SB
732

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.

Mineral land grants.

(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.

Schools and colleges.

(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.

Confirmation of grants.

Repeals.

(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the last sentence of section 35 of the Act of February 25, 1920 (41 Stat. 450; 30 U. S. C., sec. 191), as amended, are repealed and all lands therein reserved under the provisions of section 1 as of the date of this Act shall, upon the admission of said State into the Union, be granted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.

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

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Proposed Amendments or Committee Substitute for SB 732

#1 Page 1, line 16 after the word "and" adding the language "believes that it satisfies the requirements of" unam

#2 Page 2, line 8, after "tion." add the language "in the case of conflicting claims the commissioner may, but is not required to, adjudicate the conflict." unam

#3 Page 2, line 10 delete "immediate in accordance with AS 01.10.070(e) and insert "January 1, 1983" in its place. unam

#4 Page 2, line 11 add a new sub/section:

"The provisions of this section do not apply to a production license for mineral extraction issued under AS 38.05.207."

[illegible] change unam

Introduced: 2/9/82
Referred: Resources and
Finance

1 IN THE SENATE BY THE RESOURCES COMMITTEE

2 SENATE BILL NO. 732

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to issuance of production licenses for
7 mineral extraction from state land; and providing for
8 an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. PURPOSE. The purpose of sec. 2 of this Act is to require a
11 locator or lessee of locatable mineral deposits on state land to obtain a
12 license from the Department of Natural Resources authorizing production from
13 that land. This requirement applies to all existing and future mining opera-
14 tions on state land. The legislature finds that the requirement is consistent
15 with the provisions of art. VIII, sec. 11 of the Constitution of the State of
16 Alaska and believes that it satisfies the requirements of sec. 6(i) of the Alaska Statehood Act (P.L. 85-508).

#1

17 * Sec. 2. AS 38.05 is amended by adding a new section to read:
18 Sec. 38.05.207. PRODUCTION LICENSE. (a) An application for a
19 production license must be filed with the commissioner when a locator of
20 a mining claim under AS 38.05.195 or a lessee of a mining location under
21 AS 38.05.205 is prepared to produce minerals for sale in commercial
22 quantities. The application shall state under oath the location of the
23 land and ownership of the mineral deposits involved in the mining opera-
24 tion and the date production began or is expected to begin. Upon receipt
25 of an application, the commissioner shall publish in a paper of general
26 circulation in the area of the location notice of the application and
27 notice that a production license will be issued. The notice may be
28 combined with notices of other applications either in the same general
29 area or statewide. Pending completion of this public notice requirement

and issuance of the production license, the locator or lessee has the right to produce minerals from the property.

(b) If the commissioner determines under AS 38.05.185(b) that a locator or lessee has complied as nearly as possible under the circumstances of the case with the provisions of AS 38.05.185 - 38.05.280 and that no conflicting rights are asserted by any other person, the commissioner shall issue a transferable production license for mineral extraction. In the case of conflicting claims, the commissioner may, but is not required to, adjudicate the conflict. The production license serves as the certification of the commissioner for the tax exemption under AS 43.65.010(b).

#2

* Sec. ~~3~~ 4. This Act takes effect ~~immediately in accordance with AS 01.10.070(c)~~. January 1, 1983

#3

#4

~~*Sec. ... The provisions of this section do not apply to a production license for mineral extraction issued under AS 38.05.207.~~

Sec. 3. AS 38.05.345 is amended by adding a new sub-section:

(h) The provisions of this section do not apply to a production license for mineral extraction issued under AS 38.05.207.

Pg 6-7 Amendment

Introduced: 2/9/82
Referred: Resources and Finance

IN THE SENATE BY THE RESOURCES COMMITTEE

SENATE BILL NO. 732

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to issuance of production licenses for mineral extraction from state land; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. PURPOSE. The purpose of sec. 2 of this Act is to require a locator or lessee of locatable mineral deposits on state land to obtain a license from the Department of Natural Resources authorizing production from that land. This requirement applies to all existing and future mining operations on state land. The legislature finds that the requirement is consistent with the provisions of art. VIII, sec. 11 of the Constitution of the State of
believes that it satisfies the requirements of
Alaska and ^ sec. 6(i) of the Alaska Statehood Act (P.L. 85-508).

* Sec. 2. AS 38.05 is amended by adding a new section to read:

Sec. 38.05.207. PRODUCTION LICENSE. (a) An application for a production license must be filed with the commissioner when a locator of a mining claim under AS 38.05.195 or a lessee of a mining location under AS 38.05.205 is prepared to produce minerals for sale in commercial quantities. The application shall state under oath the location of the land and ownership of the mineral deposits involved in the mining operation and the date production began or is expected to begin. Upon receipt of an application, the commissioner shall publish in a paper of general circulation in the area of the location notice of the application and notice that a production license will be issued. The notice may be combined with notices of other applications either in the same general area or statewide. Pending completion of this public notice requirement

1 and issuance of the production license, the locator or lessee has the
2 right to produce minerals from the property.
3 (b) If the commissioner determines under AS 38.05.185(b) that a
4 locator or lessee has complied as nearly as possible under the circum-
5 stances of the case with the provisions of AS 38.05.185 - 38.05.280 and
6 that no conflicting rights are asserted by any other person, the commis-
7 sioner shall issue a transferable production license for mineral extrac-
8 tion. (B) The production license serves as the certification of the commis-
9 sioner for the tax exemption under AS 43.65.010(b).
10 * Sec. 3. This Act takes effect ~~immediately in accordance with AS 01.10.-~~
11 ~~070(c)~~. (C) January 1, 1983

(D) .345 exclusion
(submitted)

(B) In the case of conflicting claims, the comissioner may, but is not required to, adjudicate the conflict.

3:55pm. 4/11/82

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

POUCH M
JUNEAU, ALASKA 99811
PHONE:

PROPOSED AMENDMENT TO SB 732 -- PRODUCTION LICENSES FOR MINERAL EXTRACTION

(This should probably be section 3 of the bill as currently written, with the existing section 3 renumbered to 4.)

A new/sub section is added to AS 38.05.345 to read:

"(h) The provisions of this section do not apply to a production license for mineral extraction issued under AS 38.05.207."

Rationale:

The issuance of a production license would be a "sale, lease or disposal of an interest in state land" under (a)(3) of AS 38.05.345. Since streamlined public notice procedures are already contained in Section 2 of SB 732, the more extensive requirements of .345 should not apply.

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January 16, 1981

response to first draft

Mr. Robert Maynard
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Dear Bob:

I am writing on behalf of the Alaska Miners Association to offer comments in response to your draft legal opinion dated August 18, 1980, relating to certain aspects of mining law. As I understand it, the opinion project developed as a response to a November 9, 1979 opinion request from the Department of Natural Resources. The opinion request itself addressed various issues relating to the status under state and federal mining laws of lands in the interim between state selection and tentative approval. In the course of your work on that subject, the scope of your inquiry was broadened to include various questions relating to subsection 6(i) of the Alaska Statehood Act. The draft opinion's treatment of those 6(i) questions is the only part of the opinion I wish to discuss in this letter.

It is not my purpose to advocate any particular legal interpretation of subsection 6(i) on behalf of the Alaska Miners Association or any of its members. Instead, this letter is intended to contribute some ideas for consideration in your further work on this project. The letter closes with some comments regarding the practical implications of publishing a formal opinion on the subject.

Subsection (i) of Section 6 of the Alaska Statehood Act[1/] reads as follows:

> (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 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 the District of Alaska.

Before discussing specific interpretation issues which seem to be presented by subsection 6(i), let me make two general observations. First, I think it is important to

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1/ There is an error in the version of subsection 6(i) which appears in the Michie Publishing Co. edition of the Alaska Statutes. The second sentence of the original Act refers to only a single "express condition" (see, 72 Stat. 342), not to multiple "express conditions", as it appears in Michie. This typographical error could lead one to assume incorrectly that there are two different conditions imposed by the subsection -- the required "reservation" requirement in the second sentence and the "subject to lease" requirement in the third sentence. (See, pp. 10-13).

bear in mind that there are three separate provisions of subsection 6(i) which are subject to varying interpretations. The first is the so-called "mineral alienation condition," which is set forth in the second sentence of the subsection. This imposes an "express condition" that all grants by the United States to the State of Alaska of "mineral lands" under subsections 6(a) and (b) must contain a certain reservation of minerals. It is this provision of subsection 6(i) which was at issue in the Cook Inlet Land Exchange litigation. See, State v. Lewis, 559 P.2d 630 (Alaska 1977). The second controversial provision of subsection 6(i) appears in the third sentence of the subsection, wherein it is provided that "mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." The third provision which is susceptible of conflicting interpretations is the proviso at the end of the subsection relating to forfeiture of "lands or minerals hereafter disposed of contrary to the provisions of this section."

Each of these three provisions in the subsection presents its own distinct problems of interpretation. In certain respects each one is "ambiguous." That is to say, each is subject to at least two reasonable alternative interpretations. The August 18 draft opinion draws exclusively upon legislative history as the sole source of guidance in attempting to resolve these ambiguities. I believe it is fair to say that the legislative history cited in the draft opinion reflects either misunderstanding or disinterest on the part of the parties involved as to the specific issues addressed in the draft opinion regarding the applicability and substantive content of subsection 6(i). Only a few people seem to have been aware that the provision had been inserted into the Statehood bills; and, of them, there does not seem to be even one who recognized that its antecedent was the School Lands Act of 1927 (43 U.S.C. §870(b)). The only issues which were clearly framed in the discussions were (1) whether mineral interests (be they claims or leases) would be allowed to go to patent, and (2) whether mineral character determinations would be allowed to hold up the land selection adjudication process. The legislative record fails to disclose any coherent dialogue on the specific questions addressed in the draft opinion.

With inconclusive legislative history, we would expect a court to turn to the other conventional sources of statutory interpretation for additional aid in resolving literal ambiguities in the statute. The draft opinion contains no discussion of federal administrative practice

under either the School Lands Act of 1927 or the Statehood Act itself. Nor does it examine the issues from the practical standpoint, taking into account the actual impact which differing interpretations would have upon today's public land administration or private mining activities. It also omits mention of the federal constitutional problems presented by certain of the alternative interpretations. We would certainly urge that those dimensions of the problem be explored fully in the course of your work.

As is explained in the draft opinion, there are two alternative methods available under the Alaska Land Act for the acquisition of rights to mine for and extract locatable minerals. The first is the mining claim authorized under AS 38.05.195. This method, patterned after the federal procedure under the Mining Law of 1872, was introduced to Alaska law in Territorial days. The second of these methods is the mining lease or so-called "leasehold location" authorized under AS 38.05.205. These two procedures both follow the state constitutional dictate that "discovery and appropriation shall be the basis for establishing a right" in locatable minerals. Alaska Constitution, Art. VIII, § 11.[2]

Generally speaking (that is, except in respect of certain categories of land which are restricted to the leasehold location method only), state law gives the miner a choice as to which of these two procedures he will follow. Historically, miners have chosen to proceed under section 195 (mining claim) rather than under section 205 (leasehold location). It is my understanding that the Division of Lands has never even had an occasion to adopt a leasehold location form or, though applications have been filed, to act upon any application for a lease under Section 205.

2/ In the Preamble of the Alaska Statehood Act, Congress expressly "accepted, ratified, and confirmed" the Alaska Constitution. This represents a determination by Congress that the state constitution's provisions on mining law are consistent with subsection 6(i) of the Statehood Act. Those state and federal laws should therefore be read _in pari materia_.

The hypothesis which your office is now studying is that the acquisition of third-party interests in locatable minerals in certain state lands (specifically, those acquired by the State under subsections 6(a) or 6(b) of the Statehood Act) by the mining claim procedure authorized by AS 38.05.195 is a violation of subsection 6(i) of the Statehood Act. This hypothesis would appear to rest upon three premises:

> (1) That the third sentence of subsection 6(i) ("Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct") constitutes a prohibition of the mining claim method under AS 38.05.195, with respect to the lands to which that provision of the statute applies.
>
> (2) That the term "such lands" (the reference employed to establish the range of that third sentence's application) encompasses all of the "mineral lands" which are the subject of the mineral alienation condition set forth in the second sentence of subsection 6(i).
>
> (3) That the term "mineral lands," as used in the "mineral alienation condition" in the second sentence of subsection 6(i), encompasses all lands obtained by the State under subsection 6(a) or (b).

Complicated questions exist regarding the validity of each of those three premises. I will discuss these questions in the following portion of this letter.

THE "MINERAL LANDS" ISSUE

In the Cook Inlet Land Exchange litigation, the meaning of the term "mineral lands" in the second sentence of subsection 6(i) was at issue. As I am sure you know, the State took the position in its Supreme Court brief that "mineral lands" is a term of art in federal public land law referring to lands known to be "chiefly valuable" for commercial mineral production at the time of their grant to the State. (Rather than rehashing the State's argument on this point here, I have enclosed a copy of pp. 40 through 46 of the State's August 16, 1976 brief on the issue. You may also wish to refer to the brief filed in the U.S. Supreme Court in the case.)

In the August draft opinion, you seem to concur with this analysis insofar as it relates to the intended meaning of the "mineral alienation condition" contained in the School Lands Act of 1927. However, the legislative history of the Alaska Statehood Act evidently leads you to suspect that Congress intended to treat Alaska differently on this issue. As I understand it, this is based upon the following circumstances: The original subsection 6(i) proposal which was included in the Senate committee's 1954 bill had included a final sentence requiring that the mineral character of state-selected lands would be determined by the Department of the Interior at the time patent issued, in order to foreclose any future doubt as to the applicability _vel non_ of the mineral alienation condition. In early 1955 the House deleted this final sentence from the subsection. Your research shows that this change was probably made at the request of the Governor of the Territory of Alaska, who expressed concern that requiring mineral character determinations during the selection adjudication process would retard the speedy transfer of federal lands to the new state. A House committee report on the 1955 House bill, which deleted the sentence requiring mineral character determinations at the time of patent, contains the statement that the subsection "provides that all grants to the state under the Act include mineral deposits and requires that all state conveyances of lands granted by subsections 6(a) and 6(b) (_i.e._, all selected lands) shall be subject to a reservation . . . ." This description of the applicability of the subsection refers to "lands" rather than to "mineral lands." The inference drawn from this reference in the 1955 House committee report is that the House committee must have decided to alter the 1927 School Lands Act provision which the Senate had added in 1954, so as to make that provision applicable to _all_ state-selected lands rather than only to those of the state-selected lands which were "mineral lands."

This interpretation of what the 1955 House committee intended in its version of subsection 6(i) raises several questions. In the first place, it violates the paramount rule of statutory interpretation to the effect that statutes are to be interpreted in the manner which gives effect to each word and renders none of them superfluous or meaningless. _City and Borough of Juneau v. Thibodeau_, 595 P.2d 626, 634 (Alaska 1979). If, as you have suggested, the 1955 House committee had actually decided that the subsection 6(i) limitations should apply to all state-selected lands, not just to "mineral lands" which might be selected by the State, then it would have removed

the limiting adjective "mineral" from the first sentence of the subsection. That word becomes entirely superfluous under the interpretation which you have proposed.

It is a common occurrence that a legislative committee report will conflict in some respect with the literal text of the bill to which it refers. Such is almost certainly the case in the instance of the 1955 House committee report. Although the bill refers to "*mineral*" lands, the report refers to "lands" without utilizing that limiting adjective. In such a case, it is well established that the committee report will be disregarded. *U.S. v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932); *Pennsylvania R. Co. v. Int'l. Coal Mining Co.*, 230 U.S. 184, 198-199 (1913).

In its discussion of the legislative history, the draft opinion draws heavily upon *two isolated dialogues* which took place in House committee hearings held in 1955 and 1957. Both instances are cited as evidence that the committee understood the subsection to apply to *all* state-selected lands rather than only to "mineral lands" within the meaning of the School Lands Act of 1927. I question whether either dialogue fairly supports this view.

The first of these two committee discussions involves Bob Bartlett's representation to the House committee that the Territorial Governor had suggested elimination of the final sentence of the Senate's proposal. That was the provision requiring mineral character determinations at the time of patent. The Governor's reported concern about this mineral character determination provision related to the red tape which would be involved in making mineral character determinations prior to patenting to the State. According to the Bartlett statement quoted in the draft opinion, territorial officials were "apprehensive about the rapidity with which lands would move to the new State if the requirement remained in that the mineral character of all land would have to be determined in advance." Although mineral character determinations would probably be necessary to establish which lands would be subject to the subsection's mineral alienation condition, the Territory apparently preferred that the new State be given the flexibility either to advance them or defer them as necessary. This would eliminate unnecessary delays in the state selection adjudication process, and it would accord Alaska the same treatment in that respect as the other public land states under the School Land Act of 1927.

The draft opinion reads much more into Bartlett's comments on the territorial officials' request for deletion of the 1954 Senate bill's provision requiring mineral character determinations at the time of patent. It surmises that the territorial officials wanted to eliminate the distinction between "mineral lands" and non-mineral lands altogether, and to treat all state-selected lands as if they were "mineral lands." Given the hostility to any form of reserved federal control over state lands, which prevailed at that time among political leaders in the Territory, this supposition is just not credible.

The second committee discussion referred to in the draft opinion took place in March of 1957, more than two years after the House dropped the Senate's "mineral character determination" provision and published its confusing committee report. In this colloquy, Glenn Franklin of the Alaska Miners Association argued against inclusion of subsection 6(i). I do not see how the discussion bears one way or another upon the question of which category of lands would be subject to the subsection's restrictions. Franklin's objection was not addressed to the scope of the subsection's applicability. He was deeply concerned about the wisdom of prohibiting the alienation of the State's fee interest in its minerals. Although his testimony admittedly reflects an apprehension on his part that the subsection could apply to mining on all state-selected lands, he did not devote his attention to that question.

Even if Franklin's discussion with the committee members in 1957 were taken to reflect, unequivocally, a belief on his part that the effect of the 1955 House committee's revision of the 1954 Senate bill was to expand the reach of the subsection's restrictions from "mineral lands" to all lands, that would not materially assist in interpreting the provision which was ultimately enacted. "Courts have been reluctant to attempt to ascertain legislative intent from statements made before a committee when no committee report incorporating those statements has been prepared and distributed to the legislature." Alaska Public Employees Association v. State, 525 P.2d 1217 (Alaska 1974).

In Utah v. Bradley Estates, 223 F.2d 129, 130, cert. denied, 350 U.S. 841 (1955), the Tenth Circuit held, with reference to the Utah Enabling Act, that the intended meaning of its land grant provisions must be viewed "in light of the mining laws, in light of the school land indemnity law, and in the light of established public policy relating to mineral lands." Likewise, it would be

reasonable to assume that Congress had the same thing in mind in engrafting the 1927 School Lands Act provision upon the Alaska Statehood Act as subsection 6(i).

No committee of the Congress ever removed the limiting adjective "mineral" from the subsection so as to extend the applicability of its mineral alienation provision to all state lands. Had there been an overt effort to do so, the territorial officials and the Alaska congressional delegation would undoubtedly have risen to make a major political issue of it. A serious constitutional issue would be presented under the Equal Footing clause if Congress tried to condition Alaska's admission to the union in such a way, when the other land grant states were not treated in that manner.[3/]

The conclusion expressed in the draft opinion is grounded entirely upon the 195[illegible] House committee's deletion of the final sentence of the 1954 Senate committee's version of the subsection. In Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947), the Supreme Court discredited this manner of divining legislative intent "from changes made without explanation in committee." It warned that "the interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." To me, this legislative history argument is contrived. I think it is easily overcome by all of the other factors which must be taken into account in interpreting the statute.[4/]

3/ The hypothesis that Congress intended the mineral alienation condition to apply to all 6(a) and 6(b) lands is dubious for another reason. If Congress had concluded that this restriction should not be limited in its application to "mineral lands" only, but should apply more broadly, by what logic would Congress have extended it to 6(a) and 6(b) lands only? Would it not also have imposed the restriction on the other statehood land grants under Section 6 - such as the tide and submerged lands, the University and Mental Health lands, and the special site lands?

4/ While there are numerous additional issues raised in the draft opinion regarding the reference date for determination of mineral character and the substantive standards and agency procedures which would be utilized in making such determinations, I have not addressed them in this letter. That can be the subject of further discussion later, if necessary.

THE "SUBJECT TO LEASE" ISSUE

Having discussed the issue of what is meant by "mineral lands" in the second sentence of subsection 6(i), the next issue is whether the reference to "such lands", contained in the third sentence, refers to all of those "mineral lands" or to some subcategory of them. There is also a third issue, interrelated to the "such lands" issue, which has not been addressed in the draft opinion: what is the prohibitory effect, if any, of the statement that "mineral deposits in such lands shall be subject to lease by the State"? In the draft opinion, it was assumed that (1) this statement represents a federal prohibition of certain kinds of state action, (2) the specific action prohibited is any alienation of minerals other than by "lease," and (3) alienation under a location system is not "leasing." Since the substance of that alleged implied prohibition must be taken into account in analyzing the interpretative question regarding the "such lands" reference, I will deal with that first.

The third sentence of the subsection does not literally prohibit anything. It directs that the state "shall" make mineral deposits in the subject lands "subject to lease." A literal reading of the sentence might lead one to believe that Congress wanted to protect the mining industry by insisting that these lands be left open for "leasing," and, therefore, that the purpose of the sentence is only to prohibit the state from removing them from the pool of lands available for private mining activities. Alternatively, the sentence might be interpreted to require that "leasing" be one of the mechanisms through which these lands would be made available for mining development, but not that it be the only disposal mechanism.

Those interpretations admittedly seem questionable. For the purpose of this discussion, I will join you in your assumption that the sentence represents an implied prohibition of all actions not specifically authorized by it.

There are at least two alternative hypotheses as to what this "subject to lease" provision was intended to prohibit. One possibility is that it was intended to establish a second, more restrictive condition, supplementary to the "mineral alienation condition." If the provision is taken to apply only to a subcategory of mineral lands (i.e., the "such lands" to be discussed below), then this would make sense. That is, all mineral lands would be subject to

the "mineral alienation condition," and then certain of those mineral lands would be subject to the second layer of restriction, the "subject to lease" prohibition.

The second possibility is that the "subject to lease" prohibition was intended to complement and clarify the "mineral alienation condition," rather than to supplement it. This interpretation is based on the theory that, having first identified the conduct which is prohibited (in the second sentence's "mineral alienation condition"), Congress then described that which would be permitted. As thus interpreted, the two provisions would be congruent in the sense that the class of things prohibited by the second sentence is identical to the class of things permitted by the third sentence. This reading of the statute would make sense if the "such lands" reference is assumed to encompass all mineral lands.

If the second and third sentences were not congruent (in terms of what the first prohibits and what the second permits), and if both of them are interpreted as applicable to all "mineral lands," then the second prohibition in effect subsumes the first. The state would not only be prohibited from alienating the fee interest in "mineral lands" but would also be restricted to disposing of them only by "lease." This would render the first condition superfluous, because the "lease" constraint would always be more restrictive than the mineral alienation condition.

I suggest that the more likely hypothesis is that the "subject to lease" provision was intended to be entirely congruent with the "mineral alienation condition," in the sense that the former authorizes precisely the same range of actions that the latter prohibits, no more nor less. What was obviously of concern to the Congress when it included these restrictions in the School Land Act of 1927 and in the Alaska Statehood Act was the necessity that the States retain the underlying fee interest in their mineral lands in perpetuity. Congress was primarily interested in assuring that the states did not dispose of their property interests in the minerals in these lands irrevocably and forever. It insisted that the states grant no more than a leasehold interest in these minerals, so that the minerals would never be owned absolutely by any private party. There is no indication in the legislative history discussed in the draft opinion that anyone in Congress had the slightest interest in controlling the states' prerogatives to decide which disposal methods to employ in creating these "less-than-fee"

interests in the minerals. Its intent was to limit the nature of the property interest or estate which the state could transfer to a third party, not to dictate the specific procedural mechanism which the state might use to effect that transfer.

In attempting to divine what Congress might have meant in providing that the states make these mineral lands "subject to lease", one must also take into account the federal constitutional limitations upon the power of Congress to pre-empt state and local decision-making prerogatives about how locally owned resources are managed. (A jumping-off point for research on this subject is the case of Brown v. Environmental Protection Agency, 521 F.2d 827, 837-42 (9 Cir. 1975).) The Tenth Amendment imposes a limit on the ability of Congress to dictate the terms and conditions upon which public lands may be made available by states for extractive mineral development. While Congress might well have had legitimate federal concerns about the extent of private interests which the states might authorize in their mineral lands, it is hard to imagine what legitimate federal concern there could be in restricting the states' powers to decide for themselves which procedures would be employed in disposing of such interests as Congress might authorize.

The draft opinion makes the tacit assumption that employing the unpatentable mining claim as a minerals disposal method is inconsistent with the "subject to lease" requirement. This does not necessarily follow. In the first place, the property interest obtained under a "mining claim" established pursuant to AS 38.05.195 could be characterized as a leasehold interest. Since it can never ripen into a patent it is sharply distinguishable from the federal mining claim, the latter being a species of fee interest. An unpatentable state mining claim bears all of the earmarks of a leasehold interest; rather than being a "sale, grant, deed or patent," it is much more akin to a lease, license or profit a prendre. In fact, from a conceptual standpoint the only real difference between the interest held under an unpatentable mining claim and the interest obtained under a leasehold location made pursuant to AS 38.05.205 is that the former is not reflected in a document signed by the lessee and the lessor. In this respect, it can be compared to the "lease" interest in state lands available under the original "open-to-entry" program in Alaska some years ago. In that program, an individual would obtain a leasehold interest in State lands by staking and filing. This right to use the land was referred to as a "lease," and could be converted to

fee ownership on certain terms and conditions at the election of the lessee.

The draft opinion cites the Arizona case of Rodgers v. Berger, 103 P.2d 266 (Ariz. 1940), as if it were authority for the proposition that disposal of interests in state "mineral lands" under a mining claim procedure would violate the "subject to lease" provision contained in the School Lands Act of 1927. Rodgers does not so hold. It only notes, in dictum, that mining claims were not allowed on Arizona's 1927 "mineral lands". Whether this was due to a federal prohibition or an absence of state law authority, the opinion does not say. In Rodgers, the "first and principal question" was whether federal mining claims located prior to the 1927 Act were "valid and subsisting claims." 103 P.2d, at 268. Since they were, the state's purported lessee had no title. The applicability or interpretation of the 1927 School Lands Act was not in controversy, and no issue relating to the propriety of a state law providing for unpatentable mining claims on "mineral lands" was presented for decision.

In summary, there is good reason to believe that the "subject to lease" provision of subsection 6(i) does not impliedly prohibit Alaska's unpatentable mining claim procedure as a method for the acquisition of leasehold interests in "mineral lands" to which it applies. We cannot see how forcing the State to use the leasehold location system rather than the mining claim system as the mechanism for the creation of third-party interests in minerals in state lands would achieve any of the federal policy objectives which might be attributed to the subsection.

THE "SUCH LANDS" ISSUE

The third question relates to the identity of the lands referred to in the third sentence of the subsection, which reads: "Mineral deposits in such lands shall be subject to lease by the State as the state legislature may direct." The draft opinion recognizes that there are two alternative interpretations of the "such lands" reference in this provision. One interpretation is that it refers to all "mineral lands," that is, to the same class of lands as are referred to in the preceding sentence. The alternative interpretation is that it refers to a subcategory of "mineral lands" consisting of those lands with respect to which the State or its predecessor in title has disposed of an interest in the surface by "sale, grant, deed, or patent."

If the "subject to lease" provision discussed earlier in this letter were interpreted as prohibiting the disposition of mineral rights by an unpatentable mining claim procedure, then there might have been a reason for Congress to apply that "subject to lease" provision to lands where the state would only hold the reserved or retained federal interest. Allowing the staking of mining claims on those lands would be disruptive of the surface owner's use and enjoyment of his property rights. Congress might have wished to prohibit appropriative forms of mineral disposals for such lands, in order to protect the rights of surface grantees.

There is a particularly good reason why this might have been the intention of Congress in the original School Land Act of 1927. The grant made by that statute extended both to federal lands which had been withheld from the states due to their known mineral character, and also to those which had theretofore been taken up by the states under mistaken assumptions that they were non-mineral. Thus, for lands granted by the 1927 Act it was possible that either the United States or the grantee states might have created third-party interests in those lands prior to the 1927 grant. Those third parties, grantees of either the federal government or the states, would have been concerned about the exposure of their holdings to mineral location practices. This could explain the provision for "lease" of those mineral interests, if the "subject to lease" provision is read in the more restrictive manner. The underlying premise of this alternative interpretation is that Congress imposed the mineral alienation condition in order to protect the interests of the states themselves, and then added the "subject to lease" requirement (for "such lands" only) to protect the interests of private third parties. (This is apparently the interpretation which the State of Alaska has accorded to the "such lands" reference for nearly 30 years under 11 AAC 86.135(b)).

The draft opinion concludes that the "such lands" reference encompasses <u>all</u> "mineral lands," not a subcategory of "mineral lands." The draft opinion refers to a House committee report on the 1927 statute. The portion quoted in the draft opinion, insofar as it purports to express the committee's views as to the meaning of the statute, does not shed any light on the question of whether the "such lands" reference in the "subject to lease" provision was intended to apply to all mineral lands or only to some of them. It only demonstrates a concern for inclusion of the "mineral alienation condition." (The hypothesis that the "subject to

lease" provision, applicable to the mysterious category labelled "such lands," applies to all mineral lands admittedly seems to find support in the statement of the Secretary of the Department of the Interior. It is hard to evaluate the probity of that comment, however, without having the entire record.)

The draft also relies upon an implication arising out of a 1932 amendment to the 1927 School Lands Act. This amendment modified the "subject to lease" provision so that it would only apply to "such lands not heretofore disposed of by the State." It is postulated that the purpose of this amendment was to eliminate from the class of "such lands" those "mineral lands" disposed of by the states after 1927 without the required reservation of minerals. The need for such an amendment, it is suggested, arose due to the fact that mineral lands granted to the States by the Act of 1927 were not distinguished from non-mineral lands granted to the States earlier. According to this hypothesis, if the phrase "such lands" referred only to those "mineral lands" with respect to which the surface estate had been conveyed to third parties by states, then the 1932 amendment would not have been needed. This hypothesis as to the purpose of the 1932 amendment and what it reflects as to the scope of the term "such lands" fails to take into account the special problem created by the grant to the States in 1927 of "mineral lands" in which third parties held prior interests, such as mineral leases. It is quite possible that Congress was concerned, in 1932, to validate state dispositions of minerals in those lands. That hypothesis as to the purpose of the 1932 Act is not inconsistent with the narrower reading of the "such lands" phrase.

Reliance on the 1932 Act and its legislative history to determine the meaning of the 1927 Act also runs afoul of the general rule that the intention of one Congress cannot be ascertained by reference to the words and actions of a subsequent Congress. *Waterman S. S. Corp. v. United States*, 381 U.S. 252; *Penn. Mut. L. Ins. Co. v. Lederer*, 252 U.S. 523.

THE FORFEITURE PROVISION

Numerous questions exist concerning the proper interpretation and effect of subsection 6(i)'s proviso dealing with forfeiture proceedings to be instituted by the United States. Although these issues have not been addressed in your draft opinion, I believe that it is

important to take them into consideration in making a judgment as to the practical significance of the legal issues which have been discussed.

It seems clear that the forfeiture remedy is a discretionary enforcement tool which can only be invoked by the United States. The basis for this conclusion was set forth in the State's Supreme Court brief in the Cook Inlet Land Exchange case, and need not be reviewed here. Only the United States Department of Justice can invoke this remedy. To our knowledge, it has never seen fit to try.

Secondly, an argument can be made to the effect that this forfeiture remedy is subject to waiver if the United States does not take affirmative action to invoke it within a reasonable period after the alleged violation of the subsection becomes a matter of public record.

There may be some doubt as to which property interests are subject to forfeiture under the proviso. The statute refers to "lands <u>or</u> minerals," rather than to "lands" or "lands <u>and</u> minerals." It may be that Congress only intended to subject the property interest alienated by the State to forfeiture, leaving unaffected the State's retained interest. If the State were to convey all of its right, title and interest in lands subject to that proviso, then that entire interest would be subject to the possibility of forfeiture. On the other hand, if the State violated the subsection by conveying an unconditional fee interest in a mineral estate only, retaining its fee interest in the remaining estate, then perhaps only the conveyed mineral estate would be subject to forfeiture. If this interpretation is correct, then the only party at risk of forfeiture under the proviso is the third party. No property interest retained by the State would be subject to forfeiture.

It seems to me that, no matter where your additional research should take you on these questions, the State's interests might not be promoted by publishing an Attorney General's opinion. No matter what statutory interpretations the opinion might ultimately endorse, I believe that it could serve no useful purpose for the State or for the industry and would only invite difficulties for state public land administrators.

Since the forfeiture remedy contained in the proviso of subsection 6(i) can only be invoked by the United States, it is unclear what impact a state Attorney

General's published views as to the applicability of the section might have upon its enforcement. The United States has been fully advised as to Alaska's state mining law system for more than 30 years, and to our knowledge it has never entertained the possibility that subsection 6(i) might warrant forfeiture proceedings. This long history of administrative practice must certainly reflect more than ignorance of the law, particularly in light of the fact that Congress specifically accepted and approved Article VIII, Section 11, of the Alaska Constitution.

Suppose for the sake of discussion that Alaska state laws did run afoul of subsection 6(i). How could publication of a state Attorney General's opinion ameliorate that situation? That is a question which can be addressed from the standpoints of both existing claims and future claims.

Retrospectively, it seems that nothing the Attorney General might say or do now could help. Property interests have already been acquired by thousands of miners acting in good faith in compliance with presumptively valid state laws. In many cases, these parties have developed, conveyed or hypothecated their interests. Many have undertaken substantial contractual obligations in reliance upon the validity of their claims. Subsection 6(i) does not prohibit alienation of minerals in violation of the subsection; it only subjects them to the possibility of forfeiture. Thus, those miners all hold property interests subject under state and federal constitutions to protection from taking by the State. This is so irrespective of whether the state law under which they were acquired happens to violate subsection 6(i).

No Attorney General's opinion could extinguish those property rights. All it could do is to create a public tempest encouraging gadflies to petition federal authorities to invoke the discretionary forfeiture remedy. Protracted litigation and curative legislation would almost certainly ensue. If someone wishes to raise a question about this with the Department of Justice, he is quite free to do so without the impetus of a state Attorney General's opinion.

Likewise, we fail to see the utility of an Attorney General's opinion on these matters from a prospective standpoint. No agency or official of the United States has expressed any concern as to whether Alaska's current mining claims system conforms to the

requirements of subsection 6(i). At present, state law offers two alternatives for the acquisition of mining rights in locatable minerals, the mining claim and the leasehold location. If a miner should feel at risk under subsection 6(i), he is free to proceed under the leasehold location method instead.

People on all sides of the current mining law policy issues seem to agree that minerals policy applicable on state lands should be formulated and implemented by the State, not by the federal government. Likewise, I expect that all would agree that the regime of law which governs the acquisition of mining rights upon state lands should be based upon relevant economic and environmental considerations, not upon purely fortuitous conditions such as the particular statutory authority under which the State acquired any given section of land decades ago.

Under the Lewis decision, it is clear that subsection 6(i) could be amended or deleted entirely by unilateral action of the Congress inasmuch as it is not a part of the state-federal compact. Congress has shown no reluctance to abolish similar antiquated "purse strings" provisions in other Statehood enabling legislation, upon request of the affected states.[5] All of these legal questions cou[illegible]e effectively mooted if the State and the Department o[illegible]terior joined hands to request a repeal.

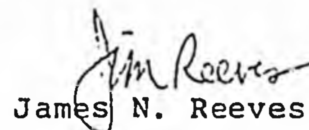
With subsection 6(i) repealed the State would be free to make its own rules concerning the stewardship of its resources, without federal intervention. Issues as to the nature of the property interest which individuals should be permitted to acquire in minerals on state lands and as to the various disposal mechanisms which will be available, are local policy questions. It is better that these be addressed in the Alaska Constitution, statutes and regulations, rather than by Congress.

5/ The federal Public Land Law Review Commission has endorsed that approach. See, One Third of Our Nation's Land; A Report to the President and to the Congress by the Public Land Law Review Commission (1970), pp. 247-48.

For the Alaska Miners Association, I want to thank you for your courtesy and receptiveness to further discussion on this subject. We regard it as a privilege to be able to offer these additional comments and suggestions for consideration in the course of your research project. I will look forward to discussing them in detail with you at your earliest convenience in Juneau or Anchorage.

Very truly yours,

FAULKNER, BANFIELD,
DOOGAN & HOLMES



James N. Reeves

JNR:nf
encl.

THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA; GOVERNOR JAY HAMMOND; GUY R. MARTIN Commissioner of Natural Resources; MICHAEL C. T. SMITH, Director, Division of Lands, Appellants, vs. J.R. LEWIS and HAROLD H. GALLIETT, JR., Appellees.	Supreme Court No. 3039

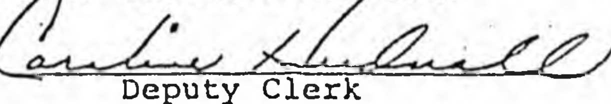
BRIEF OF APPELLANT STATE OF ALASKA

AVRUM M. GROSS
ATTORNEY GENERAL

By: James N. Reeves
Assistant Attorney General
360 "K" Street, Suite 105
Anchorage, Alaska 99501

Filed August 16, 1976
in the Supreme Court for
the State of Alaska

CLERK OF THE SUPREME COURT

By 
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Section 6(i) does not impose a condition upon the alienation of all minerals in all lands owned by the State of Alaska. Instead, the condition attaches only to "mineral lands" acquired under Section 6 of the Alaska Statehood Act. See, pages 9-13 supra. As has been noted, there is a simple historical explanation for this: when Congress decided to permit the new State to select its quantity land grant from lands which were both mineral and nonmineral, it insisted on parity of treatment by imposing as to the mineral lands that Alaska would select the same condition it had imposed upon the other states with respect to the same class of lands in the School Lands Act of 1927, 43 U.S.C. 870(b). Hence, the mineral alienation provision of Section 6(i) of the Alaska Statehood Act applies not to all lands granted by Congress to the new state, but only to those which were "mineral lands" - the same category of federal lands which had been unavailable to the other public land states prior to the 1927 Act extending their statehood land grants to "mineral lands."

The plaintiffs' amended complaint contained no allegation that the lands in this action are "mineral lands" within the special meaning of that phrase. Instead, they stubbornly maintained that the mineral alienation provision of Section 6(i) applies to all lands, irrespective of whether they are "mineral lands;" and they did not tender competent evidence to prove that any state lands involved in the trade were "mineral lands" on the proper reference date (i.e., the date upon which they were originally acquired by the State).

Therefore, the Court's holding that the mineral reservation condition provision of Section 6(i) is applicable in this case presumably rests upon the mistaken view that that provision relates to all lands regardless of whether they are "mineral lands" within the meaning of that special term.

If the plaintiffs and the Court had not simply ignored the adjective "mineral" in Section 6(i) but had instead endeavored to determine whether any of the lands involved in this action were "mineral lands" within the meaning of that statute's mineral alienation provision, it would have been necessary to identify the standards by which such determinations are made. Because the early federal railroad and statehood grants originally excluded "mineral lands," there is a body of U.S. Supreme Court case law dealing with the subject. Applying the criteria explained in those musty old cases, it might have been possible to determine whether given lands, such as those state lands involved in the Cook Inlet land exchange, are "mineral lands."

A statement of the general principle appears in United States v. Southern Pacific Co., 251 U.S. 1 (1919), a case arising from allegations that the railroad had fraudulently represented lands overlying the principal geologic structure in Elk Hills, California to be non-mineral. According to the Court in that case, "mineral lands" are lands as to which "the known conditions [at the time of their grant] were such as reasonably to engender the belief that the lands contained oil

[or other mineral] of such quantity as would render its extraction profitable and justify expenditures to that end." Id., at 13-14. While actual production need not be shown, "conditions upon which prudent and experienced men . . . are shown to be accustomed to act and make large expenditures" should be.
Ibid. In the Elk Hills case, the Supreme Court sustained the view of the United States that the lands in question were mineral lands because:

> the lands were valuable for oil, in that an ordinarily prudent man, understanding the hazards and rewards of oil mining and desiring to engage therein for profit, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and in that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure.

See also, Diamond Coal & Coke Co. v. United States, 233 U.S. 236 (1914) (arid lands having no surface value but containing coal in large deposits of recognized commercial value and active commercial mining operation held to be "mineral lands"); Deffeback v. Hawke, 115 U.S. 392, 404 (1885) ("there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable.")

There is a second element of the "mineral lands" test which was also overlooked by both the plaintiffs and the Superior Court. The determination of whether lands are

"mineral lands" - and thus, for this case, whether Section 6(i)'s condition might or should have been imposed upon their grant by appropriate provisions in the land patent - must necessarily be made with reference to a date certain. This reference date for determining mineral character is either the date upon which the grant was made or, if the original grant is indeterminate as to location, then perhaps [39/] upon the date(s) upon which the grant attached specifically to land by the filing of the State's application(s) to select. Wyoming v. United States, 255 U.S. 489 (1921); Shaw v. Kellogg, 170 U.S. 312, 332 (1898). Thus, the question at hand is not whether state lands which may pass to the United States under the exchange ag[illegible]nt are now known to be chiefly valuable for the commercial removal of minerals, but whether they were known to be so when the Statehood Act grant attached to them. Wyoming v. U.S., id., pp. 495-96. [40/]

39/ For the view that the mineral character reference date is upon the land grant act's passage rather than upon the actual location of the land on the ground by selection, see Cooper v. Roberts, 15 U.S. (18 How.) 173, 15 L.ed. 338 (1856). The court is not required in this case to decide which of these two dates - statehood or application for selection - is the appropriate reference date, for the public record would establish that the lands involved were not "mineral lands" under the above test on either date. Moreover, as will be seen (p. 47, infra), the Secretary's decision not to include the Section 6(i) condition in the patents is conclusive on the factual question of mineral character.

40/ In Wyoming, the court relied upon its holding in Colorado Coal & Iron Co. v. United States, 123 U.S. 307 (1887), that "a change in the conditions occurring subsequently to the sale [or, in Wyoming and in this case, the grant], whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at sale." Wyoming v. U.S., 255 U.S. 489, 498. See also, Deffeback v. Hawke, 115 U.S. 392, 404-405 (1885).

Since the plaintiffs bear the burden of proof on the issue of mineral character, application of these substantive criteria to the lands involved in this case is possible notwithstanding the paucity of evidence on the issue. Certainly all parties recognize that some state lands involved in the Cook Inlet land exchange contain significant - albeit more or less speculative - mineral values.[41/] But the plaintiffs never presented evidence as to the mineral character of any state lands <u>at the time they were acquired from the United States</u>.

The plaintiffs' key concern regarding mineral values has been with the area under coal lease in the Capps Glacier area within the so-called "Beluga land pool."[42/] The evidence they tendered consisted of estimated volumes unaccompanied by evidence of commercial value, and of counsel's "testimony" in brief (unsupported by any evidence at all) that the Beluga lands were known long ago to have "tremendous coal reserves." The

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41/ The Superior Court properly noted this fact, but it erred in venturing the further opinion that the land "contains up to 2-5 billion dollars in coal reserves." R., p. 473. There was certainly no stipulation nor any competent evidence to support that immaterial finding of fact.

42/ As to other areas involved in the land exchange, the plaintiffs' showings on mineral character were plainly incompetent because lacking in foundation and were irrelevant because premised on speculative information which is too recent. They relied, for example, on "good possibilities" for oil and gas based upon "recent" gravity geophysical work (R., p. 30), "very recent" evidence of a new natural gas field (R., p. 31), and "probable" but as yet undiscovered reserves (R., p. 30). Coal resources were catalogued in estimated volume without any reference to the feasibility of mining, transporting and marketing them - thus, the evidence did not tend to prove commercial value. The emphasis, instead, was upon "potential" value.

public record - not in evidence in this case, but subject to judicial notice - shows that these lands were naked of mineral entries when the State of Alaska selected them following statehood and received tentative approval for their patent in 1961. Permits for exploration were later acquired, but the permitholders allowed them to expire without any effort to convert them under state law to mineral leases. Thus abandoned, the "tremendously valuable" lands lay open but neither explored or exploited until 1968. No "prudent and experienced men" made "large expenditures" in these suspected coal bearing lands, as occurred in the Elk Hills case. Even today, more than fifteen years after the reference date for determination of mineral character, because of present technological limitations, transportation problems and market conditions there exists a question as to whether the coal occurring in these lands is commercially exploitable, or "economic."[43/] But whatever the commercial feasibility of the coal in this area at present, today's economic interest due to better technology, investment and market conditions, and definition of the mineral occurrence cannot be related back to change its nonmineral character on the reference date. See, pp.42 -44, supra. The Beluga lands - plaintiffs' key alleged

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43/ Dr. Bradford H. Tuck, Economic Analyst for the Federal - State Land Use Planning Commission for Alaska (which body studied the proposed Cook Inlet Land Exchange at the request of the Alaska State Legislature and recommended unanimously that it be approved), concluded that "there is, firstly, a real question as to whether some (or perhaps any) of these resources will ever have commercial value." FSLUPC memorandum dated March 5, 1976, page 9; Appendix E of the Commission's "Cook Inlet Report" dated March 6, 1976; R., p. 216.

"mineral lands" - meet neither of the twin standards which must both be met when lands are first selected if they are to be impressed by the Secretary with Section 6(i)'s mineral alienation condition. They were not "chiefly valuable" for commercial mineral production when they were acquired, nor in fact were they then known to hold coal in such quantity and quality as to make their mining under the technology then available commercially feasible and thus induce prudent investors to expend money on them. Thus, they are evidently not mineral lands within the meaning of Section 6(i) of the Alaska Statehood Act.

* * *

In any event, the Court need not in this case enter the thicket of issues which usually arise in mineral character determinations. There exists a procedure for making such determinations administratively, and a review of the land patents issued by the Secretary of the United States Department of the Interior to the State of Alaska would readily confirm what the plaintiffs have by their silence intimated: no portion of any of the state lands involved in this case was ever found by the Secretary to be "mineral land" within the special meaning of Section 6(i). None of those patents contains the reservation of authority to the United States which is to be inserted by the Secretary when a patent to mineral lands issues to the State of Alaska.

The Secretary's actions in the federal administrative process of adjudicating the State's applications to select its

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

JUN 2 1981

JAY S. HAMMOND, GOVERNOR

POUCH K–STATE CAPITOL
JUNEAU, ALASKA 99811

May 22, 1981

The Honorable Terry Gardiner
House Resources Committee
House of Representatives
Pouch V, State Capitol
Juneau, Alaska 99811

Dear Chairman Gardiner:

On April 30, 1981, during a hearing on HB 350, the House Resources Committee requested that, prior to the conclusion of this legislative session, this office issue its opinion on whether, and to what extent, leasing is required for mineral interests in lands granted to the state under section 6(a) and 6(b) of the Alaska Statehood Act. (The opinion is often referred to as the "6(i) opinion" because the leasing restriction is contained in section 6(i) of the Alaska Statehood Act.) The purpose of the request was to allow time for the legislature to act if the opinion concluded that a significant change was necessary in the manner that the state has dealt with minerals in 6(a) and (b) lands. This office has released drafts of a proposed opinion on this subject and is currently working on its final opinion.

Although it will not be possible to issue a final opinion on all matters prior to the end of this legislative session, this letter expresses our opinion on at least one of the issues: whether the past state interpretation of the mineral leasing restriction in section 6(i) of the Alaska Statehood Act was correct. Although the correct application of the 6(i) restriction is still being researched, our opinion is that past state practice was incorrect. A final opinion on the correct interpretation will be forthcoming sometime this summer. In that opinion the matters discussed in this letter will be set forth more thoroughly.

This opinion does not conclude which lands are covered by the leasing requirement. The draft opinions' tentative conclusion that the leasing restriction applies to all 6(a) and (b) lands is vigorously disputed. As expressed by the testimony of the Alaska Miners Association, by Mr. Phil Holdsworth, during the hearing on HB 350, the miners' position is that the mineral leasing restriction in section 6(i) applies only to those 6(a) and (b) lands that are "mineral" in character as determined by the Department of Natural Resources.

Although the miners' position may be correct, their view also represents a significant departure from past practice. The Department of Natural Resources has never made mineral character determinations. Requiring such determinations would possibly result in severe dislocations in present mining activities while miners await those determinations. Thus, some legislative relief this session would still be appropriate. A more detailed discussion of this remaining issue, and the attendant legal and practical problems, is contained later in this letter.

Section 6(i) provides:

> "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 expressed 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 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 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."

The issue causing the greatest controversy is the application of the phrase "mineral deposits in such lands will be subject to lease . . . . ." (emphasis added). The question is which lands are "such lands." The draft opinion concludes that, first, "such lands" means all mineral lands granted under section 6(a) and (b). Second, the draft opinion concludes that the term "mineral lands" as used in section 6(i) means all 6(a) and (b) lands that contain valuable mineral deposits no matter when those deposits become known.

The miners apparently agree that the restriction applies to "mineral lands," but contend that "mineral lands" means only those lands which are believed to be valuable at a certain point in time as determined by the Department of Natural Resources. Minerals discovered after the land has been determined to be "non-mineral" would not need to be leased. The draft opinion recognizes that the miners' position may be valid, and research is still being done on this point.

But the state's interpretation and practice to this time has taken still a third position--one which this office concludes is incorrect. The prior state interpretation, presently set forth in 11 AAC 86.135(b), only applied the mineral leasing restriction to those 6(a) and (b) lands which had previously been conveyed to third parties. If 6(a) and (b) lands remained in state ownership, then past state practice would allow miners to mine simply by location and discovery whether or not the land was mineral in character. Since until recently little 6(a) and 6(b) land was sold to third parties, the leasing restriction was practically nonexistant. As a result few, if any, hard rock mineral leases have been issued by the Department of Natural Resources.

Notwithstanding the department's interpretation and practice, it is our opinion that section 6(i) requires a different scheme. Whether or not the state sells the non-mineral interest, the state may only lease the minerals in the 6(a) and (b) mineral lands.

These restrictions, however, do not apply to all lands granted to the state. The first sentence of section 6(i) includes mineral rights in all state grants: "All grants made or confirmed under this Act shall include mineral deposits." The leasing restriction, however, applies only to lands granted under section 6(a) and 6(b), and then only those 6(a) and (b) lands which are "mineral" in nature.

As will be set forth more fully in the eventual final opinion, the reasons for the conclusion that the past state practice was incorrect are based on the legislative history, administrative interpretations, and judicial decisions surrounding the almost identical provisions of the 1927 School Lands Act, 43 U.S.C. 870, and the history of section 6(i) itself. The legislative history of the School Lands Act and section 6(i) are set forth in the draft of February 11, 1981, which is appended to this letter for your reference. See also, e.g., Shores v. Utah, 52 I.D. 503 (1928); Instructions, 52 I.D. 51 (1927), 52 I.D. 273 (1928), 53 I.D. 30 (1930).

Definition of "Mineral Lands".

Although the applicability of the 6(i) leasing restriction to all 6(a) and (b) mineral lands is relatively clear, a more difficult question is the meaning of the term "mineral lands." The February 11, 1981, draft's preliminary conclusion was that "mineral lands" meant all 6(a) and (b) lands that contain minerals no matter when the mineral character of the land became known. That conclusion would require leasing of minerals on all 6(a) and (b) lands, since there would be no point in time where anyone could conclusively say that a particular piece of land was not mineral in nature.

The reasons for this preliminary conclusion are set forth in the February 11, 1981, draft at pages 49-54, and will not be repeated here. It is to be emphasized that that conclusion was only preliminary, and, in fact, subsequent research has tended to weaken the rationale for that result.[1]

The alternative interpretation was generally described in testimony by former natural resources commissioner Phil Holdsworth before your committee concerning HB 350. Basically, under this approach, the term "mineral lands" only applies to lands known or reasonably believed to contain valuable minerals at the time of equitable transfer from the federal government to the State of Alaska. Since the federal government has granted both the mineral and non-mineral land to the state, the federal government does not

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1/ The conclusion in the February 11, 1981, opinion was based solely on the School Lands Act experience and comments during the admittedly confused legislative process surrounding section 6(i) of the Alaska Statehood Act. See, e.g., comments of Representative Pillion quoted in the February 11, 1981, draft at page 87. The term "mineral lands," however, has been applied in a wide range of federal land grants, and subsequent research has included research into those other types of grants and the decisions and practices of the Department of the Interior in those other applications. Subsequent research has tended to show that a more restrictive reading of the term "mineral lands" has had application in a wider range of instances than previously thought. Particularly telling has been the tendency of administrative bodies to automatically apply the more restrictive interpretation of the term "mineral lands" even when the purposes of the restriction were markedly different.

have the authority to make that initial determination and, instead, the state is responsible for setting up and implementing that administrative decision. See Instructions, 53 I.D. 30, 35 (1930).[2]

Under this approach, the mineral leasing restriction applies only to land the state determines is mineral in character. If the state determines that the land is not mineral in character, the leasing restriction does not apply even if there is a subsequent discovery of minerals in that land.

Even if the miners' position is correct, there are still a number of unresolved questions which require additional research. Briefly, the main areas of inquiry are:

(1) What are the criteria for determining whether land is mineral in character?

(2) What date is the relevant time for identifying the known conditions which form the basis for determining whether land is mineral?

(3) What is the effect of the provision in section 6(g) of the Statehood Act which provides:

> Following the selection of lands by the State and the tentative approval of such selection by Secretary of the Interior 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.

2/ This was the approach taken by the Department of the Interior in implementing the School Lands Act. E.g., Instruction, 52 I.D. 51, 54 (1927). On the other hand, the Department of the Interior took the position that it could review the mineral character of the land in order to determine whether the state has violated the leasing and mineral reservation restrictions, since the Department has taken the position that it must recommend to the U.S. Attorney General to institute forfeiture proceedings in appropriate instances. See, generally, 1 American Law of Mining, Section 3.16 at page 508; Shores v. Utah, 52 I.D. 503, 505 (1928); Instructions, 53 I.D. 30 (1930).

The most commonly cited expression of the "mineral lands" test is contained in the U. S. Supreme Court case of Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239-40 (1914):

> It must appear that at the time [of determination] . . . the land was known to be valuable for minerals; that is to say, it must appear that the known conditions at the time . . . were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

There is some confusion, however, concerning what passes for evidence of profitability. On the one hand, there is some indication in the cases that profitability must be judged in terms of the then contemporaneous market conditions.[3]

On the other hand, it has been held that subsequent developments may be considered so as to allow a finding that lands are "mineral" even though the contemporary belief is that the minerals were unmarketable.[4] Furthermore, there is even doubt that this test applies at all to hardrock minerals. See, e.g., Diamond Coal & Coke, supra, 233 U.S. at 249.

3/ See United States v. Southern Pacific Co., 251 U. S. 1, 13 (1919) which implies that an immediate willingness to risk money is the test:

> That an ordinary and prudent man, understanding the hazards and awards of oil mining, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and in that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure.

4/ In Standard Oil of California v. United States, 107 F. 2d 402, 415 (9th Cir. 1940), the court held land to be mineral and, after quoting the Diamond Coal & Coke test,

> "In applying such a test, rather than that of actual discovery, it is obvious that a wide field of inquiry is opened up. It was not necessary to show that appellants themselves, in 1903, believed the land to be valuable for oil, or that there was unanimity of contemporary opinion to that effect. The erection of

Besides the criteria to be applied in deciding the physical attributes of mineral land, a second question is identifying the relevant point in time for applying the criteria. Are the conditions those which were known at the time of statehood? State selection? Tentative approval? Patent? Or subsequent transfer to a third party? Arguments can be made for all five dates. Generally, however, it appears that the key time is the point of equitable transfer from the federal government to the state. E.g., Wyoming v. United States, 255 U. S. 489 (1921). This narrows the inquiry to a choice between two dates: (1) when the state has done all that it must do to complete its selection for a piece of land; or (2) when the state's selection is tentatively approved by the Department of the Interior. The completion of all activities necessary for selection is the traditional time for determining mineral character for those types of grants where a state is able to select the land from the general public domain. One such example was the ability of states to make in-lieu selections for grants in aid of schools where the original in-place grants were determined to be mineral in character and not passed to the state under pre-1927 law. Id. On the other hand, 6(g) of the Statehood Act gives the state the authority to dispose of its interest in land upon the receipt of tentative approval. At least one court has stated that "section 6(g) provides that on tentative approval of the selected lands equitable title passes to the State," Schraier v. Hickel, 419 F.2d 663, 665 (D. C. Cir. 1969).

The language of section 6(g) raises an additional question. Again, 6(g) provides:

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

> such standards would require, in the one case, proof of fraud, and, in the other, proof of conditions pointing so unerringly to the existence of valuable oil deposits as to be the equivalent of actual discovery. Nor, as we understand the rule laid down in the controlling decisions, need it be shown that contemporary belief was such as to prompt the willingness immediately to risk money in the exploitation of the land. On this point there is persuasive evidence that the then prevailing market for oil was unfavorable to new development and continued to be so for a number of years." (emphasis added)

Section 6(g) seems to state that the only way that the state can convey a third party interest in land prior to receipt of patent is by a conditional lease or conditional sale contract. Since section 6(i) prevents the sale of the mineral interest at all times, even if non-mineral land can be mined by location after the state receives patent, it may be that prior to patent the state may only authorize mineral entry by means of a conditional lease. Given the long period of time between tentative approval and receipt of patent in most instances, present mining activities may still be affected. Further research on this question is also being conducted.

Conclusion

Past state practice was based on an incorrect interpretation of section 6(i). Also, it is relatively clear that whatever the proper application of section 6(i) may be, there will be a significantly increased need for the issuance of leases for mining activities on 6(a) and (b) land. If no transitional legislation is enacted, disruption of mining activities could occur. This potential for disruptions exists even if the miners' interpretation of the 6(i) restriction is eventually adopted in our final opinion because of the need of the department to make mineral character determinations under the miners' analysis.

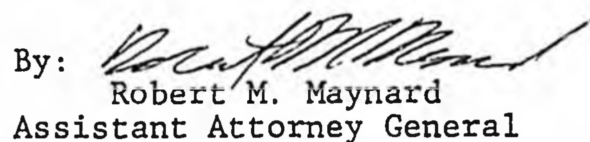
On the other hand, even though past state interpretation was incorrect, it should not be assumed that the state has violated the 6(i) restriction. First, the state has always retained the mineral interest when it has sold 6(a) and (b) land to third parties. AS 38.05.125. Second, the leasing requirement in 6(i) is probably satisfied as long as a lease eventually issues. Allowing interim mining solely by discovery and location prior to issuance of a lease would probably not be a violation of section 6(i). Cf. Idaho Code Annotated §47-703 et. seq. (where the statute allows mining by location only for two years before a lease must be secured). Thus, if a claim has been staked on 6(a) and (b) mineral land, the potential violation of 6(i) would probably be cured by issuing a lease for that claim. Third, given the poor market for hardrock minerals in Alaska until recent years, many lands that have been tentatively approved or patented may not be "mineral lands" under one of the likely tests for mineral character: i.e., that the land was reasonably believed to contain valuable minerals at the time the state completed its selection. Therefore, the lands already conveyed to the state by tentative approval or patent that would be "mineral" may be very few. Finally, if a court would rule that the state practice was incorrect, it is likely that the court would give the ruling prospective effect only. See, e.g., Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971).

Again, a final opinion is expected to be issued sometime this summer. That opinion will expand upon the matters discussed herein, reach conclusions on the undecided issues outlined above, and answer a number of related questions addressed in prior drafts but not discussed in this letter.

If you have any questions please do not hesitate to call.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: 
Robert M. Maynard
Assistant Attorney General

RMM:mr

LEGISLATION SUMMARY

SB 732: "An Act relating to issuance of production licenses for mineral extraction from state land; and providing for an effective date."

GENERAL: Establishes a mineral production license for production from locatable mineral deposits to by issued by the Department of Natural Resources. The production license is consistent with sec. 6(i) of the Alaska Statehood Act.

Sec. 1: PURPOSE. Requires the locator or lessee of locatable mineral deposits on state land to obtain a production license from DNR to mine the deposits. Applies to all existing and future mining operations. The legislature finds that the license is consistent with State Constitutional and Statehood Act provisions.

Sec. 2: Requires the locator or lessee of a mining claim or location to apply for a mineral production license prior to mining commercial quantities. The commissioner DNR shall publish notification of receipt of the application. Pending notification and issuance of the license, the locator or lessee has the right to produce minerals from the property.

The commissioner will issue a transferable production license if he determines that no conflicting rights are asserted by any other person, and that the locator or lessee has complied as nearly as possible with the requirements of Article 7 (Mining Rights) of the Alaska Lands Act [AS 38.05.185-AS 38.05.280].

Sec. 3: Immediate effective date.

PRIME SPONSOR: Resources

CO-SPONSOR(S): None

ALASKA MINERS ASSOCIATION, INC.

509 W. Third Ave., Suite 17, Anchorage, Alaska 995^1 (907) 276-0347

Dear AMA Member:

The State of Alaska Attorney General's office is considering the implementation of a mineral leasing system to replace the historical practice of acquiring mineral rights upon State lands by location. The Attorney General has written a draft legal opinion that section 6(i) of the Statehood Act mandates a leasing system for minerals on <u>all</u> state lands.

The Attorney General's draft opinion is incorrect; Section 6(i) applies only to land on which surface rights have been sold by the state. This fact was recognized by the author's of Alaska's constitution and current mining law. The Alaska Miners Association has retained legal counsel to counter the Attorney General's draft opinion and we believe our legal arguments will prevail.

It is imperative however, that Alaska miners be aware of the impact a leasing system will have upon them as individual locators and upon the mining industry in general. A lease system most likely will cause:

1. Loss of rights to acquire mineral rights by discovery and location. This practice is mandated by the State Constitution.

2. Loss of right to self initiate a mining investment. You will have to secure the permission of the State before any mineral development.

3. Individual miners to compete with major corporations in any competitive lease action.

4. A royalty to be paid to the State for any minerals extracted. This royalty would probably be in addition to the current mining license tax.

5. An expansion of the State bureaucracy, on the order of 60 to 80 new positions, at a cost in excess of $500,000 per year, just to administer a leasing system.

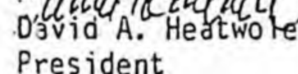
6. Decreased mineral exploration upon state lands.

7. Use of additional bureaucracy to enforce administrative provisions upon the individual operators.

The implementation of a mineral leasing system will be a state policy decision. Individual operators are urged to voice your objection to such a system by writing directly to Governor Hammond and your legislators making them aware of the impact that leasing would have upon your type of operation. Every miner must respond <u>individually</u> if we are to stop the state from implementing a leasing system.

For coordination purposes please send a copy of your letter to the Alaska Miner's Association statewide office, 509 W 3rd Avenue Suite 7, Anchorage, Alaska 99501.

ALASKA MINERS ASSOCIATION



David A. Heatwole
President

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

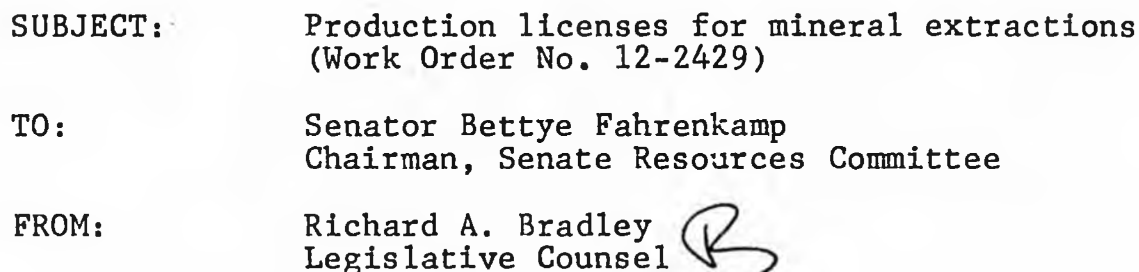
LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M   February 5, 1982

SUBJECT: Production licenses for mineral extractions
(Work Order No. 12-2429)

TO: Senator Bettye Fahrenkamp
Chairman, Senate Resources Committee

FROM: Richard A. Bradley
Legislative Counsel



The bill as requested is enclosed.

I have discussed some of the editorial changes made to the bill with Phil Holdsworth but he has not seen the bill. Subsecs. (b) and (c) were redone after a discussion with Phil and I think I have achieved his goals.

The title has been changed to narrow its scope.

In sec. 207(a), I changed the phrase "location and ownership of the mineral holdings" to "location of the land and ownership of the mineral deposits" as more reflective of both legislative style and the presumed intent of the language.

The revisor noted that the use of the term "began" ["the date production began"] suggests that production can begin without the license. I assume that what is intended is that the locator/lessee may begin to remove mineral deposits from the land for tests and the like but before removals "in commercial quantities" may begin, a license is required. If this is not stated clearly enough, we can reconsider the language.

If I can assist further, please advise.

RAB:ljb

Enclosure

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SB 732
Title An Act relating to issuance of production licenses for mineral extr.
Requested by Senate Resources Date 2/12/82

II. FISCAL DETAIL
Agency Affected Dept. of Natural Resources
Program Category Affected Management of Mineral Resources
BRU, Program, Or Subprogram(s) Affected Mineral Development
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES		68.1	73.3	78.7	84.6	91.0
200 TRAVEL		2.6	0.6	0.7	0.8	0.9
300 CONTRACTUAL		6.0	6.0	6.0	6.6	7.3
400 COMMODITIES		0.9	1.0	1.1	1.2	1.3
500 EQUIPMENT		1.4				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		79.0	80.9	86.5	93.2	100.5

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND		79.0	80.9	86.5	93.2	100.5
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME		2	2	2	2	2
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

A. Assumptions

This note assumes passage of SB 732 as introduced, but with adoption of an amendment to exempt licenses from the notice requirements of AS 38.05.345

B. Program Summary

The issuance of production licenses for mining operations will consist of four elements: 1) submission of the application by the miner; 2) adjudication of the application by the Division of Minerals and Energy Management (DMEM); 3) publication of notice of intent to

(Continued on attached page)

IV. DATE 2/12/82 PREPARED BY David A. Hedderly-Smith
AGENCY DNR/DMEM
PHONE 276-2653

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

issue the production license by DMEM; and 4) issuance of the license by DMEM.

Two new postions within DMEM are anticiapted to be required to handle this administrative load: a Land Management Officer II and a Land Management Technician I. In FY 83 these people will prepare regulations and design an appropriate license form in conjunction with the Department of Law. Issuance of the licenses will start in mid-FY 83. It is anticipated that the work load for this project will remain relatively steady through FY 87, with the annual workload roughly summarized as follows: FY 83 - adoption of regulations, design of license form, initial issuance of licenses; FY 84 - issuance of licenses to miners who "didn't get the word" about the production license requirement; FY 85-7 - issuance of licenses to new mines going into production (new mining locations filed with DMEM increased threefold between 1979 and 1980 and another 80% in 1981; we anticipate that many of these new mining properties will be initiating production in FY 85-7) and to old mines as miners move their operations onto claims that were not licensed in FY 83 & 84.

Expenditures for FY 83 are summarized below:

100	Personal Services	
	Salary & benefits for LMO II and LMT I	68.1
200	Travel	
	Travel to and from public hearings for adoption of regulations; travel to Fairbanks placermining seminar for LMO II	2.6
300	Contractual	
	Publication of notices for adoption of regulations and issuance of licenses; printing of production licnse forms	6.0
400	Commodities	
	Miscellaneous office supplies	0.9
500	Equipment	
	New office equipment for two new positions	1.4
		79.0

Increases in expenditures for FY 84 through 87 reflect anticipated inflation at 7.5% for personal services and roughly 10% for other items. Travel decreases in cost for FY 84 and beyond because regualtion hearir will no longer be required.

STATE of ALASKA

MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF RESEARCH AND DEVELOPMENT

Preview of an opinion request which you should get sometime.

TO: WILSON L. CONDON, Deputy Attorney General
Department of Law

DATE: November 9, 1979

FILE NO:

THRU: GEOFF HAYNES
Deputy Commissioner

TELEPHONE NO:

FROM: AMOS MATHEWS
Director

SUBJECT: Mining Locations on State Selected Land

The Department of Natural Resources has posed in this memo a series of questions that arise from the staking of mining claims on land selected by but not yet tentatively approved to the State. The questions derive from an ongoing departmental effort to assess options for dealing with what is becoming an increasingly volatile situation involving the State, federal government and private mining interests.

AS 38.05.275 provides that "Mining locations made on...state selected lands, under section 185--280 of this chapter...acquire for the locator mining rights under section 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." Although neither the federal government or the State can dispose of land of state selected status, the State agrees to retroactively validate such mining claims if and when it receives tentative approval. In the meantime, the miner is expected to perform annual assessment work as though the claim were already valid.

This procedure has created no difficulty in the past, but with the passage of FLPMA and more recent national monument proclamations, the federal government has begun to take a more active role in the management of federal lands, including state selected land. The Department of Interior has decided that if a miner seeks access to state selected but still federal land on the basis of a claim filed under state law, which technically cannot yet apply, access will be denied. This would leave the miner with no way to carry out the annual labor required under state mining law (see attached Interior Department solicitor's opinion).

This situation raises a number of questions:

- What is the State's opinion of the legal status of mining claims under state law on state selected lands?

- What rights, if any, does the mining claimant have under either state or federal law in this situation? (none)

- Do such claims, assessment work associated with them, and/or state permits issued to authorize work violate the Statehood Act? Has the State incurred any liability to the federal government?

To miners who have staked claims in good faith, especially on land the State has no expectation of receiving?

- Does the federal government's past acquiescence or inaction regarding the presence of such "claims" on state selected lands and the performance of annual labor in the past, give the State or the miners any legal support in asserting the right to continue assessment work now?

- Is the State legally obligated to press for conveyance to state selected lands in order to protect an individual's prospective land interest under AS 38.05.275?

- If conveyance cannot be achieved in the near future, could 11 AAC 86.125, which is based on AS 38.05.185(b), be used to forgive the performance of annual labor on the claims involved?

- AS 38.05.185(a) allows the Department to close state land to mining. Could DNR also close state selected land to the filing of new claims, or does AS 38.05.275 preclude this?

- Does AS 38.05.275, in granting special privileges to mineral locaters on state selected land, present a problem under Article VII, Section 17 of the Alaska Constitution?

- The 1961 version of AS 38.05.275 stated that "locations...will constitute a valid mining claim...at the time Alaska receives tentative approval of its selection. Such locations shall be subject to the provisions of said tentative approval and <u>to the classifications by the State after such tentative approval</u>" [emphasis added]. Similarly, 11 AAC 86.115 emphasizes that the locations are subject to "land classification by the State." (Because that regulation was part of the 1974 comprehensive revision, it is impossible to trace its history. But it was presumably adopted during the 1960s). However, in 1966, AS 38.05.275 was amended to delete any reference to land classification; the location is made "subject to existing rights and to any denial of or restriction in the tentative approval of state selection or the patent of the lands to the State." Is 11 AAC 86.115 still valid? What discretion, if any, does the State retain in vesting mineral locators on state selected land with valid state mining claims pursuant to AS 38.05.275 upon tentative approval?

Many of these questions have been informally posed to members of your Anchorage staff over the past several months. In particular, Tom Meacham has been involved in discussions on this issue. It would be our preference to continue working with Tom on this subject and would hope to meet with him to discuss this formal request for legal opinion in the near future.

Attachment:

Interior Department Solicitor's Opinion

cc: Ted Smith
Tom Cook

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUN 1 9 1979

Honorable Don Young
House of Representatives
Washington, D.C. 20515

Dear Don:

We appreciate the concern you expressed in your letter of April 24, 1979, on behalf of Mr. Wallace Gordon, who has filed several mining claims on state selection lands within the Gates of the Arctic National Monument. We do not agree, however, with your broad allegations concerning the Department's handling of this matter. In our view, you have been misinformed or do not fully understand the situation.

The Department's approach to the mining issues in the Alaska national monuments reflects our commitment to finding a cooperative solution which is consistent with the needs of the Deparument and the mining community. In the case of the National Park Service, thi s taken the form of amendments to the applicable regulations, 36 Part 9, Subpart A, to aid the permit review process. After a series of meetings with miners in Alaska, we also established a process by which operators, whose claims can meet initial screening for validity and legality of location, may receive temporary approval to operate this season. This approval is subject, however, to a test of validity which could result in a later determination that the claim was not properly located or is otherwise invalid. This procedure seems to us eminently fair and was developed with a great deal of assistance from the Alaska Miners' Association.

As to the Gordon matter specifically, we suggest that an understanding of the facts substantiates the Department's action. Mr. Gordon does not have a valid Federal mining claim. Prior to his entry the land in question had been selected by the State. As you know, once land is selected by the State, it is no longer open to mineral entry. 43 CFR §2627.4(b). Thus, Mr. Gordon cannot assert that he has a valid Federal mining claim. Mr. Gordon must have understood this for he did not file Federal mining claims. Rather, he filed his claims under the State mining laws.

Neither does Mr. Gordon have a valid State claim in our opinion. While the lands on which the claims are situated have been selected by the State, they have not been conveyed or tentatively approved for conveyance. Accordingly, title to the land remains in the United States. Section 6(g) of the Alaska Statehood Act provides that only tentatively approved or patented selections may be alienated by the State. Consequently, these lands are not available for mineral entry under the State program and won't be until the lands are tentatively approved or patented. We conclude, therefore, that because neither title to these lands nor a right to convey them has passed to the State, they remain under Federal jurisdiction and control, and unavailable for mineral entry.

State Selected Lands

Since Mr. Gordon has been issued a temporary approval under the National Park Service mining regulations, 36 CFR Part 9, Subpart A, to continue his operation for this season, he will not be affected by this conclusion. If Mr. Gordon believes our understanding of the facts or the law to be wrong, he will have an opportunity to so demonstrate when the final determinations are made as to the validity of his claims. However, in all future cases, we will refuse to grant access to any claim filed under State law on lands which have been merely selected and not tentatively approved. In this regard, I appreciate you calling this matter to my attention in order that we may clarify our policy on this issue.

As to lands which have been conveyed or tentatively approved for conveyance to the State, we will recognize State mining claims which are properly filed under State law, and permit mineral activity on them. Where access to such a claim is across park land, the Park Service must exercise its regulatory authority to ensure that significant environmental degradation does not result. We cannot promise in every case that further controls will not be required. However, it is our practice to accept for access purposes the material submitted to the State in compliance with its regulations governing mining. This information normally will provide us with an adequate basis upon which to make our decisions, and we, thereby, eliminate duplicate applications.

We would also like to advise you of our policy concerning exploration work done by the State or by native corporations on land identified for selection or selected. When this exploration is designed to aid the selection process, it may be allowed at the discretion of the Department. When such work is authorized, the Alaska Area Office of the National Park Service and the Anchorage Office of the Bureau of Land Management will coordinate this activity. Specifically, there is a NEPA responsibility which must be completed before any permit is issued to a native corporation or the State authorizing mineral examinations; the provisions of section 603 of FLPMA must also be complied with.

We trust that this explanation of our approach to the mineral issues in the monuments in Alaska meets your concerns. It is a matter of top priority in the Department. We are devoting resources and manpower from all parts of the Department to it in our effort to make compliance with Federal requirements as rapid and easy as possible and also to see that our management responsibilities are implemented properly.

Sincerely,

(Sgd) Cecil

SECRETARY

cc: Senator Mike Gravel
Senator Ted Stevens
Governor Jay Hammond

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

RECEIVED
JUN 25 1979 | 34 PM '79
NAT'L PARK SERVICE
ALASKA STATE OFFICE
ANCHORAGE, ALASKA

Memorandum

To: Alaska Area Director, National Park Service

From: Assistant Solicitor, Parks and Recreation

Subject: Application of the Mining in the Parks Regulations

This is in response to discussions we have had with Howard Wagner of your staff regarding the application of the Mining in the Parks Regulations, 36 C.F.R. Part 9, Subpart A, to various classes of mineral activity in the Alaska national monuments under the administration of the National Park Service.

The Mining in the Parks Regulations apply only to activity on claims that have been located under the Mining Law of 1872, 30 U.S. C. § 22 et seq., within the boundaries of an area of the National Park System, and where access is required across Service administered lands. Thus, there are two threshhold questions which must be answered : 1) is the claimant seeking to exercise rights which arise by virtue of the 1872 Mining Law; and 2) does he require access across federally owned lands administered as part of the monument? The exercise of rights arising under a state mining law system is not controlled by these regulations.

In view of these general principles, you have asked how the status of the land on which the claim is located affects the application of the regulations. When access is required across park lands, the regulations apply to the exercise of 1872 Mining Law rights, regardless of the land status. But, when the land between the claim and the park boundary is not federally owned, the application of the regulations is controlled by the status of the land on which the claim is located. When that land is federally owned or merely selected, but not tentatively approved (TA), the regulations would apply. Conversely, the regulations would not apply to TA lands or patented lands

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NAT'L PARK SERVICE
ALASKA STATE OFFICE
ANCHORAGE, ALASKA

where access can be achieved without use of Service administered property.

The premise for treating TA lands like patented lands is that by the granting of tentative approval, sufficient interest is vested in the State to say that it has equitable title, placing in it jurisdictional and administrative responsibility. The regulations would have application to a federal mining claim on such lands, however, to the extent that other park administered property may be required for access.

With respect to state selections which are not TA, however, the result is somewhat different. In this situation, the land is still federally owned and the State may, with the consent of Secretary, relinquish the selection. As a result, the Service has a much greater degree of interest in the management of these lands. This distinction is consistent with section 6(g) of the Statehood Act, 48 U.S.C. Prec. 21, which authorizes state conveyances of land only after TA. Because of this interest and the legal status of the land title, the Mining in the Parks Regulations would apply to a mining claim on these lands located under the 1872 Mining Law, even where the lands around it are not federally owned.

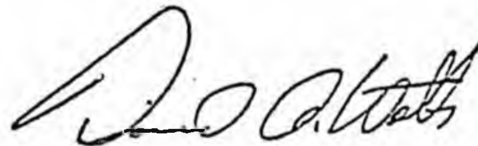
An issue has also arisen with respect to continuation of exploration activities within the Alaska Monuments under the administration of the Service. By the emergency withdrawal and proclamations, these monuments were withdrawn from further mineral entry and location under the 1872 Mining Law. Therefore. under the federal law, no further exploration is permitted on any land within a monument where the claim was not valid as of the date of the withdrawal. Whether exploration may be allowed under the State's mining law depends upon the status of the land on which the exploration is to occur. If they are nonselected federal lands, the exploration would be precluded because the State law cannot apply to federal land. If the State has title or the lands are TA,

exploration work permitted under State law is proper. The Mining in the Parks Regulations would not apply to this work, even to the use of federal lands for access, because the rights being exercised do not arise under the 1872 Mining Law. Any other regulations regarding access would, however, apply.

State selected lands which have not been TA present a different problem. As we have noted, because the State may, with the Department's consent, relinquish the selection, the Service has a high degree of interest in protecting the resources of the land. Also, because the title to the lands is still federal, the State mining law technically cannot apply. See section 6(g) of the Alaska Statehood Act, 48 U.S.C. Prec. 21. Thus, the Department has concluded that if a claimant seeks access to such lands on the basis of a claim filed under State law, that access will be denied.*/ As we understand their practice, the State also recognizes the contingent nature of these claims. The State upon receiving TA will grant rights under its mining law dating back to the date of location but only if the State concludes it does not need the land for nonmining purposes. Thus, the locator is on notice that even under State law he cannot obtain an interest in the land until it is TA. As to the exercise of federal rights on these lands, exploration activity would be permitted only on claims which were valid as of the date of the withdrawal. Any such activity would have to be done in compliance with the Mining in the Parks Regulations. To reach a conclusion other than this would be inconsistent with the retained federal title and the great degree of interest the Service has in managing the resources of such land in light of the possible selection relinquishment.

The final element of your concern involves activities to examine the mineralized character of lands in aid of the selection process. On lands which Native corporations have selected or identified for selection, as well as lands which Alaska has identified for selection, exploration work may be allowed in the discretion of the Department. Before

a decision is made to allow such work, you should contact the State Office of the BLM in order to properly coordinate your responsibility with theirs. Specifically, there is a NEPA responsibility which must be completed before any permit authorizing a Native corporation or the State to undertake mineral examinations may be issued; the provisions of section 603 of FLPMA must also be complied with. In no instance may an individual be authorized to undertake this exploration work. It is a special benefit which may be granted only to native corporations and Alaska, and then, only in order to aid informed selections of land. The discretion is, however, vested in the Department and, as a prerequisite to its exercise, the Department must comply fully with NEPA and section 603 of FLPMA.



David A. Watts

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*/ In the case of the Wallace Gordon claims in Gates of the Arctic National Monument, access has already been temporarily approved. That approval should not be revoked, but it should also not be extended beyond the presently authorized period, unless the land status changes.

Alaska State Legislature

BETTYE FAHRENKAMP, CHAIRMAN
VIC FISCHER, VICE-CHAIRMAN
BRAD BRADLEY
DICK ELIASON
DON GILMAN
BOB MULCAHY
ARLISS STURGULEWSKI

POUCH V
STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-3834
(907) 465-3835

Senate

Committee on Resources

MEMORANDUM

TO: SENATE RESOURCES COMMITTEE MEMBERS

FROM: SENATE RESOURCES COMMITTEE STAFF

RE: ATTACHED MATERIALS ON SECTION 6(i) OF STATEHOOD ACT

DATE: MARCH 5, 1981

Attached is a memorandum prepared by the House Resources Committee staff for the House members of that committee.

The co-Chairmen of House Resources Committee has made this memorandum available to the Senate Resources Committee members.

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 accurate interpretation. It is a legal discussion between the lawyers representing each interest group. In this case the State on one side and the mining industry on the other.

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. What action will the Legislature and the Executive branch have to take?

It is important to understand the two levels of discussion. Some of the people will be testifying regarding the legal interpretation of Section 6(i) and others will be testifying regarding the practical implications of adopting a leasing 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 Legislature could express its concern and opinion on what the ultimate solution could be, it does not have the absolute control over the issue.

If the interpretation of Section 6(i) is changed by the Executive it is incumbant upon the Legislature to undertake certain actions both in the budgetary and legislative means to alleviate the practical effects of the change.

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 leasing restrictions as applying only to lands where the surface interest 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 opinion concludes that the present interpretation of Section 6(i) is incorrect. 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 matters which must be considered by the Committee and the Legislature regarding this issue are as follows:

1.0 Transition from the present system to a leasing 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 Terms and conditions of the leases. Alaska statutes in AS38.05.205 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 Royalties. 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 certain minerals should be exempted from the royalty provision.

4.0 Public notice. The Constitution, Article V111, 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 discovery 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 mireral 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 V111 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

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

(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

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

was applied to state-owned lands by ch. 123, 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

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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.

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 Vlll
3.0 Alaska Statutes, AS 38.15.185-.205
4.0 Draft Attorney General's Opinion 2/11/81 regarding Section 6(i)

MAR 5 1981

221-10

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

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4.0 Draft Attorney General's Opinion 2/11/81 regarding Section 6(i)

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K–STATE CAPITOL
JUNEAU, ALASKA 99811

January 29, 1981

Honorable Bill Ray
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Ray:

Wil Condon has informed me of your conversation with him and has asked that I send you a follow-up letter on the mineral leasing problem. As you may be aware, the Attorney General is required to answer opinion requests from client agencies; a 1979 request from the Department of Natural Resources concerning rights of miners on state-selected lands required a discussion of what type of interest a miner could acquire on state-selected lands. It is our tentative conclusion that the Statehood Act requires the issuance of a lease to miners.

This conclusion will not necessarily affect miners large or small. A lease can be a simple one-page document that requires little, if any, rental or royalty. A lease can be issued without competitive bid or application; in fact, the present statutory system requires DNR to issue a lease after a miner has discovered and located a claim. The draft opinion would not change this scheme, thus the miners' fears of competitive leasing or some change in the manner of becoming entitled to a particular tract of land because of this opinion will not be borne out.

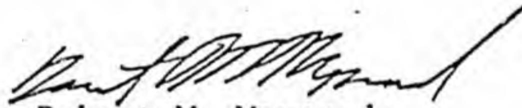
The other concern is that the content of the lease will change the miners' manner of doing business. This may occur, but <u>not</u> because of the opinion. The opinion in no manner will require different actions by individual miners. The legislature, or DNR, however, in determining the content of the leases, could change those requirements. The requirements could also be left unchanged.

U3-C6LH

Simply, the federal system provided for a mining claim leading to patent. The opinion allows for a mining claim leading to lease. A mining claim, under the present statutes, is still the main part of the system. The addition of the lease need not add any additional burden on the miners; the only burden added would be a burden consciously chosen by either the legislature or DNR as a policy matter. On the other hand, a lease could be a benefit to miners in that the state would be officially recognizing the miners' rights; presently the state does nothing to either approve or disapprove a claim.

The opinion is still in draft form, and will not be issued until it is reviewed by DNR and attorneys for outside interests including the miners. We expect a final opinion to be issued in about a month.

Sincerely,



Robert M. Maynard
Assistant Attorney General

RMM:ew

RICHARD W. ROWE,
DANIEL GAUDIANE

20 IBLA 59

Decided *April 24, 1975*

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting oil and gas lease offer F-694.

Affirmed.

1. Alaska: Land Grants and Selections: Generally—Notice: Constructive Notice

Published notice of a proposed State selection in accordance with regulatory requirements is adequate notice to all persons claiming the lands adversely to the State.

2. Alaska: Land Grants and Selections: Validity—Alaska: Statehood Act—Notice: Generally—Patents of Public Lands: Generally

Section 6(b) of the Alaska Statehood Act does not require that patents issued to the State include a proviso that the conveyed lands are vacant, unappropriated, and unreserved, and do not affect any valid existing claim, location or entry under the laws of the United States. The Department assures compliance with this provision by excluding from selection all lands noted on its records as being appropriated and reserved, or subject to valid existing interests, and by requiring that adequate notice be given to all other persons claiming an interest in the selected land. The Department can then receive objections to the issuance of a patent and can render a determination as to the availability of the selected lands.

3. Alaska: Land Grants and Selections: Mineral Lands—Alaska: Land Grants and Selections: Validity—Alaska: Statehood Act—Patents of Public Lands: Reservations

Section 6(i) of the Alaska Statehood Act provides that grants of mineral lands to the State are made upon the condition that all subsequent State conveyances of the mineral lands shall be subject to and contain a reservation to the State of all the minerals in the lands so conveyed. The Act does not require that federal patents to the State include a proviso to the above effect, rather, it is subsequent State conveyances which must contain a reservation for minerals.

APPEARANCES: Max Barash, Esq., Washington, D.C., for appellants; James N. Reeves, Esq., Office of the Attorney General, for the State of Alaska; Karen A. Shaffer, Esq., Office of the Solicitor, Department of the Interior, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

INTERIOR BOARD OF LAND APPEALS

[1] In their initial argument, appellants contend that it was improper for the Department to issue a patent to the State without having first given appellants *actual* notice and an opportunity to object to the issuance of the patent. In accordance with 43 CFR 2627.4(c), the State of Alaska published notice of its proposed selection for five consecutive weeks in order to bring to the knowledge and attention of all persons who were interested in the lands described therein the fact that the State proposed to establish and perfect its claim to the selected lands. The State's publication specifically stated that, "One purpose of this notice is to allow all persons claiming the lands adversely to file in this [BLM] office their objections to issuance of patent to the State." Publication in accordance with regulatory requirements is adequate notice. *Duncan Miller*, 20 IBLA 1 (1975); *Chemi-Cote Perlite Corp.* v. *Bowen*, 72 I.D. 403 (1965); *see also* 66 C.J.S. *Notice* §§ 13, 18 (1955), and cases cited therein. Accordingly, we find that, as a result of the publication, appellants received adequate notice and an opportunity to object to the issuance of the patent to the State of Alaska.

In their next argument, appellants contend that it was improper for the Department to issue a patent to the State which failed to describe the lands selected as vacant, unappropriated, and unreserved, and as not affecting any valid existing claim, location, or entry under the laws of the United States. Appellants also object to the fact that the patent did not include a proviso prohibiting the State from subsequently reconveying the mineral interests it acquired.

[2] Section 6(b) of the Statehood Act provides that the State may select up to 102,550,000 acres from the public lands in Alaska which are vacant, unappropriated and unreserved at the time of their selection, provided the selection does not affect any valid existing claim, location or entry under the laws of the United States. The Act does not require that patents to the State include a proviso to that effect. Compliance with this provision is fulfilled by the Department excluding from selection all lands noted on its records as being appropriated and reserved, or subject to valid existing interests, and by requiring that

adequate notice be given to all other persons claiming an interest in the land. The Department can then receive objections to the issuance of a patent and can render a determination as to the availability of the selected lands. In the present case, following publication of the State's proposed selection, the BLM, in its decision tentatively approving the State's application, made a finding that, "The lands described * * * are not known to be occupied or appropriated under the public land laws, including the mining laws * * *." We conclude that this procedure adequately assured conformity with the requirements of the Statehood Act.

[3] We also reject appellants' argument that it was improper to issue a patent to the State without including a proviso prohibiting the State from reconveying acquired mineral interests. Section 6(i) of the Statehood Act provides that grants of mineral lands to the State are made upon the condition that all subsequent State conveyances of the mineral lands shall be subject to and contain a reservation to the State of all of the minerals in the lands so conveyed. All lands or minerals disposed of contrary to the provision are to be forfeited to the United States by appropriate proceedings instituted by the United States Attorney General. Again we note that the Act does not require that federal patents to the State include a proviso to the above affect. Rather, it is subsequent State conveyances which must contain a reservation for minerals. Adherence to this requirement of the Act is adequately assured by the fact that the laws of the United States are the supreme law of the land, and state action in contravention can be set aside. *Lee* v. *Florida*, 392 U.S. 378, 385-86 (1968).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

MARTIN RITVO,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

STATEHOOD FOR ALASKA

FRIDAY, MARCH 15, 1957

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TERRITORIAL AND INSULAR AFFAIRS
OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10 a. m., in the committee room, New House Office Building, Hon. Leo W. O'Brien (chairman of the subcommittee) presiding.

Mr. O'BRIEN. The Subcommittee on Territorial and Insular Affairs will come to order.

I would like to explain what the hearing plan is for this morning: Some of the witnesses who were scheduled to appear today include Governor Gruening and Mr. Rivers, and they have been most understanding of the situation. They will be here right along, whereas some of the other witnesses are anxious to get away. So they have yielded today to these other people.

As you know, we have given up any hope of concluding the hearings this week. I suppose it was overoptimism on the part of the chairman to start with. But we will have another hearing next Wednesday, and it certainly is my earnest hope that we will have concluded the hearings before we begin to commence the hearings on Hawaiian statehood legislation.

At this point, we will hear from Mr. Glen Franklin, of the Alaska Miners Association, who is a resident of Fairbanks.

Mr. Franklin.

STATEMENT OF GLEN D. FRANKLIN, CHAIRMAN, LEGISLATIVE COMMITTEE, ALASKA MINERS ASSOCIATION, FAIRBANKS, ALASKA

Mr. FRANKLIN. Mr. Chairman and gentlemen, I have my papers filed with you there in perhaps a little disorder. The first sheet that I should cover is about myself, and you will find that on the back of the page dated March 5. Since I have been sitting in hearings, I felt sure that in order to more fully explain our point, I needed supplementary information. So I prepared a supplementary statement, and that you have also.

First of all, my name is Glen D. Franklin. I reside at Boundary, Alaska. I married an Alaskan girl and have two daughters born in Fairbanks.

I was educated in the State of Washington, in the primary grades and high school. I went to Alaska in the fall of 1933 and attended the University of Alaska. I graduated from the University of Alaska in 1936 with a bachelor of science degree in business administration and a major in accounting.

Since 1936 I have been engaged in the gold-mining business. In 1945, I entered a partnership to mine for myself, and have been so occupied since. I have mined quicksilver in the Kuskokwim, placer gold in the Fortymile and Sixtymile, and at Livengood, which is west of Fairbanks. I explored for tungsten in the Seward Peninsula, copper in southeastern Alaska, and placer gold in many parts of the Yukon Territory.

As for political history, I was a member of the house of representatives during the 19th and 20th regular sessions of the legislature. I was chairman of the ways and means committee during the 20th session.

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 should like to state that it is our unqualified belief that the sponsors of enabling legislation to provide statehood for Alaska have provided land withdrawals for the benefit of the new State that are most generous and a sharp departure in their magnitude from any comparable grants provided for any of the States accepted into the Union.

We also believe that the grant of mineral rights on all these lands was done to aid the new State in meeting the added expense of statehood. Further, that mineral deposits must be expressly mentioned in order for mineral rights to be encompassed by a congressional land grant to a State.

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.

The enabling legislation for Alaska statehood provides that unsurveyed land claimed by the new State will have an outer perimeter survey made by the Department of the Interior. After this survey is made, title will pass to the new State. Provisions should be made so that the State legislature, at its discretion, could make use of descriptive location language in order to dispose of a specific plot or area of State-claimed land before survey is completed.

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.

Any 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 provisions in the bills.

According to our interpretation of the language of the various bills, if the new State made claim to unsurveyed land the Secretary of the Interior would make an outer perimeter survey of any land so claimed. Until such time as the survey was completed, the new State could not dispose of any of the land claimed.

Therefore, in order to reserve to itself potentially valuable land, the new State would undoubtedly make immediate claim to vast areas.

Any qualified mining engineer with Alaskan experience could, in the space of a few hours, outline a 50 or 60 million acre area for claiming by the new State of Alaska, that would include all the known and probable major mineralized areas in Alaska. Never in the history of the United States has any State had the right to select as State-owned land any of the known mineralized areas in the public domain.

This simple act of claiming would effectively close down this area to any prospecting and development. No disposition of the rights or the land could take place until perimeter surveys could be made.

A very conservative estimate of the time necessary to make perimeter surveys would be 15 to 20 years.

The Alaskans who framed the proposed constitution of the State of Alaska, which has been ratified by the people of Alaska, attempted to provide for the protection of the rights of the individual prospector or miner. The pertinent parts of 2 sections from article 8 entitled "Natural Resources," are quoted here:

> 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 * * *
>
> SECTION 12. MINERAL LEASES AND PERMITS. The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law * * *

The belief that Alaska should not be accorded greater freedom in the administration of mineral lands than that accorded existing States having congressional land grants is valid only if comparable and identical conditions exist. We feel that they do not exist and that the conditions that will exist when Alaska becomes a State will be such that the potential revenue to be realized from Alaska's mineral resources should be available to the new State as quickly as possible. Congress has it within its power to deviate from equal treatment when in its judgment it is deemed necessary. We submit that the consideration of Alaska for statehood is in itself a deviation, because all of the 48 States have a contiguous boundary.

We subscribe to the declaration of policy of the American Mining Congress adopted at Los Angeles, Calif., October 1-4, 1956. On the subject of public land policy we quote out of context the following paragraph:

> We reiterate our confidence in the system established by the general mining laws for the location and patenting of mining claims as the means of encouraging and providing for development of the mineral resources of the public domain through private initiative and enterprise.

Our recommendations are: The language in the bills should be changed so that the State could dispose of unsurveyed land claimed, before the outer perimeter survey is completed.

Disposition of mineral rights on State claimed lands should be left to the discretion of the State legislature in conformity with provisions covering this subject in the State constitution.

Mr. Chairman, that is the end of my prepared statement at this time except for the supplement.

As you can see, we have here two different but related problems.

I should like an opportunity to read the supplementary statement. If we can cover the first point first with questions, I think it is relatively simple, and if we can cover that first I should then like an opportunity to cover the supplementary statement before going into the mandatory leasing rights.

Mr. O'BRIEN. If that is agreeable with the committee.

Mr. PILLION. I think this subject might be explored first before we get into the other statement. I think that is what the witness would like.

Mr. O'BRIEN. I think that would be perfectly all right. Then at this point you are ready for questions from the committee on what you have stated so far?

Mr. FRANKLIN. On just part of it, the part that pertains to the disposition of State-claimed land before the survey is completed, it in a sense is a mere technicality, in that I have tried to point out that the State may claim as much as 103 million acres. Then it will be tied up until the survey is completed. All we are anxious to have there is something that the State could dispose of this before the outer perimeter survey is completed.

Mr. ASPINALL. The committee may question the witness as it may see fit and are not limited by any suggestions made.

Mr. O'BRIEN. Yes; that is the rule of the committee. I think the suggestion would be helpful to the committee. However, that is the suggestion of the committee. The Chair will not be arbitrary about it. It is the feeling of the committee that they would like to permit the witness, after some questioning, to read the supplemental statement. That will be agreeable. Mr. Aspinall?

Mr. ASPINALL. I take it, Mr. Franklin, that you are a supporter of immediate statehood for Alaska?

Mr. FRANKLIN. My position here is one of representing the Miners Association. We as a group have never come out for or against statehood.

Mr. ASPINALL. What is your personal position?

Mr. FRANKLIN. My own personal position? I have reservations as to whether or not the State can pay its way.

Mr. ASPINALL. You have answered my question.

Are you in favor of or are you opposed to immediate statehood for Alaska?

Mr. FRANKLIN. I am not in favor of immediate statehood for Alaska.

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.

Mr. ASPINALL. The next question I have is: As I understand your statement, you are in favor of the development of further mining in Alaska from these lands, which are to be transferred to the State if this act goes through, by the same type of procedures as those followed in the mining States of the West during the early days of mining; is that correct? A person goes in and makes a finding, a discovery, and he can lay out his lines and proceed to the operation of the claim and perhaps a patent or a long-term lease, without any reference to regular survey methods and procedures; is that right?

Mr. FRANKLIN. No. That is not correct. The bills provide that the outer perimeter survey must be made, and I think it should be made. But until such time as the survey is completed, that land should be made available to the prospectors in order to benefit the State of Alaska.

Mr. ASPINALL. How are we to determine the boundaries of the property to be mined?

Mr. FRANKLIN. In the same manner in which we do it now, by describing in location.

Mr. ASPINALL. Do you want to proceed to patent that way?

Mr. FRANKLIN. I do not think you could possibly proceed to patent that way until the survey was made. You would have no point from which to start. All you would be able to do would be to hold it as an unpatented mining claim owned by the State until such time as the survey was completed.

Mr. ASPINALL. Was it your understanding that they had to wait for these formal surveys in the early days of mining in the West before they could proceed to patent?

Mr. FRANKLIN. Yes, but that did not prohibit them from holding the mining claim. They did not have to necessarily have it patented.

Mr. ASPINALL. I understand that. But I am just trying to find out in my own mind what you are talking about in your statement. You do not want to wait until the perimeter has been determined; that is the first thing.

Mr. FRANKLIN. Yes, sir; that is correct.

Mr. ASPINALL. Then you wish to have them legally placed in position on whatever area they wish to operate; is that correct?

Mr. FRANKLIN. Are we talking about a prospector or miner?

Mr. ASPINALL. Yes.

Mr. FRANKLIN. Yes.

Mr. ASPINALL. And you wish them to have possession until the final survey is made if they desire to; is that correct?

Mr. FRANKLIN. Yes, sir.

Mr. ASPINALL. You do not wish them to proceed to patent until the final survey is made; is that correct?

Mr. FRANKLIN. Well, if patenting were possible, yes. It would be all right to proceed to patenting if they so desired.

Mr. ASPINALL. But could they proceed to patent before the formal survey, or can they proceed in your thinking to a patent with just the

survey made as far as that particular claim is concerned, as far as that particular area is concerned?

Mr. FRANKLIN. I think not. I think the entire survey would have to be completed before the patent survey could be performed.

Mr. ASPINALL. At least as I understand it, that is your position. You think that would be necessary?

Mr. FRANKLIN. I believe so, yes.

Mr. ASPINALL. If it were not necessary, would you like to have them proceed to patent before, if they wished to?

Mr. FRANKLIN. Well, I do not see whether they get the claim by patent or open claiming makes any difference.

Mr. ASPINALL. Well, let me follow through with another suggestion which you make in your statement.

Am I to understand that prospective operators, mining operators, are to be given certain benefits that have not been heretofore given to miners throughout areas under the control of the Government? I do not understand what you mean by these additional benefits that are necessary for mining in Alaska.

Mr. FRANKLIN. Well, if the State owns 103 million acres of land, and if in their discretion, in order to develop any mineral resources, they would like a large company or a group of prospectors to get into that country and look it over, if they were able to dispose of it in some other way besides leasing, they might conceivably offer as an incentive that they would sell the land at a dollar an acre or some nominal sum, in order to try to get development of their land. That is the point that I was trying to make there.

Mr. ASPINALL. And more than likely be charged with a giveaway program.

Mr. FRANKLIN. Well, of course, anything like that would have to have work performance restrictions. In other words, if a man did not perform the work that he said he was going to do, he would lose his rights.

Mr. ASPINALL. Now let me ask you this, and then I am through. Do you think that that should be put in an authorizing legislative act, or that that should be left to the people of Alaska if the land is once transferred to them?

Mr. FRANKLIN. I think it should be left to the people of Alaska.

Mr. ASPINALL. That is all.

Mr. O'BRIEN. Dr. Miller?

Dr. MILLER. Mr. Franklin, what are the procedures now for getting a mining claim or mineral-deposit claim in Alaska?

Mr. FRANKLIN. Any land that is in the public domain which would be owned by the Federal Government—all you need to do is to go on to a creek, make a discovery, hew out your claim posts, stick them up, and file an affidavit of claiming on the property, and then file it with the recorder. And then you own it by right of staking it at that time, providing there are no prior rights and you are not staking over.

Dr. MILLER. How would that differ under statehood?

Mr. FRANKLIN. I would think that if the legislation goes through with mandatory leasing, it would depend entirely upon what the mechanics that the land division of the State would require to claim ownership. You would probably designate the area that they were interested in, and then probably have to go to the land commissioner and make some arrangement with him to lease this property. Then it would be probably on a royalty basis.

Now I am making some assumptions in trying to answer your question.

Dr. MILLER. Of course, in the bill it requires a survey as to this 103 million acres before you even go forward with your mining claims.

Mr. FRANKLIN. Yes, sir.

Dr. MILLER. We have had some estimates in the past that it would take a hundred years to get it surveyed at the present rate of surveying territory.

Mr. FRANKLIN. I think that would be modest.

Dr. MILLER. I have often wondered who arrived at the figure of 103,350,000 acres of land, Mr. Chairman. Did somebody just pick it out of the air? I wonder if the author of the bill could tell me.

Mr. BARTLETT. Well, actually, I guess the answer would be that it was taken out of the air, which is not a precise answer. In previous bills, Dr. Miller, there has been an additional section giving the new State X acres of land for specific purposes. And at this time it was thought it would be more convenient, and just as practicable, to lump the land grants together.

Dr. MILLER. I think Mr. Franklin has made a contribution here as to suggested amendments to the bill should it go through. We have not had many suggestions on the bill. Most of them have talked about being "secondary citizens." You have lived up there since 1936. Do you think that you are a sort of appendage or second-class citizen of the United States? Have you felt discriminated against?

Mr. FRANKLIN. Only that I have not been able to vote for the President of the United States.

Dr. MILLER. Otherwise you do not feel too badly. I hope the future witnesses will talk a little bit about the bill. And I notice you question where the income comes—$103 million comes from Government spending, which looks like it was mostly a Government operation that maintained the Territory, and of course that is true of some communities in the United States also.

Mr. SAYLOR. Doctor, is that not about true with some of these other Western States?

Dr. MILLER. I have said there are States where the same thing holds true.

I appreciate the statement you have made. And, of course, as you look over the bill, it is proposed to give the new State a good deal of help in the next 5 years, about $93 million, to get it born and weaned and on its way; so that there would be considerable help if the Congress did do that.

Mr. SAYLOR. I want to congratulate the witness on coming down here and giving us this assistance in trying to work out a bill for a future State. I will agree with Dr. Miller that probably if more people would look a little at what is in the bill, we might not have some trouble later on in getting it passed. Because the interested people will know what is in it and at least come down and tell us what they would like to have in the statehood bill. As a contribution of the Alaska Miners Association, I think it was very helpful.

Mr. FRANKLIN. Thank you.

Mr. O'Brien. Mr. Pillion?

Mr. Pillion. Mr. Franklin, I am at a loss to wholly understand the meaning of the outer perimeter survey. Is that a survey made of the complete outer boundaries of the proposed State?

Mr. Franklin. No; that means that any area that is claimed by the new State, any of these 103 million acres that are claimed by the new State—this block is not going to be chosen in one piece. There is going to be a block here and there and all over. And each such block has to have an outer perimeter survey made before the area within that has been claimed by the State can be disposed of.

Mr. Pillion. In other words, the State of Alaska would, assuming statehood, locate a mineralized area, perhaps by physical description or physical appearance or physical location or physical stakes, or whatever it might be, and then the actual survey would be made in accordance with that at some future date?

Mr. Franklin. Yes.

Mr. Pillion. And that area to be claimed by the State of Alaska might have 1 square mile in it or 10,000 square miles; is that right?

Mr. Franklin. It could have. There is a minimum. We will call it a square mile. But anything from there on up to the full block if they so chose.

Mr. Pillion. So the length of time for the claims to be made and the surveys to be completed might run anywhere from 5 years to 50 years. I note in your statement that you have an estimate of 15 to 20 years.

Mr. Franklin. I thought I was being conservative, and I think I am, except for this factor. If I may deviate just a little to answer your question, the Coast and Geodetic Survey of the Interior Department are experimenting with a new type of aerial survey that would probably answer, the same thing that we are talking about now, as to a ground survey. That might cut the time down so that it could qualify to the 10- or 15-year period. But I have talked to these people, and no one will make any guess as to time, and I have tried to say, "Well, will it be 10 years, or 20 years?" and they say, "We don't know." It will be 10 anyway——

Mr. Pillion. Of course, engineers have been studying and experimenting with aerial surveys for the past 30 or 35 years. Has that science or that profession now arrived at a state where it is possible or might be possible to use these aerial surveys in outer perimeter measurements?

Mr. Franklin. I am sorry. I cannot qualify to answer that question because I do not know.

Mr. Pillion. Then I presume that it might be well to bring in some of the people in the Coast and Geodetic Survey to inquire as to how long that type of survey may take and what degree of accuracy they are able to give us, and whether or not that degree of accuracy would be acceptable for the purposes that we have in mind. Do you not think that might be a good idea?

Mr. Franklin. Yes, I do. The Department of the Interior is going to be charged with this survey, and they would be the people that have the best idea as to the time involved.

Mr. Pillion. But the Coast and Geodetic Survey people are actually the experts in the field of making surveys, and not the Department of the Interior; is that right?

Mr. Franklin. As far as I know, yes.

Mr. Pillion. Mr. Chairman, we were discussing here the advisability of asking the Coast and Geodetic Survey people to determine whether or not aerial surveys could be made to cut down this time in the measurement of the outer perimeter.

If these surveys are going to take 25 or 50 years, what we will be doing in effect, I think, based on the statement of witnesses, is to block off the exploitation and the exploration and the development of mining in the whole area. Is that about right, Mr. Franklin?

Mr. Franklin. That is our prime point; yes, sir.

Mr. Aspinall. Now will the gentleman yield?

Mr. Pillion. Surely.

Mr. Aspinall. Do you mean, Mr. Franklin, that if this land is set aside to the new State of Alaska and they are given sole control of the lands that they choose, that their legislature could not go ahead and provide the procedures.

Mr. Franklin. Mr. Congressman, as far as we can see, there is nothing in the bill that says that they cannot.

Mr. Aspinall. As I remember it, there was nothing in the bill that brought in many of the Western States, including my own, and if I remember correctly my history it did not bother at all the mining development of Colorado.

Mr. Franklin. Mr. Congressman, may I read a portion of the Alaska mental health bill, which we think, if this little section were included, would satisfy this technicality, and it reads this way:

> Following the selections of lands by the Territory pursuant to subsection (b), but prior to the issuance of final patent, the Territory shall be authorized to lease and to make conditional sales of such selected lands.

If that were included it would be completely clear.

Mr. Aspinall. That would remove your objections?

Mr. Franklin. To that one point; yes, sir.

Mr. Bartlett. Will the gentleman yield just for a technical statement?

Mr. Franklin's statement alluded to the act approved July 28, 1956, being Public Law 830 of the 84th Congress, subsection (d), of section 202.

Mr. Franklin. Thank you.

Mr. Pillion. On the other hand, if the suggestion that you offered here is enacted into law, Mr. Franklin, and the State legislature is given the right to dispose, either by lease or by other means, the right to lease and patent these lands, has there been any program or schedule or means offered by which the State legislature could fairly and properly dispose of these mineral rights without running into any great frauds or any abuses? Has the State legislature looked forward to setting up a program that would best make use of the rights to make claims to these mineral areas?

Mr. Franklin. The legislature is meeting in the Territory now, and they have a bill introduced which revises and reorganizes the land department. I left before the copies of those bills were in print, but I am assuming that they are now doing the ground work of setting up a department that will be authorized to claim the lands in the first place, and then have some means of disposing of their rights.

Mr. PILLION. But there has been no formal or no final crystallization of the means and methods by which these claims would be put on the open market for the public to make use of for the best advantage of the State of Alaska?

Mr. FRANKLIN. That was best covered in the State constitution. That is the only action that has been taken to this date.

Mr. PILLION. There has been no final crystallization of thought to implement the provisions of the State constitution?

Mr. FRANKLIN. No, sir.

Mr. ASPINALL. Would my good friend yield there, so that we can get the record straight?

How much of the present economy, Mr. Franklin, depends upon mining activities?

Mr. FRANKLIN. According to my supplementary statement, of the $500 million annual income for 1956, the mining industry accounted for $24,919,000, of which some $8 million was from the production of sand and gravel.

Mr. ASPINALL. This is in your supplementary statement? We do not have that yet.

Mr. FRANKLIN. That is right.

Mr. PILLION. That is all, Mr. Chairman.

Mr. O'BRIEN. At this point I think we should clear up something for the committee. Individual members of the committee I am sure, or will, receive letters from individuals in Alaska expressing their views for or against statehood. So far in the proceedings, 2 or 3 of those letters either have been entered into the record or have been referred to. Now, it is the belief of the Chair that the fullest possible expression should be permitted, but I think that we ought to have some kind of a ruling about putting these individual letters in the record. I know in one instance so far, we had a rather lengthy letter read into the record, given equal weight to testimony given by people here, and no opportunity was provided for the committee to ask any questions of the person who sent the letter. I do not think that provides for orderly procedure.

It does seem to me that what the committee should do is make such individual letters part of the file. The members, those who receive the letters, can very well ask questions which arise from the letters.

So, unless the committee overrules the Chair, the procedure from here on will be to place in the record letters which express the opinions of organizations, such as chambers of commerce, and so forth, or people in official position, with the individual letters noted for the record, the name, and whether they are for or against statehood, with the members, of course, always free to ask any questions that are raised in the letters. Otherwise, I think we might have a record that would extend from here to kingdom come.

Mr. PILLION. Mr. Chairman, I would like to object to that ruling, on the ground that we are not strictly following legal procedure here in our hearings, and that on occasion a member of the committee might have a letter that contains information or a statement of fact or a conclusion that he might particularly like to have in the record.

I think, however, that the members of the committee might take care that they do not abuse that privilege and not just insert them for the purpose of building up the record, and I think if we proceeded that way we would not unduly enlarge the record and at the same time would reserve for the members of the committee the right to occasionally put into the record a letter that they think is for the benefit of the committee at large. I do not think it would be abused, but I do not think that the members themselves ought to be precluded from occasionally being permitted to enter into the record the views of persons who might want to communicate them to the committee and are unable to come here from that great distance of Alaska to Washington.

Mr. O'BRIEN. I think what the gentleman from New York has said has a great deal of merit. Of course any member of the committee has the power to offer any letter at any time, subject to the approval of the committee.

Mr. PILLION. I agree with the purpose the Chairman has in mind.

Mr. O'BRIEN. I may say that any letters that come to the Chair—the Chair will use that.

Mr. BARTLETT. Mr. Chairman, I should like to refer to the letter which I handed in yesterday. It came to my office, but actually it was intended for this subcommittee, and it was from Mr. Victor Guns, a lawyer of Ketchikan, and it was rather abusive in its concluding paragraph regarding the members of the delegation here under the so-called Alaska Tennessee plan. Likewise, Mr. Guns said that if Alaska became a State it would be turned into a Reno. Now, he said that on the authority of two people with whom he had talked.

I think that before that sort of material goes in the printed hearings we ought to have the opportunity to cross-examine such a man. And I would not want to see that record, for example, go into the printed hearings, because it is quite unfair.

Mr. O'BRIEN. I think perhaps the gentleman from New York has stated it very well, that it would be up to the individual judgment of the individual member of the committee to decide what letters he would offer for the record. The Chair did have in mind letters such as the one I have before me, which I believe properly belongs in the record. It is from the Northwestern Alaska Chamber of Commerce, which is located in Nome, and it does not go into the whole question of statehood, but it does go specifically to the reaction of the people of Nome, the business people of Nome, to this withdrawal line.

Now, one of the major questions before the committee is this: Would the people of Alaska generally favor such a withdrawal authority for the present?

Now, in this case they did have a meeting of the chamber of commerce, they did vote, and they state their position in four short paragraphs. That, to me, would be representative thinking.

On the other hand, I doubt if I would want to put in the record a letter which would state without any authority that there was a plan to turn Alaska loose for the racketeers to operate in. But, as I say, we will be guided by the individual views of the members, and I am sure as in the past they will use excellent judgment.

Mr. BARTLETT. May I add, Mr. Chairman, that the Northwestern Alaska Chamber of Commerce has no objection whatever to this withdrawal line?

Mr. O'BRIEN. Well, I think that I will simply offer the letter from the Northwestern Alaska Chamber of Commerce for the record, stating their position on the withdrawal line, and the record will speak for itself.

With no objection, the letter will be made a part of the record at this point.

(The letter referred to is as follows:)

NORTHWESTERN ALASKA CHAMBER OF COMMERCE,
Nome, Alaska, January 29, 1957.

Hon. E. L. BARTLETT,
Delegate from Alaska,
New House Office Building, Washington, D. C.

DEAR DELEGATE BARTLETT: In the absence of Mr. von der Heydt I brought up your letter regarding military reservations in the Second Judicial Division before the Northwestern Alaska Chamber of Commerce and a vote was taken on a motion made by myself that we endorse statehood even if it means that certain areas of the State will be reserved; providing, that the entire geographical area now known as Alaska is granted statehood. This motion carried unanimously.

We are still against partition, but see no reason to oppose military reservations which can be made at any time regardless of whether Alaska is a State or Territory.

We have already presented our views in this respect to the Secretary of the Interior. We also stated that we are still opposed to any withdrawals which are not directly connected with national defense, such as Withdrawal Order No. 82.

I hope we have expressed ourselves sufficiently in this respect. In the event that we have not please feel free to call for further clarification. We are enclosing sufficient copies of this letter for each of the Tennessee plan representatives and ask you to please forward a copy to each.

Sincerely yours,

RUSSELL R. HERMANN,
Legislative Committee.

Mr. O'BRIEN. You may proceed, Mr. Franklin. I believe the committee has concluded its questioning in regard to your first statement.

Mr. ABBOTT. If I may, Mr. Chairman.

You make the statement, Mr. Franklin, that never in the history of the United States has any State had the right to select as State-owned land any of the known mineralized areas in the public domain.

Are you certain as to the accuracy of that statement?

Mr. FRANKLIN. In all honesty, I will have to say "No." But I would like to clarify for just a moment, if you will allow me to, what I mean by that. What we mean is this: That the United States Bureau of Mines and the Territorial bureau of mines have over the past many years explored the potential and traced the geological structures in Alaska, so that now that we have eliminated a lot of land as not important from a mineral point of view, and we have designated areas that are definitely important—and I do not think that the other Territories had that advantage when they became States.

Mr. ABBOTT. Then you in a very real sense are qualifying, because at least as early as 1802, in the enabling act, or the admission act, that brought Ohio in—and it is the first time I believe that appears, and Ohio was the 17th State to come into the Union—there was a flat school land grant, as you are aware undoubtedly, as followed by later precedents, where section 16 throughout the State was granted. Thereafter when Texas came in, she was granted all of the vacant unappropriated reserved lands in Texas, and certainly some of those lands were known to be valuable for minerals. And thereafter, and jumping a number of States, it appears that the first time that mineral lands were exempted from certain grant selections was with the act of 1889 that provided for the admission of North Dakota, South Dakota, Washing-

ton, and Montana. And there have been school land grants, as indicated, from 1802 up to the present time, which would mean that the last 31 States which came in had school land grants.

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.

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 geological 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 personally 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 mineral 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. Well now, you stated earlier in response to a question that you were opposed, I believe, to statehood at this time?

Mr. FRANKLIN. Yes, I am, but I have absolutely attempted to eliminate whether I am for or against in this statement. And we are only dealing with what we term "technicalities" that would be just as valuable from the standpoint of the new State potentially as it would be to the mining industry. I am speaking solely as a witness for the mining industry; not for myself.

Mr. PILLION. Will the gentleman yield?

I think the gentleman ought to be accorded the courtesy of permitting him to appear here in his official capacity. I understand he is representing the mining interests, and in that respect he has stated that the group that he represents—has not taken an official stand either for or against statehood.

Mr. ABBOTT. Well, Mr. Pillion, my reason for asking the question: We have other witnesses who have asked to appear who take this position: They are qualifiedly opposed to statehood. They are opposed to statehood unless the Congress adopts certain amendments to the proposed enabling act. And I simply wanted to ask if that was the position of this witness.

Mr. PILLION. I see.

Mr. FRANKLIN. I did not understand that.

I would say that the majority voice of Alaska should be heard, and if the majority wants statehood and Congress sees that is the answer, we will try to work this thing out some other way. But we should certainly like to work it out now.

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 your position correctly that you would prefer that it be left to the State?

Mr. FRANKLIN. Yes, sir.

Mr. PILLION. 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. Pillion, 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. PILLION. Does that clarify it? It does not to me, because it is too involved. I just cannot follow it.

Mr. O'BRIEN. The witness is to proceed, as I understand it, at this time with his supplemental statement.

Mr. FRANKLIN. Thank you, Mr. Chairman.

The supplementary statement by the Alaska Miners Association:

In order to properly weigh the importance of allowing the State legislature freedom in disposing of mineral rights on land claimed by the State, a brief summary should be made of the income producing industries. Also, a summary should be made of the taxes collected by Alaska on this income and the appropriation demand against these taxes collected.

The total annual Territorial income has been established at $500 million by the United States Department of Commerce for the year ended December 31, 1956. This is broken down as follows (figures

from Territorial commissioner of mines and Alaska Resources Development Board):

	1956
Mining industry	$24, 010, 000
Forestry	34, 305, 000
Fishing	78, 000, 000
Farming and miscellaneous	8, 000, 000
Defense and/or Government spending	355, 000, 000
Total	500, 814, 000
(Round figure)	500, 000, 000

Mining, we believe, offers a potentially greater source of income. Forestry products are already proving their potential, and should increase. Since fisheries income has remained relatively stable for the past 3 years, it could be assumed that a plateau has been reached.

Defense and/or Government spending is being classed as industry insofar as its impact on Alaska's economy is concerned. Since it represents such a large proportion of the annual income, it is important to know if it has plateaued, is going on up, or is it going down. The honorable chairman explored that field in asking questions of General Twining.

My recollection of the results of that questioning are that the Government will have a continuing expenditure for an indeterminate period for maintenance, but the heavier construction spending would probably fall off. How much this will amount to is open to conjecture. During 1956 the Corps of Engineers reported that defense construction in place totaled $89,316,000.

Any reduction in Government spending will have to be made up in additional income from other sources.

The various taxes collected by Alaska from all sources of income for the year ended December 31, 1956, totaled $20,354,126.67 (source, Territorial department of taxation). Certain of these revenues are earmarked and approximately $14,500,000 will go to the general fund and $1,500,000 to the support of schools. So, for our purposes, a figure of $16 million can be used. At the same annual rate of collection we can assume that for a 2-year period, or biennium, the collections going to the general fund and support of schools will amount to $32 million.

In the present Territorial legislature, the budget request is some $48 million. Representative Ken Johnson, chairman of the Ways and Means Committee, has stated in a newspaper interview at Juneau, Alaska, that he feels the request can be trimmed to some $36 million. Additional increases in taxes are being considered to close the gap.

Our premise is that in order to maintain the present level of expenditure the same level of income must be maintained, or as an alternative make additional tax increases.

We feel that if the legislature has the power to dispose of its land and mineral rights by lease, sale, or other adequate compensation it could be used as an incentive to speed development of Alaska's untapped resources consistent with the public interest.

Thus help the mining industry increase its productive capacity which in turn would take up the slack in any decrease in Government spending.

Mr. O'Brien. Mr. Franklin, I would like to ask 1 or 2 questions at this point that I should have asked at the beginning.

You are chairman of the Legislative Committee of the Alaska Miners Association; is that correct?

Mr. Franklin. Yes, sir.

Mr. O'Brien. How many members does the association have?

Mr. Franklin. I anticipated that question, but did not get the answer.

Mr. O'Brien. Approximately how many?

Mr. Franklin. Oh, I would think there would be four or five hundred members. But the members who are represented represent this $24 million.

Mr. O'Brien. Are they all engaged in mining?

Mr. Franklin. Yes. Well, they are either engaged in mining or they have interests in mining. They are actively engaged, like I am, or they have interests in mining ventures.

Mr. O'Brien. Am I correct in assuming that the association as such has not taken a position on statehood one way or the other?

Mr. Franklin. Yes, sir; that is correct.

Mr. O'Brien. And when you expressed your views, those were your individual views?

Mr. Franklin. Yes.

Mr. O'Brien. And I must recall that you expressed them under pressure of questioning from the committee.

Mr. Franklin. I did not want to express my views, because I figured I was appearing as a witness for the miners association, and they had not expressed a view.

Mr. O'Brien. One other question. You said that the membership is several hundred, four or five hundred. Do you know how many of those members are residents of Alaska and how many are residents of the States?

Mr. Franklin. They are all residents of Alaska.

Mr. O'Brien. They are all residents of Alaska?

Mr. Franklin. Yes, sir.

Mr. O'Brien. I note that you state that the total income, Territorial income, is roughly $500 million, and that the defense or Government spending is $355 million of that. It has stated in various ways before this committee that a rather horrible economic catastrophe would ensue if Government spending or defense spending was removed. Do you believe that there is any possibility of any substantial reduction in defense spending in Alaska other than for heavy construction in the foreseeable future?

Mr. Franklin. I am hardly qualified to answer that except in my own personal opinion and from listening to General Twining here the other day, I would say that there probably would not be too much of a fall-off except for the heavy construction.

Mr. O'Brien. Yes. And then when we include that $355 million as an industry, as you do in your statement here, we are justified in so considering it. In other words, we cannot consider it as a rotting plank under the economic platform. I wanted to bring that point out.

And one other point: While the income other than defense and Government spending is only $145 million, I think you might agree that a number of Territories which came into the Union which had statehood did not have anywhere near $145 million income at the time they came in. Certainly not a half a billion dollar income.

Mr. Haley. How many of the States that came into the Union had a budget of $48 million when they came in?

Mr. O'Brien. Well, may I say that the $48 million figure has not been substantiated here as a budget figure, but as a budget request, which will be cut down. I know the gentleman from New York would agree in our State that we do not even make public the budget requests from the various departments, and that before the budget goes to the legislature it is trimmed each year at least a hundred million dollars.

Mr. Haley. On the other hand, Mr. Chairman, it could just as well go up, too. There is no showing here that the requested budget is $48 million. There is no showing here that it will cut down to $32 million. There is only the statement that they hope it could. I hope so, too. But it could well rise way above the $48 million, too.

Mr. O'Brien. Well, I think perhaps we have a situation here, as we had yesterday, about the stone and the glass house. We have a Federal budget confronting us right now of $71,800,000,000. But I think one reason that some of our Territories did not have budgets of this size when they came in is that they were not as well organized and as ready for statehood. They were not operating as governments to any great extent.

Mr. Pillion. I hope that the opponents will have equal time to that of the chairman in questioning.

Mr. O'Brien. The Chair thought that he was speaking very impartially and merely pointing out some of the testimony.

Mr. Pillion. The impartiality of the chairman always astounds me.

Mr. O'Brien. I yield to the Delegate from Alaska.

Mr. Bartlett. Well, I thought this would be helpful to Mr. Haley. That is the only reason why I interrupted. Mr. Franklin is referring to 1956 figures for income for Alaska, amounting to half a billion dollars, and the Territory during that year from tax sources was expending about $16 million.

Mr. O'Brien. That is correct. I think we all become confused here from time to time, because we accept these as annual figures. The appropriations are for a 2-year period. We do not do that in our State, so I was confused, I will concede. So it would be half the amount.

Mr. Haley. I might say, Mr. Chairman, that I am not confused, because I understand this appropriation is for a period of 2 years.

Mr. O'Brien. I know, if the gentleman will excuse me, the gentleman is never confused. The Chair was confused.

Mr. Haley. I do not think that I would agree with that.

But getting back to your amount of money, I am sure that the Chair realizes that when other Territories came into the Union, we had a sound dollar. In other words, the dollar was worth a dollar.

Mr. O'Brien. Well, my history is a little bit vague, but I do recall reading from time to time about the cost of certain things in, well, shall we say, California and other places, before they became States. I think that they had ingrown inflation of their own. I will admit that there is inflation in Alaska. It has been very costly. But I think that inflation is a new excuse for not granting statehood.

You did complete your statement, I believe.

Mr. Aspinall?

Mr. Aspinall. Do you know whether or not the sum of $24,919,000 for 1956 for the mining industry is a reliable norm for the industry for the last 10 to 20 years?

Mr. Franklin. I cannot give it to you that far back. I can give it to you for the last 3 years: 1954 was $24,407,000; 1955, $25,412,000; 1956, $25,400,000. I would think, as a guess, for the last 10 years it has probably been at about that level, and I would not want to go any further than that.

Dr. Miller. I have one question. I think it probably should be directed to Mr. Bartlett. That is on page 2:

> The State of Alaska shall consist of all the Territory, together with the Territorial waters appurtenant thereto, now included in the Territory of Alaska.

That I understand. However, do you later on in the bill then make some exceptions for the withdrawal of lands that have already been established by the Federal Government?

Mr. Bartlett. Yes, all existing reservations are continued in that status, Dr. Miller.

Dr. Miller. Do you know how many acres are now in existing reservation withdrawals?

Mr. Bartlett. I doubt if anyone even in the Interior Department could answer that specifically. I think a good estimate would be between 90 and 95 million acres.

Dr. Miller. Between 90 and 95 million. I have a map here. It is an old one, I know. I have been looking it over. And I find a lot of the rich mineral lands, the rich oil lands, that have been described in testimony, apparently are in the withdrawal, the Territorial withdrawal. And in that respect I have a letter dated March 14, addressed to our chairman, Mr. O'Brien, in which an attempt is made to bring up to date the withdrawals of the Alaska land as of October 1956: oil and gas reservations north of the Brooks Range, including naval petroleum company reserves, 48,800,000 acres.

Now, that presumably would not be available for oil development by the new State so that it could become a State.

Mr. Bartlett. Well, if Secretary Chilson's proposal concurred in by General Twining is adopted, the State could not withdraw any land north of this line without the permission of the President.

Dr. Miller. The national forest there was 20,700,000 acres there. Of course, I presume that would be excluded from any oil or mineral development.

Mr. Bartlett. No, I think mineral development is permitted, under existing Federal law.

Dr. Miller. Wildlife refuge and national parks and monuments—the total here is 92,318,000 acres.

Mr. Aspinall. That total is for the area that you just referred to, national parks.

Dr. Miller. No, the total of all lands withdrawn, apparently, 92,318,000.

Mr. Bartlett. With over half of that coming north of the Yukon.

Dr. Miller. But none of that, then, would be subject to earmarking by the new State under this 103 million acres.

Mr. Bartlett. That is absolutely correct, with the stipulation noted that they might select north of the line if the President would permit

and be able to select south of the line if the reservations are revoked in the future.

Dr. MILLER. I would like to ask the witness then: What is the extent of known minerals and oil south of this proposed line?

Mr. FRANKLIN. Would you repeat your question?

Dr. MILLER. What is the known resources of minerals and oil, and so forth, south of that line?

Mr. FRANKLIN. I am not qualified to answer that.

In the first place, I am not a mining engineer. But all I can say is that there is a general belt of geological potential mineral deposits that runs all the way through the area. From the Canadian border it would run all the way up in through here [indicating]. We know, there are deposits, for instance, up in the Seward Peninsula, which has the only known tin deposits in North America. There is copper up here. There is gold in the Chandalar. That is the best way I can answer it.

Dr. MILLER. I am wondering if the bill provides for the withdrawal of that land for mining purposes.

Mr. BARTLETT. Will the gentleman yield there?

We were told by a witness from the Interior Department on Monday, I believe, that the mining laws would be operative north of the line, except under circumstances when it might be deemed inadvisable by the military.

Dr. MILLER. Of course, the military finds it advisable sometimes to close a lot of this land.

Are there any gold mining operations carried on, any extensive gold mining operations, in Alaska?

Mr. FRANKLIN. The largest operation is the Fairbanks exploration division, of the United States Smelting Co., which is in Fairbanks. I think they are operating about 5 or 6 dredges. I do not know what their annual production is, because that is all withheld. That is the largest single operation in gold.

To my knowledge, there are no hard rock or underground gold mines attempting to operate.

Dr. MILLER. The big gold mining operation at Juneau is no longer in operation?

Mr. FRANKLIN. That is correct. It is not.

Dr. MILLER. And that, I presume, is due to the price of gold.

Mr. FRANKLIN. Yes, sir. The price of gold remained at $35 and everything else went up around it. It is simply a unit factor. If you do not have enough money per ton in your ore, you cannot mine it unless you can get more for the gold.

Dr. MILLER. Would you not have some advantages if you had a State here instead of a Territory, as far as mining operations are concerned?

Mr. FRANKLIN. As far as the mining industry is concerned, I do not believe that that would necessarily be true.

Dr. MILLER. Then you do not believe the fact that it has been a Territory all this time has held up the development of mining operations and mineral development?

Mr. FRANKLIN. I think not. A miner will go wherever he can make any money.

Mr. HALEY. I would just like to clarify one point.

In this $24,019,000 figure of income from the mining industry, how much of that, can you approximate, is carried on north of that line?

Mr. FRANKLIN. I am afraid I won't be able to give you those figures. I thought I might be able to give it to you in a general way, because for the most part that area represents the second division. But I am afraid that there is no breakdown in this.

Mr. HALEY. Is is substantial?

Mr. FRANKLIN. I would not say that it was substantial, but it does have a great potential.

Mr. PILLION. Will the gentleman yield?

The reason that it is not substantial is that the $24 million figure includes the ordinary process of sand and gravel and that sort of thing, which makes up a great part of the $24 million.

Mr. HALEY. What about the rest of these figures, here? Is a good bit of this income produced north of that proposed line?

Mr. FRANKLIN. You mean the breakdown I have in my supplementary statement?

Mr. HALEY. Yes.

Mr. FRANKLIN. I would say that mining would be the only portion of the breakdown that would be coming from that area. Forestry is mostly from the southeastern and fishing, of course—we learned the other day that there would be small division of the fishing income, but I am certainly not qualified to indicate what portion of that.

Mr. HALEY. But it would be some?

Mr. FRANKLIN. Yes.

Mr. PILLION. Mr. Franklin, did I understand you to say that you were chairman of the legislative committee financing ways and means in the Alaskan Legislature?

Mr. FRANKLIN. I was chairman of the Ways and Means Committee in the 20th session in 1951.

Mr. PILLION. And is the Ways and Means Committee the appropriations committee there, or is it the taxation committee?

Mr. FRANKLIN. It is both. The Ways and Means Committee in Alaska brings out the budget and recommends any tax measures to support their stand.

Mr. PILLION. That is a very good idea. I wish we could institute that here in Congress, a situation where the committee that does the appropriating also has some responsibility for raising the taxes.

Mr. Franklin, I notice an item here of your supplemental statement on defense and/or governmental spending of $355 million, spent by the United States Government in Alaska in the year of 1956. Could you tell me whether that is primarily defense spending or whether it includes all governmental spending, such as postal operations and that sort of thing? Or is it primarily what the Defense Department spent in the Territory of Alaska?

Mr. FRANKLIN. My understanding of the figure is that it includes all Government spending, the operation of the Department of the Interior, the Post Office, and, as you say, everything.

Mr. PILLION. And you could tell me what the defense spending is, separated from the other governmental costs?

Mr. FRANKLIN. No, sir. I cannot. The only breakdown I have there is the $89 million that was spent on heavy construction, or construction.

Mr. PILLION. And, of course, if that heavy construction were to stop, it would be quite a serious blow to the economy of Alaska, because that 80 some million dollars of defense construction alone is almost one-half of the total of all other income other than governmental.

Mr. FRANKLIN. We are hopeful that if there is any reduction in spending, the basic industries can pick up the difference. And that is my reason for presenting this statement, to try to indicate that the mining industry should be in a position to do that.

Mr. PILLION. Yes. But, of course, $86 million is an awful lot of income when mining runs about $24 million.

I will yield to the gentleman from Nebraska.

Dr. MILLER. I believe also the military told us in some of their testimony that this heavy military construction was practically at an end.

Mr. BARTLETT. Would the gentleman yield?

Mr. PILLION. Surely.

Mr. BARTLETT. I think we must bear in mind that when the Government spends $100 million for defense construction, that includes the money spent for steel here in the States, includes the money spent for automotive equipment, freight, and much of this work is carried on at remote places, the labor is flown there, and very little of that money in some cases remains behind in Alaska.

Mr. PILLION. Now, Mr. Franklin, there was some questioning here as to whether or not the defense spending and appropriations would continue in Alaska for some indefinite period of time ahead. Now, that actually is a conclusion to be drawn, first, by the military experts. And you, I do not believe, claim that you are a military expert, do you?

Mr. FRANKLIN. No, I do not.

Mr. PILLION. So you would not know much about the defense costs that would be necessary to be spent to defend, say, against guided missiles and that sort of thing? You have no information of special value to this committee on that subject, have you?

Mr. FRANKLIN. I have no information whatsoever.

Mr. O'BRIEN. Will the gentleman yield?

I agree with the gentleman that the people who would know would be the military experts, who already have testified that the spending there would continue on a high plateau for the foreseeable future.

Mr. PILLION. And of course the military experts merely make recommendations to Congress, who in the last analysis are the final judges of how much money shall be spent. Is that correct, Mr. Franklin?

Mr. FRANKLIN. That is my understanding of it, yes.

Mr. PILLION. And it is their determination as to whether the defense experts are more sound, and whether or not the economy of this country will bear the recommendations that a defense expert might make. They are merely recommendations to the Congress.

Mr. O'BRIEN. Will the gentleman yield?

Mr. PILLION. Surely.

Mr. O'BRIEN. Will not Congress also consider whether or not we can risk reducing our defense installations in Alaska, and that Congress will consider not only the cost but our very existence?

Mr. PILLION. Now, Mr. Franklin, I have here before me a list of items to be spent in Alaska, made up by the Interior Committee for the fiscal year 1958, which is next year. I will not break them down, but I will just run over them in the categories here.

The Treasury Department, $5,836,000. The Defense Department, $10 million. That is over and above the regular defense appropriations. The Agriculture Department, some fifteen-odd-million dollars. Health, Education, and Welfare, some fifteen-odd-million dollars. The Judiciary of Alaska, $385,000. The Commerce Department, $42½ million. The Interior Department, $26 million. The Justice Department, $2 million. The Post Office Department, $3,608,000. Making a total to be spent by all the Departments, in accordance with the figures of the Interior Department, in Alaska, of $122 million.

Now, do you know whether all of these figures here are more or less included in the $355 million that you quoted as being spent for defense and governmental spending in Alaska?

Mr. FRANKLIN. I do not know that they are, but I would assume that they would be. The $500 million that I got was from the United States Department of Commerce.

Mr. PILLION. Well, the $122 million here is outside of defense spending. Is it correct to assume, Mr. Franklin, that the civilian population of Alaska is roughly 160,000 persons? Is that about a fair statement?

Mr. FRANKLIN. Yes, 160, did you say?

Mr. PILLION. Roughly 160 or 170.

Mr. FRANKLIN. Yes, 160 to 170.

Mr. PILLION. Now, is the estimated position of the United States as a whole, of 170 million, a fair estimate of that population?

Mr. FRANKLIN. You would be in a better position. I am sorry. I do not know.

Mr. PILLION. Let us assume that is true. Then the population of Alaska is approximately one one-thousandth of the population of the United States. Is that a correct mathematical deduction?

Mr. FRANKLIN. I presume so.

Mr. PILLION. All right. Now, the budget of the United States Government for the next year will be approximately $70 billion, of which approximately $40 billion is for defense, leaving a total estimated cost of operating the United States Government of $30 billion over and beyond defense spending.

Now, if we were to project that, and we spent the same rate in the United States as we spend in Alaska, our budget for nondefense purposes, instead of being $30 billion a year, would be one thousand times $122 million, which was spent in Alaska, which would give us a total of $122 billion. In other words, the Federal Government is spending in Alaska for nondefense purposes 4 times the rate and 4 times the amount that is being spent for all these nondefense purposes, health and welfare and education, et cetera, in the United States. And if those figures are true, Mr. Franklin, then certainly the claim that the people of Alaska are second-rate citizens, or stepchildren of the United States Government, is not true, so far as spending is concerned for the welfare of the Territory of Alaska at the present time.

I would not expect an answer to that.

Mr. FRANKLIN. I was sure you would not.

Mr. O'BRIEN. Will the gentleman yield?

I think the gentleman would agree that he has demonstrated the very high cost to the American Government of keeping Alaska as a Territory. Perhaps unconsciously, subconsciously, he has presented a very strong argument for statehood.

Mr. PILLION. The gentleman may draw his own conclusions, whether sound or unsound.

Mr. HALEY. In addition to that, this bill, here, as I read it, gives the citizens of Alaska an additional $93 million over a period of a few years. And even taking the statement of the distinguished chairman of the Ways and Means Committee, Mr. Ken Johnson, taking his figures, apparently the amount somebody is going to have to make up is about $4 million. So I do not see where the gentleman has made any great statement here in my viewpoint as to statehood for Alaska. He is bringing out just exactly what we have been saying all the time, that we do not believe that economically Alaska is ready to stand on its own feet.

Mr. PILLION. I would like to comment on the very sound statement of the distinguished gentleman from Florida. I agree with him certainly.

Mr. O'BRIEN. Would you yield? I was quite interested in the gentleman's remark that of course you cannot be a second-class citizen if the Government gives you enough money in one form or another. Of course, that excludes the right to vote, and so forth, which many of us have, and do not have in Alaska. But I have an interesting figure before me. Now, the gentleman from Florida the other day said if there ever were second-class citizens, they were the Indians, over whose destiny he has much to say as chairman of the Subcommittee on Indian Affairs. The figure I have is that we are spending about $360 a year per Indian; and to project, as did the gentleman from New York, if we did that for everyone else in the United States, our budget for health, welfare, and education alone would be $61,200,000,000 a year.

So I think it just proves that you can do strange and wondrous things with figures.

Mr. HALEY. Will the gentleman yield so that I can reply to the chairman?

I might inform the distinguished chairman that we have been, as a Nation, in the Indian affairs business since we became a Nation. And if we are spending that much money for our trusteeship or our wardship over these Indians, and have not in 170 years made them first-class citizens, then I say it is something that we should be ashamed of.

Mr. O'BRIEN. Well, the Chair, to whom the gentleman's remark was addressed, is willing to admit that he is ashamed.

Mr. HALEY. So am I.

Mr. O'BRIEN. If the gentleman will yield further, I might say that the Indian problem is not confined to the 48 States, and some of the $122 million mentioned by the gentleman from New York does go for the welfare of Indians in Alaska. So these per capita figures always astonish me, as to doing anything with them. And I think that we will find that in some of our States there are many many more dollars given than to other States. The gentleman from New York has complained repeatedly, and I think with some justification, that for every dollar New York gets we spend about 2 or 3. It goes to other States, the way it is. I do think that the fact that it is costing us so much in Alaska is a prime argument for giving consideration to immediate statehood.

Mr. PILLION. I yield to the gentleman from California.

Mr. SISK. I will not ask the gentleman to yield now. I am probably next in line now.

Mr. PILLION. Mr. Franklin, is there a growing concern among the businessmen of Alaska, and a growing alarm over the higher taxes that exist today, or—that is, the plateau of the taxes that exist today—on the prospect that the taxes will keep going up?

Mr. FRANKLIN. There are some of us who feel that they probably have not reached the top yet, and we do not know where they are going.

Mr. PILLION. Well, is there not a fear expressed on the part of the businessmen that statehood would substantially increase the cost of operations for most businesses due to taxes?

Mr. FRANKLIN. If I might confine that answer to the mining industry, in the mining industry I think they feel that there is a possibility.

Mr. PILLION. I do not wish to embarrass you in any way, and if there is any question that I ask that embarrasses you, please do not hesitate to just say that you would rather not answer it, and we will certainly respect that.

Mr. FRANKLIN. Thank you.

Mr. PILLION. There is an unemployment tax in existence in Alaska at the present time, amounting to what percent of the payroll?

Mr. FRANKLIN. Unemployment insurance tax?

Mr. PILLION. Yes.

Mr. FRANKLIN. A total of 3 percent: 2.7 goes to the Territory, and 0.3 goes to the Federal Government.

Mr. PILLION. Now, is there a pending bill before the legislature to increase this tax?

Mr. FRANKLIN. That has been a terrific problem up there for the last several years. And I am not familiar with the bill, if there is one.

Mr. PILLION. Now, as I understand it, the Ketchikan Paper & Pulp operation is a rather marginal operation. Are you familiar with the costs in that operation of Ketchikan Pulp & Paper?

Mr. FRANKLIN. No, sir; I am not.

Mr. PILLION. Is there some prospect that the Georgia Pacific Pulp & Paper Co., that has been making plans to make investments in Alaska—that that company may change its mind and not come to Alaska, because of the fear of increase in taxes?

Mr. FRANKLIN. I cannot answer that.

Mr. PILLION. Is it not true, as a businessman, Mr. Franklin, that taxes are a major consideration in the investment of capital in any area which in turn gives employment, and the only way we can give employment is to employ capital investments, savings of the people, in a manner which will furnish a sufficient return for a businessman to make it advisable to invest money, and that higher taxes is a great deterrent to the expansion of the economy of any State or Territory or area.

Mr. FRANKLIN. That is true in my case.

Mr. PILLION. Would you say, Mr. Franklin, that at the present time the taxes in the Territory of Alaska are at least as high or higher

than the average taxes of the States, the 48 States; or do you have any figures?

Mr. FRANKLIN. I do not have any figures.

Mr. PILLION. But you do agree, do you, Mr. Franklin, that we ought to look forward to seeing the growth of Alaska brought about by private industry rather than by Government spending which, in essence, is not actually true prosperity; that the real prosperity comes from private investment, private business, expanding the economy and creating capital investment and bringing about a higher level of economic activity and prosperity?

Mr. FRANKLIN. Those are my feelings.

Mr. PILLION. Thank you very much.

Mr. O'BRIEN. I wonder if the Chair might make an observation at this point. We are running into a bit of difficulty in a situation which has been created to a great extent by the Chair itself. I have talked too much. I think all of us have. We have had hearings this week on Monday, Tuesday, Wednesday. We have had them all week. This morning we had hoped to hear a number of people who are here at great inconvenience to themselves. They have shown their interest either for or against statehood by traveling a great distance. Now, it is true that Mr. Franklin has been a good witness. His statements were brief. And his long tenure was due to questions from members of the committee.

The Chair has no power nor desire to cut down the questioning, but I do believe that to devote 2 hours, 2 precious hours, to a single witness who did not intend to testify for or against statehood, who came here only to discuss a specific part of the bill before us—if we continue at this pace, we will not be able to act upon this legislation this year or next year. Now, that might be all right with some of us. But I wonder if it would be the desire of the committee to place a limit upon our questions not only to accommodate the witnesses but to enable us to allow the members to speak or ask questions.

I am not suggesting this because I think we should curtail the record to any degree. I think it should be wide open, and everyone should have a chance to speak. But, in effect, what we are doing is curtailing the opportunity of some people, some people who probably figure they cannot stay in Washington all winter.

Of course, the Chair is subject to the feeling of the committee.

Mr. SISK. Mr. Chairman, could I speak to that point?

That was primarily what I had hoped to have an opportunity to say today before we adjourned. I have not been in regular attendance at these meetings, due to some other commitments. However, I think I have come in on every day for at least part of the time. And I think with possibly only one exception has the questioning ever gotten as far down the table as I am.

Now, I have all the respect in the world for my good friend from New York and the sincerity of his position, and I certainly do not want to see anything done to cut off his opportunity to explore fully every aspect of this case. But it would seem to me that, for example, the witness this morning made an excellent witness, but he was here to testify on a single technical matter. It would seem to me that 5 minutes should have been ample time, or if we wanted to, we could make it even a little longer.

I personally would have been glad to yield my 5 minutes, had we been operating under the 5 minutes rule, to the gentleman from New York, because I had no particular questions of this nature. But it would seem to me that questioning this gentleman or some other witness on a specific technical approach on the whole broad scope of this thing is just wasting time. It is beating a dead horse to death. And I would hope that we might be able, Mr. Chairman, to reach some agreement as to time. I personally, as I suggest this morning, do not have a lot of questions to put to this particular witness, but I would like to have an opportunity from time to time to have at least a few minutes to direct some questions to some of the witnesses that we have here.

Mr. O'BRIEN. Are there any other questions of this witness?

Mr. BARTLETT. I would have a few, Mr. Chairman, yes, and let me say that I have some apprehension over the fact that Mr. Boddy is here from Alaska and is very anxious to get away, and Dr. Gould came down yesterday from Philadelphia and returned home last night and came down here again today.

I know the problems the committee faces, but, as you said before, the witnesses are rather inconvenienced by the fact that time is running out on us.

Mr. O'BRIEN. Yes. And the difficulty might apply more to the opposition than to the proponents, because I think that some of the opponents, at least as listed here, have had their names added to the list quite recently. We have listed for today Miss Alice Stuart of Fairbanks, and we have Charles Callison and C. R. Gutermuth, who are from, respectively, the National Wildlife Federation and the Wildlife Management Institute.

What the Chair is most anxious to avoid when we complete these hearings in a reasonable time is the charge that anyone was precluded. Well, there is more than one way to preclude a witness. You can just let him stand in the corridor or sit in the rear until the times runs out or you can refuse to hear him. I want to hear everyone who has come here. I know what an inconvenience it is to come here from Alaska.

Some of these people have come here from 5,000 miles, and whether they are for or against statehood I admire them for their interest in the subject.

I think that so many of these matters that we question special witnesses on could be handled, for example, when Governor Gruening gets on the stand, or something of that sort.

Now, I made the mistake today of asking this witness, say, military questions, questions of military judgment. Well, I think I did it because I was trying to bring out a point. And I think the witness himself will admit that he qualified as an expert on many subjects he did not consider himself an expert on when he arrived here this morning.

So I think if we use a little self restraint we can get on a little more rapidly. And I am not blaming the gentleman from New York. I am guilty. I think we have all been guilty except the unfortunate gentlemen down here who have not been reached for some of this questioning.

So if there are no further questions of this witness——

Mr. BARTLETT. I have some, though.

Mr. O'BRIEN. All right, Mr. Bartlett. He is yours.

Dr. MILLER. May I ask, before Mr. Pillion goes: What is the plan on how long we expect to run today and tomorrow and the next day?

Mr. O'BRIEN. I would like, if it meets with the approval of the committee, to run until 12:30 today and to return at 2:30, because we have at least two witnesses here who will be unable to testify at all unless they are heard today.

Dr. MILLER. Who would you hear when we return, may I ask?

Mr. O'BRIEN. I hope to finish with Mr. Boddy, who is president of the Alaska Sportsmen's Council, at the morning session. Then in order I have Mr. Erceg of Fairbanks, Miss Stuart, Dr. Gould, Robert F. Spicer, and Mrs. Prout, who is president of the General Federation of Women's Clubs. She does not have that problem that the others have because she is here in Washington. And then also available, if time permits, according to my schedule, is the Assistant Secretary of State, Mr. Francis Wilcox. Then we have Mr. Callison and Mr. Gutermuth, whom I have mentioned previously; and still in a state of suspended animation are the gentlemen who constitute the membership of Alaska's Tennessee plan delegation, one of whom has completed his testimony subject to questioning, one of whom has presented only a small part of his testimony, and one of whom has not been heard at all.

Dr. MILLER. Mr. Chairman, of the witnesses you have named here, who might be against the bill, and how are they divided? Are you going to hear any opposition witnesses at all?

Mr. O'BRIEN. Miss Stuart is third on the list after Mr. Franklin leaves the stand. We have Mr. Callison and Mr. Gutermuth, who are listed on my list as opposition witnesses.

Dr. MILLER. They would be heard some time next month, I suppose.

Mr. O'BRIEN. I would hope not some time next month.

Dr. MILLER. I would hope that you would at least give them an opportunity to be heard.

Mr. O'BRIEN. I certainly will.

Mr. PILLION. We expect some departmental witnesses here. We had departmental witnesses in favor, and they stretched over some little period of time. I understand that somebody from the Department of State is going to be here. And we want to have some opportunity to present those witnesses.

Mr. O'BRIEN. I certainly think that all witnesses should have a reasonable opportunity to be heard. But I do not think it would be the will of the majority of this committee that we should prolong these hearings until a few weeks before adjournment of Congress and perhaps never get to Hawaiian Statehood.

I have never used in this committee room—at least I do not think I recall ever having used it—the word "filibuster." But my opposition to filibuster does not extend only to the great United States Senate but it includes committees of Congress.

Mr. PILLION. Mr. Chairman, I will just state that so far the proponents have had an opportunity and have organized a series and a list of witnesses that have taken the complete week of this committee, and we are not completed yet. Now, certainly the opposition ought to have some fair opportunity to present its witnesses, in view of the full week's time that has been taken up so far—and we have not concluded—with the witnesses in favor of statehood.

Mr. O'BRIEN. Well, would the gentleman agree with me that we have been in hearings so far on Alaska statehood 8 hours and one-half. Will he further agree with me that 2 hours today, one-fourth of that total time, has been consumed by a witness who stated he personally was in opposition to statehood? And will he agree further that at least another 2 hours have been taken up by comments of members of this committee in opposition to statehood?

I think when we read the record we will find that the voice of the opposition is very shrill in the record so far. And we have Miss Stuart, who has been waiting for these 2 hours to testify.

Under ordinary procedure I thought we would have arrived at Miss Stuart by 11 o'clock. She is the only witness so far who has come from Alaska as a stated-in-advance opponent of statehood. I am most anxious to hear Miss Stuart. She gave delightful testimony in Fairbanks. And it is not the fault of the committee that she has not been heard. But I do not think the proponents—truly they are organized, but may I say that the three principal witnesses of the proponents, Governor Gruening, Senator Egan, and Representative Rivers, are organized as a result of a mandate of a vote of the people of Alaska. That is quite an organization.

The opposition has had a long time to organize. They knew that the hearings were coming on. They were announced publicly. I just wonder where this opposition is.

Mr. SISK. Will the gentleman yield? With all due respect, and I certainly want to see that the opposition has a fair and ample opportunity——

Mr. O'BRIEN. Will the gentleman excuse me at this point?

May Mr. Franklin be excused? He has a plane to catch in 25 minutes.

Mr. Bartlett, will you waive your questioning of Mr. Franklin?

Mr. BARTLETT. I will, Mr. Chairman, but I must say I am very unhappy about it. Mr. Franklin has made comments of a very important nature. I did not want to harry him, but I wanted to draw out further some of the statements he made.

Mr. O'BRIEN. Would you, if Mr. Bartlett submits certain questions to you in writing, send them to the committee to be made a part of the record at this point?

Mr. FRANKLIN. I would be very glad to.

Mr. BARTLETT. I would prefer not to do it that way, Mr. Chairman, but I know the plane is not going to wait, so I will waive my questioning at this time.

Mr. SISK. I would like to make a further statement, if I might, Mr. Chairman. I think that the record should show this.

We are discussing now the opportunity of the opposition. I have a very high regard for my good friend from New York, and I want to see him have every opportunity. But I am just wondering what this record would show. I would like to hear the gentleman comment on it—this week, as to who had the opportunity of questioning the witnesses, from the standpoint of opposition or of proponents. I might say, and I wish my friend from Florida was here as I asked him to stay, and he said he would not—that between the gentleman from Florida and the gentleman from New York, I think the opposition has been most ably represented here this week. I believe, and

DRAFT

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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. <u>HISTORY OF MINING PROVISIONS IN ALASKA STATEHOOD ACT AND ALASKA CONSTITUTION</u>

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 <u>Wyoming v. United States</u>, 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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*/ <u>See</u>, 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 of 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 transferring 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.B. 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 1934 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: <u>Provided</u>, That any lands or minerals <u>hereafter</u> 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 <u>requires that all State conveyances of lands granted by sub-sections 6(a) and 6(b) (selected lands)</u> 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, <u>supra</u>. (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. <u>In particular, the current language expressly calls upon Alaska to adopt a mineral leasing system</u>, 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 geological 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 Record, 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 the land transfers. From what has be 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 (mphasis 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. <u>Discovery and Appropriation Rights</u>. 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, <u>his possessory right, for all practical purposes of ownership, is as good as though secured by patent</u>.

<u>Wilber v. United States ex rel Kershnic</u>, 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. <u>"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</u>

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 <u>Wyoming v. United States</u>, <u>supra</u>;

> [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 Stat[illegible] In cases of homestead, preemption, c[illegible]n site entries, the law exclude[illegible]eral lands, but it was never doubte[illegible] the title, once passed, was free f[illegible] conditions of subsequent discoverie[illegible] mineral.

255 U.S.at 499. (Quoting from <u>Shaw v. Kellog</u>, 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 "leasable 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

*/ 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 prevents 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. <u>See</u> <u>Moore</u> <u>v</u>. <u>State</u>, 553 P.2d 8, 26-27 n. 37 Alaska 1976. A more difficult question is the applicability of AS 38.05.345, which provides:

> <u>Notices</u>. (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.