MEMORANDUM

State of Alaska
Department of Law

To: James A. Sampson, Chair
Board of Trustees
Alaska Permanent Fund Corporation

Wilson L. Condon, Commissioner
Department of Revenue

Robert D. Storer, Executive Director
Alaska Permanent Fund Corporation

Date: July 23, 2002

File No.: 663-03-0022

Tel. No.: 465-3600

From: Marjorie L. Vandor
Assistant Attorney General
Governmental Affairs – Juneau

Re: Timing of Annual Transfer from the Earnings Reserve Account of the Alaska Permanent Fund under AS 37.13.145 for the PFD Program

You have asked our advice regarding the timing of annual transfers from the earnings reserve account under AS 37.13.145. In particular, you have asked when the annual transfer to the Department of Revenue for the PFD program must be made.

Under AS 37.13.145(a), a separate earnings reserve account is established within the Alaska Permanent Fund ("the fund") into which the income of the fund is deposited and accounted for by the Alaska Permanent Fund Corporation ("APFC"). Subsection (b) of AS 37.13.145 provides for the annual transfer of amounts from the earnings reserve account by the APFC to the Department of Revenue to pay the annual Alaska Permanent Fund dividend under AS 43.23 ("the PFD program"). Alaska Statute 37.13.145(b) calls for the PFD program transfer to the Department of Revenue to be made "[a]t the end of each fiscal year."[1] You have asked whether the timing of that transfer under a memorandum of understanding between the APFC and the Department of Revenue ("the

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1 Alaska Statute 37.13.145(b) provides, in full:

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

MOU") (*i.e.*, approximately 80 days after the close of the fiscal year) is consistent with that requirement. We believe that it is not.

We understand that the MOU, entered into in 1985, was the result of protracted discussions between the APFC and the Department of Revenue over the timing of the transfer to fund the PFD program each year. For both agencies, the timing of the transfer was important because of the opportunity to earn income on the transfer amount. The longer the amount was held in the fund's earnings reserve account, the greater the income to the fund in that fiscal year. Since the PFD payments were not made to individual recipients until early October of each year, the APFC argued that the benefit of any income earned on the amount to be transferred to the Department of Revenue should accrue to the fund.[2] The Department of Revenue, on the other hand, saw that an early transfer to the Department of Revenue meant that additional income would accrue to the general fund.[3]

We are not aware of the specific considerations that gave rise to the timing of the PFD transfer agreed to by the agencies under the MOU. Nor have we studied the statutes in effect when it was entered into to determine if the timing was appropriate at that time. We conclude, however, that, even if the MOU was valid and effective in 1985, it no longer is. This is in part because the MOU was predicated on a statute -- AS 43.23.045(b) -- that is no longer in effect,[4] but is primarily because we do not believe that delaying the PFD program transfer for some 80 days after the close of the fiscal year is sufficiently timely in response to the explicit statutory requirement of AS 37.13.145(b) that the transfer be made "*at the end*" of the fiscal year.

Having concluded that the MOU is not valid and effective, the question remaining to be answered is: What timing for transfer of the PFD program amount is called for in response to the requirement of AS 37.13.145(b)? A literal interpretation of that requirement would call for the transfer to be at the stroke of midnight on June 30 of each year. However, as a practical matter, transfer of the funds to the Department of Revenue is not possible until accounts are verified and reconciled. There are standard end-of-year steps that both the APFC's custodian and the APFC must take in order to verify and

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2 And ultimately to the future benefit of PFD recipients, since, under the statutory formula for determining the amount of income that would be distributed annually under the PFD program, increased fund earnings meant greater PFD payments in subsequent years.

3 1984 Inf. Op. Att'y Gen.(366-605-84; Nov. 8) (Note: this opinion predates the MOU).

4 Alaska Statute 43.23.045(b) was repealed in 1992 (sec. 29, ch. 134, SLA 1992).

reconcile the fund's value as of the end of the fiscal year and to compute its income for that year, as described by the APFC's Director of Finance.[5]

Under the circumstances attendant to the APFC's determination of the fund's value and income for the fiscal year just ended in order to establish the amounts to be transferred for the PFD program and to principal for inflation-proofing,[6] we believe that AS 37.13.145(b) calls for the transfer of PFD program funds to occur as soon as is administratively practicable after the close of the fiscal year. We believe this interpretation is consistent with applicable rules of statutory construction. Statutes should be construed to avoid results that are absurd or where statutes are susceptible of construction which preserves the usefulness and intent of the law. *See Sherman v. Holiday Construction Co.,* 435 P.2d 16, 19 (Alaska 1967). Further, a court will ignore the apparent plain meaning of a statute where the plain meaning defeats the usefulness of the enactment. *Davenport v. McGinnis*, 522 P.2d 1140, 1144 n.15 (Alaska 1974). And, if the literal import of the text is inconsistent with the legislative intent or would lead to absurd results, the words of a statute may be modified to agree with the intention of the legislature. Vol. 2A Singer, *Sutherland Statutory Construction*, sec. 46.07 (6th ed., 2000 rev.); cited in *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 613 n.101 (Alaska 1999).

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[5] In discussing this timing with the APFC's Director of Finance, she indicates that preparation of the draft annual financial statements typically requires about 20 business days after the close of the fiscal year. This time is necessary for the APFC's custodian bank to close its books for the end of June — particularly with respect to the fund's non-U.S. stock holdings; for the APFC to then convert the electronic data received from the custodian bank to usable accounting entries that the APFC then reconciles and uploads to its general ledger system; for the APFC to also post those fund assets that are not held by the custodian bank (including real estate, Alaska certificates of deposit, and Alaska mortgages and notes receivable); for the APFC to prepare accrual schedules for year-end expenditures to generate accrual accounting entries; and for the APFC to then analyze and reconcile all data and calculations, prepare appropriate footnotes to the financial statements, and assure that applicable accounting standards requirements and formats are adhered to.

[6] Alaska Statute 37.13.145(b) provides that the amount to be transferred annually for the PFD program is 50 percent of the "income available for distribution," as determined under AS 37.13.140. Under AS 37.13.140, the "[I]ncome available for distribution equals 21 percent of the net income of the fund for the last five fiscal years, including the fiscal year just ended." (Emphasis added.) Similarly, with respect to the determination of the amount to be transferred to principal for inflation-proofing, that amount is established based on the value of the principal of the fund at fiscal year-end. (AS 37.13.145(c)(3)).

Based on the information provided to us by the APFC's Director of Finance regarding the necessary steps and timing to determine the fund's earnings for that fiscal year for inclusion in the computation of the "income available for distribution" under AS 37.13.140 , we believe that the transfer of funds should occur at the time that the APFC has prepared the draft financial statements for the fund for submission to the APFC's independent auditor -- normally, [7] within 20 business days after the close of the fiscal year.[8]

We trust this adequately addresses your concerns. Please call us if you have further questions.

MLV:jn

7 It is at least conceivable that unforeseen events in a particular year might prevent the APFC from completing its draft financial statements within the typical 20-business day timeframe.

8 It may be appropriate to ask the legislature to consider amending the statutes to give direction as to the timing of the PFD transfer to the Department of Revenue that reflects the end-of-year administrative practices discussed above.