SCOMM

#11:22

JOSEPH P. WITHERSPOON, S. J. D.
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313 TOWNES HALL 2500 RED RIVER
AUSTIN, TEXAS 78705

OFFICE AC 512 471-5151
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STATEMENT

June 21, 1976

TO: Senator John Huber, Chairman
Special Committee on Taxation and Revenue
Alaska State Legislature, Senate

FROM: Joseph P. Witherspoon, Professor of Law, University of Texas School of Law, Austin, Texas

SUBJ: Legal services relative to tax legislation proposed by Senate Special Committee on Taxation and Revenue, Ninth Legislature, Second Session

PERIOD: January 31 - April 1, 1976

For legal services rendered pursuant to my letter agreement of January 31, 1976, to and at the request dated January 27, 1976, and telephone call of the same date of Senate Special Committee on Taxation and Revenue, Alaska State Legislature, by Senator John Huber, Chairman, in conjunction with research for and preparation of memoranda upon constitutional and policy problems presented by bills prepared for or contemplated by such Committee, including Senate Bill No. 620, 621, and more especially a memorandum dated March 15, 1976, entitled: "Validity of exemption in behalf of Native individual and group . . . interests . . ."

Legal services from January 31 through April 1, 1976
-- 18 hours at $60.00 per hour $1080.00

Respectfully submitted,

Joseph P. Witherspoon

Joseph P. Witherspoon

AGO 513761

JOSEPH P. WITHERSPOON, S. J. D.
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313 TOWNES HALL 2500 RED RIVER
AUSTIN, TEXAS 78705

OFFICE AC 512 471-5151
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June 21, 1976

Senator John Huber, Chairman
Special Committee on Taxation and Revenue
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear John:

It was certainly good to talk with you today and to review the problems you encountered during the session just ended. There will be a next time to resume the effort for a better legal system for Alaska.

I look forward to meeting with you in Anchorage on my visit there July 8-11 and I will call you at the number you gave me when I arrive. My visit is in conjunction with the opening of the Alaska Pacific Bank. I had assisted former Senator Rettig and others associated with him in combatting the opposition of the four principal banks in Alaska to obtaining a state bank charter and to obtaining clearance from the U. S. Department of Justice for its association with the Alaska Mutual Bank. It was quite an experience with very few holds barred. I will also be in Anchorage in late July and early August to assist the Alaska Pacific and the Alaska Mutual with certain problems. Although you will probably be out of the state then, I will plan to call you on that visit also.

I have enclosed my statement for services rendered your Committee during the recent session. It was again a pleasure to work with you.

I am glad to know that you plan to attend the scheduled meeting of the new organization of the petroleum producing states to be held in Houston in August. As you suggested, I will contact Representative Wyatt and obtain the current information on his plans. It will be good to attend these meetings with you.

Again, it was good to talk with you today. With best personal regards, I remain,

Sincerely,

Joseph P. Witherspoon

AGO 513762

June 15, 1976

Joseph P. Witherspoon, S.J.D.
Professor of Law
313 Townes Hall
2500 Red River
Austin, Texas 78705

Dear Joe:

The Subcommittee on Taxation and Revenue is in the process of preparing its final report. I want to thank you for the good job that you did for us. The information was most helpful in carrying out the committee's work.

Please review your records to see if all billings and payments have been made. If there is an additional billing or if a payment is missing, please inform me by phone or return mail. The committee will cease to exist and all funds will lapse as of June 30, 1976.

You can be assured that when matters come before the Legislature in your area of expertise that I will recommend that your services be retained. Thank you again for all of your help.

Sincerely,

John Huber

Enclosure

AGO 513763

FCCS SCS CSHB 586

The question being: "Shall the free conference committee report be adopted?" The roll was taken with the following result:

Yeas:	14	Bradley, Chance, Colletta, Croft, Ferguson, Huber, Kerttula, Meland, Orsini, Poland, Ray, Rodey, Willis, Ziegler
Nays:	0	
Absent:	3	Butrovich, Hohman, Tillion
Excused:	3	Miller, Rader, Sackett

And so, FREE CONFERENCE COMMITTEE SUBSTITUTE FOR SENATE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 586 was adopted.

The Secretary was requested to notify the House.

Alaska State Legislature

SPECIAL COMMITTEE ON TAXATION AND REVENUE
POUCH V
JUNEAU, ALASKA 99811
(907) 465-3779

SENATORS
JOHN HUBER, CH.
JOE ORSINI
PAT RODEY

Senate

May 29, 1976

The Honorable Chancy Croft
President of the Senate
Alaska State Legislature

Dear Mr. President:

The Special Committee on Taxation and Revenue met immediately after the May 29, 1976 session. The purpose of the meeting was to review the ongoing tax and revenue studies by the Committee staff. The Committee found that sufficient progress has been made in the designated subjects so that the Committee's charges have been met.

After the review the Committee instructed the Chairman to complete the staff studies now under way and to file a final report for inclusion in the Supplemental Journal. The final report shall be submitted not later than the final date of service of the contract employee staff, which is June 30, 1976. It was further decided to terminate all of the Special Committee's consultants on the same date.

In accordance with your charge on formation of the Committee on January 24, 1975, the following information is submitted giving the current status of the projects.

Items #1 and #2 - Relate to Corporate Taxes and Their Structure

Alaskan residents and corporations pay one of the nations highest income tax rates. The outside and vertically integrated multi-national corporations largely avoid this taxation. The multi-state compact is inadequate to provide a fair formula to a resource extractive state. Legislative changes have been enacted in the final two items--per centage depletion allowance and investment tax credits.

Item #3 - Advantages and Disadvantages of Taxation of Oil & Gas in Place by Elimination of Present Exemption

This was sole Committee activity during the session of 1975. Subsequently, the Legislature adopted the Modified Reserves Ad Valorem Temporary Tax (as a finger in the dike measure.)

Items #4 and #5 - Revision of Serverance Tax Law and Difference in Tax on Oil and Gas

Specific legislation has been submitted on these subjects and presently rests in the Legislature's committees.

Item #6 - Proposals regarding liquor excise tax collection were made and submitted in legislation. Wholesale liquor income tax avoidance is still under study. Further study on the multi-state tax compact and cooperative arrangements with the U.S. Alcohol and Tobacco unit and the State of Washington Liquor Control Board are under way.

Legislation to control foreign real estate speculation was submitted and withdrawn. This needs more study because the actual drafted bill, based on Vermont law, proved to be too broadly based.

We have joined initial work on interstate cooperation between the 14 petroleum producing states regarding oil and gas taxation.

Conclusion and Recommendations

The Chairman will be responsible for the final report.

The Committee further recommends that any continuing tax and revenue source study and action be conducted by the Legislature within the framework of the standing committee system, with interim committees when needed. It is felt that either a new standing committee or preferably an expansion of one of the existing standing committees to include this neglected area of revenue and tax sources should be established by the next Legislature.

In conclusion, the Committee thanks the Senate for the opportunity to work on these crucial matters at a time when our state seemed to face virtual bankruptcy. It is hoped that our final report will help the Legislature replace the repressive and regressive oil and gas reserves tax which we now depend on so heavily for state budget funding. A system of taxation based upon the net profitability of the produced resources as well as the instigation of reforms in excise, corporate income, and gross severance taxes is recommended for consideration.

We wish to thank our highly competent and dedicated professional staff for their invaluable services as well as our consultants and the Legislative Council for additional support services and adequate funding of our operation. We have been efficient enough with our budget to allow lapsing funds 15 to 35% of the total amount allocated.

In finish, that motions may begin.

John Huber

Joe O'Brien

Pat Foley

AGO 513765

JOSEPH P. WITHERSPOON, S. J. D.
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March 16, 1976

The Honorable John Huber
Senator and Chairman,
Special Committee on Taxation and Revenue
Alaska State Legislature - Senate
Pouch V
Juneau, Alaska 99811

Dear John:

I have attached a fresh memorandum on the question of the validity of an exemption in behalf of Native individuals, Native groups, or Native regional corporations in legislative measures imposing an ad valorem tax on oil and gas reserves. The memorandum explains that I did not prepare such a memorandum in 1975. I only expressed myself orally to you and before your Committee. The memorandum is definitive and should prove helpful for the future when you have this problem as well as now.

I am also working on the memorandum requested by Chancy concerning the constitutionality of the bill restricting shipments of oil and gas from state leased lands and will be sending it on up reasonably soon.

I shall look forward to hearing from you concerning other specific matters you want me to handle.

With best personal regards, I remain,

Sincerely,

Joseph P. Witherspoon

AGO 513766

JOSEPH P. WITHERSPOON, S. J. D.
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OFFICE AC 512 471-5151
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March 15, 1976

The Honorable John Huber
Senator and Chairman,
Special Committee on Taxation and Revenue
Alaska State Legislature - Senate
Pouch V
Juneau, Alaska 99811

In re: Validity of exemption in behalf of Native individual and group (village or regional corporation) property interests contained in legislative measures imposing an ad valorem tax on oil and gas reserves

Dear Senator Huber:

During the First Session of the Ninth Legislature several proposals were made to exempt from the proposed legislative measures imposing an ad valorem tax on oil and gas reserves certain interests in property of a Native individual, Native group or village, or regional corporation.

You have asked me to provide you with any memorandum that may have been prepared by me during that session bearing upon the validity under the Constitution of the United States of such exemptions. Upon checking my files, I discovered that I did not prepare any such memorandum. However, I did participate in a conference on April 9, 1975, in the offices of your Special Committee in which both Dean Erwin Griswold and I expressed our respective views concerning this matter. There were present at that meeting yourself, Senator Chancy Croft, Representative Steve Cowper, and Professor Henry Wilkinson, among others.

This letter summarizes my views upon the validity of the kind of exemption about which you have inquired. It is based upon a fresh and in-depth investigation of the relevant case and scholarly authorities.

The Types of Exemptions in Behalf of Native Property Interests Contained in Proposed Measures Imposing An Ad Valorem Tax on Oil and Gas Reserves

There were two types of exemptions proposed in behalf of Native property interests in proposed measures imposing an ad valorem tax on oil and gas reserves during the First Session of the Ninth Legislature. One type, which took many forms, applied to property interests owned by Native individuals, Native groups, or Village or Regional Corporations. Another type, which was discussed as a possible measure at the April 9th meeting referred to above, applied to property interests transferred by such individuals, groups, or corporations to third parties and owned by the latter.

So far as the question of validity of the first type of exemption is con-

cerned, the variation in form presented in the various proposals is without significance. Some proposals of this type simply tracked the exemption contained in Section 21 of the Alaska Native Claims Settlement Act, 43 U.S.C. section 1620. Thus, CS for Sponsor Substitute for House Bill No. 297 (Original sponsor: Cowper, et al; Introduced 4/25/75) provided for the exemption as follows:

> "Sec. 43.58.020. Exemptions. (a) The following interests . . . shall be exempt . . .:
> (2) any interest exempted from taxation by sec. 21 of the Alaska Native Claims Settlement Act (P.L. 92-203, 43 U.S.C. 1620)."

Other proposals of this type provided a wider form of exemption. Thus, an amendment proposed for consideration by the Free Conference Committee with respect to CS SSHB 297 (Rules) on May 28, 1975, called for adding the following exemption to

> "Sec. 43.58.020. Exemptions. (a) The following interests . . . shall be exempt . . .:
> (5) any property of a Native individual, Native group or village, or regional corporation conveyed to such owner of that property pursuant to the Alaska Native Claims Settlement Act (P.L. 92-203) during the period of exemption specified by sec. 21 of that Act or pursuant to any other federal statute or authority that provides for a conveyance of such a property to a Native individual, Native group or village, or regional corporation."

I am not aware of any bill which proposed the second type of exemption described above so as to extend the exemption to any property transferred by a Native individual, Native group or village, or regional corporation to a third party and owned by such party who does not fall into the class of persons or entities to which the grantor belongs.

The Validity of Exemptions in Behalf of Native Property Interests under the Constitution of the United States

In light of the well-established constitutional doctrines applicable to state and local tax legislation, the only provision that is relevant for testing the validity of such exemptions is the Equal Protection Clause of the Fourteenth Amendment. No serious question of validity of these exemptions can be raised, without involvement of additional facts, under either the Due Process Clause of the Fourteenth Amendment or the Commerce Clause.

As I mentioned in the conference of April 9, 1975, the Alaska Native Claims Settlement Act operates to give validity to state legislation that grants exemptions from state tax measures, even though the state tax exemption is wider than the federal tax exemption, provided that the same persons or entities are being benefitted by the two exemptions. This proposition follows from application of the principle that a state can act to give support to a federal policy within its own jurisdiction so long as this does not hinder the achievement of the policy. The fact that the state extends its support of that policy to areas beyond the focus of that policy as originally conceived by the federal government does not basically change the conclusions stated above. Unless the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it, the State may supplement that scheme. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-30 (1947). While the principle stated in the Rice case was made with regard to federal regulation, the principle is a fortiori applicable with regard to federal taxation. In the

field of taxation and taxation policy, the federal and state governments each retain ample power to pursue their respective interests and there is far less occasion for finding conflict between their respective efforts to legislate. See, e.g., Detroit v. Murray Corporation, 355 U.S. 489 (1958), in which the Supreme Court sustained the application of local government personal property taxes to property owned by a subcontractor under a prime contract for the manufacture of airplane parts between two private companies and the United States. Also, see, the McCarran Act, 59 Stat. 33, 15 U.S.C. sections 1011-1015, which declared that the business of insurance shall be subject to the laws of the several states relating to the regulation or taxation of such business. This act was enacted after the decision of the Supreme Court of the United States in United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) in which it was held that the business of insurance could be subjected to federal regulation and that the Sherman Antitrust Act applied to it. Just as the McCarran Act is to be viewed as federal legislation permitting state taxation of an insurance company engaged in interstate commerce so far as business done within a state so the Alaska Native Claims Settlement Act is to be viewed as permitting state exemptions from taxation of those exempted from taxation by that act. Even if, without the federal statute, there would be no state power so to act because of some federal statutory or constitutional provision, the constitutional federal statute operates to provide power to the state to act within the scope of its policy and purposes.

Equal Protection Clause Considerations

Since the analysis so far would only sustain the validity of the first type of exemption under consideration, it is necessary to consider the application of the Equal Protection Clause of the Fourteenth Amendment to the second type of exemption. Moreover, since the Legislature may want to utilize a broader form of the first type of exemption, it will be necessary to consider the application of the Equal Protection Clause to that broader form. The analysis utilized above only sustains, strictly speaking, the validity of the first type of exemption which precisely tracks the exemption from taxation contained in Section 21 of the Alaska Native Claims Settlement Act.

Under certain circumstances, which should be carefully understood, exemptions of both the first and second type discussed above are valid under the Equal Protection Clause of the Fourteenth Amendment, in my opinion. The circumstances are that the Legislature chooses to enact these exemptions upon the basis that they are needed in order to protect Native individuals, Native groups or villages, or Native regional corporations with regard to the public interest in their economic, educational, social, political, and other like development and progress. The Legislature must have a rational basis for concluding that either or both of these exemptions will promote this public interest. The Legislature will especially require justification for its conclusion that the second type of exemption will promote this public interest since there will be, by hypothesis, no essential difference between a third party who enjoys the tax exemption because of a transfer of a property interest from a Native individual or entity and a third party who does not enjoy the tax exemption because of a transfer of a property interest from someone or some entity other than a Native individual or entity. This justification should be supported by evidence or data presented to the relevant legislative committees of both houses of the Alaska Legislature and, preferably, this evidence or data should be assembled in a report by each of these committees.

The starting point of the development of the doctrine concerning the application of the Equal Protection Clause as a limitation upon the taxing power of the states was the case of Bell's Gap Railroad Co. v. Pennsylvania, 134 U.S. 232 (1890). In upholding the particular tax involved, an annual tax measured by the nominal value of corporate bonds although all other moneyed securities were taxed at their actual value, Mr. Justice Bradley said for the Court:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. . . . All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise." Id. at 237.

Perhaps the classic position concerning the validity of exemptions in state property tax laws was stated by the Supreme Court of the United States in the case of Williams v. Mayor and City Council of Baltimore, 289 U.S. 36 (1933). In that case a state law exempting from taxation railroad property of a single, specified railroad company, which was in great financial trouble, was challenged as a violation of the Equal Protection Clause. The federal district court upheld the statute. The Court of Appeals for the Fourth Circuit reversed upon the ground that the statute was invalid under both the Equal Protection Clause and several provisions of the Maryland Constitution. The Supreme Court reversed the latter decision. While the Court held the plaintiff cities to be without standing to raise the Equal Protection issue, it entertained their claim that the statute violated the Maryland constitutional requirement of uniformity in taxation, which basically paralleled the scope of the federal Equal Protection Clause. The Court's disposition of the latter issue is, therefore, of great significance for its bearing upon the doctrine of Equal Protection as a limitation upon the state's power to tax. Mr. Justice Cardozo, speaking for the Court, stated:

> "Furtherance of the public good is written over the face of this statute from beginning to end as its animating motive. 'It is of the utmost importance for the welfare of the State and particularly the communities served by said railroad, that the operation of said railroad be continued.' 'It is in the judgment of the General Assembly' that 'to encourage the continued operation' of the road by the grant of the exemption will be to give heed to the promptings of 'a wise and sound public policy.' The exemption is to be confined to that part of the property of the company, which is used for railroad purposes, is to continue only so long as the property is so used, and is to expire in any event at the end of the two years beginning in

> January, 1931. It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. . . . The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the Legislature must have its way. . . . Nor in marking out that field will a court be forgetful of presumptions that help to fix the boundaries. 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.' . . .
>
> We are told that the signs of an arbitrary preference are written on the statute because the exemption is confined to this particular insolvent when it might have been extended to all other insolvents engaged in a like business. There is nothing to show that any Maryland railroad other than this one was in the hands of a receiver. The assailants of the statute have the burden of proving everything essential to their case. . . . But the result will be no different if other insolvents be assumed. The public policy that made it wise in the judgment of the Legislature to help this particular railroad and keep its business going may have failed altogether in respect of any other railroad, solvent or insolvent. Here was a line carrying millions of passengers, and supplying the only railroad service between the capital of the state and its most populous city. The rescue of such a road might be dictated by the public interest when a road in some other territory might wisely be abandoned to its fate." Id. at 41-43.

The Supreme Court in Lawrence v. State Tax Commission of State of Mississippi, 286 U.S. 276 (1932) sustained a state statute, challenged under the Equal Protection Clause, which exempted corporations from the obligation of paying an annual tax on their net income derived from activities in building highways outside of the taxing state while imposing that obligation upon the non-incorporated competitors of such exempted corporations. The Court applied the same kind of analysis with respect to the public interest it utilized in the Williams case, supra. It stated:

> "Apart from other considerations which may have led to the present legislation as an integral part of the state system of taxation of the income of corporations, one which affords a rational basis for the distinction made, is the fact that the state has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income, by taxing either the income of the corporation or the dividends of its stockholders, but not both. . . . In the case of corporate income and dividends attributable to business done outside the state and received by stockholders of domestic corporations, the stockholders are taxed, and not the corporations." Id. at 284.

The most recent case applying the above doctrine is Kahn v. Shevin, 416 U.S. 351 (1974). In that case the Florida property tax exemption in behalf of widows was challenged by a widower as a denial to him of equal protection of the laws. The Supreme Court upheld the Florida Supreme Court decision sustaining the validity of the statute. Mr. Justice Douglas, speaking for the Court, stated:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. . . . data compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males--a figure actually six points lower than had been achieved in 1955. Other data point in the same direction. The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.
>
> "There can be no doubt, therefore, that Florida's differing treatment of widows and widowers 'rest(s) upon some ground of difference having a fair and substantial relation to the object of the legislation.' Id. at 353-355.

The later cases applying the doctrine elaborated above show greater concern with the actual justification offered in behalf of tax exemptions or classifications. In addition to the Kahn case, the cases of Reed v. Reed, 404 U.S. 71 (1971) and Frontiero v. Richardson, 411 U.S. 677 (1973) illustrate the point.

It remains to be examined whether a state tax statute can validly grant an exemption to a person or entity not because it will serve some public interest associated with that person or entity but because by exempting that person or entity some other person or entity will be provided protection or assistance that is in the public interest. The answer is "yes". The Supreme Court, for example, has upheld the exemption of persons dealing with farmers in order to relieve the latter of the ultimate burden of the tax. The exemption from a tax upon the generation of electric power of that sold to consumers for use in irrigation was sustained as being in aid of a matter of public concern. Utah Power & Light Co. Pfost, 286 U.S. 165, 185 (1932). Agriculture has always been treated as a paramount industry in our economy and legislation designed to promote the welfare of farmers, particularly farmers with a problem, is viewed sympathetically by the courts. Thus, a statute exempting from an occupation tax upon all other sugar refiners, planters who refined sugar from their own cane was sustained by the Supreme Court. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900). Again, in Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935), the Supreme Court sustained the exemption of carriers of farm produce owned by the producers from an annual license fee of twenty-five dollars exacted from other motor carriers for hire. In this case, Mr. Justice Cardozo stated:

> "The plight of the Georgia farmer has been pictured by the State Court. . . . To free him of fresh burdens might seem to a wise statecraft to be a means whereby to foster agriculture and promote the common good." Id. at 291.

The final inquiry in the application of the above doctrine concerning the Equal Protection Clause to exemptions in state property tax laws is whether the exemption of third persons who lease or purchase property from Native inviduals, Native groups or villages, or Native regional corporations will be judged by the Supreme Court to have been done by the Alaska Legislature with the result that it is reasonably related to the promotion of a public interest in the welfare of such individuals, groups or villages, or regional corporations and that that asserted public interest is one that may be so promoted. On page 3 of this letter, I have suggested that that public interest could well be the economic, educational, social, political, and other like development and progress of these individuals and entities. I have also suggested that it is important that the Legislature and its committees in enacting such an exemption demonstrate in their consideration of it their concern with such development and progress and the basis for the judgment that that development and progress will be facilitated by the exemption granted.

There are considerable authorities for the proposition that government may specially favor Native individuals or groups and exempt them from taxation. Most of these authorities concern the federal government and federal measures or policies exempting Indians from state and local taxation. Nevertheless, these authorities are strong analogies for sustaining state tax measures which exempt Native individuals and groups from the obligation of paying taxes as well as those who buy or lease property from them. A leading case of this sort is Board of County Commissioners of Creek County v. Seber, 318 U.S. 705 (1943). In this case the land of certain members of the Creek Tribe was subjected to Oklahoma property taxes. The taxpayers relied upon a federal statute exempting land held by an Indian subject to restrictions against alienation except with approval of the Secretary of the Interior from taxation as the basis for their suit to recover taxes paid. The federal statute was challenged as being unconstitutional. Mr. Justice Murphy, speaking for the Court, held the statute to be valid. He stated:

> "The Acts of 1936 and 1937 are constitutional. From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. . . . This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.
>
> "They (the Acts of 1936 and 1937) are appropriate means by which the federal government protects its guardianship and prevents the impairment of a considered program undertaken in discharge of the obligations of that guardianship. The fact that the Acts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts." Id. at 715-718.

While there are, of course, vital differencesbetween the situation of the Indians involved in the Seber case whom the federal government sought to protect by the Acts of 1936 and 1937 and the situation of the Native individuals and entities whom the Alaska Legislature might seek to protect and assist by both types of exemptions previously discussed, the principle of the Seber case would be applicable to state action designed to provide necessary protection and assistance to Native individuals and entities by such exemptions. That principle would sustain the validity of the state action if the Legislature demonstrates that that protection and assistance is necessary and that the exemptions will in fact make that possible.

If I can be of further assistance on this problem, please let me know.

Sincerely,

Joseph P. Witherspoon

Joseph P. Witherspoon

cc: The Honorable Chancy Croft
President of the Senate

JOSEPH P. WITHERSPOON, S. J. D.
PROFESSOR OF LAW
313 TOWNES HALL 2500 RED RIVER
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OK John Huber

March 15, 1976

The Honorable John Huber
Senator and Chairman,
Special Committee on Taxation and Revenue
Alaska State Legislature - Senate
Pouch V
Juneau, Alaska 99811

In re: Validity of exemption in behalf of Native individual and group (village or regional corporation) property interests contained in legislative measures imposing an ad valorem tax on oil and gas reserves

Dear Senator Huber:

During the First Session of the Ninth Legislature several proposals were made to exempt from the proposed legislative measures imposing an ad valorem tax on oil and gas reserves certain interests in property of a Native individual, Native group or village, or regional corporation.

You have asked me to provide you with any memorandum that may have been prepared by me during that session bearing upon the validity under the Constitution of the United States of such exemptions. Upon checking my files, I discovered that I did not prepare any such memorandum. However, I did participate in a conference on April 9, 1975, in the offices of your Special Committee in which both Dean Erwin Griswold and I expressed our respective views concerning this matter. There were present at that meeting yourself, Senator Chancy Croft, Representative Steve Cowper, and Professor Henry Wilkinson, among others.

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The Types of Exemptions in Behalf of Native Property Interests Contained in Proposed Measures Imposing An Ad Valorem Tax on Oil and Gas Reserves

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So far as the question of validity of the first type of exemption is con-

cerned, the variation in form presented in the various proposals is without significance. Some proposals of this type simply tracked the exemption contained in Section 21 of the Alaska Native Claims Settlement Act, 43 U.S.C. section 1620. Thus, CS for Sponsor Substitute for House Bill No. 297 (Original sponsor: Cowper, et al; Introduced 4/25/75) provided for the exemption as follows:

> "Sec. 43.58.020. Exemptions. (a) The following interests . . . shall be exempt . . .:
> (2) any interest exempted from taxation by sec. 21 of the Alaska Native Claims Settlement Act (P.L. 92-203, 43 U.S.C. 1620)."

Other proposals of this type provided a wider form of exemption. Thus, an amendment proposed for consideration by the Free Conference Committee with respect to CS SSHB 297 (Rules) on May 28, 1975, called for adding the following exemption to

> "Sec. 43.58.020. Exemptions. (a) The following interests . . . shall be exempt . . .:
> (5) any property of a Native individual, Native group or village, or regional corporation conveyed to such owner of that property pursuant to the Alaska Native Claims Settlement Act (P.L. 92-203) during the period of exemption specified by sec. 21 of that Act or pursuant to any other federal statute or authority that provides for a conveyance of such a property to a Native individual, Native group or village, or regional corporation."

I am not aware of any bill which proposed the second type of exemption described above so as to extend the exemption to any property transferred by a Native individual, Native group or village, or regional corporation to a third party and owned by such party who does not fall into the class of persons or entities to which the grantor belongs.

The Validity of Exemptions in Behalf of Native Property Interests under the Constitution of the United States

In light of the well-established constitutional doctrines applicable to state and local tax legislation, the only provision that is relevant for testing the validity of such exemptions is the Equal Protection Clause of the Fourteenth Amendment. No serious question of validity of these exemptions can be raised, without involvement of additional facts, under either the Due Process Clause of the Fourteenth Amendment or the Commerce Clause.

As I mentioned in the conference of April 9, 1975, the Alaska Native Claims Settlement Act operates to give validity to state legislation that grants exemptions from state tax measures, even though the state tax exemption is wider than the federal tax exemption, provided that the same persons or entities are being benefitted by the two exemptions. This proposition follows from application of the principle that a state can act to give support to a federal policy within its own jurisdiction so long as this does not hinder the achievement of the policy. The fact that the state extends its support of that policy to areas beyond the focus of that policy as originally conceived by the federal government does not basically change the conclusions stated above. Unless the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it, the State may supplement that scheme. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-30 (1947). While the principle stated in the Rice case was made with regard to federal regulation, the principle is a fortiori applicable with regard to federal taxation. In the

field of taxation and taxation policy, the federal and state governments each retain ample power to pursue their respective interests and there is far less occasion for finding conflict between their respective efforts to legislate. See, e.g., Detroit v. Murray Corporation, 355 U.S. 489 (1958), in which the Supreme Court sustained the application of local government personal property taxes to property owned by a subcontractor under a prime contract for the manufacture of airplane parts between two private companies and the United States. Also, see, the McCarran Act, 59 Stat. 33, 15 U.S.C. sections 1011-1015, which declared that the business of insurance shall be subject to the laws of the several states relating to the regulation or taxation of such business. This act was enacted after the decision of the Supreme Court of the United States in United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) in which it was held that the business of insurance could be subjected to federal regulation and that the Sherman Antitrust Act applied to it. Just as the McCarran Act is to be viewed as federal legislation permitting state taxation of an insurance company engaged in interstate commerce so far as business done within a state so the Alaska Native Claims Settlement Act is to be viewed as permitting state exemptions from taxation of those exempted from taxation by that act. Even if, without the federal statute, there would be no state power so to act because of some federal statutory or constitutional provision, the constitutional federal statute operates to provide power to the state to act within the scope of its policy and purposes.

Equal Protection Clause Considerations

Since the analysis so far would only sustain the validity of the first type of exemption under consideration, it is necessary to consider the application of the Equal Protection Clause of the Fourteenth Amendment to the second type of exemption. Moreover, since the Legislature may want to utilize a broader form of the first type of exemption, it will be necessary to consider the application of the Equal Protection Clause to that broader form. The analysis utilized above only sustains, strictly speaking, the validity of the first type of exemption which precisely tracks the exemption from taxation contained in Section 21 of the Alaska Native Claims Settlement Act.

Under certain circumstances, which should be carefully understood, exemptions of both the first and second type discussed above are valid under the Equal Protection Clause of the Fourteenth Amendment, in my opinion. The circumstances are that the Legislature chooses to enact these exemptions upon the basis that they are needed in order to protect Native individuals, Native groups or villages, or Native regional corporations with regard to the public interest in their economic, educational, social, political, and other like development and progress. The Legislature must have a rational basis for concluding that either or both of these exemptions will promote this public interest. The Legislature will especially require justification for its conclusion that the second type of exemption will promote this public interest since there will be, by hypothesis, no essential difference between a third party who enjoys the tax exemption because of a transfer of a property interest from a Native individual or entity and a third party who does not enjoy the tax exemption because of a transfer of a property interest from someone or some entity other than a Native individual or entity. This justification should be supported by evidence or data presented to the relevant legislative committees of both houses of the Alaska Legislature and, preferably, this evidence or data should be assembled in a report by each of these committees.

The starting point of the development of the doctrine concerning the application of the Equal Protection Clause as a limitation upon the taxing power of the states was the case of Bell's Gap Railroad Co. v. Pennsylvania, 134 U.S. 232 (1890). In upholding the particular tax involved, an annual tax measured by the nominal value of corporate bonds although all other moneyed securities were taxed at their actual value, Mr. Justice Bradley said for the Court:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. . . . All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise." Id. at 237.

Perhaps the classic position concerning the validity of exemptions in state property tax laws was stated by the Supreme Court of the United States in the case of Williams v. Mayor and City Council of Baltimore, 289 U.S. 36 (1933). In that case a state law exempting from taxation railroad property of a single, specified railroad company, which was in great financial trouble, was challenged as a violation of the Equal Protection Clause. The federal district court upheld the statute. The Court of Appeals for the Fourth Circuit reversed upon the ground that the statute was invalid under both the Equal Protection Clause and several provisions of the Maryland Constitution. The Supreme Court reversed the latter decision. While the Court held the plaintiff cities to be without standing to raise the Equal Protection issue, it entertained their claim that the statute violated the Maryland constitutional requirement of uniformity in taxation, which basically paralleled the scope of the federal Equal Protection Clause. The Court's disposition of the latter issue is, therefore, of great significance for its bearing upon the doctrine of Equal Protection as a limitation upon the state's power to tax. Mr. Justice Cardozo, speaking for the Court, stated:

> "Furtherance of the public good is written over the face of this statute from beginning to end as its animating motive. 'It is of the utmost importance for the welfare of the State and particularly the communities served by said railroad, that the operation of said railroad be continued.' 'It is in the judgment of the General Assembly' that 'to encourage the continued operation' of the road by the grant of the exemption will be to give heed to the promptings of 'a wise and sound public policy.' The exemption is to be confined to that part of the property of the company, which is used for railroad purposes, is to continue only so long as the property is so used, and is to expire in any event at the end of the two years beginning in

> January, 1931. It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. . . . The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the Legislature must have its way. . . . Nor in marking out that field will a court be forgetful of presumptions that help to fix the boundaries. 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.' . . .
>
> We are told that the signs of an arbitrary preference are written on the statute because the exemption is confined to this particular insolvent when it might have been extended to all other insolvents engaged in a like business. There is nothing to show that any Maryland railroad other than this one was in the hands of a receiver. The assailants of the statute have the burden of proving everything essential to their case. . . . But the result will be no different if other insolvents be assumed. The public policy that made it wise in the judgment of the Legislature to help this particular railroad and keep its business going may have failed altogether in respect of any other railroad, solvent or insolvent. Here was a line carrying millions of passengers, and supplying the only railroad service between the capital of the state and its most populous city. The rescue of such a road might be dictated by the public interest when a road in some other territory might wisely be abandoned to its fate." Id. at 41-43.

The Supreme Court in Lawrence v. State Tax Commission of State of Mississippi, 286 U.S. 276 (1932) sustained a state statute, challenged under the Equal Protection Clause, which exempted corporations from the obligation of paying an annual tax on their net income derived from activities in building highways outside of the taxing state while imposing that obligation upon the non-incorporated competitors of such exempted corporations. The Court applied the same kind of analysis with respect to the public interest it utilized in the Williams case, supra. It stated:

> "Apart from other considerations which may have led to the present legislation as an integral part of the state system of taxation of the income of corporations, one which affords a rational basis for the distinction made, is the fact that the state has adopted generally a policy of avoiding double taxation of the same economic interest in corporate income, by taxing either the income of the corporation or the dividends of its stockholders, but not both. . . . In the case of corporate income and dividends attributable to business done outside the state and received by stockholders of domestic corporations, the stockholders are taxed, and not the corporations." Id. at 284.

The most recent case applying the above doctrine is Kahn v. Shevin, 416 U.S. 351 (1974). In that case the Florida property tax exemption in behalf of widows was challenged by a widower as a denial to him of equal protection of the laws. The Supreme Court upheld the Florida Supreme Court decision sustaining the validity of the statute. Mr. Justice Douglas, speaking for the Court, stated:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. . . . data compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males--a figure actually six points lower than had been achieved in 1955. Other data point in the same direction. The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.
>
> "There can be no doubt, therefore, that Florida's differing treatment of widows and widowers 'rest(s) upon some ground of difference having a fair and substantial relation to the object of the legislation.' Id. at 353-355.

The later cases applying the doctrine elaborated above show greater concern with the actual justification offered in behalf of tax exemptions or classifications. In addition to the Kahn case, the cases of Reed v. Reed, 404 U.S. 71 (1971) and Frontiero v. Richardson, 411 U.S. 677 (1973) illustrate the point.

It remains to be examined whether a state tax statute can validly grant an exemption to a person or entity not because it will serve some public interest associated with that person or entity but because by exempting that person or entity some other person or entity will be provided protection or assistance that is in the public interest. The answer is "yes". The Supreme Court, for example, has upheld the exemption of persons dealing with farmers in order to relieve the latter of the ultimate burden of the tax. The exemption from a tax upon the generation of electric power of that sold to consumers for use in irrigation was sustained as being in aid of a matter of public concern. Utah Power & Light Co. Pfost, 286 U.S. 165, 185 (1932). Agriculture has always been treated as a paramount industry in our economy and legislation designed to promote the welfare of farmers, particularly farmers with a problem, is viewed sympathetically by the courts. Thus, a statute exempting from an occupation tax upon all other sugar refiners, planters who refined sugar from their own cane was sustained by the Supreme Court. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900). Again, in Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U.S. 285 (1935), the Supreme Court sustained the exemption of carriers of farm produce owned by the producers from an annual license fee of twenty-five dollars exacted from other motor carriers for hire. In this case, Mr. Justice Cardozo stated:

> "The plight of the Georgia farmer has been pictured by the State Court. . . . To free him of fresh burdens might seem to a wise statecraft to be a means whereby to foster agriculture and promote the common good." Id. at 291.

The final inquiry in the application of the above doctrine concerning the Equal Protection Clause to exemptions in state property tax laws is whether the exemption of third persons who lease or purchase property from Native inviduals, Native groups or villages, or Native regional corporations will be judged by the Supreme Court to have been done by the Alaska Legislature with the result that it is reasonably related to the promotion of a public interest in the welfare of such individuals, groups or villages, or regional corporations and that that asserted public interest is one that may be so promoted. On page 3 of this letter, I have suggested that that public interest could well be the economic, educational, social, political, and other like development and progress of these individuals and entities. I have also suggested that it is important that the Legislature and its committees in enacting such an exemption demonstrate in their consideration of it their concern with such development and progress and the basis for the judgment that that development and progress will be facilitated by the exemption granted.

There are considerable authorities for the proposition that government may specially favor Native individuals or groups and exempt them from taxation. Most of these authorities concern the federal government and federal measures or policies exempting Indians from state and local taxation. Nevertheless, these authorities are strong analogies for sustaining state tax measures which exempt Native individuals and groups from the obligation of paying taxes as well as those who buy or lease property from them. A leading case of this sort is Board of County Commissioners of Creek County v. Seber, 318 U.S. 705 (1943). In this case the land of certain members of the Creek Tribe was subjected to Oklahoma property taxes. The taxpayers relied upon a federal statute exempting land held by an Indian subject to restrictions against alienation except with approval of the Secretary of the Interior from taxation as the basis for their suit to recover taxes paid. The federal statute was challenged as being unconstitutional. Mr. Justice Murphy, speaking for the Court, held the statute to be valid. He stated:

> "The Acts of 1936 and 1937 are constitutional. From almost the beginning the existence of federal power to regulate and protect the Indians and their property against interference even by a state has been recognized. . . . This power is not expressly granted in so many words by the Constitution, except with respect to regulating commerce with the Indian tribes, but its existence cannot be doubted. In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.
>
> "They (the Acts of 1936 and 1937) are appropriate means by which the federal government protects its guardianship and prevents the impairment of a considered program undertaken in discharge of the obligations of that guardianship. The fact that the Acts withdraw lands from the tax rolls and may possibly embarrass the finances of a state or one of its subdivisions is for the consideration of Congress, not the courts." Id. at 715-718.

While there are, of course, vital differencesbetween the situation of the Indians involved in the Seber case whom the federal government sought to protect by the Acts of 1936 and 1937 and the situation of the Native individuals and entities whom the Alaska Legislature might seek to protect and assist by both types of exemptions previously discussed, the principle of the Seber case would be applicable to state action designed to provide necessary protection and assistance to Native individuals and entities by such exemptions. That principle would sustain the validity of the state action if the Legislature demonstrates that that protection and assistance is necessary and that the exemptions will in fact make that possible.

If I can be of further assistance on this problem, please let me know.

Sincerely,

Joseph P. Witherspoon

Joseph P. Witherspoon

cc: The Honorable Chancy Croft
President of the Senate

February 27, 1976

Mr. Joseph P. Witherspoon, S. J. D.
Professor of Law
313 Townes Hall
2500 Red River
Austin, Texas 78705

Dear Joe:

Enclosed, for your information, is the most recent bill filed in the Legislature concerning oil taxation. It is known as the Cowper bill.

Sincerely,

John Huber

Enclosure

AGO 513783

February 10, 1976

Joseph P. Witherspoon, S. J. D.
Professor of Law
313 Townes Hall
2500 Red River
Austin, Texas 78705

Dear Joe:

Enclosed is the tax package that the Special Committee on Taxation and Revenue has prepared and filed with the Legislature. Because of your position as a consultant to the Committee I thought you would be interested in receiving these bills.

HB 695 and SB 620 are the companion bills on net proceeds; and HB 703 and SB 621 are the companion bills on excess value.

Sincerely yours,

John Huber

Enclosures

JOSEPH P. WITHERSPOON, S. J. D.
PROFESSOR OF LAW
313 TOWNES HALL 2500 RED RIVER
AUSTIN, TEXAS 78705

OFFICE AC 512 471-5151
RESIDENCE AC 512 452-1939

January 31, 1976

The Honorable John Huber, Senator and
Chairman, Special Committee on Taxation and Revenue
Alaska State Legislature - Senate
Pouch V
Juneau, Alaska 99811

Dear John:

It was good to talk with you on January 24th and to learn of the progress of the work of your Special Committee and of your legislative work more generally.

As a result of our conversation, I have made a brief, initial study of what constitutional and related problems might be presented by the tax legislation your Committee is considering this session. Your packet of reports and your Staff's draft bills, which arrived today, certainly demonstrate a thoroughgoing approach to the matter of tax legislation bearing upon the oil and gas industry.

I appreciate your invitation to serve as a consultant on constitutional law and related legal matters for your Special Committee and will be happy to serve again, as indicated in our telephone conversation. I would estimate that approximately 125 professional hours of research, analysis, and drafting will be necessary to perform the services you will require on constitutional law and related legal matters. Contemplating the making of one visit to Juneau together with the necessary preparatory work here, I estimate that the sum of $5,000 would cover the amount of the fee for the services you requested plus the expenses of travel and related professional expenses and agree to perform these services, including expenses incurred, for that sum.

Currently, I am preparing to serve as a committee witness on February 4th next in Washington, D.C., before the Subcommittee on Civil Rights and Constitutional Rights, House Judiciary Committee, of which Congressman Peter Rodino is Chairman. Just as soon as I return on Thursday, I will look up the memorandum you requested on the matter of the constitutionality of various kinds of statutory exemptions operating in behalf of the Native groups.

With best personal regards to you and your wife and Chancy Croft, I remain,

Sincerely,

Joseph P. Witherspoon

Joseph P. Witherspoon

January 30, 1976

Joseph P. Witherspoon, S. J. D.
Professor of Law
313 Townes Hall
2500 Red River
Austin, Texas 75705

Dear Joe:

I am enclosing a copy of the Moody report which was done for our Alaska Natural Gas Pipeline Impact Committee of which I am a member. Upon reading the report it will be obvious to you why I have sent it.

It is obvious that positive action will be necessary and this work does fit in with our taxation and revenue work. Your suggestions and recommendations, particularly in regards to legal points raised as to whether you agree or disagree, I feel are absolutely necessary. I, in particular, am a great advocate of converting Alaska's natural gas to a petrochemical product namely, methanol, and thereby crawling out from under the oppression, and downright unjust control of another federal bureaucratic agency, the FPC.

I am hoping to hear from you and looking forward to seeing you in the not too distant future. By the way, our Legislature started this year on January 12 and according to Chancy, it by God better not last over 90 days.

Sincerely yours,

John Huber

Enclosures

FILE COPY

JOSEPH P. WITHERSPOON, S. J. D.
PROFESSOR OF LAW
313 TOWNES HALL 2500 RED RIVER
AUSTIN, TEXAS 78705

OFFICE AC 512 471-5151
RESIDENCE AC 512 452-1939

May 31, 1975

STATEMENT

TO: Senator Chancy Croft, President of the Senate
Senator John Huber, Chairman,
Special Committee on Taxation and Revenue
Alaska State Legislature - Senate

FROM: Joseph P. Witherspoon, Professor of Law, University of Texas School of Law, Austin, Texas

SUBJ: Legal services relative to constitutional and drafting problems presented by Senate and House bills designed to impose an ad valorem property tax on oil and gas reserves

For legal services rendered to Special Committee on Taxation and Revenue, Senate: Senator John Huber, Chairman, and Senator Chancy Croft, President of the Senate, between May 9 and May 29, 1975, with respect to Senate and House bills designed to impose an ad valorem property tax on oil and gas reserves with a special focus upon constitutional law and drafting problems, including analysis of administration proposed amendments to CS for SS for HB 297; conferring with Senator John Sackett and his attorney concerning desired amendments to above bill relative to exemptions; preparation of memorandum entitled "Problems with the 'SOHIO' Amendment to HB 297; preparation of memorandum entitled "Present Importance of Exercising the State's Tax Function relative to Prudhoe Bay Reserves of Oil and Gas"; preparation of work draft copy of proposed Free Conference CS for Senate CS for SS for HB 297 am S in two versions; preparation of work draft copy of proposed Free Conference CS for Senate CS for SS for HB 297 am S in a version imposing a 1975 half-year tax; testimony before Free Conference Committee presenting constitutional problems involved in HB 297's provisions relating to departmental procedure, judicial review, operator responsibility for paying another's tax, tax credit provisions, and the "SOHIO" Amendment; drafting of changes in above work draft copy desired by Free Conference Committee in consultation with John Messinger; conferring with various Senators, Representatives, and representatives of the Office of the Attorney General; consulting with Senators Croft and Huber on various problems in connection with the above; and preparation of various draft amendments for possible use by Senator Huber.

A. legal services from May 9 through May 29 - 157 hours at $60.00 per hour: $9420.00 - rendered at half-rate by special arrangement with Senator Croft $ 4710.00

AGO 513787

JOSEPH P. WITHERSPOON, S. J. D.
PROFESSOR OF LAW
313 TOWNES HALL 2500 RED RIVER
AUSTIN, TEXAS 78705

OFFICE AC 512 471-5151
RESIDENCE AC 512 452-1939

May 31, 1975

The Honorable John Huber
Senator and Chairman
Special Committee on Taxation and Revenue
Alaska State Legislature - Senate
Pouch V
Juneau, Alaska 99811

Dear John:

It was a real pleasure and challenge to work with you and Chancy again on the constitutional and drafting problems presented by the Senate and House bills for an ad valorem property tax on oil and gas reserves. When the tax bill is passed, I would greatly appreciate your sending me a copy of it.

I have enclosed my statement for legal services in connection with this last visit. The 157 professional hours spent in rendering these services have been billed at one-half of my usual rate of $60.00 or $30.00 per hour. Chancy and I discussed the matter of my fee on May 27 in light of the additional time that was required beyond May 22. This billing is within the guidelines he gave me.

Again, thank you very much for giving me this opportunity to serve the Alaska State Legislature again. Inevitably, these experiences enable me to bring many new insights to my students and legal scholarship. This last experience was especially rewarding in this respect.

Also, I want to thank you and your fine wife for having me to dinner in your Juneau home and for taking me out fishing with you. Believe me, I want to do some more fishing for salmon and like fish. It was great fun. I also enjoyed the trip around Douglas Island and the performance of your boat.

I will be leaving for Anchorage on June 4 in connection with a hearing for a bank charter for a bank sponsored by the Alaska Mutual Savings Bank which is to be held on June 9. This is the last lap of an effort extending over some ten months. My contribution has been concerned with administrative law and anti-trust law problems.

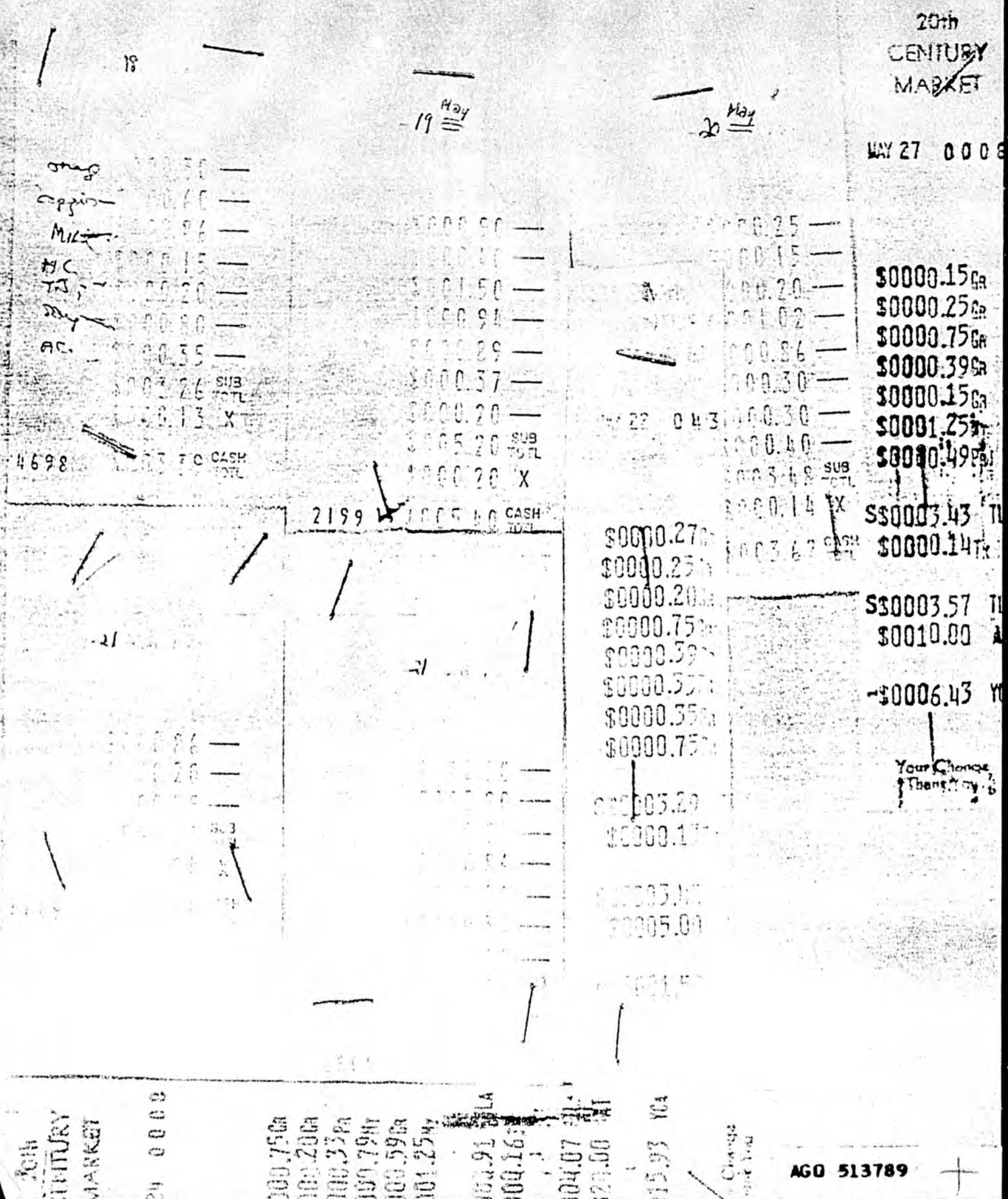
With best personal regards to you and your wife, I remain,

Sincerely,

Joseph P. Witherspoon

AGO 513788

Joseph P. Witherspoon — May 31, 1975 Statement to Senator Chancy Croft and Senator John Huber - Air Ticket, Hotel Statement, etc.



Joseph P. Witherspoon — May 31, 1975 Statement to Senator Chancy Croft and Senator John Huber - Air Ticket, Hotel Statement, etc.

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JOSEPH P WITHERSPOON JR

THE PROSPECTOR
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Joseph P. Witherspoon

May 31, 1975 Statement to Senator Chancy Croft and Senator John Huber - Air Ticket, Hotel Statement, etc.

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May 31, 1975 Statement to Senator Chancy Croft and Senator John Huber - Air Ticket, Hotel Statement, etc.

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FORM OF CREDIT: 4652 520 211 016 — EXP. DATE 10/75 — BAC — JOSEPH P WITHERSPOON JR

FARE: 425.52 TAX: 24.52 6.00 — TOTAL: 458.24 — SC 2.16

BRANIFF AIRWAYS, INCORPORATED — DALLAS, TEXAS U.S.A. — PASSENGER TICKET AND BAGGAGE CHECK — PASSENGER'S COUPON

NAME OF PASSENGER: Witherspoon/J. Mr.

CONJUNCTION TICKETS: 002-4300664563

DATE OF ISSUE: 14 MAY 75

002 4300 664 562 — AUS 7533 I387 CTO

X/O	NOT GOOD FOR PASSAGE	FARE BASIS	CARRIER	FLIGHT/CLASS	DATE	TIME	STATUS
FROM	Austin	Y	BN	19 Y	15 MAY	10	OK
TO	Dallas	Y	BN	15 Y	15 MAY	11	OK
TO	Seattle	Y	AS	17 Y	15 MAY	7	OK
TO	Tucson						

FARE CALCULATION: Aus Dal BN 22.76 Sea BN Tus AS 115.72 Sea AS Dal BN 115.72 Aus BN 2.76 SC 2.16

FARE: 425.56 — EQUIV. AMT. PD.: SC 2.16 — TAX 24.52 6.00 — TOTAL 458.24

FORM OF PAYMENT: 4652 520 211 016 — 10/75 BAC — JOSEPH P WITHERSPOON JR

IT IS UNLAWFUL TO PURCHASE OR RESELL THIS TICKET FROM/TO ANY ENTITY OTHER THAN BRANIFF AIRWAYS, INCORPORATED OR ITS AUTHORIZED AGENTS.

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FROM	Tucson	Y	AS	[illegible]	[illegible]	[illegible]	OK
TO	Seattle	Y	BN	[illegible]	[illegible]	[illegible]	OK
TO	Dallas	Y	BN	[illegible]	[illegible]	[illegible]	OK
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AGO 513793

May 25, 1975

TO: Senator John Huber, Chairman
Special Committee on Taxation & Revenue
Pouch V
Juneau, Alaska 99811

FROM: Joseph P. Witherspoon
Professor of Law
University of Texas School of Law
Austin, Texas 78705

SUBJECT: Present Importance of Exercising the State's Tax Function Relative to Prudhoe Bay Reserves of Oil and Gas

The purpose of this memorandum is to set forth certain considerations concerning, among other things, the present importance of the State's exercising tax function relative to Prudhoe Bay reserves of oil and gas.

1. Before the sale of oil and gas leases at Prudhoe Bay in 1969, the State of Alaska had available to it three distinct levels of governmental functions for dealing with the oil and gas underlying that state-owned area so as to maximize the return to the State and its people from the ownership, discovery, production, and transportation to ultimate markets of such minerals. These functions were:

(A) the sale of oil and gas leases in the Prudhoe Bay area pursuant to a State policy that would allow the State to realize upon the increase in value of State lands containing oil and gas following the initial sales and that would protect the State with respect to any manipulation of cost factors that would cause the amount of the royalties payable at the well-head upon production to be reduced.

(B) the leasing of State lands and control of leasing of private lands as right of way for private construction of a pipeline or State construction of a pipeline for transporting oil from the Prudhoe Bay area to the ultimate markets.

(C) the taxation of various traditional taxable interests relative to ownership and production of oil and gas in place; ownership of other property associated with exploration for and production, processing, and transportation to ultimate markets of oil and gas; and income from the foregoing activities.

2. Unfortunately, the full array of opportunities available at the first level of governmental functions relative to Prudhoe Bay oil in place were not utilized by the State and are no longer available to it. The State exercised its leasing function without reserving substantial portions of the designated area from leasing sales in checkerboard fashion so that the reserved land could be sold at subsequent sales at considerably higher prices than those paid in 1969 due to the greater knowledge later available concerning the existence of oil and gas under the land and other factors, such as inflation, that would tend to raise the price obtainable for such reserved lands. Since the land of the area was completely sold, neither may the State, instead of selling the remaining oil and gas leases, engage in its own developmental and production work on the remaining land. Nor did the State act to obtain, in addition to its reserved royalty, a substantial 50 per cent interest in the profits of the corporations which obtained production from the lands leased, as some of the Native groups have done. Unfortunately, also, the State failed to put numerous provisions into its oil and gas leases of Prudhoe Bay land similar to those incorporated subsequently into the original Alaska Pipeline Right-of-Way Leasing Act of 1972 that would have provided great protection to State interests. A primary example of such provisions would have been one relating to the maintenance of a reasonable level of tariffs charged by subsidiary pipeline companies of the producer/lessees since that level affects the amount of the State royalties payable upon production at the wellhead value.

3. The State in 1972 initially exercised its available government function at the second level by its passage of the Alaska Pipeline Right-of-Way Leasing Act (AS 38.35.10 - .260). This Act was designed not only to create substantial non-tax revenues for the State for the use of its lands by pipeline companies in transporting oil of producer/lessees in the Prudhoe Bay area to ultimate markets. It was also designed to bring back to the State important leverage that it failed to provide for in its original oil and gas leases as well as to create additional important forms of leverage. An example of the first kind of leverage was the provision in the Act permitting inclusion of the optional lease provision with respect to the lessee's maintaining a reasonable level of tariff charges on file with the Interstate Commerce Commission. Examples of the second kind of leverage provided by the Act were lease provisions required to be inserted into every lease concerning the pipeline companies' assumption of common carrier and common purchaser statuses; the sale to the State of up to a 20 per cent undivided interest in the pipeline; and the making of connections together with appropriate facilities for the purpose of making deliveries of crude oil or natural gas to a municipal area desiring such deliveries. The Act was also designed to provide the State with an excellent vehicle for negotiating from a strong position, in return for State reductions in the level of lease rentals, for various affirmative actions on the part of pipeline companies that would assist in the solution of numerous major State problems, such action to be provided for in lease provisions looking to Native hire, the expansion of existing pipelines, the construction of new pipelines, education and training for employees, and installation of facilities and inauguration of services that would make possible general economic growth in the State. This extraordinarily important Act providing the State with such valuable leverage for dealing with pipeline companies and, indirectly, with their parent producer companies in the solution of State problems was so changed in its content by the 1973 amendments thereto as to be of little value for achieving its original purposes.

4. As a result of the way the State exercised its leasing function relative to oil and gas in place in the Prudhoe Bay area in 1969 and as a result of

the 1973 amendments to its 1972 Alaska Pipeline Right-of-Way Leasing Act, the State now has only one of its three basic governmental functions left to exercise with respect to the oil and gas in place in the Prudhoe Bay area in order to achieve its reasonable goal of maximizing the return to the State and its people from the ownership, discovery, production and transportation to ultimate markets of the oil and gas in the original lease area at Prudhoe Bay. This is, of course, the State's taxing function. By a careful and thorough use of this third and only remaining function - so far as the oil and gas reserves in the Prudhoe Bay lease area are concerned - the State can generate revenue that it could have generated and could have continued to generate by optimum use of the first two functions as well as to realize the normal tax revenues to which it is entitled by the exercise of this function. Moreover, while the State cannot regain the leverage it has lost by the way it has exercised its first two governmental functions, it can generate revenue through which it can do itself what it could have required or negotiated for the producers and pipeline companies to do under appropriate leases and lease laws.

In this context, the ad valorem property tax on oil and gas in place has a special justification as a new and independent source of substantial tax revenues at this time. Not only is such a tax a usual, normal and prudent exercise of the State's tax function as proven by its wide use in other mineral producing states, but also, its use now can produce revenues for the State to replace the revenues that could have been produced by the reservation in checkerboard fashion of oil and gas lands in the lease area of Prudhoe Bay and their subsequent sale at increased prices as, for example, today when Alaska is in the midst of heavy inflation and a financial crunch. Its use today can produce revenues for the State to replace the revenues that would have been produced by the State having reserved, as Native groups have, a 50 per cent interest in the profits of the oil producing corporations. The oil companies who obtained the Prudhoe Bay oil and gas lands that should have been reserved by the State for later sale and who have profited by the increase in value in oil and gas in place since

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4. As a result of the way the State exercised its leasing function relative to oil and gas in place in the Prudhoe Bay area in 1969 and as a result of the 1973 amendments to its 1972 Alaska Pipeline Right-of-Way Leasing Act, the State now has only one of its three basic governmental functions left to exercise with respect to the oil and gas in place in the Prudhoe Bay area in order to achieve its reasonable goal of maximizing the return to the State and its people from the ownership, discovery, production and transportation to ultimate markets of the oil and gas in the original lease area at Prudhoe Bay. This is, of course, the State's taxing function. By a careful and thorough use of this third and only remaining function - so far as the oil and gas reserves in the Prudhoe Bay lease area are concerned - the State can generate revenue that it could have generated and could have continued to generate by optimum use of the first two functions as well as to realize the normal tax revenues to which it is entitled by the exercise of this function. Moreover, while the State cannot regain the leverage it has lost by the way it has exercised its first two governmental functions, it can

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> "(The ad valorem tax) is the clearest means of equating the tax burden on mines with that on other property. It provides state and local government more stable revenue than any other form of mine taxation, and it is less arbitrary than its rivals."
> H. Groves, Financing Government (1965) at page 347.

JOSEPH P. WITHERSPOON, S. J. D.
PROFESSOR OF LAW
313 TOWNES HALL 2500 RED RIVER
AUSTIN, TEXAS 78705

OFFICE AC 512 471-5151
RESIDENCE AC 512 452-1939

April 30, 1975

The Honorable John H. Huber
Senator
Alaska State Legislature - Senate
Pouch V
Juneau, Alaska 99801

Dear John:

Thank you for your letter of April 22. I certainly understand the matter of your authority. My indication that I was exploring further the matter of the owner versus operator responsibility was simply to inform you of the fact due to my own personal, professional interest in it. If I discover any pertinent material beyond what I have already examined in some depth, it will be my very great pleasure to send it to you purely on a pro bono basis.

Mrs. Robert Porter called me by long-distance telephone on March 18th, as I recall, to inform me that you wanted my advice on a matter concerning the University of Alaska that she had previously brought to your attention. She explained the matter at length during the course of an hour-long conversation. At my request she agreed to send me a letter giving more precise details since I explained that I felt I could not give sound advice on the basis of her oral presentation. She also asked me to contact her after I had read the letter if I had any further questions about the nature of the problem.

Because I was so very busy in March and throughout April both with my work with your Special Committee, my work with the U. S. Senate Subcommittee on Constitutional Amendments, and my work with Representatives Truan, Von Dohlen, and Tom Uher in drafting seven complex civil rights bills which came on for hearing before the House State Affairs and House Health and Welfare Committees of the Texas Legislature during the past two days, I simply did not get a chance until this evening to open Mrs. Porter's letter. When I saw the enclosed letter was addressed to you, although the envelope was addressed to me, I gathered that I had misunderstood Mrs. Porter. I regret that I have kept the letter this long, but my precise understanding of what Mrs. Porter wanted me to do was as I have stated it above. I have resealed the envelope without reading the letter and have enclosed the envelope with this letter. If I can be of any assistance to you on the matter, please feel free to call on me. I often assist legislators on a pro bono basis in Texas and various parts of the country and am happy to do so.

Thank you for the copies of your bill and Steve Cowper's latest one. Again, it was a great pleasure to work with you on the ad valorem tax bills. I will look forward to hearing the further developments concerning your bill.

It appears that I will be in Anchorage and Juneau the first week of June in connection with a project in the private sector that I have been handling in my private practice since the latter part of 1974. I hope to be able to spend some extra time in Alaska on this occasion and certainly would look forward to seeing you if that would be possible and convenient after my work is done.

Please give my regards to Mrs. Huber. Currently, I have learned the avocation of grafting pecan trees both by the inlay graft and patch bud graft methods. It is a great thing and I thoroughly enjoy the work. I have some property in the country where I have planted a goodly number of grafted pecan trees. Now I am converting native pecan trees into the grafted papershell varieties. I also have a few head of Black Angus Cattle and Suffolk Sheep. Last year I built a tank or pond of some size and stocked it with both bass and catfish. Now I am able to catch fish of good size in the tank. I also have four dogs. They thoroughly enjoy getting out in the country too.

With best regards to you and to Chancy, I remain,

Sincerely,

Joseph P. Witherspoon