

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984

2924 HSA RESIDENCY #2

2924

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. Appolonio, 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.

Stottlemeyer v. Stottlemeyer, 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 & 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 irrebuttable 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
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 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
Margaret Ramos

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

Paula Stark
Notary Public, State of Alaska
My commission expires 9/5/82

ATTACHMENT 6

Vest v. Schaefer

RECEIVED
FEB 28 1983

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FIRST JUDICIAL DISTRICT AT JUNEAU

3 RODNEY G. VEST,)

4 Plaintiff,)

5 vs.)

6 MARIAN SCHAFER and)
7 STATE OF ALASKA,)

8 Defendants.)

No. 1JU-82-1103 Civil

8 (C) _____)

9 ORDER

10 On August 16, 1982, the parties to the above action filed
11 a proposed Agreement and Order of Settlement. Based on that
12 agreement: ^{1/} of the parties,

13 IT IS HEREBY ORDERED that all actions and proceedings in
14 the above-captioned case, other than the certification of the
15 plaintiff class, the approval by the Superior Court for the
16 settlement agreement to be submitted to the plaintiff class,
17 and any further approval by the court necessary to consummate
18 the settlement agreement after the certification of plaintiff
19 class, are stayed through and including the date of adjournment
20 of the first regular session of the 13th Alaska Legislature or
21 June 30, 1983, whichever event occurs first in time.

22 IT IS FURTHER ORDERED that procedures for class certifica-
23 tion shall be submitted to the court for review no later than
24 September 10, 1982, and the parties will request the court to
25 render its order with respect to the notice procedures for the
26 said class no later than September 24, 1982. Notice to the
27 class shall be transmitted, along with the proposed settlement
28 agreement and the conditions necessary to affectuate the settle-
29 ment, on or before October 11, 1982. The State of Alaska will
30 undertake reasonable efforts to assist the plaintiff to locate
31

32 1. This order embodies some but not all of the elements
the parties included in their proposed order.

1 those persons sixty-five years or older as of July 1, 1982, who
2 have been bona fide Alaska residents in Alaska for one year
3 immediately prior to that date. In the event the settlement
4 agreement is not consummated for whatever reason, but the
5 plaintiff class has been certified by the court as set forth
6 above, the plaintiff shall not be precluded from seeking an
7 enlargement of the class and a certification thereof so as to
8 include other persons having a shorter residential duration
9 within the state than specified in the agreement and may also
10 seek a greater retroactive recovery than that specified in the
11 agreement.

12 IT IS FURTHER ORDERED that the Alaska Legislative Council
13 shall utilize its best efforts to secure the enactment during
14 the first regular session of the 13th Alaska Legislature of the
15 legislation described in the above agreement, subject to the
16 conditions specified in the agreement.

17 This court specifically expresses no opinion as to whether
18 a one-year residency requirement is reasonable, necessary and
19 appropriate in order to demonstrate bona fide Alaskan residency;
20 more particularly, this court has not been requested to and
21 does not determine whether a period of residency less than one
22 year may be constitutionally mandated or whether a period of
23 residency greater than one year may be constitutionally permis-
24 sible in order for persons of the age of sixty-five or over to
25 receive longevity bonus payments. The court merely acknowledges
26 the right of the parties to agree that this matter shall be
27 stayed for a period of time and to agree that the Alaska
28 Legislative Council shall utilize its best efforts to secure the
29 enactment of legislation that treats equally all persons of the
30 age of sixty-five or older who have been residents of the State
31 of Alaska for one year or longer with respect to their residen-
32 tial qualifications to receive any longevity bonus payments or

1 substitute benefits from July 1, 1982, and thereafter for as long
2 as the legislature may determine to continue such a program.
3 Accordingly, nothing in this order should be construed to infringe
4 upon the freedom of the legislature independently to determine
5 whether and, if so, how the Longevity Bonus Program (AS
6 47.45.010 et. seq.) should be amended.

7 DONE at Juneau, Alaska, this 24th day of August, 1982.

8
9
10 Walter L. Carpeneti
Superior Court Judge

11 CERTIFICATION

12 This is to certify that on the above date I provided a copy
13 of the above Order to:

- 14 Mark Sandberg, Esq.
- 15 Wilson L. Condon, Esq.
- 16 William G. Ruddy, Esq.

17
18 Sharon A. Walker
Secretary to the Judge

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT

RODNEY G. VEST,)
)
Plaintiff,)
)
v.)
)
MARIAN SCHAFER and STATE OF)
ALASKA,)
)
Defendants.)
_____)

CONFIDENTIAL

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 recipients 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 for the 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
Attorney for Defendants
Marian Schaefer and
State of Alaska

WILSON L. CONDON
ATTORNEY GENERAL

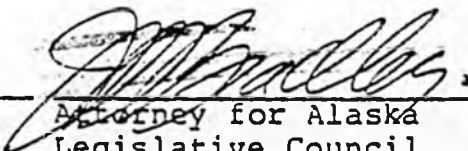
DATED: August 6, 1982

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

ORDER

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

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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

¹Zobel v. Williams, 72 L. Ed. 2nd 672 (1982)

²Vest 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 1972⁴ 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

³Chapter 64, SLA 1915.

⁴Chapter 205, SLA 1972; AS 47.45.010 et. seq.

⁵SB 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. compensating for past hardships suffered by Alaska's pioneers; 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.

⁶Chapter 13, SLA 1981

⁷AS 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

⁸Under 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 in 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

¹⁰In 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.")

¹²ALB 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

¹³Assessment, op. cit. n. 11 at 31.

¹⁴ALB Survey, op. cit. n. 9 at 12.

¹⁵id. at 10, 18.

¹⁶Assessment, 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

¹⁷Memorandum, Havelock to Egan, Re: FCCS HCS CSSB 211 at 17 (June 29, 1972).

¹⁸In 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.

¹⁹Opinion 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:

²⁰See Brennan conc., 72 L. Ed.2nd at 684; O'Connor conc., 72 L. Ed. 2nd at 685.

²¹Brennan conc., 72 L. Ed. 2nd at 681, 684.

²²See 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 include 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";

²³Op. cit. n. 17 at 5.

²⁴Order 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

²⁵See 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 care²⁷ 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

²⁶Dunn v. Blumstein, 405 U.S. 330 (1972).

²⁷Memorial Hospital v. Maricopa County, 415 U.S. 450 (1974).

²⁸Shapiro v. Thompson, 394 U.S. 618 (1969).

²⁹One 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:

³⁰See 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. Malkeison, 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 domiciliary. 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 lengthy 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

³¹One "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.

321982 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 structured 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.

³³See n. 3, 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; and³⁶

³⁴AS 43.23.075.

³⁵See 42 U.S.C. §1382(a)(b)(6).

³⁶See 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.

³⁷IRS Index Nos. 0061.40-00; 0451.20.00; 0102.00-00.

³⁸Department 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 needy 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 recipient will receive the mean benefit currently given or projected for

³⁹Assessment, op. cit. n. 11 at 31.

existing recipients -- \$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

<u>Year</u>	<u># Add. on OAA</u>	<u>Mean Benefit</u>	-----IN MILLIONS-----		
			<u>Added Medicaid Costs</u>	<u>Added ALB Costs (Savings)</u>	<u>Net</u>
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 concomitant 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

⁴⁰Shapiro v. Thomson, 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.

⁴¹Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d at 1259-61.

⁴²Assuming 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 \$5,000 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

⁴³Because 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

⁴⁴Reeves, 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 perceived 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 severely impinge on the tax planning flexibility of individual Alaskans.⁴⁶

Nonetheless, it is our opinion that the annuity option should result in the deferral of both the permanent fund

⁴⁵cf. 26 U.S.C. §401-404

⁴⁶See 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

⁴⁷U.S. v. Goldsmith, 586 F.2d 810 (Ct.Cl. 1978).

⁴⁸Id.

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

⁴⁹Id.

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 exclusion⁵¹ 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.

⁵⁰See, 42 U.S.C. §1382(a)(a)(2)(B).

⁵¹See 42 U.S.C. §1382(a)(b)(2)(B).

⁵²See 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

⁵³Alaska Population Overview, Alaska Department of Labor, 1981

⁵⁴Id.

national growth patterns projected by the federal Social Security Administration, which are as follows:

<u>YEAR</u>	<u>% OF ELDERLY POPULATION</u>
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.

5542 U.S.C. §414(a)(1)

Moreover, we believe there is a substantial likelihood that the existing ALB exemption in federal law could be retained. Indeed, stripped to its essence 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

⁵⁶For 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

⁵⁷Alaska Comprehensive Health Care Financing Study, Batelle Human Affair Research Center (1981)

⁵⁸HB 641, 12th Leg. 1st Sess. (1981)

⁵⁹ALB 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 security⁶⁰ 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

⁶⁰42 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 as custodial care in a nursing home. Moreover, it is currently facing severe cutbacks in areas such as reimbursement for health-related travel expenses⁶².

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

⁶¹Interview, Ms. P. Eubanks, Field Rep. Social Security Admin. (Feb. 24, 1983)

⁶²Interview, Ms. P. Roberts IHS, (Feb. 23, 1983)

rates in Alaska run from \$90 to \$172 per day⁶³. 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

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 Supremacy Clause.⁶⁵

⁶⁴42 U.S.C. §1382(a)(1)(B)

⁶⁵Florida 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 Alaska⁶⁶ were all that were required for free and unlimited nursing home coverage, the potential of in-migration may be severe. There are two potentially justifiable 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

⁶⁶It 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:

⁶⁷Starns 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; and⁶⁸

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;

⁶⁸See 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 determining 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 from the following disadvantages:

1. Since most Alaskan elderly have lived here more than 10 years most Alaska elderly will suffer some demonstrable 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 bureaucracy -- an intrinsically 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

⁶⁹Commercial 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 threshold 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

RODNEY G. VEST,)
)
Plaintiff,)
)
v.)
)
MARIAN SCHAFFER and STATE OF)
ALASKA,)
)
Defendants.)
_____)

CONFIDENTIAL

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 recipients of monthly longevity bonuses, or alternatively, to invalidate the entire program and cease payment of monthly bonuses to any person;