# ARTICLE VIII

## NATURAL RESOURCES

At the time of the constitutional convention, Alaska had a slender economic base. Mining and fishing were the economic mainstays, and neither industry was robust. Proponents of statehood believed that the future of the state of Alaska depended upon the successful development of all its natural resources. Statehood bills pending in Congress indicated that the new state government would acquire an enormous amount of land from federal holdings, and it would assume responsibility for managing all fish and wildlife. Alaska's delegate to Congress, Bob Bartlett, devoted his keynote speech at the constitutional convention to the role of resource development in Alaska's future and to the ease with which the benefits of this development could be lost by careless management: ". . . fifty years from now, the people of Alaska may very well judge the product of this Convention not by the decisions taken upon issues like local government, apportionment, and the structure and powers of the three branches of government, but rather by the decision taken upon the vital issue of resources policy."

Delegate Bartlett and others urged constitutional defenses against freewheeling disposals of public resources and colonial-style exploitation that would contribute nothing to the growth and betterment of Alaska. Such abuses were common in the early history of resource management in the western states, and manifestations of them were visible in contemporary Alaska under the complacent management of federal bureaus. Thus, the convention delegates sought to enshrine in the state constitution the principle that the resources of Alaska must be managed for the long-run benefit of the people as a whole—that is, the resources of the state must be managed as a public trust. They did not attempt to write a resource code; rather, they sought to fix the general concept of the public interest firmly in the resource law and resource administration of the state, as well as in the consciousness of Alaskans, so it would not be subverted through the indifference or avarice of future generations.

In drafting this article, delegates were unable to refer to other state constitutions or the *Model State Constitution* for ideas and guidance, as none of them dealt with natural resource policy as broadly as the Alaskans thought necessary. At the time of Alaska's constitutional convention, only the Hawaii Constitution addressed natural resource policy in a separate article, and that article was brief. Other state constitutions, if they contained reference to resources at all, focused on specific matters of local relevance, such as irrigation and water rights in the western states, tidelands in Washington, reforestation in Oregon, and so on. These state constitutions were, for the most part, written before modern principles of conservation and resource policy—sustained yield and multiple use, for

example—were articulated. Thus, Alaska's natural resource article was a unique product of the 1956 convention, and it remains unique among the states, even though constitutional treatment of natural resource and environmental issues in other states has grown through amendment and revision in recent years.

Article VIII of Alaska's constitution clearly establishes that the natural resources of Alaska should be developed. Indeed, to the convention delegates, the very success of statehood hung in the balance. But while this article creates a strong presumption in favor of resource development, it will not abide that which is wasteful, biologically exhaustive, rooted in special privilege, narrowly selfish or contrary to the rights of others and to the larger public interest. With certain exceptions, this article allows the government to sell, lease or give away public land and resources, but it may do so only in accordance with constitutional and statutory guidelines, and all transactions must be in full public view.

Despite their philosophical aversion to the "giveaway" of public resources, the delegates were enamored with the long-established federal method of disposing of public mineral lands, which allows a person to obtain the right to receive fee title to a legitimate mineral deposit by filing a claim to it and performing certain tasks thereafter. Meanwhile, a draft article on natural resources prepared by consultants to the convention called for the state to retain in public ownership the subsurface title to all mineral lands and to lease the right to produce minerals from these lands. Congress was predisposed to the same idea, and in all likelihood was going to prohibit the state from transferring out of state ownership the mineral rights to land acquired from the federal government. Nonetheless, in the constitution the delegates opted for the existing federal system of obtaining full title to mineral lands "if not prohibited by Congress." As it happened, Congress forced on the state the leasing alternative and required the state to retain ownership of the minerals on its land.

Delegates debated at some length the organization of the executive agency to be charged with managing natural resources. There was vocal public support for a commission of fish and game to oversee the management of those resources (as there was support for the creation of a constitutional board of education to head the state department of education). In the end, however, the delegates left the way open for a board to head a principal department but willed to the legislature the task of deciding when and where (see discussion of Article III, Section 25).

It is not surprising that controversies over resource management have been among the most bitter in Alaska's political history and that the courts have been called on frequently to decide the meaning of constitutional language in the context of these disputes. This is because natural resources loom so large in the lives of so many Alaskans, if not as a source of livelihood then as source of cherished recreation. It is also because the language of this article is general and often opaque. A major challenge of the resource agencies has been to manage in the interest of conservation and to satisfy the needs of various user groups without creating special privileges and exclusive rights, which the constitution abhors. The courts have had to determine when management schemes reasonably limit

access and reasonably allocate among user groups, and when they cross a constitutional threshold and violate guarantees of equal and open access to the public.

## Section 1. Statement of Policy

> **It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.**

This is an emphatic statement that the policy of the state is to encourage the development of its land and resources, but in a manner that recognizes the collective interests of the people as the owners of these lands and resources. The meaning of the phrase "consistent with the public interest" is found elsewhere in this article. For example, it means that the principles of conservation must govern resource management (Sections 2 and 4); that everyone should be treated equally by management rules, particularly rules adopted in the interests of conservation that limit the access of some groups to certain resources (Sections 3, 15, 16 and 17); and that the public must be notified of all disposals of public land and resources, which may occur only according to the terms of general laws (Sections 8, 9 and 10). The delegates wanted the state's resources developed, not plundered. At the time of the convention, a current of opinion in Alaska was that corporate developments such as the Kennecott copper mine made insufficient lasting social and economic contributions to the territory, and that absentee owners of fish traps had unfair, exclusive rights of access to Alaska's salmon and were depleting the resource in their single-minded quest for profits.

## Section 2. General Authority

> **The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.**

This section is a broad grant of legislative authority to implement the policy enunciated in Section 1. The original resource article of the Hawaii constitution written in 1950 began with a similar provision: "The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources" (Article X, Section 1 of the 1950 constitution). In addition to utilization and development, conservation appears as an objective of resource management. The delegates understood the term in its traditional sense of "wise use." The Alaska Supreme Court has said: "The terms 'conserving' and 'developing' both embody concepts of utilization of resources. 'Conserving' implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. 'Developing' connotes management of a resource to

make it available for use" *(Kenai Peninsula Fisherman's Co-op Association v. State,* 628 P.2d 897, 1981).

**Section 3. Common Use**

**Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.**

This section enshrines in the Alaska Constitution the common law doctrine that natural resources must be managed by the state as a public trust for the benefit of the people as a whole, rather than for the benefit of the government, corporations, or private persons. Sections 15 and 17 of this article reinforce the public trust doctrine of natural resource management in Alaska, and they work in harmony with this section to prohibit the state from granting to any person or group privileged or monopolistic access to the wild fish, game, waters, or lands of Alaska. Sections 3, 15, and 17 are known as the "equal access clauses" of the natural resources article. The Alaska Supreme Court has said that "although the ramifications of these clauses are varied, they share at least one meaning: exclusive or special privileges to take fish and wildlife are prohibited" (*McDowell v. State*, 785 P.2d 1, 1989). Allegations of a violation of this section typically involve an allegation of a violation of the other two as well.

Tension exists between the equal access clauses and other provisions of this article that require natural resource management to honor principles of conservation (Sections 2 and 4) and that expect "preferences among beneficial uses" (Section 4). Regulating the harvest of fish, game, and other resources in the interest of conservation involves limiting access to them in some manner, as for example with bag limits and closed seasons. Where is the line that separates legitimate regulatory measures from unconstitutional denial of access guaranteed by Sections 3, 5 and 17? This is a question that is often before the courts.

The Alaska Supreme Court has upheld traditional regulatory tools of fish and game management such as registration requirements and limitations on the means and methods of taking. For example, the court upheld designation by the Board of Fisheries of "superexclusive" fishing districts in which people who register to fish are barred from other districts *(State v. Herbert,* 803 P.2d 863, 1990). It upheld designation by the Board of Game of urban areas as "nonsubsistence areas" in which no priority may be given to subsistence hunting (*State v. Kenaitze Indian Tribe*, 894 P.2d 632, 1995). It has also upheld regulations that selectively ban certain equipment in the taking of fish and game. For example, it upheld a ban on spotter airplanes in the Bristol Bay salmon fishery (*Alaska Fish Spotters Assn v. State*, 838 P.2d 798, 1992), and it upheld a ban on airplanes and airboats as a means of access to certain areas for hunting (*Interior Alaska Airboat Association v. State*, 18 P.3d 686, 2001).

The courts have also upheld regulations of the Alaska Board of Fisheries that allocate resources among user groups. For example, the supreme court upheld an allocation of salmon among commercial and recreational fishermen *(Kenai Peninsula Fisherman's Co-op Association v. State,* 628 P.2d 897, 1981). The court of appeals upheld an allocation among commercial fishermen using different types of fishing gear *(Meier v. State Board of Fisheries,* 739 P.2d 172, Alaska Ct. App., 1987). The supreme court upheld a fixed quota of king salmon to commercial trollers that was challenged by sportsmen who claimed the quota amounted to a special privilege and limited the ability of the vast majority of the public to fish for king salmon *(Tongass Sport Fishing Assn v. State,* 866 P.2d 1314, 1987).

To be free of constitutional problems, resource laws and regulations must have adequate justification; they must have a reasonable basis for distinctions they make among various users; they must put everyone on an equal footing within a group of users; and they may not prevent anyone from belonging to a particular user group. A regulation may make access to a resource more convenient for some people and less so for others, but convenience of access is not protected by the constitution.

However, a law or regulation in the name of conservation may treat groups unfairly or convey a special privilege in violation of the common use and anti-monopolistic safeguards of Sections 3, 15, and 17. One such law was a subsistence measure adopted by the legislature in 1986 that made access to subsistence uses of fish and game dependent upon place of residency. According to the law, people who lived in areas determined to be urban were denied access to subsistence activities, and those who lived in areas determined to be rural were permitted access. In a decision with far-reaching political impact, the Alaska Supreme Court said the state could legally allocate subsistence resources among different groups if necessary to protect the resource, but it could not use place of residency as criterion for making that allocation (*McDowell v. State*, 785 P.2d 1, 1989). As a consequence of this decision, the federal government found that state management of fish and game on federal land failed to conform to provisions of the federal Alaska National Interest Lands Conservation Act of 1980, which requires that rural residents have a subsistence preference, and took from the state control of fish and game management on federal land in Alaska.

Another regulatory scheme found to violate the equal access sections of Article VIII was one that authorized exclusive areas for big-game guides. Permits for these areas, in which only the permit holder could guide hunters, were not available for competitive bidding. Rather, they were assigned on the basis of past use, occupancy and investment by guides. The permits were of unlimited duration and required no lease or rental payment to the state. The rules regarding the transfer of permits allowed the holder to sell a permit as if it were private property. The court said that although there was nothing unconstitutional about leases and exclusive concessions on state lands, this particular scheme for allocating hunting areas among competing guides was constitutionally offensive because it resembled "the types of royal grants the common use clause expressly intended to prevent. Leases and concession contracts do not share these characteristics" (*Owsichek v. State*, 763 P.2d 488, 1988).

As a result of the *Owsichek* decision, the attorney general advised the commissioner of the Alaska Department of Natural Resources that the department's proposal to limit the number of commercial fishing guides on the Kenai River by issuing permits according to criteria similar to those used by the guide board for exclusive hunting areas violated the common use and equal access clauses of the constitution (Memorandum of September 27, 1991).

Permits issued under the state's limited entry fisheries program share several of the characteristics that the court found objectionable in *Owsichek* (allocation of the permit on the basis of past use, sale of the permit as private property), but that program enjoys its own constitutional authorization (see the commentary below under Section 15).

**Section 4. Sustained Yield**

> **Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.**

This section bolsters the commitment to conservation found in Section 2. The principle of sustained yield management is a basic tenet of conservation: the annual harvest of a biological resource should not exceed the annual regeneration of that resource. Maximum sustained yield is the largest harvest that can be maintained year after year. State law defines maximum sustained yield as "the achievement and maintenance in perpetuity of a high level annual or regular periodic output of the various renewable resources of the state land consistent with multiple use" (AS 38.04.910). At the time of the constitutional convention, stocks of Alaska's salmon had been reduced to a sad remnant of their past bounty by neglect of the sustained yield maxim. The qualifying phrase "subject to preferences among beneficial uses" signals recognition by the delegates that not all the demands made upon resources can be satisfied, and that prudent resource management based on modern conservation principles necessarily involves prioritizing competing uses.

In a challenge to the legality of the state's predator control program, which sought to reduce the number of wolves and bears in certain areas so that more moose and caribou would be available to hunters, the Alaska Supreme Court determined that the constitutional mandate to manage wildlife on a sustained yield basis applied to predators as well as game animals, and that the phrase "subject to preferences among beneficial uses" allowed the board of game to give priority to prey over predators *(West v. State, Board of Game,* 248 P.3d 689, 2010). In this case, the court ruled that the plaintiffs failed to show that the department of fish and game had ignored considerations of sustained yield.

**Section 5. Facilities and Improvements**

> **The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.**

This section is, strictly speaking, unnecessary because the legislature possesses the inherent power to provide for all facilities, improvements, and services it deems necessary to promote a public purpose. Its presence in the constitution is hortatory—that is, it *exhorts* the legislature to do these things in order to further the constitutional mandate to use and develop the state's resources. Commentary on this section submitted by the drafting committee at the convention noted that it was "not intended as an authorization for the state's entering business in competition with private industry."

**Section 6. State Public Domain**

> **Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.**

The public domain is government-owned land that has not been set aside for special use and remains open for private settlement and development in accordance with public land laws. Thus, all state lands, including tidelands and submerged land beneath navigable rivers and inland bays, are in the public domain except for parcels explicitly withdrawn for a specific governmental purpose. The second sentence of this section is a general authorization for the legislature to select land in accordance with the Statehood Act (it was evident at the time that Congress would make a large grant of federal land to the new state) and to provide for the administration of state lands. It is technically unnecessary, as managing state lands is an inherent power of all state legislatures.

**Section 7. Special Purpose Sites**

> **The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.**

This language, like that of Section 5 and Section 6, is not necessary to authorize action which the legislature would otherwise be prevented from taking. However, it makes clear that special-purpose withdrawals are within the constitutional scheme even though development objectives are stressed in

other sections. That is, this section prevents constitutional objections to such withdrawals on the grounds that they are incompatible with commercial development.

Alaska Statute 38.04.070 authorizes land to be classified for forest and wildlife reserves, state parks (to protect areas with special recreational, scenic, cultural, historical, wilderness and similar values), state trails and wild and scenic rivers. However, these classifications may not impair public access for traditional recreational use unless they are less than 640 acres or the legislature approves (AS 38.05.200).

**Section 8. Leases**

> **The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.**

This and the following section deal with public access to resources on state lands. This section authorizes the legislature to lease the public domain and issue permits for mineral exploration on it. Commentary on this section prepared by the drafting committee said:

> The legislature is authorized to lease state lands or interests therein. In granting leases, the potential uses of the land are to be considered so that maximum benefit can be derived. Each lease shall state the particular use or uses to be made of the lands as well as the conditions of the use and the term or tenure of the lease in order to facilitate reasonable concurrent use by others if occasion arises. "Reasonableness" of concurrent uses implies that possibilities of conflict in use should be kept to a minimum. Provisions of liability, forfeiture and other means of enforcement of the lease are to be provided in the instrument.

The legislature has exercised this authority in the Alaska Land Act, AS 38.05.

**Section 9. Sales and Grants**

> **Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these**

**resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.**

In addition to leasing, the legislature may sell or give away (by means of a grant) state-owned resources. "Interests therein" refers to specific, limited uses of the land, such as agricultural uses, which may be sold without transferring full title. The second sentence of this section anticipated that Congress would prohibit the new state from conveying away the mineral interests in its land, and, in fact, Section 6(i) of the Alaska Statehood Act bars the state from selling or giving away mineral rights. The background of this provision is discussed at length in *State v. Lewis,* 559 P.2d 630, 1977; see also Section 11 below, and Article XII, Section 13. A condition of sale or grant of the surface use of state land is that the state retains ownership of the subsurface mineral resources and may provide third party access to these resources. In the case *Hayes v. A.J. Associates* (960 P.2d 556, 1998), the court ruled that commercial developers who had purchased land from the state had to accommodate a person who staked mining claims on their land. Third-party access may not unduly impair the owner's right to use the land or to control trespass by others, and the owner may be compensated for damages caused by those seeking to exercise their right of access This little-known reservation of mineral rights to the state, and the right of anyone to stake mining claims in pursuit of these minerals, received widespread public attention in 2003 when homeowners in the Matanuska-Susitna valley discovered that the state had issued leases to a company to explore for coal bed methane gas on private, residential lots that had once been state land.

The Alaska Land Act, AS 38.05, implements this section by providing for the sale of land by auction, lottery and other methods.

**Section 10. Public Notice**

**No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.**

This section requires the state, when disposing of state lands and resources as authorized by Sections 8 and 9 above, to observe fixed legal procedures that protect the public's interest in these lands and resources. One such procedure is a formal announcement by the state that it intends to sell, lease or grant a specific parcel before the transaction occurs. This requirement is a protection against fraud and administrative wrongdoing, and against concessions, sales and leases that may inadvertently confer special privileges in violation of Sections 3, 15 and 17. The Alaska Supreme Court underscored the significance of this provision in *Alyeska Ski Corporation v. Holdsworth,* 426 P.2d 1006, 1967. In that case, an unsuccessful bidder for a state lease complained of procedural irregularities in the award of the bid. The Department of Natural Resources rejected the complaint and asserted that the commissioner's decision in the matter was final, not subject to review by the

courts. The court held otherwise, compelled by the "unequivocal constitutional mandate requiring that all leases of state lands are to be entered into in accordance with safeguards imposed by law." If the pertinent statutes and regulations were ambiguous regarding judicial review, the constitution was not, in the view of the court. The justices noted that Article VIII, Section 10 "reflects the framers' recognition of the importance of our land resources and of the concomitant necessity for observance of legal safeguards in the disposal or leasing of state lands."

In 1976, the voters turned down an amendment to this section which would have given the legislature veto power over all disposals of state-owned natural resources. The proposed amendment stemmed from legislative dissatisfaction with certain sales of state royalty oil that had been negotiated by the executive branch.

In a dispute over a contract issued by the Alaska Railroad Corporation to a company to remove gravel from the corporation's land, the Alaska Supreme Court said that the public notice requirement of this section applied to the contract, and that the requirement for public notice was not satisfied merely by the company applying for a conditional use permit from the local government prior to digging (*Laverty v. Alaska R.R.Corp.*, 13 P.3d 725, 2000).

**Section 11. Mineral Rights**

> **Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface uses of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.**

This and the following section describe the methods by which citizens can acquire the right to explore for and produce minerals on state-owned land. These methods perpetuate the distinction between locatable and leasable minerals established in federal land law. Locatable minerals are gold, silver, lead, and other metallic minerals; the main leasable minerals are coal and oil.

Locatable minerals on federal land are managed under the U.S. Mining Law of 1872. According to this law, a person can prospect freely on the public domain, and, upon discovering a mineral deposit, file a claim that gives the right to produce and sell the mineral. Indeed, the prospector can patent a legitimate claim, that is, he may acquire from the government full ownership (fee title) to the land as well as to the minerals it contains. The alternative to locating mineral claims on public land is leasing the land from the government for a fee and sharing with the government the income from the sale of minerals produced from the lease (i.e., paying royalties).

Mining interests in the territory sought to perpetuate the location system for metallic minerals on state lands that would be acquired from the federal government at the time of statehood. However, Congress was mindful of the importance of resource income to the new state government and troubled by the "giveaway" of public resources inherent in a location system. Accordingly, it was inclined to require the state to adopt a leasing system for these minerals. Indeed, statehood bills pending in Congress at the time of the constitutional convention called for the leasing of minerals in all lands transferred to the state. A draft resources article prepared by the Public Administration Service (a private, nonprofit group serving as technical consultants to the convention) proposed that the delegates adopt a leasing system for metallic minerals rather than the existing location system. But the delegates nonetheless made clear in this section their preference for the location system, including the right to patent a claim, if Congress would not stand in the way. Thus, the next-to-last sentence allows a mining claim to be patented ". . . if authorized by the State and not prohibited by Congress."

As it happened, Congress in Section 6(i) of the Statehood Act prohibited the state from parting with the title to its minerals. This section says, in part:

> The grants of mineral lands to the State of Alaska . . . are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented . . . . Mineral deposits in such lands shall be subject to lease by the State as the legislature may direct . . . .

The state government subsequently adopted a mining law that was nominally a leasing system, but which had the main attributes of the traditional location system (claims could not be patented, but they were otherwise similar to claims filed under the federal law). This system was challenged by a coalition of environmental, Native, and fishing groups on the grounds that it was not a true leasing system as contemplated in Section 6(i) of the Statehood Act because it required no rent or royalty payments to the state *(Trustees for Alaska v. State,* 736 P.2d 324, 1987). The Alaska Supreme Court upheld the challenge, and the U.S. Supreme Court refused to hear an appeal by the state. A new metallic mining law was adopted in 1989 that incorporates rental fees and royalties (AS 38.05.212).

**Section 12. Mineral Leases and Permits**

> **The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.**

This section provides for a leasing system similar to that of the federal Mineral Leasing Act of 1920, whereby the rights to explore for and extract oil and gas and other nonmetallic minerals are leased by the state according to terms and conditions it may impose. Thus, for example, an oil company may not freely drill for oil on public land as a miner might prospect for gold; it must first obtain from the state a lease to a specific tract, which is normally issued at a competitive auction to the highest bidder (the state usually specifies that bids in excess of minimum required lease payments be in the form of a cash payment, but it may specify that the bid terms be royalty payments or share of net profits; see *Baxley v. State,* 958 P.2d 422, 1998, under Article II, Section 19). The company holding the lease must share the value of the product of the lease with the state by payment of a royalty. Royalties are payments to the landowner, who is typically a private person in other states. Royalties are not taxes, which the state government may collect from mineral production on its own land as well as private land.

This section is implemented by AS 38.05.135-180. Petroleum revenue from competitive oil and gas lease bonus bids, royalties, and taxes have been the financial lifeblood of the state of Alaska.

**Section 13. Water Rights**

> **All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.**

This section continues the traditional right in the western United States to use water on a "first-come-first-served" basis. This method differs from an early method of acquiring water rights used historically on the East Coast. Known as the "riparian method," it allocated water rights to owners of

the stream bank. In Alaska and the other western states, however, water rights were traditionally acquired by actual use of the water. Under this constitutional provision, which is further developed in state statute and regulation, a prior user of water has preference to it, but these rights may be withdrawn or limited in order to reallocate the water to a use that has a higher public priority (a hydroelectric development might displace placer mines, for example). The "reservation of fish and wildlife" clause in the last sentence means that those who appropriate water do not also acquire a property right to the fish or wildlife that use the water.

### Section 14. Access to Navigable Waters

> **Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.**

This section adopts the public trust doctrine regarding navigable rivers and other public waterways, whereby citizens of the state have the right to travel on and otherwise use these bodies of water. The government may not deny this use except by a general law that protects a public interest. For example, a state law may keep people away from a lake that supplies drinking water to a town, or impair navigation on a river by building a dam; but it may not protect the interests of a private fishing lodge by blocking public access to a stream. When the state sells or leases public land next to a navigable waterway or other public body of water, it must, because of this section, reserve a public access easement (AS 38.05.127; see also *CWC Fisheries, Incorporated v. Bunker,* 755 P.2d 1115, 1988, in which the court said that a sale of tidelands contained an implicit public access easement, by virtue of the public trust doctrine, even though such an easement was not mentioned in the patent). This section does not authorize trespass across private land to reach a navigable body of water.

### Section 15. No Exclusive Right of Fishery

> **No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.**

This is one of three "equal access" clauses of Article VIII; it applies specifically to fishing. It works with Sections 3 and 17 to guarantee that no one should have monopolistic access to any of Alaska's natural resources (see discussion under Section 1). The second sentence was added by amendment in

1972 to authorize an exception to the prohibition in the first sentence so that the state could institute a limited entry program for distressed fisheries.

The prohibition in the first sentence of this section derives from a federal law governing Alaska's fisheries during the territorial period. Section 1 of the White Act prohibited the U.S. secretary of commerce from granting an "exclusive or several right of fishery" or denying to any citizen "the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted."

The exception in the second sentence was the result of efforts to revitalize the depressed salmon fisheries in the mid-1960s. Restricting the number of boats in various state-managed fisheries had primarily economic objectives but also served long-term management and conservation goals. The legislature passed a limited entry law in 1968 (ch 186 SLA 1968), but a federal court found the law unconstitutional. The U.S. Supreme Court vacated that decision, but the issue was later litigated in state superior court, which found the law to violate Sections 3 and 15 of Article VIII and Section 1 of Article I.

Recognizing that a limited entry system would require constitutional authorization, the legislature placed such an amendment before the voters in 1972. The measure was ratified, and soon thereafter the legislature adopted a limited entry law (AS 16.43). The Commercial Fisheries Entry Commission administers the program. Constitutionality of the law has been upheld by the state supreme court *(State v. Ostrosky,* 667 P.2d 1184, 1983), and an initiative to repeal the law was rejected by a wide margin of the voters in 1976.

In 2005, in response to regulatory changes by the Board of Fisheries in certain salmon fisheries in Cook Inlet that reduced the number of salmon that fishermen in these fisheries could catch, the fishermen sued the state for compensation for the decline in the market value of their limited entry permits. The Alaska Supreme Court ruled that these permits did not have private property status that would require compensation in cases of a government "taking." To hold otherwise would effectively give permit holders an exclusive right to fish not enjoyed by other people in violation of sections 3 and 15 of this article *(Vanek v. State, Board of Fisheries*, 193 P.3d, 283, 2008).

A dispute over the meaning of this section which predates the limited entry issue centered on the question of whether leasing of tidelands for the purpose of set net fishing created an exclusive right of fishery. Attorney general opinions on the matter have said no. "While Section 15 of Article VIII prohibits the state from granting exclusive fishing rights through legislation or regulation, it does not preclude the state from granting property interests which, by their nature, lead to exclusivity of use for fishing. The fact that the motivating force behind the creation of the property interest is a desire to promote fishing is of no consequence . . . ." (1963 Informal Opinion Attorney General, March 13; see also 1983 Informal Opinion Attorney General, April 21).

**Section 16. Protection of Rights**

> **No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.**

This section further reinforces the right of public access to state-owned resources by circumscribing the conditions under which this right may be infringed or revoked. Only a superior public purpose established in law may intervene, and a fair payment must be made if a specific existing right is extinguished.

A prime intent of the drafters of this section was to assure those who had built improvements on pilings over the tidelands could acquire property rights. At the time, many docks, warehouses, businesses, public buildings, and homes in coastal communities of Alaska were built over tidelands owned by the federal government, which considered these facilities, as a legal matter, in trespass. "Properly understood, section 16 establishes that substantial improvements on tidelands that existed at the time of statehood would give rise to protected property rights while tidelands that were unimproved at the time of statehood would be state property that could be disposed of only in accordance with other provisions of Article VIII" *(State, Dept. of Natural Resources v. Alaska Riverways, Inc.,* 232 P3.d 1203, 2010). In this case, the state supreme court rejected a claim that this section gave a riverbank property owner the right to build a dock over a state-owned riverbed without first obtaining a lease from the state.

In 1973, the state supreme court ruled that a person whose property access was impaired by the construction of a new state road was entitled to just compensation under this section. In that case, construction in Anchorage of the Minnesota Bypass across Chester Creek obstructed the flow of high water up the creek, which had been used by the plaintiff for many years as access from his property to Cook Inlet for commercial fishing. Also, the new road made access to his driveway difficult *(Wernberg v. State,* 516 P.2d 1191, 1973).

However, the court denied another claim for compensation under this section because the state's construction of a bridge downstream from the residence of the claimant did not keep him from using the river as a base for his floatplane, it merely made the use less convenient *(Classen v. State,* 621 P.2d 15, 1980).

**Section 17. Uniform Application**

> **Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.**

This section is an "equal protection of the laws" provision (see Article I, Section 1) that pertains specifically to natural resource management. It is one of three "equal access" clauses of Article VIII (see discussion of Section 3). Resource laws and regulations must apply equally to all people who are "similarly situated." Fishermen who claimed unequal treatment by a fishing regulation that granted a smaller allocation of fish to their district than to neighboring districts were told by the court that the districts were not "similarly situated" with respect to fish spawning patterns and historical catch levels and participation in the fishery. As a result, the court said the fishermen did not have a valid complaint under this section *(Gilbert v. Department of Fish and Game,* 803 P.2d 391, 1991).

**Section 18. Private Ways of Necessity**

> **Proceedings in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization of resources. Just compensation shall be made for property taken or for resultant damages to other property rights.**

The state may use its power of eminent domain (forcing people to sell their property for the benefit of a larger public purpose) for a project that is privately owned, such as an oil pipeline or a road to a significant mining development. However, the owner must receive fair compensation for the property that is taken. (See also Article I, Section 18.)

The commentary that accompanied the draft of this section explained the intent of the constitutional convention's resources committee.

> This provision was borrowed from the Wyoming Constitution and modified to meet Alaskan conditions. The Wyoming provision states, "Private property shall not be taken for private use unless by consent of the owner, *except for private ways of necessity,* and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, domestic or sanitary purposes, nor in any case without due compensation." In that arid state this provision was developed to assure access to water supply even though it might be necessary for a private person to secure easement across adjoining private lands. Since the adoption of the Wyoming Constitution, a number of western states have included a similar provision in their constitutions. Since the problem of essential access in Alaska is not limited to water

supply as in Wyoming, this article makes a general provision for the use of eminent domain proceedings to provide essential access for extraction and utilization of natural resources.