

HB

187

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

REPORTED OUT
MAY 3 2005
SENATE FINANCE
COMMITTEE

DATE: 5/1/05

FURTHER:

DATE TURNED
IN TO OFFICE: 3 May 2005

Finance Committee considered CS FOR HOUSE BILL NO. 187(FIN)(efd fld)

HB 187 AMERADA HESS INCOME; CAPITAL INCOME FUND

"An Act relating to money deposited into the Alaska permanent fund as a result of the settlement of State v. Amerada Hess; relating to the Alaska capital income fund and to deposits of income from State v. Amerada Hess settlement money into the Alaska capital income fund."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

CS Senate Bill:
 Same Title
 New Title

SCS House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

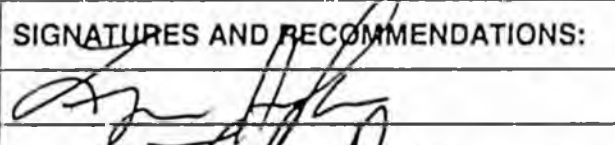
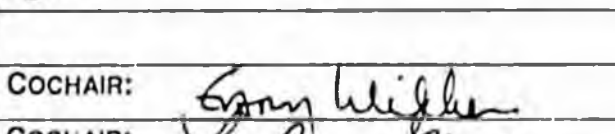
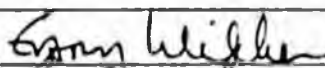

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Ind.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Ind.	Zero	FN#
Rainie	4/24/05			✓	#1

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			✓	
			✓	
			✓	
COCHAIR: 			✓	
COCHAIR: 	✓			

FISCAL NOTE

REPORTED OUT

MAY 3 2005

SENATE FINANCE
COMMITTEE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 187(FIN)COMMITTEE
 (H) Publish Date: 4/27/05

Revision Date/Time (Note if correction):
 Title Alaska Capital Income Account

Dept. Affected: Revenue
 RDU AK Permanent Fund Corporation
 Component AK Permanent Fund Corporation

Sponsor Governor
 Requester House Finance Committee Component No. 103

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would create a new fund, the Alaska Capital Income Fund, in the State's general fund. In addition, the bill would change existing statutes to place the realized earnings from the settlement of State v. Amerada Hess into this new fund where they would be available for Legislative appropriation.

The additional staff time required to administer this account will fall under the APFC Finance Department's normal scope of duties. Therefore we do not expect additional costs as a result of this bill.

Prepared by: Michael Burns, Executive Director/CEO Phone 465-2047
 Division Alaska Permanent Fund Corporation Date/Time 4/26/2005
 Approved by: _____ Date 4/26/2005
 Agency _____

ALASKA STATE LEGISLATURE HOUSE FINANCE COMMITTEE

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State Capitol, Juneau, Alaska 99801-1182 Sponsor Statement

CS House Bill 187 (FIN) 'Amerada Hess Income, Capital Income Fund'

CS HB 187 (FIN) would establish the Alaska capital income fund within the general fund and would authorize the deposit into that fund the earnings on money received from State v. Amerada Hess, et al., IJU-77-847 Civ. (Superior Court, First Judicial District).

In 1992, the state's oil and gas royalty litigation (Am Hess litigation) was headed to trial. Both state and federal judges had expressed concerns about the capacity of Alaskan judges and jurors to participate in the case on an impartial basis in light of the fact that the earnings on the portion of any recovery in the case would be deposited into the permanent fund and be used to pay permanent fund dividends that all Alaskan judges and jurors receive. AS 37.13.145 (d) was enacted, which deposited into the principal of the permanent fund the earnings of all amounts received from settlement of this case and directed that no earnings of the Am Hess principal be used for dividends. Thus, the concern about impartiality was resolved by disallowing the earnings from the settlement from being used in calculating the annual dividend amount.

The Amerada Hess litigation is now settled, though the possibility of a re-opener subject to arbitration remains. Approximately \$424 million from this case, including earnings on the settlement receipts and inflation proofing, is contained in the Amerada Hess portion of the principal of the permanent fund.

This bill proposes to end inflation proofing of the Amerada Hess principal, maintaining a static balance in the Am Hess principal. That portion of inflation proofing that would have been deposited into the principal of the Amerada Hess sub account will now be deposited into the 'other' portion of the permanent fund principal.

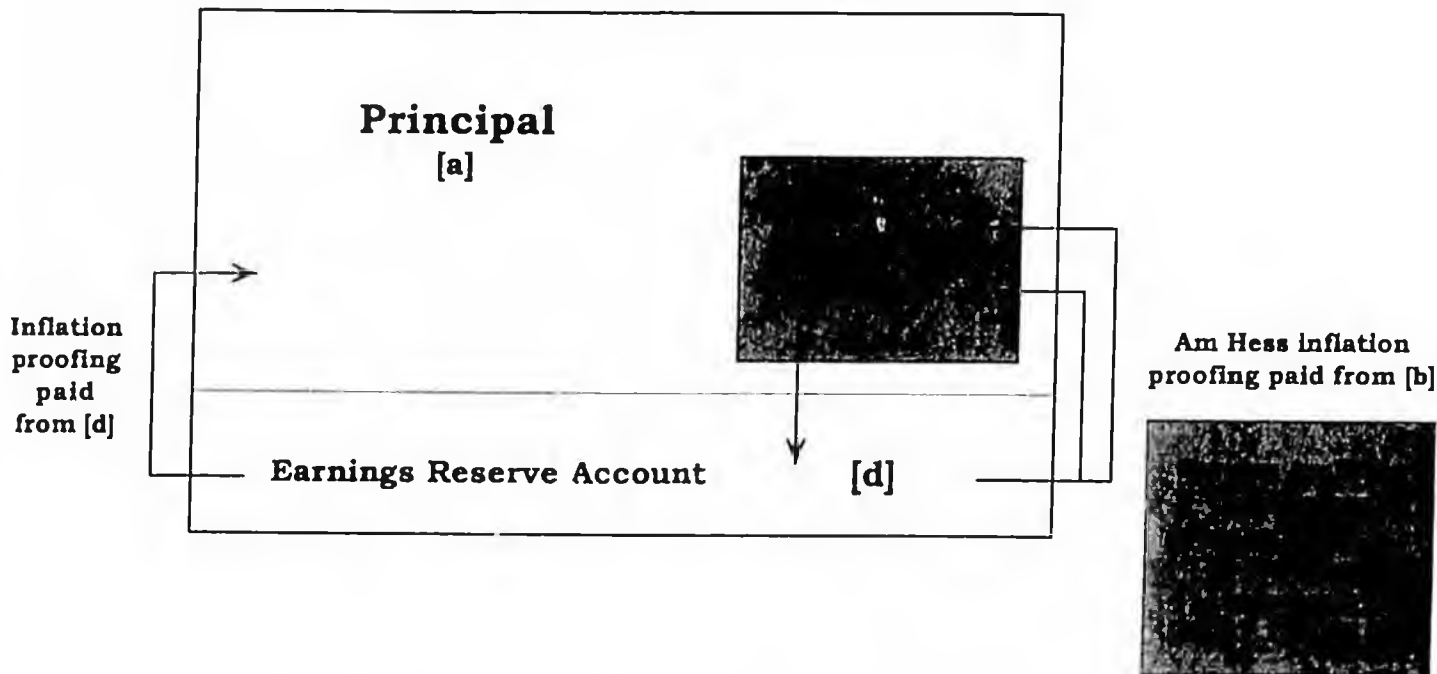
HB 187 would authorize the deposit of the earnings from the Amerada Hess principal (estimated to be \$30 million/year) to the new Alaska capital fund. Money deposited into the Alaska capital fund can be used for any valid public purpose.

This legislation has no effect on the dividend calculation and is neutral on the dollar amount of each Alaskan's dividend.

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

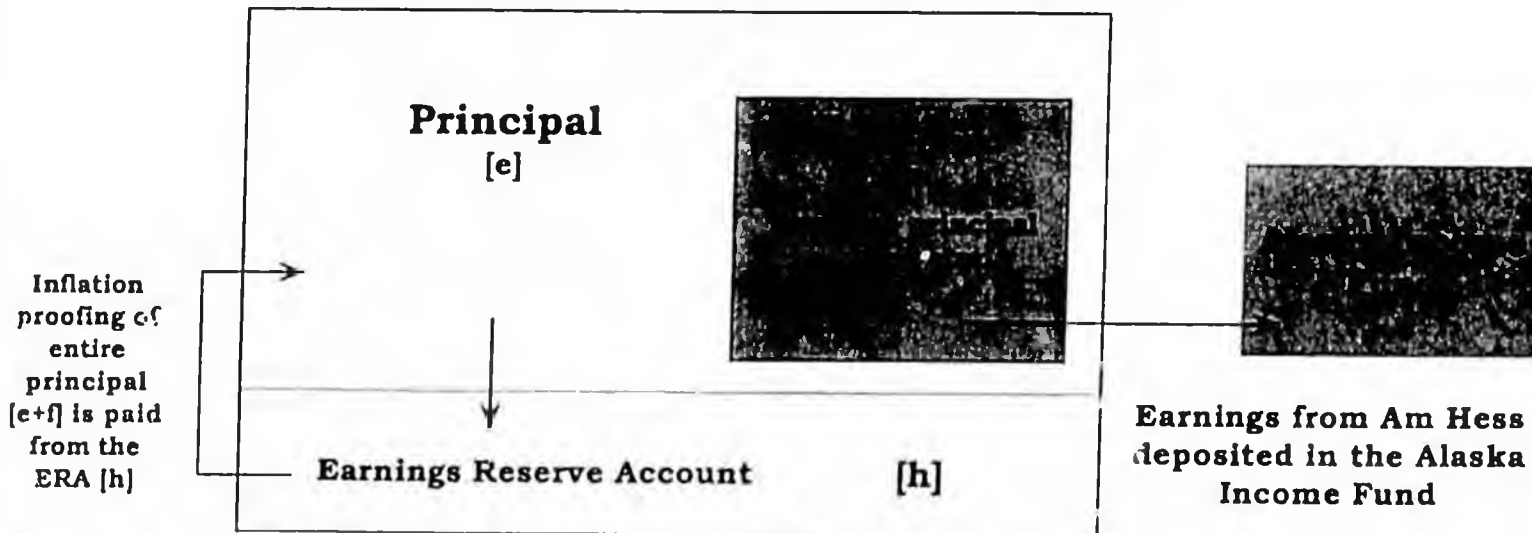
CURRENT SYSTEM

$$[c] \text{ Entire Principal} = \text{Principal} + \text{Am Hess} [a+b=c]$$



PROPOSED SYSTEM (HB 187)

$$[g] \text{ Entire Principal} = \text{Principal} + \text{Am Hess} [e+f=g]$$



Inflation proofing paid from [h], but only deposited into [e]

NEUTRAL ON DIVIDENDS

Cheryl Frasca
Re: Repeal of *Amerada Hess* earning sequestration
requirement in AS 37.13.145(d)

January 28, 2005

MEMORANDUM

State of Alaska
Department of Law

To: Cheryl Frasca
Office of the Governor

Date: January 28, 2005

From: Wilson L. Condon
Assistant Attorney General
Oil, Gas & Mining-Anchorage

Tel. No.: 269-5255

File No.: N/A

Re: Repeal of *Amerada Hess*
earning sequestration
requirement in AS 37.13.145(d)

I. INTRODUCTION

In 1991 the legislature enacted the current version of AS 37.13.145(d) as part of provisions governing management of the Alaska Permanent Fund Corporation ("APFC"). The statute imposes a financial sequestration requirement on earnings from settlement proceeds received by the State in ANS Royalty Litigation, commonly known as the *Amerada Hess* ("*AmHess*") litigation. In relevant part, AS 37.13.145(d) requires that:

[I]ncome earned on money awarded in or received as a result of State v. *Amerada Hess*, et al., IJU-77-847 Civ. (Superior Court, First Judicial District), including settlement, summary judgment, or adjustment to a royalty-in-kind contract that is tied to the outcome of this case, or interest earned on the money, or on the earnings of the money . . . is not available for distribution to the dividend fund, and shall be annually deposited into the principal of the Alaska permanent fund.

The legislature adopted the statute in order to negate an argument advanced by producers during the *AmHess* litigation that no Alaska judge or juror could be impartial in the adjudication of the matter because they had a financial stake in the outcome. According to the producers, any judgment returned would ultimately be deposited into the Alaska Permanent Fund, affecting the size of the annual Permanent Fund Dividend ("PFD").

Cheryl Frasca
Re: Repeal of *Amerada Hess* earning sequestration
requirement in AS 37.13.145(d)

January 28, 2005

All issues in the *AmHess* litigation were concluded and the case dismissed in 1995. Since the statute was adopted, the APFC has always used a separate sub-account to isolate any *AmHess* proceeds and the income earned on those proceeds. This sub-account is part of the principal account of the permanent fund. The purpose of the sub-account is: (1) to ensure that *AmHess* earnings are not included in the amount from which the PFD is annually paid; and (2) to track the amount to be transferred annually from the Fund's realized earnings account to Fund principal, and thereafter be allocated to the *AmHess* sub-account. Presently, no additional *AmHess* litigation proceeds are due from the producers, but annual earnings allocations and adjustments continue to be handled in conformity with AS 37.13.145(d).

II. QUESTIONS PRESENTED

1. Can the legislature repeal AS 37.13.145 at this time?

III. SHORT ANSWER

1. Yes, the legislature has authority to repeal the provisions of AS 37.13.145. However, the bias challenge raised by the producers in *AmHess* is one that is capable of repetition in future litigation. Most likely, it would be raised again.¹ Therefore, repeal of AS 37.13.145 may undermine the State's position in future litigation that Alaska judges and jurors are not financially impacted by litigation proceeds. The producers will argue that an agreement by the State to segregate future litigation proceeds is illusory. They will contend that any segregation requirement will eventually be repealed, and the money thereafter commingled with PFD funds. Thus, under their argument, judges and jurors will retain an expectation of recovery from the proceeds in the matter before them, thereby requiring their disqualification.

IV. DISCUSSION

As long as there are no contractual promises enforceable under the federal Contract Clause,² a valid general act may effectively repeal or supersede the provisions of a prior

¹ This is so because the disqualification issue was never fully litigated on the merits through appeal in either the state or federal litigation arising out of *Hess*.

² U.S. Const. art. 1, § 10, cl. 2 ("[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

Cheryl Frasca
Re: Repeal of *Amerada Hess* earning sequestration
requirement in AS 37.13.145(d)

January 28, 2005

act.³ Here, there is no contractual promise with the *AmHess* parties to maintain a sequestration requirement for any fixed period of time, or indefinitely. No judicial order mandates the treatment. The reasons prompting enactment of the provision became moot when all issues in the case were settled in 1995. Thus, as a legal matter, the legislature is presently free to repeal the sequestration requirements of AS 37.13.145(d).

In practical terms, repeal of AS 37.13.145(d) would mean that the annual realized income of the Fund would be increased by the amount earned from approximately \$400 million of assets. Under the current distribution formula, this means that the amount of the annual PFD would be increased as a result of inclusion of *AmHess* proceeds in "the amount available for distribution to the dividend fund."⁴ The *AmHess* judges and potential jurors will now belatedly realize larger PFDs from repeal of the provision.

Although no legal obstacle impedes repeal of AS 37.13.145(d), the legislature may care to balance the benefits of such repeal versus the potential negative consequences. In the benefit column, there will be fairly insubstantial savings of APFD accounting time and bookkeeping entries isolating the funds and the earnings on those funds. Also in the benefit column, there will be an increased annual PFD available for all Alaskans. In the negative column, the legislature may have furnished the producers an evidentiary basis to argue in future litigation that "we all know that proceeds of this lawsuit will eventually find their way into the PFD, and therefore, no Alaskan judge or juror can be impartial."

I cannot say that a future state or federal court would entertain such an argument based on a one-time incidence of repeal. It is even more tenuous to suggest, as the producers would, that Alaskan judges and jurors follow the requirements of PFD accounting so closely to know of the repeal of AS 37.13.145(d). However, it may unnecessarily complicate future litigation. Therefore, in the absence of a more compelling justification for repeal than I currently see, I would counsel leaving the statute on the books.

WLC:AMP:cb

³ *State v. Lewis*, 559 P.2d 630 (Alaska 1977), cert. denied, 432 U.S. 901.

⁴ AS 37.13.145(d).

Amerada Hess Settlement

	Principal			Realized Earnings (over inflation)			Inflation-proofing			Total Settlements <u>Principal</u>
	<u>Beginning</u>	<u>Contributions</u>	<u>Ending</u>	<u>Beginning</u>	<u>Additions</u>	<u>Ending</u>	<u>Beginning</u>	<u>Additions</u>	<u>Ending</u>	
FY 1992	Inception	82,099,000	82,099,000	0	0	0	0	2,005,000	2,005,000	84,104,000
FY 1993		16,411,000	98,510,000	0	4,641,000	4,641,000	2,005,000	4,541,000	6,546,000	109,697,000
FY 1994		13,213,000	111,723,000	4,641,000	5,620,000	10,261,000	6,546,000	3,615,000	10,161,000	132,145,000
FY 1995		61,717,000	173,440,000	10,261,000	6,145,000	16,406,000	10,161,000	5,060,000	15,221,000	205,067,000
FY 1996		2,860,000	176,300,000	16,406,000	18,441,000	34,847,000	15,221,000	5,864,000	21,085,000	232,232,000
FY 1997		7,847,000	184,147,000	34,847,000	21,377,000	56,224,000	21,085,000	7,058,000	28,143,000	288,514,000
FY 1998		24,622,000	208,769,000	56,224,000	31,254,000	87,478,000	28,143,000	6,853,000	34,996,000	331,243,000
FY 1999		0	208,769,000	87,478,000	36,086,000	123,564,000	34,996,000	5,102,000	40,098,000	372,431,000
FY 2000		6,886,000	215,655,000	123,564,000	30,331,000	153,895,000	40,098,000	8,307,000	48,405,000	417,955,000
FY 2001		13,587,000	229,242,000	153,895,000	7,687,000	161,582,000	48,405,000	14,543,000	62,948,000	453,772,000
FY 2002		(35,159,000)	194,083,000	161,582,000	(23,384,000)	138,198,000	62,948,000	(5,154,000)	82,112,000	394,393,000
FY 2002		0	194,083,000	138,198,000	0	138,198,000	62,112,000	4,318,000	82,112,000	394,393,000
FY 2003		0	194,083,000	138,198,000	0	138,198,000	62,112,000	6,160,000	68,272,000	400,553,000
FY 2004		0	194,083,000	138,198,000	14,713,000	152,911,000	68,272,000	9,133,000	77,405,000	424,399,000
	Total	194,083,000		Total	152,911,000		Total	77,405,000		

Note: FY2002 reductions are the result of an audit correction of an over deposit of settlement principal and related earnings.

Legislative Research Services

Alaska State Legislature
Legislative Affairs Agency
Division of Legal and Research Services

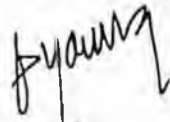
State Capitol, Juneau, AK 99801
Phone: 907-465-3991
Fax: 907-465-3908

March 8, 2005

Memorandum

TO: Representative Lesil McGuire

FROM: Patricia Young
Manager



RE: Use of Funds from Settlement of *Amerada Hess* (*ANS Royalty Litigation*)
LRS 05.211, Supplemental Material

As I understand it, the core question behind your request for background on *Amerada Hess*, has to do with the language in AS 37.13.145(d) which specifies as follows about proceeds from the case:

... income earned on money awarded in or received as a result of *State v. Amerada Hess, et al.*, 1JU-77-847 Civ. (Superior Court, First Judicial District), including settlement, summary judgment, or adjustment to a royalty-in-kind contract that is tied to the outcome of this case, or interest earned on the money, or on the earnings of the money shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund, and shall be annually deposited into the principal of the Alaska permanent fund.

This provision was a very narrow piece of legislation, designed specifically to address the defendants' claim that any judge and jurors in Alaska would face an insurmountable conflict of interest because they would all be permanent fund dividend recipients. The attached copy of *Exxon Corporation v. Heinze*, 32 F. 3d 1399 (1994 U.S. App.) details the history of the conflict of interest issue and its resolution in the *ANS Royalty Litigation* (aka *Amerada Hess*). As you will see, the court ruled that the final version (the current version) of the law cured the bias problem. When all avenues of appeal on the conflict of interest issue ran dry, the producers settled the oil royalty claims and counterclaims. The underlying issues never came before a judge and jury.

Tamara Cook, legislative counsel, notes that a settlement agreement that prescribes how the recipient party can use the money would be a very unusual document. Ms. Cook believes that in this situation, there can be no conflict because there is no judge or jury making a decision. She suggests that the Department of Law review their copies of the settlement documents for any language that limits the use of the funds.

I hope this is helpful. Please let me know if you have questions or if I can provide you with any other information.

LEXSEE 32 F3D 1399

EXXON CORPORATION, Plaintiff-Appellant-Cross-Appellee, v. HAROLD C. HEINZE; CHARLES E. COLE, Attorney General for the State of Alaska; RONALD SWANSON, Director of the Division of Lands; JAMES E. EASON, Director of the Division of Oil and Gas, Defendants-Appellees-Cross-Appellants.

Nos. 92-35266, 92-35323

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

32 F.3d 1399; 1994 U.S. App. LEXIS 21908; 94 Cal. Daily Op. Service 6273; 94 Daily Journal DAR 11467

November 2, 1993, Argued, Submitted, Seattle, Washington
August 17, 1994, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Alaska. D.C. No. CV-91-543-JKS. James K. Singleton, District Judge, Presiding.

DISPOSITION: VACATED and REMANDED

LexisNexis(R) Headnotes

COUNSEL: Thomas Gibbs Gee and David D. Sterling, Baker & Botts, Houston, Texas; and Joseph R. D. Loescher, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, Alaska, for the plaintiff-appellant-cross-appellee.

Bruce M. Botelho, Deputy Attorney General, Juneau, Alaska; and Deborah L. Williams, Hellen, Partnow & Condon, Anchorage, Alaska, for the defendants-appellees-cross-appellants.

JUDGES: Before: Eugene A. Wright, Alfred T. Goodwin, and Procter Hug, Jr., Circuit Judges. Opinion by Judge Goodwin.

OPINIONBY: ALFRED T. GOODWIN

OPINION: [*1400] OPINION

GOODWIN, Circuit Judge:

Exxon Corporation ("Exxon") n1 appeals an order dismissing its 42 U.S.C. § 1983 lawsuit and denying its prayer to enjoin certain Alaska state court litigation over state oil and gas royalties. Exxon contends that the state court litigation violates its due process right to an unbiased forum. Because a partial settlement has substantially changed the posture of the case, and because the fac-

tual record is now insufficient to review Exxon's claims on their [**2] merits, we dismiss for lack of ripeness, vacating the district court's order.

n1 Chevron U.S.A., Inc. ("Chevron") was originally a coparty to Exxon's appeal; however, Chevron and Alaska settled, agreeing to dismiss Chevron's appeal, No. 92-35389, and to dismiss Chevron as a party to the State's cross-appeal, No. 92-35323. For convenience, we refer to Exxon as the sole appellant and cross-appellee throughout.

I.

In 1977, the State of Alaska filed a state court action against Exxon and eighteen other companies producing gas and oil on Alaska's North Slope ("the producers"). See *Alaska v. Amerada Hess Corp. et al*, Civil No. 1JU-77-847 (hereinafter "the *ANS Royalty Litigation*"). The State sought a declaration of its rights under certain mineral leases which require the producers to pay [*1401] royalties on the gas and oil they extract from state lands.

In 1983, the State amended its complaint to add a claim for underpayment of past royalties, alleging that the producers had systematically underestimated the value of certain [**3] gas and oil. The producers counterclaimed for overpayment of royalties. The parties agreed to sever the gas royalty and other gas claims from the oil royalty claims and to litigate the oil royalty claims first.

In 1987, after extensive discovery on the oil royalty claims, several producers, including Exxon, filed suit in federal court, contending that the pending *ANS Royalty Litigation* violated their due process rights and requesting injunctive and declaratory relief under 42 U.S.C. § 1983. *Standard Alaska Production Co. v. Schaible*, No.

87-621 (D. Alaska, Nov. 2, 1987). The complaint alleged that the outcome of the *ANS Royalty Litigation* would substantially affect the Alaska Permanent Fund, and, consequently, the annual Permanent Fund dividends Alaska residents receive each year. n2 Because Alaska state judges and potential jurors are eligible to receive Permanent Fund dividends, the producers argued, they had a financial interest in the case, rendering them unconstitutionally biased.

n2 The Alaska State Constitution requires state administrators to place 25% of all state oil and gas royalties in the Alaska Permanent Fund which is used only for income-producing investments. Alaska Const. Art. IX § 15. Under the Permanent Fund Dividend Program, enacted in 1982, the State pays Alaska residents approximately 50% of the income received each year from these investments. *Alaska Stat. §§ 43.23.045(b), 37.13.140*. Each person who has resided in Alaska for a year or more - and thus all Alaska state judges, potential jurors, and their family members - are eligible to receive these payments or Permanent Fund dividends. In fact, since Alaska judges must have resided in Alaska for five years and Alaska jurors are selected from a list of Permanent Fund recipients, see *Alaska Stat. § 09.20.050(b)*, jurors and judges are, by definition, eligible to receive Permanent Fund dividends. Between 1988 and 1992, the annual Permanent Fund dividend paid to each resident ranged from \$826.90 to \$952.63, or approximately \$3,600 for a family of four.

[**4]

Then-District Judge Kleinfeld, an Alaska state resident, recused himself from the federal case, agreeing that one might question the impartiality of a judge who receives Alaska Permanent Fund dividends, but expressly declining to reach the due process issue or rule on the fairness of the state court forum. R.T. March 8, 1988. The Chief Judge of the Ninth Circuit then appointed Judge Belloni, a non-Alaskan, to hear the case.

Judge Belloni ultimately dismissed the producers' § 1983 complaint without prejudice, rejecting the State's Eleventh Amendment defense, but holding that the controversy was not ripe for federal review because the producers had not raised the bias issue in a state court motion to disqualify. Judge Belloni challenged the State to provide a fair forum, and invited the producers "to re-open this federal case" if "the State Officials fail to provide an unbiased forum within a reasonable time." *Standard Alaska Prod. Co. v. Schraible*, No. 87-521, Unpublished Opinion at 7 (D. Alaska June 20, 1988). We affirmed,

agreeing that "until a proper motion for disqualification is made in the state court, the disputed factual questions concerning the alleged bias of all Alaska [**5] judges and jurors cannot be reviewed by any federal court." *Standard Alaska Prod. Co. v. Schraible*, 874 F.2d 624, 630 (9th Cir. 1989), cert. denied, 495 U.S. 904 (1990).

After we decided *Schraible*, the Alaska legislature amended the Permanent Fund dividend legislation to provide that "income earned on money awarded after trial" in the *ANS Royalty Litigation* would "not [be] available for distribution to the dividend fund." *Alaska Stat. § 43.23.045(b)* (1989) (repealed 1991). In addition, the Alaska Supreme Court amended Alaska Rule of Civil Procedure 47(c) to provide that an Alaska juror's eligibility to receive Permanent Fund dividends did not constitute grounds for challenging the juror for cause. n3

n3 The amended rule allows challenges for cause when the juror "has a financial interest, other than that of a taxpayer or a permanent fund dividend recipient in the outcome of the case." Alaska R. Civ. P. 47(c)(12) (1989).

After the Supreme Court denied [**6] certiorari, *Schraible*, 495 U.S. 904 (1990), and the state court imposed [*1402] a deadline for filing a motion to disqualify, Exxon moved to disqualify Alaska Superior Court Judge Carpeneti, who was presiding over the state court litigation. n4 Exxon argued that the 1989 amendment had not cured the bias problem because it did not address: (1) payments received pursuant to a declaratory judgment; (2) payments received as a result of a settlement or summary judgment; or (3) payments received as a result of royalty-in-kind adjustment clauses. Judge Carpeneti issued a "Notice of Intention to Grant Motion for Disqualification," concluding that judges who receive Permanent Fund dividends have a "direct financial interest or another interest which strongly resembles a direct interest in the outcome of this case," and ruling that the 1989 amendments had not eliminated that interest. *In re ANS Royalty*, No. 1JU-77-847, Order No. 91-9 at 9 (Sup. Ct. Alaska March 14, 1991). Judge Carpeneti also found that the "Rule of Necessity" did not apply. *Id.* He gave the state seventy days to remedy the bias problem.

n4 Exxon contends that this motion was based exclusively on state law and argues that it expressly reserved its "right" to have federal courts decide federal constitutional issues. Appellants' Br. at 14 n.6 (citing *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964)).

[**7]

In response, in May 1991, the Alaska legislature again amended *Alaska Stat. § 43.23.045*, replacing the 1989 amendment with an amendment requiring any award received as a result of the *ANS Royalty Litigation* (including royalty-in-kind adjustments from third parties and interest earned on such funds) to be deposited into the Permanent Fund principal and not made available for distribution as dividends. *Alaska Stat. § 43.23.045(e)* (1991) (current version at *Alaska Stat. § 37.13.145(d)* (1992)).ⁿ⁵ The legislature also enacted a section providing that the amendment would be automatically repealed if the Alaska Supreme Court held that eligibility to receive Permanent Fund dividends under the unamended statute would not disqualify a judge or juror from hearing the *ANS Royalty Litigation*. *Alaska Stat. § 43.23.045(e)* (1991) (current version at *Alaska Stat. § 37.13.145(d)* (1992)).

ⁿ⁵ The amended statute provides that

... income earned on money awarded in or received as a result of [the *ANS Royalty Litigation*], including settlement, summary judgment, or adjustment to a royalty-in-kind contract that is tied to the outcome of this case, or interest earned on the money, or on the earnings of the money shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund, and shall be annually deposited into the principal of the Alaska permanent fund.

[**8]

Judge Carpeneti ruled that these amendments cured the bias problem and denied Exxon's motion to disqualify. Exxon filed a motion to reconsider, arguing that the newest amendments did not eliminate the bias problem because they did not address the producers' counterclaims and because the repeal provision "reinforced" each Alaskan's interest. Judge Carpeneti denied the motion to reconsider, ruling that the producers had waived any challenge based on the counterclaims and rejecting Exxon's reliance on the repeal provision on its merits. A second superior court judge affirmed, and the Alaska Supreme Court summarily denied Exxon's petition for review and motion for an expedited appeal. *BP Exploration v. Alaska*, No. S-4654, S-4662, S-4689 (Alaska filed Aug. 23, 1991).

Exxon and Chevron then filed the instant § 1983 action in federal court, again seeking to enjoin the *ANS Royalty Litigation*. Exxon moved to disqualify Judge Singleton, the Alaska District Judge assigned to the federal case. Judge Singleton denied Exxon's motion to disqualify, rul-

ing that a citizen's eligibility to receive Permanent Fund dividends is a "bare expectancy," not a financial interest, and noting that even [**9] if justification for recusal existed, the Rule of Necessity might require him to hear the case. *Exxon Corp. v. Heinze*, 792 F. Supp. 72, 76 (D. Alaska 1992) (citing *United States v. Will*, 449 U.S. 200, 212-16, 66 L. Ed. 2d 392, 101 S. Ct. 471 (1980)). Chief Judge Holland, reviewing Judge Singleton's ruling pursuant to 28 U.S.C. § 144, affirmed. *Exxon Corp. v. Heinze*, 792 F. Supp. 77, 79 (D. Alaska 1992).

Judge Singleton then denied the producers' motion for a preliminary injunction and [*1403] dismissed the complaint with prejudice, relying on the Rule of Necessity. R.T. March 12, 1992 at 17. Exxon and Chevron appealed. Thereafter, in April 1992, Chevron and Exxon settled the oil royalty claims and counterclaims. The severed gas claims and counterclaims remain.

II.

Both parties agree that the posture of this case has changed significantly since Judge Singleton dismissed it. Both parties, however, urge us to reexamine Judge Singleton's orders in light of the facts as they then existed. We decline to do so. Because of the settlement, the [**10] correctness of Judge Singleton's rulings, on the facts as they then existed, is moot. *Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 469 (9th Cir. 1986). We will not issue an advisory opinion on the merits of Judge Singleton's various orders regarding the settled oil claims.

However, Exxon urges that its appeal is not entirely moot, as the severed gas claims and counterclaims remain. It asks us to decide if the same bias problems apply to the remaining claims and notes that Judge Singleton's dismissal with prejudice may preclude it from returning to federal court. Exxon also emphasizes that litigation before financially interested judges and jurors raises fundamental issues of due process, even when the judges' financial interest is relatively small. See *Connally v. Georgia*, 429 U.S. 245, 251, 50 L. Ed. 2d 444, 97 S. Ct. 546 (1977) (paying magistrates a \$5 fee for granting a search warrant application, but nothing for denying warrant applications, violates due process); *Tumey v. Ohio*, 273 U.S. 510, 523, 532, 71 L. Ed. 749, 47 S. Ct. 437 (1927) [**11] (paying adjudicator \$12 per conviction, but nothing for acquittals, violates due process).

We agree that "the Due Process Clause entitles a person to an impartial and disinterested tribunal," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 64 L. Ed. 2d 182, 100 S. Ct. 1610 (1980), and that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955).

n6 Moreover, like the more stringent federal judges' disqualification statute, 28 U.S.C. § 455, the Constitution is concerned not only with actual bias but also with "the appearance of justice." *Id.* Thus, the question is not whether the Alaska judges and jurors are actually biased or even whether they "would do their very best to weigh the scales of justice equally between contending parties," *Id.*, but whether the alleged pecuniary interest is sufficiently "direct, personal, [and] substantial" that it "would offer a possible temptation to the average man." *Tumey*, 273 U.S. at 523, 532. [*12] n7 Regardless of his personal integrity, "no man can be the judge in his own case [or] try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. at 136.

n6 See also *Aetna Life Ins. Co. v. Lavole*, 475 U.S. 813, 822, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986); *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975) (The "probability of actual bias on the part of a judge or decision-maker is too high to be constitutionally tolerable" when "the adjudicator has a pecuniary interest in the outcome."); *Gibson v. Berryhill*, 411 U.S. 564, 36 L. Ed. 2d 488, 93 S. Ct. 1689 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972).

n7 But see *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980) (reversing judge's decision to recuse himself from a case which might reduce state residents' utility bills); *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir. 1976) (same).

[*13]

However, as Alaska emphasizes, this case also implicates other serious issues, such as a state's sovereign interest in its courts, the need to prevent the federal system from being used as a strategic forum for delay, and litigants' interest in the speedy resolution of cases. Federal courts have long hesitated to interfere with on-going state litigation, and have repeatedly recognized the dangers of doing so. See, e.g., *Younger v. Harris*, 401 U.S. 37, 43, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). Given the disruptive effect of allowing parties to transform every challenge to a state tribunal into a federal due process claim, we will not lightly interfere with pending state litigation. *Schaible*, 874 F.2d at 629.

[*1404] Balancing these interests, and examining the case as it currently exists, we conclude that Exxon's due process claim is not ripe for federal review. See *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). Whether a dispute is ripe de-

pends on "the fitness of the issues for judicial decision and [*14] the hardship to the parties of withholding court consideration." *Id.* at 149; *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas*, 792 F.2d 782, 789 (9th Cir. 1986). A claim is "fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Schaible*, 874 F.2d at 627.

Here, Exxon's bias claims require further factual development. The parties have filed no pleadings and conducted only limited discovery on the remaining gas claims and counterclaims. Without any information on these claims' value or their potential impact, if any, on Permanent Fund dividends, we cannot weigh intelligently the potential bias of Alaska judges and jurors or determine whether their alleged interest has "sufficient substance to disqualify them, given the context in which this case arose." *Gibson*, 411 U.S. at 579.

Moreover, Exxon concedes that the settlement and Alaska's curative legislation have eliminated much of the bias [*15] problem. It argues that bias remains (1) because the gas counterclaims might reduce the funds available for dividend distribution and (2) because the repeal provision implies that State litigation proceeds might ultimately be distributed as dividends and has a subjective impact on jurors.

However, on the counterclaims, Exxon has shown only that the curative legislation does not mention the counterclaims by name. It has not shown that state courts will interpret the law in such a way that the counterclaims will actually affect the Permanent Fund dividends. State courts might, for example, rule that, any recovery on the counterclaims will simply reduce the State's recovery on other claims, such as the settled oil claims. We cannot tell, based on the record, whether state courts will interpret state law so as to eliminate the counterclaims' potential impact on Permanent Fund dividends. Nor can we determine whether any of Exxon's counterclaims have merit: The State argues that, on some claims, Exxon has paid no royalties, and thus cannot counterclaim for overpayment of royalties. Such issues require further factual development.

Exxon's arguments about jurors' subjective perceptions of [*16] the Fund or lack of understanding of the curative legislation do not apply to ongoing discovery and will have no impact unless and until the case goes before a jury. Exxon concedes that Alaska judges will understand the curative legislation, and will not be confused about the litigation's capacity to increase their dividends. Moreover, as the State emphasizes, any "subjective" juror bias might be addressed by a properly conducted voir dire. *Los Angeles Memorial Coliseum Comm'n v. NFL*,

32 F.3d 1399, *1404; 1994 U.S. App. LEXIS 21908, **16;
94 Cal. Daily Op. Service 6273; 94 Daily Journal DAR 11467

726 F.2d 1381, 1400 (9th Cir.), cert. denied, 469 U.S. 990 (1984).

Exxon has not shown that withholding review will cause it substantial hardship. *Abbott Lab.*, 387 U.S. at 148. Extensive discovery must occur before the case is ready for trial. Exxon does not allege that any remaining bias problems affect Alaska judges' fitness to rule on discovery issues and does not object to Alaska judges ruling on discovery issues. In fact, Exxon emphasizes that, if necessary, the case can be removed to another forum after discovery is complete.

Because the parties have not yet developed a factual [**17] record on the value of the remaining claims or their potential impact (if any) on Alaska Permanent Fund dividends, we cannot evaluate Exxon's bias claims on

their merits. Exxon does not object to state judges presiding over discovery, and many of its arguments pertain to *jurors*, not judges. This case may never go to a jury, and, if it does, the State may be able to remedy any problems of subjective juror bias with a properly conducted voir dire. Thus, the case is not ripe for review.

We express no opinion on the merits of the parties' arguments regarding abstention and [*1405] the Rule of Necessity. The district court order dismissing Exxon's complaint with prejudice is VACATED, and the case is REMANDED to the district court to dismiss without prejudice.

VACATED and REMANDED, neither party to recover costs on appeal.

Amerada Hess Chronology re: bias issue

1. September 2, 1977. State of Alaska files lawsuit against 19 oil producers related to underpayment of royalties. *State of Alaska v. Amerada Hess Corp., et al.*, No. 1JU-77-847 Civ. (Super. Ct. Alaska).
2. November 2, 1987. Producers file suit in federal district court, *Standard Alaska Prod. Co. v. Schaible*, No. 87-621 (D. Alaska), claiming PFDs create impermissible bias for judges and jurors in *Am Hess* case.
3. 1988. Judge Kleinfeld issues unpublished decision recusing himself from the federal case because of receipt of PFDs. Case assigned to Judge Belloni in Oregon.
4. June 20, 1988. Judge Belloni issues unpublished decision finding bias issue unripe and challenges Alaska to provide a fair forum for case.
5. April 29, 1989. Ninth Circuit dismisses federal bias case as unripe. *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624 (9th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990).
6. May 13, 1989. First Am Hess segregation enacted. CSHB 276(Fin) am, ch. 38, SLA 1989 (amending AS 43.23.045(b) to segregate income from "money awarded after trial" from PFD fund).
7. October 12, 1989. Alaska Supreme Court amends civil and criminal rules to provide that receipt of PFD does not provide basis for challenging a juror for cause. Alaska S.Ct. Order 1013 (amending Civil Rule 47(c) and Criminal Rule 24(c)).
8. March 14, 1991. Judge Carpeneti issues "Notice of Intention to Grant Motion for Disqualification," and indicating that 1989 segregation legislation did not go far enough to remove bias issues. *State of Alaska v. Amerada Hess Corp., et al.*, No. 1JU-77-847 Civ., Order 91-9 (Super. Ct. Alaska).
9. June 6, 1991. Second Am Hess segregation enacted. HCS CSSB 213(JUD), ch. 18, SLA 1991 (adding new subsection to AS 43.23.045 to segregate income from "money awarded in or received as a result" of the Am Hess case from PFD fund).
10. August 23, 1991. Judge Carpeneti rules that the new legislation cured the bias problem and the Alaska Supreme Court denies petition for review. *BP Exploration v. State of Alaska*, No. S-4654, S-4662, S-4689 (Alaska 1991).
11. 1991. Oil producers re-file federal bias suit. *Exxon Corp. v. Heinze*, Civ. A91-0543.
12. February 24, 1992. Judge Singleton issues order declining to recuse himself from case on account of receipt of PFD. *Exxon Corp. v. Heinze*, 792 F.Supp. 72 (D. Alaska 1992).
13. March 3, 1992. Judge Holland affirms Judge Singleton's decision and declines to remove reuse himself as well. *Exxon Corp. v. Heinze*, 792 F.Supp. 77 (D. Alaska 1992).
14. July 1, 1992. Current Am Hess segregation enacted. HCS CSSB 39 (FIN), sec. 19, ch. 134, SLA 1992 (same language as in second Am Hess segregation, but enacted at AS 37.13.145(d)).
15. April 1992. Oil phase of Am Hess litigation settles.
16. April 17, 1994. Ninth Circuit determines that appeal of refusal to recuse by Judges Singleton and Holland are not ripe. *Exxon Corp. v. Heinze*, 32 F.3d 1399 (9th Cir. 1994).
17. March 1995. Gas phase of Am Hess litigation settles.

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February 25, 2005

The Honorable John Harris
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Harris:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that would establish the Alaska capital income account as a separate account of the Alaska permanent fund, and would authorize the deposit into that account of the earnings on money received from *State v. Amerada Hess, et al.*, 1JU-77-847 Civ. (Superior Court, First Judicial District).

In 1992, the state's oil and gas royalty litigation (*State v. Amerada Hess, et al.*, 1JU-77-847 Civ. (Superior Court, First Judicial District)) was headed to trial. Both state and federal judges had expressed concerns about the capacity of Alaskan judges and jurors to participate in the case on an impartial basis in light of the fact that the earnings on the portion of any recovery in the case would be deposited into the permanent fund and be used to pay the permanent fund dividends that all judges and jurors receive. AS 37.13.145(d) was enacted, which deposited into the principal of the permanent fund the earnings of all amounts received from settlement of this case. Thus, the concern about impartiality was resolved by disallowing the earnings from the settlement from being used in calculating the annual dividend amount.

The *Amerada Hess* litigation is now completed, though the possibility of a re-opener subject to an arbitration remains. Approximately \$425 million from this case, including earnings on settlement receipts and inflation-proofing, was deposited into the permanent fund.

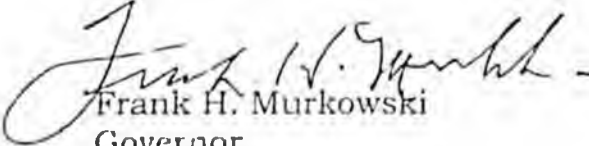
This bill proposes to end inflation proofing of the part of the permanent fund principal attributable to the *Amerada Hess* settlement and to authorize the deposit of the earnings from the settlement proceeds into a separate

The Honorable John Harris
February 25, 2005
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account of the Alaska permanent fund called the Alaska capital income account. The money in this separate account could then be appropriated by the legislature for any valid public purpose, including covering debt service on bonds to finance capital improvements in the state issued by the State of Alaska Capital Corporation under a companion bill I also am transmitting.

I urge your prompt and favorable action on this measure.

Sincerely yours,


Frank H. Murkowski
Governor

Enclosure