarantee their success in court. Indeed, there are numerous serious and potential fatal attacks that could be mounted against the entire program. But, since the program has continued uninterrrupted for approximately 70 years, we believe that it is appropriate for the courts rather than this department to make the final judgment rejecting all serious arguments in support and, if it is the proper conclusion, stopping the program. In the absence of that court ruling, therefore, we believe it is appropriate to continue the program and finish the proposed regulation project.

III. ANALYSIS

History

Before addressing these questions, a brief overview of the history of the Pioneers' Homes program is helpful. The Pioneers' Homes program has been an important institution in Alaska for almost 70 years.

In 1913 the first territorial legislature in Alaska accepted the offer of the United States government to turn over

some Marine barracks buildings in Sitka for use as a home for indigent ailing persons who wished to stay in Alaska. Chapter 80, SLA 1913, set up a three-member, unpaid board of trustees to manage and control "a home for indigent prospectors and others who have spent their years in Alaska and become dependent." The home was declared open to "[e]very worthy pioneer, or other person, who shall have been a resident of the Territory of Alaska for five years preceding his application for admission and who shall need the aid or benefit of said Home in consequence of physical disability or other cause within the scope of the regulations of the board." 1/ The legislature appropriated $10,000 for the operation of the Sitka home. 2/

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1. Although nothing in the 1913 act specifically limited eligibility to men, this apparently was the intent, as evidenced by § 6, ch. 64, SLA 1915 (setting up the allowance program discussed later in this memorandum): "Women who are otherwise qualified to apply for relief under this Act, may make application hereunder, and if entitled thereto shall receive the allowance herein provided for, notwithstanding the fact that as women they might not be eligible to be received in the Alaska Pioneers' Home."

2. Also in 1913, the legislature established the Board of Aged Prospectors Home Commission, to "investigate as to the climatic and other conditions of the several hot springs in Interior Alaska, the adaptability of same for use as a home for aged prospectors, the title price and possible methods of securing same, and to secure options on property adjoining any such springs as may be determined upon as desirable for such purpose." Ch. 78, SLA 1913. Apparently nothing became of this investigation, since this legislation was repealed in 1923. Ch. 7, SLA 1923. A Pioneers' Home was finally opened in Fairbanks in 1967.

The home opened on September 2, 1913, with 5 residents, and quickly expanded to 51 residents by February, 1915. According to the initial report of the board, operations were successful. A copy of that report is enclosed with this opinion.

In 1915 the legislature enacted an alternative program for Alaska's impoverished older residents. Chapter 64, SLA 1915 established a predecessor program to the current longevity bonuses (AS 47.45): any "pioneer" 65 or older, who had resided in Alaska for ten consecutive years since 1905 and who was "entitled to the benefits of the Alaska Pioneers' Homes" could, in lieu of applying for admission to the Homes, apply to the Homes' board of trustees for a monthly allowance not to exceed $12.50, to be paid out of the "revenues" of the Homes "in excess of suitable provisions for inmates of said Homes and those likely to be admitted thereto," and set according to the applicant's needs. The board could in its discretion deny the application if it found the applicant's case not "worthy." In 1917 the age requirement for women was lowered to 60, and the ceiling on allowances for them raised to $25 a month. Chapter 49, SLA 1917. Chapter 17, SLA 1919 increased the residency requirement to 15 years immediately preceding the application, and specifically excluded from eligibility "Natives or other Indians," who were defined as not being

"pioneers." 3/ In 1923 the ceiling on allowances was raised again, to $25 a month for men and $45 for women, and the requirement that allowances be paid out of "revenues of the Home" was replaced by a provision that allowances were to be paid out of money appropriated by the legislature for them. 4/

The 1929 legislature repealed the earlier acts on both Pioneers' Homes and allowances and enacted one omnibus piece of legislation, chapter 65, SLA 1929, "to revise and codify the laws relative to the care and support of the destitute and the needy." With respect to the Homes, chapter 65 essentially reenacted the 1913 legislation, with one significant change. Under section three, a five-year resident "in need of the aid or benefit of said Home in consequence of physical disability or other cause"

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3. In 1925, however, the legislature amended the act to exclude only "any Indian or Eskimo resident of the Territory who is provided for by the Department of the Interior out of the funds of the Treasury of the United States or . . . any ward of the Government of the United States." Ch. 65, SLA 1925. This change, though, was apparently not a substantial one; evidently it still excluded most Natives. The 1925 legislature saw a heated debate over the exclusion of Natives, with one representative threatening to tie up the whole program if the exclusion were not lifted.

4. It is unclear whether the allowance program before 1923 was actually dependent on whether the Home generated revenue, i.e., spent less than the sum appropriated for it. For, from 1915 on, an appropriation was made specifically for allowances. The initial appropriation, § 7, ch. 64, SLA 1915, referred to "revenue of said Home." But some subsequent appropriations lacked this reference. For instance, the 1919-20 budget, ch. 36, SLA 1919, contained separate appropriations for the Home and for the allowance program.

was not entitled to admission unless destitute. As a corollary, section five authorized, but did not require, the board to admit non-destitute ten-year residents over age sixty-five 5/ "upon his agreement to pay to the Territory such sum per day as the Board may deem sufficient to compensate the Territory for the cost of care and support of such person at the Home." 6/ With respect to the pioneers' allowances, section nine lengthened the residency requirement so as to cover only those who had resided in Alaska continuously since January 1, 1906, and section eleven raised the maximum allowance for men from $25 to $35. (Women remained at $45.)

In 1935 the January 1, 1906 requirement of the allowance program was changed to a simple 25-year residency requirement. Ch. 47, SLA 1935. However, the entire program was abolished in 1947 (ch. 73, SLA 1947) probably because a general old age assistance program, with far less strenuous residency requirements had been enacted in 1937. Chapter 2, L. Ex. Sess. 1937.

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5. Although the Pioneers' Homes are generally thought of as senior citizens' homes, there is no age limitation for destitute residents admitted under AS 47.25.020, only for non-destitute residents admitted under § 30.

6. The 1929 legislation also provided that the members of the board of trustees other than the governor receive salaries.

Several changes have also been made to the statutory structure of the Pioneers' Homes program. In 1946 the provisions relating to the board of trustees were overhauled, and a new section defining the rights and duties of the superintendent of the home was added. Chapter 29, SLA 1946. In 1955 the legislature added the provision, now found at AS 47.25.020(b), that persons entitled to admission (i.e., destitute persons) could be required to pay to the home all income in excess of a certain sum (then $15, now $35). Chapter 158, SLA 1955. The same chapter also authorized the board to pay an allowance (then $5 per month, now $35 under AS 47.25.020(c)) to totally indigent residents. In 1961 the Alaska residency requirement for admission was raised to the present 15 years, chapter 89, SLA 1961, up from 5 years for persons entitled to admission (AS 47.25.020) and 10 for persons eligible for admission on payment (AS 47.25.030). In addition to these statutory changes, a significant physical change took place: the construction of a new Pioneers' Home in Sitka in 1934, built by the WPA on the site of the old Home. 7/

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7. During construction of the new home the residents were housed for a year or two, at facilities at Goddard Hot Springs in southeast Alaska.

Since 1961 there have only been minor changes in the statutes governing the Pioneers' Homes program. 8/ The program itself, however, has grown tremendously; its budget for the 1983 fiscal year is nearly $19 million. In addition to the Sitka Home, there are now Homes in Fairbanks (dedicated in 1967), Palmer (1971), Anchorage (1977), and Ketchikan (1981), and planning is underway for a Home in Juneau. The five existing Homes, plus a small senior center in Kotzebue run under contract with the program, are capable of housing 635 people.

Although the Pioneers' Homes are capable of housing 635 people, only 519 people are currently in residence making the actual cost per year per resident approximately $36,600. 9/

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8. Chapter 71, SLA 1963, authorized the establishment of branch Homes besides the one in Sitka. Chapter 63, SLA 1965, changed the dollar figures in AS 47.25.020(b) and (c), discussed above. Executive Order 30, issued in 1968, transferred responsibility for the Homes to the Department of Administration. Chapter 118, SLA 1968, repealed the prohibition on Indians and Eskimos, which had already been rendered ineffective by other provisions of law. Chapter 7, SLA 1971, raised the dollar figures in AS 47.25.020(b) and (c) to their current levels. And Chapter 89, SLA 1978, enacted AS 47.25.035, providing an exception to the continuous 15-year residency requirement for persons with 30 years total residency.

9. Many of the rooms in the Pioneers' Home in Sitka were designed for double occupancy but for privacy reasons are used by only one person. Due to the growing waiting list, these rooms will return to double occupancy as needed. Other current vacancies in the Homes are due to the remodeling of the Anchorage Pioneers' Home as well as to the fact that a limited number of beds in the nursing portions of the Homes must be kept vacant to allow for emergency use by current residents.

This figure and the total Pioneers' Homes program budget of nearly $19 million for fiscal year 1983 may be compared with the state's public assistance programs which include Aid to Families with Dependent Children, Adult Public Assistance (former separate programs for the blind, disabled, and aged), and General Relief. These programs require a total of approximately $34 million in state general funds matched with $21 million from the federal government. Under the AFDC program, over 13,500 people may receive assistance in any one month. A family of four with no income may be eligible for a maximum of $15,857 per year in assistance which would be allotted as follows:

$ 7,608	AFDC payments
3,264	Food stamps
425	Energy benefit
4,560	Medicaid benefit if needed
$15,857	

The recipients of AFDC assistance or other categorical aid must meet a variety of eligibility requirements depending upon the type of aid sought. All must, however, fall below specific income levels to qualify for help.

Of the 519 persons presently participating in the Pioneers' Homes program, 515 were admitted under the non-destitute, over 65 and paying clause (AS 47.25.030), while only four were admitted under AS 47.25.020 because they were destitute and disabled. Thus, the program now is for practical purposes no longer a home for the needy -- at least as the

statutes make that distinction. Instead, the program is more of a retirement home for non-destitute "pioneers."

Furthermore, even for the destitute and disabled, the ioneers' Homes program is essentially duplicative of existing programs. Alaska has chosen to participate in the medical assistance program of subchapter XIX of the federal social security program, 42 U.S.C. § 1396, et seq. See AS 47.07.010. That program provides federal money to the state to assist with medical costs of the needy, contingent upon the state's meeting a lengthy list of conditions set out in 42 U.S.C. § 1396a. Disabled persons entitled to admission to the Pioneers' Homes are also covered by subchapter XIX. See 42 U.S.C. § 1396a(a)(10) (state plan shall provide certain medical services to all individuals receiving aid or assistance under a state plan approved under subchapter XVI of Social Security Act; subchapter XVI relates to supplemental security income for the aged, blind, and disabled). Even if § 1396a(a)(10) does not require states to pay for nursing home costs of the disabled -- see subparagraph (A) and 42 U.S.C. § 1396d(a) -- Alaska has chosen to provide this care. AS 47.07.030; 7 AAC 43.005(b)(2) and (3).

The eligibility standards under the Alaska program are found in Title 7, Part 3 of the Alaska Administrative Code (Health and Social Services -- Family and Children Services). 7 AAC 40.170(a) adopts the federal definition of disability in

42 U.S.C. § 1382c(a)(3). That definition basically provides that a person is disabled only if his physical or mental impairment precludes him from engaging in any kind of "substantial gainful work." Disabled persons eligible for medical assistance are those eligible for (but not necessarily receiving) Adult Public Assistance (APA) payments, plus a few others. 7 AAC 43.020(a). APA eligibility is defined in 7 AAC 40: a person may not have resources in excess of $1,500 for an individual or $2,250 for a married couple (7 AAC 40.270), subject to numerous resource exclusions (7 AAC 40.280--290), and may not have income in excess of certain amounts, depending on the person's status and living arrangements. These amounts, based on state rather than federal law, will be listed in the soon-to-be-promulgated 7 AAC 40.310.

These standards for medical assistance differ slightly from both those currently utilized by the Pioneers' Homes in making decisions under AS 47.25.020 and those in the Homes' proposed regulations, 2 AAC 30. Under present policies, as set forth in the current Policy and Procedures Manual of the Pioneers' Homes (the section on admissions policies became effective in February 1981), income limits for destitutes are the same as for the Adult Public Assistance (aged, blind, and disabled) program, and resource limits may be tougher. The policy manual sets a ceiling of $35,000 on the value of an applicant's property, while

under 7 AAC 40.280(a)(1) the applicant's home seems to be excluded from counted resources regardless of the home's value.) The policy manual's definition of disability, though, seems laxer than the definition in 42 U.S.C. § 1382c(a)(3) cited above: according to the manual a person is eligible under AS 47.25.070 if he or she "has a physical infirmity, disability or impairment that prohibits activity, or other disability which makes it necessary for them [sic] to receive assistance from others in coping with the problems of daily living." The proposed regulation on income and resources, 2 AAC 30.030(a), seems to use the current resources guidelines, but the Aged, Blind and Disabled income limits (to be issued in 7 AAC 40.310) uses federal Office of Management and Budget poverty guidelines. The proposed regulation on need under AS 47.25.020 and 2 AAC 30.040 approximates current policy on what constitutes a disability.

Constitutionality of Residency Requirements

Addressing the most fundamental matter first, the question is whether the 15-year, continuous residence (or 30 years of total residence) requirement is constitutional. As the former and present statutes and the program's history show, there are two separate purposes of the program.

First, the Homes are to provide care to the destitute disabled of any age. Second, the Homes also are to be retirement

Homes for non-destitute persons over 65 years old who could pay for their support.

A state may not deny access to welfare benefits or "basic necessities of life" like housing and care for the needy on the basis of length of residence unless the state can show that such a classification is absolutely necessary to promote a compelling state interest. Williams v. Zobel, 619 P.2d 448, 453 (Alaska 1980); Shapiro v. Thompson, 394 U.S. 618 (1969). This "strict scrutiny" test is rarely met. The Ninth Circuit Court of Appeals recently explained the standard and its application in the following manner.

> The right to travel is a fundamental right, and it has been recognized that durational residency requirements - because they disadvantage a class of persons who may have recently exercised the right to travel - may, in certain circumstances, unduly infringe upon this right. In Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), the Court held unconstitutional a one-year durational residency requirement for welfare assistance. The Court stated, however:
>
> > "We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." [Id. at 638, n.21]

> The Court held, in Dunn v. Blumstein, 405 U.S. 330 (1972), and Memorial Hospital v. Maricopa County, [415 U.S. 250 (1974)], that durational residency requirements which involved deprivations of the right to vote and free nonemergency medical care triggered strict scrutiny. In Maricopa County, however, the Court noted that "The amount of impact required to give rise to the compelling-state-interest test [has] not been made clear." [Id. at 256-7] (Footnote omitted). In Fisher v. Reiser, 610 F.2d 629 (CA9 1979) cert. denied, [447 U.S. 930 (1980)], we noted the importance of the "nature of the benefit denied." Id. at 635. In fact, Judge Hufstedler, dissenting in Fisher, after reviewing the right to travel cases, commented that "The Court [has] indicated that the 'penalty' required to invoke strict scrutiny involves a genuinely significant deprivation, such as a denial of the basic 'necessities' (as in Shapiro), or the denial of a 'fundamental political right' (as in Dunn)." Id. at 639 (footnote omitted) (emphasis added). Judge Hufstedler also noted that "Deprivations which are only uncomfortable are not enough, such as conditioning lower tuition at state institutions of higher education upon a one-year residency requirement." Id. at 639, n.5.

Hawaii Boating Association v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981).

Denial of access by the destitute to public housing and life-care aid have usually been found to be "significant deprivations" or denials of "basic necessities of life." Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970); Strong v. Collatus, 593 F.2d 420 (1st Cir. 1979); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir.

1971) cert. denied 404 U.S. 863 (1971). An argument can be made, however, that these rulings were conditioned on the non-existence of essentially similar public services. For example, in Cole the right denied was access to public housing. The court expressly premised its ruling that a compelling state interest had to be shown on the non-existence of an adequate alternative:

> Normally, persons eligible for public housing have only to sign up and wait six months for a vacancy. Plaintiffs were required to wait two years before they could be placed on the six-month waiting list. During that time, they were forced to live in substandard housing. Using "penalty" in what appears to be the right context, i.e., not in the sense of a criminal or civil sanction, plaintiffs and other in their class can truly be said to suffer "disadvantage, loss, or hardship due to some action."
>
> As a result of penalizing the right to travel, the Authority can successfuly defend its residency requirement only by demonstrating that the requirement furthers a compelling state interest.

435 F.2d at 811 (citations omitted; emphasis added). See also King v. New Rochelle Municipal Housing Authority, supra, 442 F.2d at 647; Strong v. Collatus, 593 F.2d at 422; Memorial Hospital v. Maricopa County, 415 U.S. at 261 ("The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.").

Here, however, there are adequate and substantially similar alternatives. As described earlier, disabled persons

denied access to the Pioneers' Home are entitled to subchapter XIX medical assistance, which, with a few differences, offers substantially similar aid.

The differences that do exist between the Pioneers' Homes program and the state's subchapter XIX medical assistance program are arguably not constitutionally significant. In other words, in no case will a person who would be eligible for the Pioneers' Homes under AS 47.25.020 but for lack of 15 years residence be deprived of necessary medical care. It might be that a 15-year resident would be considered disabled and admitted to a Home under the proposed definition of disability, while a similarly situated shorter-term resident would not be admitted to a nursing home under AS 47.07. But that would be because the state believed that that person was not really so disabled as to require the services of a nursing home; that person would still receive necessary medical care, either under subchapter XIX or, if the person did not qualify under that program, under the state's General Relief Medical program (7 AAC 47.180-- 260). Consequently, an argument can be made that these statutes do not deny access to a "basic necessity of life," and should not be reviewed under the compelling-state-interest test.

Furthermore, to the extent that the program offers care and housing to the non-needy, an even stronger argument can be made for a less intensive standard of review. Here the purpose

is to provide retirement housing and care to the non-needy, with some reimbursement of the costs of providing that service. Denial of this service to persons who are not destitute would presumably not rise to the level of a denial of access to a basic necessity of life. The United States Supreme Court has linked the economic standard of the class allegedly discriminated against to the determination of "access to a basic necessity of life":

> Whatever the ultimate parameter of the Shapiro penalty analysis, it is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.

Memorial Hospital, 415 U.S. at 259 (citation omitted; emphasis added). Denial of access to the Pioneers' Homes to persons who do not otherwise need the service is, using the Ninth Circuit's terminology in the Hawaii Boating case, even more arguably an "uncomfortable deprivation" rather than a "genuinely significant deprivation."

If the purpose and effect of the Homes do not trigger strict scrutiny of the program, then the program's distinction between categories of people must survive the Alaska Constitution's "intensified scrutiny" test, and the Federal Constitution's "rational basis" test. The inquiry proceeds in

three parts: (1) identifying the purpose for the distinction; (2) determining whether that purpose is a legitimate state purpose; and (3) testing the "fit" between the purpose and the distinction itself to see if the distinction accomplishes the claimed purpose.

The Alaska and federal tests differ primarily in the required closeness of the fit between the distinction made and the purpose behind the distinction. Under the Alaska approach the court

> will balance the nature and extent of the infringement (on the right to interstate travel) caused by the classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification.

Williams v. Zobel, 619 P.2d at 453.

On the other hand, the federal standard is extremely forgiving, and in fact has been characterized by the Alaska Supreme Court as "virtual abdication" of the court's responsibility. Isakson v. Rickey, 550 P.2d 359, 363 (Alaska 1976). The test is termed the "rational basis" test, and was explained by the United States Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485 (1970):

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

> mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426. 10/

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10. The choice of the level of scrutiny usually determines the outcome of the analysis. Zobel II, 619 P.2d at 452. This is particularly evident in durational residency cases. For a period of time there was substantial confusion concerning whether strict scrutiny was always required in durational residency cases or was limited to only those instances where significant deprivations resulted from failure to meet the residency requirement. E.g., Memorial Hospital v. Maricopa County, 415 U.S. at 257; Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970). As a result, various courts have ruled differently on almost identical issues. E.g., compare Larsen v. Gallogly, 361 F.Supp. 305 (D. R.I. 1973) (two-year residency requirement for divorce subject to strict scrutiny; held unconstitutional) with Mendez v. Heller, 380 F.Supp. 985 (E.D. N.Y. 1974) aff'd on other grounds, 530 F.2d 457 (2d Cir. 1976) (two-year requirement for divorce subject to rational basis test; held constitutional); Bolanewski v. Raich, 330 F.Supp 724 (D.C. Mich. 1971) (three-year residency requirement for mayor subject to scrict scrutiny; held unconstitutional) with Walker v. Yucht, 352 F.Supp. 85 (D.C. Del. 1972) (three-year residency requirement for candidates for General Assembly subject to rational basis test; held constitutional); State v. Wylie, 516 P.2d 142 (Alaska 1973) (one-year residency requirement for state employment subject to strict scrutiny; held unconstitutional) with Ostendorf v. Turner, 411 So.2d 330 (Fla. App. 1982) (five-year residency requirement for homestead exemption subject to rational basis; held constitutional). It is extremely rare for a durational residency requirement to be overturned under the rational basis test, and usually will only occur in exceptional cases. E.g., Antonio v. Kirkpatrick, 579 F.2d 1147 (8th Cir. 1978) (ten-year residency requirement in order to run for state auditor); Massey v. Appollonio, 387 F.Supp. 373, 376-377 (D. Me. 1974) (three-year residency requirement in order to be licensed as a lobsterman).

The first issue, then, is to determine the purposes of the 15- and 30-year residency requirements of AS 47.25.020, .030 and .035. Like the purposes ascribed by the legislature to the longevity bonus program in AS 47.45.170, the following purposes here appear to be paramount:

(1) to reward long-term residents for their past contributions to the state and their persevering through past economic hardship;

(2) to prevent present suffering and hardship to such persons that would be caused by their having to retire outside the state, including loss of contact with family; and

(3) to retain in Alaska those persons' personal knowledge of Alaska's past history, so that it is accessible to present and future generations.

The next and most difficult issue is to determine the legitimacy of these three purposes. All three appear to be legitimate under the Alaska Constitution. Under the Federal Constitution, the "reward for past contributions" purpose is clearly illegitimate; the other two purposes, however, are arguably legitimate. A description of the permanent fund dividend cases is essential to an explanation of the present state of the law.

In a series of cases -- Williams v. Zobel, 619 P.2d 422 (Alaska 1980) (Zobel I); Williams v. Zobel, 619 P.2d 448 (Alaska 1980) (Zobel II); and Zobel v. Williams, ___ U.S. ___, 72 L.Ed.

2d 672 (1982) (Zobel III, reversing Zobel II) -- the Alaska Supreme Court and the United States Supreme Court ruled upon various residency distinctions relating to tax relief (Zobel I) and distribution of permanent fund dividends (Zobel II and Zobel III). In Zobel III, the United States Supreme Court overturned the then existing permanent fund dividend distribution plan.

In Zobel II, the Alaska Supreme Court found that rewarding past contributions is "a permissible purpose, albeit not a particularly compelling one." 619 P.2d at 460. Further, the court held that using length of residence as a measure of past contributions did satisfy the Alaska Constitution:

> Although we recognize that the length of residency may be an imperfect measure of past contributions, we have concluded that the state may recognize these contributions. The fit between means and ends need not be perfect. We think the relationship is fair and substantial. There clearly is a correlation between one's length of residency and the extent to which that individual has been able to make contributions to the community. We are not convinced that any workable alternative method of measuring past contributions is clearly preferable. Although the existence of a preferable alternative would not automatically render the relationship unfair or insubstantial, the absence of any preferable workable alternative is a strong indication that the classification chosen by the legislature is acceptable. We think the relationship is as fair and substantial as the Alaska Constitution requires in this context.

Id. at 461.

The second purpose of the Pioneers' Home program -- using length of residence as a measure of the present suffering that would be caused if the retiree would otherwise move out of the state, was not mentioned by the majority, but was expressly endorsed by Justices Dimond and Matthews in their dissent in Zobel II:

> [A]dmission to pioneer homes, AS 47.25.020-.030 . . . require[s] lengthy residency periods. . . . [The program is] apparently designed to help those individuals who would like to retire in the state but cannot do so because of the high cost of living. The state might well want to limit these benefits to those that would suffer the most hardship by being forced to leave, and it seems reasonable to suppose that a long period of residency would be some indicia of close ties to Alaska and the disruption that leaving might cause.

619 P.2d at 469 n.2. Therefore, at least two Justices would apparently uphold this program on the above rationale alone.

Finally, there is the third purpose of present access to the historical knowledge contained by these persons. Although probably not a compelling reason, it is a legitimate purpose and one that is directly tied to length of residence.

Therefore, a valid defense can be advanced that the Pioneers' Homes program meets the Alaska Constitution's equal protection test. The Alaska Supreme Court has expressly upheld the "past contribution" rationale and its "fit" with the residency requirement, while the "present hardship" reason was expressly

approved by the two Justices as sufficient to withstand constitutional scrutiny.

The question then becomes whether the revised program is defensible under the Federal analysis. In summary, although the "past contribution" purpose is an improper purpose under the Federal Constitution, the strength of the remaining two purposes does not have to be very great to withstand the minimal scrutiny of the federal "rational basis" test. Almost any legitimate purpose is defensible, so the real inquiry is whether the two remaining purposes are legitimate in light of the residency criteria. Although the United States Supreme Court has indicated serious concern with the use of residency as a measure of any trait beside bona fide residence and qualification for office,[2] there remains room for argument that other purposes are legitimate and that residency is not an arbitrary means to be used to further those purposes.

Despite its notoriety in Alaska, the United States Supreme Court opinion in Zobel III actually stands for only two propositions. First, making an award of benefits based on residency accumulated prior to the date of enactment of the benefits program is not rationally related to the purpose of granting

believes that such valid independent interests are few and far between:

> To be sure, allegiance and attachment may be rationally measured by length of residence - length of residence may, for example, be used to test the bona fides of citizenship - and allegiance and attachment may bear some rational relationship to a very limited number of State purposes. But those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare.

Id., Brennan concurrence at 684 (citations omitted).

Although the instances where length of residence has an independent utility as a device to further a legitimate state interest may be rare, they may not be as rare as Justice Brennan implies. Justice Brennan indicated his belief that there were only two categories that would admit of an independent interest: testing bona fide residence and qualifying for public office. Id. But there may well be other legitimate instances that Justice Brennan did not think of, such as Justices Dimond and Matthews' view that length of residence might be a reasonable tool to measure the present hardship that would be caused by disrupting ties to the state. Zobel II, 619 P.2d at 469 n.13.

Thus, Zobel III does not preclude the state from arguing either (1) that the "present hardship" and "link with the past" purposes are legitimate, or (2) that length of residence is a legitimate tool to distinguish between those residents who meet

those purposes and those who do not. Consequently, given the "virtual abdication" of scrutiny under the federal test (Isakson v. Rickey, 550 P.2d at 363), a good faith defense can be mustered to uphold the constitutionality of the Pioneers' Homes program.

This is not to say, however, that there are not serious and possibly fatal arguments against the entire program. Besides the strong implication in the Zobel cases that residency can only be used as a discriminatory tool in extremely rare cases, there are other serious constitutional problems that the courts could find to be fatal.

One problem is that the courts could view the provision of housing and medical care as the provision of a "basic necessity of life" in all instances, and not just when there are no existing alternatives or where the purpose of the program is to aid indigents. Another problem is that the Alaska Supreme Court might view the Zobel III rejection of the "past contribution" purpose as a persuasive analysis to be applied under the Alaska constitution. That, in addition to an analysis that the "penalty" on interstate migration is much greater than that under the permanent fund dividend program, could shift the balance under the state's intensified scrutiny test against the lengthy residency requirement.

A third potential problem is that even if the courts recognize the legitimacy of the purposes and the potential

appropriateness of a residency requirement, either they could view this specific instance as an inappropriate means for using a residency test, or they could find that 15 continuous years or 30 years overall is an unreasonably long period to use to achieve these goals.

We do believe, however, that there is enough of a defense for the program that it is appropriate for the courts, rather than this office, to make the ultimate determination. Given the present state of confusion in the case law, the state's strong interest in this program, and the long-standing and uninterrupted 70-year history of the Pioneers' Homes program, a judicial resolution is appropriate.

Response to Division of Legislative Audit

With regard to Division of Legislative Audit's preference question, we believe that the statutory language clearly commands that destitute and disabled applicants be given preference over those able to pay, in the event that space limitations preclude acceptance of all otherwise eligible applicants. This conclusion follows from the language of AS 47.25.020(a) -- that worthy persons "destitute and in need of the aid or benefit of the Home" are entitled to admission -- and of § 030 -- that persons not destitute may on application be admitted. Since admission is automatic for the first group and discretionary for

the second, the first group must be given preference.

With regard to the "pay-for-care" provision, there is in our opinion no clear answer. The 1929 legislature may have intended through its statute -- permitting the board of trustees to admit non-destitute residents on their agreement to pay "such sum per day as the Board may deem sufficient to compensate the Territory for the cost of care and support of such person at the Home" -- to extract from paying residents the full cost. The language suggests this. though it is not unequivocal; "compensate" could be read as meaning "partially compensate" rather than fully compensate.

Although there is no record of specific legislative or administrative intent in subsequent years, it has consistently been the administrative practice not to require full payment of costs. Legislative Audit has noted that by 1967 non-destitute residents were assessed only 66% of the full costs, which figure has decreased to 21% in 1976 and to 11% in 1982. In addition, the legislature has consistently appropriated the money to make up the difference. Therefore, there has been a consistent and long-standing administrative (and even legislative) interpretation that the statute does not require the payment of the full cost of support. See generally 2A Sands, Sutherland Statutory Construction, ¶49.03-49.05, at 233-238 (4th ed. 1973).

And there is no discernable legislative intent, either originally or currently, which would inhibit the administrative ability to continue to interpret the statute to allow the payment of less than the full cost of support.

We would note, however, that there does not seem to be any formal or informal record to support either the present level of support ($225 a month for residential care and $275 a month for skilled nursing care), or any mechanism for reviewing the level of support at intervals to adjust for increased costs of service. Although an administrative agency does have reasonably broad discretion in making judgments such as these, if challenged there must be some evidence that the judgment was not arbitrary, capricious, or irrational. Kingery v. Chapple, 504 P.2d 831, 834-835 (Alaska 1972); Kelly v. Zamarello, 486 P.2d 906, 911 (Alaska 1970). Therefore we would recommend that the agency review the costs and leave some record of the reasons for settling on a particular number or proportion of total cost. This determination should be reviewed at reasonable times in the future so that original judgments will not become irrational because of markedly changed circumstances.

IV. CONCLUSION

Therefore, it is our opinion that

(1) the Pioneers' Homes program durational residency requirements are defensible;

(2) destitute and disabled applicants receive priority over paying applicants; and

(3) paying residents do not need to pay the full cost of support.

Finally, we believe that some administrative review of the level of payment should be undertaken. Since the present set of proposed regulations can now proceed, it might be appropriate to include procedures for that review in those regulations.

Sincerely,

Wilson L. Condon
Attorney General

WLC:mr

Enclosure

891-679-603

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ALASKA PIONEERS' HOME.

To the Senate and the House of Representatives:

Chapter 80, Session Laws, 1913, providing for the acceptance and use of the United States Marine buildings at Sitka as a home for indigent prospectors and others who have spent their years in Alaska and become dependent, constitutes the Governor of Alaska a member of the Board of Trustees, provided for in the law, and directs him to appoint two citizens to act with him as members of the Board. In accordance therewith, on June 19, 1913, W. P. Mills and Sergius George Kostrometinoff, of Sitka, were appointed members of the Board, and a formal organization was effected on July 4, following. W. P. Mills was designated Treasurer and Sergius G. Kostrometinoff Secretary of the Board, and Arthur G. Shoup was appointed Superintendent, to serve without compensation.

A report giving in detail the history of the Home and its operation since its establishment, together with the cost of maintenance, receipts and disbursements, and the other information, prepared by the Superintendent, is submitted herewith and made a part of this report. The Board has endeavored to discharge its duties in a manner commensurate with the trust with which it is charged, and it is a pleasure to acknowledge the hearty sympathy which has been expressed in many ways by the people of Alaska generaly for the success and welfare of this Territorial institution. At one time it was feared by the Board that the appropriation made for the maintenance of the Home would be exhausted before another appropriation could be made by the Legislature. Happily, such fear proved groundless, and the Home was enabled to continue through appropriations received from the Federal indigent funds from the judges of the four judicial divisions for the support of inmates from their respective divisions.

Much painstaking work has been required to place the Home in its present condition: many handicaps had to be overcome in overhauling the buildings, furnishing them and getting them ready for occupancy. The Home was ready for the admission of inmates on September 2, 1913, and was opened with five members. There are now fifty-one, the number having steadily increased since that time; ten have died, three have been adjudged insane and com-

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mitted to Morningside Sanitarium, and six have been discharged at their own request. The physical condition of a number of the inmates has resulted in making the institution a hospital as well as a home, and a hospital equipment as well as the employment of a trained nurse willl be necessary hereafter. It will be also necessary to provide for the employment of a superintendent under salary, who should be a man of executive ability and fitted in every way for the management of an institution of this kind, which calls for kindliness, patience coupled with firmness, and good judgment in all circumstances.

The Board estimates that provision should be made by the Legislature for the maintenance of eighty-five inmates of the Home, on an average, for the next two years, or until May 1, 1917, and that the sum of $50,000 will be required for the support of the institution for that period; and in addition to the above amount the sum of $6,000 will be required for the purpose of erecting and equipping a new building in order to afford the necessary accommodations that will be needed with the increase of inmates; also $2,000 for repairs and painting the present buildings.

Your attention is respectfully directed to the recommendations contained in the exhaustive report of the Superintendent, which are generaly endorsed by this Board, for such action as you may deem proper in the premises.

The Board of Trustees feel that they can not close this report without rendering due acknowledgment of the invaluable services of Honorable Arthur G. Shoup, a member of your honorable body, in the establishment and conduct of the Home. The success achieved in its management has been due largely to his unselfish efforts in its behalf without other compensation than the knowledge that he was assisting in making the declining days brighter, happier and easier for men who have spent their years in Alaska as trail-blazers and pioneers in a new land.

Respectfully submitted,

J. F. A. STRONG,
Chairman.

W. P. MILLS,
Treasurer.

S. G. KOSTROMETINOFF,
Secretary.

Sitka, Alaska, February 27, 1916.

REPORT TO THE BOARD OF TRUSTEES

By the

SUPERINTENDENT OF

THE ALASKA PIONEERS' HOME.

To the Board of Trustees,
Alaska Pioneers' Home:

Gentlemen:

I have the honor to submit herewith a detailed report of the operations of the Alaska Pioneers' Home at Sitka, Alaska, since its establishment on July 4, 1913, to the close of December 31, 1914, together with tabulated statements concerning the inmates received and cared for, and financial reports for the said period.

HISTORY AND PURPOSE.

Inasmuch as this will comprise a part of the first official report of the Trustees, and as it may be of some future interest, I shall undertake to state briefly the history of, and reasons for the establishment of this institution.

By order of the Secretary of the Navy, on March 17, 1912, the United States marine guard at Sitka, Alaska, was withdrawn, leaving the barracks and other buildings of the station abandoned. Without referring to a somewhat voluminous previous correspondence, I quote the following letter, which fully indicates the manner in which the use of these buildings was acquired by the Territory:

Department of the Interior,
Washington, April 23, 1913.

The Honorable,
The Secretary of the Navy.

Sir:

By Department letter of January 22, 1913, your attention was invited to the fact that this Department had received letters from Honorable James Wickersham, Delegate from Alaska, dated January 16, 1913, and from Hon. Arthur G. Shoup, of the Alaska Legislature, dated December 16, 1912, requesting that the abandoned buildings of the Marine Barracks at Sitka be devoted to use as a home for indigent prospectors and old men who have spent their years in Alaska and have met with misfortune; and you

were requested to advise this Department as to whether the buildings mentioned were under your jurisdiction and control, and if so as to whether they might be used for the purpose suggested.

Under date of March 10, 1913, you replied:

"The Department is willing to allow the use of these buildings as suggested by Mr. Shoup, and requests that you designate a representative at Sitka to whom the custodian may transfer them. They will be turned over with the understanding that the buildings are to be kept in as good condition as they are at present."

In response I have to advise you that the Governor of the Territory of Alaska, at Juneau, Alaska, is hereby designated as the representative to whom the custodian may transfer the buildings in question for the purpose stated.

It is requested that your representative in Alaska be advised of this action at the earliest practicable date. I have this day advised Delegate Wickersham, Mr. Shoup and Governor Clark of my action in the premises.

Respectfully,

(Signed) FRANKLIN K. LANE.

Agreeably to the foregoing letter, on May 3, 1913, Governor Clark designated Mr. Arthur G. Shoup, of Sitka, Alaska, to act as his representative in the matter of receiving these buildings from the Navy Department, with instructions to take them into his immediate charge, and on May 9, 1913, the following buildings and grounds were formally transferred to the representative of the Governor, namely:

1 Marine Barracks,
1 large coal house,
1 small coal house,
1 officers' quarters,
1 canteen building,
1 engine house,
1 store house.
U. S. Government grounds and water front belong to the above.

On December 23, 1914, the building formerly used as a residence by the Governors of Alaska, and afterwards used as a Naval Hospital, was receipted for to the representative of the Navy Department by the writer as the representative of the Governor of Alaska and the Department of the Interior. This building is about seventy years old and in a state of very poor repair. However, it is thought that with some repairs it can be used to advantage by the Alaska Pioneers' Home, and is of further value because of the excellent garden plot adjoining it. Many Alaskans feel that because of its unusual historical significance this building should be repaired and preserved by the Territory.

Under the act of the First Alaska Legislature, approved April 30, 1913, the Hon. J. F. A. Strong, as Governor of Alaska, appointed Mr. W. P. Mills, of Sitka, Alaska, Treasurer of the Board of Trustees of the Alaska Pioneers' Home, and Rev. S. G. Kostrometinoff, of Sitka, Alaska, Secretary of said Board, with the Governor as ex-officio President. On July 4, 1913, this Board met at Sitka and arranged for the use of the Marine Barracks buildings as a home for indigent prospectors and others who have spent their years in Alaska and became dependent. The Board of Trustees at this meeting appointed A. G. Shoup Superintendent, with instructions to purchase necessary furniture, make necessary repairs to the buildings, hire necessary help, make rules and regulations for the government of inmates, and to organize and operate the institution as a home for dependent men who have assisted in the exploration and development of Alaska.

The buildings at this time had been entirely unoccupied for fifteen months, and were becoming considerably dilapidated. The plumbing had frozen during the winter and a great many of the water pipes were burst, and had to be replaced. The lawns had been used as a playground by the children from the Indian village, and many of the windows were broken. The heating plant also required a number of expensive repairs. There was absolutely no furniture of any kind, excepting a kitchen range, and it was necessary to order needed furniture, dishes, cooking utensils, and other supplies. These we were able to buy at wholesale prices through the courtesy of the W. P. Mills mercantile company, which extended to the Home the benefit of its credit and buying facilities, resulting in a very material saving of funds. All of the furniture and permanent supplies purchased for the institution since its opening have been furnished by the W. P. Mills Company at actual cost.

OCCUPANCY.

The first inmates to arrive at the Home were Samuel Dutton and David Spencer, on July 28, 1914, but as the buildings were not then ready for occupancy, arrangements were made with the management of the Sitka Hot Springs, at Sanitarium, Alaska, for their temporary care. On August 10th John A. Hammill arrived from Nome, and he was also sent to Sanitarium. Frank Sears, of Circle, arrived at Sitka on August 29th, and he was cared for in a hospital at Sitka until the Home was opened. On September 2, 1914, we moved into the present quarters with five inmates. This number was increased to thirteen before the end of September. As will be seen by reference to tabulated statements herewith, the number of inmates constantly increased, as rapidly as it was possible to provide accommodations within the limits of available funds.

While it was known that many of the old-timers who had been on the frontier of Alaska were greatly battered by time and hardship, it was not anticipated that the need of a home in which they could spend their declining years was as great as the establishment of this institution has shown it to be. Owing to limited room, as well as very restricted funds, it has been necessary to refuse admission to many worthy Alaskans whom the Territory ought to provide for, and, from such investigation as it was possible to make, only the most urgent cases have been admitted.

The Legislature estblished the Home for Alaska pioneers, with the idea of providing a haven for old or disabled men who had spent their years in exploring, prospecting and developing Alaska, and had become unable to earn a living. It was thought that most of these men would still be able to do some work in connection with the operation of the institution, but experience has proved that practically all of the men who have been admitted are entirely unable to do anything at all. Many of them are altogether helpless and require constant personal attendance. This has unavoidably increased operating expenses beyond expectations, and even then the care we have been able to give the most invalid cases has been far from satisfactory. Moreover, it is inevitable that these men, who are far advanced in years and worn by severest hardships, should decline in strength after their arrival here, and I cannot too earnestly urge the provision of

more adequate hospital facilities. Another thing which has somewhat added to our troubles is that some communities, with a mistaken idea of the situation, have sent men here who were far advanced in sickness. Their condition was usually aggravated by the ordeals of travel. These men have in most cases lived but a short time after their arrival at Sitka. However, some of the apparently hopeless cases have greatly improved or recovered. A detailed statement of the physical condition of the inmates will be found in the accompanying report of the attendant physician.

RECOMMENDATIONS FOR IMPROVEMENTS.

So far as it is possible to estimate, the number of inmates in the Home will be increased in the next year to seventy-five or one hundred, and if that is so it will be necessary to increase the building space. As it is at present, we are compelled to quarter cripples, who are unable to climb stairs, in the ward with the bed-ridden invalids. That naturaly works a hardship on both the sick men and the cripples, and there should be some dormitory space on the ground floor. The dining room is small and necessitates two sittings at table with the present number of inmates. There is much need also of an assembly and recreation room. With nothing to do, life naturally becomes more or less monotonous to these old men who have led active lives. A recreation and assembly room in which entertainments could be held is highly desirable. I would recommend, therefore, that a two-story building, about forty-six feet by sixty-six feet in size, be erected at the southeast end of the "Barracks" building. This would nearly double the sleeping quarters, and provide a new dining room and assembly room. The present dining room could then be used as a ward for semi-invalid cases. Such a building should be constructed for about six thousand dollars.

The need for a trained nurse is keenly felt, and it is hoped there will be sufficient funds to keep a competent nurse in attendance next year.

The heating plant is situated in a separate building. This plant was designed by the Navy Department for the double purpose of heating the building and operating an electric light plant. It consists of one 80 H. P. tubular marine boiler eighteen feet long and four feet wide, with two doors to the fire box; one switchboard panel; one elec-

tric generator, form "C", speed 450; one marine engine; form "D", speed 450, size 6 1-4 by 6; four traps in four-foot condensing; one receiver for returns from buildings, and one Dean steam pump, six-inch stroke. There are forty-four radiators in the buildings, and the boiler consumes about 1,200 pounds of bituminous coal per twenty-four hours. A material saving in expense could be made by installing a more economical heating plant.

CEMETERY.

A plot of about one-half acre of ground was selected in the military cemetery at Sitka as a burial place for deceased inmates of the Alaska Pioneers' Home. A small portion of this has been cleared, and it is hoped that the funds will permit all of it to be put in first class shape next year. The estimated cost for clearing, grading and seeding this plot is about five hundred dollars. There should also be funds available with which to purchase permanent markings for the graves.

The men who have died in the institution have usually left a few personal belongings of nominal value. Some, however, have left a little money. Wherever there has been enough money to pay the funeral expenses it has been applied to that purpose, but the superintendent has in his possession several small amounts left by deceased inmates. This he is holding until it is decided what disposition should be made of such money. There should be a simple and uniform method of disposing of such moneys without probate procedure, either by reversion to the Home or payment to heirs. Whenever it has been possible to locate heirs such personal effects as might be valued have been sent to them.

CHARACTER OF INMATES.

Almost all of the men who have come to the Alaska Pioneers' Home are of the highest type of American trail-blazer. They are men who have lived alone in the silent places, and are of a naturally adventurous disposition. In fact, it is this very quality that has kept them upon the Alaska frontier, and it is to such men that the Territory must credit much of its development.

Some friends of the Institution have suggested that more rigid discipline should be enforced upon these old men in this Home. To me, however, it seems that to annoy these men with unnecessary restrictions would be an unkindness

that is not called for. The Alaska Pioneers' Home was established as a place where these men might spend their declining years in comfort, and is intended as a partial reward for their pathfinding services. To avoid restraint was one of the factors which made them independent prospectors and frontiersmen. And, as a matter of fact, the best way, in my opinion, to insure good conduct and avoid friction among such men is to allow them to follow their own inclinations as much as possible. They, like all of their kind, are big-hearted and generous to a fault, and are the last men in the world to impose upon the rights of others or to allow others to impose upon them. Of course, there have been some occasional cases of admitting men who never were of any use and they have given some trouble; but for such cases there is the simple remdy of summary dismissal from th Home. Instances of intoxication here have been exceptional. Owing to the weakened physical resistence of these men, if for no other reason, intoxication cannot be permitted among them under any circumstances, and that is one thing against which a positive rule has been established. The most effective factor in discouraging heavy drinking by an inmate of the Alaska Pioneers' Home is the bad standing he thereby establishes for himself among his comrades.

Much of the success of the Alaska Pioneers' Home so far, which has been under rather adverse conditions, is largely due to the hearty moral support tendered by the people of Alaska, and I wish particularly to thank those who have assisted with generous presents at each Christmas time, and in donating books for a libarary. For the support given, and confidence reposed by the Board of Trustees, I am deeply grateful.

Respectfully,

ARTHUR G. SHOUP,
Superintendent Alaska Pioneers' Home.

ATTACHMENT 5

Andress v. Baxter

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, v. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBERG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	No. A82-307 Civ.

MOTION FOR SUMMARY JUDGMENT

Defendants Fred J. Baxter et al., move this court for entry of a summary judgment in their favor under the provisions of Rule 56 of the Federal Rules of Civil Procedure.

This motion is based on the pleadings, deposition, the accompanying memorandum in support, and on the attached Affidavit of Kerry Romesburg. These materials establish that there is no

genuine issue as to any material fact and that defendants are entitled to judgment in their favor as a matter of law.

DATED this 8th day of September, 1982.

WILSON L. CONDON
ATTORNEY GENERAL

By: Robert M. Maynard
Robert M. Maynard
Assistant Attorney General

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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, v. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBERG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	)	No. A82-307 Civ.

DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION AND SUMMARY

The question before this court is whether Alaska's student loan program, which is by far the most generous program in the nation, can require two years residency as a condition of application in order "to make virtually certain that students who are not, in fact, bona fide residents of the State, cannot take

advantage of in-state rates." Vlandis v. Kline, 412 U.S. 441, 454 (1973) ("Vlandis") (emphasis added).

Judith Andress contends that the two-year requirement violates the Federal Constitution's Due Process Clause, Equal Protection Clause, Privileges and Immunities Clause, and the Citizenship Clause. Of these challenges, only the equal protection question merits any detailed response.

Denial of a student loan is not the denial of either a fundamental political right (such as voting), or a basic necessity of life (such as welfare or access to medical treatment). Consequently, the equal protection standard to be used is the rational basis test. Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981) ("Hawaii Boating").

The courts have upheld one-year residency requirements for reduced tuition rates at state schools where all students actually remain in the state to attend school. E.g., Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd mem. 401 U.S. 985 (1971). It is not irrational to require two years of residency where the state is paying out cash and where the recipients may then take the money to attend out-of-state schools for up to eight years.

The rationality of the requirement is further enhanced by the incentive created by the Alaska loan program to come to Alaska solely to take advantage of this state benefit. Unlike loan programs in the rest of the nation, an Alaskan resident does not have to pass a needs test, nor is there a family income

limitation for recipients of loans for waiver of interest while in school. Alaska's loans are available on the same terms to all regardless of either need or family income. In addition, other states' loan programs lend only $2,500 per year to undergraduates, and $5,000 to graduates. Alaska lends $6,000 and $7,000, respectively. The maximum total allowed in other states is $12,500 for undergraduates and $25,000 for graduates (including any undergraduate loans); Alaska's totals are $30,000 for undergraduates, $35,000 for graduates, and $53,000 combined. The interest rate in other states is 9%; Alaska's is 5%. Affidavit of Dr. Romesburg. (Attached as Appendix I.)

Given the tremendous disparity between other states and Alaska, it is not irrational to require two years as a test for the bona fides of a student's residence. The state is lending large amounts of money at extremely preferential rates. It wishes that money to go to persons who presently intend to make Alaska their home after completing their education. It is reasonable to require a two-year residency requirement when money is being lent to students who previously resided out-of-state, where those students will be receiving up to $53,000 of state money, and when those students can spend that money while attending school out-of-state for up to the next eight years. The state can rationally and constitutionally require a student to meet a two-year residency test in order to show that student's bona fides and to assure the state that this money is going to persons

who intend to return upon completion of their education and make Alaska their home.

II. DESCRIPTION OF THE PROGRAM

AS 14.40.751--14.40.806 sets forth the conditions for the Alaska student loan program. Undergraduates may receive up to $6,000 per year (AS 14.40.759), while graduates may receive up to $7,000 per year (AS 14.40.763). Undergraduate students may receive loans for five years (or $30,000); graduate students may receive loans for five years (or $35,000); and total undergraduate and graduate loans may be received for eight years ($53,000). AS 14.40.763(d). The loan is to be repaid at an interest rate of 5% per year for up to ten years. AS 14.40.763(f) and (g). There is no needs test or family income limit.

As the Affidavit of Dr. Kerry Romesburg shows, the Alaska program is the most liberal program in the nation. All other states use the Federal Guaranteed Student Loan (GSL), which requires that students meet a needs test and have family incomes of less than $30,000 per year for waiver of interest while in school. The GSL lends only $2,500 per year to undergraduates, and a total of only $12,500. Graduate students under the GSL can receive $5,000 per year for a total of $25,000, but that total includes undergraduate loans. GSL's are to be paid back at an interest rate of 9% per year.

Only four other states have loan programs in addition to the GSL: Alabama, Georgia, Kansas, and Oregon. All of those

programs, however, are at least as restrictive as the GSL. Alabama provides loans for medical and dental study at a 7% interest rate and has no residency restriction. Georgia provides 9% loans for up to $1,500 per year for study in "critical fields" of study. Kansas provides "loans of last resort" to students. If a student can not qualify for a GSL, loans of up to $1,500 for a first-time freshman, $2,500 for other undergraduates, and $5,000 for graduate students are made available at 9% interest. Oregon provides loans for medical and dental study at 9% interest. The loans are for up to $2,500 per year. Affidavit of Dr. Romesburg.

In order to qualify for an Alaskan loan, an applicant must: (1) be either a full-time college student, a high school student, or scheduled to graduate from a high school within the next six months; and (2) be a resident of the state for two years at the time of application. AS 14.40.765. AS 14.40.765(b) further provides that:

> For purposes of this subsection, a person qualifies as a resident of the state if at the time he applies for the loan the person
>
> (1) has been present in the state for at least two years unless his absence from the state during any part of the two years was due to military service; or
>
> (2) is a person who is dependent on a parent or guardian for his care, and the parent or guardian has been present in the state for at least two years.

It is this two-year requirement which is challenged by Judith Andress as violating the Federal Constitution under the Equal Protection, Privileges and Immunities, Due Process, and

Citizenship Clauses. Since the only serious question arises under the Equal Protection Clause, that issue will be discussed first.

III. ARGUMENT

A. SUMMARY JUDGMENT IS APPROPRIATE.

Rule 56 of the Federal Rules of Civil Procedures provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Although defendants deny a number of Ms. Andress' allegations, even if all of Ms. Andress' factual allegations are correct, defendants are entitled to judgment as matter of law.

The only disputed fact which requires some explanation is Ms. Andress' allegation that her "application is disadvantaged by the priority given applications based on the applicant's length of residency in Alaska as required by AS 14.40.767(a)(2)." That statute provides for the award of points in order to allocate priority among late applications, with some points going for length of residency in Alaska. The Alaska Commission on Postsecondary Education has never applied that statute and will not be applying that statute with this year's applications. Affidavit of Kerry Romesburg. Instead, as Dr. Romesburg's affidavit points out, if because of limited funds priorities were to be

awarded, the awards will go to applications on a first come, first served basis. This course of action has been taken with the advice of the Department of Law. Therefore, the only question before this court is whether or not the two-year durational residency requirement contained in AS 14.40.765(b) is constitutional. For that issue, there are no material issues of fact in dispute, and summary judgment is appropriate.

B. THE TWO-YEAR RESIDENCY REQUIREMENT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

There is no question "length of residence may . . . be used to test the bona fides of citizenship." Zobel v. Williams, __ U.S. __, 50 U.S.L.W. 4613, 4617 (concurring opinion of Justice Brennan). In addition, the state has a legitimate interest in assuring that state money and its preferential interest rates are actually received by students who intend to make Alaska their home. The United States Supreme Court's pronouncements on resident tuition are equally applicable to student loans:

> The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.

Vlandis v. Kline, 412 U.S. 441, 453-454 (1973) ("Vlandis").

Similarly, the issue here is whether a two-year requirement is a reasonable way to make "virtually certain" that an applicant has a present intent to return to the state after completing his or her education. The first inquiry in the equal

protection analysis is whether the requirement is to be analyzed under strict scrutiny or the rational basis test.

. . . The rational basis standard applies since neither a fundamental political right or access to a basic necessity of life is involved. Hawaii Boating Ass'n v. Water Transportation Facilities, 651 F.2d 661 (9th Cir. 1981); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). Strict scrutiny is involved only when genuinely significant deprivations are involved:

> Deprivations which are only uncomfortable are not enough, such as conditioning lower tuitions at state institutions of higher education upon a one-year residency requirement.

Hawaii Boating Ass'n at 665, quoting from Fisher v. Reiser, 610 F.2d 629, 639, n.5 (9th Cir. 1979), cert. denied, 447 U.S. 930 (1980) (Judge Hufstedler dissent). Like student tuition, denial of the right to a state funded student loan is at best an "uncomfortable deprivation." Therefore, the two-year residency requirement need only be rationally related to its purpose of assuring that student loans go only to bona fide residents.

The rational basis test was explained by the United Supreme Court in Dandridge v. Williams, 397 U.S. 471, 485 (1970):

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be,

> and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426.

That rational basis exists here. First, it should be noted that the choice of the level of scrutiny usually determines the outcome of the analysis. This is particularly evident in durational residency cases. For a period of time there was substantial confusion concerning whether strict scrutiny was always required in durational residency cases or was limited to only those instances where significant deprivations resulted from failure to meet the residency requirements. E.g., Memorial Hospital v. Maricopa County, supra, 415 U.S. at 257; Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970); Fisher v. Reiser, supra. As a result, various courts ruled differently on almost identical issues. E.g., compare Larsen v. Gallogly, 361 F.Supp. 305 (D. Rhode Is. 1973) (two-year residency requirement for divorce subject to strict scrutiny; held unconstitutional) with Mendez v. Heller, 380 F.Supp. 985 (E.D. N.Y. 1974) aff'd on other grounds, 530 F.2d 457 (2d Cir. 1976) (two-year requirement for divorce subject to rational basis test; held constitutional); Bolanewski v. Raich, 330 F. Supp. 724 (D.C. Mich. 1971) (three-year residency requirement for mayor subject to strict scrutiny; held unconstitutional) with Walker v. Yucht, 352 F.Supp. 85 (D.C. Del. 1972) (three-year residency requirement for candidates for General Assembly subject to rational basis test; held constitutional); State v. Wylie, 516 P.2d 142 (Ak.

1973) (one-year residency requirement for state employment subject to strict scrutiny; held unconstitutional) with Ostendorf v. Turner, 411 So.2d 330 (D.C. App. 1982) (five-year residency requirement for homestead exemption subject to rational basis; held constitutional). It is extremely rare for a durational residency requirement to be overturned under the rational basis test, and usually will only occur in outrageous cases. E.g., Antonio v. Kirkpatrick, 579 F.2d 1147 (8th Cir. 1978) (ten-year residency requirement in order to run for state auditor); Massey v. Appollonio, 387 F.Supp. 373, 376-377 (D. Me. 1974) (three-year residency requirement in order to be licensed as a lobsterman). 1/

Establishing bona fide residence, or domicile, occurs when a person both (1) is physically present within the state; and (2) intends to remain and make a home. E.g., State v. Adams, 522 P.2d 1125 (Alaska 1974); Restatement (Second) of Conflict of Laws, §§ 15, 16, 18 (1971). Applying these principles, however, is often extremely difficult -- particularly the determination of intent:

---

1. The Alaska Supreme Court, for one, until recently held that durational residency requirements always required a compelling state interest. See, Williams v. Zobel, 619 P.2d 449, 451-452 (1980). The Alaska Supreme Court now analyzes durational residency requirements under its intensified scrutiny test, which is an intermediate balancing approach between strict scrutiny and the rational basis test. Id. This "intensified scrutiny" test was set forth in State v. Erickson, 574 P.2d 1 (Alaska 1978). In a May 5, 1981 informal opinion to Representative Don Clocksin, Assistant Attorney General Bruce Botelho stated that he believed that the Alaska Supreme Court would overturn the two-year residency requirement, primarily applying the Erickson balancing test. Upon closer review, this office now believes that the two-year requirement would meet even the stricter Erickson test.

> [I]t is known jurisprudential fact that these requisites are deceptively simple, and are much more easily stated than applied. In particular, whether an individual possesses the necessary intent is often a very difficult question to answer.

Stottlemyer v. Stottlemyer, 329 A.2d 892, 899 (Pa. 1974).

Moreover, as the United States Supreme Court has expressly recognized, there are particular problems in determining the bona fides of college students "since those students are characteristically transient." Memorial Hospital, supra, 415 U.S. at 260, n.15; Vlandis v. Kline, supra, 412 U.S. at 452. Thus even during the period of uncertainty as to whether strict scrutiny always applied to durational residency cases, it was recognized that one-year residency requirements for in-state tuition were constitutional. E.g., Coleman v. Housing Authority of City of Newport, supra, 435 F.2d at 810, n.9. (D. Me. 1974).

Consequently, it is evident that a one-year residency requirement for student loans would easily pass constitutional muster under the rational basis test. The state can condition the grant of preferential rates for tuition on a one-year residency requirement. Vlandis v. Kline, supra; Hooban v. Boling, 503 F.2d 648 (6th Cir. 1974); Sturgis v. State of Washington, 368 F.Supp. 38 (D.C. Wash. 1973), aff'd mem., 414 U.S. 1057 (1973); Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd mem., 401 U.S. 985 (1971). Kirk v. Board of Regents of the University of California, 279 Cal App. 2d 430, 78 Cal. Rptr. 260 (Cal App. 1967) app. dismissed, 396 U.S. 554 (1970); Padgar v. Indiana University, 381 N.E.2d 1274 (Ind. App. 1978). The actual transfer

of cash to a student is at least on par to the tuition cases, if not a more compelling reason in and of itself for the application of a more stringent requirement. In any event, the issue before this court could also be cast as whether it is irrational for the State of Alaska to require two years of residence instead of one year in order to be eligible for a student loan.

The two-year requirement is reasonable. It is not irrational or outrageous. The Alaska student loan program does not require that the student remain in-state to attend school (unlike the resident tuition cases). The student can spend up to $53,000 in state loan funds for up to eight years attending school in California, Washington, Arizona, or any other state in the Union. Given the judicially recognized "special problems" involved in determining the bona fide residence of college students even when the students will be physically located in the state for their years of school (Memorial Hospital, supra, 415 U.S. at 260, n.15; Vlandis 412 U.S. at 452), even greater problems attend such a determination when an out-of-state student comes in, gets money, and then leaves the state for a substantial period of time. Thus, even if the Alaska loan program were the same as all other states' programs a two-year residence requirement would not be irrational.

In addition, however, the Alaska program is far and away the most attractive education loan program in the United States. All other states use the Federal Guaranteed Student Loan Program (GSL), which is substantially inferior and much more

restrictive than the Alaska program. As pointed out earlier, the GSL is limited to $2,500 per year for undergraduate, and $5,000 per year for graduates. ...Alaska lends $6,000 and $7,000 respectively. The maximum total allowed under GSL is $12,500 for undergraduates and $25,000 for graduates (including undergraduate loans). Alaska's respective totals are $30,000 and $35,000; in addition, combined graduate and undergraduate loans could total up to $53,000 for eight years of study. The interest rate for GSL's are 9%; Alaska's are 5%. Further, in order for a student who has a family income of $30,000 or more to receive a fully subsidized GSL loan, that student must demonstrate substantial financial need based upon a standardized needs test. Alaska's loans are open to all irrespective of need or income. Affidavit of Dr. Romesburg.

In short, it is not irrational to believe that a two-year residency requirement, rather than a one-year requirement, is a "reasonable criteri[on] for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the state .... cannot take advantage" of the enormous benefits of Alaska's loan program. Vlandis v. Kline, supra, 412 U.S. at 455 (emphasis added). The two-year residence requirement meets the rational basis test, and does not violate equal protection.

C. THE TWO-YEAR RESIDENCY REQUIREMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE, THE CITIZENSHIP CLAUSE, OR THE PRIVILEGES AND IMMUNITIES CLAUSE.

Ms. Andress also challenges the two-year residency requirement under the Due Process Clause, the Privileges Immunities Clause, and the Citizenship Clause. These assertions are without merit.

Vlandis settled the due process issue by holding that only "a permanent irrebuttable presumption of non-residence . . . is violative of the Due Process Clause." Vlandis, 214 U.S. at 453. In Vlandis the Court overturned a scheme where if a student was not a resident by a certain date (the date of admission to school), that student could never achieve resident status thereafter. The Court contrasted that scheme with plans that allowed the rebuttal of that presumption after a period of residence:

> Minnesota's one-year durational residency requirement, however, differed in an important respect from the permanent irrebutable presumption of issue in the present case. Under [Minnesota's requirement], a student who applied to the University from out of State could rebut the presumption of non-residency, after having lived in the State for one year, by presenting sufficient other evidence to show bona fide domicile within Minnesota.

Vlandis, 492 U.S. at 453, n.9. In other words, durational residency requirements, since they can be rebutted by a period of residence, do not violate the Due Process Clause.

Ms. Andress' challenges under the Privileges and Immunities Clause and the Citizenship Clause are also without support. Because Ms. Andress claims to be a bona fide Alaska

resident, the Privileges and Immunities Clause is inapplicable. Hawaii Boating, 651 F.2d at 666. Nor does the state see how Ms. Andress' claim falls within the accepted ambit of the Citizenship Clause. E.g., Slaughter-House Cases, 83 U.S. 36 (1873).

Instead, it appears that Ms. Andress is attempting to argue a violation of a fundamental right to interstate travel based upon these clauses, an approach recently argued by Justice O'Connor in her concurrence in Zobel v. Williams, supra, 50 U.S.L.W. at 4616-4620. Whatever the future of that analysis, it is clear that eight out of the nine justices presently reject that approach. Id., at 4615, n.4, 4616-4617 (J. Brennan concurring), 4621, n.3 (J. Rehnquist, dissent). Ms. Andress' arguments on these points will have to await another day -- they are not meritorious under the present state of the law.

IV. CONCLUSION

For the reasons stated in the brief, defendants respectfully request this court to grant their motion for summary judgment.

DATED this 8th day of September, 1982.

WILSON L. CONDON
ATTORNEY GENERAL

By: Robert M. Maynard
Robert M. Maynard
Assistant Attorney General

Wilson L. Condon
Attorney General
State of Alaska
Pouch K
Juneau, Alaska 99811
(907) 465-3600

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JUDITH ANDRESS, Plaintiff, v. FRED J. BAXTER, MILDRED BANFIELD, THELMA BUCHHOLDT, LEE DEMMERT, THELMA LANGDON, MARY ELIZABETH LOMEN, JOHN MALONE, JOHN SHIVELY, TERRY STIMSON, DONNIS THOMPSON, BLANCHE WALTERS, WALTER WARD, KERRY ROMESBERG AND THE ALASKA COMMISSION ON POSTSECONDARY EDUCATION, Defendants.	)	No. A82-307 Civ.

AFFIDAVIT OF MAILING

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

MARGARET RAMOS, being first duly sworn upon her oath, deposes and says:

That she is employed as a legal secretary with the Attorney General's Office, Pouch K, Juneau, 99811, and that on

the 8th day of September, 1982 she mailed the 1) Motion for Summary Judgment, 2) Defendants' Memorandum in Support of Summary Judgment, and 3) Affidavit of Kerry Romesburg by DHL Courier Express Service to tne following:

Ronald G. Zobel
Hellen and Partnow
425 "G" St., Suite 710
Anchorage, Alaska 99501

DATED this 8th day of September, 1982.

Margaret Ramos

Subscribed and sworn to me this 8th day of September, 1982.

Notary Public, State of Alaska
My commission expires 9/9/83

ATTACHMENT 6

Vest v. Schaefer

RECEIVED
FEB 28 1983

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

RODNEY G. VEST,

Plaintiff,

vs.

MARIAN SCHAFER and STATE OF ALASKA,

Defendants.

(C)

No. 1JU-82-1103 Civil

ORDER

On August 16, 1982, the parties to the above action filed a proposed Agreement and Order of Settlement. Based on that agreement[1] of the parties,

IT IS HEREBY ORDERED that all actions and proceedings in the above-captioned case, other than the certification of the plaintiff class, the approval by the Superior Court for the settlement agreement to be submitted to the plaintiff class, and any further approval by the court necessary to consummate the settlement agreement after the certification of plaintiff class, are stayed through and including the date of adjournment of the first regular session of the 13th Alaska Legislature or June 30, 1983, whichever event occurs first in time.

IT IS FURTHER ORDERED that procedures for class certification shall be submitted to the court for review no later than September 10, 1982, and the parties will request the court to render its order with respect to the notice procedures for the said class no later than September 24, 1982. Notice to the class shall be transmitted, along with the proposed settlement agreement and the conditions necessary to affectuate the settlement, on or before October 11, 1982. The State of Alaska will undertake reasonable efforts to assist the plaintiff to locate

1. This order embodies some but not all of the elements the parties included in their proposed order.

those persons sixty-five years or older as of July 1, 1982, who have been bona fide Alaska residents in Alaska for one year immediately prior to that date. In the event the settlement agreement is not consummated for whatever reason, but the plaintiff class has been certified by the court as set forth above, the plaintiff shall not be precluded from seeking an enlargement of the class and a certification thereof so as to include other persons having a shorter residential duration within the state than specified in the agreement and may also seek a greater retroactive recovery than that specified in the agreement.

IT IS FURTHER ORDERED that the Alaska Legislative Council shall utilize its best efforts to secure the enactment during the first regular session of the 13th Alaska Legislature of the legislation described in the above agreement, subject to the conditions specified in the agreement.

This court specifically expresses no opinion as to whether a one-year residency requirement is reasonable, necessary and appropriate in order to demonstrate bona fide Alaskan residency; more particularly, this court has not been requested to and does not determine whether a period of residency less than one year may be constitutionally mandated or whether a period of residency greater than one year may be constitutionally permissible in order for persons of the age of sixty-five or over to receive longevity bonus payments. The court merely acknowledges the right of the parties to agree that this matter shall be stayed for a period of time and to agree that the Alaska Legislative Council shall utilize its best efforts to secure the enactment of legislation that treats equally all persons of the age of sixty-five or older who have been residents of the State of Alaska for one year or longer with respect to their residential qualifications to receive any longevity bonus payments or

substitute benefits from July 1, 1982, and thereafter for as long as the legislature may determine to continue such a program. Accordingly, nothing in this order should be construed to infringe upon the freedom of the legislature independently to determine whether and, if so, how the Longevity Bonus Program (AS 47.45.010 et. seq.) should be amended.

DONE at Juneau, Alaska, this 24th day of August, 1982.

Walter L. Carpeneti
Superior Court Judge

CERTIFICATION

This is to certify that on the above date I provided a copy of the above Order to:

Mark Sandberg, Esq.
Wilson L. Condon, Esq.
William G. Ruddy, Esq.

Secretary to the Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT

CONFIDENTIAL

RODNEY G. VEST,

Plaintiff,

v.

MARIAN SCHAFER and STATE OF ALASKA,

Defendants.

Case No. 1JU-82-1103 Civ.

AGREEMENT AND ORDER OF SETTLEMENT

WHEREAS, in 1972 the Alaska Legislature enacted the Alaska Longevity Bonus Program (AS 47.45.010 et. seq.) which currently provides, inter alia, for the payment of $250 for each month of continued residency by bona fide Alaska residents over the age of 65 who were domiciled in Alaska on or before January 3, 1959 and who have maintained a continuous domicile in Alaska for 25 years;

WHEREAS, the purpose of the Alaska Longevity Bonus Program is among other things, to reward elderly Alaskans for their past contributions to the state and territory, and for past hardships suffered during territorial and early statehood days. AS 47.45.170;

WHEREAS, since 1972, the State of Alaska in good faith has administered the Longevity Bonus Program in the belief that

the rewarding of prior residency was a constitutionally permissible purpose;

WHEREAS, in upholding the State's prior Permanent Fund Dividend distribution program, the Alaska Supreme Court ruled that "reward[ing] those Alaska residents who have chosen to stay" is a constitutionally permissible purpose. Williams v. Zobel, 619 P.2d 448, 460 (Alaska 1980);

WHEREAS, Justices Dimond and Matthews, in dissenting in Williams v. Zobel, believed that the Longevity Bonus Program would withstand constitutional scrutiny (619 P.2d at 469, n.13);

WHEREAS, on June 14, 1982, the United States Supreme Court, in invalidating Alaska's prior Permanent Fund Distribution Program, ruled that a statutory purpose of rewarding prior residency was constitutionally impermissible. Zobel v. Williams, ____ U.S. _____, 80-1146;

WHEREAS, because of the U.S. Supreme Court's decision in Zobel v. Williams, it appears the Longevity Program may not be deemed constitutional;

WHEREAS, a serious and good faith disagreement has developed and the Alaska Legislative Council questions whether the appropriate remedy is to expand the class of recipiants of monthly longevity bonuses, or alternatively, to invalidate the entire program and cease payment of monthly bonuses to any person;

WHEREAS, this uncertainty regarding the appropriate remedy derives from § 2, Ch. 205, SLA 1972, which provides, with respect to the Longevity Bonus Program:

> If any provision of this Act, or the application of a provision of this Act to any person or circumstances is held invalid, this entire act shall be considered invalid.

very important

WHEREAS, unless and until the question of appropriate remedy is resolved by this court, or a settlement of this controversy is achieved, it is reasonable and prudent that the State of Alaska continue to administer the Longevity Bonus Program in the manner provided by statute;

WHEREAS, on July 6, 1982, Plaintiff Rodney Vest filed the above-captioned action, seeking as relief his inclusion in the Longevity Bonus Program of "any . . . bona fide Alaska resident who is 65 years or older....". Complaint, Prayer for Relief, para. 3;

WHEREAS, ON July 23, 1982, Plaintiff Vest filed an amended complaint seeking to have this case certified as a class action under Alaska Rule of Civil Procedure 23 on behalf of all bona fide Alaskans of the age of 65 or older, and further seeking as alternative relief the invalidation of the Longevity Bonus Program, or the payment of retroactive bonuses "in amount equal to what they would have been entitled to obtain under the program had the unconstitutional criteria never been in place or

enforced." First Amended Complaint, Prayer for Relief, paras. 4-6.

WHEREAS, there are currently 9,124 recipients of monthly longevity bonuses, and many of these recipients are of modest means, and depend upon the monthly bonus for sustenance, and the termination of the longevity bonus payments to these individuals could cause great and irreparable harm;

WHEREAS, because of the uncertainty with respect to the appropriate remedy, the parties are desirous of settling this litigation in a manner which affords meaningful relief to Plaintiff Vest and others similarly situated, but which also ensures the continuation of monthly bonus payments to existing recipients;

WHEREAS, the parties are further desirous of achieving a settlement which will finalize and constitute a full and final accord of the rights and liabilities of the parties hereto;

WHEREAS, there may be as many as 4,000 persons who are similarly situated with Plaintiff Vest -- to wit, bona fide Alaskans of the age of 65 or over -- who are not currently receiving longevity bonus payments because of the residency requirements of the statute;

WHEREAS, the parties agree that, because of the nature of the rights of recipients involved in this litigation, a one-year residency requirement is reasonable, necessary and appropriate in order to demonstrate bona fide Alaskan residency;

WHEREAS, a full and final settlement of the parties' rights and liabilities hereto cannot be achieved until all persons similarly situated with Plaintiff Vest are certified as a class under Alaska Rule of Civil Procedure 23(c);

WHEREAS, the settlement envisioned by the parties includes the retroactive payment of longevity bonuses to plaintiff class commencing and including July 1, 1982;

WHEREAS, the payment of such retroactive bonuses to an expanded class of recipients would require the appropriation of sums above the amount currently appropriated for the longevity bonus program for fiscal year 1982-83. Moreover, and because of the Alaska Legislative Council's view of the non-severability clause, quoted above (effecting the expansion of the class of longevity bonus recipients), such payments may require the enactment of curative legislation;

WHEREAS, it is therefore necessary, in order to effectuate this settlement, for appropriate legislation to be enacted;

WHEREAS, the Alaska Legislature is a coordinate branch of government of the State of Alaska, and is represented in this action by the Attorney General;

WHEREAS, notwithstanding the above, the Attorney General cannot in any manner bind or compel the Alaska Legislature in the exercise of its legislative powers;

WHEREAS, on July 16, 1982, the Alaska Legislative Council moved to participate in the above-captioned action as amicus curiae, it is agreed that the Alaska Legislative Council may participate in all negotiations of any settlement, the filing of briefs and may participate in oral arguments; however, the Alaska Legislative Council agrees that it will not be involved in discovery proceedings in the event the case is ultimately litigated and will not become otherwise involved in accordance with the terms of this settlement agreement;

WHEREAS, and while the Alaska Legislative Council cannot bind the Alaska Legislature in the exercise of its legislative powers, the Alaska Legislative Council can and is willing to commit its best efforts to the enactment of appropriate legislation during the first regular session of the 13th Alaska Legislature;

WHEREAS, and subject to (1) the certification of plaintiff class, (2) the Superior Court's approval of a settlement proposal herein, and (3) the commitment of the Alaska Legislative Council to use its best efforts in the enactment of appropriate legislation, plaintiff class is agreed that such action will provide full and adequate consideration for the promise and agreement of plaintiff class not to seek relief in any form with respect to the Longevity Bonus Program through and including the adjournment of the first regular session of the

13th Alaska Legislature or June 30, 1983, whichever ever event comes first in time;

WHEREAS, nothing herein is to be construed as an admission by the State of Alaska as to the unconstitutionality of the Longevity Bonus Program;

WHEREAS, except with respect to the good faith of the State and its agents, nothing herein is to be construed as an admission by either party in the event the settlement agreed to here is not consummated;

NOW THEREFORE THE PARTIES STIPULATE AND AGREE AS FOLLOWS:

1. All actions and proceedings in the above-captioned case, other than:

(a) the certification of plaintiffs class

(b) the approval by the Superior Court for the State of Alaska, First Judicial District of this proposed settlement agreement, and

(c) any further approval by the court necessary to consummate the settlement agreement after the certification of plaintiffs class,

are stayed through and including the date of adjournment of the first regular session of the 13th Alaska Legislature or June 30th, 1983, whichever event occurs first in time. Procedures for class certification shall be submitted to the Court for review no later than September 10, 1982, and the parties will request the

Court to render its order with respect to the notice procedures forthe said class no later than September 24th, 1982. Notice to the class shall be transmitted, along with the proposed settlement and the conditions necessary to affectuate the settlement, on or before October 11th, 1982. The State of Alaska will undertake reasonable efforts to assist Plaintiff to locate those persons 65 years or older as of July 1, 1982, who have been bona fide Alaska residents in the state of Alaska for one year immediately prior to that date. In the event this settlement agreement is not consummated for whatever reason, but the class certification has been certified by the court as set forth above, the Plaintiff shall not be precluded from seeking an enlargement of the class and a certification thereof so as to include other persons having a shorter residential duration within the State and may also seek a greater retroactive recovery.

2. The Alaska Legislative Council shall utilize its best efforts to secure the enactment, during the first regular session of the 13th Alaska Legislature, of the following legislation;

(a) Legislation which treats equally all bona fide Alaska residents of the age of 65 or older with respect to their residential qualifications to receive any "longevity bonus payments" or any substitute benefits from July 1, 1982 and thereafter for as long as the legislature may determine to continue such a program. Bona fide Alaska residents are those

who continuously resided in the state for one year immediately prior to the date of eligibility; and

(b) Any appropriation which might be required to fund the legislation described in paragraph (a), including the retroactive payment of bonuses.

3. If the Alaska Legislature passes legislation described in 2(a)-(b) above at any time during the first regular session of the 13th Alaska Legislature and the Governor signs the said legislation or otherwise allows 2(a)-(b) to become law so that 2(a)-(b) will be effective no later than Ninety days after enacted, the above action shall be dismissed with prejudice, subject only to the determination of attorney fees by the Court.

4. If the above-captioned action is dismissed under paragraph 3 above, all claims or rights of any class member (except those class members who exercise their right to opt out under Rule 23 of the Alaska Rules of Civil Procedure), with respect to the Longevity Bonus Program, shall be merged into the judgment of dismissal and extinguished;

5. If the Legislation described in 2(a)-(b) above is not enacted during the first regular session of the 13th Alaska Legislature or in any event no later than June 30, 1988, then this agreement shall be null and void, except that the Plaintiff and the class certified, together with any additional members, if there is an enlargement of the class, may prosecute this case as

if this agreement had not been entered into, it being the intent of the parties that certification of the plaintiff class, or the enlargement thereof, shall not be affected if this agreement becomes null and void;

6. The obligation of the Alaska Legislative Council under 2 herein is contingent upon certification of plaintiff class under Alaska Rule of Civil Procedure 23(c), which class shall include each and every individual of the age of 65 or older who, as of July 1, 1982, had continuously resided one year immediately preceding that date within the State of Alaska, and in the event that a class is certified which is less inclusive than as above described, the State of Alaska has reserved the right to waive the protections of this paragraph in whole or in part. Nothing in this paragraph is intended to modify or affect the certification of the class or the right of the Plaintiff to enlarge the class if this agreement becomes null and void.

DATED this __ day of _____, 1982.

DATED: August 9, 1982 Wilson L. Condon by [illegible]
Attorney for Defendants
Marian Schaefer and
State of Alaska

WILSON L. CONDON
ATTORNEY GENERAL

DATED: August 6, 1982 Henry J. Camarot
Attorney for Plaintiff

Henry J. Camarot
Camarot, Sandberg & Hunter

DATED: 8/16/82

Attorney for Alaska
Legislative Council
Amicus Curiae

FOR William Ruddy
Robertson, Monagle,
Eastaugh & Bradley

O R D E R

IT IS SO ORDERED.

DATED: _____

Hon. Walter Carpeneti
Superior Court Judge

ATTACHMENT 7

Tillinghast Report

THE LONGEVITY BONUS PROGRAM:
OPTIONS UNDER THE VEST SETTLEMENT

JON K. TILLINGHAST

Birch, Horton, Bittner, Pestinger & Anderson

March 8, 1983

TABLE OF CONTENTS

I. INTRODUCTION

On June 14, 1982, the United States Supreme Court ruled that the cumulative residency requirements of Alaska's permanent fund dividend distribution program violated the Equal Protection Clause of the United States Constitution.[1] Shortly thereafter, Alaska's Longevity Bonus ("ALB") Program was challenged on equal protection grounds.[2] On August 9, 1982, the Department of Law, with the approval of the Alaska Legislative Council, entered into a stipulation in the Vest case which stayed all proceedings pending adjournment of this legislative session, in order to afford the legislature an opportunity to address the constitutional problems with the existing program.

The purpose of this report is to analyze some 10 options available to the legislature in amending the Alaska Longevity Bonus Program. This report is a first step in a process which must be completed by the end of this session. As subparts (C) and (D) of this section discuss, the likely consequence of failing to enact remedial legislation this session is that the ALB program will be judicially terminated.

A. Description Of The Longevity Bonus Program

Predecessors of the existing ALB program can be traced to 1915. In that year, the Territorial Legislature authorized a monthly allowance of $12.50 for needy elderly Alaskans of 10 years

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[1]Zobel v. Williams, 72 L. Ed. 2nd 672 (1982)

[2]Vest v. Shafer, 1 JU-82-1103 Civ. (1st Jud. Dist., 1982)

residency who chose not to enter the newly-created Pioneers' Homes.[3] The current program was enacted in 1972[4] as a result of legislation introduced by Senators Butrovich and Ray.[5] Quite unlike the "need-based" focus of its predecessors, the 1972 legislation was to:

> "... provide all law-abiding Alaskans capable of managing their own affairs who have maintained a domicile in the state for at least 25 years and have reached a retirement age of 65, an incentive to continue uninterrupted residency in the state. Under no circumstances shall this chapter be considered a form, type, or manner, of public relief. The bonuses made under this chapter are not predicated on need even though they may appear to provide supplemental income to some qualified persons who would otherwise be forced to become responsibilities of the state. The Legislature further finds and states that this legislation recognizes the economic hardships suffered by many elderly Alaskans, Alaskans who through their tenacity and perseverance molded Alaska as we know it through skillful application of their talents. These pioneers are the same Alaskans who, in the prime of their life, were in effect treated as second class citizens by the federal government and who paid much of their hard earned income to a government in which they did not have the right to participate through the power of the ballot. The legislature also is aware of the fact that many of these pioneers have been forced to live out their retirement years in areas far away from the land they loved and nurtured and thereby also suffering, in many cases, the loss of familial relationship with their own kin, an experience that is sad and frustrating to them as well as depriving new generations of Alaskans the benefit of their wisdom and experience. This legislation hopefully will provide our pioneers with the economic means to remain in and continue to serve their state and to enjoy the opportunity of aiding

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[3]Chapter 64, SLA 1915.

[4]Chapter 205, SLA 1972; AS 47.45.010 et. seq.

[5]SB 211, 7th Leg., 2nd Sess.

the new Alaskan in making the state truly "The Great Land." §1, Ch. 205, SLA 1972.

The ALB program, then, has several purposes:

1. providing an incentive for a particular class of senior citizens to remain in the state;

2. compensating for the hardships faced by retirement in Alaska;

3. rewarding the past contributions of Alaska's elderly;

4. co[illegible]ting for past hardships suffered by Alaska's [illegible]neers; and

5. retaining the wisdom and experience of Alaska's pioneers.

Originally, the bonus was $100 per month. Over the years, the amount has gradually increased to its current $250 per month.[6] A person is eligible for a bonus if he or she:

1. is 65 years of age or older;
2. was "domiciled in the territory" on or before January 3, 1959; and
3. has been continuously domiciled in the state for 25 years.[7]

Additionally, if a person is absent from the state for more than 30 days, he will not receive another bonus until he returns. AS 47.45.030. If the person is absent for a continuous period in excess of 180 days, he is ineligible for a bonus for the next 12 calendar months following his return. Id.

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[6]Chapter 13, SLA 1961

[7]AS 47.45.010

Exceptions are made if the absence "is beyond the control of the recipient." Id.

The longevity bonus is taxable under the Internal Revenue Code. However, it is almost universally excluded in calculating income eligibility for state and federal assistance programs.[8]

B. The Individuals Covered By The Alaska Longevity Bonus Program.

There are currently some 9,425 Alaskans receiving some $28.4 million in longevity bonus payments. Sketching an accurate portrait of the state's ALB recipients is difficult, because the ALB application form requires little personal information. In 1976, the Alaska Department of Health and Social Services conducted a random survey of ALB recipients,[9] and, in conjunction with the Vest

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[8]Under 42 U.S.C. §1382(a)(b)(2)(B), which governs eligibility for federal Supplemental Security Income, and by reference also controls other federal programs such as Medicaid and energy assistance, the following is excluded from the definition of income:

> "monthly (or other periodic) payments received by any individual under a program established prior to July 1, 1973, if such payments are made by the State of which the individual receiving such payments is a resident, and if eligibility of any individual for such payments is not based on need and is based solely on attainment of age 65 and duration of residence is such state by such individual."

[9]"Alaska Longevity Bonus Impact Survey," Alaska Department of Health and Social Services (1976) (hereinafter "ALB Survey)

settlement, the Department of Law conducted a non-random survey of some 1,896 participants.

From those surveys, it is apparent that a large percentage of ALB recipients are Alaska Natives living in rural areas of the state.[10] Moreover, and in large part because of the ineligibility of many rural residents for social security, the longevity bonus is often the primary source of income for rural residents. For example, 41% of the elderly in Southwest Alaska, and 66% in Northwest Alaska, rely on the longevity bonus as their primary source of income.[11]

Available evidence suggests that a large percentage of ALB recipients have incomes only marginally above the current state welfare assistance level of $546 per month. The Department of Law's 1982 survey -- which was skewed toward the more needy recipients of the ALB -- found that 81.4% of the 1,896 recipients sampled had monthly incomes of $750 or less. The 1976 ALB survey found that half of the ALB recipients had a monthly income, "including that of their spouse," of under $500 per month.[12] Another

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[10]In 1976, 41% of the ALB recipients lived in rural areas of the state and 24.1% were Alaska Natives. ALB Survey at 14-15.

[11]"An Assessment of the Status and Needs of Alaska's Elderly," Department of Sociology, College of Arts & Sciences, University of Alaska (1981) (hereinafter "Assessment.")

[12]ALB Survey, op. cit. n. 9 at 18-19.

44% had incomes of less than $1,000 per month. A 1981 University of Alaska survey indicated that roughly half of Alaska's elderly had monthly incomes of less than $800.00.[13]

The 1976 ALB survey suggests that, in light of the high percentage of bonus recipients in the 65-70 age group, the bonus has had a material effect in allowing older citizens to remain in the state after retirement.[14] The report also indicates that the ALB program has allowed a significant percentage of the elderly to remain off various public assistance programs -- including food stamps and state Old Age Assistance.[15]

One significant characteristic of Alaska's elderly in general warrants note -- one that will become quite significant in our analysis of alternatives. Only 10% of Alaska's elderly have resided in the state for 10 years or less.[16]

C. The Effects of Zobel And Vest On The ALB Program.

In reviewing the 1972 legislation creating the Longevity Bonus Program, the Department of Law concluded that "... the classification predicated upon being domiciled in the territory on or before January 3, 1959, bears little, if any, rational relationship to any legitimate legislative purpose which this bill is conceivably designed to serve and thus is in

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[13]Assessment, op. cit. n. 11 at 31.

[14]ALB Survey, op. cit. n. 9 at 12.

[15]Id. at 10, 18.

[16]Assessment, op. cit. n. 11 at 12.

all probability unconstitutional."[17]

Nonetheless, the ALB program remained unchallenged until 1982, following the U.S. Supreme Court's decision in Zobel v. Williams (hereafter "Zobel III").[18]

The law in issue in Zobel III (AS 43.23.010 et. seq.) provided for the distribution of a permanent fund dividend of $50.00 for each year of accumulated Alaska residency. The Court ruled, 8-1, that the cumulative residency requirement of the program was not rationally related to the goals of the statute -- a ruling which is discussed in more detail in section II(A), post.

The permanent dividend fund distribution program, in part, was intended to reward Alaskans for prior contributions to the state, a goal which: (1) three justices believed was constitutionally impermissible;[19] and (2) five justices believed was a permissible goal, but was not rationally furthered by a scheme

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[17]Memorandum, Havelock to Egan, Re: FCCS HCS CSSB 211 at 17 (June 29, 1972).

[18]In Williams v. Zobel, 619 P.2d 422 (Alaska 1980) ("Zobel I"), the Alaska Supreme Court invalidated the state's graduated personal income tax repeal. In Williams v. Zobel, 619 P.2d 448 (Alaska 1980) ("Zobel II"), the court upheld the cumulative residency requirement of Alaska's permanent fund dividend distribution plan -- a ruling reversed by the U.S. Supreme Court in Zobel III.

[19]Opinion of the Court, 72 L. Ed. 2nd at 679.

which awarded dividends solely on the basis of residency.[20]

Beyond the ruling of the case, the various opinions -- particularly those of the concurring justices -- are rich in forboding language suggesting that any durational residency requirement may receive "intensified scrutiny" by the Court, and will be justified only in "rare" circumstances.[21]

As is more fully discussed in Part II(A), post, the impact of the Zobel decision upon the ALB program was apparent. Two major goals of the existing ALB program are to reward elderly Alaskans for their prior contributions, and to compensate for past hardships and suffering -- ends which are implemented by a durational residency requirement more severe than that at issue in Zobel. A challenge to the ALB program was not long in coming. On July 6, 1982, one Rodney G. Vest challenged the ALB program in Superior Court in Juneau.[22] Mr. Vest is an elderly Alaskan whose residency in the state commenced three months after statehood. His complaint sought declaratory and injunctive relief striking the durational and statehood residency requirements of the act.

The State's response was colored by §2 of the legislation, which provided, inter alia, that:

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[20]See Brennan conc., 72 L. Ed.2nd at 684: O'Connor conc., 72 L. Ed. 2nd at 685.

[21]Brennan conc., 72 L. Ed. 2nd at 681, 684.

[22]See n. 2, ante.

> "if any provision of this act, or the application of a provision of this act to any person or circumstance is held invalid, this entire act shall be considered invalid."

As the Department of Law explained in reviewing the 1972 law:

> "It is clear that the intent of the Legislature expressed in Section 2 of the bill is to forestall the possibility that a partial declaration of unconstitutionality would result in broadening the coverage of the bill to included additional clauses. This would be the case, for example, if either the 25 year waiting period requirement or the January 3, 1959 cutoff date were declared invalid, and the bill was expressly or impliedly severable."[23]

Thus, invalidation of the Longevity Bonus Program would result not in expanding the number of ALB recipients, but rather in the abrupt termination of the entire program.

Facing that grim probability, the State, with the approval of the Alaska Legislative Council, entered into an agreement with Vest, a copy of which is attached as Appendix A. The essence of the agreement is as follows:

> 1. Proceedings in the Vest case are stayed through the conclusion of this legislative session. Because that case has been subsequently certified as a class action,[24] existing ALB recipients are not in jeopardy at least through adjournment of this session;
>
> 2. The Alaska Legislative Council promised to use its "best efforts" to secure the enactment of legislation which treated equally "all persons 65 years or older as of July 1, 1982, who have been bona fide Alaska residents for at least one year prior to that date";

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[23] op. cit. n. 17 at 5.

[24] Order Certifying Class and Directing Notice to Class Members, Oct. 1, 1982.

3. If legislation of this sort were enacted this session, the suit would be dismissed; and

4. Recognizing that the Council could not bind the legislature, if legislation is not enacted, Mr.. Vest may pursue his case, with the probable result that the program will be terminated.

There are three aspects of the settlement which warrant note. First, obviously, are the severe time constraints under which the legislature is operating. Second, there is the settlement's intentionally broad litmus test of acceptable legislation. All the legislature need do is treat all elderly, one-year Alaskan residents "equally." The standard could be met by any number of options, including repeal of the program. Third, there is the inescapable financial impact of the settlement itself. In order to treat all elderly Alaskans who were one-year residents as of July 1, 1982 equally, it will be necessary to fund retroactive longevity bonus payments under the existing program to the some 3,800 elderly Alaskans who would have qualified. The necessary retroactive appropriation is approximately $11.4 million.

Of course, the legislature itself is not "bound" to pass any particular kind of legislation, or any legislation or appropriation at all. While a "best efforts" clause is enforceable, that obligation runs only to the Alaska Legislative Council, which has already demonstrated both good faith and diligence in attempting to meet the obligations of the order and settlement.

D. Scope And Intent Of This Report.

The purpose of this report is not to recommend particular amendments to the Alaska Longevity Bonus Program. As Section II, post makes plain, any "recommendation" is a function of the goals which the legislature seeks to achieve through this exercise.

Rather, the goal of this report is to assemble a comprehensive list of alternatives proposed by various interested parties, and to analyze the alternatives in light of:

1. constitutional constraints;
2. fiscal impacts;
3. practicability; and
4. the effect of any changes on the elderly's eligibility for other programs.[25]

In developing a list of alternatives, this report has included five options examined by the Sheffield Administration, and five alternatives developed by the authors of this report. The information presented with respect to each option is intended to be sufficient for a threshold determination of feasibility. The report attempts to anticipate the major problems and issues surrounding each option; however, it is not intended to exhaust the details of every proposal.

Rather, the report should be used as a basis for the Senate Judiciary Committee's preliminary indication of

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[25]See Section II.(C) post.

preference. We are recommending that the committee choose two or three primary options. We will then prepare implementing legislation and a detailed analysis of the primary options. Under this approach, the committee will not be required, at this early point, to make an "all or nothing" choice. It will also afford the committee flexibility in the event that, for some presently unforeseeable reason, one option becomes impracticable.

Draft implementing legislation and a detailed analysis of the committee's choices can be transmitted within two to three weeks, depending on the options chosen.

E. Alternatives Included In This Report.

The options included in this report, which are analyzed in turn in Section III, are:

1. expand the Alaska Longevity Bonus Program to include all elderly Alaskans with one-year's residency;

2. phase out the Alaska Longevity Bonus Program by gradually reducing benefits;

3. phase out the Alaska Longevity Bonus Program by gradually reducing benefits, while contemporaneously raising the eligibility limits for general state assistance;

4. providing a minimal base payment under the Alaska Longevity Bonus Program based solely on one-year's residency, with supplemental payments made on the basis of need;

5. phase out the Alaska Longevity Bonus Program by increasing the age eligibility each year;

6. create an annuity plan, with the annuity corpus consisting of permanent fund distributions. This option would necessitate a transition program for those persons 40 years and older;

7. fund the Alaska Longevity Bonus Program through a "pay as you go" social security system, funded by approximately 25% of the existing permanent fund dividend distributions;

8. replacing the Alaska Longevity Bonus Program with a comprehensive health insurance program for elderly Alaskans;

9. condition eligibility for a longevity bonus upon a demonstration of hardship which would be suffered by being unable to continue Alaska residency; and

10. open the Alaska Longevity Bonus Program to all one-year residents, and terminate the program -- giving FY 1984 recipients a grandfather right to continued bonuses.

II. CONSTRAINTS ON THE CHOICE OF OPTIONS

There are four basic considerations in choosing a package of amendments to the Alaska Longevity Bonus Program. The purpose of this section is to provide an overview of the constraints and policy choices which should play a role in this committee's decision.

A. Constitutional Constraints.

The obvious and primary constraint on any set of amendments to the Alaska Longevity Bonus Program lies in the equal protection clauses of the United States (Amendment 14) and Alaska (Art. 1, §1) constitutions. The existing Alaska Longevity Bonus Program discriminates between Alaska residents based on their duration of residency; moreover, all of the alternatives considered by this report involve some durational residency requirement.

Under both the federal and Alaska constitutions, a durational residency requirement which conditions or denies either a "fundamental right" or a "basic necessity of life" is valid only if the discrimination is necessary to further a compelling state interest. Zobel II, 619 P.2d at 448; Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974). "Fundamental rights" involve such things as voting,[26] while "basic necessities of life" include basic medical care[27] and welfare.[28]

The so called "right to travel" -- which any durational residency requirement arguable affects -- is not a fundamental right automatically triggering the compelling state interest test. Zobel II, 619 P.2d at 425-426, Zobel III, 72 L.Ed. 2nd at 677-678.[29]

We are confident in concluding that longevity bonus is not a "basic necessity of life." The program is not welfare -- it is not based on need. Basic indigent assistance -- including both income supplements and Medicaid -- are available to the

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[26]Dunn v. Blumstein, 405 U.S. 330 (1972).

[27]Memorial Hospital v. Maricopa County, 415 U.S. 450 (1974).

[28]Shapiro v. Thompson, 394 U.S. 618 (1969).

[29]One of the oddities of Justice Brennan's concurrence in Zobel III was his view that the "right to travel" is a "fundamental" right (id. at 682) -- although impairment of that right by a durational residency requirement should be tested under the deferential "rationally related" standard (see text, post) or at worst "intensified ... scrutiny." Id. at 681.

needy in this state.[30] The longevity bonus program seems more akin to the permanent fund dividend, which the Alaska Supreme Court held in Zobel II was not a "basic necessity of life." 619 P.2d at 445. As the Court of Appeals for the Ninth Circuit has observed:

> "Deprivations which are only uncomfortable are not enough, such as conditioning lower tuition at state institutions of higher education upon a one-year residency requirement." Fisher v. Reiser, 610 F.2d 629, 639 n. 5 (1979), cert. denied 447 US 930.

Under the federal constitution, then, any durational residency requirement imposed by amendments to the ALB program need only be "rationally related" to a legitimate governmental purpose. Zobel III, 72 L.Ed. 2nd at 678. As this section will discuss, however, that standard is occasionally more deferential in its terms than in its application.

Conversely, under the Alaska Constitution, a durational residency requirement will withstand scrutiny only if it is "fairly and substantially related" to a legitimate governmental purpose. Zobel I, 619 P.2d at 427. The more the balance tips in favor of the individual, the more necessary the discrimination must be in order to further the law's purpose. Id.

From these standards, the following ground rules can be extracted from applicable case law:

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[30] See Memorial Hospital v. Maricopa County, 415 U.S. at 261

1. Unquestionably, the "length of residence may be used to test the bona fides of citizenship." Zobel III, 72 L.Ed. 2d at 684 (Brennan conc.). In other words, the state may, by a durational residency requirement, "make virtually certain (that the recipients of the program are) bona fide residents of the state ..." Vlandis v. Kline, 412 U.S. 441, 453-454 (1973).

As a general rule, attorneys have assumed that in cases not involving the "compelling state interest" standard, a one-year durational residency requirement is permissible as a presumption of domiciliary. See, Starns v. Malkerson, F. Supp. 326, 234 (Minn. 1970), affd. mem. 401 U.S. 985 (1971). Moreover, the State of Alaska has taken the position that in cases involving either particularly attractive benefits, or particularly transient populations, a durational residency requirement in excess of one year is constitutionally permissible. See Motion For Summary Judgment, September 8, 1982, Andress v. Baxter, et al., No. A82-307 Civil, U.S. District Court, (D. Alaska 1982).

For the purposes of the Longevity Bonus Program, there are three reasons why it makes little sense to attempt a multi-year durational residency requirement as a presumption of domicilary. First, the attempt would lack substantial

precedential support. Second, it would be contrary to the August 9, 1982 settlement in the Vest case. Finally, and as noted previously, a durational residency requirement would not begin to exclude significant numbers of elderly Alaskans unless it was in excess of 10 years.

2. Durational residency requirements may be permissible for reasons other than presuming domiciliary, although at least four justices of the United States Supreme Court believe that those situations are "rare." Zobel III, 72 L.Ed. 2nd at 684.[31]

At the outset, a state cannot use a lengthly durational residency requirement to reward long time residents for their prior contributions to the state. To a majority of the court, while the purpose itself is permissible, a durational residency requirement is irrationally tailored to that goal -- a point bluntly made by Justice O'Connor in her concurrence:

> "A multitude of native Alaskans -- including children and paupers -- may have failed to contribute to the state in the past. Yet the state does not dock paupers for their prior failures to contribute, and it awards every person over the age of 18 dividends equal to the number of years that person has lived in the state." 72 L.Ed.2d at 689.

The flip side of rewarding a person for prior contributions is compensating a person for prior hardships. That, as noted previously, is a second major goal of the

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[31]One "rare" example cited by the four concurring justices was qualification of public office. Id.

existing ALB program. If it is irrational to assume that all long time residents "contributed" to the state, it may be equally irrational to assume that all long time residents suffered substantial past hardship.

There is one universal hardship which equates with territorial residency -- the lack of franchise. It is conceivable that a Longevity Bonus Program intended to compensate for that lack of representation would be constitutionally permissible. However, that rationale would only justify the January 3, 1959 residency requirement -- not the 25-year continuous residency provision of the act.

A much closer question is posed by the program's goal of allowing elderly Alaskans to remain in the state who would suffer particularly severe hardship if they were financially required to relocate. Justices Dimond and Matthews of the Alaska Supreme Court believe this may be a constitutionally permissible goal substantially furthered by a durational residency requirement:

> "... a state Longevity Bonus ... require(s) lengthy residency. Both those programs, however, are apparently designed to help those individuals who would like to retire in the state but cannot afford to do so because of the high cost of living. The state might well want to limit the benefits to those that would suffer the most hardship by being forced to leave, and it seems reasonable to suppose that a long period of residency would be some indicia of close ties to Alaska and the disruption that leaving might cause." Zobel II, 619 P.2d at 469 n. 13 (Dimond dissenting).

The Department of Law, in fact, has concluded that the Pioneers' Home may be constitutionally defensible as a reasonable means of accomplishing precisely this goal.[32] Indeed, one option considered in this report would award longevity bonuses on the basis of hardship caused by relocation -- which in turn would be measured in part by length of residence. By making length of residency "some indicia" (619 P.2d at 469) of the hardship of relocation, the option would avoid the indictment of overbreadth which was fatal to the permanent dividend fund distribution program in Zobel III.

Finally, as to the ALB program's goal of providing an incentive for a specific subclass of Alaska's elderly to remain in the state, the courts in all likelihood would view that purpose as merely discrimination for its own sake. See Zobel III, 72 L.Ed. 2nd at 678-679. Presuming that only long-time residents have the requisite "wisdom and experience" to warrant subsidization is hardly likely to impress the U.S. Supreme Court.

B. Varying Goals of Several Longevity Bonus Options.

There is a substantial difference of opinion as to what an amended ALB program should accomplish. As noted previously, the legislature may wish to retain one of the major goals of the existing program -- allowing those elderly with the closest ties to Alaska to continue to live here.

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[32] 1982 Op. Atty. Gen. ____(November 26, 1982) at 25.

Alternatively, the fiscal consequences of the various alternatives may be the primary consideration. As previously discussed, if legislation in conformity with the Vest settlement is enacted, an additional $11 million must be appropriated as retroactive bonus payments to July 1, 1982. Several of the options which propose to phase out the program, or which propose a conversion to permanent fund earnings, are partially or primarily directed at this end.

The primary goal of the legislation may also be to protect those currently most dependent upon the bonus. The current Old Age Assistance income level is $546.00 per month and there are approximately 2,300 elderly Alaskans receiving state assistance. Since the longevity bonus is not included in the calculation of income for state assistance, the practical consequence of a phase out or termination of the program would be to materially reduce the available income of the poorest elderly Alaskans. Moreover, as noted in Section I(B), ante, there are a large number of elderly Alaskans who are currently only marginally above the existing state poverty level.

There are two options particularly sensitive to this goal -- the phase out of the ALB program in conjunction with a correlative rise in state assistance levels, and the option of compensating those who would suffer the most hardship by relocation.

With respect to this goal, however, it should be stressed that the existing ALB program has been purposefully sturctured so as to not be a "welfare program." Precisely for this reason, the program is administered by the Department of Administration, rather than the Department of Health and Social Services, and any conversion to a "need-based" program will undoubtedly offend the dignity of many elderly Alaskans.

Finally, there is the possible goal of providing a long term, stable bonus program which frees the general fund from increasing commitments. The annuity and state social security options are primarily directed at this goal.

C. Consequential Effects of Any Amendment To The Longevity Bonus Program.

Any change to the Longevity Bonus Program may have two consequences which must be considered: (1) the continued eligibility of ALB recipients for other state or federal assistance programs; and (2) tax consequences on participants.

As noted in Section I(A), ante, under federal law the ALB is excluded from the definition of "income" for many federal assistance purposes.[33] As long as any amendments to the ALB program continue to base eligibility "solely on attainment of age 65 and duration of residency," and remain sufficiently similar to the existing program so as to be fairly called "a program established prior to July 1, 1973," the exemption would be retained.

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[33]See n. 8, ante.

Obviously, any material changes in eligibility requirements or structure of the program raise the risk that the new benefit will be included as "income," and many elderly Alaskans will be terminated from the applicable federal program. The Department of Health and Social Services has estimated the impacts from a loss of the longevity bonus exclusion. Those estimates appear at Appendix B of this report.

Anticipating the same problem with permanent fund dividends, the legislature, in the 1982 Special Session, provided that the state would substitute lost benefits for a period of four months.[34] Obviously, and to the extent possible, any amendments to the ALB program should either be tailored to the existing exception, or fall within another separate statutory income exclusion such as a "need based" payment.[35]

The tax consequences of amendments to the existing ALB program become particularly important with respect to this report's annuity option -- which is treated in detail in Section III (F), post. At the outset, it is sufficient to note that:

1. The existing longevity bonus program is taxed under the Internal Revenue Code;

2. Any ALB program which is based on need, or could be characterized as a "social benefit program for the promotion of the general welfare," would in all likelihood not be taxed by the IRS; and[36]

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[34]AS 43.23.075.

[35]See 42 U.S.C. §1382(a)(b)(6).

[36]See IRS Revenue Rulings, 63-136, 1963-2 C.B. 19; 68-38, 1968-1 C.B. 446; 72-340, 1972-2 C.B. 31; 78-170, 1978-1 C.B. 24.

3. On February 27, 1981, the Internal Revenue Service ruled that dividends distributed under the state's prior permanent dividend fund legislation -- the statute invalidated in Zobel III -- were taxable under the Internal Revenue Code.[37] While the IRS has yet to rule on the existing dividend program, it is likely that taxation of the permanent fund dividend could be deferred if it is used to fund the annuity or social security options discussed in this report.

III. DISCUSSION OF ALTERNATIVES

A. Expanding The Class Of Alaska Longevity Bonus Recipients To Include All Elderly With One-year's Residency.

There are currently some 9,425 Alaskans who receive bonuses totally $28.28 million. This proposal would require additional appropriations for (1) bonuses for an additional 3,803 people; and (2) additional clerical support in the Department of Administration. The additional costs would total $12 million in FY 1984, increasing to $13.7 million in FY 1988.[38]

These appropriations are in addition to the $11.4 million retroactive award required under the Vest settlement.

The advantages of this option are two-fold. First, it is one of the constitutionally "safest" options. Second, since eligibility would remain dependent on "duration of residence" -- albeit only one-year -- in all likelihood it would fall within the existing ALB exclusion to federal assistance programs.

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[37]IRS Index Nos. 0061.40-00; 0451.20.00; 0102.00-00.

[38]Department of Administration draft fiscal note, January 11, 1983.

Additionally, while theoretically any "one-year" elderly Alaskan could take advantage of this program, the demographics of Alaska's elderly (see Section 1(B), ante) are such that the primary beneficiaries of this option would be those who have lived in the state from 10 to 25 years. Whether such a program would encourage in-migration is problematical.

In addition to obvious fiscal disadvantages, this alternative would dilute the dignity and recognition attendant the current bonus to the point of non-recognition.

B. Phase Out The Existing Longevity Bonus Program.

One of the options analyzed by the Sheffield administration would phase out the ALB Program by reducing benefits by $50.00 each year beginning with FY 1984. By paying $200.00 a month to 13,228 recipients rather than $250.00 to 9,425, the net increase to the program in FY 1984 would be $2.1 million. In fiscal year 1985, however, when the bonus is reduced to $150.00, there will be a net decrease of $8.7 million in program costs.

This option has been unfavorably viewed by the administration, and apparently was prepared only as a point of comparison. Despite its fiscal benefits, the proposal protects no one. The poorest of Alaska's elderly would suffer the most. Since, as discussed previously, Alaska longevity bonuses are not counted in existing state and federal assistance income limits, the needly elderly person in Alaska receives, currently, a

subsidized monthly income of $546 for Old Age Assistance, plus $250 from the ALB program. This option would thus materially reduce state assistance levels.

C. Phase Out The Existing Longevity Bonus Program With A Contemporaneous Increase In State Assistance Levels.

The apparent "preferred" option of many with the Sheffield administration is to gradually increase state Old Age Assistance levels while at the same time gradually decreasing the amount of the longevity bonus. The program would function in the following manner:

CHART 1.

YEAR	OLD AGE ASSISTANCE LEVEL	ALASKA LONGEVITY BONUS
FY 1983	$546	$250
FY 1984	$596	$200
FY 1985	$646	$150
FY 1986	$696	$100
FY 1987	$746	$ 50
FY 1988	$796	$ 0

In analyzing the fiscal impacts of this alternative, assumptions must be made about how many elderly Alaskans will become eligible for Old Age Assistance as the OAA income level increases, and how many of the newly eligible will be inclined to seek assistance as their longevity bonus gradually diminishes.

Regardless of which assumptions are used, the impacts upon the longevity bonus program, are, of course, identical to the "phase out" option. Those impacts would be as follows:

CHART 2.

ADDITIONAL COST (SAVINGS) TO THE ALB PROGRAM (in millions)

FY 1984	2.1
FY 1985	(8.7)
FY 1986	(19.2)
FY 1987	(30.9)
FY 1988	(44.1)

The fiscal impact upon the Department of Health and Social Services' OAA program is far more difficult to determine. The Department of Administration has used two alternative assumptions -- (1) that of the 13,228 elderly in Alaska, 5% will become eligible and apply for public assistance as the income level is increased to $796 in FY 1988; or (2) that 25% of the elderly will become eligible and apply for assistance during that period.

We believe that the 25% possibility may be closer to the truth. Approximately 30% of Alaska's elderly have monthly incomes marginally above existing assistance levels -- from $500-$800 per month.[39] If those figures are accurate, as many as 3,968 will become eligible for public assistance -- in addition to the 2,300 currently on the OAA program.

The second variable involves the size of the benefits which the new clientele will receive. The Department of Health and Social Services has assumed that each new recepient will receive the mean benefit currently given or projected for

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[39]Assessment, op. cit. n. 11 at 31.

existing receipients -- $295 in FY 1984.

In computing the fiscal impacts for this option, we have used the following three assumptions:

(1) Of the 3,968 elderly whom current data suggest could be eligible for the increased OAA program, 2500 will in fact apply. This figure arbitrarily discounts both those who will decline to apply for psychological reasons, and those who will not apply because the minimal benefits to them are simply not worth the bother;

(2) Because we have discounted those who will receive minimal benefits, we have retained the "mean benefit" assumption employed by the Department of Health and Social Services; and

(3) The new recipients will be evenly distributed over each of the five years -- so that in each year an additional 500 recipients will be added to the OAA program.

Additionally, persons who become eligible for Old Age Assistance will also become eligible for Medicaid. The State's Medicaid budget for FY 1983 is $65 million dollars. 48% of that figure -- or $31.2 million -- is paid by the State. Some 23% of that budget -- or $7.17 million dollars -- is attributable to those currently on Old Age Assistance. If the OAA population doubles over the next five years -- as our assumptions presume that it will -- there will be an additional cost of $7.17 million (not adjusted for inflation) to this option, chargeable in equal portions to each of the next five fiscal years.

With these assumptions, the following chart illustrates the possible net fiscal impact of this option:

CHART 3

Year	# Add. on OAA	Mean Benefit	--------IN MILLIONS-------- Added Medicaid Costs	Added ALB Costs (Savings)	Net
FY 1984	500	$295.02	1.4	2.1	5.27
FY 1985	1000	345.02	2.8	(8.7)	(1.76)
FY 1986	1500	395.02	4.2	(19.2)	(5.90)
FY 1987	2000	445.02	5.6	(30.9)	(14.60)
FY 1988	2500	495.02	7.0	(44.1)	(29.30)

Thus, even with fairly liberal assumptions regarding the number of additional OAA clients and Medicaid costs, this option will begin saving money in FY 1985.

Moreover, for those elderly in the $500 - 800 per month income range who pay some federal taxes, the option would have advantages, since increased need based assistance, unlike the longevity bonus, should not be taxed under the Internal Revenue Code.

One obvious disadvantage of this option is that it transforms the longevity bonus program into a welfare scheme. Persons who currently receive $796 or less per month -- including the bonus -- will indeed be "held harmless" under the option, but only at the expense of applying for assistance to the Department of Health and Social Services.

Moreover, those current elderly bonus recipients whose monthly incomes (excluding the bonus) exceed $796 per month will receive no protection under this option.

Finally, because welfare payments are generally viewed by the courts as involving "basic necessities of life" (see §II(A), ante), the durational residency requirement for increased old age assistance must be dropped from one year to 30 days.[40] The minimum national old age assistance level under the federal Supplemental Security Income system -- which OAA supplements -- is $284.30/mo. A person with $600 a month income in a "minimum benefit" state is presumably ineligible for old age assistance (including Medicaid) in that state, but could become eligible under the Alaska system upon 30 days residency. While the mere prospect of an additional $196 per month (in FY 1988) is unlikely to induce people to retire in Alaska, the concommitant provision of Medicaid services -- including full nursing home coverage -- may have that effect. If a person can obtain free nursing home coverage -- valued at between $40 - $60,000 per year -- simply by spending the month of August in Anchorage, the State may face a rather remarkable in-migration problem indeed.

D. Retaining A Modest Longevity Bonus, While Providing A "Need Based" Supplement.

This option is largely a variant of option C, and has been discussed by the Sheffield Administration as a means of

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[40] Shapiro v. Thompson, 394 U.S. 618 (1969).

retaining some longevity bonus payment which could not be considered "welfare."

Under this option, the longevity bonus, as with Option C, would be gradually reduced to, say, $100.00 per month. As the fiscal information for alternatives B and C suggest, this alternative would result in a savings to the longevity bonus program of $19.2 million by FY 1986.

To compensate for the loss of $150.00/mo. to the needy, either State OAA limits could be increased by $150, or a separate "need based bonus supplement" could be established by the Department of Administration.

The advantage of the latter option is that although based on "need," applicants will not be dealing with the Department of Health and Social Services, and may view the supplement less as a form of welfare. Additionally, since the supplement will be provided under a program other than State OAA, its recipients would not be entitled to Medicaid (including nursing home coverage) unless they are otherwise eligible for OAA under existing limits.

Additionally, the "need" is not necessarily limited to financial need. As this report's discussion of Option I indicates, longevity bonuses may be apportioned according to the hardship which the elderly would face by being forced to retire outside Alaska.

The disadvantage of a separate "need based" program in the Department of Administration is, of course, the necessary creation of a parallel bureaucracy in state government.

The fiscal costs of this option have not been developed by the administration or this report because of the variables involved -- the size of the remaining "basic" longevity bonus, and the question of administration. Costs of administration aside, the net savings to the State should be substantially similar to the FY 1986 figures for Option C -- in which the declining longevity bonus payment would be $100.00 per month. The projected net savings of $5.9 million would certainly exceed the costs of even a parallel bureaucracy within the Department of Administration.

E. Gradual Increase In The Age Of Eligibility.

Another option explored by the Administration would reduce the durational residency requirement for a bonus to one year, but raise the eligibility age each fiscal year. For FY 1984, the age would be raised to 66; to 67 in FY 1985; and so on.

This option would have a substantial fiscal impact until fiscal year 1988, at which time mortality would have reduced the class of beneficiaries below existing levels. For FY 1984, the option would cost an additional $9.5 million dollars beyond existing funding levels, according to the Department of Administration.

This option has been quite unfavorably received. It has been facetiously but not unfairly referred to as the "newcomer's bonus program." A recent migrant born prior to June 30, 1918 would receive a longevity bonus for life, while a long-time Alaskan born subsequent to that date would receive nothing.

F. Self-Sustaining Annuities.

The prior five options were developed by members of the administration, although the administration has not formally "sponsored" any particular approach. Moreover, several of the options -- particularly the "graduated age" and "phase out" options -- were developed more as comparative conversation pieces than as actual proposals.

The following five options -- commencing with the self-sustaining annuity -- were prepared by the authors of this report.

Under the self-sustaining annuity option, individuals would no longer receive a permanent fund dividend under AS 43.23. Rather, those dividends would form the corpus of a self-sustaining annuity account from which the individual would receive an annuity commencing at the age of 65.

According to Department of Revenue projections, the permanent fund dividend payment for FY 1984 will be $365.00, rising gradually throughout the remainder of this century to $952 in the year 2000.

Given this level of contribution to the corpus, a self-sustaining annuity account will produce an annuity roughly equivalent to the existing longevity bonus (with a 3 percent annual cost of living adjustment) for those who are currently 40 years or younger, and who will be residents of Alaska each of the next 20 years. For various age groups, the annuity entitlements at age 65 as a percentage of the "target" annuity ($3000/yr. plus 3% per annum) would be roughly as follows:

Current age	Annuity as a % of target annuity
25	358%
35	161%
40	100%
45	66
55	21

Obviously, some transition measure is necessary for those who are simply incapable of accruing a sufficient corpus by the age of 65 to be entitled to the "target annuity". The general fund, simply put, will be required to make up the difference, although, over time, that "differential" will decrease as annuity accounts assume some significance.

Many of the options explored in this report could suffice as a 20-25 year shrinking general fund obligation. One option particularly tailored to the annuity approach would be to allow those who are at or near the age of 65 to continue to receive their permanent fund dividends in cash, with the PFD being subtracted from the longevity bonus amount. For those in

the 40-60 year age group, the general fund would simply fund the difference between their annuity and the "target" figure.

Under this "transitional measure", the general fund "residual" payment would be based on the amount necessary to supplement the annuity corpus assuming that an individual received a permanent fund dividend every year. There would seem, in this regard, no obligation on the part of the state to give a larger general fund supplement to someone with two PFD credits than to someone with 15.

Thus, in fiscal year 1994, when current 55-year olds first receive their annuity, they would receive a state supplemental of 79 percent of the target annuity -- regardless of the actual PFD credit any individual has accrued.

The remaining question, obviously, is what to do about the person who is currently 65. If that individual's supplement is the same in 1994 as a new annuitant -- 79% -- he will in fact receive less than the new annuitant since he will have only his permanent dividend, rather than a 21% annuity, to make up the difference. Conversely, if the grandfathered PFD recipient received a full target annuity in 1994, he would be at a substantial advantage over the new annuitant. The reason is this: while the new annuitant has earned a substantial portion of his target annuity by foregoing his cash dividend each year, the "grandfathered" recipient has both enjoyed the dividend, and its earning power, over that same period of time.

The question is largely one of equity for the legislature. Either approach is defensible. While the latter scenario would seem to discriminate in favor of the existing elderly, the Alaska Supreme Court has recognized the legitimacy of creating preferential grandfather rights for those who have come to depend upon an existing state program.[41]

In either case, the difficulty with this "transition" option is that the longevity bonus program continues to be a substantial drain on the general fund for 20-25 years to come. Under the transition option described above, the FY 1984 budget for the ALB program would be increased by $6 million dollars over existing funding levels.[42]

Through Aetna Insurance Co., we investigated the alternative of simply purchasing a lifetime annuity for all those currently 65 or older. Unfortunately, the cost of a lifetime annuity for all Alaskans 65 or older would be prohibitive -- in the neighborhood of $300 to $400 million.

Finally, the Legislature should consider using the administration's options C and/or D as a transition measure. The short term fiscal impacts of those options are superior to those of a simple general fund supplement.

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[41] Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d at 1259-61.

[42] Assuming that the ALB of the "grandfathered class" is reduced by the $365 permanent fund dividend, each of 13,228 persons will receive a payment of $2,635 this year -- totaling $34 million dollars.

For all of the short term problems of an annuity program, the long term advantages should receive equal time. First, in a period of 20-25 years, the general fund will no longer be encumbered with the longevity bonus program. Second, the eventual size of one's annuity payments would be a function of the number of permanent fund dividend contributions that have been credited to the annuitant's account. We seriously doubt that a successful durational residency claim could be made to this aspect of the program. An annuitant with three years contributions could no more claim that he is due an annuity based on 20 years contribution than could a 1996 resident claim not merely the $787 cash dividend available that year, but rather some $6,000 which his predecessors had amassed by being residents of Alaska since 1984.[43]

We believe that there is a strong case for distributing annuities only to persons who are residents of Alaska at the

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[43]Because future annuities are a direct function of actual past payments to the program, the program does not "reward" presumed contributions but simply returns actual investments. cf. Zobel I, 619 P.2d at 435 (Rabinowitz conc.) Nor is the option akin to a situation where prior tax contributors are excused from funding the present needs of government, as with the tax repeal scheme at issue in Zobel I. At any point in time, each Alaskan is treated quite equally -- being entitled to an annuity credit if he or she resided in the state for six months during the pertinent year.

time. Partially for reasons discussed below, no individual will have a "vested right" to an annuity in the future. A purpose of the annuity program will be to alleviate the particular financial hardships caused by retirement in Alaska -- a purpose which we believe is constitutional. This goal would be served only by confining actual annuity payments to Alaska residents. Second, and particularly if the program is properly viewed as conferring an economic benefit not upon the crediting of an annuity account, but rather upon annuity distribution, the state certainly possesses the right to prefer its own residents in the disposition of its resources.[44]

There are, of course, other issues surrounding the annuity option. Many Alaskans will undoubtedly wish to retain the existing cash benefits of the permanent fund distribution. Alaskans will not be, however, totally without recompense. An annuity account for younger Alaskans in particular -- at least for those planning to stay in the state -- will one day lead to substantial benefits.

Of course, the prospect of a lucrative retirement account is a product of the legislature's continued willingness and ability to devote 25% of permanent fund earnings to the

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[44] Reeves, Inc. v. State, 65 L.Ed. 2nd 244, (1980); see also White v. Massachusetts Council of Construction Employees, ___ U.S.___, No. 81-1003 (U.S.S.Ct., Feb. 28, 1983)(distinguishing Hicklin v. Orbeck, 437 U.S. 518 (1978).

annuity program. Unquestionably, at some point in time, a material percentage of the permanent fund's earnings will be necessary for general government expenses. The point at which that will require access to more than 75% of the fund's earnings is problematical.

The tax consequences of an annuity program warrant detailed discussion. As noted previously, the Internal Revenue Service may well rule that permanent fund cash distributions are taxable. Conversely, if credits to an annuity account equal to the permanent fund dividend are not tax exempt, the real economic value and perce ved political worth of an annuity option is substantially lessened.

The annuity program envisioned by this report is not employer/employee related, and therefore would not qualify as an exempt plan under the Internal Revenue Code.[45] Nor was serious consideration given to qualifying this annuity option as an Individual Retirement Account -- because (1) the state is not a qualified financial institution to administer such an account; (2) the required terms of an IRA were not compatible with the option considered; and (3) any "state required" IRA -- even if possible -- would severly impinge on the tax planning flexibility of individual Alaskans.[46]

Nonetheless, it is our opinion that the annuity option <u>should</u> result in the deferral of both the permanent fund

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[45]cf. 26 U.S.C. §401-404

[46]<u>See</u> 26 U.S.C. §408.

dividend contributions and accrued interest under the Internal Revenue Code. The courts and the IRS have generally ruled that contributions to an unqualified "annuity," "retirement" or "deferred compensation" plan are nonetheless tax deferred if the individual is not in "constructive receipt" of the annuity contributions, and the contributions do not represent a present "economic benefit."[47]

Combining the standards of that doctrine with the attributes of the proposed annuity program, the program should be taxed deferred for the following reasons:

1. If the State were to purchase individual annuities with each permanent fund dividend, with each resident being the beneficiary, the resident would have a vested and secured interest in the contribution, and would thus have received a current "economic benefit." If, however, the State were to merely give the annuitant an unsecured promise of payment, purchasing an annuity account with itself as the beneficiary in order to provide a funding source for that promise, there would be no "current economic benefit" and taxation would be deferred.[48] This is one customary means by which employers obtain tax deferral of an unqualified plan;

2. A person is in "constructive receipt" of an annuity contribution if he has current access to the

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[47]U.S. v. Goldsmith, 586 F.2d 810 (Ct.Cl. 1978).

[48]Id.

contributions without substantial terms and limitations.[49] Under this report's option, under no circumstances would an annuitant be entitled to withdraw anything until annuities are actually distributed;

3. To underscore the contingent nature of the annuity -- such that the IRS could not reasonably conclude that it represents a "current economic benefit" -- the annuity will only be received if the person is an Alaska resident at the time of the pertinent distribution.

Our only hesitancy in this regard is the February 27, 1981 ruling of the IRS that even if an individual chooses to defer receipt of his permanent fund dividend, it is taxable in the year that it could have been received. The ruling, however, "may not be used or cited as precedent," and, even if of precedential value, is distinguishable from this situation. The ruling is consistent with the proposition that the individual cannot have unfettered discretion in choosing the year in which income will be taxed. While an individual does have unbridled choice in determining when to take a permanent fund dividend, he will have no choice as to the time of receipt of his annuities. Moreover, where a person would have an absolute right to a deferred dividend, he will have no right to annuity distribution unless he is an Alaska resident at the time.

For tax reasons, then, the annuity option must be carefully structured. The former permanent fund dividend must

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[49] Id.

be used by the State to purchase an annuity for its own account, with itself as the beneficiary. The annuity income received by the State will then be used as the funding source for the annuity payments -- although technically and necessarily the annuity income could be used for any fiscal purpose.

A far closer question arises with respect to the effect of this option on other public assistance programs. Generally, annuity income is included in the calculation of income for various assistance programs.[50] If, however, this option can be characterized as a continuation of the longevity bonus program, then the existing longevity bonus income exclusion[51] may persist. If -- consistent with tax considerations -- the only "annuity" is the one purchased by the State as a funding source, then the existing longevity bonus program can be retained in both name and substance, with the amount of the bonus still dependent upon residency history. After all, under the option, (1) a person must be a six month resident in order to obtain a single PFD, and must be eligible for the annuity at the time of distribution;[52] (2) the amount of annuity is dependent upon the number of PFD's credited to the individual's account; and (3) the "grandfathered" class of existing elderly would presumably be required to meet a one-year durational residency requirement.

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[50] See, 42 U.S.C. §1382(a)(a)(2)(B).

[51] See 42 U.S.C. §1382(a)(b)(2)(B).

[52] See n. 8, ante.

The above, of course, is an argument -- it is not necessarily the law, which in final measure will be largely determined by the federal officials involved. The exposure to existing assistance programs -- at least for those not within the grandfathered transition class -- must be considered a risk of this option.

Even if, however, annuity distributions are considered "income" to various assistance programs, the corpus of the annuity account will not be. A person may be disqualified from a federal assistance program not only if his income exceeds a certain level, but as well if he has alternative available resources which he can upon from at any time. However, in this instance, a true "annuity corpus" does not exist -- since the only annuity runs for the benefit of the State. Moreover, even if federal officials were to view the "corpus" as belonging to the individual, it cannot be withdrawn prior to actual distribution.

G. State Social Security System.

In large part because of the need for a lengthy transition period with a self-sustaining annuity plan, this report also considered the possibility of a state social security system funded by a portion of the permanent fund dividends distributed under AS 43.23.

Under this system, a sufficient portion of each resident's permanent fund dividend would be withheld each year

to fund a retirement program designed to pay each Alaska resident of 65 years or older with one-year's residency $250 per month, with a moderate cost of living adjustment each year.

In assessing the feasibility of this option, the most important variable was the projected growth in Alaska's elderly population. The difficulties facing the federal social security system are due in part to an increasingly large percentage of elderly in the population.

For fiscal year 1983, the Alaska Department of Labor projects that there will be some 13,672 elderly in Alaska -- approximately 3% of Alaska's population.[53] The Department has projected that that population, as a percentage of all Alaskans, will remain relatively static through the year 2000, when, out of a population of 831,000 people, there will be 25,158 elderly.[54]

We believe that those projections are overly conservative, and do not take into account the significant nationwide trend of increased elderly population. Nor do those projections include the retirement years of the post World War II "baby boom" generation -- which will begin about the year 2010.

Accordingly, in projecting the long term impact of this option on permanent dividend distribution, we have used the

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[53]Alaska Population Overview, Alaska Department of Labor, 1981

[54]Id.

national growth patterns projected by the federal Social Security ministration, which are as follows:

YEAR	% OF ELDERLY POPULATION
1950	8.1
2000	13.1
2025	19.5
2050	21.8

Using those assumptions, Travelers' Insurance Co., on our behalf, calculated the percentage of permanent fund dividends which would be required to fund a "pay as you go" system.

For fiscal year 1983, the calculations are relatively straight-forward. Given an aggregate distribution of some $169 million in permanent fund dividends this year, approximately 25% would be needed to fund a "pay as you go system."

However, even assuming a 3% cost of living adjustment in the payment each year, the percentage needed to fund the program decreases. This is because permanent fund earnings will increase at a rate substantially higher than inflation. From the year 1983 to 2000, the average funding required would be 15 to 19 percent of the distributions, while, in the years 2000 to 2025 (and assuming continued growth in permanent fund earnings) the funding amount would be 10-12 percent.

Thus, if the withholding remains static at 25% over the course of several years, the resultant excess would begin to build a savings account of substantial magnitude, which at some

point in the future would make the program partially, or perhaps totally self-sustaining.

One obvious advantage of this option is that it frees the general fund from ALB obligations immediately. Conversely, by materially reducing the annual permanent fund dividend, it obviously raises some political difficulties.

Additionally, the social security option could likewise be tied to contribution history -- although not in the precise manner of the annuity option. The federal social security system currently fully covers any individual who had "not less than one quarter of coverage ... for each calender elapsing after 1950 ... except that in no case shall an individual be a fully insured individual unless he has at least 6 quarters of coverage."[55] Because, in the future, some portion of the benefits will be paid by the "savings account" resulting from the static 25% contribution, we believe that a similar contribution history requirement could be established in the legislation.

Even more so than the annuity option, there would be no "current economic benefit" from the program. By reducing the permanent fund distribution by 25%, and funding a retirement program from which the individual may or may not ultimately benefit, we believe it extremely unlikely that the IRS would conclude that the reduced sum is in some manner taxable.

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[55] 42 U.S.C. §414(a)(1)

Morever, we believe there is a substantial likelihood that the existing ALB exemption in federal law could be retained. Indeed, stripped to its essense this option does little more than alter the funding source of the ALB program.

The primary risk of the program is all the more apparent in light of the current difficulties with the federal social security system. While option F would be funded by a currently purchased annuity, younger Alaskans would be contributing to this option on the mere hope that the requisite amount of permanent fund earnings would remain available for the program well into the 21st century. The "savings account" created by the static 25% withholding is intended to alleviate that problem; however, regardless of the rate of growth of that account, there is plainly some risk in this option.[56]

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[56]For example, under our population projections, there will be 30,747 elderly in Alaska in the year 2000. The permanent fund distributions for that year under AS 43.23 are estimated by the Department of Revenue to be $792 million, of which, under our static 25% withholding, $198 million would be placed in the social security fund. In that year, with a 3% COLA, the maximum monthly bonus will be approximately $390. Even if every elderly Alaskan is eligible for full benefits under the law's contribution requirements, the maximum payments would be $120 million -- with a savings account deposit being made in that year alone of $70 million. Of course, many of these elderly may not be fully eligible, and some who are eligible may not be residing in Alaska during that year.

Finally, there is some advantage to the existing elderly in this system over the annuity option. The existing elderly would have a net loss of only 25% of their permanent fund dividend, rather than the entirety of the benefit under the annuity approach.

H. Health Insurance For The Elderly.

The state of health insurance for the elderly, and indeed for all Alaskans, has already been the subject of considerable study,[57] and legislative activity.[58] Because of the obvious critical importance of adequate health care coverage for Alaska's elderly, the option of providing comprehensive health insurance for Alaska's older citizens in lieu of the longevity bonus was included in this report as an option.

While the Department of Law report found that health expenses were a major use of the longevity bonus for only 5.5% of its sample, the 1976 longevity bonus study found that 29% of the bonus recipients used at least a portion of the ALB for medical care, while 11% used a portion of the bonus for "insurance of all kinds."[59]

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[57]Alaska Comprehensive Health Care Financing Study, Batelle Human Affair Research Center (1981)

[58]HB 641, 12th Leg. 1st Sess. (1981)

[59]ALB Survey, op. cit. n. 9 at 22

In fact, almost all of Alaska's elderly receive some kind of public or private health coverage assistance -- either through Medicare, Medicaid, public and private retirement programs, Veteran's benefits or the Indian Health Service/Public Health Service.

When assessing the health insurance option, the two obvious questions are: (1) how severe are the gaps in existing coverage; and (2) how much would it cost to fill those gaps?

The major source of health insurance coverage for the elderly in Alaska is obviously Medicare -- a federal insurance plan which provides hospitalization for those eligible for social security[60] and medical insurance for an additional fee of $12.20 per month.

Both the hospital and medical insurance contain substantial deductibles, i.e. the first $304 of the hospital bill -- and co-payment requirements (20% in the case of medical insurance.)

Nursing home coverage under Medicare is severely limited -- confined to post-hospital care in a "skilled nursing facility" for short periods of time.

It is difficult to determine how many resident Alaskan elderly are on Medicare -- available statistics are bloated by Medicare claims submitted by tourists. There are some 9,323

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[60]42 U.S.C.§§ 426,1395(c). A person ineligible for Social Security may obtain Medicare hospitalization insurance for $113 per month

retired persons in Alaska receiving social security -- and hence eligible for Medicare.[61].

The largest group of elderly Alaskans ineligible for Medicare are rural residents, primarily Natives, who do not have a sufficient wage earning history to qualify for social security. All Alaska Indians, Aleuts and Eskimos are eligible for IHS -- which provides a broad range of services depending upon available facilities. IHS is, however, primarily a direct provider of facilities -- it does not make cash payments for services such a custodial care in a nursing home. Moreover, it is currently facing severe cutbacks in areas such as reimbursement for health-related travel expenses[62].

The most comprehensive health coverage in Alaska is, of course, Medicaid. To be eligible for Medicaid, one must meet the State public assistance income limitations. As noted previously, there are currently some 2300 elderly Alaska citizens on Medicaid. Medicaid does cover virtually unlimited nursing home residency.

The most glaring deficiency in Alaska health care for the elderly is the lack of coverage for institutionalization in custodial environments such as nursing homes. Nursing home

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[61]Interview, Ms. P. Eubanks, Field Rep. Social Security Admin. (Feb. 24, 1983)

[62]Interview, Ms. P. Roberts IHS, (Feb. 23, 1983)

rates in Alaska run from $90 to $172 per day[63]. The costs are simply prohibitive for anyone not on Medicaid -- indeed, of the 467 elderly Alaskans currently residing in State nursing homes (other than the Pioneers Homes), all but 31 are there under Medicaid, or Alaska's General Relief Medical Assistance.

Conversely, nursing home rates in Washington, for example, have been estimated by the Department of Health & Social Services to vary from $50-$60 per day. It is not known how many elderly Alaskans are institutionalized in lower forty-eight custodial care facilities; however, it is apparent that unless one is eligible for Pioneer Home placement, a nursing home can be afforded if, at all, only by relocating to the lower forty-eight.

Three private organizations were asked to estimate the premium amount required to supplement Medicare and other coverage for Alaska's elderly to provide health insurance equivalent to the existing Public Employees' Retirement System's retiree coverage, and to include comprehensive nursing home coverage. Neither Travelers Insurance, nor Aetna Insurance felt capable of providing an estimate.

However, insurance consultants frequently used by the state for matters such as the public employees Supplemental Benefits System estimated that to provide supplemental coverage

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63Alaska Nursing Home Census, Alaska Department of Health & Social Service, 12/31/82

for Medicare, insurance could be provided at a premium of approximately $70 per individual per month. This would include comprehensive nursing home coverage.

Medicare is currently a primary insurer -- that is, the State could provide for Supplemental coverage without endangering basic Medicare eligibility. Moreover, and in all likelihood, supplemental State coverage could properly provide otherwise uninsured Alaska Natives with those costs not covered by the Indian Health Service.

The major difficulty is Medicaid. Medicaid eligibility is very much contingent upon the unavailability of "resources".[64] Currently, the State only pays 48% of a Medicaid's patient bills. If a State health insurance policy was considered a "resource" the State could find itself footing the entirety of a Medicaid patient's bill.

Of course, the State would hardly need to "supplement" any Medicaid coverage -- Medicaid coverage itself being essentially inclusive. The statute, could simply exempt Medicaid recipients from the coverage of the policy. The issue posed by such an enactment is whether the State would be frustrating the Congressional goals behind Medicaid -- which is to provide a health coverage means or last resort -- thereby running afoul of the Supremecy Clause.[65].

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[64]42 U.S.C. §1382(a)(1)(B)

[65]Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963)

Assuming that the State could continue to merely supplement Medicare, IHS facilities and existing private and retiree coverages, and that the consultants' figures are accurate, there remain two difficulties with the health insurance option. First, it is of no benefit to Alaska's needy elderly -- who will merely continue with Medicaid coverage at the price of their longevity bonus.

Secondly, there is the potentially severe problem of in-migration. If a year's residency in Alaska[66] were all that were required for free and unlimited nursing home coverage, the potential of in-migration may be severe. There are two potentially justifable components of the program which could mitigate this potential:

1. If a purpose of the health insurance option is to allow Alaska residents to continue to reside in the state even if nursing home coverage is required, nursing home coverage could be limited to Alaska institutions, just as many states

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[66]It is possible, although we believe unlikely, that a court would rule that supplemental health insurance coverage would constitute a "basis necessity of life" -- dropping the maximum possible durational residency requirement to 30 days. The program would be supplemental to a host of existing assistance insurance programs, and would not be based on need. See Memorial Hospital v. Maricopa County, 415 U.S. at 261.

limit resident tuition discounts to in-state universities.[67] The difficulty, obviously, is that existing Alaskan nursing home capacity is limited. Whether unlimited nursing home coverage for all Alaskans would result in the expansion of existing facilities is debatable;

2. For the reasons cited with respect to the annuity and social security options, eligibility for health insurance coverage might properly be based upon contribution history if (a) a portion of the individual's permanent fund dividend is used to help fund the insurance program; and (b) the funding is in excess of current needs, in order to amass the same type of "savings account" envisioned with respect to the social security option.

I. LONGEVITY BONUS PREMISED ON INDIVIDUALIZED RELOCATION HARDSHIP.

As noted in Section II(A), ante, there is some judicial support for the view that it is permissible for Alaska to establish a program intended to benefit those who would suffer the most hardship by financially-coerced relocation from the state, and to measure that hardship in part by duration of residence.

This option relies upon that support, and involves three steps:

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[67]Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), affa mem. 401 U.S. 985 (1971)

1. cataloging those criteria which would differentiate those Alaska elderly who would suffer relatively more hardship by being forced to retire outside the state, and who need financial assistance in order to remain in-state;

2. translation of those subjective criteria to a point system similar to that used by the Alaska Commercial Fisheries Entry Commission; and[68]

3. structuring of that point system such that (a) administrative costs are minimized; and (b) successful applicants are confined to a pool roughly equivalent in number to existing bonus recipients.

Indeed, the structure of this option is similar to the Alaska Limited Entry Act -- which translates certain very subjective criteria -- such as "economic dependence on the fishery" -- into an objective point system. It does so, of course, at a bureaucratic price -- approximately $2.5 million a year for a pool of applicants originally roughly equivalent to those which this option would affect. It also does so at other costs, which will be discussed below.

It is not difficult to catalog the criteria which would set our "relocation hardship" pool aside. Duration and continuity of residence would be one criteria, as would, perhaps:

1. income;

2. location of family;

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[68]See AS 16.43

3. location of property; and

4. ethnic, religious, and cultural ties.

Although income and duration of residency would play a role in determing eligibility, no one factor alone would be dispositive.

It would not be difficult to translate these factors into a point system; nor would it be particularly difficult to structure that point system to limit the class of successful applicants. The proposal, however, does suffer fror the following disadvantages:

1. Since most Alaskan elderly have lived here more than 10 years most Alaska elderly will suffer some demonsterable hardship from relocating elsewhere -- although a certain percentage obviously do not require a longevity bonus to remain;

2. The alternative also involves the establishment and funding of a new bureacracy -- an intrisically unworthwhile undertaking, but one which nonetheless would cost far less than simply opening the class to all elderly Alaskans;

3. Perhaps the most obvious disadvantage is the burden that it would place upon elderly Alaskans themselves. There would presumably be a lengthy application form, together with evidentiary requirements, and in some cases, adjudicatory hearings. The Limited Entry Commission is currently involved in some 120 judicial appeals -- a number which is either at or below historic levels. According to the Commission's FY1984

budget presentation, there is a current backload of some 325 administrative adjudications.

Attorneys will be required -- regardless of what efforts are undertaken to make the process simple and informal. The difficulties facing the elderly applicant are thus rather apparent.

J. GRANDFATHERING

This report closes with one of the simpler alternatives -- opening the class of longevity bonus recipients to all elderly Alaskans with one year's residency, and terminating the program for the future. Persons eligible, or becoming eligible this year will be "grandfathered" and will receive a longevity bonus for life. The fiscal impacts of this alternative are, for FY1984, identical to option A, and will obviously decline in the future due to mortality and relocation.

The obvious advantage of this program is that it protects those currently on the longevity bonus program. Equally, it deprives those approaching the age of 65 with any expectation of receiving a bonus.

We believe that this option is constitutionally permissible. The Alaska Supreme Court shares the general view of the constitutionality of grandfathering laws -- as long as the grandfathered class itself is constitutionally defined.[69] Plainly, the state legislatures

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[69]Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d at 1259-61.

have the right to terminate social programs while protecting those who have come to rely on their benefits.

4. CONCLUSION

As noted at the outset, the purpose of this report is merely to provide a threshhold feasibility review of various options for amending the longevity bonus program. Through discussions with administration officials, legislative staff members, consultants and private industry, we have attempted to highlight the major issues surrounding each alternative, and provide at least rough information on each question raised. If, after the Judiciary Committee has identified two or three relatively attractive options, the effort expended over the past three weeks on 10 proposals can be condensed into the pursuit of three, proposed legislation and a more intricate analysis of the preferred options can be promptly transmitted.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT

CONFIDENTIAL

RODNEY G. VEST,

Plaintiff,

v.

MARIAN SCHAFER and STATE OF ALASKA,

Defendants.

Case No. 1JU-82-1103 Civ.

AGREEMENT AND ORDER OF SETTLEMENT

WHEREAS, in 1972 the Alaska Legislature enacted the Alaska Longevity Bonus Program (AS 47.45.010 et. seq.) which currently provides, inter alia, for the payment of $250 for each month of continued residency by bona fide Alaska residents over the age of 65 who were domiciled in Alaska on or before January 3, 1959 and who have maintained a continuous domicile in Alaska for 25 years;

WHEREAS, the purpose of the Alaska Longevity Bonus Program is among other things, to reward elderly Alaskans for their past contributions to the state and territory, and for past hardships suffered during territorial and early statehood days. AS 47.45.170;

WHEREAS, since 1972, the State of Alaska in good faith has administered the Longevity Bonus Program in the belief that

the rewarding of prior residency was a constitutionally permissible purpose;

WHEREAS, in upholding the State's prior Permanent Fund Dividend distribution program, the Alaska Supreme Court ruled that "reward[ing] those Alaska residents who have chosen to stay" is a constitutionally permissible purpose. Williams v. Zobel, 619 P.2d 448, 460 (Alaska 1980);

WHEREAS, Justices Dimond and Matthews, in dissenting in Williams v. Zobel, believed that the Longevity Bonus Program would withstand constitutional scrutiny (619 P.2d at 469, n.13);

WHEREAS, on June 14, 1982, the United States Supreme Court, in invalidating Alaska's prior Permanent Fund Distribution Program, ruled that a statutory purpose of rewarding prior residency was constitutionally impermissible. Zobel v. Williams, ____ U.S. _____, 80-1146;

WHEREAS, because of the U.S. Supreme Court's decision in Zobel v. Williams, it appears the Longevity Program may not be deemed constitutional;

WHEREAS, a serious and good faith disagreement has developed and the Alaska Legislative Council questions whether the appropriate remedy is to expand the class of recipiants of monthly longevity bonuses, or alternatively, to invalidate the entire program and cease payment of monthly bonuses to any person;

WHEREAS, this uncertainty regarding the appropriate remedy derives from § 2, Ch. 205, SLA 1972, which provides, with respect to the Longevity Bonus Program:

> If any provision of this Act, or the application of a provision of this Act to any person or circumstances is held invalid, this entire act shall be considered invalid.

WHEREAS, unless and until the question of appropriate remedy is resolved by this court, or a settlement of this controversy is achieved, it is reasonable and prudent that the State of Alaska continue to administer the Longevity Bonus Program in the manner provided by statute;

WHEREAS, on July 6, 1982, Plaintiff Rodney Vest filed the above-captioned action, seeking as relief his inclusion in the Longevity Bonus Program of "any . . . bona fide Alaska resident who is 65 years or older....". Complaint, Prayer for Relief, para. 2;

WHEREAS, ON July 23, 1982, Plaintiff Vest filed an amended complaint seeking to have this case certified as a class action under Alaska Rule of Civil Procedure 23 on behalf of all bona fide Alaskans of the age of 65 or older, and further seeking as alternative relief the invalidation of the Longevity Bonus Program, or the payment of retroactive bonuses "in amount equal to what they would have been entitled to obtain under the program had the unconstitutional criteria never been in place or

enforced." First Amended Complaint, Prayer for Relief, paras. 4-6.

WHEREAS, there are currently 9,124 recipients of monthly longevity bonuses, and many of these recipients are of modest means, and depend upon the monthly bonus for sustenance, and the termination of the longevity bonus payments to these individuals could cause great and irreparable harm;

WHEREAS, because of the uncertainty with respect to the appropriate remedy, the parties are desirous of settling this litigation in a manner which affords meaningful relief to Plaintiff Vest and others similarly situated, but which also ensures the continuation of monthly bonus payments to existing recipients;

WHEREAS, the parties are further desirous of achieving a settlement which will finalize and constitute a full and final accord of the rights and liabilities of the parties hereto;

WHEREAS, there may be as many as 4,000 persons who are similarly situated with Plaintiff Vest -- to wit, bona fide Alaskans of the age of 65 or over -- who are not currently receiving longevity bonus payments because of the residency requirements of the statute;

WHEREAS, the parties agree that, because of the nature of the rights of recipients involved in this litigation, a one-year residency requirement is reasonable, necessary and appropriate in order to demonstrate bona fide Alaskan residency;

WHEREAS, a full and final settlement of the parties' rights and liabilities hereto cannot be achieved until all persons similarly situated with Plaintiff Vest are certified as a class under Alaska Rule of Civil Procedure 23(c);

WHEREAS, the settlement envisioned by the parties includes the retroactive payment of longevity bonuses to plaintiff class commencing and including July 1, 1982;

WHEREAS, the payment of such retroactive bonuses to an expanded class of recipients would require the appropriation of sums above the amount currently appropriated for the longevity bonus program for fiscal year 1982-83. Moreover, and because of the Alaska Legislative Council's view of the non-severability clause, quoted above (effecting the expansion of the class of longevity bonus recipients), such payments may require the enactment of curative legislation;

WHEREAS, it is therefore necessary, in order to effectuate this settlement, for appropriate legislation to be enacted;

WHEREAS, the Alaska Legislature is a coordinate branch of government of the State of Alaska, and is represented in this action by the Attorney General;

WHEREAS, notwithstanding the above, the Attorney General cannot in any manner bind or compel the Alaska Legislature in the exercise of its legislative powers;

WHEREAS, on July 16, 1982, the Alaska Legislative Council moved to participate in the above-captioned action as amicus curiae, it is agreed that the Alaska Legislative Council may participate in all negotiations of any settlement, the filing of briefs and may participate in oral arguments; however, the Alaska Legislative Council agrees that it will not be involved in discovery proceedings in the event the case is ultimately litigated and will not become otherwise involved in accordance with the terms of this settlement agreement;

WHEREAS, and while the Alaska Legislative Council cannot bind the Alaska Legislature in the exercise of its legislative powers, the Alaska Legislative Council can and is willing to commit its best efforts to the enactment of appropriate legislation during the first regular session of the 13th Alaska Legislature;

WHEREAS, and subject to (1) the certification of plaintiff class, (2) the Superior Court's approval of a settlement proposal herein, and (3) the commitment of the Alaska Legislative Council to use its best efforts in the enactment of appropriate legislation, plaintiff class is agreed that such action will provide full and adequate consideration for the promise and agreement of plaintiff class not to seek relief in any form with respect to the Longevity Bonus Program through and including the adjournment of the first regular session of the

13th Alaska Legislature or June 30, 1983, whichever ever event comes first in time;

WHEREAS, nothing herein is to be construed as an admission by the State of Alaska as to the unconstitutionality of the Longevity Bonus Program;

WHEREAS, except with respect to the good faith of the State and its agents, nothing herein is to be construed as an admission by either party in the event the settlement agreed to here is not consummated;

NOW THEREFORE THE PARTIES STIPULATE AND AGREE AS FOLLOWS:

1. All actions and proceedings in the above-captioned case, other than:

(a) the certification of plaintiffs class

(b) the approval by the Superior Court for the State of Alaska, First Judicial District of this proposed settlement agreement, and

(c) any further approval by the court necessary to consummate the settlement agreement after the certification of plaintiffs class,

are stayed through and including the date of adjournment of the first regular session of the 13th Alaska Legislature or June 30th, 1983, whichever event occurs first in time. Procedures for class certification shall be submitted to the Court for review no later than September 10, 1982, and the parties will request the

Court to render its order with respect to the notice procedures forthe said class no later than September 24th, 1982. Notice to the class shall be transmitted, along with the proposed settlement and the conditions necessary to affectuate the settlement, on or before October 11th, 1982. The State of Alaska will undertake reasonable efforts to assist Plaintiff to locate those persons 65 years or older as of July 1, 1982, who have been bona fide Alaska residents in the state of Alaska for one year immediately prior to that date. In the event this settlement agreement is not consummated for whatever reason, but the class certification has been certified by the court as set forth above, the Plaintiff shall not be precluded from seeking an enlargement of the class and a certification thereof so as to include other persons having a shorter residential duration within the State and may also seek a greater retroactive recovery.

2. The Alaska Legislative Council shall utilize its best efforts to secure the enactment, during the first regular session of the 13th Alaska Legislature, of the following legislation;

(a) Legislation which treats equally all bona fide Alaska residents of the age of 65 or older with respect to their residential qualifications to receive any "longevity bonus payments" or any substitute benefits from July 1, 1982 and thereafter for as long as the legislature may determine to continue such a program. Bona fide Alaska residents are those

who continuously resided in the state for one year immediately prior to the date of eligibility; and

(b) Any appropriation which might be required to fund the legislation described in paragraph (a), including the retroactive payment of bonuses.

3. If the Alaska Legislature passes legislation described in 2(a)-(b) above at any time during the first regular session of the 13th Alaska Legislature and the Governor signs the said legislation or otherwise allows 2(a)-(b) to become law so that 2(a)-(b) will be effective no later than Ninety days after enacted, the above action shall be dismissed with prejudice, subject only to the determination of attorney fees by the Court.

4. If the above-captioned action is dismissed under paragraph 3 above, all claims or rights of any class member (except those class members who exercise their right to opt out under Rule 23 of the Alaska Rules of Civil Procedure), with respect to the Longevity Bonus Program, shall be merged into the judgment of dismissal and extinguished;

5. If the Legislation described in 2(a)-(b) above is not enacted during the first regular session of the 13th Alaska Legislature or in any event no later than June 30, 1983, then this agreement shall be null and void, except that the Plaintiff and the class certified, together with any additional members, if there is an enlargement of the class, may prosecute this case as

if this agreement had not been entered into, it being the intent of the parties that certification of the plaintiff class, or the enlargement thereof, shall not be affected if this agreement becomes null and void;

6. The obligation of the Alaska Legislative Council under 2 herein is contingent upon certification of plaintiff class under Alaska Rule of Civil Procedure 23(c), which class shall include each and every individual of the age of 65 or older who, as of July 1, 1982, had continuously resided one year immediately preceding that date within the State of Alaska, and in the event that a class is certified which is less inclusive than as above described, the State of Alaska has reserved the right to waive the protections of this paragraph in whole or in part. Nothing in this paragraph is intended to modify or affect the certification of the class or the right of the Plaintiff to enlarge the class if this agreement becomes null and void.

DATED this __ day of _____, 1982.

DATED: August 9, 1982 Wilson L. Condon by JHS
Attorney for Defendants
Marian Schaefer and
State of Alaska

WILSON L. CONDON
ATTORNEY GENERAL

DATED: August 6, 1982 Henry J. Camarot
Attorney for Plaintiff

Henry J. Camarot
Camarot, Sandberg & Hunter

DATED: 8/16/82

Attorney for Alaska
Legislative Council
Amicus Curiae

FOR William Ruddy
Robertson, Monagle,
Eastaugh & Bradley

O R D E R

IT IS SO ORDERED.

DATED: _____

Hon. Walter Carpeneti
Superior Court Judge

PROGRAM NAME	PROGRAM DESCRIPTION	TYPE OF BENEFITS	(Number of Persons) 1	2	3	4	ALB EXCLUDED	NUMBER OF ELDERLY ALASKANS	MEAN BENEFIT	NUMBER OF ELDERLY AT RISK
Medicaid - Nursing Home	Provides payments on behalf of needy persons in nursing homes for cost of care 48% federal 52% state funds	Vendor Payments	852.90	n/a	n/a	n/a	Yes	up to $450/mo.	$3600	275* es app. 120 included 500 at risk SSI
Medicaid - Regular	Provides payment for necessary medical care on behalf of recipients of Old Age Assistance federal, 52% state funds, 48%	Vendor Payment	546	802 (net)	n/a	n/a	Yes	app. 2300 eligible, of whom app. 943 use benefits each month	$1027/ useage	app. 1200* *includes 500 at risk in SSI program

PROGRAM NAME	PROGRAM DESCRIPTION	TYPE OF BENEFITS	(Number of Persons) 1	2	3	4	ALB EXCLUDED	ELDERLY ALASKANS	MEAN BENEFIT	NUMBER OF ELDERLY AT RISK
Old Age Assistance	Payments to needy	Monthly Cash	546	802	n/a	n/a	Yes	app 2300	246.70/mo.	app 1200* *includes 500 at risk in SSI
Food Stamp Program	A federally funded program designed to promote the health of the nation's population by raising the levels of nutrition among low-income households	Food coupons that are used in place of money	490	650	810	970 This is net monthly income	No	1700	$32 per person (random sampling of 10-elderly cases.)	-0-
Supplemental Security Income(SSI)	Federally funded & administered program providing assistance to needy persons who are aged or disabled 100% federal funds	Monthly Cash	284.30	426.40	n/a	n/a (net)	Yes	app 900	app $228 mo.	500
Energy Assistance	Grants to low-income households to offset energy costs	Vendor home energy credit	$851	$1113	$1375	$1637 (net)	Yes	app. 1400	$475	300-400
General Relief (Medical)	100% state-funded, provides medical assistance on behalf of needy persons. For elderly, primarily provides drugs for Medicaid eligible persons on OAA and SSI	Vendor Payment	$300 or same as SSI and/or OAA (net)	$400			Yes, for elderly	2750 eligibles app. 30% of whom use benefits	$50/mo. useage	app. 1475

ATTACHMENT 8

Gilman v. Martin

RECEIVED
FEB 28 1983

IN THE SUPREME COURT OF THE STATE OF ALASKA

DON GILMAN, et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
HARRY V. MARTIN, et al.,	)	
	)	
Appellees.	)	Supreme Court No. 5937
	)	

SUPPLEMENTAL BRIEF OF AMICUS CURIAE STATE OF ALASKA

WILSON L. CONDON
ATTORNEY GENERAL

By: Robert M. Maynard
Assistant Attorney General
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Juneau, Alaska 99811
(907) 465-3600

Filed in the Supreme Court
of the State of Alaska
This 23rd day of July, 1982
ROBERT D. BACON
CLERK OF THE SUPREME COURT

By: _____
Deputy Clerk

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I. INTRODUCTION AND SUMMARY

In a series of cases -- Williams v. Zobel, 619 P.2d 422 (Alaska 1980) (Zobel I); Williams v. Zobel, 619 P 2d 448 (Alaska 1980) (Zobel II); and Zobel v. Williams, ___ U.S. ___, Op. No. 80-1146 (June 14, 1982) (Zobel III) -- this court and the United States Supreme Court ruled upon various residency distinctions relating to tax relief (Zobel I) and distribution of permanent fund dividends. Zobel II and Zobel III. These cases culminated in Zobel III, in which the United States Supreme Court overturned the then existing permanent fund dividend distribution plan.

After Zobel III, this court invited the State of Alaska to submit an amicus brief on the effect of Zobel III on the residency provisions of Kenai's land disposal program in light of the state's land disposal lottery program (AS 38.05.058). The state's program requires one-year residency in order to qualify for the lottery (AS 38.05.057). In addition, it grants a discount of 5% toward the purchase price for every year of residency up to a maximum discount of 50% (10 years) (AS 38.05.058).

The residency provisions of the Kenai land disposal program are almost identical to the provisions of the state program. As a result, a ruling on the Kenai program will be seen as a ruling on the state program. Consequently, the state will present its arguments in support of the state disposal program so that this court may make distinctions between the programs, if they exist, or treat the programs similarly if no distinctions exist. The state understands this to be the court's desire by

its express reference to AS 38.05.058 in its order inviting the state to appear as amicus curiae. In any event, the state urges the court to expressly consider AS 38.05.058 in its ruling on the Kenai land disposal program.

The position of the state is that both the one-year residence requirement and the residence provisions of the discount program are constitutional under Zobel III. As to the one-year residence requirement, Zobel III did not change the law regarding using length of residence as a test of bona fide citizenship. Consequently, that requirement is to be analyzed under preexisting law. Under that analysis the one-year requirement is constitutional.

The discount program is also constitutional under Zobel III. Zobel III, including the concurring opinion of Justice Brennan, would allow using length of residence as a basis for distinguishing among bona fide residents as long as the distinction is related to a valid state interest apart from simply rewarding longer term residents. E.g., Zobel III, Brennan concurrence at 5. 1/ The constitutionality of distinctions between residents, however, appears to be limited by the implication in Zobel III that even if there is a valid state interest, the Court

---

1. All cites to Zobel III refer to the Court's slip opinion. The majority opinion by Chief Justice Burger is referred to as the "Burger opinion," the concurring opinions of Justices Brennan and O'Connor are referred to as the "Brennan concurrence" and "O'Connor concurrence," and the dissent by Justice Rehnquist is referred to as the "Rehnquist dissent."

will probably reject any distinctions which create an unlimited ever-expanding number of permanent classes (i.e., where a 60-year resident always wins over a 59-year resident, or a 10-year resident over a 9-year resident, etc.). As Justice Dimond noted in his dissent in Zobel II, it must be "at least likely that new residents would achieve equality." Zobel II at 468. Under the discount plan, a valid state interest is furthered and the number of classes of residents created is limited.

The Court's holding in Zobel III only established two propositions of law: (1) rewards for past contributions cannot be based on length of residence; and (2) recognizing residency accumulated prior to the date of enactment of a statute is not rationally related to the purpose of creating incentives to stay in the future. Those holdings potentially apply only to awarding discounts based on residency accumulated prior to 1978 (the date of enactment of the discount program, 1978 SLA, ch. 181, § 6). Otherwise, the discount program is unaffected by the holding in Zobel III.

A more difficult problem is the effect of the vigorous dicta in Zobel III that all programs which create unlimited and ever-expanding classes of residents are unconstitutional. Whether that dicta is the law of the land, however, need not be resolved. Even though the reasoning of that dicta would have overturned the dividend plan in its entirety, the court was unwilling to memorialize the dicta in a holding.

Therefore, the Zobel III dicta represents the water's edge of constitutional restraints on residency requirements. Since the residency discount is substantially less expansive in its distinctions between residents, there is no call for expanding the rationale of the Zobel III dicta further to encompass this program. Rather, the program should be analyzed solely under the modified rational basis equal protection test expressed in State v. Erickson, 574 P.2d 1 (Alaska 1978). Zobel II shows that the residency discount passes muster under that test.

Finally, the state urges this court to apply any adverse ruling prospectively only so as to: (1) not upset any ongoing property transactions (Moore v. State, 553 P.2d 8 (Alaska 1976); and (2) treat all participants in the program equally.

The state urges the court to look closely at the question of residency. There are numerous residency-based programs that will likely be affected by the analysis that will be developed in this case. Zobel III actually stands for a limited number of narrow propositions; it is of little help in assessing the constitutionality of a wide range of programs. Each program has a different purpose; consequently, a means of analysis that is broader than Zobel III must be developed. Length of residency measures different attributes and furthers different purposes in, for example, the student loan program (AS 14.40.763) and the Pioneers Home program (AS 47.25). Both of these are different from the land discount plan (AS 38.05.058). A broad rejection of all length of residence plans is clearly unwarranted.

Conversely, a case-by-case rejection or approval tends to throw doubt upon many perhaps legitimate programs.

A clarification of the law in this area is sorely needed. Zobel III added more confusion than it resolved. Because of that existing confusion, we urge the court to give an expedited consideration of the issues raised.

II. ARGUMENT

A. ZOBEL III STANDS FOR ONLY A FEW NARROW PROPOSITIONS

Despite its local notoriety, the United States Supreme Court opinion in Zobel III actually stands for only two propositions. First, making an award of benefits based on residency accumulated prior to the date of enactment is not rationally related to the purpose of granting incentives to continued residence. Second, a statute may not award benefits or rights based on past contributions measured solely by length of residence. 2/

---

2. Although the majority opinion by Chief Justice Burger could be read to deny all awards based on past contributions, the concurrences of five of the justices would restrict its application to contributions measured by length of residence alone.

> The court today reaffirms the important principle that, at least with respect to a durational residency discrimination, a state's desire "to reward citizens for past contributions" is "clearly not a legitimate state purpose."

Zobel III, Brennan concurrence at 4 (emphasis added). See also Id., Brennan concurrence at 8-9 and O'Connor concurrence at 1, n.1.

Beyond these two holdings, the impact of Zobel III is in its strong implication that the United States Supreme Court will not tolerate a certain kind of discrimination between bona fide residents. This discrimination is the creation of "fixed, permanent distinctions between an ever-increasing number of permanent classes of concededly bona fide residents, based on how long they lived in the state." Zobel III, Burger opinion at 4. See also Id., Burger opinion at 9 (stating that it would be "clearly impermissible" to "divide citizens into expanding numbers of permanent classes"). Although the Court's opinion avoided ruling on the constitutionality of the "prospective" portion of the dividend distribution plan, the concurring opinions of Justices O'Connor and especially Brennan leave little doubt that that plan would not have passed constitutional muster.

The Court's opinion in Zobel III restated the three purposes advanced in justification of the distinctions among residents made by the dividend plan. Those purposes were stated as

> (1) the creation of a financial incentive for individuals to establish and maintain residence in Alaska; (2) the encouragement of prudent management of the Permanent Fund; and (3) the apportionment of benefits in recognition of "undefined 'contributions of various kinds, both tangible and intangible, which residents have made during their years of residency.'"

Id., Burger opinion at 6.

The Court concluded that the distinctions among residents made under the plan did not satisfy the rational basis

test. Under the plan, residents were to receive greater benefits for greater durations of residency. The plan was also to be applied retroactively so that residency before enactment of the plan would also be counted toward increased benefits. The Court's opinion focused on the retrospective aspect of the plan. The Court failed to see any rational relationship between this retrospective aspect of the plan and the first two purposes noted above. In that regard, the Court stated:

> Assuming arguendo that granting increased dividend benefits of each year of continued residence might give some residents an incentive to stay in the State in order to reap increased dividend benefits in the future, the State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment.
>
> Nor does the State's purpose of furthering the prudent management of the Permanent Fund and the State's resources support retrospective application of its plan to the date of statehood.

Id., Burger opinion at 7.

The Court relied upon Shapiro v. Thompson, 394 U.S. 618 (1969) to hold that the third objective -- to apportion benefits in recognition of past contributions to the state -- was not a legitimate state purpose. Thus, the Court concluded that the distinctions were invalid under the equal protection clause at least insofar as they were applied retroactively to provide greater benefits based on length of residence before enactment of the dividend plan.

In a concurring opinion written by Justice Brennan for himself and three other members of the Court, it was emphasized that

> The Court today reaffirms the important principle that, at least with respect to durational-residency discrimination, a State's desire "to reward citizens for past contributions" is "clearly not a legitimate state purpose."

Id., Brennan concurrence at 4, quoting from the Burger opinion at 7-8. Beyond that, Justice Brennan's opinion indicates that at least four of the Justices considered the constitutional concerns raised by the dividend plan to be such as "might well preclude even the prospective operation of Alaska's scheme." Id., Brennan concurrence at 1.

Zobel III, however, neither disturbed the case law on using length of residence as a means of establishing the bona fides of citizenship, nor ruled that all discriminations between bona fide residents based on length of residency were unconstitutional per se. Even Justice Brennan, whose opinion is the harshest of the attacks on the distribution plan, stated that "length of residence may . . . be used to test the bona fides of citizenship." Id., Brennan concurrence at 6. Concerning distinctions between bona fide citizens, Justice Brennan would only automatically overturn residency discrimination having no independent valid state interest:

> It is, of course, elementary that the Constitution does not bar the States from making reasoned distinctions between citizens. Insofar as those distinctions are rationally related to the legitimate ends of the State

> they present no constitutional difficulty, as our equal protection jurisprudence attests. But we have never suggested that duration of residence vel non provides a valid justification for discrimination. To the contrary, discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself.

Id., Brennan concurrence at 5.

It is noteworthy that the Court as a whole declined to take an additional step and invalidate the prospective component of the unlimited and ever-expanding dividend distribution plan. Although five justices signed on to the concurring opinions of Justices Brennan and O'Connor, and even though under the reasoning of the concurring opinions the entire program would have been expressly overturned, the Court refused to make that holding. Zobel III, therefore, also stands for the proposition that the residency provisions of the dividend plan represent "the water's edge"; i.e., that distinctions such as those made by the dividend program mark the boundary into per se unconstitutional territory. Distinctions between residents that are not unlimited and "ever-expanding" are not automatically invalid, and must be analyzed on a case-by-case basis.

This case brings before the court plans which are supported by legitimate state interests and which are not as pervasive as the permanent fund plan in their distinctions between residents. The question before this court is whether these plans are so extreme as to cross the boundary marked by the dicta in the Zobel III.

B. THE ONE-YEAR RESIDENCE REQUIREMENT IS A VALID TEST FOR ESTABLISHING THE BONA FIDES OF ALASKA RESIDENCE

Prior to reaching the specifics of the discount program, it is appropriate to discuss that part of the land disposal program which was not affected by the Zobel III decision: the requirement of one-year residence as a precondition to qualification. This is simply a length of residence requirement to test the bona fides of citizenship. It is an objective requirement which is constitutional since neither a fundamental political right or access to a basic necessity of life is involved.

In order to be eligible to participate in the land lottery itself, the only check on the bona fides of residency is the one-year residence requirement. AS 38.05.057(b). However, in order to qualify for the discount to the purchase price, additional criteria are added, namely that the person:

(1) has a place of residence in the state;

(2) be registered to vote in the state;

(3) has not claimed residence elsewhere for the previous year; and

(4) has otherwise acted in a manner to show that his intent is to remain in Alaska. AS 38.05.058(b)(2) - (5). If the person is able to meet these requirements, he is entitled to participate in the discount program.

The one-year residence requirement appears in both the statute authorizing the lottery [AS 38.05.057] and the statute authorizing the discount [AS 38.05.058]. Since the qualification for the discount applies only to those eligible to participate in

the lottery in the first place, the one-year residence requirement for the discount program is actually redundant of the one-year requirement to get into the lottery itself. Therefore, the issue is whether the state, as its only test, can require a one-year residence requirement in order to assure that only bona fide residents participate in the state land disposal lottery. 3/

There is little question that "length of residence may . . . be used to test the bona fides of citizenship." Zobel III, Brennan concurrence at 6. Here the purpose is not to create distinctions between citizens, or bona fide residents, but to determine whether a particular person should be considered a resident at all.

---

3. What follows is an analysis grounded in equal protection. Theoretically, there is a distinction between discriminations between bona fide residents, which are analyzed under equal protection, and between residents and nonresidents, which are tested under privileges and immunities analysis. Unfortunately, an objective test using length of residency to determine whether a person has the requisite "intent" to be a bona fide resident falls in between. To the extent it denies benefits to those who have the subjective intent but do not meet the residence requirement, it is a distinction between bona fide residents to be analyzed under equal protection. To the extent that it withholds benefits from nonresidents, the requirement is to be analyzed under privileges and immunities. In addition, the existing vagaries of the right to travel analysis is at the core of the problem. The confusion on this score is manifest in the United States Supreme Court opinions in Zobel III. Since, however, "a state has more authority to draw distinctions between residents and non-residents than between long- and short-term residents" (Zobel II at 451, n.7), if the one-year residence requirement passes muster under equal protection analysis of the right to travel, it should suffice for privileges and immunities purposes.

Unfortunately, the terms "resident" and "residence" are often used loosely, even in court opinions. Bona fide residency, or domicile, involves two separate elements: (1) physical presence; and (2) intent to remain. See, e.g., State v. Adams, 522 P.2d 1125 (Alaska 1974). "Residence" or "being a resident" in the sense of owning a home or otherwise living at a particular location, meets only the first criterion.

Determining intent, however, is a more difficult problem. There are two means by which intent can be measured. First, a "subjective" or individualized inquiry could be made. This would entail looking at indicators of the individual's state of mind such as voter registration, drivers' licenses, affidavits or sworn statements, or other such indicators of subjective intent. Second, an objective measurement, traditionally length of residence, could also be used.

> Domicile is established by an actual physical presence in the state coupled with a coincident intent to make the state one's permanent place of abode. Domicile cannot be established by mere physical presence in the state for a fixed period without the intent to permanently reside there, but the strong presumption of domicile which arises from physical presence is usually difficult to rebut. Thus, as a practical matter, domicile may be established either through a "subjective test" -- examination of the proponent's state of mind -- or through an "objective" test -- e.g., a durational residency requirement.
>
> The subjective test is, of course, dependent to a large extent upon conduct traditionally indicative of domicilliary intent, e.g., local voter registration.

State v. Adams, 522 P.2d 1125, 1126-27 (Alaska 1974) (emphasis added).

The obvious advantage to an objective residency test is that it is more easily administered than 400,000 individualized determinations. Id. Therefore, unless the state's interest in a generally administered objective test of bona fide residency is outweighed by a more important individual interest, it is a reasonable and legitimate tool. Vlandis v. Kline, 412 U.S. 441, 452-[illegible]9, Starns v. Malkerson, 326 F.Supp. 234 (Minn. 1970), aff'd, 401 U.S. 985 (1971). But if the individual interest involved requires that the state program be analyzed with strict scrutiny, then the state cannot generally use the objective test of length of residency to determine bona fide residency. Instead, a subjective or individualized test must be used. Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); State v. Adams, 522 P.2d 1125, 1126-27 (Alaska 1974). 4/ Where strict scrutiny applies, a state can use length of residence as a qualification only when and to the extent that it is necessary for the administration of the program, or is otherwise "necessary to promote a compelling governmental interest." Shapiro v. Thompson, supra at 634; Dunn v. Blumstein, supra;

---

4. The Adams position that all infringement on the right to travel requires a compelling state interest has been abandoned (Zobel II at 450-451). Therefore, all infringements on the right to travel do not require strict scrutiny and the subjective residence requirement necessary under strict scrutiny.

State v. Van Dort, 502 P.2d 453 (Alaska 1972). Furthermore, the only time a "compelling state interest" must be advanced is when either a fundamental political right or a basic necessity of life is being withheld. Zobel I at 426-427; Zobel III, Burger opinion at 9, n.11; Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974).

Unlike the right to vote, welfare benefits, or access to medical care, qualification for participation in a state land lottery does not involve a fundamental political right or a basic necessity of life. Therefore, strict scrunity is not appropriate. Instead, the residency qualification is to be tested under the modified rational basis standard set forth in State v. Erickson, 574 P.2d 1 (Alaska 1978).

> We will no longer regard all durational residency requirements as automatically triggering strict scrutiny and requiring a showing that such a classification is absolutely necessary to promote a compelling state interest. Instead, we will balance the nature and extent of the infringement on this right [the right to travel] caused by the classification against the state's purpose in enacting the statute and the fairness and substantiality of the relationship between that purpose and the classification.

Zobel II at 453. 5/

---

5. There is some indication that this court may be moving away from the Erickson test in favor of the old rational basis test. E.g., Rose v. Commercial Fisheries Entry Commission, __ P.2d __, Op. No. 2515 (Alaska, June 11, 1982) at 31, n.6 (Rabinowitz, J., dissenting). If so, then both the one-year residence requirement and the discount program would be subject to even less strict review. Since, however, both pass muster even under the Erickson test, they would meet a revived rational basis analysis as well.

There is little question that the state has "the right to impose . . . , as one element in demonstrating bona fide residence, a reasonable durational residency requirement." Zobel III, Brennan concurrence at 6. The question, then, is whether the 12-month requirement is reasonable in light of the Erickson test.

First, a comparison with other constitutional residency requirements indicates its reasonableness. A one-year requirement for resident tuition has been held constitutional by the United States Supreme Court (Starns v. Malkerson, 326 F.Supp. 234 (D. Minn. 1970), aff'd, 401 U.S. 985 (Vlandis v. Kline, 412 U.S. 441 (1973)) as has a one-year requirement for divorce (Sosna v. Iowa, 419 U.S. 393 (1975). 6/ The state's interest in assuring that persons buying state land are actually bona fide residents is surely equal to its interest in student tuition or divorce.

In applying the elements of the Erickson test, first, the right to travel is only slightly impacted by the requirement, if at all. The privilege gained is the right to enter a lottery for the right to purchase property. If that person wins, he or she can buy the property at market value. It is extremely doubtful that the withholding of this benefit to participate in the

---

6. This court overturned a one-year requirement for divorce in State v. Adams, supra, however, the basis for that ruling was expressly abandoned in Zobel II. Zobel II at 450-451.

lottery for a period of one year could be any penalty or infringement on the right to travel. Zobel II at 458.

Even if there is some marginal infringement, the state's interest in permanently disposing of one of its most valuable resources to bona fide residents is surely great. And, a one-year residence requirement is reasonable as a sorting device. For example, given the seasonal nature of much of the employment in Alaska, a one-year requirement assures that a person is not merely temporarily here for seasonal employment. Overall, a one-year requirement is a substantial enough but not overlengthy period so that it could reasonably be said that a person intended to make Alaska his or her home.

C. THE DISCOUNT PROGRAM IS CONSTITUTIONAL.

1. The Program is Valid Under the Standards Set Forth in Zobel II and Erickson.

A more substantial equal protection problem is raised by the residency discount. Without Zobel III the only question would be whether the program meets the Erickson test. Zobel II, supra, at 452-453. As will be shown first, the discount plan would be constitutional under that test. The final question is whether Zobel III would change that result.

Since no fundamental political right or access to a basic necessity of life is involved, the discount program is to

be measured under the Erickson balancing test. 7/ Zobel I at 426-427, Zobel II at 452-453. The first inquiry is to "the nature and extent of the infringement on [the right to interstate travel] caused by the classification." Zobel II at 453.

The infringement is de minimus. The discount program awards increasing benefits in the form of discounts of up to 50% from the appraised market price. Applying the analysis of this court in Zobel II, this grant of differing discounts cannot be characterized as a penalty or infringement on the right to travel.

> The new resident does, in fact, receive financial gain for exercising his or her right to move into Alaska; and whatever "penalty" may accrue from the fact that the gain is not as large as that realized by a long-term resident we regard as de minimus.

Zobel II at 458. In fact, the infringement here is much less in this case than that of the permanent fund dividend. Unlike the dividend, the discount is not automatically available. The longer term resident must win a parcel of land in a lottery; a lottery in which all bona fide residents compete equally. Therefore, the discount program does not automatically confer greater benefits on longer term residents -- the longer term resident may never get the opportunity to exercise his or her discount, while the shorter term resident may enjoy whatever discount he or she has accrued immediately. This precondition of having to win a

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7. Assuming that the Erickson balancing test is still applicable. See supra, n.5.

Zobel II at 458. 8/ The legitimacy and importance of this purpose was endorsed by this court in Zobel II. Id. at 459-460, n.33 at 459, and 461.

There is a fair and substantial relationship between increased discounts toward the purchase price of state land based on length of residency and the purpose of stabilizing the population and encouraging residents to stay in Alaska. As this court concluded in Zobel II

> The second of the listed purposes [population stability and encouraging residents to stay] is clearly related to the classification system. A significant financial incentive is created to encourage persons to maintain residency in Alaska; and the stabilization of long-term residents clearly reduces population turnover. . . . As above, we do not regard this system as imposing a "penalty" on new residents. Thus we hold this purpose to be permissible and the relationship clear . . . .

Id. at 461.

This conclusion is directly applicable to the discount program. The prospect of increasing discounts surely encourages people to stay in the state. Further, applying that discount to the purchase of a piece of property in Alaska greatly enhances a person's ties to the state. This system is at least as

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8. The discount program is either an incentive program or a reward program, or both. To the extent that the program is a reward for past contributions, that justification cannot be used as a basis for its constitutionality. Consequently, this court should analyze the discount program only as an incentive to induce the future action of maintaining residence.

stabilizing and encouraging of continued residence as the receipt of cash dividends. Coupled with the de minimus infringement on the right to travel, the discount program is constitutional under Zobel II and Erickson.

2. Zobel III Does Not Alter the Results of the Erickson Analysis.

As explained previously, the dicta in Zobel III represents the water's edge for any per se constitutional restraints on residency requirements. Plans which do not create unlimited and ever-expanding classes of residents, or otherwise fall outside of the Zobel III dicta, must be analyzed on a case-by-case basis in light of preexisting equal protection analysis.

As for the Zobel III decision itself, it would potentially only affect a small portion of the discount program. As was mentioned previously, Zobel III held that for the permanent fund dividend program, recognizing residency prior to the date of enactment was not rationally related to the purpose of encouraging people to remain in the future. Under this holding, it would only be residency accumulated prior to 1978 (the date of enactment of the discount program) which would be called into question.

In this case, however, the recognition of residency accumulated prior to 1978 is only an incidental effect. See Zobel II at 467, n.37. The program had to start somewhere, and, unlike the dividend program, the award of increased discounts to longer term residents does not directly lessen the portion of the

"pie" to be given newer residents. The value of the newer residents' discount would remain the same whether or not the older resident began with a larger discount at start-up. Second, invalidating residency accumulated prior to 1978 does not further the legitimate purposes of the program; namely, creating an incentive to stay. The legislature assumed a 10-year or longer resident needs no further increased discount as an incentive. Treating a 10-year resident in 1982 as a four-year resident will not reawaken that incentive. Thus, unlike the permanent fund dividend plan, to apply the Zobel III holding to the discount program would serve no real purpose.

As for the Zobel III dicta, the land discount program makes for more limited distinctions between residents than did the dividend distribution plan. Even under the prospective operation of the dividend program, a 50-year resident would be preferred over a 49-year resident, who in turn was preferred over a 48-year resident, and so on. This unlimited and ever-expanding discrimination was viewed as much too pervasive by the Court in Zobel III. But the discount plan does not distinguish between the 50-year resident over the 49-year resident, over the 48-year resident, etc. All are equal after 10 years. Instead, it is only during the first 10 years of residency that distinctions are made. These distinctions are rational and are drawn as part of a program to induce persons to stay a significant period of time. During that time a person may establish such roots that it is unlikely he or she will leave. In addition, the person can use

the discount in purchasing property and further establish roots in the state. Zobel III would not prevent this purpose or plan.

The United States Supreme Court did not rule on the question of awards based on residency accumulated after the date of enactment. The Court held that "[I]n our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 [sic] and those who have become residents since then." Zobel III, Burger opinion at 10 (emphasis added).

The Court was seriously divided in its views of the prospective operation of the dividend plan. There were not five votes to overturn the plan in its entirety. The dividend plan represented the extreme which triggered severe expressions of concern, but not outright rejection. As a result, the Court stated that: "We need not consider whether the State could enact the dividend prospectively only." Id. Therefore, Zobel III does not directly impact the continued operation of the discount program.

On the other hand, there is language in the concurring opinions of Justices Brennan and O'Connor which would lead to the conclusion that even the prospective operation of the dividend plan would have been unconstitutional. Justice Brennan wrote:

> I write separately only to emphasize that the pervasive discrimination embodied in the Alaska distribution scheme gives rise to constitutional concerns of somewhat larger proportions than may be evident on a cursory reading of the Court's opinion. In my view, these concerns might well preclude even the prospective operation of Alaska's scheme.

Id., Brennan concurrence at 1. Later, Justice Brennan simply states that "[a] scheme of the sort adopted by Alaska is inconsistent with the Federal structure even in its prospective operation." Id. at 3.

Justice O'Connor would have applied privileges and immunities analysis and, under her approach, would have stricken both the retroactive and prospective applications of the program. Justice O'Connor believed that distinguishing between residents, or between residents and nonresidents, infringes a fundamental right for purposes of the Privileges and Immunities Clause:

> Certainly the right infringed is "fundamental." Alaska's statute burdens those nonresidents who choose to settle in the state. It is difficult to imagine a right more essential to the nation as a whole than the right to establish residence in a new state."

Id., O'Connor concurrence at 6.

Justice O'Connor's approach would not distinguish between residency accumulated before the date of enactment and after the date of enactment. Thus, five justices, the three joining with Justice Brennan's concurring opinion plus Justice O'Connor, would likely rule that the prospective application of the dividend plan was unconstitutional. Consequently, it is instructive to see if the apparent reasons for their dissatisfaction would necessarily attach to the discount program.

In this analysis, Justice Brennan's concurrence is central. His opinion is the harshest attack on the dividend plan and Justice O'Connor's analysis is expressly not favored by the

other eight members of the Court. Id., Burger opinion at 7, n.3; Brennan concurrence at 2; Rehnquist dissent at 4, n.3. 9/

The core of Justice Brennan's concern was the extreme nature of the plan. He was alarmed by the all-inclusive and "pervasive discrimination embodied in the Alaska distribution scheme." Id. As he explained later, the notion of a society permanently divided solely on the basis of the assumption that past residence means greater worth is an anathema to our national ideals. At one point Justice Brennan explained the specific aspect of the dividend plan he found offensive:

> The Constitution places the recently naturalized immigrant from a foreign land on an equal footing with those citizens of a State who are able to trace their lineage back for many generations within the state's borders. The eighteen-year-old native resident of a state is as much a citizen as the fifty-five-year old native resident. But the Alaska plan discriminates against the recently naturalized Alaska citizen, in favor of the Alaska citizen of longer duration: or discriminates against the eighteen-year old native resident, in favor of all residents of longer duration. If the Alaska plan were limited to discriminations such as these, and did not purport to apply to migrants from sister states, interstate travel would not

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9. Besides the disagreement on Justice O'Connor's views on the right to travel and its sole location in the Privileges and Immunities Clause, it is unlikely that the Court would accede to her view that all distinctions between residents and nonresidents who have a place of abode in the state impinges on a fundamental right. This would lead to more limitations on the right of a state to draw distinctions between nonresidents and residents than between residents themselves. This result is not consistent with prior case law. See Zobel II at 451, n.7.

> be noticably burdened - yet those discriminations would surely be constitutionally suspect.

Id., Brennan concurrence at 4 (emphasis added).

This pervasive and unlimited aspect also troubled Chief Justice Burger. He wrote

> "Alaska's reasoning [that past contributions should be rewarded] . . . . would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible."

Id., Burger opinion at 9. Justice Dimond, in his dissent in Zobel II, touched on this concern when he distinguished Sosna v. Iowa, supra, and other durational residency requirements from the dividend plan by explaining "[i]n Sosna it was at least likely that new residents could achieve equality." Zobel II at 468.

Thus it was the unlimited and pervasive discrimination that disturbed the Court -- where a longer term resident would always be preferred over a shorter term resident, whether it was 50 years of residency over 49, or 10 years over 9 years. Unlike other durational residency requirements, where equal treatment was achieved at some point, equality could never be achieved under the dividend plan. Like a race on a treadmill with a width of one person, the second to enter could never catch up. Although not specifically expressed, a majority of the Court clearly viewed such an unlimited plan as inherently so indiscriminate as to be presumed to reward residency solely for its own sake.

The Court would have recognized distinctions based on residency, but those distinctions had to be drawn for a purpose

other than simply rewarding long-term residents. Whatever that independent reason may be, a majority of the Court could not view that reason as justifying an unlimited preference that would be unending. They apparently believed that the state simply could never rationally make a distinction between a 50-year resident over a 49-year resident over a 48-year resident, and so on down to the brand new resident. They viewed such distinctions as so inherently arbitrary that the real purpose must be the belief that length of residence is a badge of worth. As Justice Brennan concluded:

> In my view, it is difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that some citizens are more equal than others. We rejected that premise and, I, believe, implicitly rejected most forms of discrimination based on length of residence, when we adopted the Equal Protection Clause.

Id., Brennan concurrence at 7.

But even Justice Brennan would allow distinctions based on length of residence so long as simply rewarding residence was not the underlying purpose.

> [T]he Constitution does not bar the states from making reasoned distinctions between citizens. Insofar as those distinctions are rationally related to the legitimate ends of the State they present no constitutional difficulty, as our equal protection jurisprudence attests. But we have never suggested that duration of residence vel non provides a valid justification for discrimination. To the contrary, discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself.

Id., Brennan concurrence at 5 (emphasis added). Justice Brennan believes that such valid independent interests are few and far between:

> To be sure, allegiance and attachment may be rationally measured by length of residence - length of residence may, for example, be used to test the bona fides of citizenship - and allegiance and attachment may bear some rational relationship to a very limited number of State purposes. But those instances in which length of residence could provide a legitimate basis for distinguishing one citizen from another are rare.

Id., Brennan concurrence at 5-6 (citations omitted).

Although we agree that the instances where length of residence has an independent utility as a device to further a legitimate state interest may be rare, the state does not believe that they are as rare as Justice Brennan implies. Justice Brennan implied that there were only two categories that would admit of an independent interest: testing bona fide residence and qualifying for public office. Id. We believe that there are other legitimate instances. For example, as Justice Dimond noted in his dissent in Zobel II, length of residence might be a reasonable tool to measure the present hardship that would be caused by disrupting ties to the state. Zobel II at 469, n.13.

Whatever other instances may or may not exist, it is surely legitimate to use length of residence as a tool for instilling allegiance and attachment. For example, AS 14.40.763 and AS 14.40.825 provide for forgiveness of student loans based on years of residence after completing school, with a forgiveness of up to 50% (6 years). This use of graduated length of

residence is clearly permissible. The purpose of the loan program is to provide the state's residents with education -- it is in the state's interest to have an educated citizenry. Consequently, it is in the state's interest to have those to whom it loans money return to the state with the benefits of that education. The best means to induce persons either to stay or to return after their education is to give an incentive to return and stay. The best way to apportion that incentive is to relate the benefit to future residence in the state. Such a program does not create a preferred class of citizens, reward past contributions, or otherwise partake of the characteristics that the Court found objectionable in Zobel III. But such a program does make distinctions between residents based upon the length of their residence.

The same rationale applies to the discount program. It is not a "reward" for past contributions or for simply being in the state longer. It is not intended to create a preferred class of citizens. Instead it is an incentive -- an incentive to establish roots in Alaska.

After 10 years the legislature assumed that no further discount or incentive is needed; it assumed that a person's roots are established and will not be significantly influenced by the prospect of even greater discounts. Thus it does not continue to grant incentives for residency solely because of the length of residence. The statute treats everyone equally for purposes of the effect of the incentive after that 10 years. It does not

reflect a legislative belief that comparatively longer residency in and of itself justifies preferential treatment. It is only longer residency during those years when the incentive has a reasonable chance of influencing future behavior which is preferred.

The resident land discount program therefore furthers an independent and valid interest; as such, it would survive even Justice Brennan's analysis. What better way is there to encourage people to stay than to give increasing discounts based on length of residence during the first years of residence in the state? After a period of time, perhaps, it would be irrational to believe that the increasing discount will further that person's allegiance and attachment. A 40-year resident is unlikely to require a greater benefit than that given a 25-year resident -- their likelihood of staying or leaving will be dependent on other factors than the existence of sufficient roots in the state.

But that is not true for brand new residents, or those who have been here for comparatively few years. The prospect of substantially increasing discounts during those years could make the difference between staying in Alaska and leaving. A one-year resident might stay an extra year to take advantage of the discount, as might a two-year resident. During that extra time other roots will be established, and the state's goals of stabilizing the population and creating incentives to stay is furthered.

The legislature decided that after 10 years there was no need to continue to increase the discount. The state believes that this is a reasonable time under the Erickson analysis, particularly given the de minimus infringement on interstate travel on the other side of the scale.

The underlying rationale expressed in the various opinions in Zobel III is relatively straightforward. It is hard to argue with the view that length of residence in and of itself cannot entitle a citizen to preferential treatment. Nor do we necessarily disagree that an unlimited and ever-expanding preference measured solely by comparative residency leads to the conclusion that it is, in reality, simply a preference for longer term residents. After a certain period of residence, comparative residency will probably not be a valid indicator of relevant distinctions between people separated by a few years.

But Zobel III stands only for those propositions. It does not prohibit distinctions based on length of residence, nor does it prohibit a limited number of classes distinguished by length of residence. To the extent that using length of residence fairly and substantially furthers an independent, valid state interest it is constitutional. The land discount, given its limited scope and its fair and substantial relationship to the valid state interests in stabilizing the population and encouraging state residence, is constitutional under Erickson, Zobel II, and Zobel III.

D. IF THE COURT FINDS THE LAND DISPOSAL PROGRAM TO BE UNCONSTITUTIONAL, IT SHOULD APPLY ITS RULING PROSPECTIVELY ONLY

If this court rules that a portion, or all, of the land discount program is unconstitutional, substantial, inequitable and unnecessary hardship will occur unless this court makes its ruling prospective.

In Warwick v. State ex rel. Chance, 540 P.2d 384, 393 (Alaska 1976), this court stated:

> A state supreme court has unfettered discretion to apply a particular ruling either purely prospectively, purely retroactively, or partially retroactively, limited only "by the jurisprudential philosophy of the judges . . . , their conceptions of law, its origin and nature." The decision is not a matter of law, but a determination based on weighing the merits and demerits of each case.

(Citations omitted.) This court also summarized the guidelines for when it will apply a ruling prospectively in Plumley v. Hale, 594 P.2d 497, 503 (Alaska 1979):

> In accord with the United States Supreme Court precedent [Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971)], we have previously identified four conditions indicating the propriety of non-retroactive treatment in civil cases: 1) the holding is one of first impression, or overrules prior law, and was not foreshadowed in earlier decisions; 2) there has been justifiable reliance on an alternative interpretation of the law; 3) undue hardship would result from retroactive application; and 4) the purpose and intended effect of the holding is best accomplished by prospective application.

A ruling of unconstitutionality in this case was not foreshadowed. In fact, the reasoning in Zobel II would have lead to upholding the discount program in its entirety. The partial

reversal in Zobel III was not foreshadowed and has only confused the constitutional analysis of residence requirements. In large measure this court's ruling on this case will be one of first impression.

Second, there has been justifiable reliance on an alternative interpretation of the law. Here the "alternative interpretation" is the plain reading of AS 38.05.057 and AS 38.05.058. It is surely justifiable for citizens and administrators to depend on a statute which was unchallenged for a number of years.

There are two types of equitable hardship that should be avoided by a prospective only application of an adverse ruling. First, persons who have entered and won land in the lottery should not have their title impaired or the land transfer impeded by a ruling that the program was flawed. Not unwinding settled property transactions was found to be sufficient reason to apply a ruling propectively only in Moore v. State, 553 P.2d 6 (Alaska 1976), and that reasoning applies with equal force here. Consequently, lotteries held prior to the issuance of this court's opinion should be allowed to proceed to completion of formal transfer of title under the original terms of the program.

Second, there is an equitable hardship in applying a ruling that residency accumulated prior to the date of enactment cannot be counted. Many persons have already received their land at the stated discount -- it would be unfair to those who either were not lucky enough to win a parcel, waited to apply for a

different piece of property, or waited in order to receive a larger discount. In fact, it would be residents who were already here in 1978 who acted in the manner hoped for by the legislature and remained an extra year or two to take advantage of an increased discount who could be harmed the most. They may find that, instead, their discount has been slashed by elimination of residency acquired prior to 1978.

The intended effect of a holding of unconstitutionality would not be advanced by striking the pre-enactment portion of the discount. Here the application of that ruling would not increase the benefit to the newer citizens: their discount would be exactly the same. And, since the underlying sale is by lottery, their access to land is equal to that of every other resident. The only effect of applying that rule to the discount program would be to make the purchase of land more difficult for some citizens. This is contrary to the main policy of the entire program, namely, that "[p]rivate land use rights are integral to the material well-being of the people of Alaska and our society." AS 38.04.005(d).

Nor, as was mentioned previously, is the legitimate purpose of the program furthered by not recognizing residency accumulated prior to the date of enactment. The legislature assumed that persons with more than 10 years residence did not need any additional discount as an incentive to stay. That lack of incentive will not be recreated by "assuming" for purposes of the program that a 10-year resident in 1982 is only a four-year

resident. It is an assumed state of mind that is measured by the residence requirement. Artificially assuming that a four-year resident has the state of mind of a 10-year resident does not further the legitimate purposes of the legislation. The program had to start somewhere, and it is otherwise appropriate to recognize the real period of residence of program participants than it is to assume that they all arrived in 1978.

Therefore, this court's ruling was not clearly foreshadowed, there was justifiable reliance on the existing law, the equitable considerations favor allowing the program to continue or, at the very least, not undoing existing transactions, and the intended effect of this court's holding would not be furthered by applying the rule to this program. Consequently, the state urges the court to apply its ruling prospectively only.

III. CONCLUSION

For the reasons stated in this brief, the state urges this court to uphold Kenai's land disposal program and, by express implication, to approve the analogous state program in AS 38.05.057 and AS 38.05.058.

DATED this 23rd day of July, 1982.

WILSON L. CONDON
ATTORNEY GENERAL

By: Robert M. Maynard
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Assistant Attorney General

ATTACHMENT 9

Ron Zobel Letter

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March 15, 1983

William Hudson
c/o Representative Mitch Abood
State House of Representatives
Pouch V (MS 3100)
Juneau, AK 99811

Dear Mr. Hudson:

I have been giving some thought to our recent conversation concerning durational residency requirements and would like to clarify two points that we were discussing.

We generally agreed that there was benefit in having a uniform durational period as proof of bona fide residency. Generally, I agree that a one year durational residency requirement could be imposed for special state benefits not based on need, such as subsidized state loans or lower tuition at the university. However, such a uniform statute may be somewhat difficult to write. The seminal cases in this area dealt with one year durational residency requirements for eligibility for welfare (Shapiro v. Thompson, 394 U.S. 618 (1969)) and eligibility for voting (Dunn v. Blumstein, 405 U.S. 330 (1972)). A one-year uniform waiting period for proof of bona fide residency could not be made to apply to voting or basic necessities of life or it would be quickly subject to court challenge. I think that a one year waiting period is, in most instances, reasonable, but in the case of voting, welfare benefits, medical care, or even housing, there is much case law striking down one year waiting periods. Those cases may make the establishment of a uniform one year requirement less feasible than I indicated when I talked to you on the phone, because it would necessarily have to contain a number of exceptions in order to avoid a court challenge.

I have been doing additional thinking about the proposal I made to you that those persons who had qualified for an Alaska student loan but who had not returned to the state might be charged a higher or market rate of interest. I certainly think that a statute could be structured which would have the effect of telling persons who applied for an Alaska student loan that if their education was to be used out of state they are going to have to bear the market rate for the loan which they receive. If the rebate provision in the present law is permissible, and I believe it is, applying the same prinicple to the rate of interest paid for the loan would not seem to present any insurmountable legal problems. Certainly, the State of Alaska

has no obligation to subsidize the loans of non-residents, but so as to avoid any attack on such a provision as a penalty on the right to travel interstate, I would structure the provision so that everyone who took an Alaska Student Loan would pay the market rate of interest, but add a provision that would reduce that rate of interest to 5%, or whatever level was chosen, if the person subsequently was employed in the State of Alaska. That would make the loans much less attractive to persons who have no intentions of ever returning to this state to make use of their education here. If a person knew that he was going to take his loan, go to another state, get an education and never come back, the interest rate on a $7,000.00 loan would have to be a major consideration. This provision would discourage those persons who have no intention of remaining residents of the state from applying for a loan, but would not discriminate against persons of rather short residency (one to two years) who need a loan to further their education and do intend to make a contribution to the state with it.

Also, if this "rebate" interest rate was reduced upon gaining employment in the state, it would not be based upon residency at all. For example, the upper-middle class person who studied Chinese literature just for the fun of it would not get a subsidized loan. I would question whether the State has any real need to provide such a subsidized loan in the first place. The point I am making is that if the loan is reduced from the market rate to a subsidized rate and that rate is tied to employment in the state, the State would achieve the dual purpose of targeting persons who have no intent to ever use their education in the state and likewise achieve the purpose of only subsidizing loans which have some direct relationship to bettering the economy of the state. Such a provision would be more defensible in the courts and likewise would seem to make more economic sense than giving a subsidized loan to a person who has lived in the state for ten years and who has no intention of ever returning to the state and denying a loan to a resident of a year and a half who has a real commitment to make his or her future here. I hope these clarifying comments are of some help to you.

Yours truly,

Ron Zabel

RZ:ap

Sec. 08.04.110. PERSONAL REQUIREMENTS.

An applicant for the certified public accountant certificate shall be

(1) Repealed by sec. 3 ch 127 SLA 1974.

(2) a resident of this state;

(3) at least 19 years of age; and

(4) of good moral character.

Sec. 08.08.207. LAW CLERKS.

(a) Every person who desires subsequently to qualify as a general applicant for admission to the Alaska Bar without having been graduated from an approved law school shall register as a law clerk as provided by this section. The person must be a bona fide resident of the state and shall present satisfactory proof that the person has been granted a bachelor's degree (other than bachelor of laws) by a college or university offering the degree on the basis of a four-year course of study and has successfully completed the first year of studies at a law school.

(b) The applicant shall obtain regular and full-time employment as a law clerk in the office of a judge of a court of record or an attorney or firm of attorneys licensed to practice law in Alaska and engaged in the general practice of law. The person by whom the applicant is employed, or, if the applicant is employed by a firm, the person under whose direction the applicant is to study, must have been admitted to practice law in this state for at least five years at the time the application for registration

is filed, and be otherwise eligible to act as tutor. Before the commencement of the study of law under this section, the applicant shall file with the university an application to register as a law clerk. The application shall be made on a form to be provided by the university and shall require answers to interrogatories the university may determine from time to time to be relevant to a consideration of the application. Proof of a fact stated in the application may be required by the university. If the applicant fails or refuses to furnish any information or proof or answer any interrogatory required by the application, or independently by the university, in a manner satisfactory to the university, the application may be denied.

(c) Accompanying the application there must be submitted a statement under oath of the person by whom the applicant is employed as a law clerk, or, if the applicant is employed by a firm, of the person under whose direction the applicant is to study, certifying to the fact of the employment and that that person will act as tutor for the applicant and will faithfully instruct the applicant in the branches of the law prescribed by the courts of study adopted by the university. No person is eligible to act as tutor while disciplinary proceedings (following the service of a formal complaint) are pending against the person, or if the person has ever been censured, reprimanded, suspended or disbarred. If a registered law clerk finds it necessary to change tutors during the period of study, a new application for registration as a law clerk is required and such credit given for study under a prior tutor as the university may determine.

(d) A law clerk whose registration has been approved by the university must pursue a course of study for three calendar years of at least 44 weeks each year, with a minimum each week of 35 hours of study (it being understood that the time actually spent in the performance of the duties of law clerk is to be considered as time spent in the study of law). The tutor must give personal direction regularly and frequently to the clerk, must examine the law clerk at least once a month on the work done in the previous month, and must certify monthly as to compliance with the requirements of this subsection and (e) and (g) of this section.

(e) The examinations shall be written and not oral, and shall be answered by the clerk without research or assistance during the examination. The monthly certificate of compliance submitted by the tutor shall be accompanied by the originals of all written examinations and answers given during the period reported. If the certificates, together with the required attachments, are not filed timely with the university, no credit may be given for any period of the default.

(f) If a registered law clerk does not furnish evidence of completion of law studies within a period of six years after registration, the university may cancel the registration.

(g) The course of study to be pursued by a registered law clerk shall cover subjects, text books, case books, and other material the university may from time to time require.

(h) A registered law clerk who has attended either an approved or a nonapproved law school may, in the discretion of the university, receive credit for work done and obtain advanced

standing. In no event will credit be given for fractional parts of semesters or terms, or for correspondence school work.

(i) As used in this section

(1) "law school" means a law school accredited, approved or meeting the standards of the Council of Legal Education of the American Bar Association or the Association of American Law Schools; or a school in Alaska offering a course of study which the university approves as the equivalent to a year's study in a law school under this section;

(2) "university" means the University of Alaska.

Sec. 08.54.100. QUALIFICATIONS FOR A MASTER GUIDE LICENSE.

A person is entitled to be licensed as a master guide if the person

(1) has legally hunted in the state for a part of each of 10 years during which time a substantial source of the person's income was from guiding or related activities directly contributing to the person's experience and competency as a guide;

(2) meets all the requirements of a registered guide and has been actively engaged in licensed guiding activities in the state for at least five years preceding application;

(3) has not been convicted of a violation of federal or state sport fishing, game or guiding laws or regulations within the preceding five years;

(4) has consistently performed in a superior manner as evidenced by required reports submitted to the board and by inquiries made by the board to at least two of the guide's clients of record; and

(5) meets additional qualifications which the board may require.

Sec. 08.54.110. QUALIFICATIONS FOR REGISTERED GUIDE LICENSE.

A person is entitled to be licensed as a registered guide if the person

(1) is 21 years of age or more;

(2) is a resident of the state and maintains a permanent place of abode in the state;

(3) has practical field experience in the handling of firearms, hunting, judging trophies, field preparation of trophies, first aid and photography;

(4) is familiar with the terrain and transportation problems in the district for which the license is requested;

(5) has passed the qualification examination prepared and administered by the board;

(6) has demonstrated to the board sufficient standards of competence and ethical conduct and has not been convicted of a crime involving moral turpitude;

(7) has legally hunted in the state for all or part of each of five years in a manner directly contributing to the person's experience and competency as a guide;

(8) has been licensed as and performed the services of an assistant guide in the state for a part of each of three years;

(9) submits a written recommendation to the board from a registered guide for whom the applicant has worked;

(10) is capable of performing the physical duties associated with guiding activities;

(11) has been favorably recommended in writing by two hunters that the person has guided or assisted in guiding during each year of the person's three years as an assistant guide, whose recommendations have been solicited by the board from a list provided by the applicant;

(12) meets additional qualifications which the board may require.

Sec. 08.54.120. QUALIFICATIONS FOR A CLASS-A ASSISTANT GUIDE LICENSE.

A person is entitled to be licensed as a class-A assistant guide if the person

(1) has been employed for at least one season as a licensed assistant guide;

(2) has had at least 20 years experience in the guide district in which the person is to be employed; for the purposes of this paragraph physical presence at some time of the year during each of the 20 years constitutes adequate evidence of experience, and military service outside the state for no more than six years shall be accepted as part of the required 20 years experience;

(3) has been recommended in writing as qualified by a registered or master guide to the board.

Sec. 08.54.140. QUALIFICATIONS FOR ASSISTANT GUIDE LICENSE.

A person is entitled to be licensed as an assistant guide if the person

(1) is 19 years of age or more;

(2) is a resident of the state;

(3) is favorably recommended to the board, in writing, by a registered guide;

(4) meets additional qualifications which the board may require;

(5) is in sound physical condition.

Sec. 08.54.142. QUALIFICATION FOR TRANSPORTER LICENSE.

(a) A person may not engage in the activity of transporting unless the person is licensed as a transporter under this chapter. A person may be licensed as a transporter if the person

(1) is a resident of the state;

(2) is familiar with the terrain and transportation problems in the district or districts for which the license is requested;

(3) obtains a business license to do business as a transporter under AS 43.70.030.

(b) A person may not engage in the activity of transporting by air without an air commerce certificate as required by AS 02.05.040.

Sec. 08.88.171. ENTITLEMENT TO LICENSE.

(a) A person is entitled to a real estate broker license if the person is a resident of the state, if the person passes the real estate brokers examination, if the person applies for a license within six months after the person has taken the real estate brokers examination, if the person has had at least 24 months of active and continuous experience as a licensed real estate salesman, if the person is not under indictment for, or seven years have elapsed since the person has completed a sentence imposed upon conviction of, forgery, theft, extortion, conspiracy to defraud creditors, or any other felony involving moral turpitude, and if the person is an owner of a real estate business or employed as a real estate broker by a corporation or a partnership, and if that corporation or partnership does not

have an existing licensed broker. Unless the broker fails to pay the biennial renewal fee or unless the broker's license is suspended or revoked under AS 08.88.071(a)(3), the real estate broker's license continues in effect so long as the broker is an owner of a real estate business, or the broker is employed as a real estate broker by a corporation or a partnership. If the broker stops being an owner of a real estate business, or stops being employed as a real estate broker by a corporation or partnership, the broker's license is suspended from the time the broker stops until

(1) the broker again becomes an owner of a real estate business or is again employed as a real estate broker by a corporation or a partnership; or

(2) the broker is employed by a licensed real estate broker as an associate real estate broker, in which case the real estate broker license is returned to the commission, and the commission issues the broker an associate real estate broker license.

(b) A person is entitled to an associate real estate broker license if the person is a resident of the state, if the person passes the real estate brokers examination, if the person applies for a license within six months after the person has taken the examination, if the person has had at least 24 months of active and continuous experience as a licensed real estate salesman, if the person is not under indictment for, or five years have elapsed since the person has completed a sentence imposed upon conviction of, forgery, theft, extortion, conspiracy to defraud creditors, or any other felony involving moral turpitude, and if the person is employed by a licensed real estate broker as an associate real estate broker. Unless the associate broker fails

to pay the biennial renewal fee or unless the associate broker's license is suspended or revoked under AS 08.88.071(a)(3), the associate real estate broker's license continues in effect so long as the associate broker is employed by a licensed real estate broker as an associate broker. If the associate broker stops being employed by a licensed real estate broker, the associate broker's license is suspended from the time the associate broker stops until

(1) the associate broker again is employed by a real estate broker as an associate broker; or

(2) the associate broker becomes an owner of a real estate business, in which case the associate broker's associate real estate broker license is returned to the commission, and the commission issues the associate broker a real estate broker license.

(c) A person is entitled to a real estate salesman license if the person is a resident of the state, if the person passes the real estate salesman examination, if the person applies for a license within six months after the person has taken the examination, if the person is at least 19 years old, if the person is not under indictment for forgery, theft, extortion, conspiracy to defraud creditors, or any other felony involving moral turpitude, or, if convicted of such an offense, the person has completed the sentence imposed upon conviction, and if the person is employed by a real estate broker. Unless the salesman fails to pay the biennial renewal fee or unless the real estate salesman's license is suspended or revoked under AS 08.88.071(a)(3), a real estate salesman's license continues in effect so long as the salesman is employed as a salesman by a

licensed real estate broker. If the salesman stops being employed as a real estate salesman, the real estate salesman's license is suspended from the time the salesman stops until he again is employed as a salesman by a licensed real estate broker.

(d) A licensee shall promptly inform the commission of a change in business association that affects the status of the licensee's license under this section.

Sec. 09.55.130. RESIDENCE REQUIREMENTS FOR ACTION TO DECLARE MARRIAGE VOID.

When a marriage has been solemnized in the state and the plaintiff is a resident of the state, an action to declare the marriage void may be brought at any time. If the marriage has not been solemnized in the state, the action may be maintained only when the plaintiff has been a resident for at least one year before the commencement of an action.

Sec. 16.05.400. PERSONS EXEMPT FROM LICENSE REQUIREMENT.

(a) A license is not required of a resident or nonresident person under the age of 16 years for sport fishing nor shall a license be required of any resident under the age of 16 for hunting or trapping.

(b) A sport fishing, hunting or trapping license is not required of a resident who is 60 years of age or more and has been a resident for 30 consecutive years or more. The commissioner of revenue shall issue a permanent identification card without charge to persons who qualify by age and residence and who complete the forms required by the commissioner for implementation of this subsection. A person who is issued a permanent identification card under this subsection shall have it in his possession while sport fishing, hunting or trapping.

Sec. 16.05.940. DEFINITIONS.

In AS 16.05.010 - 16.05.950

(1) "a board" means either the Board of Fisheries or the Board of Game;

(2) "commercial fisherman" means an individual who fishes commercially for, takes, or attempts to take fish, shellfish, or other fishery resources of the state by any means, and includes every individual aboard a boat operated for fishing purposes who participates directly or indirectly in the taking of these raw fishery products, whether participation is on shares or as an employee or otherwise; however, this definition does not apply to anyone aboard a licensed vessel as a visitor or guest who does not directly or indirectly participate in the taking; and the term "commercial fisherman" includes the crews of tenders or other floating craft used in transporting fish;

(3) "commercial fishing" means the taking, fishing for, or possession of fish, shellfish, or other fishery resources with the intent of disposing of them for profit, or by sale, barter, trade, or in commercial channels; the failure to have a valid subsistence permit in possession, if required by statute or regulation, is considered prima facie evidence of commercial fishing if commercial fishing gear as specified by regulation is involved in the taking, fishing for, or possession of fish, shellfish or other fish resources;

(4) "commissioner" means the commissioner of fish and game unless specifically provided otherwise;

(5) "department" means the Department of Fish and Game unless specifically provided otherwise;

(6) "fish" means any species of aquatic finfish, invertebrates and amphibians, in any stage of their life cycle, found in or introduced into the state;

(7) "fish or game farming" means the business of propagating, breeding, raising, or producing fish or game in captivity for the purpose of marketing the fish or game or their products, and "captivity" means having the fish or game under positive control, as in a pen, pond, or an area of land or water which is completely enclosed by a generally escape-proof barrier;

(8) "fur dealing" means engaging in the business of buying, selling, or trading in animals skins. The term does not apply to a hunter or trapper selling the animal skins he has legally taken, or to a person, other than a fur dealer, purchasing animal skins for his own use;

(9) "game" means any species of bird and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals; and game may be classified by regulation as big game, small game, fur bearers or other categories considered essential for carrying out the intention and purposes of AS 16.05.010 - 16.05.950;

(10) Repealed by sec. 2 ch 32 SLA 1968;

(11) "hunting" means the taking of game under AS 16.05.010 - 16.05.950 and the rules and regulations promulgated under it;

(12) "nonresident" means a person who is not a resident;

(13) "operator" means the individual by law made responsible for the operation of the vessel;

(14) "resident" means a person who for 12 consecutive months has maintained a permanent place of abode in the state and who has continually maintained his voting residence in the state; and in the case of a partnership, association, joint stock company, trust, or corporation, "resident" means one that has its main office or headquarters in the state; however, a member of the military service who has been stationed in the state for the preceding 12 consecutive months is a resident for the purposes of AS 16.05.010 - 16.05.950, and the dependent of a resident member of the military service, who has been living in the state for the preceding year is a resident for the purposes of AS 16.05.010 - 16.05.950, and a person who is an alien but who for one year has maintained a permanent place of abode in the state is a resident for the purposes of AS 16.05.010 16.05.950;

(15) "seizure" means the actual or constructive taking or possession of real or personal property subject to seizure under AS 16.05.010 - 16.05.950 by an enforcement or investigative officer charged with enforcement of the fish and game laws of the state;

(16) "sport fishing" means the taking of or attempting to take for personal use, and not for sale or barter, any fresh water, marine, or anadromous fish by hook and line held in the hand, or by hook and line with the line attached to a pole or rod which is held in the hand or closely attended, or by other means defined by the Board of Fisheries;

(17) "subsistence fishing" means the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries;

(18) "take" means taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game;

(19) "taxidermy" means tanning, mounting, processing, or other treatment or preparation of fish or game, or any part of fish or game, as a trophy, for monetary gain, including the receiving of the fish or game or parts of fish or game for such purposes;

(20) "trapping" means the taking of mammals declared by regulation to be fur bearers;

(21) "vessel" means a floating craft powered, towed, rowed, or otherwise propelled, which is used for delivering, landing, or taking fish within the jurisdiction of the state, but for the purposes of AS 16.05.010 - 16.05.950 does not include aircraft;

(22) "visitor" means a nonresident or alien temporarily sojourning in the state as a visitor or tourist;

(23) "aquatic plant" means any species of plant, excluding the rushes, sedges and true grasses, growing in a marine aquatic or intertidal habitat;

(24) "fish derby" means a contest in which prizes are awarded for catching fish;

(25) "fishing derby association" means a civic, service or charitable organization in the state, not for pecuniary profit, whose primary purpose is to promote interest in fishing for recreational purposes and which has been in existence for five years before applying for a permit under AS 16.05.010 -

16.05.950, but does not include an organization formed or operated for gaming or gambling purposes.

(26) "subsistence uses" means the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption; for the purposes of this paragraph, "family" means all persons related by blood, marriage, or adoption, and any person living within the household on a permanent basis;

(27) "barter" means the exchange or trade of fish or game, or their parts, taken for subsistence uses

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature;

(28) "domestic mammals" include musk oxen, bison and reindeer, if they are lawfully owned.

(29) "nonresident alien" means a person who is not a citizen of the United States and whose permanent place of abode is not in the United States.

Sec. 16.10.310. POWERS OF THE DEPARTMENT.

(a) The department may

(1) make loans to

(A) individual commercial fishermen who have been state residents for a continuous period of five years immediately preceding the date of application for a loan under AS 16.10.300 - 16.10.370 and have had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43 for any one of the past five years, and who actively participated in the fishery during that period, for the purchase of entry permits;

(B) an individual who has been a state resident for a continuous period of five years immediately preceding the date of application for a loan under AS 16.10.300 - 16.10.370, who (i) because of lack of training or lack of employment opportunities in the area of residence does not have occupational opportunities available other than commercial fishing; or (ii) is economically dependent on commercial fishing for a livelihood and commercial fishing has been a traditional way of life for the individual in Alaska, for the repair, restoration or upgrading of existing vessels and gear, for the purchase of entry permits and gear, and for the construction and purchase of vessels;

(C) corporations, partnerships, or joint ventures, 100 percent of which are owned by individual commercial fishermen who have been state residences for a continuous period of five years immediately preceding the date of application for a loan under AS 16.10.310(a)(1)(B) and have had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43 for any one of the past five years, and who actively participated in the fishery during that period, for the repair, restoration or upgrading of existing vessels and gear, for the purchase of gear, and for the construction and purchase of vessels;

(2) designate agents and delegate its powers to them as necessary;

(3) adopt regulations necessary to carry out its functions;

(4) establish amortization plans for repayment of loans, which may include extensions for poor fishing seasons or for adverse market conditions for Alaskan products;

(5) enter into agreements with private lending institutions, other state agencies, or agencies of the federal government, to carry out the purposes of AS 16.10.300 - 16.10.370;

(6) enter into agreements with other agencies or organizations to create an outreach program to make loans under AS 16.10.300 - 16.10.370 in rural areas of the state.

(b) The department shall consult with the Department of Fish and Game on regulations and procedures established under this chapter.

Sec. 16.10.680.

Eligibility for loans.

(a) The commissioner may purchase a mortgage or note under AS 16.10.660(b) if it secures a loan to an individual who meets one of the requirements of (b) of this section and who

(1) has been a resident of Alaska for at least five years;

(2) does not qualify for a loan for the purposes described in AS 16.10.670 under a state loan program;

(3) has not previously participated in the loan program established in AS 16.10.650 - 16.10.720 or in any other state loan program for the purposes described in AS 16.10.670; and

(4) meets the guidelines established by the commissioner to determine whether the applicant is reasonably likely to succeed as a commercial fisherman and be able to repay the loan.

(b) In addition to the requirements of (a)(1) (4) of this section, the commissioner may purchase a mortgage or note under AS 16.10.660(b) only if it secures a loan to an individual who demonstrates under guidelines established by the commissioner that

(1) because of his lack of training or the lack of employment opportunities in the area in which he resides, he does not have occupational opportunities available to him other than commercial fishing; or

(2) he is economically dependent on commercial fishing for a livelihood and commercial fishing has been a traditional way of life for him in Alaska.

(c) The commissioner may not refuse to purchase a mortgage or note from a private financial institution under AS 16.10.660(b) solely because the applicant for the loan does not have a credit history.

(d) In determining whether the applicant is reasonably likely to be able to repay the loan under (a)(4) of this section, the private financial institution shall consider the applicant's income from commercial fishing and from other sources.

Sec. 16.35.130. BOUNTY NOT TO BE PAID.

No bounty may be paid under secs. 50 - 120 of this chapter to a person who for the immediately preceding year has not maintained a permanent place of abode inside the game management unit or part of the game management unit in which the animal was taken and a bounty is paid, or to a person who has not continually maintained his legal residence in the state, or to a salaried employee of a federal or state agency which is engaged in fish or game protection, management, research activity, or to any person whose bounty claim results from a trophy hunt as publicly declared by the Department of Fish and Game.

Sec. 18.55.330.

Preference to veterans.

units in a housing project for rent or sale to veterans. The offer shall be by publication of reasonable notice in a newspaper circulated in the area in which the housing project is located. The authority shall set aside these units for rental or sale to veterans for at least 30 days following first publication of the notice before making them available to other residents. If, after an additional 30 days a unit remains unassigned, the authority may rent or sell it to any person in the state, provided that residents have first preference.

Sec. 18.55.470.

Definitions.

In AS 18.55.300 - 18.55.470

(1) "authority" means the Alaska State Housing Authority;

(2) "moderate cost" means a cost determined by the authority which is below the level at which private enterprise is currently building a needed volume of reasonably safe and sanitary dwellings for sale in the locality involved;

(3) "moderate rental" means a rental rate determined by the authority which is below the level at which the dwellings are currently being offered for rent by private persons in the locality involved;

(4) "resident" means a person who has lived in the state continuously for any one year;

(5) "veteran" means a person honorably separated from the military service of the United States who has at any time resided continuously for at least a year in the state and who served in the armed forces of the United States for at least 90 days or whose service was for less than 90 days because of injury or disability incurred in the line of duty, between (A) September 16, 1940 and July 25, 1947; (B) June 25, 1950 and January 31, 1955; or (C) August 4, 1964, and a date six months after the termination of hostilities involving forces of the United States in Viet Nam; "veteran" also includes the spouse or widow or widower of a veteran.

Eligibility for veterans' interest rates.

The following persons are eligible veterans for the purposes of AS 18.56.098(g) and (h):

(1) a person who served in the armed forces of the United States for 90 days or more, or whose service was for less than 90 days because of injury or disability incurred in the line of duty, after April 6, 1917,

(A) who at the time of induction into the service was a resident of the territory or state, who had been a resident for not less than one year immediately before his induction, and who returned to the territory or state within one year after discharge as a resident with the intention of remaining in the territory or state; or

(B) who, not being a bona fide resident of the territory or state at the time of entry into the service, has been a resident of the territory or state for at least one year at the time of the loan application and has been a resident of the territory or state for at least five years; and

(C) whose discharge was under honorable conditions;

(2) the widow or widower of a member of the armed forces or an eligible veteran if

(A) the member or veteran was a resident of the territory or state for one year before induction into the service;

(B) the member or veteran served in the armed forces for at least 90 days after April 6, 1917; and

(C) his discharge was under honorable conditions;

(3) a person who has served in the Alaska Army National Guard, the Alaska Air National Guard, or the Alaska Naval Militia or who has served in a reserve unit of the United States armed forces in Alaska if the reserve unit required, as a minimum, one weekend each month of duty and 15 consecutive days of active duty training each year for not less than five years and whose discharge was under honorable conditions.

Sec. 21.06.250. FEES AND LICENSES.

(a) The director shall collect required fees in advance. The fees are as follows:

(1) certificate of authority

(A) for filing an application for certificate of authority, articles of incorporation and other charter documents, bylaws, financial statement, examination report, power of attorney to the director, and all other documents and filings required in connection with such application, and for issuance of an original certificate of authority, if issued domestic insurers ..... $100 foreign insurers 100

(B) annual continuation of certificate of authority ..... $ 65

(C) reinstatement of certificates of authority ..... $ 65

(D) amending certificate of authority ..... $ 10

(2) filing amendments of articles of incorporation, domestic and foreign insurers .... $ 10

(3) filing bylaws or amendments thereto, where required ..... $ 10

(4) filing annual statement of insurer, other than as part of application for original certificate of authority .... $ 10

(5) general agent or agent license, property, casualty, surety, title insurance agents, and including disability insurance without additional license or fee when written by property, casualty, or surety insurer otherwise represented by the general agent or agent

(A) application for original license, and including issuance of license, if issued,

(i) individual ..... $ 35

(ii) firm or corporation 75

(B) annual renewal or continuation of license

(i) individual ..... $ 35

(ii) firm or corporation 75

(C) appointment of agent or general agent, each insurer ..... $ 5

(D) annual renewal of appointment of general agent or agent, each insurer .... $ 5

(E) temporary license ..... $ 35

(6) nonresident general agent or agent's license

(A) individual ..... $ 75

(B) firm or corporation $150

(C) annual renewal or continuation of license ..... $ 75

(7) broker license

(A) application for original license and including issuance of license if issued - resident

(i) all line broker $100

(ii) property-casualty broker 75

(iii) life-disability broker 75

(B) annual renewal or continuation of license resident

(i) all line broker $100

(ii) property-casualty broker 75

(iii) life-disability broker 75

(C) application for original license and including issuance of license, if issued - nonresident

(i) all line broker $250

(ii) property-casualty broker 150

(iii) life-disability broker 150

(D) annual renewal or continuation of license nonresident

(i) all line broker $250

(ii) property-casualty broker 150

(iii) life-disability broker 150

(8) solicitor license

(A) application for original license, including issuance of license if issued ..... $ 15

(B) annual continuation of license ..... $ 15

(9) general agent or agent license, life, disability insurance and annuities

(A) application for original license, including issuance of license, if issued,

(i) individual ..... $ 35

(ii) firm or corporation 75

(B) annual renewal or continuation of license,

(i) individual ..... $ 35

(ii) firm or corporation 75

(C) appointment of general agent or agent, each insurer $ 5

(D) annual renewal of appointment of general agent or agent, each insurer ..... $ 5

(10) examination for license as general agent, agent, broker, solicitor or adjuster, each examination ..... $ 10

(11) surplus line broker license

(A) application for original license and for issuance of license, if issued - resident $100

(B) application for original license and for issuance of license if issued - nonresident $300

(C) annual renewal or continuation of license resident $100

(D) annual renewal or continuation of license nonresident $300

(12) adjuster license

(A) application for original license and for issuance of license if issued - resident .....$ 35

(B) annual renewal or continuation of license resident .....$ 35

(C) application for original license and for issuance of license, if issued - nonresident .....$ 75

(D) annual renewal or continuation of license nonresident .....$ 75

(13) insurance vending machine license, each machine, each year ..... $ 35

(14) for issuing any other certificate required or permissible under law ..... $ 5

(15) for accepting service of process ..... $ 5

(16) for copy of insurance code, actual printing cost plus postage;

(17) for copy of insurance report, actual printing cost plus postage;

(18) for any printed material furnished by the director not mentioned above, the director may charge the actual cost of printing plus handling and postage;

(19) for limited license (travel insurance agent) ..... $ 25

(20) Repealed by sec. 6 ch 113 SLA 1974, effective January 1, 1975.

(21) rating bureaus (for a three-year license) $100

(b) The director shall promptly deposit with the commissioner of revenue to the credit of the general fund of this state all fees received by him under this section.

Sec. 21.27.090. AGENT AND BROKER QUALIFICATIONS.

(a) To qualify for an agent or broker license an applicant must comply with this title and

(1) be 19 years of age or over, if an individual;

(2) if for a resident agent's or broker's license: be a bona fide resident for a period of not less than one year of continuous residency, immediately before issuance of license, and actually residing in Alaska; or if a corporation, be other than an insurer and maintain a lawfully established place of business in this state, except as provided in AS 21.27.270;

(3) be empowered to be an agent or broker, as the case may be, under its members' agreement, if a firm, or by its articles of incorporation, if a corporation;

(4) successfully pass any examination required under AS 21.27.060;

(5) be a trustworthy person;

(6) not intend to use or use the license for the purpose principally of writing controlled business, as defined in AS 21.27.030;

(7) if for an agent license, be appointed as its agent by one or more authorized insurers, subject to issuance of the license;

(8) if for broker license, have had experience either as an agent, solicitor, adjuster, general agent, broker, or as an employee of insurers or representatives of insurers, or special education or training of sufficient duration and extent reasonably to satisfy the director that he possesses the competence necessary to fulfill the responsibilities of broker.

(b) If the director finds that the applicant is qualified and that the license fee has been paid, he shall issue the license. Otherwise, the director shall refuse to issue the license.

Sec. 21.27.220. SOLICITOR'S QUALIFICATIONS.

A person is entitled to be licensed as a solicitor if he

(1) is a bona fide resident of Alaska and has been a continuous resident for at least one year immediately before issuance of a license;

(3) intends to and does make the soliciting and handling of insurance business under his license his principal gainful occupation;

(4) is to represent and be employed by but one licensed agent or broker;

(5) has passed any examination required under this chapter;

(6) is otherwise qualified under this title.

Sec. 26.15.130. ELIGIBILITY FOR LOANS.

(a) Qualifications for loans under AS 26.15.010 26.15.160 are:

(1) persons who served in the armed forces of the United States for 90 days or more, or whose service was for less than 90 days because of injury or disability incurred in the line of duty, between April 6, 1917, and November 11, 1918, and beginning September 16, 1940, to November 7, 1975, or in a combat zone during any period of armed conflict, who were separated from the armed forces with a discharge other than dishonorable, and

(A) who, at the time of induction into the service, were residents of the territory, who had been residents for not less than one year immediately before their induction, and who returned to the territory or state after discharge as residents with the intention of remaining in the territory or state; or

(B) who, not being bona fide residents of the territory before their entry into the service, have been residents of the territory or state for five or more years;

(2) persons who were dependent on a member of the armed forces or a veteran of World War II at the time of the member's or veteran's death, if

(A) the member or veteran was a resident of the territory for one year before induction into the service; and

(B) he served in the armed forces for at least 90 days between September 16, 1940, and July 25, 1947, but no benefits for loans accrue to dependents of an enlistee or re-enlistee for time served after November 1, 1945, regardless of whether the

enlistment or reenlistment was before or after November 1, 1945; and

(C) he died before the official date of the termination of that war; and

(D) his discharge was not dishonorable;

(3) persons who have served in the Alaska Army National Guard or the Alaska Air National Guard or the Alaska Naval Militia for not less than six years and who have not received a discharge other than honorable.

(b) Dependents shall be unmarried and the deceased member of the armed forces or deceased veteran shall have been their chief means of support and they shall be either a widow, widower, minor son, minor daughter, or mother, father, sister or brother incapable of self-support. Dependents shall be residents of the territory or state at the time of making application and intend to reside in the territory or state permanently. The rights of minor children may be exercised only if they have no surviving parent and have an appointed guardian who may apply on their behalf to secure a loan for their care, support, education or other purposes mentioned in AS 26.15.040 or to receive the bonus for those purposes.

Sec. 29.63.065. EXEMPTION.

(a) The real property owned and occupied by a resident 65 years of age or over, or the spouse, widow, widower, or minor heir of the original applicant, on which is located only his permanent abode which is a single-family residence, is exempt from (1)

special sewer assessments levied by a home rule or general law municipality after September 2, 1975 and (2) special water assessments levied by a home rule or general law municipality after September 2, 1975. Only one exemption may be granted with respect to the same property, and, if two or more persons are eligible for an exemption with respect to the same property, the parties shall decide between or among themselves which shall receive the benefit of the exemption. No real property may be exempted under this subsection which the municipality determines, after notice and hearing to the parties concerned, has been conveyed to the applicant primarily for the purpose of obtaining the exemption. The determination of the municipality is appealable under AS 44.62.560 44.62.570.

(b) No exemption may be granted under this section except upon written application for the exemption on a form prescribed by the state assessor for use by local assessors and in accordance with the following requirements:

(1) the claimant must file the initial application during the period of time between the date the assessment roll is certified and the time of payment fixed by the assembly or council. Within one year of the date the assessment roll is certified the assembly or council for good cause shown may waive the claimant's failure to make timely initial application for the exemption and authorize the assessor to accept the application as if timely filed;

(2) a claimant receiving the exemption must file with the department by March 15 of each subsequent year a separate application proving eligibility as of January 1 in order to retain the exemption. Within the same year the department for

good cause shown may waive the claimant's failure to make timely application and approve the application as if timely filed;

(3) if an application is filed within the required time under this subsection and is approved by the assembly or council, the exemption shall be allowed in accordance with the provisions of this section. If a waiver under this subsection is granted and the application for exemption approved, the amount of any assessment, penalty or interest which the claimant may have already paid on the assessment shall be refunded to him. The municipality may at any time require proof in the form considered necessary of the right and amount of an exemption claimed under this section.

(c) The state shall reimburse a home rule or general law municipality for the sewer and water assessment revenues which it would receive but for the operation of this section. Reimbursement under this subsection is a lien in favor of the state against the property exempted to the extent of the assessment against the property exempted. Upon recordation in the recording office of the district in which the property exempted is located the lien is prior and superior to other liens against the property except for general taxes or other special assessments and may be enforced by lien foreclosure. The lien becomes immediately due and payable

(1) upon sale or other transfer of the property except to a spouse, widow, widower, or minor heir; however, if the property is transferred to a minor heir the lien becomes due and payable on the date the minor heir reaches the age of 25 years; or

(2) when property exempted under (a)(1) or (2) of this section receives more than one sewer connection or more than one water connection; or

(3) when the claimant fails to prove eligibility under (b)(2) of this section.

(d) In this section

(1) "resident" means a person who for 12 consecutive months has maintained his permanent place of abode in the state;

(2) "real property" includes, but is not limited to, mobile homes, whether classified as real or personal property for municipal tax purposes.

(3) "minor heir" means a person who, at the time of transfer of the property, has not attained the age of 19 years or who, if he has not attained the age of 22 years, is a full-time student at an educational institution or a member of the armed forces of the United States.

Sec. 38.08.030. APPLICATIONS FOR HOMESITE ENTRY; FEES.

(a) To qualify for a homesite entry permit, an applicant shall

(1) at the time of application have attained the age of 18;

(2) submit proof acceptable to the commissioner that he is a resident of the state at the time of application, and that he has been a resident of the state for not less than three years immediately preceding the date his application was submitted, or that he has been a resident for 20 years cumulatively;

(3) agree to comply with the requirements for obtaining a patent to land set out under AS 38.08.060.

(b) Fees for filing an application may not exceed $10.

Sec. 39.25.155. VOCATIONAL SUBSTITUTION PROGRAM.

(a) It is the purpose of this section to establish a liberal system under which Alaskan residents not employed by the state who do not meet the minimum educational or experience criteria for state employment may demonstrate their abilities and achieve temporary or permanent state employee status. This program is intended for use primarily in remote or underemployed areas where the opportunity to gain required hiring qualifications does not exist, but where there is a local need for employees with certain vocational skills. The provisions of this section apply notwithstanding the provisions of AS 39.25.150(3).

(b) The director of personnel shall establish vocational standards as alternatives for educational or experience levels now required for nonprofessional occupational areas under the state personnel system and incorporate these alternatives into the state classification plan.

(c) Applicants shall be placed on eligible lists for the vocational classification indicated in their applications submitted to the division of personnel in the order of their relative ranking based on an assessment of their technical ability, place of residence and without written examination. Aptitude or occupational tests may be given if a position requires a specific ability.

(d) The director of personnel shall establish rates of pay for the selected vocational substitution classifications in relation to the beginning entry classification pay rates. However, vocational substitution personnel may not be classified lower than one pay range below the range to which the classified position is allocated.

(e) The director of personnel shall embody a concept combined of technical ability, place of residence, local hire and area unemployment in the personnel rules to accomplish the intent of this section.

(f) Applicants selected under this section are subject to the provisions of AS 39.25.160.

(g) In this section "resident" means a person who has been domiciled in Alaska for at least one year immediately before filing his application.

(a) Notwithstanding any other provisions in this chapter, extracting industries shall meet the following provisions of this section as a condition of qualifying for a tax credit set out in this chapter.

(1) A person seeking tax credit status under this chapter shall set up and maintain an on-the-job training program approved by the Department of Labor aimed at qualifying Alaska residents presently lacking in the requisite technical skills of the activity carried on. This training program shall be geared so that Alaska residents comprise 50 per cent of the employees at the end of the first year of tax credit. Alaska residents shall comprise 60 per cent of the employees at the end of the second year of tax credit and 70 per cent at the end of the third year of tax credit.

(2) The department shall set up procedures to be followed by the person seeking tax credit status under this section and shall certify to the Department of Commerce and Economic Development those persons qualifying for this status. In no case may the Department of Commerce and Economic Development grant tax credit status to a person coming under the provisions of this section without first receiving certification from the department nor continue this status after revocation of certification by the department.

(3) The department shall hold formal hearings for those persons to whom it denies certification. The purpose of these hearings is to hear evidence on the reasons for a person failing to qualify under this section. In order to obtain a reversal of the

denial, the person denied certifcation must show by convincing evidence that he is unable to comply with this section because

(A) the specific activity engaged in requires a greater percentage of trained personnel than the guidelines for resident hiring permits and these trained personnel are not available within the state in great enough number to make out-of-state recruiting unnecessary; or

(B) even though the person applying for tax credit status has set up an on-the-job training program approved by the department, he has been unable to meet the resident guideline requirements due to the inability of the local labor market to supply enough trainable personnel.

(4) A person certified for tax credits status who subsequently fails to comply with the training and hiring practices set out in this section, upon a finding by the department of this failure, forfeits this status. However, if the person seeking tax credit status, within a reasonable time during the first year of exemption, has made application to the department for a hearing to show cause why he will be unable to comply with the training and hiring provisions of this section and the department determines that the failure is excusable under this section the department shall permit a maximum of six months to comply with the training and hiring practices before withdrawing certification and causing the credit to lapse. Extensions of time for compliance shall be added on to the overall time requirements in the second and third years so that a person need not comply with the higher percentages until the expiration of his extension plus the year allowed in this section.

(5) A person having certification revoked under (4) of this section may apply to the department for a hearing to show cause for recertification within six months of the revocation.

(b) In this section

(1) "department" means the Department of Labor;

(2) "extracting industry" means an industry which processes, severs, harvests or extracts a natural resource of the state as a primary activity of the industry;

(3) "resident," at the end of the first year of tax credit, means a person who has been domiciled in Alaska for at least one year immediately before the granting of the tax credit to the business; "resident," at the end of the second and third year of tax credit, means a person who has been domiciled in Alaska for at least one year either immediately before the granting of the tax credit to the business or after the granting of the tax credit to the business.

(c) A person holding a tax credit granted before the effective date of this section is not subject to the provisions of this section.

Sec. 44.81.210. POWERS OF THE BANK.

(a) The bank may

(1) make variable rate or fixed rate loans to individuals who are residents and who are engaged in commercial agriculture or fishing, including harvesters, processors, suppliers and marketers. or to corporations, partnerships or joint ventures

commercial agriculture or fishing, the majority interest of which is beneficially owned by residents of the state and a majority of the owners of which are residents of the state, if the recipient of the loan is a member of the bank; however, the bank may make a loan under this paragraph to a corporation, partnership, or joint venture for the purchase of a new or existing fishing vessel or for the repair or renovation of an existing fishing vessel, the primary purpose of which is to commercially harvest fishery resources, only if the corporation, partnership, or joint venture is wholly owned and controlled by residents of the state and if the recipient of the loan is a member of the bank.

(2) make and alter bylaws necessary or desirable to carry out its corporate functions;

(3) establish amortization plans for repayment of loans, which may include extensions for poor fishing or farming seasons, or for adverse market conditions for Alaskan products;

(4) enter into agreements with regional institutions of the federal farm credit system, private lending institutions, and other state agencies or agencies of the federal government, to carry out the purposes of AS 44.81.010 - 44.81.350;

(5) adopt, alter, and use a corporate seal;

(6) sue and be sued in the name of the bank;

(7) issue bonds to carry out any of its corporate purposes and powers;

(8) sell, lease as lessor or lessee, exchange, donate, convey or encumber in any manner by mortgage or by creation of any other

security interest, real or personal property owned by it, or in which it has an interest, when, in the judgment of the board of directors, the action is in furtherance of its corporate purposes;

(9) incur secondary liability by guaranty or endorsement of the obligations of another corporation or legal entity when, in the judgment of the board of directors, the action is in furtherance of its corporate purposes;

(10) make loans as provided in (1) of this section in participation with financial institutions, and establish and regulate the terms of the loans;

(11) make contracts and execute instruments necessary or convenient in the exercise of its corporate powers;

(12) acquire by purchase, lease, bequest, devise, gift, the satisfaction of debts, or the foreclosure of mortgages, and hold, maintain, use, operate, and convey real or personal property;

(13) borrow money and issue secured and unsecured evidence of indebtedness for a corporate purpose or to fund, refund, pay, or discharge outstanding obligations, and enter agreements and contracts concerning these obligations;

(14) secure the payment of its obligations by pledge or mortgage or other lien on its contracts, revenues, income, or property;

(15) appoint officers, employees, trustees for certificate holders, and agents, and prescribe their powers and duties;

(16) provide technical services to members of the bank; for the purpose of this paragraph, "technical services" includes services

that will enhance the ability of the member to obtain financial assistance from the bank;

(17) make loans, as provided in (1) of this section, secured by liens subordinate to valid first liens and security agreements granted to a private lending institution;

(18) participate with state departments and agencies in formulating policy and in planning for the development of commercial fishing and agriculture in the state;

(19) do what is necessary or desirable to carry out the corporate purposes and powers expressed or implied in AS 44.81.010 - 44.81.350;

(20) make loans to individual commercial fishermen for limited entry permits; a loan under this paragraph may be made only to an individual commercial fisherman who has been a state resident for a continuous period of five years immediately preceding the date of application for the loan and who has had a crewmember or commercial fishing license under AS 16.05.480 or a permit under AS 16.43.010 - 16.43.380 for any one of the past five years, and who has actively participated in the fishery during that period; loans made under this paragraph are subject to the provisions of AS 44.81.230;

(21) indemnify a director, officer or employee of the bank and his heirs, executors and administrators against all liabilities and related expenses including, but not limited to, court costs and attorney fees, judgments, and the cost of reasonable settlements, incurred by him in connection with or arising out of an action or proceeding brought against him because of an act or omission in the performance of his official duties as director,

officer or employee of the bank regardless of whether he is a director, officer or employee at the time the expenses or liabilities are incurred;

(22) accept the pledge of a limited entry permit as security for a loan made under AS 44.81.010 44.81.350 for the repair, restoration, or improvement of a commercial fishing vessel or commercial fishing gear, or for the construction or purchase of a commercial fishing vessel, subject to the conditions set out in AS 44.81.230 - 44.81.250 on pledges of limited entry permits.

(b) The provisions of (a)(21) of this section do not authorize the bank to indemnify a director, officer or employee of the bank who is adjudged liable for negligence or misconduct in the performance of his official duties.

Sec. 44.81.220. TRANSITION.

Notwithstanding the provisions of AS 10.15.005, upon the repurchase of all the nonvoting, preferred shares initially issued by the bank and purchased by agencies of the state, the provisions of AS 44.81.010 - 44.81.350 lapse and the bank may proceed to operate solely as a private cooperative corporation under the terms of its bylaws and the provisions of AS 10.15.010 - 10.15.600.