

SB

122

BACKGROUND PAPER

Use of the Amerada Hess
Settlement to Invest
in Alaska's Infrastructure

(SB 121/122 and HB 187/188)

*Office of the Governor
Office of Management and Budget*

March 29, 2005

Amerada Hess Royalty Oil Dispute and Settlement

Settlement's History

The fight with North Slope oil producers started in 1977, almost as soon as oil began to flow through the Trans-Alaska pipeline. That year the state filed a lawsuit accusing oil companies of undervaluing their oil and gas and thus denying the state the full value of its 12.5% royalty share. In 1989, the state filed claims against 15 companies for \$902 million. The dispute became known as the Amerada Hess case, named after the first company listed alphabetically in the lawsuit.¹

Royalty oil is the state's ownership share of the crude coming out of the ground. The state takes its royalty share in two ways: in-kind, which is sold to Railbelt refineries and a Fairbanks electrical utility; and in value, which is sold back to the producers and priced at the wellhead net of transportation costs. The problem came in figuring out how to value the royalty oil. The state claimed that the companies used "bookkeeping fictions and intracorporate transactions" to under value the oil at market and overstate transportation costs, which combined to artificially lower the wellhead value.² The production at issue occurred between 1977 and 1986 from the Kuparuk River and Prudhoe Bay oilfields.

The case became the longest running legal battle between the state and North Slope producers, lasting 18 years. One issue that came up early in the course of the litigation was that since 25% of royalty payments are dedicated to the Permanent Fund, earnings from settlement payments would eventually trickle into annual dividends paid out to Alaska residents. This issue was first raised in 1987 when three oil company defendants filed a lawsuit in federal district court to enjoin the Amerada Hess case from proceeding to trial in any court in Alaska. They claimed they could not receive a fair trial in Alaska because every judge and juror had a financial interest in the outcome of the case by reason of their respective annual Permanent Fund Dividends, which would be increased by any earnings derived from damages awarded to the state in Amerada Hess.³

¹ The Amerada Hess company was actually a very minor player in the case and settled out of court with the state in 1989 for \$319,000.

² "State Settles Oil Fight - \$100 Million Ends 18-Year Battle," Ralph Thomas, *Anchorage Daily News*, April 7, 1995.

³ Transmittal from Governor Hickel for SB 213, March 18, 1991.

Amerada Hess Royalty Oil Dispute and Settlement

In June 1988, the federal district court dismissed the action, ruling that the due process issue must be addressed in the state court before being asserted in the federal court. The companies appealed. In 1989, the Ninth Circuit Court of Appeals encouraged the parties to seek a legislative solution. Governor Cowper immediately introduced corrective legislation. This was ultimately passed into law (Ch 38, SLA 1989) in May 1989. Codified as AS 43.23.045 (b) Dividend Fund, it provided that:

income earned on money awarded after trial in State v. Amerada Hess, et al, 1JU-77-847 Civ. (Superior Court, First Judicial District) shall be treated in the same manner as 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.

Independently, in April of the same year the Ninth Circuit affirmed the district court's disposition, requiring the oil companies to raise the issue of disqualification in state Superior Court. The companies sought review by the U.S. Supreme Court but their petition was denied.

In October 1990, the companies filed a motion to disqualify the Alaska courts. In March 1991, Judge Carpeneti ruled that AS 43.23.045(b) removes most, but not all, of the sources of revenue flowing to the Permanent Fund dividend that created the bias. He also found that the statute failed to prevent additional monies from going to the dividend fund as a result of the so-called Amerada Hess price adjustment clauses in royalty-in-kind (RIK) contracts. He agreed with claims by the oil companies that if the state prevailed, it would result in a \$300 million judgement against refineries and the Fairbanks utility for in-kind purchases. Part of any judgement then would flow to the Permanent Fund and increase Permanent Fund Dividends (by \$10 in the first year, increasing to about \$40 in FY2015).

According to Judge Carpeneti, this failure to deal with RIK recoveries would require the Alaska court to disqualify itself. The result was another piece of legislation introduced by Governor Hickel in March of 1991 that became part of a more comprehensive rewrite of Permanent Fund statutes (19 Ch 134 SLA 1992) that included repealing AS 43.23.045(b) above. A new section was added to AS 37.13.145 Disposition of Income statute:

(d) Notwithstanding (b) of this section, 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 judgement, 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 to the dividend fund, and shall be annually deposited to the principal of the Alaska permanent fund.

One final note on the legal history: 19 Ch. 134 SLA 1992 contained a conditional repealer stating that if the Alaska Supreme Court made a final determination that "no judge or juror is disqualified from serving as a judge or juror solely because the judge or juror may qualify to receive a permanent fund dividend," subsection (d) would be repealed, i.e., earnings on the Amerada Hess principal would be added into the annual dividend calculation.

Eventually, almost all of the state's claims were settled out of court. The final piece fell into place in 1995, when the state settled an assortment of gas royalty claims against three companies—BP, Exxon, and Mobil—for the last \$100 million of about \$1 billion in total settlements. Altogether the state spent nearly \$100 million in building its legal case. Over the course of the litigation, the share of settlements deposited into the Permanent Fund totaled \$194.1 million. Realized earnings on the Amerada Hess settlement money since the first deposit in FY 92 have added another \$230.3 million to the settlement principal, which totaled \$424.4 million at the end of FY 04.

Amerada Hess Settlement

	Principal			Realized Earnings (over inflation)			Inflation-proofing			Total Settlement Principal
	Beginning	Contributions	Ending	Beginning	Additions	Ending	Beginning	Additions	Ending	
FY 1992	Inception	82,099,000	82,099,000	0	0	0	0	2,005,000	2,005,000	84,104,000
FY 1993		82,099,000	98,510,000	0	4,641,000	4,641,000	2,005,000	4,541,000	6,546,000	109,697,000
FY 1994		98,510,000	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		111,723,000	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		173,440,000	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		176,300,000	184,147,000	34,847,000	21,377,000	56,224,000	21,085,000	7,058,000	28,143,000	268,514,000
FY 1998		184,147,000	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		208,769,000	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		208,769,000	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		215,655,000	229,242,000	153,895,000	7,647,000	161,542,000	48,405,000	14,543,000	62,948,000	453,772,000
FY 2002		229,242,000	194,083,000	161,542,000	(23,384,000)	138,198,000	62,948,000	(5,154,000)	62,112,000	394,393,000
FY 2002		194,083,000	194,083,000	138,198,000	0	138,198,000	62,112,000	4,318,000	62,112,000	394,393,000
FY 2003		194,083,000	194,083,000	138,198,000	0	138,198,000	62,112,000	6,160,000	68,272,000	400,553,000
FY 2004		194,083,000	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.

Legislation to Leverage Amerada Hess Settlement Earnings To Finance Capital Projects

Summary

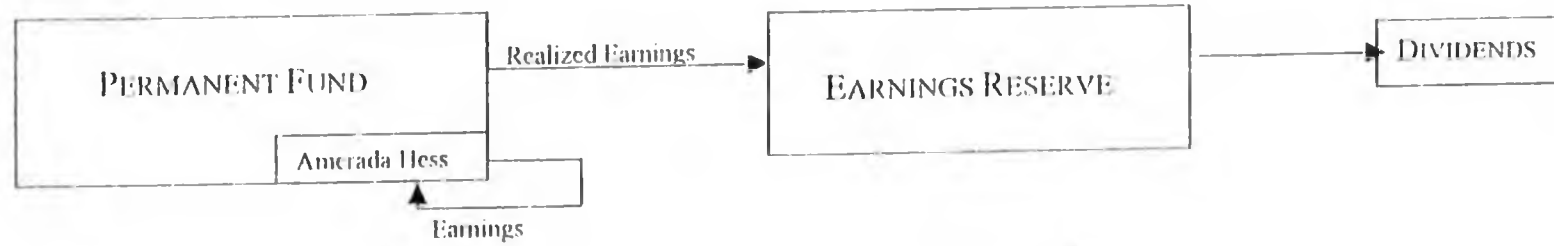
1. **Create the Alaska Capital Fund** (HB 187, SB 122)
 - Legislation establishes the Alaska Capital Fund
 - The realized earnings off of the Amerada Hess principal (expected to be in the \$30+ million/yr. range) would be deposited into the Alaska Capital Fund.
 - The Alaska Capital Fund is established within the Earnings Reserve Account of the Permanent Fund
 - ✓ The purpose of putting it in the ERA instead of the general fund is so the balance can be carried forward without being subject to the annual CBR sweep.
 - ✓ The ability to carry fund balance forward is critical to providing security of payment to Wall Street despite expected volatility of earnings.
 - ✓ The Alaska Capital Fund would be invested the same as the ERA and retain its own earnings.
 - ✓ The Alaska Capital Fund would accumulate realized earnings for 2 years, beginning in FY 05, before being drawn down to pay debt service.
 - ✓ The accumulated balance would fund reserve accounts to secure debt.
 - AS 37.13.145(c) would be changed so there would be no inflation proofing of the Amerada Hess principal from the Alaska Capital Fund.
 - ◆ Changes are made to the Alaska Permanent Fund section of the FY 05 and 06 budget bills so that Amerada Hess realized earnings are deposited into the Alaska Capital Fund and Amerada Hess principal is exempt from inflation proofing.
 - ◆ The Amerada Hess portion of Permanent Fund principal would remain at \$424 million thereafter.

2. State of Alaska Capital Corporation Created (HB 188, SB 121)

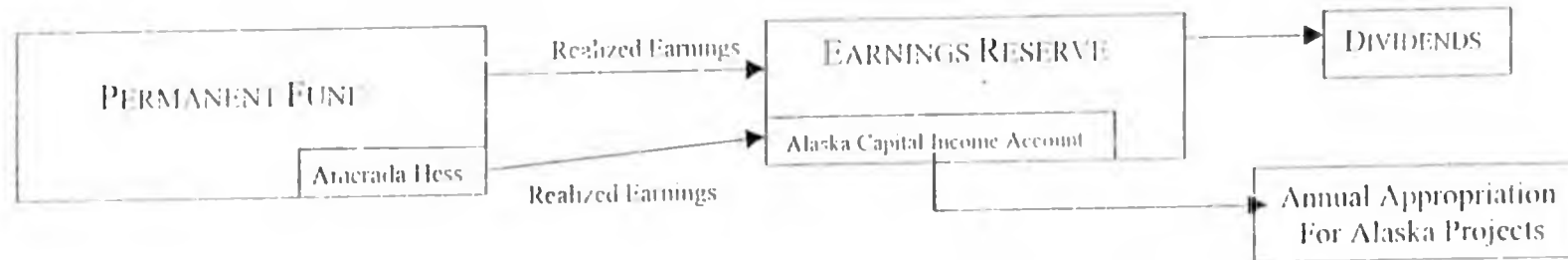
- Legislation establishes the State of Alaska Capital Corporation. The Corporation is closely linked to the Department of Revenue and State Bond Committee that would issue stand-alone moral obligation debt of the state totaling \$343 million.
 - ◆ The Alaska Capital Fund would be the source of revenue to pay debt service on bonds issued by the corporation.
 - ◆ Historically the Permanent Fund average annual earnings have been 9.64% and the ten year forecasted rate of realized return is 7.04%.
 - ◆ Modeling shows debt service may be paid with a realized rate of return as low as 5.5%, but given market volatility it is extremely important to be able to withstand short term bear markets.
 - ◆ A debt service reserve fund and an advance funded debt payment account along with the fund balance of the Alaska Capital Fund provide a high probability of an available funding source.
- Debt service on the bonds will be paid through annual legislative appropriations from the Alaska Capital Fund to the Corporation.
 - ◆ The moral obligation of the state is necessary to provide further assurance to bondholders that annual debt service payments will continue even during improbable unanticipated prolonged down market periods, when there may be low or negative Amerada Hess realized earnings paid into the Alaska Capital Fund.
 - ◆ Consultations with credit rating agencies and financial advisors have provided assurance that there will be no negative effect on the state's credit rating by issuing these bonds.
 - ◆ Investment grade ratings in the "A" range are expected on the bonds.
 - ◆ Bonds will be issued with a requirement to pay interest only with a final theoretical principal maturity date of 20 years. Purchasers, however, understand that the actual repayment of principal will be based on Amerada Hess earnings deposited into the Alaska Capital Fund. Expectations are that the bonds will be paid off much sooner than 20 years.

ALASKA CAPITAL INCOME ACCOUNT

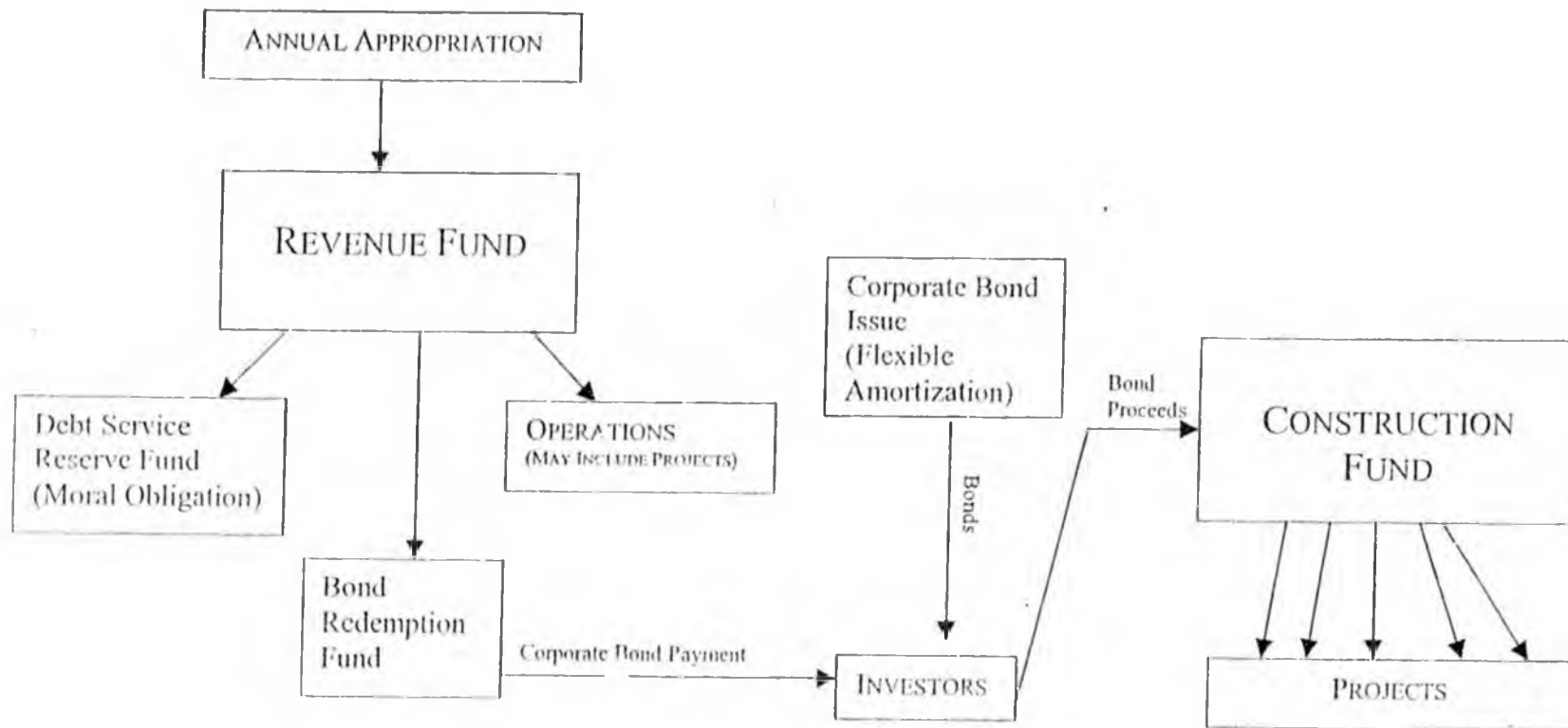
CURRENT



PROPOSED (HB 187, SB 122)



STATE OF ALASKA CAPITAL CORPORATION (HB 188, SB 121)



Alaska Capital Income Account (HB 187, SB 122)					
Am Hess Principal			424,399,000		
Am Hess Transfer Rate					
Blended Rate					
	Realized Earnings Rate	Beginning Balance	Amerada Hess Earnings	Transfer to SOA CC	Ending Balance
2005	7.04%	-	29,877,690	29,877,690	-
2006	7.04%	-	29,877,690	29,877,690	-
2007	7.04%	-	29,877,690	29,877,690	-
2008	7.04%	-	29,877,690	29,877,690	-
2009	7.04%	-	29,877,690	29,877,690	-
2010	7.04%	-	29,877,690	29,877,690	-
2011	7.04%	-	29,877,690	29,877,690	-
2012	7.04%	-	29,877,690	29,877,690	-
2013	7.04%	-	29,877,690	29,877,690	-
2014	7.04%	-	29,877,690	29,877,690	-
2015	7.04%	-	29,877,690	29,877,690	-
2016	7.04%	-	29,877,690	29,877,690	-
2017	7.04%	-	29,877,690	29,877,690	-
2018	7.04%	-	29,877,690	29,877,690	-
2019	7.04%	-	29,877,690	29,877,690	-
2020	7.04%	-	29,877,690	29,877,690	-
2021	7.04%	-	29,877,690	29,877,690	-
2022	7.04%	-	29,877,690	29,877,690	-
2023	7.04%	-	29,877,690	29,877,690	-
2024	7.04%	-	29,877,690	29,877,690	-
2025	7.04%	-	29,877,690	29,877,690	-
2026	7.04%	-	29,877,690	29,877,690	-
2027	7.04%	-	29,877,690	29,877,690	-
2028	7.04%	-	29,877,690	29,877,690	-
2029	7.04%	-	29,877,690	29,877,690	-
2030	7.04%	-	29,877,690	29,877,690	-
2031	7.04%	-	29,877,690	29,877,690	-
2032	7.04%	-	29,877,690	29,877,690	-
2033	7.04%	-	29,877,690	29,877,690	-
2034	7.04%	-	29,877,690	29,877,690	-
2035	7.04%	-	29,877,690	29,877,690	-
2036	7.04%	-	29,877,690	29,877,690	-
2037	7.04%	-	29,877,690	29,877,690	-
2038	7.04%	-	29,877,690	29,877,690	-

Average annualized realized earnings rate
7.04%
* Total return is forecast at 7.61% which will result in AM Hess principal growth of 57% annually that is not reflected in this model

State of Alaska Capital Corporation (HB 188, SB 121)

Revenue Fund

	Borrowing Rate	Earnings Rate	Beginning Balance	Lease Appropriation Received	Outstanding Bonds	Nominal Interest Payments	Flexible Principal Payments	Earnings on Fund Balance	Transfers In	DSRF or CF Transfers out / Operations Expense	Ending Balance
2005	6.00%	2.00%	-	29,877,690	-	-	-	-	-	-	29,877,690
2006	6.00%	2.00%	29,877,690	29,877,690	326,096,837	9,782,905	-	1,134,948	-	32,709,684	18,397,738
2007	6.00%	2.00%	18,397,738	29,877,690	326,096,837	19,565,810	-	1,792,385	-	100,000	30,402,002
2008	6.00%	2.00%	30,402,002	29,877,690	326,096,837	19,565,810	21,148,072	1,821,278	-	100,000	21,287,088
2009	6.00%	2.00%	21,287,088	29,877,690	304,948,765	18,296,926	14,570,926	1,716,391	-	100,000	19,913,317
2010	6.00%	2.00%	19,913,317	29,877,690	290,377,839	17,422,670	14,945,666	1,693,684	-	100,000	19,016,354
2011	6.00%	2.00%	19,016,354	29,877,690	275,432,173	16,525,930	15,842,183	1,675,566	-	100,000	18,101,496
2012	6.00%	2.00%	18,101,496	29,877,690	259,589,990	15,575,399	16,828,387	1,656,724	-	100,000	17,132,123
2013	6.00%	2.00%	17,132,123	29,877,690	242,761,603	14,565,696	17,878,420	1,636,733	-	100,000	16,102,429
2014	6.00%	2.00%	16,102,429	29,877,690	224,883,183	13,492,991	18,994,137	1,615,497	-	100,000	15,008,487
2015	6.00%	2.00%	15,008,487	29,877,690	205,889,046	12,353,343	20,179,492	1,592,935	-	100,000	13,846,278
2016	6.00%	2.00%	13,846,278	29,877,690	185,709,554	11,142,573	21,438,821	1,568,966	-	100,000	12,611,539
2017	6.00%	2.00%	12,611,539	29,877,690	164,270,733	9,856,244	22,776,740	1,543,500	-	100,000	11,299,744
2018	6.00%	2.00%	11,299,744	29,877,690	141,493,993	8,489,640	24,198,155	1,516,446	-	100,000	9,906,085
2019	6.00%	2.00%	9,906,085	29,877,690	117,295,838	7,037,750	25,708,274	1,487,703	-	100,000	8,425,453
2020	6.00%	2.00%	8,425,453	29,877,690	91,587,564	5,495,254	27,312,635	1,457,166	-	100,000	6,852,420
2021	6.00%	2.00%	6,852,420	29,877,690	64,274,929	3,856,496	29,017,118	1,424,724	-	100,000	5,181,219
2022	6.00%	2.00%	5,181,219	29,877,690	35,257,811	2,115,469	30,827,972	1,719,648	32,609,684	100,000	36,344,800
2023	6.00%	2.00%	36,344,800	29,877,690	4,429,839	265,790	4,429,839	1,646,374	-	100,000	63,073,234
2024	6.00%	2.00%	63,073,234	29,877,690	-	-	-	1,574,991	-	100,000	94,425,915
2025	6.00%	2.00%	94,425,915	29,877,690	-	-	-	2,208,379	-	100,000	126,411,983
2026	6.00%	2.00%	126,411,983	29,877,690	-	-	-	2,854,562	-	100,000	159,042,235
2027	6.00%	2.00%	159,044,235	29,877,690	-	-	-	3,513,800	-	100,000	192,335,724
2028	6.00%	2.00%	192,335,724	29,877,690	-	-	-	4,186,355	-	100,000	226,299,769
2029	6.00%	2.00%	226,299,769	29,877,690	-	-	-	4,872,497	-	100,000	260,949,956
2030	6.00%	2.00%	260,949,956	29,877,690	-	-	-	5,572,501	-	100,000	296,300,146
2031	6.00%	2.00%	296,300,146	29,877,690	-	-	-	6,286,646	-	100,000	332,364,482
2032	6.00%	2.00%	332,364,482	29,877,690	-	-	-	7,015,219	-	100,000	369,157,391
2033	6.00%	2.00%	369,157,391	29,877,690	-	-	-	7,758,510	-	100,000	406,693,590
2034	6.00%	2.00%	406,693,590	29,877,690	-	-	-	8,516,817	-	100,000	444,988,096
2035	6.00%	2.00%	444,988,096	29,877,690	-	-	-	9,290,443	-	100,000	484,056,229
2036	6.00%	2.00%	484,056,229	29,877,690	-	-	-	10,079,698	-	100,000	523,913,617
2037	6.00%	2.00%	523,913,617	29,877,690	-	-	-	10,884,898	-	100,000	564,576,205
2038	6.00%	2.00%	564,576,205	29,877,690	-	-	-	11,706,365	-	100,000	606,060,259

State of Alaska Capital Corporation (HB 188, SR 121)

Reserve Fund

	Earnings Rate	Beginning Balance	Additional Contributions	Earnings on Fund Balance	Earnings Transfer Out	Termination of Reserve	Ending Balance
2005	4.00%	-				-	-
2006	4.00%	-	32,609,684	652,194	652,194	-	32,609,684
2007	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2008	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2009	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2010	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2011	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2012	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2013	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2014	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2015	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2016	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2017	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2018	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2019	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2020	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2021	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2022	4.00%	32,609,684		1,304,387	1,304,387	-	32,609,684
2023	4.00%	32,609,684		652,194	652,194	32,609,684	-
2024	4.00%	-		-	-	-	-
2025	4.00%	-		-	-	-	-
2026	4.00%	-		-	-	-	-
2027	4.00%	-		-	-	-	-
2028	4.00%	-		-	-	-	-
2029	4.00%	-		-	-	-	-
2030	4.00%	-		-	-	-	-
2031	4.00%	-		-	-	-	-
2032	4.00%	-		-	-	-	-
2033	4.00%	-		-	-	-	-
2034	4.00%	-		-	-	-	-
2035	4.00%	-		-	-	-	-
2036	4.00%	-		-	-	-	-
2037	4.00%	-		-	-	-	-
2038	4.00%	-		-	-	-	-

State of Alaska Capital Corporation (HB 188, SB 121)

Construction Fund

Run Solver to force cell g38 to equal zero by changing cell d6.

	Earnings Rate	Beginning Balance	Bond Proceeds /Transfers	Earnings on Fund Balance	Project Cash Flow	Ending Balance					
2005	3.00%	-		-		-					
2006	3.00%	-	326,096,837	9,625,031	20,150,000	315,571,868					
2007	3.00%	315,571,868		3,458,439	88,467,690	230,562,617					
2008	3.00%	230,562,617		2,221,338	84,694,733	148,089,222					
2009	3.00%	148,089,222		822,628	94,070,000	54,841,850					
2010	3.00%	54,841,850		445,650	25,577,500	29,710,000					
2011	3.00%	29,710,000		375,000	5,085,000	25,000,000					
2012	3.00%	25,000,000		0	25,000,000	0					
2013	3.00%	0		0		0					
2014	3.00%	0		0		0					
2015	3.00%	0		0		0					
2016	3.00%	0		0		0					
2017	3.00%	0		0		0					
2018	3.00%	0		0		0					
2019	3.00%	0		0		0					
2020	3.00%	0		0		0					
2021	3.00%	0		0		0					
2022	3.00%	0		0		0					
2023	3.00%	0		0		0					
2024	3.00%	0		0		0					
2025	3.00%	0		0		0					
2026	3.00%	0		0		0					
2027	3.00%	0		0		0					
2028	3.00%	0		0		0					
2029	3.00%	0		0		0					
2030	3.00%	0		0		0					
2031	3.00%	0		0		0					
2032	3.00%	0		0		0					
2033	3.00%	0		0		0					
2034	3.00%	0		0		0					
				total projects		343,044,923.00					

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").

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

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

January 28, 2005

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

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).

The following Capital Projects are proposed for
FY 06 funding by the Alaska Capital Fund

**Project Review Listing
FY06 Governor's Capital Budget**

Multiple User Selected Fund Codes

Department of Fish and Game

<u>AP/AL Project Title</u>		<u>Fund Source Total</u>
AP Deferred Maintenance Facilities	2000 Bond Funds	\$400,000
AP Fairbanks Infrastructure Renewal and Replacement Upgrades	2000 Bond Funds	\$200,000
AP Vessel and Aircraft Repair and Maintenance	2000 Bond Funds	\$278,500
AP DIDSON Sonar Equipment Purchase	2000 Bond Funds	\$500,000
AP Westward Region Chignik Weir Improvements and Repairs	2000 Bond Funds	\$121,500
	General Fund Total:	0
	Federal Total:	0
	Other Total:	\$1,500,000
	Department Total:	\$1,500,000

Office of the Governor

<u>AP/AL Project Title</u>		<u>Fund Source Total</u>
AP Governor's House Maintenance	2000 Bond Funds	\$100,000
	General Fund Total:	0
	Federal Total:	0
	Other Total:	\$100,000
	Department Total:	\$100,000

Department of Health and Social Services

<u>AP/AL Project Title</u>		<u>Fund Source Total</u>
AP MH: Cnsis Treatment Facility - Phase 2	2001 Bonds MH	\$2,500,000
AP Bethel Youth Facility Security Improvements	2000 Bond Funds	\$233,900
AP Anchorage Pioneer Home Emergency Generator Replacement	2000 Bond Funds	\$600,000
AP Juneau Pioneer Home Roof Replacement	2000 Bond Funds	\$1,000,000
AP Deferred Maintenance: Renovation, Repair and Equipment	2000 Bond Funds	\$1,500,000
AP Pioneers' Homes Deferred Maintenance, Renovation, Repair and Equipment	2000 Bond Funds	\$2,500,000
AP Emergency Medical Services Ambulances and Equipment Statewide - Match for Code Blue Project	2000 Bond Funds	\$425,000

* Indicates an appropriation with allocations (amounts not included in totals)

**Project Review Listing
FY06 Governor's Capital Budget**

Multiple User Selected Fund Codes

Department of Health and Social Services

<u>AP/AL Project Title</u>	<u>Fund Source Total</u>
AP Juvenile Offender Management Information System Software Upgrade	2000 Bond Funds \$325,000
AP MH: Alaska Psychiatric Institute Automation Project	2001 Bonds MH \$674,200
AP Senior Centers Deferred Maintenance, Construction, Renovation, Expansion and Equipment	2000 Bond Funds \$1,000,000
AP MH: Deferred Maintenance and Accessibility Improvements	2001 Bonds MH \$150,000
	General Fund Total: 0
	Federal Total: 0
	Other Total: \$10,908,100
	Department Total: \$10,908,100

Department of Labor and Workforce Development

<u>AP/AL Project Title</u>	<u>Fund Source Total</u>
AP Alaska Vocational Technical Center Deferred Maintenance	2000 Bond Funds \$2,500,000
	General Fund Total: 0
	Federal Total: 0
	Other Total: \$2,500,000
	Department Total: \$2,500,000

Department of Law

<u>AP/AL Project Title</u>	<u>Fund Source Total</u>
AP Management Information System	2000 Bond Funds \$1,000,000
	General Fund Total: 0
	Federal Total: 0
	Other Total: \$1,000,000
	Department Total: \$1,000,000

Department of Military and Veterans Affairs

<u>AP/AL Project Title</u>	<u>Fund Source Total</u>
AP Anchorage Armory Expansion	2000 Bond Funds \$500,000
AP Military Youth Academy Dining Facility Renovation and Repair	2000 Bond Funds \$276,900

* Indicates an appropriation with allocations (amounts not included in totals)

**Project Review Listing
FY06 Governor's Capital Budget**

Multiple User Selected Fund Codes

Department of Public Safety

<u>AP/AL Project Title</u>			<u>Fund Source Total</u>
AP Electronic Fingerprint Services-Live Scan	2000	Bond Funds	\$465,000
AP Aircraft and Vessel Repair and Maintenance	2000	Bond Funds	\$2,314,300
AP Law Enforcement Equipment Replacement	2000	Bond Funds	\$1,177,100
AP Live Burn Building at Fairbanks Fire Training Center	2000	Bond Funds	\$150,000
AP Burn Panel Installation at Juneau Fire Training Center	2000	Bond Funds	\$150,000
General Fund Total:			0
Federal Total:			0
Other Total:			\$5,475,200
Department Total:			\$5,475,200

Department of Transportation and Public Facilities

<u>AP/AL Project Title</u>			<u>Fund Source Total</u>
* AP Governor's Transportation Initiative	2000	Bond Funds	\$108,000,000
AL Anchorage: Mid-Town Congestion and Truck Route Improvements	2000	Bond Funds	\$26,000,000
AL Glenn Highway Corridor	2000	Bond Funds	\$30,500,000
AL Kenai Peninsula: Kalifornsky Beach Road Rehabilitation	2000	Bond Funds	\$11,000,000
AL Mat-Su: Congestion Improvements	2000	Bond Funds	\$21,000,000
AL Richardson Highway: Passing Lanes Segments	2000	Bond Funds	\$5,000,000
AL Fairbanks: University Avenue-Geist-Johansen Intersection Improvements	2000	Bond Funds	\$3,500,000
AL Cordova: Copper River Highway Rehabilitation	2000	Bond Funds	\$4,000,000
AL McCarthy Road: Major Maintenance	2000	Bond Funds	\$2,000,000
AL Stampede Road: Improvements MF 0 to 8	2000	Bond Funds	\$5,000,000
* AP Governor's Transportation Access to Resources Initiative	2000	Bond Funds	\$37,000,000
AL Richardson Highway: Shaw Creek Bridge	2000	Bond Funds	\$2,500,000
AL Elliot Highway: Washington Creek Bridge Replacement for Gas Pipeline	2000	Bond Funds	\$3,500,000

* Indicates an appropriation with allocations (amounts not included in totals)

Project Review Listing
FY06 Governor's Capital Budget

Multiple User Selected Fund Codes

Department of Transportation and Public Facilities

<u>AP/AL Project Title</u>			<u>Fund Source Total</u>
AL Fairbanks: Richardson Highway - Northbound Chena Overflow Bridge for Gas Pipeline	2000	Bond Funds	\$11,000,000
AL DeLong Mountain: Port Expansion EIS Completion	2000	Bond Funds	\$2,000,000
AL North Slope: Foothills West Road EIS	2000	Bond Funds	\$4,000,000
AL North Slope: Bullen Point EIS	2000	Bond Funds	\$5,000,000
AL Dalton Highway: Surfacing Upgrades	2000	Bond Funds	\$9,000,000
AP Industrial Road Program	2000	Bond Funds	\$10,000,000
AP Airport Deferred Maintenance	2000	Bond Funds	\$1,500,000
AP Highway Deferred Maintenance	2000	Bond Funds	\$3,000,000
AP Facilities Deferred Maintenance and Critical Repairs	2000	Bond Funds	\$8,000,000
AP Emergency and Non-Routine Repairs	2000	Bond Funds	\$500,000
AP Alaska Marine Highway System - Vessel and Terminal Overhaul and Rehabilitation	2000	Bond Funds	\$6,500,000
AP Material Stockpiles - Dalton Highway, Glenn Highway, Richardson Highway and Tok Cutoff	2000	Bond Funds	\$600,000
AP Harbor Deferred Maintenance	2000	Bond Funds	\$3,000,000
AP Hoonah Harbor Deferred Maintenance and Transfer	2000	Bond Funds	\$3,500,000
AP Petersburg: North Harbor Deferred Maintenance and Transfer	2000	Bond Funds	\$2,500,000
AP Statewide Airport Lease Lots Development	2000	Bond Funds	\$4,000,000
AP Willow Maintenance Station Replacement	2000	Bond Funds	\$350,000
AP WAN Infrastructure Upgrade	2000	Bond Funds	\$185,000
* AP Statewide Federal Programs	2000	Bond Funds	\$56,500,000
AL Federal-Aid Aviation State Match	2000	Bond Funds	\$14,500,000
AL Federal-Aid Highway State Match	2000	Bond Funds	\$42,000,000

* Indicates an appropriation with allocations (amounts not included in totals)

**Project Review Listing
FY06 Governor's Capital Budget**

Multiple User Selected Fund Codes

Department of Transportation and Public Facilities

<u>AP/AL Project Title</u>		<u>Fund Source Total</u>
AP Congressional Earmarks	2000 Bond Funds	\$15,000,000
	General Fund Total:	0
	Federal Total:	0
	Other Total:	\$260,135,000
	Department Total:	\$260,135,000

University of Alaska

<u>AP/AL Project Title</u>		<u>Fund Source Total</u>
AP Strategic Land and Property Acquisitions	2000 Bond Funds	\$2,150,000
AP Systemwide Minor Renewal and Renovation	2000 Bond Funds	\$6,886,500
AP Integrated Science Complex	2000 Bond Funds	\$21,600,000
	General Fund Total:	0
	Federal Total:	0
	Other Total:	\$30,636,500
	Department Total:	\$30,636,500

Alaska Court System

<u>AP/AL Project Title</u>		<u>Fund Source Total</u>
AP Bethel Courthouse	2000 Bond Funds	\$825,000

* Indicates an appropriation with allocations (amounts not included in totals)

**Project Review Listing
FY06 Governor's Capital Budget**

Multiple User Selected Fund Codes

Alaska Court System

<u>AP/AL Project Title</u>	<u>Fund Source Total</u>	
AP Deferred Maintenance Projects	2000 Bond Funds	\$300,000
	General Fund Total:	0
	Federal Total:	0
	Other Total:	\$1,125,000
	Department Total:	\$1,125,000

General Fund Grand Total:	0
Federal Grand Total:	0
Other Grand Total:	\$340,506,700
Grand Total:	\$340,506,700

* Indicates an appropriation with allocations (amounts not included in totals)

of intent related to the 1989 amendments to this section by ch. 4, SLA 1989 (CSHB 69(SA)), see 1989 Senate Journal 621.

Sec. 37.13.130. Gains and losses. [Repealed, § 13 ch 81 SLA 1982.]

Sec. 37.13.140. Income. Net income of the fund includes income of the earnings reserve account established under AS 37.13.145. Net income of the fund shall be computed annually as of the last day of the fiscal year in accordance with generally accepted accounting principles, excluding any unrealized gains or losses. Income available for distribution equals 21 percent of the net income of the fund for the last five fiscal years, including the fiscal year just ended, but may not exceed net income of the fund for the fiscal year just ended plus the balance in the earnings reserve account described in AS 37.13.145. (§ 5 ch 18 SLA 1980; am § 8 ch 81 SLA 1982; am § 1 ch 28 SLA 1986; am § 18 ch 134 SLA 1992)

Sec. 37.13.145. Disposition of income. (a) The earnings reserve account is established as a separate account in the fund. Income from the fund shall be deposited by the corporation into the account as soon as it is received. Money in the account shall be invested in investments authorized under AS 37.13.120.

(b) At the end of each fiscal year, the corporation shall transfer from the earnings reserve account to the dividend fund established under AS 43.23.045, 50 percent of the income available for distribution under AS 37.13.140.

(c) After the transfer under (b) of this section, the corporation shall transfer from the earnings reserve account to the principal of the fund an amount sufficient to offset the effect of inflation on principal of the fund during that fiscal year. The corporation shall calculate the amount to transfer to the principal under this subsection by

(1) computing the average of the monthly United States Consumer Price Index for all urban consumers for each of the two previous calendar years;

(2) computing the percentage change between the first and second calendar year average; and

(3) applying that rate to the value of the principal of the fund on the last day of the fiscal year just ended.

(d) Notwithstanding (b) of this section, 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. (§ 9 ch 81 SLA 1982; am § 2 ch 28 SLA 1986; am § 19 ch 134 SLA 1992)

Conditional repeal of subsection (d). — Under § 28, ch. 134, SLA 1992, subsection (d) "is repealed on the day that the revisor of statutes certifies to the legislature that the Alaska Supreme Court has made a final determination that, in the absence of AS 43.23.045(e), repealed by sec. 29 of this Act, or AS 37.13.145(d), added by sec. 19 of this Act, no judge or juror is disqualified from serving as a judge or juror solely because the judge or juror may qualify to receive a permanent fund dividend."

NOTES TO DECISIONS

Stated in State, Dep't of Revenue v. Cosio, 858 P.2d 621 (Alaska 1993); Exxon Corp. v. Heinze, 32 F.3d 1399 (9th Cir. 1994).

Sec. 37.13.150. Corporation budget. The revenue generated by the fund's investments must be identified as the source of the operating budget of the corporation in the

state's operating budget under AS 37.07 (Executive Budget Act). The unexpended balance of the corporation's annual operating budget does not lapse at the end of the fiscal year but shall be treated as income under AS 37.13.140. (§ 5 ch 18 SLA 1980; am § 10 ch 81 SLA 1982; am § 20 ch 134 SLA 1992)

Sec. 37.13.160. Audits. The Legislative Budget and Audit Committee may provide for an annual post audit and annual operational and performance evaluations of the fund's investments and investment programs. (§ 5 ch 18 SLA 1980; am § 11 ch 81 SLA 1982; am § 21 ch 134 SLA 1992)

Cross references. — For the responsibilities of the Legislative Budget and Audit Committee, see AS 24.20.206.

Sec. 37.13.170. Reports and publications. By September 30 of each year, the board shall publish a report of the fund for distribution to the governor and the public. The board shall notify the legislature that the report is available. The report shall be written in easily understandable language. The report must include financial statements audited by independent outside auditors, a statement of the amount of money received by the fund from each investment during the period covered, a statement of investments of the fund including an appraisal at market value, a description of fund investment activity during the period covered by the report, a comparison of the fund performance with the intended goals contained in AS 37.13.020, an examination of the effect of the investment criteria of this chapter on the fund portfolio with recommendations of any needed changes, and any other information the board believes would be of interest to the governor, the legislature, and the public. The annual income statement and balance sheet of the fund shall be published in at least one newspaper in each judicial district. The income statement and balance sheet for the two fiscal years preceding the publication of the election pamphlet under AS 15.58 shall be included in that pamphlet. (§ 5 ch 18 SLA 1980; am § 22 ch 134 SLA 1992; am § 62 ch 21 SLA 1995)

Sec. 37.13.180. Tax exemption. The corporation and the fund are exempt from all taxes and assessments in the state. All security instruments issued by the corporation or the fund, their transfer, and their income are exempt from all taxes and assessments in the state. (§ 5 ch 18 SLA 1980; am § 23 ch 134 SLA 1992)

Sec. 37.13.190. Political activities. The resources of the corporation or the fund may not be used to finance or influence political activities. (§ 5 ch 18 SLA 1980; am § 24 ch 134 SLA 1992)

Sec. 37.13.200. Public access to information. Information in the possession of the corporation is a public record, except that information that discloses the particulars of the business or affairs of a private enterprise or investor is confidential and is not a public record. Confidential information may be disclosed only for the purposes of an official law enforcement investigation or when its production is required in a court proceeding. These restrictions do not prohibit the publication of statistics presented in a manner that prevents the identification of particular reports, items, persons, or enterprises. (§ 5 ch 18 SLA 1980)

Sec. 37.13.205. Regulations. The board may adopt regulations under AS 44.62 (Administrative Procedure Act) to interpret and implement this chapter. (§ 12 ch 81 SLA 1982)

Sec. 37.13.210. [Renumbered as AS 37.13.900.]

Preparing for Alaska's Tomorrows

Building Alaska's Infrastructure

Senate State Affairs Committee
March 31, 2005

Governor's Proposal

- Finance capital infrastructure projects by issuance of bonds
- Use interest earnings from a settlement to pay off the bonds
- Fund projects that bring benefits today as well as prepare for Alaska's future

About the Settlement . . .

- State filed suit against oil companies over state's royalty oil valuation
- Companies filed lawsuit to stop trial proceeding in Alaska
 - Said couldn't get a fair trial because 25% of settlement will go into Permanent Fund
 - Accordingly all Alaskans who could be jurors and judges are biased
- Federal court urged legislative solution
- Cowper, Hickel introduced legislation
 - Eliminated bias by excluding settlement's earnings from calculation of dividend

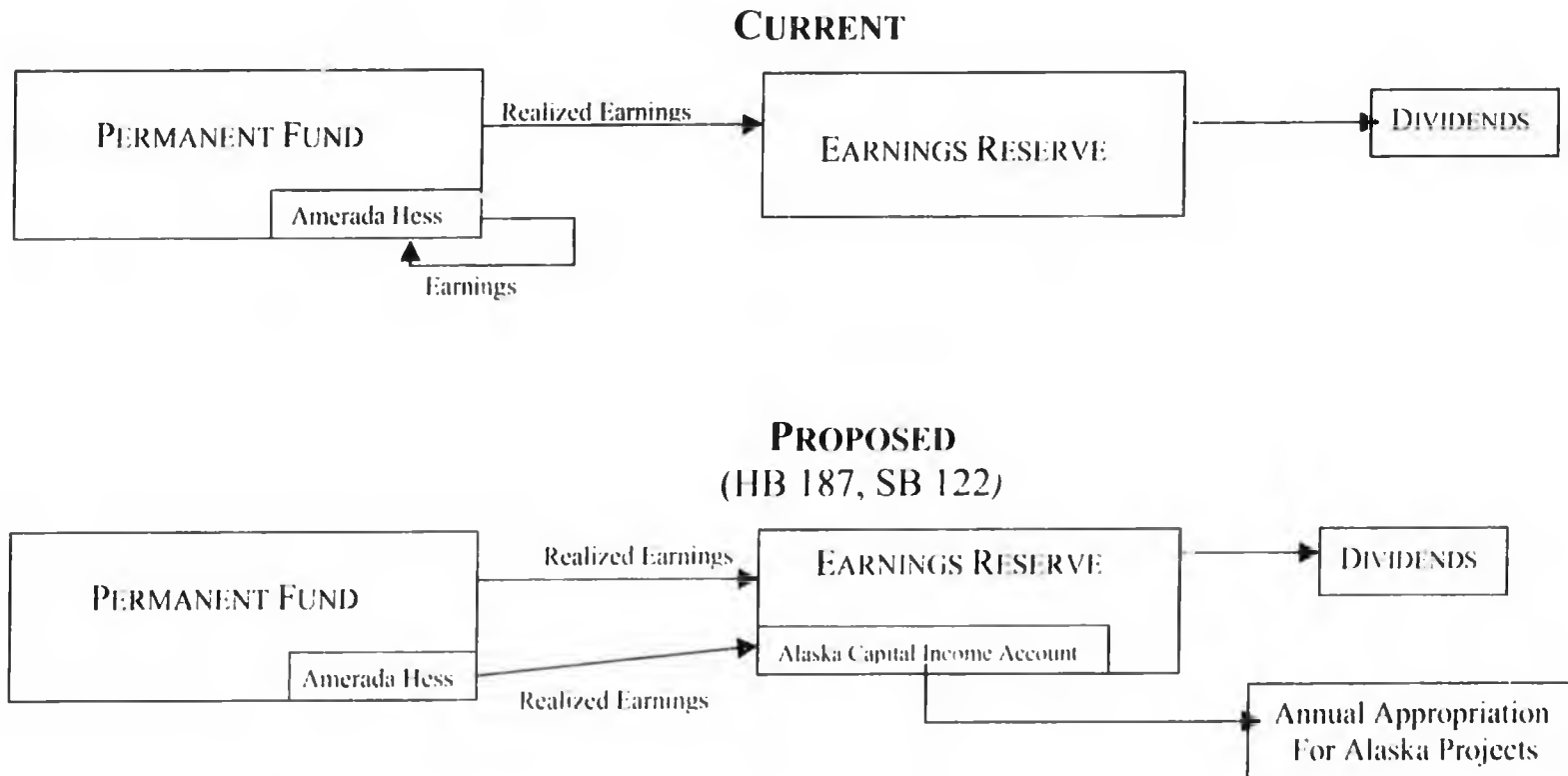
The Result . . .

- Settlement account placed in Permanent Fund
 - But earnings specifically excluded from dividend calculation
- Balance grown to \$424 million from \$82 million
- Unlike dividend, there has been no “return” to Alaska’s economy
- Proposal: Put this settlement to work for Alaska?

The Legislation . . .

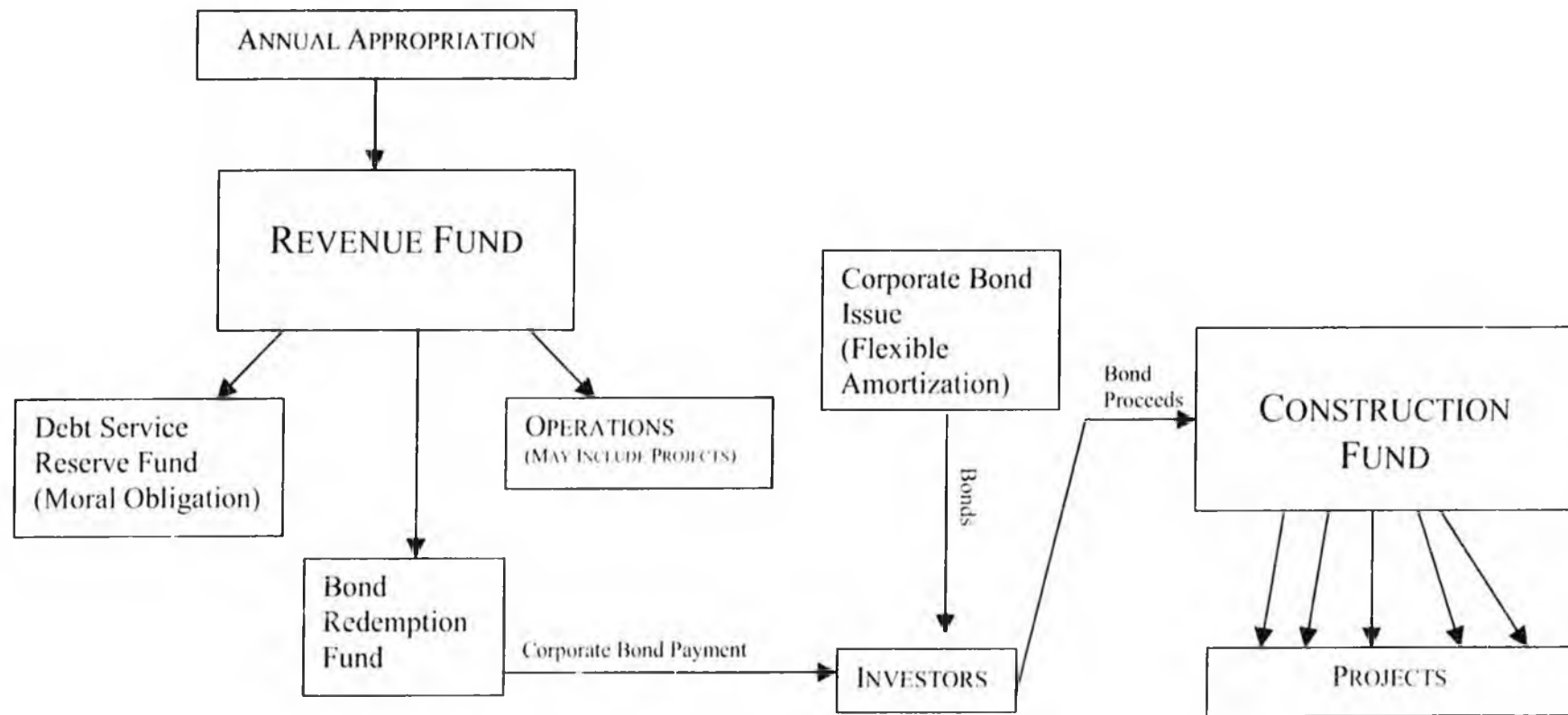
- HB 187/188 and SB 121/122
 - Creates way to leverage annual earnings by issuance of bonds to finance capital projects
 - Pay bonds off with settlement's annual earnings
 - » Estimated at \$30 million annually
 - Flexible payoff schedule in case earnings are down for a period of time
 - Protects the state's good bond rating

Alaska Capital Income Account



State of Alaska Capital Corporation

(HB 188, SB 121)



Capital Projects . . .

- Governor's capital budget proposes to tap \$340 million in bond proceeds to finance capital projects
- Projects include:
 - Transportation Initiative - \$145 million
 - Deferred maintenance - \$59 million
 - University projects - \$31 million
 - Match Federal transportation funds - \$72 million

Transportation Initiative

- “Bottleneck Busters” - \$97 million
 - Anchorage mid-town congestion - \$26 million
 - Glenn Highway corridor - \$31 million
 - Mat-Su congestion - \$21 million
- Tourism Promotion - \$11 million
 - Cooper River Hwy rehab - \$4 million
 - McCarthy Road - \$2 million
 - Stampede Trail - \$5 million

Roads to Resources

- Gasline infrastructure - Bridges
 - Shaw Creek Richardson Hwy - \$2.5 million
 - Washington Creek/Dalton Hwy - \$3.5 million
 - Northbound Chena overflow - \$11 million
- DeLong Mt. Port Expansion - \$2 million
- North Slope
 - Foothills West road EIS - \$5 million
 - Dalton Highway surface upgrade - \$9 million