



March 2, 2018

The Honorable Cathy Giessel
State Capitol, Rm 3
Juneau, AK 99801-1182

Dear Senator Giessel and Members of the Senate Resources Committee:

The Department of Natural Resources (DNR) provides this letter as supporting material for SB 166 to explain the Department's reasoning for introducing this bill. Since its release, several individuals have brought forward questions and concerns about the bill. We hope to address some of those questions here.

1. What problem is this bill trying to solve?

Miners must perform annual labor on their claims¹ under AS 38.05.210. They must also record an annual affidavit to document that the annual labor was performed. An affidavit of annual labor that does not "accurately set out the essential facts is void and of no effect" under AS 38.05.265(a). The regulation 11 AAC 86.220(c) lays out these essential facts, including, among other items, the location of the claim, the name and current mailing address of each owner, and the dates the labor was performed during the labor year.

Numerous "unintentional abandonments" occur due to failure to accurately set out the essential facts. For instance, if a miner does not accurately set out the name or number of the mining claim, such failure constitutes abandonment of the mining claim. If a claim is abandoned, another locator can stake a claim in the area and secure exclusive rights to those minerals. The issue of "unintentional abandonment" has caused concerns in the mining community about the security of mining claims and their investments.

2. How can a miner "fix" an abandonment of claims?

When abandonment occurs, a miner has limited options under the existing law to "fix" the abandonment:

- **Statutory Cure Provision:** Under AS 38.05.265(b), a miner may "cure" an abandonment by (1) properly recording an affidavit of annual labor that sets out the essential facts accurately and (2) paying a penalty

¹ For purposes of this document, the term "mining claim" will be used to include state mining claims as well as state mining leasehold locations. A leasehold location is similar to a claim, but is located in an area that is only open for mineral leasing. The mineral rights are held by the leasehold location while the lease application is processed.

equal to the annual rent for the claim. But this option is also only available if nobody else has located a mining claim or leasehold location for those minerals.²

- **Relocation:** Under AS 38.05.265(a), a locator can wait one year after abandonment and then relocate the claim (so long as no other locator has staked a claim to those minerals in the interim).
- **Substantial compliance:** A miner can apply for a certificate of substantial compliance from the Commissioner under AS 38.05.185(b). However, the miner must have “complied as nearly as possible under the circumstances of the case” with the statutory and regulatory requirements. Further, substantial compliance may only be granted if there are no conflicting rights asserted by another person.
- **Lease:** While not a “fix” to abandonment, converting a mining claim to a lease prevents the risk of abandonment and thus provides greater security of tenure. Any mining claim holder may convert the claim to a lease under AS 38.05.205. Leases are not subject to the abandonment statute (AS 38.05.265).

Note that under current law, a miner has no statutory ability to “fix” abandonment of claims if another miner has established rights to the minerals within the area of the abandoned claim.

3. What can DNR do to “fix” abandonment if there is a conflicting right?

The opportunities to address abandonment such as the “cure” and substantial compliance statutory provisions do not apply if there is a conflicting right. This is because allowing the abandoned claim to be “revived” through cure or other provision would impact the property rights of the other miner or property holder who has established rights under the law. This sometimes results in situations where a miner has invested in and mined an area for several years but lost his or her mineral rights due to a failure to accurately set out the essential facts in an affidavit of labor. In this situation, the department is unable to assist a miner using the statutory tools mentioned above. These situations can create potential conflict and confusion. This is one reason the department believes this legislation is important.

4. Why can’t DNR fix this problem in regulation or by administrative action?

The nature of the statutes prevents DNR from fully addressing this issue by regulation or agency action. A mining claim is self-initiated, self-perpetuated, and the tenure of the claim is dependent on the miner’s fulfilment of certain requirements. To a large degree mining claims are held, or lost, by the miner’s actions or inactions. In other words, DNR does not “take away” mineral rights or “cause” an abandonment. Where abandonment occurs, the statutes provide the Department little discretion or leeway to take departmental action to remedy an abandonment beyond the remedies listed above.

² Note: There is a provision of the annual labor statute that provides for amendments to affidavits of annual labor made within two years. However, this provision only applies to “non-essential” facts (11 AAC 86.220(g)). Therefore, this provision is not useful to “fix” an abandonment that occurred as a result of failure to accurately set out the essential facts.

5. Why doesn't this legislation address "over-staking" of claims?

DNR cannot prevent a miner from staking a mining claim and recording a location certificate in the Recorder's Office under existing law. This is due to the nature of the claim system, in which an area is open for mineral entry unless it is closed. Changing this legal framework would require a considerable shift from the existing system.

6. Could DNR just provide a grace period for miners to fix failures to accurately set out essential facts on affidavits or a failure to pay rent?

We assume "grace period" to mean an opportunity to cure an abandonment without allowing anybody to stake the area of the claim during the period of abandonment before cure. There is not authority for the commissioner to temporarily prevent claim staking, or to allow the cure of an abandonment after overstaking, under existing statutes.

State lands are open for mineral entry unless otherwise closed. AS 38.05.185(a) states, in part, "State land may not be closed to location...unless the commissioner makes a finding that mining would be incompatible with significant surface use on the state land." Therefore, once an abandonment occurs, the commissioner cannot prevent another locator from staking a claim without going through a lengthy public process to close the land to mining altogether.

7. How does a mining claimholder know if a claim has been staked over his claim?

Proper location of a mining claim always requires notice under AS 38.05.195(c). The locator must attach a notice to a monument on the ground so that other miners in the area see it. Notice is also provided to the public by recording the location notice in the Recorder's Office within 45 days of locating the claim. Under the current statutory scheme, the entire location process occurs on the self-initiation of a miner, with no approval document from DNR required. Miners stake in the field, provide notice in the field, and record the documents in the Recorder's Office.

8. Why does DNR allow over-staking of federal claims?

State law allows staking of "at-risk" claims on "state-selected land," a term defined broadly in AS 38.05.275(b) to include federal lands for which a state selection application was filed (including federal lands with existing federal claims). Therefore, under current law, any person may locate a "state-selected" or "at risk" claim, and such a claim could be over a current federal claim. If the land is conveyed to the State, and the area was open to mineral entry, then the state-selected claim falls into place as a state mining claim or leasehold location. In theory, this means a federal claimholder could stake a state-selected claim over one's own federal claim, relinquish the federal claim, and assuming the State was conveyed the land and that the State opened the area to mineral location, then the federal claimholder could ultimately obtain a state mining claim or leasehold location in place of the federal claim.

However, the statute has no limitations on who can stake an at-risk claim. Therefore, the current law provides no preference right to federal mining claimholders. Another person might locate a state-selected claim over a federal claim before the federal claimholder does.

9. What considerations did DNR evaluate when attempting to revise statutes regarding affidavits of labor?

First, DNR began looking at regulatory changes that could improve the situation of abandonments. Because unintentional failures to accurately set out essential facts cause abandonments, the department issued a scoping notice seeking public comment on possible changes to the regulations. The department included a version of draft regulations for comment, which streamlined the required essential facts. However, even a modification of the essential facts does not completely solve the issue. Although there would be fewer fatal flaws in accurately setting out essential facts that result in abandonment, many of the administrative issues would remain. The only way to fully address affidavit of labor issues is through a statutory fix.

For these reasons, DNR decided to introduce legislation. As we evaluated options to address the issue, it became clear that a simple fix was not available. Many alternatives shifted a significant workload onto the department. In this fiscal environment, it did not seem practical to request additional staff. The “win-win” solution that we came up with (that is, a way to ease administrative burden on miners and improve miners’ tenure security without increasing department workload) was the repeal of the annual labor requirement. There are certainly other ways to address the issue, and we welcome those discussions, but we decided to move forward with this solution.

10. Why is DNR pursuing the repeal of annual labor requirements rather than some other option?

We spent a significant amount of time evaluating many other options, including some of those offered by interested parties. Our goal was to find the most effective and compressive solution to the problem. Ultimately, we concluded that if the annual labor requirement is retained, it will continue to be a significant cause of unintentional abandonment due to failure to properly record (including failure to accurately set out the essential facts). This is true regardless of how the immediate issue is resolved.

DNR believes that the holder of a mining claim is very likely to work that claim to generate value from their exclusive rights to the locatable minerals, even without a statutory requirement to conduct annual labor. The statutory requirement to pay annual rent provides an additional economic incentive to do work on the claim. If true that the annual labor requirement is not necessary to incent work to be done, and given that the annual labor requirement creates a threat to tenure, DNR decided to propose the repeal of the annual labor requirement. To be clear that the Department still expected work to be conducted, DNR included a “bone fide” miner provision in the proposed legislation.

11. What other options may resolve this issue?

Another option to address the immediate issue is to simply strike the “essential facts” requirement from the affidavit, or at least change the statutory language such that a failure to accurately set out essential facts would not render the affidavit void. However, at least some essential facts are required to comply with the annual labor requirement, to index within the Recorder’s Office, and to know which affidavit attaches to which claim. Without any essential facts, the purpose and effectiveness of the affidavit of annual labor is diminished as the record keeping ability is lost. Therefore, DNR did not perceive striking the essential facts requirement as the best option in the larger scheme of things.

Perhaps the next best option to a repeal of annual labor would be removing annual labor from the automatic abandonment statute. This could mean there would be no repercussion for failure to comply, or there could be a process by which there would be a required period with an opportunity to cure before abandonment became effective. The latter option would increase workload on the department, as DNR staff would be required to notify miners of problems in affidavits, provide a time period to cure, and conduct all relevant follow up correspondence and administration regarding whether the cure occurred. The Department strives to solve miners' challenges without creating additional administrative burden and costs.

12. Why doesn't this bill address additional issues that were brought to the attention of DNR?

The Department has found that a bill that attempts to solve many problems is difficult to pass. We opted to focus our efforts on the most seemingly pressing mineral property issue in this bill. We do have many of the additional issues on our legislative priority list and hope to address those issues in the near future.

13. Can you please explain the "bona fide miner" requirement that is included in the bill?

Every miner that currently conducts annual labor is demonstrating by their actions that they are working for the benefit or development of the mining claim. Even if the labor requirement is removed, DNR believes that miners will work towards development of their mining claims. Further, courts have found there to be an implicit "good faith" requirement for mining claims.

That said, DNR wanted to make sure it addressed any concerns raised about the removal of the annual labor requirement. One such concern is that it could increase the ability for parties to use this change to deny access to mineral resources for development. DNR wanted to be clear that the repeal of annual labor did not imply that DNR no longer expected claim holders to work towards mineral development.

This requirement is simple in administration. For leases, an affidavit stating that the miner is bona fide must be submitted before the lease is issued. For claims, if DNR has concerns a miner is holding claims to prevent mineral exploration or development, then it may request an affidavit from the miner stating that he or she is a "bona fide miner." This requirement is not intended to be extensive or burdensome, it is intended to prevent acquisition of mining claims with the intent to impede development. Thus, it serves a similar purpose to an annual affidavit without the risk of unintentional abandonment.

14. Why is the bill proposing such a large increase on claim rental fees?

While it appears to be a large increase in annual rent, the actual increase is \$10 per claim. The appearance comes from comparing the 1989 rental rate in the statute to the proposed 2018 rate.

However, rates are adjusted every 10 years by regulation, and currently miners pay \$35 dollars per claim for a quarter-quarter section MTRSC (\$130 for 11 + years). There is an upcoming 10-year adjustment in 2019 (which is the first payment due under this bill). DNR predicts that this adjustment will likely result in a rent of \$40 for a quarter-quarter section for a claim that is less than 5-years-old (\$200 for 11+ years).

If this bill does pass, the proposed rates in the bill are \$10 higher than the predicted 2019 adjustment rates. However, the claimant will no longer have to pay recording fees for affidavits. Additionally, if the miner is profitable, the increased rent is offset because rent can be deducted from royalty requirements.

15. Do the existing affidavits of annual labor contain information that is vitally important to future mineral development?

The recorded document might contain some information that could be helpful. Specifically, the amount of labor may indicate the size of a mineral prospect. However, we do not believe that the value from maintaining the affidavit justifies the continued threat to claim tenure security posed by the annual requirement.

16. How would removing the annual labor requirement affect federal mining claims?

DNR does not believe this bill has any impact on federal requirements for federal claims. The statutes regarding federal claims that are modified or removed by this bill are state statutes which maintain that “annual labor shall be performed . . . to the extent required by the laws of the United States applicable to Alaska.” In other words, the statute is redundant of federal statutes, essentially reiterating that federal law should be followed.

We removed the state requirements for annual labor on federal claims as a matter of consistency. However, if the repeal of these statutes is deemed to be damaging to the implementation of the federal system in some way, the root problem being addressed by this bill is still solved without the repeal of the statutes that reference federal mining claims.

Sincerely,



Heidi R. Hansen
Deputy Commissioner