MINERAL RIGHTS; SECTION 6(1) STATEHOOD ACT

Alaska State Legislature

House of Representatives

Committee on Resources

Terry Gardiner, Co-Chairman
Fred F. Zharoff, Co-Chairman
465-3715

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: Co-Chairmen
Fred Zharoff TJ.
Terry Gardiner

FROM: Council to House Resources Committee
John Sund

DATE: March 4, 1981

RE: Mineral Rights; Section 6(i) Statehood Act

The following is a summary of the issues regarding the hearing on March 10, 1981.

The matter is approached on two levels:

1. Whether the interpretation placed placed on Section 6(i) of the Alaska Statehood Act from statehood until present has been the [redacted] It is a legal discussion between the lawyers representing each interest group. In this case the [redacted] and the [redacted].

2. The effect on the Alaska Minning industry both the present situation and the future situation IF the Attorney General's draft opinion is adopted in it's present or near present form. [redacted]?

It is important to understand the two levels of discussion. Some of the people will be [redacted] regarding the [redacted] of Section 6(i) and [redacted] will be [redacted] regarding the [redacted] of [redacted] system.

It is not within the purview or the power of the Legislature or the Committee to decide whether or not the Attorney General will publish an opinion regarding the interpretation of Section 6(i) of the Alaska Statehood Act. Although, the [redacted] could [redacted] its [redacted] and [redacted] on what the ultimate solution could be, [redacted] the issue.

If the interpretation of Section 6(i) is changed by the Executive it is incumbant upon the [redacted] to undertake certain actions both in the [redacted] and [redacted] means to alleviate the [redacted] of the [redacted].

The existing practice up to this date is outlined in the draft Attorney General's opinion. After passage of the Statehood Act the state officials interpreted the [redacted] as applying only to [redacted] where the [redacted] had been disposed. Thus, the usual mining rights contingent on discovering appropriation would apply on State public domain lands the same as they apply on federal public domain lands within Alaska. As long as the State did not issue a patent of the land it was not required to reserve the mineral rights in the lands and subject them to a lease. The only time the State would be required to reserve the mineral deposits of such lands as when the State conveyed the surface rights to a second party.

The draft Attorney General's [redacted] concludes that the [redacted] of Section 6(i) is [redacted]. The draft Attorney General's opinion concludes that all of the mineral deposits in the Section 6(a)or(b) lands may only be disposed of by a lease. The conclusions of the draft Attorney General's opinion are attached.

PRACTICAL CONSIDERATIONS

Some of the [redacted] which must be [redacted] by the [redacted] and the Legislature regarding this issue are as follows:

1.0 [redacted] from the [redacted] system to a [redacted] system. If the leasing systmem is adopted with an immediate effective date and applied to all 6(a) or 6(b) lands the effect is the closure of all mineral operations on those lands until the operators of the mines obtain a lease from the State. The State at the present time is not prepared from a man-power or financial point of view to issue those leases immediately.

2.0 [redacted] and [redacted] of the leases. Alaska statutes [redacted] AS38.05.285 outline a mineral leasing process and very broad guidelines. Whether those guidelines are sufficient to implement a leasing system needs to be discussed.

3.0 [redacted]. Whether there should be any royalties imposed upon the extraction of the mineral resources of the State and if so how much and whether they should apply to all minerals or whether [redacted] should be [redacted] from the [redacted] provision.

4.0 Public notice. The Constitution, Article VIII, Section 10 requires that public notice be given prior to any disposal or lease or state lands or interest therein. The issue is whether the present system of claim staking location and recovery is a disposal of the states mineral interest in the land and if recording of that claim staking in the State recording office is adequate public notice. Secondly, whether there must be prior public notice given and if so what type of notice would be sufficient for the issuance of a lease for the mineral interest in the State lands.

5.0 Method of determing lessees. Should the leases of mineral interest in State lands be competitive or noncompetitive. If noncompetitive, what process should be adopted to allow the person to apply for a noncompetitive lease. If competitive, who is intitled to compete and on what terms.

Attached to this memorandum are the following documents:

1.0 Section 6(i) Alaska Statehood Act
2.0 Article VIII of the Alaska State Constitution
3.0 AS 38.05.185-.205
4.0 draft of the Attorney General's opinion dated 2/11/81

Statehood Act

Act of March 25, 1964, Pub. L. No. 88-289, 78 Stat. 169, substituted "ten years" for "five years" in the first sentence.

(6)

(i) All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express conditions 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, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

Mineral land grants.

(j) The schools and colleges provided for in this Act shall forever remain under the exclusive control of the State, or its governmental subdivisions, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university.

Schools and colleges.

(k) Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission. Effective upon the admission of the State of Alaska into the Union, section 1 of the Act of March 4, 1915 (38 Stat. 1214; 48 U. S. C., sec. 353), as amended, and the last sentence of section 35 of the Act of February 25, 1920 (41 Stat. 450; 30 U. S. C., sec. 191), as amended, are repealed and all lands therein reserved under the provisions of section 1 as of the date of this Act shall, upon the admission of said State into the Union, be granted to said State for the purposes for which they were reserved; but such repeal shall not affect any outstanding lease, permit, license, or contract issued under said section 1, as amended, or any rights or powers with respect to such lease, permit, license, or contract, and shall not affect the disposition of the proceeds or income derived prior to such repeal from any lands reserved under said section 1, as amended, or derived thereafter from any disposition of the reserved lands or an interest therein made prior to such repeal.

Confirmation of grants.

Repeals.

Cross reference.—See note to AS 38.05.180.

Proviso as to grants of school and university lands and mental health lands.—The grants by the federal government of school and university lands and mental health lands were confirmed and transferred to the State of Alaska upon its
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States thereunder.

Alaska's ownership of same as other states.—By section, Alaska was given ownership of tidelands beneath navigable waters states of the Union. Sta Indus., Inc., Sup. Ct. Op (File No. 477), 397 P.2d 2 City of Juneau v. Croplet Op. No. 415 (File No. 752 21 (1967).

SEC. 7. Upon enactr
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Art. VIII Min. Const.

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.

Special Purpose Sites

SECTION 7. 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.

Leases

SECTION 8. 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.

Sales and Grants

SECTION 9. 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.

Public Notice

SECTION 10. 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.

Mineral Rights

SECTION 11. 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.

Mineral Leases and Permits

SECTION 12. 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.

Water Rights

SECTION 13. 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

SLA 1961.

Sec. 38.05.205. Mining leasing. (a) Prior discovery, location and filing shall initiate prior rights to mineral deposits subject to §§ 185 — 280

of this chapter in or on state lands, other than submerged lands, which are open to mining leasing. Locations shall be made and certificates of location recorded in accordance with § 195 of this chapter. If the located lands are available only for leasing, an application form for a mining lease shall be mailed to the locator by the director upon request or upon receipt of notice that the location has been made on lands open only for leasing. A lease application shall be filed with the director by the locator within 90 days after receipt of the form. If the located lands are not available for leasing, notice shall be given the locator by the director and his prior rights shall terminate. A mining lessee has the exclusive rights of possession and extraction of all minerals subject to §§ 185 — 280 of this chapter lying within the boundaries of his lease. Mining leases may be issued for one location or for a group of contiguous locations held in common. Minerals may not be mined and marketed or used until a lease is issued, except for limited amounts necessary for sampling or testing.

(b) Beginning on the date established by the commissioner under § 210 of this chapter there shall accrue an annual rental for each leasehold location or portion thereof whether or not under lease, not less than the value of annual labor improvements required for mining claims. The value of work done on, or for the benefit of, the leasehold in compliance with § 210 of this chapter may be credited against the rental.

(c) A mining lease shall be for any period up to 55 years, and the lessee has a right to a new lease at the end of each lease period. The commissioner may make reasonable adjustments of the rental rate at the end of each 20 year period, based upon changed conditions in production costs and markets. A valid mining claim located and held under § 195 of this chapter may be converted to a lease at any time upon application by the owner, and issuance by the director. No rights granted by a mining lease may be exercised until the lease has been filed for record in the recording district where the land is located. (§ 4 art IX ch 169 SLA 1959; am § 1 ch 123 SLA 1961)

Cited in Moore v. State, Sup. Ct. Op. No. 1284 (File Nos. 2551, 2587), 553 P.2d 8 (1976).

Am. Jur. reference. — 36 Am. Jur., Mines and Minerals, §§ 39 to 62, 139 to 142.

Sec. 38.05.210. Annual labor. Labor shall be performed or improvements made annually on or for the benefit or development of each mining claim on state land except that where adjacent claims are held in common, the expenditure may be made on any one claim. The commissioner shall establish the date of the commencement of the year during which the labor or improvements are to be performed. Labor shall be performed at the annual rate of $200 per claim. If more work is performed than is required by this section to be performed in any one year, the excess work up to a value of $800 may be applied against labor required to be done during the subsequent year or years. Sections 240

consider the matters set forth in AS 38.05.305(d) when the leasehold is in an unorganized borough.

IV CONCLUSION

Therefore, for the reasons stated in this opinion, we conclude that

1. the state may not issue a patent to mineral interests in 6(a) or 6(b) lands;

2. the state may only dispose of mineral deposits in 6(a) and 6(b) lands by lease;

3. the constitutionally preferred method is non-competitive leasing based on discovery and location;

4. the annual labor requirements do not apply to locations leading to a lease;

5. a location is valid if it follows either the federal, AS 27, or state, AS 38.05.185 - 280, procedures;

6. a location made after selection but prior to tentative approval is outside state law and at the locator's risk;

7. a location made after state selection but before tentative approval will be recognized by the state upon receipt of tentative approval, subject to: (1) cancellation of tentative approval, (2) eventual receipt of patent, and (3) possible closure of the lands to mining upon receipt of tentative approval; and

8. public notice under AS 38.05.305 and AS 38.05.345 must be given prior to issuing a mineral lease.

MEMORANDUM

TO: All Legislators

FROM: Rep. Terry Gardiner
Rep. Fred Zharoff
Co-Chairmen, House Resources Committee

DATE: March 4, 1981

RE: Mineral Rights; Implication of the Draft Attorney General's opinion of 2/11/81

The House Resources Committee will be holding a hearing on March 10, 1981 from 3-5 PM in Court Room A, in Juneau, Alaska for the purposes of taking testimony on the Mineral Leasing Rights issue as it may be affected by the draft Attorney General's opinion of February 11, 1981.

Testimony will be taken from the Attorney General's office and the Department of Natural Resources. Time permiting, public testimony from members both in the audience in Juneau and from teleconference sites will be taken. The teleconferencing will include all Alaska sites for both listening and participation. The participation from the teleconference sites outside of Juneau will be taken on a time available basis. The Co-Chairmen of the Committee, Rep. Gardiner and Rep. Zharoff will announce the order in which each station can testify. If time does not permit to take all the testimony, written testimony will be accepted by the Committee and if necessary a future hearing will be scheduled. Because of the limited amount of time available please be as concise as possible.

The general issue in question is the accurate interpretation of the Section 6(i) of the Alaska Statehood Act as it applies to the location and rights in mineral interests on lands which the State of Alaska has received as a part of its Statehood Act rights. Specifically, lands under the Alaska Statehood Act Section 6(a) or (b).

Documents which may be helpful in following the discussion are:

1.0 Alaska Statehood Act, Section 6(i)
2.0 Alaska State Constitution, Article VIII
3.0 Alaska Statutes, AS 38.15.185-.205
4.0 Draft Attorney General's Opinion 2/11/81 regarding Section 6(i)

DRAFT

2/11/81

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I. INTRODUCTION AND SUMMARY

On November 9, 1979, the Director of Planning and Research of your department sent an extensive opinion request to our office. The request concerned various problems surrounding mining claims located during the period between state selection of lands under Sections 6(a) and 6(b) of the Alaska Statehood Act and the receipt of tentative approval to those lands. In order to answer the questions raised, this opinion necessarily had to be broadened to include a discussion of mining on all lands, and particularly a discussion of the provisions of Sections 6(a), 6(b), 6(g) and 6(i) of the Statehood Act ("6(a), 6(b), 6(g), and 6(i)").

In general, the state does not have authority, and will not incur liability for, actions of persons locating mineral claims on state-selected land prior to the receipt of tentative approval. Those problems are concerns of federal law, although augmented by the provisions of AS 27 (procedures allowed by federal law to be added by states or mining districts). Under federal law, once the state selects land it is segregated from mineral entry under the federal mining laws. Consequently, a locator on state-selected land locates a mineral claim at his own risk.

Once the state has received tentative approval, however, mining rights are determined by state law under AS 38.05.185-.280 except as limited by restrictions contained in either the Alaska Statehood Act or the Alaska Constitution. The most important restrictions are contained in 6(i), which provides that the state must reserve minerals in all sales or disposals of state-selected (6(a) and 6(b)) lands, and that the state may only allow mineral deposits in state-selected lands to be mined by lease. As a result, the state may not allow mining by claim-staking on 6(a) and 6(b) lands unless the claim-staking leads to the issuance of a lease. The only exception is claims located prior to state selection of the land. In all other cases, the state must issue leases for mining if it determines that a discovery and location under federal or state law has been made on state-selected lands.

The Alaska Constitution and present statutes provide for a leasing system based upon discovery and location. Alaska Constitution Art. VIII sec. 11; AS 38.05.210. As a result, non-competitive leasing of mineral lands is constitutionally preferred.

This leasing system must be followed for all 6(a) and (b) lands. A lease must be issued to anyone discovering

or locating a claim on 6(a) and (b) land if the locator followed the procedure set forth either in AS 27 (federal procedure) or AS 38.05.185 280/ (state procedure). AS 38.05.275, AS 38.05.210. Public notice of the issuance of a lease under AS 38.05.305 and AS 38.05.345 must be given before the mining lease is issued. Discovery and location, however, is not a "disposal" requiring prior public notice under either the constitution, AS 38.05.305, or AS 38.05.345 Cf. Moore v. State, 553 P.2d 8, 26-27 (Alaska 1976).

Under 6(a) and (b), if the claim was made prior to state selection of the land, neither the selection, tentative approval, nor patent has any effect on the claim. The locator is entitled to all rights under federal mining laws.

Where the location is made after state-selection but before tentative approval, the locator is at his own risk until the state receives tentative approval. Once the state receives tentative approval, however, the locator will be entitled to a conditional mineral lease if the state does not close the lands to mining. 6(g), AS 38.05.275, AS 38.05.185. The conditional lease will be subject to state receipt of a patent and conditions in the patent.

In finding that a mineral lease is required for all 6(a) and (b) lands, this opinion is taking a position contrary to an interpretation used by state officials since statehood. That prior interpretation, which was never the subject of an Attorney General's opinion or memorandum, was that the leasing requirement applied only to lands where the state had previously sold the surface interest. Art IX, sec. 1, ch. 169, SLA 1959; 11 AAC 86.135(b).

Because this opinion has potential far-reaching consequences for state disposals of its mineral interests, and because it is at odds with the assumptions of many persons over the past 20 years, a proposed opinion was publically released in draft form on August 18, 1980. Additional research since that draft, and some of the comments received, have resulted in alteration of some of the conclusions in that draft -- primarly concerning the status of mineral locations and the ability of the state to close lands to mining upon receipt of tentative approval. The conclusion regarding the necessity for leasing 6(a) and (b) lands, however, remains unchanged.

The interpretation of 6(i), and its impact on the mining provision of the Alaska Constitution, Art. VIII, sec. 11, is intimately tied to historic federal mining practices

and other states' enabling act land grants. Section 6(i) was copied from a provision of the School Lands Act, presently codified at 43 U.S.C. 870(b). As a result, the history of the School Lands Act, the various statehood bills, and Art. VIII, sec. 11 of the Alaska Constitution is crucial to the resolution of the questions raised and is presented in detail at the beginning of the opinion.

II. HISTORY OF MINING PROVISIONS IN ALASKA STATEHOOD ACT AND ALASKA CONSTITUTION

A. PRIOR FEDERAL PRACTICE

Congress withheld "mineral lands" from other statehood land grants so they could be managed under the federal mining laws. */ The School Lands Act of 1927, 43 U.S.C. 870(b), was the direct result of extensive litigation caused by the problem of determining which lands were "mineral" in character. One question was the effect of a subsequent discovery of minerals in lands considered "non-mineral" at the time of the original grant. A series of cases culminating in Wyoming v. United States, 255 U.S. 489 (1921), developed the rule that the only lands not conveyed were lands known to be mineral at the time equitable title vested in the state,

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*/ See, United States v. Sweet, 245 U.S. 563 (1918). The only exception was the enabling legislation for Oklahoma, Oklahoma Enabling Act of June 16, 1916, 34 Stat. 267, 273, which included mineral lands within the grant, but mandated disposal of mineral lands by a statutory lease until a specified date.

and that subsequent discovery of minerals would not void the original transfer. This ruling did not solve all problems; there were still disputes concerning whether the lands were known to contain minerals at the time of the transfer. Even six years after Wyoming v. United States, there were

> hundreds of school sections now in contest under proceedings brought by the Federal Government and hundreds more being prepared for contest. Nor is the situation improving. It is, in fact, rapidly becoming worse, and the end is not in sight, unless it be the end of the states' school fund.

Report of Senate Committee on Public Lands and Surveys, April 16, 1926, Senate Report No. 603, Sixty-ninth Congress, first session, at page 5.

> Mineral lands, as a rule, are excepted from these grants, and in case school-section lands are of known mineral character at the time the grant would otherwise become effective, such lands remain the property of the United States. This has resulted in much vexious and costly litigation, as there is no statute of limitation which prevents inquiry at any time, either by way of Government proceedings or by private contest or protest, as to whether or not the title to school-section land has vested in a State.
>
> * * *

> In the absence of some provision by which the known condition of the specified sections, at the time when the grant takes effect, can be ascertained and adjudicated, the title of the State must remain in doubt and be subject to attack. A case in point is that of United States v. Sweet (245 U.S. 563), wherein the State sold school-section land under a grant (act of July 16, 1894, 28 Stat. 107), which does not expressly exclude or include mineral lands. The land sold, however, was of known mineral character at the time the grant would otherwise have attached. The court denied the claim of title based on the transfer by the State.

Letter from Secretary of Interior to the Honorable Robert Stanfield, Chairman of Senate Committee on Public Lands and Surveys, January 5, 1926, quoted in Senate Report No. 603, supra, at page 12 (emphasis added).

Congress resolved the problem by granting mineral rights in numbered sections to the states. In granting the minerals to the states, however, Congress expressly provided that all of the minerals so granted must be reserved to the state and could only be disposed of by lease. The 1927 Act provided, in part:

> The additional grant made by this section is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine,

> and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support of or in aid of the common or public schools: Provided, that any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

The mineral reservation and leasing requirement in this section were intended to apply to all lands transferred. House Committee on Public Lands Report on S. 564, House Report No. 1761, 69th Congress, 2nd session (January 13, 1927). As the Secretary of Interior noted, in withdrawing his opposition to a previous form of the bill (Report of the House Committee on Public Lands, December 9, 1926, House Report No. 1617, 69th Congress, Second Session):

> You will note that it grants to the States title to the minerals in school sections in place; that is, in the specific numbered sections in each township granted the States for the support of or in aid of common or public schools by Congress. The grant is on the express condition that the States shall not sell any minerals but shall lease the same, the proceeds to be utilized for the support or in aid of common or public schools, provision being made for forfeiture in the event conditions are violated.

House Report No. 1761, supra, at 2 (emphasis added).

As the Committee reported, the bill required the States

> to reserve and to withhold unto themselves all minerals of whatsoever character, in any and all lands which they shall hereafter transfer or sell, giving to them, however, the right to lease the minerals in the lands and to utilize the proceeds received as rentals or royalties for the benefit of their common or public schools.

House Report No. 1761, supra, at 3 (emphasis added). One of the primary reasons for this approach was to secure the maximum amount of principal for state school funds:

> It should, also, be borne in mind that only the interest from the funds which a State received from the sale, lease, or rental of these lands or the minerals therein can be expended, that is to say the principal can not be used. This for the reason that Congress saw fit in passing the enabling acts of the various States provided therein that the funds derived from the sale, lease or rental of these school lands should be invested to form a principal permanent fund the interest only of which might be used for the benefit of the common and public schools or other State institutions as the case may be. Thus, it will be noted that under this plan it is necessary for a State to accumulate a principal fund of some considerable amount in order to realize sufficient interest to be of benefit to its common-school system and

> to result in the reduction of taxation for school purposes. Having this in mind, your committee fully realizes the difficulties under which these States are forced to labor and therefore reached the conclusion that their cause was a meritorious one and the Congress could well afford to adopt a beneficent attitude toward them in view of the end desired to be accomplished. It also prevents valuable mineral lands from falling into the hands of third parties, thereby insuring the proper return and full measure or support to the particular institution to which the lands were granted.

Report of the House Committee of Public Lands, December 9, 1926, House Report No. 1617, 69th Congress, Second Session (emphasis added).

Congress passed the 1927 Act in order to lay to rest disputes as to whether lands were known to be mineral at the time of transfer. The passage of the 1927 amendment still did not cure the problems. The Act of May 2, 1932, c. 57, § 1, 44 Stat. 1026 was a piece of curative legislation designed to ratify prior state sales of mineral lands. But title disputes still occurred because a state received its land under two grants separated by some period of time: the original statehood grant (non-mineral lands) and the 1927 grant (mineral lands).

The title disputes still arose because of transfers of the original grant lands prior to 1927, either by the United States to third parties, or by states to third parties under the assumption that the lands were non-mineral in character. The mineral or non-mineral character of the lands determined whether the state or federal government owned the land after the original statehood grant, or whether a state first had authority to transfer the land in 1927. Therefore, the need to determine the character of lands was not laid to rest. As a result, Congress passed legislation providing for the issuance of patents to states. (Previously, no patents were issued and title transferred solely under the legislation). The enactment was the Act of June 21, 1934, c. 689, 48 Stat. 1185, codified as 43 U.S.C. 871(a) */, which provided for the issuance of patents as a mechanism for clearing title and finally determining mineral character:

> The Secretary of the Interior shall upon the application by a State cause patents to be issued to the numbered school sections in place, granted for the support of common schools by the Act approved February 22, 1889 [25 Stat. 676], by the Act approved

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*/ Repealed effective October 21, 1976, Act October 21, 1976, P.L. 94-579, § 705(a), 90 Stat. 2792.

> January 25, 1927 (44 Stat. 1026) [§§ 870, 871 of this title], and by any other Act of Congress, that have been surveyed, or may hereafter be surveyed, and to which title has vested or may hereafter vest in the grantee States, and which have not been reconveyed to the United States or exchanged with the United States for other lands. Such patents shall show the date when title vested in the State and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any. In all inquiries as to the character of the land for which patent is sought the fact shall be determined as of the date when the State's title attached.

(Brackets in original.)

The purpose and history of all of the school land acts and amendments was a memorandum accompanying a letter from the Secretary of the Interior to Senator Gerald P. Nye, Chairman of the Senate Committee on Public Lands and Surveys:

> S. 4674 proposes to authorize the Secretary of the Interior to issue patents to school sections 16 and 36, granted to the States by the act approved February 22, 1889, by the act approved January 25, 1927 (44 Stat. 1026), and by any other act of Congress, to which title has vested in the grantee States, and which have not been reconveyed to the United States or exchanged with the United States for other lands.

The act approved February 22, 1889 (25 Stat. 676), provided for the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, and provided for the grant to said States of sections 16 and 36 in each township for the use of schools.

Mineral lands, as a rule, were excepted from the original grants to the States of certain specified sections for the use of schools. By the act of January 25, 1927 (44 Stat. 1026), as amended by Public Law No. 110, approved May 2, 1932, these grants to the States of certain sections of land for school purposes were extended to embrace such sections that were of mineral character, with certain exceptions as therein provided.

There has been no provision of law whereby the States may be given evidence of title to such school section lands, either by United States Patent or other formal instrument of conveyance, the statute making the grant operating as a conveyance as well, with respect to lands of the character and status subject to the grant.

The need of legislation along the lines proposed by the bill under consideration is manifest, in order to do away with the uncertainty of title in and to these school section lands. It might appear that the grant of mineral lands made by the act of January 25, 1927, would do away with this uncertainty of title to a great extent, but this is not the case, inasmuch as it is necessary to ascertain the character of the land at the date when title would otherwise attach, in order to know whether or not title vested in the State under the grant of nonmineral lands made by the original granting act, or under the grant of mineral lands made by the act of January 25, 1927.

The bill under consideration provides that the patents issued shall show the date when title vested in the State, and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, ...

Quoted in S. Rep. No. 1104, 72nd Cong. 2nd Sess. accompanying S. 4674 (January 21, 1933) at pp. 2-3. See also, S. Rep. No. 903, 73rd Cong., 2nd Sess; H. Rep. No. 1796, 73rd Cong., 2d Sess. (1933).

After United States v. Sweet, then, mineral lands were excluded from statehood grants unless they were expressly included by the grant or by later legislation. That later legislation for lower-48 states occurred with the passage of the School Lands Act. That Act, as amended, provided that all conveyances of numbered sections in place for the support of public schools included mineral as well as non-mineral lands. Because of the later grant of the minerals in the lands to the states, however, subsequent amendments and the issuance of patents were required in order to eliminate remaining title disputes covered by transfers of land to third parties between the original statehood grant and the 1927 Act.

In granting the mineral interest to the states, Congress required that the states observe certain conditions in administering these lands, generally: (1) that the states must reserve the mineral interest from any disposition of title to the lands, and (2) that the mineral deposits were to be leased with the income to be utilized for public school purposes.

B. MINING PROVISIONS IN 1950-1956 VERSIONS OF ALASKA ENABLING ACTS.

The School Lands Act, however, would not have automatically applied to the then future state of Alaska. The legislation expressly stated that it applied only to grants of numbered school sections in place. But the eventual 6(a) and 6(b) grant was unprecedented not only in its size, but also in Alaska's right to select lands. All prior statehood grants had been "in place" grants consisting of specific numbered sections with indemnity selection rights which could be exercised only when the numbered sections were unavailable. In addition to some other land grants, Alaska also received the right to select statehood lands -- a so-called "quantity grant" - out of the federal public domain. Therefore the School Lands Act would not apply to the 6(a) and (b) grants. Also, the School Lands Act expressly excluded "all lands in the Territory of Alaska." Therefore, the Alaska Statehood Act land grants had to expressly convey mineral interests.

The original proposal offering this unprecedented quantity grant also contained an unusual provision for transfering the mineral interest to the state. Originally section 5(b), HB. 331, 81st Congress, Committee Print A, Senate Committee on Interior and Insular Affairs, May 23, 1950) (presented by Senators Anderson and O'Mahoney), the

provision as reported out by the full committee (on June 29, 1950) read,

> After five years from the Admission of Alaska into the Union, the State, in addition to any other grants made in this section, shall be entitled to select not to exceed twenty million acres from the vacant, unappropriated, and unreserved public lands in the State. Such selections shall be made in reasonably compact tracts: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, rightof-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied. Where the lands desired are unsurveyed at the time of selection, the Secretary of the Interior shall survey the exterior boundaries of the area requested without any subdivision thereof and shall issue a patent for such selected area in terms of the exterior boundary survey. Such lands may be granted or sold by the State in tracts of not more than 640 acres for any purpose, but with a reservation to the State of a royalty of not more than 12 1/2 per centum on all minerals produced therefrom. The lands granted to the State of Alaska pursuant to this subsection, the income therefrom and the proceeds thereof when said lands are sold, shall be held by said State as a public trust for the support of the public schools and other public educational institutions.

(Emphasis added.)

H.R. 331 passed the House on March 3, 1950 and was reported to the Senate on June 29, 1950, but no further action was taken. Identical language appeared in the next congress in § 5(b) of S. 50, 82nd Congress (May 8, 1951). S.50 was recommitted to committee on February 27, 1952, and died.

Although similar to School Lands Act in that the proceeds were earmarked for school funds, the rest of the provision is unusual both in its allowance of sales of mineral interests and in its mandating of some reserved royalty interest. This provision was added in the senate during executive session, and no official history of this language is available. */

In the 83rd Congress, however, the Senate Interior and Insular Affairs Committee adopted -- essentially verbatim -- the School Lands Act provision (now contained in 43 U.S.C. 870(b)) with a patent provision similar to the 193[illegible] Act:

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*/ The only documentation available to our knowledge is an October 6, 1955, memorandum from Mrs. Margery Smith, Assistant Secretary to Delegate Bob Bartlett to Bob Bartlett, which attempted to recreate this provision's history. This memorandum indicates that the genesis of the provision was Senator O'Mahoney's (one of its presenters) aversion to the idea that the surface owner of the land would have no control over the state's leasing of the mineral deposits.

> The grants of mineral lands to the State of Alaska under subsection (b) and (c) of this section 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, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: Provided, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for Alaska. For the purposes of this Act the mineral character of lands granted to the State of Alaska shall be determined at the time patent issues and the patent shall be conclusive evidence thereof.

S. 50, 83rd Cong., 2nd Sess., reported as of February 24, 1954 as the substitute bill of the Senate Committee on Interior and Insular Affairs, S. Rept. 1028 (emphasis added). */

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*/ In the following year (the first session of the 84th Congress), the statehood bill was reintroduced in the Senate, with the mineral alienation condition, as S. 49. Its counterpart in the House, H.R. 2535, also contained the new provision. The 1954 provision contained an introductory sentence concerning existing leases or contracts that was later deleted.

The committee report on S. 50 stated:

> Subsection (k) provides that all grants made or confirmed under the act shall include mineral deposits. Thus, the fact that the lands desired by the State are known or believed to be valuable for minerals will not preclude the State from exercising its right of selection with respect to them under the several grants. However, in order to give an added measure of protection to the new State government, which inevitably will be inexperienced and untried, the committee amendment provides for certain restrictions upon the disposition by the State of mineral lands which it may select under the 100-million acre grant provided in subsection (b) or the 2,440,000-acre grant made in subsection (c). The restrictions are that the State must retain title to all the minerals in these lands, whenever any of them are sold or granted. The State may dispose of the minerals in these lands only by lease in such manner as the State legislature may direct. The Attorney General is authorized to take appropriate proceedings for forfeiture of any of the lands granted to the State which are disposed of contrary to these restrictions. In making the above provision, the committee has followed the practice prevalent in a number of mining States -- a practice that has stood the test of time and experience. The language of the provision is adapted from section 1 of the act of January 25, 1927 (44 Stat. 1026), in which the 69th Congress made similar provision for the protection of mineral school lands. It should be noted, however, that the committee has limited the application of these restrictions to lands that are determined to be mineral in character at the time they are patented to the State.

S. Rep. No. 1028, 83rd Cong. 2d Sess. (1954) (emphasis added).

The 1954 version basically transferred the system and restrictions of the School Lands system wholesale to the statehood act by combining the transfer of mineral interest and patent provisions in one section. Unlike the 1950 and 1952 provisions, this version did distinguish between mineral and non-mineral lands by limiting the restriction only to lands known to be mineral at the time of patent. The patent itself was to be the conclusive evidence of the nature of the lands.

This provision survived intact, except for substituting "this subsection" for "this Act," to the 1955 session, when it was introduced as S. 50 and HR. 185.

The final sentence concerning issuance of patent to the lands, however, was deleted by the House. Report of the Committee on Interior and Insular Affairs, H. Rep. No. 88, 84th Cong., 1st Sess. 3 (1955) ("H. Rep. No. 88"). The reason for the deletion was because the Governor of Alaska and the Lands Commission did not want the mineral character of the land to be determined at the time of transfer:

> MR. BARTLETT: On page 38, beginning on line 20, delete the remainder of the subsection following the period appearing after the word "Alaska."
>
> That amendment is offered at the suggestion of the Governor of Alaska and the Land Commissioner (sic) of Alaska. They were some-

what apprehensive about the rapidity with which lands would move to the new State if the requirement remained in that the mineral character of all the land would have to be determined in advance. And the rights of the United States, the attorneys tell me, are adequately protected in the foregoing part of that subsection.

THE CHAIRMAN. The amendment is to strike, on page 38, on line 20, the following sentence:

> For the purposes of this subsection the mineral character of lands granted to the State of Alaska shall be determined at the time patent issues and the patent shall be conclusive evidence thereof.

Is it your view, Mr. Bartlett, that language is surplusage and is not necessary?

MR. BARTLETT. I do not think it is surplusage, but I will agree with the Governor and Commissioner of Lands of Alaska (sic), that it had best be deleted.

THE CHAIRMAN. Is there any objection to the amendment? If there is no objection, the amendment will be adopted and the language referred to will be striken and it is so ordered.

Hearings before the House Committee on Interior and Insular Affairs on Hawaii-Alaska Statehood, 84th Cong., 1st Sess. 332 (Feb. 15, 1955) (emphasis added).

As a result, the language restricting the application of the leasing requirement to lands known to be mineral in

character at the time of patent was deleted. Consequently, House Report 88 recognized that the leasing and mineral reservation requirement attached to all 6(a) and (b) lands.

> Subsection 6(j) [now 6(i)] provides that all grants to the State under the act include mineral deposits and requires that all State conveyances of lands granted by sub-sections 6(a) and 6(b) (selected lands) shall be subject to a reservation in favor of the State of all minerals and the right to remove the same. Such mineral deposits can be leased by the State as the legislature directs, but disposition of lands or minerals in any other manner will result in forfeiture of such lands or minerals to the United States.

H Rep. No. 88, supra. (emphasis added). The 6(i) language remained unchanged through the passage of the Statehood Act.

On November 7, 1955, Herbert Slaughter, Chief, Branch of Reference, Division of Legislation, Office of the Solicitor, Department of the Interior, summarized the history and purpose of the 6(i) provision for Delegate Bartlett ["Slaughter memorandum"]. He concluded:

> These earlier proposals, it will be noted, differ in a number of respects from the restrictions contained in the bills now pending. In particular, the current language expressly calls upon Alaska to adopt a mineral leasing system, while the earlier versions permitted the mineral deposits to be disposed of along with the surface,

provided a royalty interest was reserved by the State. On the other hand, the current language does not attempt to prescribe maximum or minimum rates of royalty as did the earlier versions, but appears to leave the terms of leasing wholly to the discretion of the State legislature. From a practical standpoint, this second difference may be more important than the first, since if the Alaska legislature is left, as H. R. 2535 and S. 49 now intend to provide, with the untrammelled right to frame its own mineral leasing laws, it can, if it so chooses, establish priorities that will tend to keep the surface and mineral rights in the same hands and can, in general, fit the provisions of its mineral leasing system to whatever may be its concepts of the public interest. */

C. ALASKA CONSTITUTIONAL CONVENTION AND ARTICLE VIII SECTION 11 - 1955-1956.

In spite of the flexibility pointed out by Mr. Slaughter, the prospect of a mandatory leasing system for state-selected lands was vehemently opposed by the Alaska miners and others. The mining provision caused great concern among the delegates to the convention.

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*/ Emphasis added. Mr. Slaughter's memorandum was apparently made part of the record of the Constitutional Convention, and is now located in the Legislative Reference Library files on the constitutional convention in File 180/210 "Constitutional Convention, Department of Interior - Mineral Lands Provision of Alaska Statehood Bill."

Committee members, as well as others who testified before the committee, were extremely concerned about these restrictions. Under Congressional laws then governing federal lands, patents to mining claims (i.e. fee ownership) could be obtained upon proving a valid mineral discovery. While this practice would be continued on federal lands in Alaska, the state could dispose of minerals by lease only. Most of those interested in mining development objected to these limitations. Bartlett explained that congressional policy has changed over recent decades and that chances of eliminating the alienation restriction from statehood enabling legislation were slight. This explanation, backed by other evidence provided the committee, led to the addition to the section on mineral leasing of a provision that:

> 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.

In part, this provision was inserted in the hope that Congress might recede from its restriction. On the other hand, delegates who concurred in the policy limiting permanent disposal of minerals went along with the proposal because they assumed Congress would stand firm. Most also saw the provision as a demonstration to miners, who might otherwise object to the constitution, that any restrictions applicable to alienation of mineral lands were being imposed from outside and were not the convention's doing. */

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*/ V. Fischer, Alaska's Constitutional Convention, University of Alaska Press, 1975, at 134.

The depth of feeling is indicated by the comments of Delegate White in discussing a proposed constitutional provision which stated,

> All provisions of the act admitting Alaska to the Union, which reserve rights or powers to the United States, as well as those prescribing the terms and conditions of the grants of lands or other property made to Alaska, are consented to fully by the State of Alaska and its people.

In the course of the debate over this provision, 4 Alaska Constitutional Convention Minutes ["ACCH"] 1955-1956 at 3050-3063, Mr. White observed:

> Now in the current statehood enabling act there is a provision that the state must retain title to all its minerals. Those of us here may or may not like that provision. We may or may not agree that it is going to be there whether we like it or not. I will be the first one to agree that there appears to be very little chance of ever getting that changed, but I would also like to point out that, of all the matters contained in the enabling act, that is far and away the most unpopular among the people of Alaska and not necessarily just among the mining industry. It is unpopular among the homesteaders, the man in the street, and everyone I have talked to, and I think that for us to sit here and deliberately, in writing, accede to that and cut the ground out from under individual Alaskans or groups of Alaskans who hope to go to Congress and try and get that changed, would be folly of the highest order.

Id., at 3063.

The delegate proposal which formed the basis of the existing constitutional provision, was dated December 12, 1955, and read as follows:

> 11 (Creation of Mineral Rights). Discovery and filing of application shall be prerequisite to the creation of a right in the minerals reserved to the State; except that prospecting permits giving exclusive right of exploration for specified periods and areas may be provided for in the explorations for oil, gas, coal, non-metalliferous metals customarily subject to exclusive exploration, and for the use of geophysical methods of prospecting. Prior discovery and filing shall in any event give prior right to such minerals and to issuance of permits, licenses or leaseholds for exploration thereof. Continuance of such right shall depend upon the beneficial use.

A revised proposed Sec. 11 made the following changes:

> 11. (Creation of Mineral Rights). Discovery and appropriation . . . and for the use of geophysical and geochemical methods of prospecting. Prior discovery and appropriation . . . licenses, leaseholds or patents if authorized by Congress for the extraction thereof. . . . Patents for mineral rights, if generally authorized by the Congress, shall be limited to those surface uses necessary to the extraction of mineral resources and until such time as the mineral deposits are exhausted. Known deposits of minerals shall be subject to lease without recognition of preferential right of discovery.

The section as introduced on the floor of the Constitutional Convention dated December 16, 1955, read as follows:

> 11. (Creation of Mineral rights). Discovery and appropriation shall be the basis for establishing a right in those minerals heretofore subject to location under the Federal Mining Laws and now reserved to the State. Prior discovery and filing shall give prior right to such minerals and to issuance of permits, licenses, leaseholds, or patents if authorized by the Congress, for the extraction thereof. Continuance of such right shall depend upon beneficial use as prescribed by laws.

Prospecting permits giving exclusive right for exploration for specific periods and areas may be provided for exploration conducted for coal, oil, gas, oil shale, sodium, phosphate, potash, sulphur and other Mineral Leasing Act minerals and for the use of geophysical, geochemical and similar methods of prospecting for all minerals. Issuance, type and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulphyr and other Mineral Leasing Act minerals shall be as provided by law.

Surface uses of the land shall be limited to those uses necessary to the extraction of the mineral deposits, and the continuance of such right shall depend upon beneficial use as prescribed by law.

The commentary which accompanied the above proposal explained the sections as follows:

Sec. 9. Sales and grants must have a reservation of minerals because of the Enabling Bill. "Such minerals", subject to lease in conformity with H. R. 2535 of the 84th Congress.

Sec. 11. This section recognizes the establishment of mining rights as applied to a system of leaseholds or limited patents. "Appropriation involves both location and filing". Mineral Leasing Act is the exception to the above. This is the reason for making exceptions of these non-metallic minerals and for the newer forms of geophysical and geochemical prospecting. Otherwise, the right of an ordinary prospector to search for mineral deposits is fully recognized and he is recognized as having a preferential right to the appropriate permit license or lease for the extraction of these mineral deposits. Lands will be available for construction of mining works, disposition of waste and for timber necessary to mine construction.

Section 9 is the present Art. VIII, Sec. 9, which provides in part "All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State . . . ."

It was in this form that the proposal went to the floor of the convention. In discussing a related provision concerning the issuance of prospecting permits (now Article VIII, section 12), the following exchange occurred between Mr. Barr and Mr. Riley, chairman of the resource committee:

> BARR: Mr. President, before that's submitted, I would like to know -- since the mineral rights are reserved to the state, if a man stakes out a placer mine for gold, what kind of permit is he going to have for production? Wouldn't that be a lease on gold? In that case you wouldn't want to put that amendment in there, you'd want to include all minerals.
>
> RILEY: Well, minerals such as you speak of, which are subject to discovery and location, are covered in the first portions of Section 13, where we have endeavored to retain all of the federal nomenclature as we know it now in the federal mining law.
>
> BARR: Then he could get a patent on his claim, then?
>
> RILEY: He could if Congress will allow.
>
> BARR: I see. Well, I didn't know, I thought perhaps the state would want to give him a lease in a case like that. I have no objection then.
>
> RILEY: In effect, it would probably amount to a lease, or to a very limited patent.

Of course, the then current drafts of the enabling act prevented patent from issuing, and the framers of the state constitution could only hope that Congress would change course. This intent to follow the historic federal scheme of discovery, location and patent if Congress would refrain from imposing a leasing system survived to the final version of this constitutional provision, which provides:

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.

D. ALASKA STATEHOOD ACT - 1957-1958

With the constitution allowing flexibility to adopt the historic federal system, the focus shifted back to congress to change the congressionally imposed leasing requirement. This attempt was lead by the Alaska Miners Association represented by Glen Franklin. Mr. Franklin's March 15, 1957, testimony before the House Sub-committee on Territorial and Insular Affairs is the only detailed discussion of the 6(i) provisions in the official committee records.

Mr. Franklin began his testimony with the miner's opposition to the required leasing of mineral deposits in all state lands:

> Following is the statement of the Alaska Miners Association relative to mandatory leasing of mineral rights on all lands reserved to the new State of Alaska.
>
> * * * * *
>
> We believe that the well-intended actions contained in the enabling legislation will have an adverse effect and that mandatory leasing of mineral rights by the new State of Alaska under the conditions imposed would irreparably damage the development of Alaska's mineral resources. As a result, it would for many years reduce tax receipts and other State revenue from the mineral industry.
>
> * * * * *
>
> We believe that the Legislature of the State of Alaska should be allowed to determine the disposition of the mineral rights on all State lands except those specifically reserved for schools. Thus they could offer additional incentive to encourage the settlement of State land and the development of its resources by making it available for maximum use consistent with the public interest.
>
> We should like to point out that even under the present simple and time-honored system of discovery and location, the mineral industry in Alaska has declined, rather than advanced, in the last decade.
>
> The several bills introduced to date in the 85th Congress have in common that Alaska is entitled to select, within 25 years after admission, 103,350,000 acres of land.

> All land so claimed shall have the mineral deposits reserved to the State and it shall be mandatory that the State lease the mineral rights; forfeiture of rights could result if disposed of contrary to the provisions in the bills.

Hearings before the House Subcommittee on Territorial and Insular Affairs of the Committee on Interior and Insular Affairs on Statehood for Alaska, 85th Cong., 1st Sess., 216-217 (March 15, 1957) ("Hearings"). Mr. Franklin urged that "[d]isposition of mineral rights on state claimed lands should be left to the discretion of the State legislature in conformity with provisions concerning this subject in the State constitution." Hearings at 220.

At one point, the committee engaged in an extensive discussion with Mr. Franklin concerning possible modifications of the proposed section. The modification would distinguish between lands that were known or believed to be valuable for minerals and lands not believed to be valuable for minerals as a basis for deciding which lands had to be leased and which lands could be transferred by patent or allowed to be mined by claim-staking:

> MR. ASPINALL. Now, do I understand that if Alaska is given statehood and 100-plus million acres of land or more or less are set aside for the use of the State, you wish the lands to be so transferred to the new State of Alaska, so that the State of Alaska can issue patents for mining claims rather than by leasing procedures as provided under the Leasing Act of 1920; is that correct?

MR. FRANKLIN. I should like the State of Alaska to be enabled or allowed to dispose of those lands or mineral rights under the form of leasing by sale or other method, as long as adequate compensation has been received, but not relegated only to leasing.

Hearings at 221.

The Mineral Leasing Act of 1920 had one procedure for lands known or believed to be capable of containing commercial quantities of minerals ("competitive leasing"), and another procedure for other areas ("non-competitive leasing"). */ The committee returned to this question later:

MR. ABBOTT. But you then say or imply that you could outline a 50 million or 60 million acre area in the new State of Alaska which would be known to be mineralized or prospectively valuable for minerals.

Is that not the effect of your statement?

MR. FRANKLIN. Yes, sir.

MR. ABBOTT. And in a sense you are objecting to a mineral leasing provision alone, are you not?

MR. FRANKLIN. Yes; mandatory leasing alone.

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*/ For oil and gas, the requirements differed depending on whether the lands covered a "known geologic structure of a producing oil and gas field."

MR. ABBOTT. Mandatory leasing. But you are familiar with the history of both the mining law and the Mineral Leasing Act of 1920, and the differences?

It is true, is it not, that the mining law envisages and to this day provides for a patent system based on exploration, discovery, and the posting of a location, compliance with the local recording laws, doing annual assessment work, and thereafter going to patent?

MR. FRANKLIN. Yes.

MR. ABBOTT. That prior to 1920 on oil and gas lands on the public domain there was a patent system. Is that correct?

MR. FRANKLIN. I am not familiar with oil and gas at all.

MR. ABBOTT. Well, I think the committee members will understand that that was the history. With the enactment of the 1920 Mineral Leasing Act, Congress said that in areas within known geologic structures producing oil and gas in paying quantities, and, as interpreted from language in the act, prospectively valuable, the United States agencies would be limited to issuing leases, not patents but leases.

MR. FRANKLIN. This was on oil and gas?

MR. ABBOTT. That is on oil and gas. But the measure was "areas known to be valuable." And here you have made the statement that 50 to 60 million acres are known to be valuable or prospectively valuable for mineral development. Would you see any value in the committee considering, in light of the provisions in the bill, what persuaded Congress to enact the 1920 act, where the basis and measure was; Are they known to be valuable for minerals? You yourself have made the statement that these areas are known to be valuable for or are in any case prospectively valuable for minerals.

The previous enabling acts have done very much the same thing that is suggested here for Alaska, with the one possible exception to which you point, and that is your interpretation that until the detailed survey was completed you would not achieve title. You are not saying that you could not achieve rights under or for entry prior to survey, are you?

MR. FRANKLIN. Yes. We contend that the claiming by the State will automatically eliminate any use of that land until the survey is made, because there is no clarifying language.

MR. ABBOTT. Well, how do you account, Mr. Franklin, for the fact that these lands have not been entered and located if they are known to be valuable for minerals? Are you saying that it is known that these 50 or 60 million acres are known to be valuable for minerals, and yet no one has gone out under the mining law and staked out a location and made a claim?

MR. FRANKLIN. I say that they have potential value. I intended that, whether I said it or not. But we are looking at this thing from the standpoint of a couple of hundred years at least. And what lies there under the soil is still yet to be discovered.

I personnally have great faith in the development of Alaska's mining and mineral resources.

MR. ABBOTT. But Mr. Franklin, do you not think that the people in your industry in Alaska and the people who would succeed to the position of or actually complement the position of the Bureau of Mines and Bureau of Land Management in Alaska today, would act just the way they do in the 11 public land States of the West under the oil and gas leasing provisions? A person comes into the controlling agency, the Bureau of Land Management, and says, "We

are filing an application on lands believed to be valuable by reason of seismic surveys, or in any case, geologic and geophysical prospecting." And with the interest shown in those lands, the lands are classified by the Bureau of Land Management. Pretty much the same thing would be done in Alaska if interest were expressed in a given area; would it not?

MR. FRANKLIN. Well, why not, let the decision as to how to dispose of those lands rest with the State legislature rather than qualifying the enabling legislation so that they have no other choice.

I feel quite sure that the land division, or whatever is ultimately set up, will probably go along the lines of leasing. But if, in their discretion, the State legislature should feel that it might be of more advantage to have some other system, why not let us do it that way? Because we understand our local problems much better, I understand, than they can be understood from here at this point, because we are looking ahead so far.

* * * * *

MR. ABBOTT. To boil it down, if Congress is going to put a provision in for disposal of these minerals, you believe that it should include provisions for patent or sale?

MR. FRANKLIN. Yes sir.

MR. ABBOTT. And do I read you position correctly that you would prefer that it be left to the State?

MR. FRANKLIN. Yes, sir.

MR. PILLON. I wonder if the counsel could clear up one point for me. In the event that a claim were made by the State of Alaska to a territory of say 500 square miles, and we were awaiting the surveys to be made pending the turning over of these lands to the State of Alaska, would the Federal Government be in a position at that time to grant the right to explore for minerals, to work for minerals, or would that claim automatically stop the Federal Government from further issuance of any mineral rights?

MR. ABBOTT. Well, I believe the language makes it clear, Mr. Pillon, that as of the date of selection -- and as I read the act there is no such thing as tentative selection or tentative segregation for possible selection; the new State would either have to elect to select this 500 square miles, or it would continue to be open as vacant, unappropriated, unreserved public domain to the Mineral Leasing Act entry and mining law entry. From the moment of selection, not unlike our present system, I assume that Alaska's laws will have provided for an entry system, a request for classification, as it now stands under mineral leasing.

If Mr. Franklin's recommendations were to be followed, then I assume that if the selection had been made, then as of the date of selection entry could be made for patent or leasing, and provision might be made for both; that if the Territory determined that the area was not known to be valuable for minerals -- or the State, I should say -- then provision would be made for the patent entry, that is, entry looking to patent based upon discovery.

> If, however, the geological experts in the State government determined it to be prospectively valuable, it might well be that you would have a mineral leasing approach, just as we do under the 1920 Mineral Leasing Act.
>
> MR. PILLON. Does that clarify it? It does not to me, because it is too involved. I just cannot follow it.

Hearings at 223-226 (emphasis added).

Under Mr. Abbott's understanding of Mr. Franklin's proposed change, lands not classified or known as being valuable for minerals could go to patent; that suggestion was not followed. Mr. Franklin's efforts to delete the mandatory leasing requirements were in vain: 6(i) remained unchanged.

Mr. Franklin was successful, however in making another suggestion. He advocated for the inclusion of an express provision allowing the state to dispose of lands prior to the issuance of patents. This further suggestion was part of the discussion quoted above. Earlier, Mr. Franklin suggested adding a provision to the statehood act similar to that in the Alaska Mental Health Act, which would provide "Following the selection of lands . . . but prior to the issuance of final patent, the territory shall be authorized to lease and to make conditional sales of such selected lands." Hearings at 225. Since patent would not issue until perimeter surveys were made, and surveys in Alaska could take years, the ability to acquire mining rights might be uncertain without an express provision giving the state authority to allowing mining prior to receipt of patent.

But in the final provision, the ability of the state to conditionally lease mineral deposits was changed from the time of selection to the time of tentative approval. 6(g) now reads, in pertinent part:

> Following the selection of lands by the state and the tentative approval of such selection by the secretary or his designee, but prior to the issuance of final patent, the state is hereby authorized to execute conditional leases and to make conditional sales of such selected lands.

When House bill 7999 (the statehood bill) reached the floor of the house, there was extensive debate on its merits. Besides the concern about the ability of the state to raise necessary revenues, there was apprehension that the federal government was giving away valuable minerals to the state and that the state would not responsibly deal with its lands. For example, on May 27, 1958, the following exchange took place between Representative O'Neill of Massachusetts and Representative O'Brien of New York:

> Mr. O'NEILL . . . There is another group in the House that is not so benevolent as the first group. They want to give away only 101 million acres of land and the property which belongs to the people of the United States. The gentleman from Texas is rather miserly in his thoughts; he wants to give them only 21 million acres.
>
> If there is ever going to be another Yazoo land scandal, if we are going to make the biggest giveaway in the history of this Nation, let us start with only 21 million acres. Please, let us not go hogwild completely.

Personally I am in opposition to the bill. I am going to vote against it regardless of what amendment is adopted because I honestly believe that the minerals up there, the fishing rights, the great forests up there belong to all the people of America. I do not think we have any right to delegate to a handful of people in a legislature in Alaska the authority to give away property that belongs to the people of America.

MR. O'BRIEN of New York. Mr. Chairman, will the gentleman yield?

Mr. O'NEILL. I yield.

Mr. O'BRIEN of New York. Is the gentleman aware that the State of Alaska would get only 400,000 acres of all the tremendous forest lands up there, the rest being reserved by the United States?

Mr. O'NEILL. I have read the bill. I know that it said that they have a period of 25 or 50 years in which to go in and pick out lots of 5,000 acres each.

Mr. O'BRIEN of New York. Except the forests.

Mr. O'NEILL. The gentleman knows and I know that for the next 25 years those people who are up there after having made surveys are not going to take up the useless property. They are going to pick out the best property.

Mr. O'BRIEN of New York. Is the gentleman familiar with the Teapot Dome scandal when the leasing was done under the Federal Government and not the State government?

Mr. O'NEILL Certainly I am familiar with that. But I think in writing a bill such as this and knowing what happened in connection with Teapot Dome and the leasing up there and knowing about the Yazoo scandal and the leasing and the sales made at that time the committee should have written some safeguards into a bill of this type.

Mr. O'BRIEN of New York. Does the gentleman know that the State of Alaska may not sell a single foot of mineral land but may only lease it?

Mr. O'NEILL Yes, I have read the bill.

Congressional Record, Vol. 104, p. 9610 (May 27, 1958). See also, Congressional Record, Vol. 104 at 9341, 9344-9345, 9361 (May 22, 1958) and id. at 9504 (May 26, 1958).

In response to criticisms of the bill, and particularly about including mineral deposits in the transfer of over 100 million acres of land, Delegate Bartlett addressed the House on May 26, 1958, Congressional Rec d, Vol. 104, at pp 9514-9516. In the course of these remarks he stated:

> Now, let us turn to the proposition of mineral grants. H.R. 7999 proposes that the minerals as well as the surface should be turned over to the State of Alaska in the land transfers. From what has been said and written around here one might believe that this is the crime of the century. Let us have a look at this situation. It deserves one. Alaska is not, as we all know, basically dependent upon agriculture. This despite the fact that Government experts who have surveyed its agriculture potentials estimate that 65,000 square miles---41,600,000 acres--are suitable for crop production and for cultivation and in addition another 35,000 square miles---22,400,000 acres--are suitable for grazing. Development of these lands will come. But, very frankly, I do not believe that the time will ever arrive when agriculture products from Alaska will be in direct competition with those from what are now in the 48 States. Further, I contend there is nothing wrong with that. This is all to the good. It serves to strengthen the economy of our whole Nation. The gentleman from New York (Mr. O'Brien) suggested in his opening speech that in a comparatively

few years after statehood Alaska will have 10 million people. I hope he is right. In any case, Alaska will have many more people than it now has and will be raising much more of the food it consumes than it now does. But always, as I see it, there will be a need for importation of foodstuffs. They will be paid for by exportation of our natural resources, raw or refined. And that will be mutually advantageous.

Right now the fact is that the subsurface values, generally speaking, are more valuable than the surface values. Alaska has always been a mining country and there is a very strong possibility that the great mining booms of the past will fade into insignificance when matched against what we believe is the coming oil boom.

The situation now is that generally speaking a citizen may go upon public domain land in Alaska--federally owned land that is--and locate a mining claim to which he may, if he so desires, obtain fee simple title. He might find the richest gold mine in the world and become its absolute owner. And, parenthetically, as far as I am concerned that is perfectly all right. It is in accordance with American free enterprise and ownership of property. Oil and gas lands may not, of course, be owned outright. They may only be leased from the Federal Government under the Mineral Leasing Act of 1920. The Alaska statehood bill is much more stringent than Federal laws. It provides that the State may never sell mineral rights. It may only lease them. This provision was inserted with the thought and hope that future citizens of the State of Alaska would continue to derive benefits from the utilization of these minerals through a leasing system. The people of Alaska are mindful of the trust reposed in the constitution for the state-to-be a resource article which meets every test

which might be applied to it. Already their legislature has enacted what is now chapter 184 Session Laws of Alaska, 1957, legislation creating a Department of Lands and establishing the ground rules under which it will operate. I feel confident that any fair-minded persons devoted to the principles of conservation will applaud that law.

If it has not already been said it will be said, undoubtedly, that the policy of granting mineral rights to a new State departs from tradition and from precedent. It is true that most of the Western States were given the surface of the land only. But any such statement would not be literally true. The Oklahoma Enabling Act was so phrased as to give that State its minerals. The Republic was not shattered by what was done there and I for one have never heard that Oklahoma is to be reprimanded and castigated for its management of these minerals instead of having them exclusively under the jurisdiction of Washington which I maintain is in contradiction to States rights.

There is another element which ought to be considered here. A material change in the attitude of the Congress toward the granting of mineral lands to the States came about in 1928 (sic). A bill then enacted and signed into law provided in effect that all grants to the States of numbered sections in place for the support of public schools should encompass sections mineral in character equally with sections nonmineral. That represented more modern thinking on this subject and influenced, or so I believe, the committees which over these many years have been considering Alaska statehood legislation.

Id., at 9515 (emphasis added).

The House passed H.R. 7999 on May 28, 1958, with the Senate approval coming on June 30, 1958. The Statehood Act, P.L. 85-508, 72 Stat. 339 became effective July 7, 1958, and with subsequent voter approval and Presidential declaration, Alaska became a state on January 3, 1959.

III. DISCUSSION OF LEGAL QUESTIONS RAISED

A. THE 6(i) LEASING REQUIREMENT APPLIES TO ALL STATE-SELECTED (6(a) AND (b)) LANDS

1. State officials were incorrect in believing the leasing requirement applied only when the state had sold or disposed of the surface interest.

After the passage of the Statehood Act, state (then territorial) officials interpreted the leasing restrictions as applying only to lands where the surface interest had been disposed. On April 4, 1959, for example, Phil R. Holdsworth, then holdover territorial commissioner of mines and soon to become the state's first commissioner of natural resources, offered what was to become the state position.

Section 6(i) of Public Law 508 entitled Mineral Land Grants makes the following statement: "All grants made or confirmed under this Act shall include mineral deposits." This section goes on to say that whenever the State of Alaska sells, grants, deeds, or patents any of the mineral lands so granted, conveyances will "....contain a reservation to to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same." From this it can be seen that lands selected by the State and which are not conveyed to a second party may be considered State public domain land. The present interpretation of Section 6(i) of Public Law 508 infers that the usual mining rights contingent upon discovery and appropriation will apply on State public domain lands the same as they presently apply on Federal public domain lands within Alaska. The major difference in the case of State lands is that the owner of an unpatented mining claim will not come to the State for a patent to that claim. Such action would compel the State to reserve the minerals in that land to the State or its lessee. Mineral deposits which have been reserved to the State in the conveyance of lands as described above "shall be subject to lease by the State as the State Legislature may direct." This concept closely parallels the policies of Public Law 167 which segregates the surface rights from subsurface mineral rights.

Presentation to the Fourth Annual Mining, Mineral and Petroleum Conference, Anchorage, Alaska, April 4, 1959.

This "inference" was included in the first Alaska Lands Act, 1959 Alaska Session Laws, art. IX, ch. 169:

> Section 1. Discovery and Appropriation Rights. Except as herein provided, all minerals which are subject to location under the mining laws of the United States, and the mineral lands in which they are contained, shall be subject to discovery, appropriation and location under the provisions of Sections 47-3-9 through 47-3-93, ACLA 1949, as amended. In the case of tide and submerged lands, and acquired lands known to contain such minerals, or lands which have been sold, granted, deeded, or patented reserving such minerals to Alaska, the right to mine and remove such minerals may be acquired only by lease on such terms and conditions as may be recommended by the Director and approved by the Commissioner.

This approach has been consistently adhered to since statehood, and is presently seen in the regulations - 11 AAC 86.135(b)

We are of the opinion that, although longstanding, this interpretation of 6(i) is incorrect. A long standing contemporaneous state interpretation of a federal statute is of little weight */; here it is particularly suspect given the intense and adverse state feelings about the 6(i) restrictions. Although the state officials recognized that they could not issue a patent that included the subsurface estate, they apparently attempted to restrict the application of the leasing language to as narrow an interpretation as possible. Although their goals may have been laudable, the attempt to retain the federal claim-staking system on state lands was precluded by 6(i).

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*/ See, generally, 2A Sutherland Statutory Construction, 4th ed., §49.05 at pp. 238. 238-249.

At no time prior to the passage of 6(i) and the Statehood Act was this interpretation offered or discussed. On the contrary, as Mr. Franklin's testimony shows and as the committee reports state, the 6(i) restriction was understood as applying to all mineral lands.

The state officials' position rests upon distinguishing between a "patent" system and a "claim-staking" system; namely, that the 6(i) restriction only applied to prevent a patent from issuing to mineral lands, not to claim-staking. Congress, under this view, only intended leasing to apply to lands where the surface was held by others with permanent rights.

But this application of the 6(i) restriction would result in a system practically identical to the federal "patent" system. Under the federal system, the only land open to claim-staking was unoccupied land, where no one else held superior rights. See, e.g., Rancher's Exploration and Development Co. v. Anaconda Co., 248 F. Supp. 708,714 (D. Utah 1965). Even under the federal system, therefore claim-staking was restricted to areas where no one had a prior permanent surface interest.

Second, merely preventing patent does little, both pratically and legally, to change the federal mining

scheme. The rights conveyed by discovery and location gave, for all practical purposes, rights identical to those conveyed by patent. As the United States Supreme Court stated:

> The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. Belk v. Meagher, 104 U.S. 279, 283; Manuel v. Wulff, 152 U.S. 505, 510-511; Elder v. Wood, 208 U. S. 226, 232 Bradford v. Morrison, 212 U.S. 389. The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent.

Wilber v. United States ex rel. Kershnic, 208 U.S. 306, 316-317 (1930) (emphasis added).

But the purpose of the 6(i) restriction was to impose significantly stricter controls over mineral disposal than under the federal scheme. As Delegate Bartlett stated in the Congressional floor debate, "The Alaska statehood bill is much more stringent than federal laws. It provides that the State may never sell mineral rights. It may only lease them" 104 Congressional Record at 9515 (May 26, 1958).

The purpose of the leasing system was to provide continuing state control of minerals, to provide revenue for the state through rental or royalties, and to prevent minerals from being "given away" to third parties. A loophole as large as the one offered by early state officials is antithetical to that purpose.

Therefore, we believe that the approach offered by state officials in 1959 was not contemplated by anyone prior to the passage of the Statehood Act. The history of the 6(i) provision, the School Lands Act, the committee reports, and the expressed purposes of the provisions lead us to the conclusion that the leasing requirement applies to all mineral lands, whether or not the state has previously disposed of the surface interest.

2. "Mineral lands" as used in 6(i) means all 6(a) and (b) lands valuable for minerals, no matter when the mineral character may become known

In our opinion, a closer question is whether the term "mineral lands" in 6(i) restricts the leasing and mineral reservation provisions to only certain, but not all, 6(a) and 6(b) lands. 6(i) states in part:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express condition that [the minerals be reserved] . . . . Mineral deposits in such lands shall be subject to lease . . . .

Although state administrators never took this position, an argument could be made that the 6(i) restriction applies only to "mineral lands" as that term was applied by case law to pre-1927 land transfers; namely, land which was known or expected to contain minerals at the time of transfer. If this question was being answered for Federal/State transfers in 1926, under the case law at that time, we would be of the opinion that that interpretation of "mineral lands" would be appropriate.

But in the context of the School Lands Act and the Statehood Act, we believe that the leasing requirement, and the requirement that minerals be reserved in any sale, applies to 6(a) and 6(b) lands whether or not they are known or believed to contain minerals at the time of their transfer to the state.

Under the case law applicable to statehood grants enacted before the School Lands Act, "mineral lands" meant lands that were known or believed to be valuable at the time that the state had performed all actions required for it to be entitled to the statutory grant. This application is a judicial rule foreclosing inquiry, and is based upon congressional intent and the desire to avoid inequitable and unforeseeable title disputes. The rule was explained in Wyoming v. United States, supra;

> [The grantees were not] at liberty to select lands which were then known to contain minerals. Congress did not intend to grant any mines or mineral lands . . . . We say "lands then known to contain mineral," for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. . . . The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title, when it passed, should pass absolutely, and not contigently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, preemption, or town site entries, the law excludes mineral lands, but it was never doubted that the title, once passed, was free from all conditions of subsequent discoveries of mineral.

255 U.S.at 499. (Quoting from Shaw v. Kellog, 170 U.S. 312, 332-333 (1898)) The court went on to describe how this general rule applied to state selections prior to the School Lands Act.

> The Land Department uniformly has ruled that the states acquire a vested right in all school sections in place which are not otherwise appropriated, and not known to be mineral, at the time they are identified by the survey, --- or at the date of the grant, where the survey precedes it, --- regardless of when the matter becomes a subject of inquiry and decision, and that this right is not defeated or affected by a subsequent mineral discovery.

255 U.S. at 500.

This rule prevents inquiry into whether the land was known to be mineral in nature after a certain date. The purpose of this rule was to prevent the grantor from subsequently attempting to recover lands which were thought to be unconditionally transferred. It also was applied only where the land which was transferred was not known to be mineral in character at the time of the transfer.

But we question whether the rule is applicable where the transfer of title does not depend upon a distinction between mineral and non-mineral land, where the rule is not necessary in order for title to be unaffected by subsequent discovery of minerals, and where the inquiry would be meaningless in terms of the question of ownership between the federal government and the state. Instead, the purpose of determining the mineral nature of the land is entirely different under the 6(i) provision --- it is to determine how

the state may deal with its resources in a disposal of the property after title has passed from the federal government to the state. The purpose of the restriction was to promote state control over the mineral deposits, not to foreclose state ownership.

In addition the rule was based, in part, on the rationale that Congress could not have intended that title be transferred upon the condition that there would be no subsequent discovery of minerals. But the School Lands Act and the 6(i) grant, in part, were meant to eliminate the problems caused by distinguishing between lands known to be valuable for minerals and other lands. These problems were solved by granting the mineral interest to the states. There is no reason, and we do not believe that Congress intended, to apply the rule to restrictions on the state's subsequent handling of the land. To impose the rule would shift the very problem the legislation was intended to solve from the point of federal/state transfer to the state/third party transfer. For if the rule were to apply, then a third party's title would be challengable at any time on the basis that the land was known to be mineral at the time of transfer from the federal government to the state.

We see no reason, and do not believe Congress intended, to apply the rule restricting the application of the term "mineral lands" in a totally different context and in a manner that would create the very problems the legislation that the parent of the 6(i) provision (the School Land Act) was supposed to prevent. A similarly narrow application of the term "mineral lands" was deleted from earlier versions of the Statehood Act at the request of territorial officials (although for arguably different reason), and we are of the opinion that it should not be implied. */

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*/ As was stated, we do believe that the question is close and that a legimate and reasonable argument can be made to the contrary. In fact, the state has argued the above definition of "mineral lands" in a prior case. See Brief of Appellant State of Alaska in State v. Lewis, Supreme Court No. 3039 at 40-46 (filed August 16, 1976). The Supreme Court did not reach the issue in its decision. State v. Lewis, 559 P.2d 630 (Alaska 1977) appeal dismissed, 432 U.S. 901 (1977). In addition to the arguments presented therein, additional support can be gleaned from Senate Report 1163, 85th Congress, 1st session (August 29, 1957, page 2) and one of the drafts of Art. VIII, sec. 11 of the Alaska constitution. And, the original 6(i) draft also intended that a mineral/non-mineral distinction based upon known character at the time of transfer be applied.

But in reviewing the entire history, the expressed purposes of the legislation, and the purpose of the rule foreclosing inquiry into its known nature after transfer, we believe that the better view is the one explained in the text.

B. THE LEASING SYSTEM SET FORTH IN AS 38.05.185 - 280 IS CONSTITUTIONAL AND APPLIES TO ALL 6(a) AND 6(b) LANDS

Section 6(i) left the choice of a leasing system to the state legislature. As Mr. Slaughter of the Department of the Interior stated,

> The Alaska legislature is left . . . with the untrammelled right to frame its own mineral leasing laws; it can, if it so chooses, establish priorities that will tend to keep the surface and mineral right in the same hands and can, in general, fit the provisions of its mineral leasing system to whatever may be its concept of the public interest.

Slaughter memorandum, supra, at 10.

Acquisition and retention of mineral rights in Alaska lands are governed by the Alaska Land Act at AS 38.05.185 - 280. These statutes apply to rights in "locatable minerals", or, more specifically, "minerals which on January 3, 1959, were subject to location under the mining laws of the United States." These minerals include metal ores (gold, silver, and the like), and high-value non-metallic minerals such as asbestos, high purity limestones, building stone, magnesite, and silica sand. These are to be distinguished from what are traditionally termed "leasible minerals," which include oil, natural gas, oil shale, asphalt, bitumen, coal, phospate, sodium, potassium, and, by state statute, sulfur. Whether or not found on 6(a) or 6(b) lands, these "leasable" minerals can only be acquired by lease. AS 38.05.135-181.

For "locatable" minerals, the statutes set up two basic methods to acquire the right to extract and sell the minerals, each of which applies to different categories of state lands. One method is the staking of a mining claim under AS 38.05.195. That statute provides for claim-staking on lands open to mineral location and rights are acquired simply by a valid discovery, location, and filing. Once a proper filing has been made, and so long as there is compliance with the annual requirements of labor or improvements, the locator immediately gains "the exclusive right of possession and extraction of all minerals lying within the boundaries of his claim." AS 38.05.195.

Another method is to acquire a lease under AS 38.05.205. A valid mining claim on lands open to claim-staking must be converted to a lease upon request of the locator. AS 38.05.205(c). On lands which are not open to claim-staking, an applicant must still discover, locate and file. On these lands, however, a valid filing only "initiates prior rights." After the director is notified, he must send the locator an application for a lease, which must then be filed by the claimant within 90 days. Only after executing the lease does the mineral lessee have "exclusive rights of

possession and extraction of all minerals . . . lying within the boundaries of his lease." AS 38.05.205(a). But prior to the issuance of a lease, "minerals may not be mined and marketed or used . . . except for a limited amount necessary for sampling or testing." AS 38.05.205(a). The law also provides for certain terms and conditions to be included in a mineral lease. AS 38.05.205.

The next question is, to what lands do each of these methods apply. AS 38.05.185(a) states that "the director, with the approval of the commissioner, shall determine those lands from which mineral deposits may be mined only under lease and . . . those lands which shall be closed to mining." This authority must be read in conjunction with the strictures of 6(i) of the Statehood Act: namely, that mineral deposits in 6(a) and 6(b) lands may only be mined pursuant to a lease. Thus, for 6(a) or 6(b) lands, the director's only option is to allow mining by lease or to close those lands to mining.

The director's discretion under AS 38.05.185(a) is further limited by AS 38.05.250, which provides that mineral deposits in tide or submerged lands may be prospected for by permit and extracted pursuant to a competitive or non-competitive lease. Other lands, pursuant to AS 38.05.185(a), may either be closed to mining, mined by lease only or mined

pursuant to a mineral claim. */

One other distinction between leases and claims is whether annual labor is required. For state land, it is only mining claims, and not leases, which require annual labor for continued validity. Mineral leases, on the other hand, require only discovery, location, and filing to establish the prior right to the lease. AS 38.05.205. In fact, prior to a lease being issued, AS 38.05.205 would prevent extracting minerals.

AS 38.05.205(b), which provides that leasehold locations will accrue an annual rental of $200, against which labor may be credited whether or not the location is actually under lease, does not indicate to the contrary. We believe that this section contemplates payment being due upon award of the lease, and that a claimant need not make payment or do any work until issuance of the lease. In part, the scheme set up by AS 38.05.205(a) compels this result. After a location has been recorded (thus perfecting

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*/ Provisions of other statutes dealing with particular categories of non 6(a) and (b) lands must also be consulted. E.g., AS 38.05.030(a) concerning leasing of university lands.

the prior right to a lease), the potential lessee has only 90 days in which to file his lease application with the director after receiving the application from the department. Thus the only source of delay during which a yearly rental would be due would be the time taken by the department in identifying the location, determining the correctness of the filing, determining if the lands were open to leasing, and complying with applicable notice requirements. Until the department responded, the locator would have no justification for assuming he had any claim or lease upon which he could prudently make improvements. Therefore, an initially valid location is sufficient to vest a locator with a prior right to a mining lease without performance of annual labor.

In summary, under existing law the only means by which a mining lease may be acquired is by discovery, location, and filing under either state (AS 38) or federal (AS 27) procedures. A discovery and appropriation automatically leads to the issuance of a mining lease. This approach forecloses competitive leasing. This scheme is similar to the mandatory leasing systems of a number of Western States. E.g. Arizona, (ARS § 27-231 - 238); Colorado, (Colorado Revised Statutes Annotated, §36-1-140); and Oregon, (ORS § 273-551, 517.420). We are also of the opinion that non-competitive leasing is constitutionally preferred in Alaska.

Article VIII, section 11 of the Alaska Constitution provides that

> Discovery and appropriation shall be the basis for establishing a right in . . . [locatable minerals]. Prior discovery, location, and filing as prescribed by law, shall establish a prior right to these minerals and also a prior right to . . . leases.

Although there may be some instances where competitive leasing may be allowable, such as when a mining lease is forfeited or returned to the state, the language Article VIII section 11 indicates that non-competitive leasing of valuable minerals is at least constitutionally preferred, if not required. Since there is no statutory authorization for competitive leasing of locatable minerals, however, we do not need to decide that question at this time.

C CLAIMS LOCATED AFTER STATE SELECTION BUT PRIOR TO TENTATIVE APPROVAL WILL BE VALID UNDER STATE LAW ONLY UPON THE STATE RECEIVING TENTATIVE APPROVAL AND SUBJECT TO PATENT OR CLASSIFICATION OF THE LANDS.

One problem that has arisen since statehood is based on the delay between state selection and tentative approval. Under 6(g), as previously mentioned, the state

does not have authority to grant or validate mining rights until the state receives tentative approval. Therefore, until the state receives tentative approval, mining operations on these lands are governed by federal law.

A claim located under federal law prior to state selection is unaffected by the state selection. The first proviso in both 6(a) and 6(b) states:

> That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied.

On the other hand, federal law pr[illegible]s a valid location under federal mining law after state-selection by providing that state selection segregates the land from mineral entry. The applicable federal regulation provides:

> Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, <u>including locations under the mining laws</u>, when the State files its application for selection in the proper office properly describing the lands.

43 CFR 2627.4(b) (emphasis added).

Therefore, locations made between state selection and tentative approval are in a legal no-man's land: they are ineffective under federal law and, until the state receives tentative approval, they are outside the reach of state law.

Recognizing this problem, the state legislature passed an act which provided for recognization of a location made between state selection and tentative approval at the time the state received tentative approval. Section 11 chapter 123, SLA 1961 provided:

> Locations made on lands which have been selected from federal lands and which were made in accordance with this article will constitute valid mining claims, mining leasehold locations, or prospecting site locations at the time Alaska receives tentative approval of its selection. Such locations shall be subject to the provisions of said tentative approval and to land classification by the state after such tentative approval. Extraction of minerals prior to classification of the land and receipt of patent by the State shall be at the risk of the locator.

With subsequent amendments, discussed later, this section is now AS 38.05.275.

James A. Williams, Director of the Alaska State Division of Mines and Minerals, summarized the scheme in a presentation before the Northwest Mining Association Convention, Spokane, Washington, Dec. 1-2, 1961:

> Locations made on lands selected by the State but prior to the time the State receives tentative approval of the selection

> from BLM are made at the locator's risk. When the State receives tentative approval of its land selection, the locations will become valid and the State may issue conditional mining leases, subject to conditions of the tentative approval and land classification by the State. These rights will be lost, or partly lost, in the event the State does not eventually receive title or patent to all or part of the lands. A claim holder on Federal public domain cannot lose his mineral rights through State land selection, because the State cannot select land included within valid mining claims.

Similar statements, particularly emphasizing that locations made between selection and tentative approval are at the locator's risk, have consistently appeared in mining handbooks issued by the state.

Section 11, chapter 163, SLA 1961 was extensively amended in 1966. Section 3, ch. 96, SLA 1966 provided,

> Mining locations made on state lands, including shorelands, tidelands or submerged lands, or state selected lands, under secs. 185 -280 of this chapter or in the manner described in AS 27.10.010 -27.10.240 acquire for the locator mining rights under secs. 185 - 280 of this chapter, subject to existing claims and to any denial of or restriction in the tentative approval of state selection or the patent of the lands to the state. If shorelands, tidelands or submerged lands are included in a mining location or within the projected boundaries of a mining location made in accordance with this section, the locator is required to file a certificate of location with the division of lands

> within 90 days following the date of posting the notice of location, in addition to filing a certificate of location as required by Sec. 195 of this chapter. The certificate of location must identify the position of the mining location in the system of rectangular or protracted surveys.

The purpose of this provision was to extend state recognition of claims to claims located under either the federal or state procedures. In a letter to the chairman of the House Resources Committee, Charles F. Herbert, then Deputy Commissioner of the Department of Natural Resources, stated;

> In Section 3, we ask the Legislature to meet the problem of acquiring State mining rights to State tidelands and submerged lands that form fractional parts of mining claims staked on adjoining Federal lands. Where a coast line is highly irregular and many indentations and tidal basins exist, it is often most difficult to trace out the boundaries between the Federal lands and the State lands. If this difficulty is not corrected there could be unending litigation over fractional claims and technically illegal staking.
>
> Section 3 would also protect the prospector who is not aware if the land he stakes is owned by the Federal or State government and would also permit him to stake a Federal claim that might include navigable waters, which, of course, are state-owned.

This letter was printed in the House Journal at the request of the committee. 1966 House Journal at 691-692

(March 23, 1966). These provisions are the current AS 38.05.275. Therefore the state must recognize a claim if it is staked either in accordance with the procedure for either federal lands under AS 27 or for state lands under AS 38.05.185.

But the 1966 amendment, with its extensive rewording, raised another question. The previous legislation recognized the validity of a location at tentative approval, with the phrase "subject to the provisions of said tentative approval and to land classification by the state after such tentative appraisal." The 1966 amendment dropped the emphasized language.

Although an argument could be made to the contrary, this deletion does not prevent the state from closing any lands to mining upon receipt of tentative approval. First, the same amendment that deleted the above language added the provision that a location would only "acquire for the locator mining rights under secs. 185-280 of this chapter . . . ." Therefore, by that addition a locator's rights were subject to the provisions of AS 38.05.185 that:

> The director, with the approval of the commissioner, shall determine . . . those lands which shall be closed to mining.

By adding the language subjecting the locator's rights to AS 38.05.185-280, the legislature retained the authority of the Department of Natural Resources to close lands to mining.

Second, we can find no indication of legislative intent to achieve a different result. The only expression of intent is contained in the Herbert letter quoted earlier. That letter gives no indication of any intention to take the larger step of eliminating the ability of the state to close lands to mining once it received tentative approval and land management authority.

Third, there was no effort to change the present 11 AAC 86.115, which states:

> (a) Locations made on lands selected by the state prior to the state's receipt of tentative approval for the selection are made at the locator's risk.
> (b) If such locations are made in accordance with this chapter, they constitute valid mining claims, leasehold locations, or prospecting sites upon receipt by the state of tentative approval for the selection from the federal government, subject, however, to the provisions of the tentative approval and to land classification by the State.

This regulation has been in effect since at least 1967. Consequently, contemporaneous administrative practice supports the interpretation allowing closing of lands to mining after receipt of tentative approval. See, generally, 2A Sutherland Statutory Construction, 4th ed., §49, at 228-267.

Therefore, it is our opinion the state may close lands to mining upon receipt of tentative approval, even if there are existing locations made after state selection but prior to tentative approval. */

D. PUBLIC NOTICE UNDER AS 38.05.305 AND AS 38.05.345 IS REQUIRED PRIOR TO ISSUING A MINING LEASE.

A final question concerns the public notice required prior to granting a mineral lease to a locator, and the timing of that notice. Article VIII, section 10, provides that:

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

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*/ In addition, the Department of Natural Resources, with the approval of this department, has previously taken this position in an administrative decision dated December 10, 1973 concerning "Clarence Hershberg, 723 W. 6th Avenue, Anchorage, Alaska Rainy day No. 1, Rainy day No. 2, Rainy day No. 3, Jackson No. 1, Allison No. 1, Placer mining claims." There the department specifically rejected the claim that the state could not close land to mining upon receipt of tentative approval if a location had been made after state selection but prior to tentative approval. In memoranda dated January 17, 1974, April 12, 1974, May 1, 1974, and May 28, 1974, this office concurred in that decision.

This provision by its terms applies to the leasing of a mineral interest in state land. The problem is in identifying the moment the state disposes of its mineral interest.

Even though a valid location in an area open to mining automatically leads to a mining lease, we do not believe that disposal of the mineral interest within the meaning of article VIII, section 10 occurs prior to the issuance of a mining lease. The primary reason for this conclusion is the existence of article VIII, section 11, and the attempt of the delegates to the convention to allow following federal mining law to the extent permitted by the terms of 6(i). See, e.g., 4 Alaska Constitutional Convention 1955-56 Minutes at 2452. Discovery and appropriation is complete upon filing of the notice with the state under both federal and state law. Prior to the filing, the act of location and discovery is unknowable to the state. Thus there could be no "prior public notice" under section 10 if discovery and appropriation gave the miner an immediate right to produce and sell the mineral. But under the federal system, discovery and appropriation, without more, did give the miner an immediate right to mine and sell minerals. The delegates clearly intended that this result could occur if the Statehood Act permitted.

As a result, the interest acquired by discovery and appropriation, even if it gives an automatic right to eventual ownership of a mineral, is not a disposal under article VIII, section 10. Rather, notice prior to the issuance of the mining lease is the constitutional notice required by article VIII, section 10.

Pursuant to this mandate, the legislature has enacted two applicable statutes: AS 38.05.305 and AS 38.05.345. AS 38.05.305 states in full:

> (a) No land or interest in land within the boundaries or within six linear miles of the boundaries of a general law, home rule or unified municipality, as defined under AS 29, may be classified, reclassified, sold or leased, or otherwise disposed of, including the renewal of a lease entered into after September 22, 1976, unless the following procedures have been complied with:
>
> (1) A notice of the proposed action shall be sent to the governing body of each municipality a boundary of which is within six linear miles of the land involved.
>
> (2) The notice shall be sent at the earliest practicable time but no less than 30 days before the proposed action.
>
> (3) The notice must contain a statement of the proposed action, identifying the land involved and the action proposed in sufficient detail to fairly inform the recipient of the nature of the proposed action. If the land is not surveyed, a legal description need not be used; but the land must be described in sufficient detail to allow the recipient to understand its approximate

size, number of tracts involved, and location. The notice must also contain a statement to the effect that the municipality is invited to comment on the proposed action and that, upon the request of the governing body, chief executive officer, or planning agency, the division will consult with the municipal officials on the proposed action. Any request by a municipality for consultation must include the name of the municipal official to be consulted and be sent no later than 15 days after receipt of the notice by the municipality, and the notice must contain a statement to this effect and name the official and address to which the municipality's request should be sent.

(4) In consulting with the municipal officials, the proposed action and the authority under which it is to be taken shall be explained and the reason for the proposed action shall be given. A public hearing need not be held, but the municipal officials may hold a public hearing or otherwise allow public participation and comment. A hearing held under this paragraph shall be attended by the commissioner of natural resources or his designee.

(5) A municipality having a right to notice or consultation under this section may appeal to the superior court and have set aside any action taken which does not conform to this section. A municipality incorporated or established less than 30 days before the action is taken has no right to notice or consultation under this section.

(b) No land or interest in land outside the boundaries of a general law, home rule, or unified municipality, as defined under AS 29, may be classified, reclassified, sold or leased, or otherwise disposed of,

including the renewal of a lease entered into after September 22, 1976, unless a notice of the proposed action as required by (a)(3) of this section is (1) given to the regional corporation organized under the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. secs. 1601-1626), within the boundaries of which the land is located; (2) given to the village corporation organized under the Alaska Native Claims Settlement Act which owns land or has selected federal land which is in the vicinity of the state land to be disposed of; and (3) posted in three public places in a community with 25 or more permanent residents located in the vicinity of the state land to be disposed of. The president of the affected regional corporation or his designee has the same rights of notice, consultation, hearing and appeal as those provided for in (a)(2)-(5) of this section.

(c) When notice is given under (b) of this section, the requirements of § 345 of this chapter relating to notice apply in addition to any other applicable notice requirements. If requested, the director shall hold a hearing within the affected area under (b) of this section. No action proposed by the director which is subject to the notice requirement specified in (b) of this section is final until at least 30 days after the date the notice was published.

(d) Before any sale, lease under AS 38.05.070-38.05.105, or other disposal of state land in the unorganized borough, the commissioner shall consider the effect of the disposal and the effect of the estimated population density that would result from the disposal upon existing traditional uses by residents in the vicinity of the land to be disposed of. The commissioner shall consider any potential conflicts with the traditional uses of the land which

could result from the sale, lease or disposal and, if he finds it necessary, he shall develop a plan to resolve or mitigate the conflicts in a manner consistent with the public interest and the provisions of this chapter.

By their terms, the requirements of 305(a), (b), (c), and (d) apply to mineral leases. See Moore v. State, 553 P.2d 8, 26-27 n. 37 Alaska 1976. A more difficult question is the applicability of AS 38.05.345, which provides:

> Notices. (a) Public notice of a sale, lease or other disposal of land or interest in it shall be substantially as follows.
>
> (b) Notice shall be published once a week for four consecutive weeks preceding the time of sale stated in the notice, in newspapers of general circulation in the state and by the electronic media covering the region of the state in which the land is located. If there is no newspaper of general circulation in the vicinity of the land offered for sale, notices shall be posted not later than four weeks before the public auction is to be held in three public places near the land to be sold or leased. The public auction shall be held not less than 45 days after publication of the first notice and not more than five weeks following the last appearance of the published notice.
>
> (c) [deleted]
>
> (d) Where the land involved is adjacent to a body of water or waterway which the department has not previously determined to be navigable or public, or not navigable or public, the notice shall state that such a determination is to be made.

(e) The director shall publish a public notice of each disposal of state land under the procedures specified in AS 38.05.057 and AS 38.08 in newspapers of general circulation in the state and by the electronic media covering the region of the state in which the land is located. The notice shall be published once each week for four consecutive weeks before the beginning date of an application period.

(f) If there is no newspaper of general circulation in the general vicinity of land offered for disposal, notices required by (e) of this section shall be posted not later than four weeks before the land is offered in three public places near the land.

(g) A notice under this section shall contain

(1) a description of the land sufficient for identification by the public;

(2) the date of the auction or the beginning of the application period;

(3) a statement that a purchaser of state land offered is responsible for the construction of access roads and capital improvements that may be required by an authority having platting authority; and

(4) the location and address of places where the public may obtain information concerning the land offered for disposal.

While subsection (a) states that the procedures apply to "all disposals," each of the remaining subsections is clearly intended to operate in situations where the land is offered for auction, (b) and (g), lottery, (e) and (g),

or other competitive public offerings initiated by the state (f). But the statutory leasing system under AS 38.05.205 is not initiated by the state; in fact, if the land is open to mineral discovery, the state has no discretion as to whom it may offer a lease.

Despite this difference, it is our opinion that the provisions of section 345(a) apply; namely, that a disposal under sections 185-280 must "substantially" comply with the procedures in section 345. Therefore, the publishing requirements of (b) must be followed to the extent they apply even though no auction is contemplated.

Although Section 345(b) appears to apply to mineral leases, sections (e) and (f) do not. Subsection (f) applies only if subsection (e) applies, and subsection (e) applies to lottery and homesite disposals under AS 38.05.057 and AS 38.08. Similarly, it also appears that subsection (d), which requires a statement in the notice of determinations for adjacent navigable or public waters, would apply to disposals of the surface estate, not to subsurface interests. Similarly, sections (g)(2) and (3) also do not appear to apply.

If the proposed lease is within the boundaries, or within six miles of the boundaries, of a general-law, home-rule, or unified municipality, the requirements of AS 38.-05.305(a)(1)-(5) must be followed; for other land, the requirements of section 305(b) apply, which track the requirements of (a)(2)-(5). In addition, the commissioner must

consider the matters set forth in AS 38.05.305(d) when the leasehold is in an unorganized borough.

IV CONCLUSION

Therefore, for the reasons stated in this opinion, we conclude that

1. the state may not issue a patent to mineral interests in 6(a) or 6(b) lands;

2. the state may only dispose of mineral deposits in 6(a) and 6(b) lands by lease;

3. the constitutionally preferred method is non-competitive leasing based on discovery and location;

4. the annual labor requirements do not apply to locations leading to a lease;

5. a location is valid if it follows either the federal, AS 27, or state, AS 38.05.185 - 280, procedures;

6. a location made after selection but prior to tentative approval is outside state law and at the locator's risk;

7. a location made after state selection but before tentative approval will be recognized by the state upon receipt of tentative approval, subject to: (1) conditions of tentative approval, (2) eventual receipt of patent, and (3) possible closure of the lands to mining upon receipt of tentative approval; and

8. public notice under AS 38.05.305 and AS 38.05.345 must be given prior to issuing a mineral lease.