

## COMMENTS

### LOOKING "NORTH TO THE FUTURE"<sup>1</sup>: MODELING PENNSYLVANIA'S DEVELOPMENT OF NATURAL GAS ON ALASKA'S PERMANENT FUND DIVIDEND

Timothy R. Bishop \*

#### I. INTRODUCTION

Every October, just as the holiday season is rapidly approaching, each eligible Alaskan resident receives the fruits of "one of the most generous social welfare programs in the country."<sup>2</sup> Since its inception in 1982, state residents have received an average annual payment of \$1,100 from the Permanent Fund Dividend (PFD).<sup>3</sup> Some use their PFD to buy the latest electronic gadget or to go on a shopping spree, while others use the money to

---

<sup>1</sup> *State Symbols*, ST. OF ALASKA, <http://www.alaska.gov/kids/student.htm> (last visited Mar. 15, 2014).

\* The author is a 2014 J.D. graduate from Widener University School of Law, who was born and raised in Anchorage, Alaska, and earned a B.S. in Justice Studies and a B.S. in Political Science from Arizona State University. He was also a Senior Staff Member of the *Widener Law Journal*, President of the 2013-2014 Widener Law Moot Court Honor Society, and a law clerk/judicial aide for the Honorable J. Michael Eakin of the Supreme Court of Pennsylvania. The author would like to thank the members of the *Widener Law Journal* for their diligence in editing this article, although any mistakes are solely attributable to the author, as well as Professor John Dernbach for providing him with the opportunity to present this article at the "Marcellus Shale Development and Pennsylvania: What Lessons for Sustainable Energy?" symposium. Finally, to my dad, whom I owe eternal gratitude for everything I am able to accomplish in life: I am at a loss for words to adequately describe how much I appreciate what you have done for me, so it will have to suffice to say that I would be nowhere near the man, both personally and professionally, that I am today without your love, care, and guidance through this journey called life; you are truly the greatest and have been such an inspiration. Thank you.

<sup>2</sup> Christopher L. Griffin, Jr., *The Alaska Permanent Fund Dividend and Membership in the State's Political Community*, 29 ALASKA L. REV. 79, 79 (2012).

<sup>3</sup> *Id.*

pay bills or donate to charity.<sup>4</sup> Moreover, the PFD is flexible according to current conditions and needs of Alaskans.<sup>5</sup> For example, in 2008, when Alaskans were paying record-high energy costs, then-Governor Sarah Palin signed an energy relief measure that added an additional \$1,200 to each Alaskans' PFD issued that year.<sup>6</sup> Understandably, the PFD is very popular among the state's residents;<sup>7</sup> in fact, some state politicians campaigning for reelection have warned of the opposing party "wanting to take Alaskans' [PFDs] to pay for more government."<sup>8</sup>

The PFD is a product of the Alaska Constitution's affirmative directive that the state legislature "provide for the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people."<sup>9</sup> In 1971, Pennsylvanians voted 1,021,342 to 259,979<sup>10</sup> to amend the Pennsylvania Constitution to "provid[e] for the preservation and restoration of [Pennsylvania's] natural resources."<sup>11</sup> Unlike the Alaska Legislature, however, the Pennsylvania General Assembly

---

<sup>4</sup> Julia O'Malley, *Alaskans Waste No Time Spending PFD, Rebate*, ANCHORAGE DAILY NEWS (Sept. 12, 2008), <http://www.adn.com/2008/09/12/524040/alaskans-waste-no-time-spending.html>.

<sup>5</sup> See Wesley Loy, *House Funds \$1,200 'Resource Rebate'*, ANCHORAGE DAILY NEWS (Aug. 6, 2008), <http://www.adn.com/2008/08/06/485115/house-funds-1200-resource-rebate.html> (displaying the flexibility of the PFD by the legislature's addition of \$1,200 to each Alaskan's PFD for that year).

<sup>6</sup> *Id.*

<sup>7</sup> If the idea of an annual check is not enough for Alaskans to support the PFD, "[t]he influx of oil dollars into state coffers reduced the need for other sources of funding," leading the state to abolish its personal, but not corporate, income tax in 1980. Jonathan Anderson, *The Alaska Permanent Fund: Politics and Trust*, 22 PUB. BUDGETING & FIN. 57, 58 (Summer 2002).

<sup>8</sup> Becky Bohrer, *War of Words Between Dems, GOP as Election Nears*, ANCHORAGE DAILY NEWS (Oct. 30, 2012), <http://www.adn.com/2012/10/30/2676993/war-of-words-between-dems-gop.html>.

<sup>9</sup> ALASKA CONST. art. VIII, § 2 (emphasis added).

<sup>10</sup> Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123 (1991).

<sup>11</sup> H.R. 31, 1971 Gen. Assemb., Reg. Sess. (Pa. 1971).

(General Assembly) has gone about its duty as trustee to the Commonwealth's natural resources in a drastically different way.<sup>12</sup>

Article I, section 27 of the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, *including generations yet to come*. As trustee of these resources, the Commonwealth shall conserve and maintain them for *the benefit of all the people*.<sup>13</sup>

The Amendment has two separate parts.<sup>14</sup> The first sentence gives Pennsylvanians a legal right to a decent environment, while the two sentences that follow "explicitly adopt a Public Trust Doctrine for Pennsylvania's 'public natural resources' and name the Commonwealth as trustee, with a duty to 'conserve and maintain them.'"<sup>15</sup> All Pennsylvanians are the beneficiaries of the public trust – including future generations yet to come.<sup>16</sup> But, as one commentator put it, "it is fair to say that Article I, Section 27 has yet to realize its full potential."<sup>17</sup>

In 2012, the General Assembly passed comprehensive legislation to tax and regulate the development of natural gas from

---

<sup>12</sup> Compare ALASKA CONST. art. VIII, § 2, with PA. CONST. art. I, § 27 (Alaska provides for the benefit of its citizens through the PFD, while Pennsylvania creates a public trust held by the state for the benefit of its citizens).

<sup>13</sup> PA. CONST. art. I, § 27 (emphasis added). For additional discussion of article I, section 27 of the Pennsylvania Constitution, see John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 693 (1999), and John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK. L. REV. 97 (1999).

<sup>14</sup> Kury, *supra* note 10, at 124.

<sup>15</sup> *Id.*

<sup>16</sup> See PA. CONST. art. I, § 27.

<sup>17</sup> KEN GORMLEY ET AL., *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* § 29.1 (2004); see also Kury, *supra* note 10, at 144.

the Marcellus Shale.<sup>18</sup> This legislation, known as Act 13, sparked much controversy and resulted in the Supreme Court of Pennsylvania ruling certain key provisions of the act unconstitutional,<sup>19</sup> causing calls by lawmakers to revisit the issue.<sup>20</sup> This Comment argues Pennsylvania should "realize" Article I, section 27's 'full potential' by implementing a distribution program that is similar to the PFD for developing natural gas from the Marcellus Shale. In order for the General Assembly to fulfill its duty to conserve and maintain the Commonwealth's natural resources in a way that will benefit future generations of Pennsylvanians, it is imperative for policy-makers to realize that the Marcellus Shale, "although large, [is] finite and that the resulting income will not continue in perpetuity."<sup>21</sup> Therefore, the Commonwealth must take "steps to assure that its current good fortune will bring long-range benefits" for current and future generations of Pennsylvanians.<sup>22</sup> A direct payment to Pennsylvanians would accomplish these goals by making the people beneficiaries, thereby serving as a check on government spending.<sup>23</sup> Moreover, this type of plan is desirable because only a small number of people benefit from the development of natural gas from the Marcellus Shale, while the extraction process negatively affects many nearby residents.<sup>24</sup>

---

<sup>18</sup> *Act 13 (Impact Fee)*, PA. PUB. UTIL. COMM'N, [http://www.puc.state.pa.us/filing\\_resources/issues\\_laws\\_regulations/act\\_13\\_impact\\_fee.aspx](http://www.puc.state.pa.us/filing_resources/issues_laws_regulations/act_13_impact_fee.aspx) (last visited Mar. 15, 2014).

<sup>19</sup> *Robinson Twp., Wash. Cnty. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013) (plurality opinion).

<sup>20</sup> Don Hopey, *Corbett Administration Asks Justices to Reconsider Act 13*, PITT. POST-GAZETTE (Jan. 2, 2014, 11:32 PM), <http://www.post-gazette.com/news/politics-state/2014/01/03/Reverse-shale-ruling-courtasked/stories/201401030125>.

<sup>21</sup> *Zobel v. Williams*, 457 U.S. 55, 57 (1982).

<sup>22</sup> *Id.*

<sup>23</sup> See Anderson, *supra* note 7, at 58-59 (explaining how the Alaska PFD was created primarily to protect portions of natural resource income from governmental spending).

<sup>24</sup> Carol Ann Gregg, *Experts Address Benefits, Hazards of Shale Drilling*, ALLIED NEWS (Apr. 30, 2011), <http://www.alliednews.com/local/x1250115257/Experts-address-benefits-hazards-of-shale-drilling#sthash.nxSS792t.dpuf>.

## II. THE PERMANENT FUND DIVIDEND – MOTIVATING FORCE, PURPOSE, AND EXECUTION

### *A. Motivating Force for the Creation of the PFD*

In 1959, President Dwight D. Eisenhower signed the Alaska Statehood Act and Alaska became the Union's forty-ninth state in 1959.<sup>25</sup> The framers of the Alaska Constitution had in mind two general themes pertinent to the PFD: the importance of resource development and the opposition to dedicated revenues.<sup>26</sup>

This first theme was a natural product of the state's historical dependency on natural resources.<sup>27</sup> With the exception of an influx of federal funding flowing into the state, each economic boom Alaska had experienced resulted from developing resources such as timber, furs, gold, and fish.<sup>28</sup> Accordingly, the Alaska Constitution requires all natural resources belonging to the state be used "for the maximum benefit of [Alaskan citizens]." <sup>29</sup> The framers' second theme – opposition to dedicated revenues – stemmed from the belief that "dedicated revenues constrained the government from pursuing the maximum welfare for its citizens."<sup>30</sup> Therefore, the Alaska Constitution initially prohibited the use of dedicated funds.<sup>31</sup>

A mere nine years after statehood, the oil was first pumped from Prudhoe Bay, Alaska.<sup>32</sup> One year later, in 1969, the state received \$900,041,605.34 (\$900 million) in royalties from leasing land in Prudhoe Bay.<sup>33</sup> To put this in perspective, the state's fiscal year 1970 budget totaled only \$172.8 million.<sup>34</sup> The Alaska

---

<sup>25</sup> Anderson, *supra* note 7, at 58.

<sup>26</sup> Joan Kasson, *The Creation of the Alaska Permanent Fund: A Short History*, EARLY HIST. OF ALASKA PERMANENT FUND 11, 13 (Alaska Permanent Fund Corp., Trustee Papers, vol. 5, 1997), available at [http://www.apfc.org/\\_amiReportsArchive/1997\\_TP5.pdf](http://www.apfc.org/_amiReportsArchive/1997_TP5.pdf).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> ALASKA CONST. art. VIII, § 2.

<sup>30</sup> Kasson, *supra* note 26, at 13.

<sup>31</sup> *Id.*

<sup>32</sup> Anderson, *supra* note 7, at 58.

<sup>33</sup> Kasson, *supra* note 26, at 13.

<sup>34</sup> *Id.*

Legislature was thus forced to decide what to do with this immediate and exponential increase in revenues: spend or save?<sup>35</sup> Many Alaskans supported the former option, arguing that because Alaska in its infancy, the legislature should use the oil revenue to invest in infrastructure for the young sovereign.<sup>36</sup> Others, such as then-Governor Keith Miller, who in 1970 introduced the first bill calling for the establishment of a public trust fund to save a portion of oil revenues for the benefit of future generations of Alaskans,<sup>37</sup> argued against spending the entirety of this one-time source of revenue on government programs in the immediacy.<sup>38</sup> Unsurprisingly, the legislature ultimately chose to use the oil revenue to invest in the state's development,<sup>39</sup> and only seven years removed from receiving the payment, Alaskans' "[f]ears of uncontrolled legislative spending" were justified when the state appropriated the remainder of the \$900 million oil-lease sale into the 1976 fiscal-year budget.<sup>40</sup> As a result of the legislature's unprecedented level of spending, many citizens became cognizant that not enough was being done to protect the state's natural-resource revenues for the benefit of future generations.<sup>41</sup>

In response to this criticism, the legislature passed legislation calling for the preservation of a portion of mineral lease sales,<sup>42</sup> which was vetoed by Governor Jay Hammond due to concerns that it would violate the Alaska Constitution's prohibition against dedicated funds.<sup>43</sup> Governor Hammond, however, was not opposed

---

<sup>35</sup> See *id.* (noting that the \$900 million "was nearly as much as all previous state budgets combined").

<sup>36</sup> Rural Research Agency, Alaska State Senate, *Alaska's Permanent Fund: Legislative History, Intent and Operations*, EARLY HIST. OF ALASKA PERMANENT FUND 34, 43-44 (Alaska Permanent Fund Corp., Trustee Papers, vol. 5, 1997), available at [http://www.apfc.org/\\_amiReportsArchive/1997\\_TP5.pdf](http://www.apfc.org/_amiReportsArchive/1997_TP5.pdf).

<sup>37</sup> Kasson, *supra* note 26, at 14.

<sup>38</sup> Anderson, *supra* note 7, at 59.

<sup>39</sup> Kasson, *supra* note 26, at 14-15.

<sup>40</sup> Anderson, *supra* note 7, at 58-59.

<sup>41</sup> *Id.*

<sup>42</sup> Kasson, *supra* note 26, at 14.

<sup>43</sup> *Id.* at 15.

to the creation of a permanent fund;<sup>44</sup> in 1976, he subsequently proposed a constitutional amendment that would preserve oil revenues in a dedicated fund.<sup>45</sup> The legislature passed Governor Hammond's proposed amendment, and it was then sent to the public for final approval.<sup>46</sup> On November 2, 1976, Alaskan voters overwhelmingly approved the amendment and the Permanent Fund (Fund) was established.<sup>47</sup> The amendment reads:

At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.<sup>48</sup>

#### *B. Purpose of the Permanent Fund*

Broadly speaking, the purpose of creating the Permanent Fund, as explained by its first chairman, Elmer Rasmuson, was a "negative goal" – namely, "to place part of the one-time oil wealth beyond the reach of day-to-day government spending."<sup>49</sup> This idea was born from the recognition that the state's "mineral reserves, although large, are finite and that the resulting income will not continue in perpetuity."<sup>50</sup> Thus, "the State took steps to assure that

---

<sup>44</sup> See *id.* (explaining that because Hammond introduced House Joint Resolution 39, he was essentially in favor of a permanent fund).

<sup>45</sup> Anderson, *supra* note 7, at 59.

<sup>46</sup> *Id.*

<sup>47</sup> See *Constitutional Amendment Summary*, LIEUTENANT GOVERNOR OF ALASKA, <http://ltgov.alaska.gov/treadwell/services/alaska-constitution/amendment-summary.html> (last visited Mar. 15, 2014) (showing the amendment passed by nearly a two-to-one margin: 75,588 to 38,518).

<sup>48</sup> ALASKA CONST. art. IX, § 15.

<sup>49</sup> Elmer Rasmuson, *A Founder's Reflections on the Early Days of the Alaska Permanent Fund Corporation*, EARLY HIST. OF ALASKA PERMANENT FUND 1, 3 (Alaska Permanent Fund Corp., Trustee Papers, vol. 5, 1997), available at [http://www.apfc.org/\\_amiReportsArchive/1997\\_TP5.pdf](http://www.apfc.org/_amiReportsArchive/1997_TP5.pdf).

<sup>50</sup> *Zobel v. Williams*, 457 U.S. 55, 57 (1982).

its current good fortune will bring long-range benefits."<sup>51</sup> But, the 1976 Amendment did not provide specific guidelines for the Fund's operation beyond that its principal was to be used "for those income-producing investments specifically designated by law."<sup>52</sup> As one commentator put it, the Permanent Fund was "a public purpose trust fund [that was] established with dedicated revenues but no specified policy purpose for expenditures."<sup>53</sup>

The 1976 Amendment did, however, delegate to the legislature the power to control the Fund's investment strategy.<sup>54</sup> Therefore, somewhat ironically, it was left to the legislature to determine how the Fund would achieve its goal of removing a portion of oil revenues from the legislature's very own grasp,<sup>55</sup> and how to best accomplish this idea of an intergenerational-public-purpose trust was the subject of much debate within the legislature and between Governor Hammond.<sup>56</sup>

### *C. Achieving the Fund's Goals as an Intergenerational Public Trust*

Due to the belief that the state was not conserving a portion of its oil-revenue windfall, the PFD was designed as a public trust so that the legislature would fulfill its constitutional mandate to manage the state's natural resources for the maximum benefit of all citizens, including future generations of Alaskans.<sup>57</sup> Two legislative findings help to understand why the PFD was ultimately structured the way it is today.<sup>58</sup> First, the Fund's goal "should be to maintain safety of principal while maximizing total return,"<sup>59</sup> and second, it "should be used as a savings device managed to allow

---

<sup>51</sup> *Id.*

<sup>52</sup> ALASKA CONST. art. IX, § 15.

<sup>53</sup> Anderson, *supra* note 7, at 59.

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* (explaining the irony of the legislature controlling the investing and allocation of the Fund, notwithstanding the fact that the primary purpose of the Fund was to guard against legislative spending).

<sup>56</sup> *Id.* at 59-60.

<sup>57</sup> *See* ALASKA CONST. art. VIII, § 2; 1980 Alaska Sess. Laws 38.

<sup>58</sup> *See infra* notes 59-60 and accompanying text.

<sup>59</sup> 1980 Alaska Sess. Laws 38.



the maximum use of disposable income from the fund for purposes [of direct distribution]."<sup>60</sup>

*D. Organization and Management of the Permanent Fund*

The Alaska House of Representatives (House) and Senate disagreed over the organization and management of the Fund.<sup>61</sup> The Senate believed that the State Department of Revenue should use its expertise to manage the Fund, arguing no conflict of interest would arise "since all the money in all the funds administered by Revenue belonged to the people of the state."<sup>62</sup> In contrast, the House believed management of the Fund should be accomplished by creating a public corporation independent from the state government,<sup>63</sup> the purpose of which, the House argued, was "to insulate the Fund from politics but keep it accountable to the public."<sup>64</sup>

In the end, the legislature formed the Alaska Permanent Fund Corporation (APFC),<sup>65</sup> which is responsible for managing and investing the Fund's assets.<sup>66</sup> The APFC is composed of a six-member Board of Trustees (Board) that is appointed by the governor.<sup>67</sup> One seat on the Board is statutorily assigned to the State's Commissioner of Revenue, and the governor chooses a cabinet member to fill another seat.<sup>68</sup> Public members, who all serve staggered four-year terms, fill the remaining four seats on the Board.<sup>69</sup>

The legislature provides the APFC with investment guidelines,<sup>70</sup> and the Fund's principal was initially limited to

---

<sup>60</sup> *Id.*

<sup>61</sup> Kasson, *supra* note 26, at 13, 20.

<sup>62</sup> *Id.* at 20.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 1980 Alaska Sess. Laws 38-39.

<sup>66</sup> ALASKA STAT. § 37.13.040 (2014).

<sup>67</sup> *Id.* § 37.13.050.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* § 37.13.050-.060.

<sup>70</sup> *See* 1980 Alaska Sess. Laws 38 (codified at ALASKA STAT. § 37.13.120) (noting the investment guidelines for the Alaska Permanent Fund).

investing in Treasury Bonds.<sup>71</sup> In 1980, the statutory list of permissible investments expanded to include corporate bonds, certificate of deposits, bankers' acceptances, and shares of savings and loan associations, although this latter investment option was subsequently removed.<sup>72</sup> Various pieces of legislation have since added to the APFC's allowable investments.<sup>73</sup> Then, in 2005, the legislature removed the statutory list of permissible investments and gave the Board the power to amend the list of allowable investments through its regulatory authority.<sup>74</sup> But despite the expansion in allowable investment opportunities, the APFC remains statutorily mandated to follow the prudent-investor rule.<sup>75</sup> The statute provides:

The prudent-investor rule as applied to investment activity of the fund means that the [APFC] shall exercise the judgment and care under the circumstances then prevailing that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the designation and management of large investments entrusted to it, not in regard to speculation, but in regard to the permanent disposition of funds, considering preservation of the purchasing power of the fund over time while maximizing the expected total return from both income and the appreciation of capital.<sup>76</sup>

By creating the APFC as a public corporation that is independent from the state government and mandating the APFC to follow prudent investor rule, the APFC has successfully insulated the Fund from politics, while still keeping it accountable to the public, and achieved its purpose of maintaining the safety of

---

<sup>71</sup> *Id.* (noting how the principal is limited pursuant to "this Act").

<sup>72</sup> 1980 Alaska Sess. Laws 38; *see also About the Alaska Permanent Fund Corporation (APFC)*, APFC, <http://www.apfc.org/home/Content/aboutAPFC/aboutAPFC.cfm> (last visited Feb. 8, 2014).

<sup>73</sup> *See, e.g., Fund Law*, APFC, <http://www.apfc.org/home/Content/aboutAPFC/lawIndex.cfm> (last visited Feb. 8, 2014).

<sup>74</sup> *See also* ALASKA STAT. § 37.13.206 (listing the regulations).

<sup>75</sup> *Id.* § 37.13.120(a).

<sup>76</sup> *Id.*

the Fund's principal while maximizing total return for the benefit of Alaskans.<sup>77</sup>

*E. Objectives of the Permanent Fund*

At least three ideas were debated between 1978 and 1980 about how to use the Fund's principal.<sup>78</sup> The House initially did nothing with the Fund's income stream, instead opting to leave the money flowing into the general fund where it was subject to appropriation by the legislature.<sup>79</sup> The Senate proposed to use the Fund's revenue to revamp the state loan programs by creating a centralized program called the Alaska Loan Programs Fund,<sup>80</sup> the purpose which was, in part, "to generate new businesses[,] particularly in the area of renewable resources."<sup>81</sup>

In contrast, Governor Hammond advocated for direct payments of money to Alaskans in the form of annual dividends.<sup>82</sup> Hammond was a skeptic of concentrating wealth in the government's hands, and he believed "the money could be used better by individuals than spent on government programs or invested in development projects."<sup>83</sup> Thus, Hammond advocated for a distribution plan that would tie the amount of money a resident would receive to the amount of time he or she had resided in the state, hoping to create a financial incentive for individuals to establish and maintain residence in Alaska.<sup>84</sup> Moreover, a direct payment was desirable because it would make all Alaskans beneficiaries, consequently serving as a check on government spending by giving "each citizen a personal stake in oil revenue and thus give Alaskans an incentive to oppose pork barrel spending

---

<sup>77</sup> *Evolving, Alaska Permanent Fund Corporation, 2013 Annual Report*, APFC, [www.apfc.org/\\_amiReportsArchive/FY2013AnnualReport.pdf](http://www.apfc.org/_amiReportsArchive/FY2013AnnualReport.pdf) (last visited Feb. 8, 2014) (noting at the end of the 2013-fiscal year, the Fund has paid out \$21 billion dollars to current generations of Alaskans and saved \$23.5 billion to benefit future generations of Alaskans).

<sup>78</sup> Kasson, *supra* note 27, at 21-22.

<sup>79</sup> *Id.* at 22.

<sup>80</sup> *Id.* at 23.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Griffin, Jr., *supra* note 2, at 82.

<sup>84</sup> Kasson, *supra* note 27, at 31.

and budgetary hyper-growth in general." <sup>85</sup> This, Hammond believed, was the only way to "[r]etain the taxpayers' one remaining tie with, and consequent for, government growth: How much it costs them."<sup>86</sup> The quickness with which the \$900 million was appropriated by the legislature buttressed Hammond's skepticism of having the Fund's principal flow into the state's general fund.<sup>87</sup>

With the legislature passing Senate Bill 161 in 1980,<sup>88</sup> the four-year debate over how the Fund would operate was finally resolved; Governor Hammond's plan of direct payments ultimately prevailed,<sup>89</sup> and many of his concerns were echoed in the legislation.<sup>90</sup> The legislative findings provided the law's purpose was:

(1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans; (2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and (3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund.<sup>91</sup>

Moreover, the legislature noted how "state residents have been paying increasingly high prices for fossil fuels, while few have received direct monetary benefits from the production and development of fossil fuels belonging to them as Alaskans."<sup>92</sup>

---

<sup>85</sup> Clifford Groh & Gregg Erickson, *The Permanent Fund Dividend Program: Alaska's "Noble Experiment,"* EARLY HIST. OF ALASKA PERMANENT FUND 29 (Alaska Permanent Fund Corp., Trustee Papers, vol. 5, 1997), available at [http://www.apfc.org/\\_amiReportsArchive/1997\\_TP5.pdf](http://www.apfc.org/_amiReportsArchive/1997_TP5.pdf).

<sup>86</sup> Kasson, *supra* note 27, at 23.

<sup>87</sup> *Id.* at 25.

<sup>88</sup> 1980 Alaska Sess. Laws 38-39.

<sup>89</sup> 1980 Alaska Sess. Laws 40.

<sup>90</sup> See *infra* note 91 and accompanying text.

<sup>91</sup> 1980 Alaska Sess. Laws 39.

<sup>92</sup> 1980 Alaska Sess. Laws 40.

Under Senate Bill 161, all Alaskan citizens received one "dividend unit" for each year they had resided in Alaska since statehood in 1959.<sup>93</sup> The purpose behind this distribution formula was to curb the state's "serious problem of population turnover . . . by providing an incentive to encourage Alaskans to maintain their residency in the state."<sup>94</sup> The value of each dividend unit was placed at \$50 for the first year dividends distributed in 1980,<sup>95</sup> and its value would vary in accordance with the Fund's principal.<sup>96</sup>

In *Zobel v. Williams*,<sup>97</sup> two Alaskans challenged the constitutionality of the dividend distribution plan.<sup>98</sup> The Zobel, husband and wife, domiciled in Alaska in 1978 and were each scheduled to receive fifty dollars for the first distribution from the Permanent Fund, while a person who domiciled in Alaska since statehood in 1959 was to receive \$1,050.<sup>99</sup> The Zobel argued that the distribution plan violated the Equal Protection Clause of the Fourteenth Amendment by distributing the Fund's income based on how long each recipient has lived in the state.<sup>100</sup> Thus, the Zobel were challenging the "distinctions made within the class of persons who were residents when the [PFD] was enacted in 1980," rather than the distinction made "between those who arrived in Alaska after the enactment of the [PFD] and those who were residents prior to its enactment."<sup>101</sup> The state advanced three justifications for upholding the law: (1) to create a financial incentive for individuals to establish and maintain residence in Alaska; (2) to encourage prudent management of the Fund; and (3) to apportion benefits "in recognition of undefined 'contributions of various

---

<sup>93</sup> ALASKA STAT. § 43.23.020 (repealed by 1982 Alaska Sess. Laws 277); 1980 Alaska Sess. Laws 39.

<sup>94</sup> 1980 Alaska Sess. Laws 40.

<sup>95</sup> *Id.*

<sup>96</sup> *Zobel v. Williams*, 457 U.S. 56, 57 (1982).

<sup>97</sup> *Zobel v. Williams*, 457 U.S. 56 (1982).

<sup>98</sup> *Id.* at 56-57.

<sup>99</sup> *Id.* at 57.

<sup>100</sup> *Id.* at 57-58.

<sup>101</sup> *Id.* at 59.

kinds, both tangible and intangible, which residents have made during their years of residency."<sup>102</sup>

The Superior Court of Alaska found the statute violated the rights of interstate travel and equal protection.<sup>103</sup> On appeal, the Supreme Court of Alaska reversed and upheld the law.<sup>104</sup> The Supreme Court of the United States disagreed and ruled for the Zobel.<sup>105</sup> The Court quickly disposed of the state's first two arguments for upholding the law, noting that the third justification – rewarding citizens for past contributions – was the only rationale relied upon by the Supreme Court of Alaska when it upheld the law.<sup>106</sup> But this, the Court said, is not a legitimate state purpose, as the Equal Protection Clause does not "permit the State to apportion all benefits and services according to the past tax [or intangible] contributions of its citizens"<sup>107</sup> because such a program "divide[s] citizens into expanding numbers of permanent classes"<sup>108</sup> and "'favoring established residents over new residents' is constitutionally unacceptable."<sup>109</sup>

The legislature, acting in response to a potential challenge in the judiciary, provided for the immediate replacement of any sections which were found unconstitutional.<sup>110</sup> After the decision in *Zobel*, therefore, the new plan went into effect.<sup>111</sup> Under the new plan,<sup>112</sup> which remains in effect today, equal direct payments are made to every state resident – adult and child – who is "physically present in the state with the intent to remain indefinitely . . . or, if

---

<sup>102</sup> *Id.* at 61 (quoting *Williams v. Zobel*, 619 P.2d 448, 458 (Alaska 1980)).

<sup>103</sup> *Zobel*, 457 U.S. at 58.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 61-63.

<sup>107</sup> *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969)).

<sup>108</sup> *Id.* at 64.

<sup>109</sup> *Zobel*, 457 U.S. at 65 (quoting *Vlandis v. Kline*, 412 U.S. 441, 450 (1973)).

<sup>110</sup> 1980 Alaska Sess. Laws 40.

<sup>111</sup> 1982 Alaska Sess. Laws 277.

<sup>112</sup> 1982 Alaska Sess. Laws 276.

the individual is not physically present in the state, intends to return to the state and remain indefinitely."<sup>113</sup>

### III. PENNSYLVANIA'S HISTORY OF DEVELOPING AND REGULATING MINERAL RESOURCES

In 1869, Edwin Drake struck oil in Titusville, Pennsylvania.<sup>114</sup> After Drake's Well became commercially successful, towns began emerging overnight as "[d]errick[s] and oilman dotted the landscape and thousands of speculators set out to make their fortunes in Pennsylvania."<sup>115</sup> The following decades were a period of prosperity for the Commonwealth and its residents, as the demand for oil skyrocketed with the advent of the internal combustion engine.<sup>116</sup> Indeed, during the early part of the twentieth century, one-half of the world's oil supply was produced in Pennsylvania.<sup>117</sup> But, like all good things, Pennsylvania's fortunes came to an end as "a gradual exodus of industry to the fertile grounds of Texas and the Southwest . . . reduc[ed] the oil and gas industry in Pennsylvania to a faint pulse."<sup>118</sup> Due to recent technological advancements, however, "Pennsylvania once again has the potential to be the energy capital of the United States."<sup>119</sup>

#### *A. Pennsylvania's Second Energy Boom — The Marcellus Shale*

The Marcellus Shale is an unconventional reserve of natural gas that stretches below New York, Pennsylvania, Ohio, West Virginia, Maryland, and Virginia.<sup>120</sup> A majority of the recoverable

---

<sup>113</sup> ALASKA STAT. § 43.23.095(7) (2014); *see also id.* § 01.10.055 (residency requirements); *id.* § 43.23.005 (eligibility requirements); *id.* § 43.23.008 (allowable absences).

<sup>114</sup> John M. Smith, *The Prodigal Son Returns: Oil and Gas Drillers Return to Pennsylvania With a Vengeance: Are Municipalities Prepared?*, 49 DUQ. L. REV. 1, 3 (2011).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 3-4.

<sup>119</sup> *Id.* at 5.

<sup>120</sup> GOVERNOR'S MARCELLUS SHALE ADVISORY COMMISSION: REPORT 19 (2011), *available at* <http://files.dep.state.pa.us/publicparticipation/marcellus>

gas from the Marcellus Shale sits below West Virginia and Pennsylvania<sup>121</sup>—including forty-nine of Pennsylvania's sixty-seven counties.<sup>122</sup> Experts estimate that the "recoverable reserves could be as large as 489 trillion cubic feet."<sup>123</sup> Although the Marcellus Shale was discovered nearly 190 years ago, extracting natural gas from the formation was considered economically unviable because of the "nearly impermeable rock" that surrounds the natural gas.<sup>124</sup> But, recent technological advancements—such as horizontal drilling and hydraulic fracturing<sup>125</sup>—have now made the Marcellus Shale economically viable and led to the growth of this industry.<sup>126</sup>

Horizontal drilling is not a new method of drilling for natural resources, but recent improvements in the process have made the technique more cost-efficient.<sup>127</sup> The process begins by drilling "a vertical hole until it reaches a few hundred feet above the depth of the targeted formation[;] [a]fter that, the drillers direct the progress of the drill bit in an arc shape until it drills on a horizontal plane."<sup>128</sup> Hydraulic fracturing (fracking) involves injecting "sand and copious amounts of fresh water treated with either gel or another friction-reducing substance" at a high pressure into the

---

shaleadvisorycommission/marcellusshaleadvisoryportalfiles/msac\_final\_report.pdf [hereinafter GOVERNOR'S REPORT].

<sup>121</sup> Joshua P. Fershee, *The Oil and Gas Evolution: Learning From The Hydraulic Fracturing Experiences in North Dakota and West Virginia*, 19 TEX. WESLEYAN L. REV. 23, 24 (2012).

<sup>122</sup> Smith, *supra* note 114, at 4.

<sup>123</sup> TIMOTHY CONSIDINE ET AL., AN EMERGING GIANT: PROSPECTS AND ECONOMIC IMPACTS OF DEVELOPING THE MARCELLUS SHALE NATURAL GAS PLAY 2 (2009), available at <http://marcelluscoalition.org/wp-content/uploads/2010/05/EconomicImpactsofDevelopingMarcellus.pdf>.

<sup>124</sup> Michael Morris, *Buyer's Remorse Over Your Pennsylvania Gas Lease? The Pennsylvania Supreme Court Upholds Meager Royalty Payments and Protects the Profitability of Marcellus Gas Drilling in Kilmer v. Elexco Land Services, Inc.*, 23 VILL. ENVTL. L.J. 25, 25 (2012).

<sup>125</sup> Laura C. Reeder, *Creating A Legal Framework For Regulation of Natural Gas Extraction From The Marcellus Shale Formation*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 999, 1003 (2010).

<sup>126</sup> Morris, *supra* note 124, at 25.

<sup>127</sup> Reeder, *supra* note 125, at 1003.

<sup>128</sup> *Id.*



shale formation.<sup>129</sup> The purpose of fracking is to "facilitate better flow of natural gas from the formation" by "maximiz[ing] the length and minimiz[ing] the height of the fractures it creates."<sup>130</sup>

Extracting natural gas from the Marcellus Shale is associated with many environmental concerns that uniquely affect the local communities surrounding the operation.<sup>131</sup> Although the environmental effects that may be associated with fracking remain unknown, it is safe to say that, "[l]ike any other industrial activity, Marcellus gas operations generate light, noise, dust, fumes, traffic, and drastic changes to the land, all of which affect the daily lives of the people living in these communities."<sup>132</sup> Furthermore, more serious environmental concerns — such as the issue of groundwater pollution — may be associated with the development of the Marcellus Shale,<sup>133</sup> and there also are issues "connected to the amount of wastewater that [fracking] generates."<sup>134</sup> Fracking wastewater, known as brine, may contain hydrocarbons, metals, and a small trace of radioactive material,<sup>135</sup> and horizontal drilling requires up to several million gallons of wastewater for each well, which must then be disposed of after the fracking is complete.<sup>136</sup>

The first well from the Marcellus Shale was drilled in Pennsylvania in 2004.<sup>137</sup> The Penn State Department of Energy and Mineral Engineering issued a study of the Marcellus Shale and estimated that it could create as many as 200,000 new jobs in the Commonwealth by the year 2020.<sup>138</sup> Moreover, they estimated the Commonwealth would receive approximately \$1.8 billion in new tax revenue from income taxes generated from these jobs and corporate income taxes paid by the drilling companies over the

---

<sup>129</sup> *Id.* at 1005.

<sup>130</sup> *Id.* at 1004-05.

<sup>131</sup> *See id.* at 1010 (stating that the actual environmental effects that are associated with Marcellus drilling operations remain inconclusive due to how new of a process it is).

<sup>132</sup> Smith, *supra* note 114, at 9.

<sup>133</sup> Reeder, *supra* note 125, at 1010.

<sup>134</sup> *Id.* at 1012.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Smith, *supra* note 114, at 22.

<sup>138</sup> CONSIDINE ET AL., *supra* note 123, at 2-3.

next decade.<sup>139</sup> Due to years of stalemate in the General Assembly,<sup>140</sup> however, Pennsylvania did not levy any form of severance tax until 2012.<sup>141</sup>

### *B. Regulating and Taxing the Marcellus Shale*

As an effort to catalyze "a comprehensive, strategic proposal for the responsible and environmentally sound development of Marcellus Shale," Governor Tom Corbett issued Executive Order 2011-01 on March 8, 2011.<sup>142</sup> Executive Order 2011-01 established the Governor's Marcellus Shale Advisory Commission (Advisory Commission) to issue recommendations on, *inter alia*, additional steps that are "necessary to protect, conserve, and enhance the Commonwealth's environment and natural gas resources" by "[i]dentifying, quantifying and recommending proposals to address the needs and impacts of natural gas development on local communities."<sup>143</sup>

After the Advisory Commission issued its report, Governor Corbett announced his support for implementing a number of the Advisory Commission's recommendations, "including changes to enhance environmental standards, an impact fee, and a plan to help move Pennsylvania toward energy independence."<sup>144</sup> In response, the General Assembly passed comprehensive legislation that seeks to ostensibly benefit Pennsylvanians by implementing a

<sup>139</sup> *Id.*

<sup>140</sup> Jones Day Publications, *West Virginia and Pennsylvania Tax Policy for the Marcellus and Utica Shale Formations: Ensuing Border Wars?*, JONES DAY (Jan. 2012), [http://www.jonesday.com/west\\_virginia\\_pennsylvania\\_tax\\_policy/#\\_edn11](http://www.jonesday.com/west_virginia_pennsylvania_tax_policy/#_edn11).

<sup>141</sup> See Calvin Kent, *Taxation of Natural Gas: A Comparative Analysis*, MARSHALL U. CENTER FOR BUS. & ECON. RES. (Prepared for Joint Interim Finance Subcommittee B, West Virginia Legislature), Oct. 12, 2011, at 3.

<sup>142</sup> GOVERNOR'S REPORT, *supra* note 120, at 5, 8.

<sup>143</sup> *Id.* at 9.

<sup>144</sup> *Governor Corbett Announces Plans to Implement Key Recommendations of Marcellus Shale Advisory Commission*, PA. OFF. OF GOVERNOR (Oct. 3, 2011), <file:///Users/katiert10/Downloads/Governor%20Corbett%20Announces%20Plans%20to%20Implement%20Key%20Recommendations%20of%20Marcellus%20Shale%20Advisory%20Commission.pdf> [hereinafter *Corbett Recommendations*].

distribution program that provides dedicated funding to a plethora of state and local government programs.<sup>145</sup>

i. Act 13

In 2012, the General Assembly passed House Bill 1950 – better known as Act 13.<sup>146</sup> Act 13 is most known for requiring "all local ordinances regulating oil and gas operations [to] allow for the reasonable development of oil and gas resources."<sup>147</sup> But, the act also did much else. For example, the General Assembly sought to create a statewide distribution program in order "to mitigate the impacts of this heavy industry."<sup>148</sup> To accomplish that goal, Act 13 allows—but does not require—a county's governing board to impose a fee on "spud unconventional gas well[s] located within its borders" after "notify[ing] the Commission and giv[ing] public notice of its intent to adopt the ordinance."<sup>149</sup>

The revenue generated by the impact fee is deposited into a dedicated fund in the Pennsylvania Treasury Department known as the Unconventional Gas Well Fund (Well Fund),<sup>150</sup> which is

---

<sup>145</sup> See generally H.R. 196-9, 2012 Sess., at 187 (Pa. 2012) (stating that Act 13 will "provide lots of money for local projects of an environmental nature in the shale region and in the rest of the State as well").

<sup>146</sup> Act of Feb. 14, 2012, P.L. 87, Act 2012-13.

<sup>147</sup> 58 PA. CONS. STAT. § 3304(a) (2012 Special Ed.); see also *id.* § 3304(b) (defining a local ordinance that allows for the "reasonable development of oil and gas resources"). On July 26, 2012, the Commonwealth Court of Pennsylvania held in a 4-3 decision that section 3304 unconstitutionally violates counties' substantive due process. *Robinson Twp. v. Commonwealth*, 52 A.3d 463, 485 (Pa. Commw. Ct. 2012). The Commonwealth Court of Pennsylvania, however, upheld the remainder of Act 13 upon finding that section 3304 was severable from the rest of the act. *Id.* The Supreme Court of Pennsylvania recently affirmed the Commonwealth Court of Pennsylvania's holding with respect to section 3304, holding the statute violated article I, section 27 of the Pennsylvania Constitution. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013).

<sup>148</sup> H.R. 196-9, 2012 Sess., at 186-87 (Pa. 2012).

<sup>149</sup> tit. 58, § 2302(a)-(a.1); see also *id.* § 2307 (duties of the Commission). The act defines "unconventional gas well" as "[a] bore hole drilled or being drilled for the purpose of or to be used for the production of natural gas from an unconventional formation." *Id.* § 2301.

<sup>150</sup> *Id.* § 2314 (a)-(b); see also *id.* § 2314(c)-(f) (describing how the funds are distributed).

administered by the Pennsylvania Public Utility Commission (PUC).<sup>151</sup> The principal of the Well Fund is then distributed for use by "local governments, counties and state agencies that respond to issues that arise as a result of Marcellus Shale gas drilling."<sup>152</sup>

The statute delineates the percentage of the impact fee, which fluctuates according to the "average annual price of natural gas for the calendar year in which the fee is imposed."<sup>153</sup> For instance, the impact fee's maximum amount is \$60,000 in year one of the well's production; \$55,000 in year two; \$50,000 in year three; \$20,000 in years four through ten; and \$10,000 in years eleven through fifteen.<sup>154</sup> The impact fee is estimated to generate "about \$120 million in the first year, climbing to nearly \$200 million within six years."<sup>155</sup>

In order to mitigate the detrimental local impacts of the drilling, Governor Corbett stated, "[a]lmost all of the money [the impact fee] brings in will go to benefit the places experiencing the impact."<sup>156</sup> A county that elects not to issue a fee, however, is exempt from participating in many of Act 13's distribution programs until the county elects to impose an impact fee.<sup>157</sup>

#### *a. Unconventional Gas Well Fund*

Although the primary purpose of the Well Fund is to mitigate the impact of Marcellus activities in counties where drilling occurs,

<sup>151</sup> *Id.* § 2307(a).

<sup>152</sup> *Corbett Recommendations, supra* note 144.

<sup>153</sup> tit. 58, § 2302(b)(6).

<sup>154</sup> *Id.* § 2302(b)(1)-(5). On January 1, 2013, the Commission began annually adjusting the fee amount "to reflect any upward changes in the Consumer Price Index for all Urban Consumers for the Pennsylvania, New Jersey, Delaware and Maryland area in the preceding 12 months . . . by multiplying the annual fee amount by any percentage increase to the Consumer Price Index." *Id.* § 2302(c).

<sup>155</sup> *Corbett Recommendations, supra* note 144. The total amount of revenue generated from the impact fee is unknown because counties have the option of assessing the fee, and the number of wells in operation varies from year-to-year.

<sup>156</sup> *See id.*

<sup>157</sup> *See* tit. 58, § 2302(a.3) (stating that counties which elect not to "adopt an ordinance imposing an unconventional gas well fee . . . shall be prohibited from receiving funds" under Act 13's distribution programs); *see also id.* § 2302(a.4) (listing alternate ways a county can impose the fee).

the Well Fund's principal is distributed among various local governments, counties, and state agencies.<sup>158</sup> For example, a portion of the principal is appropriated to county conservation districts.<sup>159</sup> Another \$10.5 million is distributed annually to various state agencies to be used for purposes relating to natural gas production.<sup>160</sup> Moreover, until 2013, a designated portion of the Well Fund went to the Natural Gas Energy Development Program (NGED Program),<sup>161</sup> established by Act 13 to fund "competitive grants to eligible applicants for eligible projects as provided in [the Act]."<sup>162</sup>

The purpose for creating the NGED Program was "to help secure energy independence and reduce reliance on foreign oil by developing 'Green Corridors' for natural gas vehicles with refueling stations at least every fifty miles and within two miles of key highways."<sup>163</sup> The permissible use of grants is statutorily limited to plans that "convert five or more [vehicles registered to an eligible applicant] into eligible vehicles or purchase five or more eligible vehicles . . . and must include the construction and utilization of a natural gas fueling station . . . or the utilization of an existing natural gas fueling station."<sup>164</sup> The General Assembly defined eligible vehicles to include dedicated compressed natural gas vehicles,<sup>165</sup> dedicated liquefied natural gas vehicles,<sup>166</sup> and bi-fuel vehicles.<sup>167</sup> Moreover, the only applicants eligible to

---

<sup>158</sup> *Id.* § 2314(b) (explaining that all collected fees will be deposited into the fund and will be appropriated according to the provisions of section 2314).

<sup>159</sup> *Id.* § 2314(c)(1)-(3).

<sup>160</sup> *See id.* § 2314(c.1).

<sup>161</sup> *Id.* § 2314(c.2)(3).

<sup>162</sup> *Id.* § 2703(b).

<sup>163</sup> *Corbett Recommendations, supra* note 144, at 3.

<sup>164</sup> tit. 58, § 2703(b)(1).

<sup>165</sup> *Id.* § 2701 (noting that a dedicated compressed natural gas vehicle is "produced by an original equipment manufacturer and operates on 100% compressed natural gas fuel").

<sup>166</sup> *Id.* (noting that a dedicated liquefied natural gas vehicle is "produced by an original equipment manufacturer and on 90% or more liquefied natural gas fuel and 10% or less on gasoline or diesel fuel").

<sup>167</sup> *Id.* A bi-fuel vehicle is defined as a vehicle that is "equipped to be propelled in part by compressed natural gas fuel and in part by diesel or gasoline fuel." *Id.*

participate in the NGED Program are a Commonwealth authority, a municipal authority, the Pennsylvania Turnpike Commission, a local transportation organization, a nonprofit entity, a state-owned or state-related university, and a "company."<sup>168</sup>

After the above-mentioned revenue is appropriated, the Well Fund's remaining principal is divided between two sources.<sup>169</sup> Sixty percent of the funds, minus an annual distribution to the Housing Affordability and Rehabilitation Enhancement Fund,<sup>170</sup> will be distributed to counties and municipalities,<sup>171</sup> and the remaining forty percent is the subject of the next subsection.<sup>172</sup>

---

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* § 2314(d).

<sup>170</sup> tit. 58, § 2314(f).

<sup>171</sup> *Id.* § 2314(d) (listing the formula for determining the amount that counties or municipalities are entitled to receive); *see also id.* § 2314(e) (limiting the payment amount a county or municipality can receive to "the greater of \$500,000 or 50% of the [prior fiscal year's] total budget").

These counties and municipalities receiving such funds may use them only for the following purposes:

(1) Construction, reconstruction maintenance and repair of roadways, bridges and public infrastructure. (2) Water, storm water and sewer systems, including construction, reconstruction, maintenance and repair. (3) Emergency preparedness and public safety, including law enforcement and fire services, hazardous material response, 911, equipment acquisition and other services. (4) Environmental programs, including trails, parks and recreation, open space, flood plain management, conservation districts and agricultural preservation. (5) Preservation and reclamation of surface and subsurface waters and water supplies. (6) Tax reductions, including homestead exclusions. (7) Projects to increase the availability of safe and affordable housing to residents. (8) Records management, geographic information systems and information technology. (9) The delivery of social services. (10) Judicial Services. (11) For deposit into the county or municipality's capital reserve fund if the funds are used solely for a purpose set forth in this subsection. (12) Career and technical centers for training of workers in the oil and gas industry. (13) Local or regional planning initiatives under . . . the Pennsylvania Municipalities Planning Code.

*Id.* § 2314(g).

<sup>172</sup> *See infra* notes 173-83 and accompanying text.

*b. Marcellus Legacy Fund*

The other forty percent of the Well Fund's remaining revenue is deposited into another dedicated fund established by Act 13—the Marcellus Legacy Fund (Legacy Fund)<sup>173</sup> — to be administered by the Pennsylvania Treasury Department.<sup>174</sup> This revenue is used to fund a number of government agencies and projects.<sup>175</sup> For example, twenty percent is distributed to the Commonwealth Financing Authority to issue grants to eligible applicants for an enumerated list of projects;<sup>176</sup> ten percent is deposited into the Environmental Stewardship Fund;<sup>177</sup> twenty-five percent to the Highway Bridge Improvement Restricted Account to fund the cost of replacing or repairing "locally owned at-risk deteriorated bridges;"<sup>178</sup> twenty-five percent to fund water and sewer projects, of which is split in half between the Pennsylvania Infrastructure Investment Authority and the Commonwealth Financing Authority;<sup>179</sup> fifteen percent of the funds is distributed on a per capita basis to counties for "acquir[ing] lands for recreational or conservation purposes and land damaged or prone to drainage by storms or flooding;"<sup>180</sup> and, until 2013,<sup>181</sup> the remaining five percent to the Department of Community and

---

<sup>173</sup> tit. 58, § 2315(a)-(a.1). The Legacy Fund also receives funding from the Oil and Gas Lease Fund, which is allocated on an annual basis to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund. *Id.* § 2505(b).

<sup>174</sup> *Id.* § 2315(a).

<sup>175</sup> *See id.* § 2315(a.1)(1)-(6) (explaining the distribution of funds).

<sup>176</sup> *Id.* § 2315(a.1)(1). The grants are limited to: (1) damage, abatement, cleanup, and reclamation of acid mines; (2) orphan or abandoned oil and gas well plugging; (3) complying with the Pennsylvania Sewage Facilities Act; (4) "planning acquisition, development, rehabilitation and repair of greenways, recreational trails, open space, parks and beautification projects;" (5) "programs to establish baseline water quality data on private water supplies;" (6) watershed programs; and up to twenty-five percent of the funds may be utilized for flood control projects. *Id.*

<sup>177</sup> *Id.* § 2315(a.1)(2).

<sup>178</sup> *Id.* § 2315(a.1)(3).

<sup>179</sup> tit. 58, § 2315(a.1)(4).

<sup>180</sup> *Id.* § 2315(a.1)(5).

<sup>181</sup> After 2013, this portion of the Legacy Fund will be deposited in the Hazardous Sites Cleanup Fund. *Id.* § 2315(a.1)(6)(i).

Economic Development for the purpose of funding projects "provid[ing] for the planning, development, remodeling, remediation and construction to projects relating to oil, natural gas or other chemical substance."<sup>182</sup>

As the foregoing demonstrates, Act 13 creates a type of revenue distribution program that the Alaska Legislature rejected when it enacted the PFD; namely, spending all the revenue generated from the production and distribution of the Marcellus Shale on government programs or initiatives and not taking "steps to assure that its current good fortune will bring long-range benefits" for current and future generations of Pennsylvanians.<sup>183</sup> The following section proposes an alternative—a Pennsylvanian PFD—that would accomplish that goal and fulfill the Commonwealth's duty to act as trustee for all Pennsylvanians, "including future generations to come."

#### IV. A PENNSYLVANIAN PFD: REDISTRIBUTING FUNDS TO PENNSYLVANIANS, NOT THEIR GOVERNMENT

This section begins by proposing a PFD-like system for Pennsylvania and describing how it could advance the same three policy goals set forth by the Alaska Legislature when it passed the PFD and how it could operate from the existing legislative framework in place in the Commonwealth.

##### *A. Providing a Mechanism for Distribution to Current and Future Generations of Pennsylvanians of at Least a Portion of the State's Energy Wealth Derived from the Development of the Natural Resources Belonging to Them as Pennsylvanians*

One method of distributing direct payments to residents is to use the groundwork created in Act 13.<sup>184</sup> Counties could, for instance, still opt into the distribution program by imposing a fee on wellheads within its borders, but rather than the Well Fund's principal being used on government initiatives, a portion of the proceeds would be placed in a trust with a portion of the principal

---

<sup>182</sup> *Id.* § 2315(a.1)(6).

<sup>183</sup> *Zobel v. Williams*, 457 U.S. 56, 57 (1982).

<sup>184</sup> *See supra* notes 146-55 and accompanying text.



being used for direct payments to residents of that county. Modeling the payment plan this way is desirable because, as opposed to the approximately 700,000 residents of Alaska, the large population of Pennsylvania would make payments *de minimis* if it were to pay each resident an equal share.<sup>185</sup> Moreover, a distribution program on the county level is the best way to ensure that the revenue from drilling in the Marcellus Shale "address[es] the needs and impacts of natural gas development on local communities,"<sup>186</sup> since, as the plurality in *Robinson Township v. Commonwealth* recognized, "some properties and communities will carry much heavier environmental and habitability burdens than others."<sup>187</sup>

This type of distribution program is consistent with the Supreme Court of the United States' holding in *Zobel*.<sup>188</sup> In *Zobel*, the distribution scheme was struck down because the Equal Protection Clause prohibits apportioning state services based on "expanding numbers of permanent classes,"<sup>189</sup> but a program that distributes revenue on a county or municipality level would not suffer from the same constitutional deficiencies as the plan in *Zobel*,<sup>190</sup> because this system would not expand citizens into permanent classes since a person who just moved into the county would be paid equal distributions as if they had lived there for

---

<sup>185</sup> *State & Local Quick Facts: Alaska*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/02000.html> (last visited Mar. 10, 2014). Pennsylvania has approximately 12 million more citizens than Alaska. *State & Local Quick Facts: Pennsylvania*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42000.html> (last visited Mar. 10, 2014).

<sup>186</sup> See generally GOVERNOR'S REPORT, *supra* note 120, at 9 (noting that recommendations were needed to "address the needs and impacts of natural gas development on local communities").

<sup>187</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 980 (Pa. 2013).

<sup>188</sup> *Zobel*, 457 U.S. at 55.

<sup>189</sup> *Id.* at 62-63.

<sup>190</sup> See *supra* note 96-108 and accompanying text.

many years.<sup>191</sup> Thus, classifying residents based on the counties in which they reside would likely survive a challenge under *Zobel*.<sup>192</sup>

Rather than putting the Fund in a division of the Pennsylvania Treasury Department, Pennsylvanians would benefit by creating an independent entity like the APFC.<sup>193</sup> Doing this would make the trust's revenue immune from politics and, therefore, assure it will not be spent as if it were revenue in the general fund. In addition, mandating the independent entity to follow a modern version prudent-investor rule, like the APFC does, would achieve the goal of maintaining the safety of the Well Fund's principal while maximizing the total returns.<sup>194</sup>

It is not likely that implementing a direct distribution program would deter companies from drilling for natural gas in Pennsylvania.<sup>195</sup> First, the "Marcellus Shale is the largest unconventional reserve of natural gas in the world,"<sup>196</sup> and although the shale runs from New York to as far south as parts of Kentucky and Tennessee,<sup>197</sup> the majority of recoverable gas lies

---

<sup>191</sup> See generally *Selective Serv. Sys. v. Minn. Pub. Research Grp.*, 468 U.S. 841, 879 n.22 (1984) (Brennan, J., dissenting) (noting that burdens can create a permanent class).

<sup>192</sup> See generally *Zobel*, 457 U.S. at 62-63 (noting that the plan was based on "expanding numbers of permanent classes").

<sup>193</sup> See *supra* notes 65-69 and accompanying text.

<sup>194</sup> See ALASKA STAT. § 37.13.120(a) (2014). The statute explains that by applying a modern prudent-investor rule, the independent entity would be required to exercise

the judgment and care under the circumstances then prevailing that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the designation and management of large investments entrusted to it, not in regard to speculation, but in regard to the permanent disposition of funds, considering preservation of the purchasing power of the fund over time while maximizing the expected total return from both income and the appreciation of capital [thereby maximizing return].

*Id.*

<sup>195</sup> See *infra* notes 197-200 and accompanying text (noting that because the majority of recoverable gas lies under Pennsylvania and because creating a Pennsylvanian PFD would not create a tax increase, companies would not be deterred from drilling in Pennsylvania).

<sup>196</sup> Morris, *supra* note 124, at 25.

<sup>197</sup> *Potential Development of the Natural Gas Resources in the Marcellus Shale, New York, Pennsylvania, West Virginia, and Ohio*, NAT. PARK SERV. 1

beneath Pennsylvania and West Virginia,<sup>198</sup> making it unlikely that the natural gas industry will cease development in the Commonwealth, especially due to the large amount of drilling already occurring across the state. Second, Pennsylvania's tax burden on natural gas is "commensurate with what the taxes are in this industry in other gas-producing States,"<sup>199</sup> and creating a Pennsylvanian PFD does not necessarily require a tax increase.

Some members of the General Assembly, however, were vocal about their opposition to the impact fee, not because it was too burdensome on the industry, but because it is a "woefully inadequate tax."<sup>200</sup> Thus, another means of providing funds for a Pennsylvanian PFD, while still generating revenue for important environmental protection programs, is to increase the Commonwealth's severance tax on unconventional gas wells. In 2009, the House Committee on Appropriations scored House Bill 1489,<sup>201</sup> which would have levied a five percent severance tax on wells producing more than 60,000 cubic feet per day, and found that the tax would generate \$179,600,000 during the fiscal year 2010-2011.<sup>202</sup> Levying an additional tax like the one proposed in House Bill 1489—regardless of whether the county elects to issue the tax—could be used to continue the distribution program that was created in Act 13,<sup>203</sup> and counties could then elect to participate in a program that distributes funds directly to its residents by imposing a voluntary impact fee, identical to Act 13.

---

(2008) [hereinafter *Development in the Marcellus Shale*] (noting how the Marcellus Shale formations can be found beneath several states including "New York, Pennsylvania, West Virginia, and eastern Ohio").

<sup>198</sup> Fershee, *supra* note 121, at 24.

<sup>199</sup> H.R. 196-9, 2012 Sess., at 191 (Pa. 2012).

<sup>200</sup> *Id.*; *see also id.* at 190 ("[W]hen you go back [to your legislative district] you can talk about the millions and millions of dollars and how wonderful that is, but make sure to tell your constituents that while you got millions and millions, you passed on billions and billions for them."). If Pennsylvania taxed at the same rate as West Virginia, for example, the Commonwealth would receive an additional \$24 billion annually. *Id.* at 89.

<sup>201</sup> H.R. 1489, 194th Gen. Assemb., Reg. Sess. (Pa. 2009).

<sup>202</sup> H. Comm. on Appropriations Fiscal Note, H.B. 1489, 2009 Reg. Sess., at 1 (Pa. 2009).

<sup>203</sup> *See generally id.* (showing that levying a similar tax as that provided in House Bill 1489 could help further Act 13).

Furthermore, adopting a Pennsylvanian PFD would advance the same policy goals set forth by the Alaska Legislature when it created the PFD.<sup>204</sup>

*B. Encourage Persons to Maintain Residence in Areas Where Development of the Marcellus Shale Occurs*

A majority of the recoverable natural gas is located in many rural areas across the Commonwealth, where communities with struggling economies are experiencing a turnover in population.<sup>205</sup> The development and production of natural gas has economically benefited those individuals who lived in these areas when the drilling began, like the individuals who were able to lease their land in exchange for royalties.<sup>206</sup> However, currently, there is not much that is being done to secure these counties' long-range economic well-being.<sup>207</sup> A Pennsylvanian PFD would do just that in two ways.

First, all things being equal, the notion of an annual direct distribution would entice a sizeable number of citizens to reside in those counties, and the economic multiplier effect of this flood of new residents would spur economic growth. Second, since a Pennsylvanian PFD would place the revenue into a trust and only pay out a portion of the trust's principal annually, it would create a savings mechanism for these counties and assure that their "current good fortune . . . bring[] long range benefits."<sup>208</sup>

---

<sup>204</sup> See Kasson, *supra* note 26, at 23 (stating the legislative purpose of the PFD).

<sup>205</sup> See generally *Development in the Marcellus Shale*, *supra* note 198 (illustrating the locations of active drilling rigs in rural Pennsylvania); *Oil and Gas from Shale Resources*, PA. INDEP. OIL & GAS ASS'N, <http://www.pioga.org/marcellus-shale/> (last visited Feb. 9, 2014) (discussing the profits made from drilling in rural Pennsylvania).

<sup>206</sup> *Oil and Gas from Shale Resources*, *supra* note 206.

<sup>207</sup> See generally *Pennsylvania*, RURAL ASSISTANCE CENTER, <http://www.raconline.org/states/pennsylvania> (last visited Feb. 9, 2014) (noting that nearly fourteen percent of rural Pennsylvania lives in poverty).

<sup>208</sup> *Zobel v. Williams*, 457 U.S. 55, 57 (1982).

### C. *Creating a More Engaged Citizenry*

A major downfall of Pennsylvania's current distribution program is that, because the funds are distributed to government agencies rather than the people, "it creates an incentive for this administration, and any administration to follow it, to lease out more State forest land for drilling, because that will provide revenue that will help fund these programs [ . . . ] [i]t is indeed a perverse incentive."<sup>209</sup> This statement by a member of the General Assembly is reflective of the anti-governmental-spending sentiment that caused the PFD's framers to support a direct distribution to individuals.<sup>210</sup> An intergenerational public trust similar to the PFD can help alleviate such concerns—while still promoting the development of the Marcellus Shale—because, by creating a system that directly benefits current and future generations of residents, it makes the citizenry much more engaged when it comes to issues concerning the development of natural resources, something the author's experience being born and raised in Alaska buttresses. A more engaged citizenry will concomitantly serve as a check on government spending by giving each citizen a personal stake in natural gas revenue and, consequently, "an incentive to oppose pork barrel spending and budgetary hyper-growth in general."<sup>211</sup> Pennsylvanians would benefit more from an intergenerational distribution system that is similar to the PFD because it would help to assure that its current good fortune will bring long-range benefits by conserving a portion of the state's revenue from mineral resources to benefit all generations of Pennsylvanians.<sup>212</sup>

## V. CONCLUSION

The production and development of natural gas from the Marcellus Shale benefits a small number of people in comparison to all those whose lives are affected solely by living in an area

---

<sup>209</sup> H.R. 196-9, 2012 Sess., at 192 (Pa. 2012).

<sup>210</sup> Griffin, *supra* note 2, at 82 (noting that "the money could be used better by individuals than spent on government programs").

<sup>211</sup> Groh & Erickson, *supra* note 85, at 4.

<sup>212</sup> *See supra* Part IV.A.

where the drilling occurs, and although the projections of trillions of cubic feet of recoverable gas from the Marcellus Shale<sup>213</sup> serve as blinders and cause many people to support its development without any reservations, we must not forget that these reserves are "finite and the resulting income will not last in perpetuity."<sup>214</sup> Therefore, the Commonwealth must take steps to assure that its good fortune will bring long-range benefits for current and future generations of Pennsylvanians. A Pennsylvanian PFD is a method for the General Assembly to fulfill its duty as trustee to conserve and maintain the Commonwealth's natural resources "for the benefit of all the people, including future generations to come."<sup>215</sup>

---

<sup>213</sup> CONSIDINE ET AL., *supra* note 123, at 2-3.

<sup>214</sup> *Zobel v. Williams*, 457 U.S. 55, 58 (1982).

<sup>215</sup> *See* PA. CONST. art I, § 27.