HB

99

(File 1)

STATE OF ALASKA
THE LEGISLATURE

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Mary Van Nimwegen

House Resources	3:00p.m	1-26-89
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25) Testimony by Randall Weiner, Trustees for Alaska

26) Letter from Mitch Demientieff, President, Tanana Chiefs Conference

27) Testimony by Anna Phillip, P.O. Box 1312, Bethel Alaska 99559

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STEVE COWPER
GOVERNOR

HB99

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 19, 1989

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Representative Cotten:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill making certain changes in the laws regarding state mining claims, leasehold locations, and mining leases. The main purpose of the bill is to resolve the long-standing "6(i)" issue, which has cast a legal cloud over the state's mining laws since statehood. The bill achieves that purpose by imposing rent and royalty requirements on state mining claims, leasehold locations, and mining leases. Those in the mineral industry will benefit from the added legal security of their mining interests, while all the people of the state will benefit from the rent and royalty income to the state.

Under existing state law, rights to "locatable" minerals (those minerals subject to location under the federal mining law at the time of statehood, including such minerals as gold, silver, and zinc) may be acquired, except in offshore areas, by staking a mining claim under AS 38.05.195, or by staking a leasehold location and converting it to a mining lease under AS 38.05.205. Present state law imposes no rent or royalty upon a mining claim under AS 38.05.195 or leasehold location under AS 38.05.205, and allows the rental requirement for a mining lease to be discharged through the performance of annual labor. AS 38.05.205(b).

In Trustees for Alaska v. State of Alaska, 736 P.2d 324 (Alaska 1987), cert. denied __ U.S. __, 108 S.Ct. 2013, 100 L.Ed.2d 601 (1988), the Alaska Supreme Court found that the state's mining law fails to comply with the minimum requirements in sec. 6(i) of the Alaska Statehood Act. In particular, the court found that cash rents or royalties are required for mining rights in mineral land granted under sec. 6 of the Statehood Act.

This bill conclusively resolves the "6(i)" issue within the context of existing law. The bill will minimize administrative burdens for the Department of Natural Resources and

will generate significantly more in general fund revenue than it will cost to administer. Passage this session will remove the threat of an injunction against mining during this upcoming season. The balance of this letter discusses the particular changes proposed.

The bill amends AS 38.05.210 to make the annual labor requirement applicable to all mining claims, leasehold locations, and mining leases, while reducing the amount from $200 to $100. Cash payment in place of the annual labor will also be allowed. In addition, the current dollar limit on the application of excess work to future years is being converted to a durational limit of four years, and an unnecessary reference to AS 38.05.240 and 38.05.242 is also deleted. Section 2 of the bill.

Section 3 of the bill adds two new sections. Proposed AS 38.05.211 provides for a minimum annual rental on each mining claim, leasehold location, and mining lease. The minimum annual rental will be on a sliding scale ranging from a minimum of $.50 per acre for a mining interest up to five years old, to a minimum of $5 per acre for mining interests held for more than 20 years.

Proposed AS 38.05.212 provides for a minimum production royalty on all minerals produced from land subject to a claim, leasehold location, or mining lease. The production royalty will be determined on a sliding scale measured on gross income. At each level of gross income, the higher of a minimum royalty or a specified percentage of net income will be payable. The details for computing gross and net income will be established by regulations.

Section 5 of the bill amends AS 38.05.265 to provide that a mining interest is considered abandoned if no annual rental or production royalty is paid by the deadline, which will be set by regulation.

Section 6 of the bill amends AS 43.05.230 to require the commissioner of revenue to provide tax returns, reports, and documents relating to the mining license tax to the Department of Natural Resources, on the condition that confidential information be protected.

The bill includes a transition section that provides for commencement dates for the annual rental and royalty requirements. These dates will allow sufficient time for the Department of Natural Resources to adopt regulations implementing the bill.

The bill also includes technical revisions, a repealer section, and other conforming amendments, to make changes necessary to achieve the purposes generally described above.

Passage of this bill will end a long and troubled period of uncertainty under the state mining laws. It will give holders of interests in mining claims greater legal security, and the people of the State of Alaska a fair return on the public's mineral resources. I urge your early and favorable consideration of this bill.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 99 No. 1
PUBLISH DATE: HOUSE 1/20/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: Rent & Royalty Payments for Mining Claims
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: DNR
BRU: Mining Management Management/Administration
Components: Property Management Admin. Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		35,900	37,000	38,200	39,400	40,800
TRAVEL		0	0	0	0	0
CONTRACTUAL		1,500	1,500	1,500	1,500	1,500
SUPPLIES		500	500	500	500	500
EQUIPMENT		4,000	0	0	0	0
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		41,900	39,000	40,200	41,400	42,800
CAPITAL		240,000	0	0	0	0
REVENUE		750,000	750,000	770,000	770,000	800,000

FUNDING: (Thousands of Dollars)

GENERAL FUND		281,900	39,000	40,200	41,400	42,800
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		1	1	1	1	1
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See attached sheet

Prepared by: Gerald Gallagher Phone: 762-2165
Division: Mining Date: 1/6/89

Approved by Commissioner: Lennie Grouch Date: 1-6-89
Agency: DNR

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Assumptions: As a result of the May, 1987 Alaska Supreme Court opinion, the State's mining laws will need to be amended to require the payment of a cash rent and production royalty. There are currently over 40,000 state mining claims and 200 mining operations on state land. Each claim will be assessed a rental of $0.50 per acre ($20 per claim) and each operation a minimum royalty of $200 or 1% of the net profits, whichever is greater. DNR estimates revenue derived from rents and royalty will be $750,000 in FY 90 and increase to $800,000 by FY 94. Rental payments should account for $650,000 and the royalty payments are estimated to be $100,000 initially.

Program Summary: This expenditure is necessary to complete the additional work load of collecting rent and royalty payments and maintaining both the current mining records system and the state's revenue and billing system.

Positions: A new "Accounting Technician I" position is needed in the Mining and Administration BRU. This position will maintain accounts in the LAS's Revenue and Billing System, audit billing registers, and prepare worksheets and reports as necessary to assure proper accounting and coding of these funds.

Other Expenditures: A one-time capital appropriation of $240,000 is necessary to purchase a new computer system in the "Mining Management" BRU. This new system will allow the Division of Mining to handle the additional workload of rent and royalty payment tracking and lease status verification without additional staff.

General fund revenues generated under this proposal wil exceed expenditures in every year. During FY 90, a general fund contribution of $468,000 after all expenses is estimated. Beginning in FY 91, general fund contribution of at least $700,000 annually are expected after operating expenses are deducted.

Position Title	No. of Positions	Range/Step	Barg. Unit
Accounting Technician I	1	12A	GGU

Time Status	Staff Months	Location	Election District
PFT	12	Anchorage	

Type of Expenditure		Amount
1	2	3
Salary	24,900	
Benefits	11,000	
Premium Pay		
Other		
Total Personal Services		35,900
Travel		
Contractual		1,500
Commodities		500
Equipment		4,000
Other		
Total Cost		41,900

Funding Source for Total Cost		
Federal Receipts	1002	
G. F. Match	1003	
General Fund	1004	41,900
I-A Receipts	1006	
CIP Receipts	1061	
Other		

Justification

The position will receive balance and code funds over the counter and by mail for payments received for the Division of Mining leases and claims. The position will determine the proper customer account, the Department handles approximately 40,000 mining leases belonging to 2500 to 3000 individual customers. The proper coding will be impacted by number of properties owned by payee. The position will do acct functions, plus provide customer information, auditing billing register to to insure proper billing and researching address changes.

Request For New Position

Agency NATURAL RESOURCES

BRU MANAGMENT & ADMINISTRATION

Component Administrative Services

Page of

Revised Date

FY 90

No. 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 99
PUBLISH DATE: HOUSE 1/20/89

FISCAL NOTE

REQUEST:

Revision Date: January 13, 1989
Title: Rent and Royalties for State Mining Claims
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Revenue
BRU: Income and Excise Audit Division
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
OPERATING						
PERSONAL SERVICES	-	-	-	-	-	-
TRAVEL	-	-	-	-	-	-
CONTRACTUAL	-	-	-	-	-	-
SUPPLIES	-	-	-	-	-	-
EQUIPMENT	-	-	-	-	-	-
LANDS & STRUCTURES	-	-	-	-	-	-
GRANTS, CLAIMS	-	-	-	-	-	-
MISCELLANEOUS	-	-	-	-	-	-
TOTAL OPERATING	-	-	-	-	-	-
CAPITAL	-	-	-	-	-	-
REVENUE	-	-	-	-	-	-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-	-	-	-	-	-
FEDERAL FUNDS	-	-	-	-	-	-
OTHER	-	-	-	-	-	-
TOTAL	-	-	-	-	-	-

POSITIONS:

FULL-TIME	-	-	-	-	-	-
PART-TIME	-	-	-	-	-	-
TEMPORARY	-	-	-	-	-	-

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steven E. Kettel
Division: Income and Excise Audit
Phone: (907) 465-2320
Date: January 13, 1989

Approved by Commissioner: Hugh Malone FOR
Agency: Revenue
Date: January 13, 1989

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

HB 99
HOUSE 1/20/89

Prepared by: Steven E. Kettel
Income and Excise Audit Division
Department of Revenue
January 13, 1989

Fiscal Note Analysis

Legislative action is necessary to cure a defect in the state's mining laws which do not comply with Section 6(i) of the Statehood Act. The central problem - - Alaska's mining leasing system does not require the payment of cash rent or royalties.

This legislation introduces a system of rental and royalty charges against those miners with claims on state land. There will be no fiscal impact upon the Department of Revenue. DNR has prepared a fiscal note showing the anticipated revenues this proposal will generate.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

April 22, 1988

MEMORANDUM

TO:

FROM: Gretchen Keiser
Legislative Analyst

RE: **Taxation of Hardrock Mining Operations**
Research Request 88.230

You requested information about local government taxation of hardrock mining operations nationwide. Specifically, you asked us to address the following issues:

1) Local government **severance tax** on hardrock mining operations.

- How many states allow political subdivisions to impose a severance tax (or its equivalent)? How many states give sole authority to impose a severance tax to their local governments?

- What are the basic formulas used to calculate the amount of severance tax? What are the rates imposed by counties or cities?

- Is the severance tax imposed on the value of the ore when it is severed, or on the ore concentrate? How is "value" established? Is value based on gross or net value?

- Are mining companies which are subject to severance tax exempt from other state or local taxes or fees (e.g., property taxes, impact taxes, user fees, income taxes, or sales taxes)?

2) **Local impact assistance** and hardrock mining operations.

- How many jurisdictions impose an impact tax in addition to severance taxes?

In jurisdictions imposing an impact tax prior to production, can the impact tax be deducted from future severance tax payments?

3) What mechanisms, if any, do local governments use to accommodate fluctuations in the profitability of mining from year to year?

4) What taxes other than severance taxes are levied to assess the economic rent implicit in hardrock mining?

5) What is the total, cumulative tax burden imposed on hardrock mining operations in specific jurisdictions in the country?

6) Are there provisions which allow the mining industry to deduct state and local taxes from federal income taxes?

7) What is the Canadian taxation on hardrock mining operations? Does it differ greatly from taxation in the United States?

In order to address many of your questions, this memorandum first presents a general overview of taxes typically imposed on hardrock mining operations in the United States. Much of this information summarizes a 1986 American Bar Association publication, State and Local Taxation of Natural Resources in the Federal System, by Walter Hellerstein. The next section briefly discusses Alaska's current taxation of mineral operations. We contacted several national organizations and obtained general information regarding local taxation of mining operations but were unable to locate a detailed compilation of local government taxation nationwide.[1] We subsequently contacted state associations of counties in several western states in order to obtain more information about local taxation of mines and assistance to communities affected by mining operations. This information is summarized in the third section of this memorandum. The final section briefly discusses Canadian taxation of hardrock mining operations.

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[1]Organizations contacted include: National Conference of State Legislatures, Council of State Governments, American Mining Congress, U.S. Bureau of Mines, National Association of Tax Administrators, Rocky Mountain Mineral Law Foundation, U.S. Bureau of the Census, U.S. Advisory Commission on Intergovernmental Relations, National Municipal League, and the National Association of Counties.

TAXATION OF HARDROCK MINING IN THE U.S.: AN OVERVIEW

Generally, taxes levied on hardrock mining companies engaged in the extraction of metal minerals fall into one of three categories: property taxes, production (severance) taxes, and other nonspecific taxes (e.g., corporate income or sales taxes).[2] Most states take a broad approach to the taxation of metal mining and currently impose a combination of the various taxes.

Property Tax. The oldest form of (mineral) taxation in the U.S. is the property tax. The tax was the basic source of revenue for both state and local governments until the late 1800s when states gradually developed other sources of revenue, leaving the taxation of mineral property largely to local governments. There are two notable exceptions to this generalization--California and Pennsylvania--which continue to collect the bulk of their mineral tax revenues under a state property tax system.

In most states, a producing mining property is assessed at its fair market value which is commonly determined on the basis of the income produced by the mine (although additional "comparable sales" and "cost to reproduce the property" methods are also employed).[3] In contrast, some western states base their property tax on a gross or net proceeds valuation of mining operations.[4] The valuation of nonproducing mineral property, if it is assessed and taxed at all, is often based on the comparable sales method since undeveloped mineral properties change hands relatively frequently. State agencies in some states provide valuation guidelines for local assessors to use on a informal or mandatory basis. However, in several western mining states, the value of mining properties is determined by a centralized state agency and then reported to county assessors for application of local millage rates.[5]

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[2]"Metals" or metalliferous minerals generally refer to the class of minerals which includes gold, silver, zinc, lead, etc. Taxation of metalliferous minerals is commonly treated separate from taxation of energy resources such as oil, natural gas, oil shale, and coal.

[3]You requested information regarding the formulas employed in various tax systems. Attachment A provides pertinent sections of the American Bar Association's State and Local Taxation of Natural Resources which specify in considerable detail the different methodologies employed for valuation of resource properties.

[4]Colorado, for example, values producing mines at 25 percent of their gross proceeds.

[5]Typically, a state department of revenue or taxation annually assesses the value of mining operations in Utah, Wyoming, New Mexico, Nevada, Montana, Idaho, and Arizona.

The determination of property value generally makes property taxes difficult and costly to administer. Furthermore, property taxation may cause a mine operator to accelerate the resource recovery in order to reduce the aggregate property tax bill over the life of the mine. A property tax based on the value of remaining reserves generally creates an incentive for rapid exploitation of the resource. The major advantage property taxes provide is the generation of revenues as the mine is developed and costs of public services are incurred. A property tax is also a more stable source of revenue than production or income taxes because it is less sensitive to fluctuations in mineral prices and business cycles.

Production Taxes. States began to impose special taxes on the production of mineral (and other nonrenewable) resources in the late 1800s. Such levies are frequently called production or severance taxes, but are also labeled as privilege, license, occupation, excise and conservation taxes. These taxes have been commonly justified on the basis of 1) the exhaustibility of the mineral resources, 2) the natural heritage these resources represent, and 3) the extraordinary costs imposed on state and local governments. To many, special mining taxes represent compensation for the one time extraction which irretrievably deprives the state of its wealth. A second argument maintains that the mineral resources constitute the natural heritage of the people and, consequently, the state is justified in imposing a (higher) tax than on other forms of property. Special mineral taxes have also been justified on the basis of the costs imposed on governments by the resource extraction activity. The costs identified include out-of-pocket expenditures for economic and social infrastructure as well as the intangible costs of environmental degradation and boom town social problems. In most states that impose production taxes, these are levied in addition to property taxes and do not exempt mining companies from other taxes by virtue of their payment of severance taxes.

The production, or severance, tax is imposed upon the activity of severing the mineral resources, regardless of land or subsurface mineral ownership.[6] Thus, severance taxes can be levied on all mineral extraction occurring within a state's borders. In 1985, state severance

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[6]In contrast, states also obtain a share of the wealth embodied in subsurface minerals they own and lease to mining companies through the imposition of royalties.

tax revenues nationwide totalled $7.5 billion from the following resources: oil and gas (89 percent), coal (8 percent) and other nonfuel minerals (3 percent).[7]

In 1987, 25 states imposed severance taxes on "hard ore" minerals (excluding oil, gas and coal).[8] The taxes are levied on the mine output, commonly as a percentage of either the gross or net value. In some cases--particularly with the extraction of minerals of relatively low value--taxes are levied as a flat rate per unit of production. Depending upon a particular state's production tax, the levy may occur at the mine mouth or following initial ore processing. Nevertheless, disputes have arisen over the proper measure of value or volume if the tax liability is attached at the time of severance when the ore might not be weighed or valued until after initial processing.

We did not identify any states which allow local governments to impose a severance tax on the extraction of metal minerals. However, pursuant to state statute, some counties in Tennessee levy severance taxes on minerals such as limestone, sand, gravel and phosphate. The two principal coal-producing counties in Maryland (i.e., Allegany and Garrett) are required to levy a severance tax on surface-mined coal in lieu of any personal property taxes on these mining operations. Similarly, these two counties impose a natural gas severance tax. In Virginia, counties and cities are authorized to levy severance taxes on coal and natural gas extraction activities, not to exceed one percent of the gross receipts from the sale of coal or natural gas severed. Most coal-producing counties in Virginia levy severance taxes under this provision.

Advantages of production taxes include the simplicity of the tax and the ease of administration by a state, particularly in comparison with other forms of taxation. Another advantage is the equitable treatment of mines producing different qualities of minerals in the case of a tax based on a percentage of the value of the mine product. From an industry perspective, the disadvantages of a severance tax are that: 1) it is often based on the quantity or value of mine production without regard to operating costs or profitability; and 2) it can lead to "high grading" or the selective

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[7]Advisory Commission on Intergovernmental Relations, Measuring State Fiscal Capacity, 1987 Edition, December 1987 pp. 99 - 101.

[8]Martha Fabricius, National Conference of State Legislatures, Fiscal Affairs Division, personal communication, April 14, 1988.

"creaming" of high quality deposits. Flat rate severance taxes are cited for their tendency to discourage development of higher cost mines and lower grade ores. Another deficiency of severance taxes is their failure to generate revenues (needed for additional public services) until the mine comes into production.

Other Nonspecific Taxes. State and local governments also impose other general taxes, such as income and sales taxes, which affect any company--including mine operators--conducting business within the state or local jurisdiction. All states except South Dakota, Texas, Washington, and Wyoming impose a **corporate income tax**, with rates ranging from 1 to 12 percent of net income in 1987.[9] Most states tend to follow the rules applicable to mineral resource industries under the federal income tax. With the possible exception of some coal-producing counties in Pennsylvania, local government income taxes--in the ten states where they occur--are unlikely to generate significant revenues from mining operations.

Forty-five states (excluding New Hampshire, Delaware, Montana, Oregon and Alaska) impose a **general sales tax**, with a national median rate of five percent in 1987.[10] Some states, such as Texas and Washington, have relatively high rates of 6 and 6.5 percent, respectively, and rely quite heavily on general sales tax revenues because they do not have corporate income taxes. Counties and municipalities in 31 states also imposed general sales taxes in 1987--typically in the one to three percent range. Cumulative state-local sales tax rates generally range from four to eight percent. The western mining states (Arizona, New Mexico, Colorado, Idaho, Montana, Utah, Wyoming and Nevada) have cumulative state-local sales tax rates generally in the five to seven percent range, with the exception of Montana which has no state or local general sales taxes. In most states, corporate activities related to mineral resources are generally not singled out for special treatment under state sales taxes.

In addition, mining companies pay federal income taxes. In general, payments for state and local taxes are considered costs of doing business and are deductible expenditures. Several changes in the tax code under the Tax Reform Act of 1986 have affected most industries, including

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[9]Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 1988 Edition, December 1987, pp. 48 - 53.

[10]Op. cit., pp. 54 - 61.

mining.[11] The repeal of capital gains treatment of income generally raises the tax rate on capital, while the repeal of the investment tax credit increases the cost of acquiring capital. These changes which tend to increase the tax burden of business are somewhat offset by a reduction in the corporate tax rates (i.e., the maximum rate declined from 46 to 34 percent). The new tax law retained an industry-favored provision which allows expensing of mining exploration and development costs which allows deduction of the cost in the year incurred.

General Comments. Given the diversity of taxes imposed--by type and rate--it is difficult to generalize about mineral taxation nationwide. The particular set of mineral taxes in each state was developed under unique historical, economic and political circumstances. The diversity of taxes also prevents an easy state-by-state comparison of the cumulative tax burden imposed on mining operations.[12] Taxation patterns, to the extent they exist, tend to be regional since states often look to their neighbors for guidance in establishing taxes. For example, several Rocky Mountain states employ a proceeds-based method for valuation under their property tax statutes. These states also have the tendency to impose mineral-specific production taxes.

Taxes which allow for the deduction of the various costs of operating a mine generally accommodate, to some extent, the fluctuations in the profitability of the mining operation. To our knowledge, only four states (Nevada, Idaho, New Mexico and Utah) employ a net proceeds or net profits method in the valuation of taxable mine property. Similarly, only a handful of states (Arizona, Idaho, Alaska, Wisconsin and Minnesota) base their production taxes on a percentage of net value or net income from mineral extraction. In these cases, a higher cost mining operation may pay lower taxes than a lower cost operation. Other states which base their severance tax on the basis of gross value also accommodate varying profits to the extent that the value (or price) of the mineral dictates a mining operation's profitability. State corporate income taxes are based on net income and therefore generally address the profitability of a mining operation.

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[11]U.S. General Accounting Office, Selected Tax Provisions Affecting the Hard Minerals and Timber Industries, June 1987, p. 1.

[12]We were unable to locate a national or regional study comparing the cumulative tax burden on mining operations.

Economists refer to the excess of revenues over the costs of mining and processing, where costs include a profit sufficient to attract capital to a project, as the economic rent. The U.S. Supreme Court decision upholding Montana's 30 percent severance tax on coal defined economic rent as the difference between the cost of production (including a reasonable profit) and the market price of the coal. The federal Windfall Profit Tax was enacted by Congress as a means to tax the economic rents accruing to oil companies when federal deregulation of oil prices resulted in significant price increases. The goal of taxing economic rent without unduly discouraging mining activity may be desirable, but considerable debate exists as how to identify such rent. Generally, states employ a production tax as the vehicle for taxing economic rent. In cases where mineral activity occurs on state lands, a higher royalty can be imposed on higher quality mineral deposits and provides another mechanism for capturing economic rent. On the other hand, local government property and sales taxes in general do not lend themselves to the capture of "excess profits" embodied in the theoretical concept of economic rent. With this overview of mineral taxation in the U.S., we now turn to a brief discussion of Alaska's taxation of mining operations.

MINERAL TAXATION IN ALASKA

Alaska currently imposes income taxes on mining corporations operating in the state via the Net Income Tax and the Mining License Tax. The (Corporate) Net Income Tax is derived from a corporation's federal taxable income. Income of less than $90,000 is subject to the state's graduated tax rate to a maximum tax liability of $4,500. If taxable income exceeds $90,000, the tax is $4,500 plus 9.4 percent of the taxable income over $90,000. The resultant Alaska gross corporate tax is adjusted for education and targeted job credits as well as investment tax credit carryovers to yield the net income tax payable to the state.[13]

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[13]Alaska's special industrial incentive tax credit, enacted in 1984 and applicable to the first $250 million in qualified investment for the mining of minerals, is no longer available. State corporate income tax generally follows the federal tax code, and investment tax credits were repealed under the Tax Reform Act of 1986.

In 1982, 54 tax returns from mining operations (with 19 reporting taxable income) generated about $21,000 in state income tax revenues.[14] This represented one-tenth of one percent of the nonpetroleum corporate income tax revenues collected in 1982 ($21.1 million). In FY 87, total nonpetroleum corporate income tax revenues were $20.5 million.

The **Mining License Tax** is a net income tax which incorporates a graduated tax rate schedule up to a maximum liability of $4,000 plus seven percent of the taxable income over $100,000. Mining operations are exempt from this tax for the first three and one-half years after production commences. State revenues from the Mining License Tax totalled $259,300 in FY 87 and is estimated at $350,000 in FY 88--up due to increased shipments of Usibelli coal and use of sand and gravel in North Slope oil fields The tax revenues have fluctuated around $300,000 during the last few years, reflecting varying activity levels in the three major mineral categories: sand and gravel, gold and coal.

In 1982, the state considered the redesign of the tax structure for depletable resources. A Council on Economic Policy--composed of business, university and government leaders appointed by former Governor Hammond--suggested that reasonable rationales for nonrenewable resource taxation in Alaska were 1) compensation for the special costs of public services incurred by the state and 2) a sharing by the state of the surplus income (economic rent) derived from development of Alaska's mineral resources.[15] The Council concluded that the Mining License Tax appeared to be the appropriate form of mineral taxation in Alaska. The conclusion was based on findings that an income tax is more reasonable to administer than a property tax and does not impose an unreasonable burden on Alaska's nascent mineral industry such as a severance tax might. However, the Council questioned whether 1) the current level of taxation would generate sufficient revenues to cover the special costs incurred in the course of mineral resource development and 2) the current rate structure (with a maximum of seven percent for net income over $100,000) allows the state to capture an appropriate share of the excess profits which would occur if unforeseen bonanzas were discovered.

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[14]1982 is the most recent year for which detailed nonpetroleum corporate tax revenue data are available from the Alaska Department of Revenue.

[15]State of Alaska Council on Economic Policy, Depletable Resource Taxation, December 1982, 28 pp.

A 1986 Alaska Attorney General opinion concludes that under current statutes, a borough may exercise the power to levy a severance tax on minerals (Attachment B). Under Alaska Statutes, home rule municipalities (i.e., Municipality of Anchorage, City and Borough of Juneau, North Slope Borough and City and Borough of Sitka) have all legislative powers not prohibited by law or charter, while general law municipalities (i.e., Bristol Bay Borough, Fairbanks North Star Borough, Haines Borough, Kenai Peninsula Borough, Ketchikan Gateway Borough, Kodiak Island Borough, Matanuska-Susitna Borough and Northwest Arctic Borough) have legislative powers conferred by law. Alaska Statute 29.35 grants general powers to all municipalities, including the power to levy taxes. Under AS 29.45, specific provisions allow for municipal property taxes and sales taxes (with certain limitations), but the statute is silent with regard to severance taxes. According to the Attorney General opinion, there is no other statute, including the Mining License Tax, which prohibits a municipality from levying a severance tax on minerals. In contrast, AS 43.55 levies the state severance tax on oil and gas production and prohibits municipalities from imposing a production tax on such activities.

LOCAL MINERAL TAXATION AND IMPACT ASSISTANCE IN SELECTED STATES

We contacted the state associations of counties in four western mining states (Colorado, Montana, Nevada and Utah) in order to obtain more detailed information regarding local taxation of and impact assistance from mining operations. The information is summarized below.

Local Mineral Taxation

Colorado. Producing metal mines are assessed at 25 percent of their gross proceeds for the preceding year. Nonproducing mineral property is valued the same way as nonmining property, but in practice, many local assessors follow the Colorado Department of Local Affairs' guidelines that recommend a minimum assessment of $100/acre when usable market or income data are unavailable. Mining companies often appeal property assessments to the State Board of Appeals. State statute requires that counties impose a uniform millage rate on all taxable properties, and the millage rates imposed vary considerably across the state. Finally, Colorado allows mining companies a credit against their mineral severance tax (up to 50 percent of their liability) for all property taxes paid on producing mines.

According to Bill Grannell of Colorado Counties, Inc., most local revenues from mining operations comes from a sharing of the State Metallic Mineral Severance Tax. A tax rate of 2.25 percent is imposed on the gross income from mining, with an exemption for the first $1 million of gross income. In 1987, counties received about $20 million in shared state severance tax revenues (out of a total of about $60 million) under a three-tiered allocation system which also disburses revenues to public schools and to a statewide trust fund.

Montana. The Department of Revenue, acting under statutory guidelines, assesses producing mines at three percent of their gross proceeds and then certifies these values to county assessors for inclusion in their tax rolls. The mineral content of nonproducing mines is excluded from the property tax base. State statute requires uniform mill levies on all taxable property. According to Gordon Morris of the Montana Association of Counties, there is no sharing of state severance of mineral severance tax revenues with local governments. On average, Montana counties are reliant on property taxes for roughly 95 percent of their revenues.

Nevada. Producing mines are taxed on the basis of their net proceeds, as determined by the Department of Taxation under detailed statutory guidelines. In addition, all patented mines and mining claims are subject to a minimum tax of $500 (which is usually the actual assessment), unless $100 in development work has been recently performed. After certifying the valuation, the state sends notices to the mining companies, which then have 30 days to make payments to the counties.

Nevada statutes impose a limitation of $3.64 per $1000 value on county property tax rates; currently no county is at that level of taxation. The state also places property and sales tax revenue base caps on local government and allows for annual adjustments for increases in the Consumer Price Index and new construction. As of July 1, 1987, the state removed mining tax revenues from under the caps which, in effect, allow counties to increase other property and sales taxes and collect significantly more revenue. According to Laurie Schlecker of the Nevada Association of Counties, mining operations have carried a large share of the local tax burden in the past and this change could shift more of the burden to others in the counties. Nevada does not impose a severance tax on mineral extraction.

Utah. The State Tax Commission assesses metal mines and mining at $10/acre plus an amount equal to twice the average net annual proceeds for the preceding three years (or since the mine opened if less than three years). The state not only assesses mineral properties, but also limits millage rates at the local level. According to Mark Walsh, legislation for more localized control of the taxing of mineral properties is proposed almost every year and defeated under strong industry opposition.

Utah imposes a mining occupation tax on those engaged in the business of mining metal minerals in the state. A one percent tax is imposed on the gross value of the metals mined. The Utah Constitution disallow state imposition of a tax which is then shared with local governments. Thus, Utah counties do not receive a share of the mining occupation tax revenues.

Local Impact Assistance

In the four states contacted, local governments have various avenues for assistance in meeting the initial public service and infrastructure needs which may arise from the development of a new mine within their boundary. With respect to one of your questions, we did not identify any county that imposed an impact fee or tax, per se. Colorado statutes allow for 1) prepayment of local property taxes for use in capital improvements (e.g., roads, water, sewer, and schools), 2) a credit on corporate income tax equal to the value of local impact assistance contributions (of property or payments for public facilities) made prior to commencement of new or expanded mining operations, and 3) a sharing of state severance tax revenues with impacted counties.

Montana established a Hard-Rock Mining Impact program in 1981 to..."provide a system to assist local government units in meeting the initial financial impact of large-scale mineral development." Under the system, a mineral developer must submit to affected counties and a state Hard-Rock Mining Impact Board a plan which describes the economic impact their development will have on local government units. The mineral developer and the affected local governments shall assure that the plan specifies 1) the development timetable and population impacts, 2) the increased local government capital and operating costs as a result of the development, and 3) the financial and other assistance provided by the developer to meet the increased need for local services. Furthermore, the developer shall commit to pay all of the increased local capital and operating cost attributable to the mineral development through property tax prepayments, special educational impact bonds, or other funds.

The state Hard-Rock Mining Impact Board generally acts as the referee if objections or disputes arise between local governments and mineral developers. In addition, the board may award grants and loans from the hard-rock mining impact trust account to local governments affected by the permanent cessation of a mining operation or at least a 50 percent reduction in the full-time equivalent workforce. The funds are designed to pay for outstanding capital bonds, decrease unusually high property tax mill levies cause by the cessation or reduction, promote diversification of the economic base, or attract new industry to the affected area.

Two counties in Nevada require mineral developers to obtain a special use permit through their normal planning process. The developer can be required to build roads, water or sewer systems, schools, etc. According to Laurie Schlecker of the Nevada Association of Counties, impact assistance is not a major issue in Nevada because mining companies are generally cognizant of the impacts their operations may cause. Nevertheless, the Association is encouraging other Nevada counties to institute a special use permit process.

In Utah, impact assistance is generally negotiated between local governments and developers. According to Mark Walsh of the Utah Association of Counties, the usual avenue for assistance is through prepayment of property taxes by the developer.

MINERAL TAXATION IN CANADA

We contacted the British Columbia Ministry of Energy, Mines and Petroleum in order to address your question regarding the general nature of mineral taxation in Canada.[16] Canadian mining companies are subject to the federal Corporate Income Tax, which is a net income based tax with an effective rate of 27 percent. Mining companies are also subject to provincial corporate income taxes which are structured similarly to the federal income tax. The British Columbia corporate tax rate currently stands at 14 percent--reduced from 16 percent two years ago--and tends to be at the higher end of a fairly narrow range of corporate tax rates imposed by the various Canadian provinces.

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[16]Douglas Wren and Dwayne Anderson, Minerals Policy and Evaluation Division, B.C. Ministry of Energy, Mines and Petroleum, personal communications, April 19, 1988.

The provinces also impose a Mineral Resource Tax, which is a profits-based tax calculated on a mine-by-mine basis (i.e., generally similar to some states' net proceeds taxes which are based on individual mining operations). The rates imposed under mineral resource taxes vary from about 5 percent (Quebec) to about 20 percent (Ontario), with B.C. currently at 15 percent (recently reduced from 17 percent).

Local governments in Canada impose property taxes on mining operations occurring within their jurisdiction. The provinces generally place limitations on local property taxation powers and require uniform levies--as is common in the U.S., British Columbia has instituted a new mining property tax assessment system effective in the next tax year. In response to difficulties with, and repeated court challenges to, market-based local assessments, the province is developing mandatory standards of valuation based on the cost of mines less depreciation. Provincial assessors will value mining properties and the assessment will be reported to the local governments for application of their millage rates. Cities in British Columbia also impose business license taxes, but the province levies the sole sales tax of six percent.

Provincial statutes in B.C. do not provide for any impact assistance for municipalities affected by mining operations. Canadian communities can extend boundaries to include nearby mines in order to generate additional property tax revenues for needed services, provided they meet certain criteria and follow provincial procedures--not unlike the boundary extension provisions in Alaska statutes. Generally, however, cities and mining companies negotiate arrangements to meet the need for public services caused by a particular mine. Impact assistance offered by mining companies are apparently not deductible or credited against provincial taxes impose on mining operations.

* * *

Please contact me if I can answer any questions or be of further assistance.

Attachments

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ATTACHMENT A

Excerpt from State and Local Taxation of Natural Resources in the Federal System, American Bar Association, 1986

ticular jurisdictions or resources in this chapter will be illustrative rather than systematic.* The slighting of these potentially intrusive details at this juncture, however, is not a device for ignoring them altogether. How particular states and localities tax particular natural resources is an integral part of what this book is about. To deal with this mass of detail, this book includes an Appendix, as described in the Introduction, that summarizes current law and practice on a state-by-state basis.

I. The Ad Valorem Property Tax

Inasmuch as the existing framework of state and local taxation of natural resources was shaped in important respects by the difficulties of taxing them under the traditional ad valorem property tax, our discussion will begin with that levy. First, however, it is essential to have some familiarity with the nature and operation of the ad valorem property tax.

A. *The General Nature and Operation of the Ad Valorem Property Tax*

As observed in the preceding chapter, the ad valorem property tax – the tax on property according to its value – was for many years the primary source of revenue for state and local governments. As the movement toward separation of state and local sources of revenue took hold, the states gradually reduced their fiscal dependence on the property tax leaving it largely, and, in some cases, entirely to local governments. The property tax today is the cornerstone of local finance and ranks second only to the federal personal income tax as a producer of revenues in the United States.[1]

In rudimentary outline, the American ad valorem property tax system operates in the following manner. The taxing unit (the county, the school district, the municipality, etc.) establishes its budgetary requirements. The amount so established (less any revenues from sources other than the property tax) determines the revenues that must be raised by the property tax. The revenues are raised by levying a tax at the appropriate tax rate or percentage of the assessed value of taxable property in the taxing unit. The assessed value may be the fair market value of the property or it may be a statutory or customary percentage of the fair market value at which property is valued for tax purposes. The percentage of tax rate applied to this value is generally expressed in terms of dollars and cents per thousand dollars of assessed value and is commonly called a "millage rate." The millage rate is determined by dividing the budget needs to be satisfied through ad valorem taxation by the total assessed value in the taxing unit. Thus to fund a one million dollar budget in a jurisdiction with $100 million of assessed value the tax rate would be one percent or ten mills.

The starting point for determining the assessed value of most property is the fair market value of the property, which is typically defined as "the value at

* With the exception of forest resources, which are treated separately in the text in Chapter 2.

which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[1] There are three accepted methods for ascertaining fair market value. The "comparable sales" or "market data" method determines fair market value by reference to recent sales of the property itself and/or to recent sales of comparable properties. The "cost" method determines fair market value by reference to the current cost of reproducing the property less depreciation from physical deterioration and functional and economic obsolescence, although factored historical cost and replacement cost are sometimes employed.[2] The "income" method determines fair market value by capitalizing the income produced by the property, i.e., by translating the income produced by the property into a corresponding value for the underlying property producing the income.

The assessment function is generally assigned to the county assessing officer. After determining the assessed values of properties within the county, the county assessor certifies these values to other taxing units in which the properties are located. Not all property is locally assessed, however. In most states, a statewide body has assumed the function of assessing certain specialized property. Utility property – e.g., railroad, telephone, and power company property – is usually assessed on a centralized basis. Natural resource property is sometimes centrally assessed, and, where this occurs, a distinction must be drawn between the underlying resource (which may be assessed by the state) and the property employed to produce the resource (which is likely to be assessed locally). The state assessor will certify the assessed value of centrally assessed property to the local taxing unit, much as the county assessor certifies the locally assessed property to taxing units lying within the county.

B. *Treating Natural Resources Like Other Property for Ad Valorem Tax Purposes: The Search for Value*

As explained in Chapter 2, the methodological controversy over the question whether natural resources should be treated like other property for ad valorem tax purposes was a critical factor in the development in some states of a separate regime for taxing such resources. In other states, however, opponents of special taxing measures for natural resources prevailed. In these states, the ad valorem tax in its traditional form continued to apply to natural resource property as it did in states whose special provisions for taxing such property were selective in their impact. For these reasons, the traditional ad valorem property tax plays a significant role in the existing framework of state and local taxation of natural resources.

The central problem in the ad valorem taxation of natural resources in jurisdictions that treat such resources like other property is the determination of fair market value. Of the three established methods for determining fair market value for property tax purposes, the income method is generally recognized as the most appropriate for "producing" natural resource property – a term used broadly in this discussion to describe property from which commercially sig-

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nificant quantities of a resource are being produced.* Sales of producing natural resource property do not ordinarily occur with sufficient frequency to support a market data approach to valuation. And when they do, the differences between individual properties are so marked that the sale of one would rarely qualify as a reliable indicator of the value of another — i.e., it would not be a "comparable sale." As a practical matter, then, the unusual producing natural resource property that changed hands in an arm's-length transaction would be the sole candidate for application of the market data approach. In fact, the market data approach is seldom employed to value producing natural resource property.

The cost approach has even less relevance to the valuation of producing natural resource property. For the most part, such property is not reproducible, thus eliminating the possibility of a reproduction-cost based valuation. With respect to timber, the principal renewable natural resource of interest here, a cost-based approach could in principle be utilized by reference to the cost of seedlings, fertilizer, forest management, etc., adjusted for the timing of the expenditure. The cost method has not, however, enjoyed any currency in the valuation of timber resources, perhaps because such resources usually have no original cost, perhaps because the gestation period for growing merchantable timber introduces overwhelming uncertainty into the determination of cost, perhaps because we are simply unaccustomed to thinking about the cost of producing a natural resource.**

The income method thus remains the only practicable approach in most cases for determining the fair market value of producing natural resource property. The income method attempts to determine the fair market value of property by reference to the income produced by that property. The relationship between income and value may be expressed in terms of a rate, called the capitalization rate, that represents the percentage of the property's value that one would expect to receive as annual income from the property. The relationship between income, capitalization rate, and value in its simplest form may be expressed algebraically as

$$\frac{I}{r} = V$$

where I is the income produced by the property, r is the capitalization rate, and V is the value of the property. Thus if a property generates $10,000 in annual income, and if one would expect to receive ten percent of the value of this type of property in annual income, the value of the property determined by the income method would be $100,000.

$$\frac{I\ (\$10{,}000)}{r\ (0.10)} = \$100{,}000$$

In establishing the capitalization rate, one must consider among other things the character of the income and property in question. For example, if the property is a wasting asset (like a building or a mine) and if the income stream to be capitalized has not already been reduced to provide for recapture of the owner's original investment in the asset, the capitalization rate must take account of this fact. In such a case, the capitalization rate would reflect not only the percentage return that one would expect to earn on an investment of that nature but, in addition, a percentage return which, when multiplied by the expected life of the asset, would restore to the owner his original investment in the asset.

The valuation of a nonrenewable natural resource property is a special case of the generic problem of valuing a wasting asset. In 1877, Henry Davis Hoskold, a British mining engineer, addressed that special problem in his pioneering volume, *The Engineer's Valuing Assistant*.† Employing an income based approach, Hoskold developed a classic and enduring formula for the determination of the fair market value of mineral property. The method embodied in the formula involves the estimation of the future income from the mine, the probable life of the mine, the rate at which the mine's future income should be reduced to present value (the "discount" or "risk" rate), and the rate of interest at which a portion of the mine's income is accumulating in a fund earmarked for restoration of the owner's original investment (the "sinking fund" or "safe" rate). The Hoskold formula may be expressed algebraically as

$$V_p = \frac{A}{\frac{s}{R^n - 1 + r}}$$

where V_p is the present value of the mine, A is the average annual net income from the mine, s is the "safe" rate earned by capital accumulating in the sinking fund, r is the "risk" rate reflecting the yield that the mine owner expects on his investment, n is the number of years the mine will be productive, and R is $(r + 1)$.‡ In 1982, more than a century after the initial publication of Hoskold's *Engineer's Valuing Assistant*, the Minnesota Supreme Court declared that "in the absence of comparable sales, the so-called Hoskold formula for many years has been utilized to arrive at market value in assessing property which is being mined."§ That statement, if read to embrace the variations on and modifications of the Hoskold formula that have been developed over the past 100 years,* would accurately describe the approach to valuation of producing natural re

* The problem of valuing nonproducing natural resource property will be considered below.

** In any event, as already noted, the peculiar problems associated with state and local taxation of timber resources will be addressed separately below, see pp. 86–91, with the comments downstream directed largely at nonrenewable natural resources.

† Including discounted cash flow analysis.

source property in many of the jurisdictions that attempt to determine its fair market value for property tax purposes.

The Hoskold formula and its progeny[6] have created an aura of objectivity around the determination of the fair market value of natural resource property. Indeed, the Hoskold and other formula-based approaches to the valuation of mineral property that rely on some form of income capitalization to determine its fair market value are often denominated the "scientific," "engineering," or "analytic" approach to valuation,[7] adjectives we tend to associate with rigor and precision. The widespread use of such formulas, sanctioned by judicial decisions,[8] may also have contributed to this impression. A closer examination of the underlying components and practical application of the Hoskold and kindred formulas, however, reveals that this impression is false.

There are four essential components of the Hoskold formula: the mine's economically productive life, its average annual net income, the "risk" rate for discounting the mine's future income to present value, and the "safe" rate for determining the interest earned by the sinking fund.* The mine's productive life is determined by dividing its total estimated reserves by its anticipated annual rate of production. Because neither the reserves nor the production rate can be ascertained with mathematical certainty, the quotient of the two—productive life—may be vulnerable to error on two counts. The possibility of error increases further when one attempts to determine a mine's future annual net income, which represents the difference between the gross income from the mine's output and the cost of producing that output. Future gross income will depend on the price that the resource will generally command in the market as well as the quantity and quality of the particular output produced by the mine. Estimates of each of these elements is likely to vary considerably among commodity analysts and mining engineers. Moreover, estimates of the future costs of producing the output depend on a prediction of the future costs of labor and equipment in the extraction and processing of mineral reserves under economic and geological conditions that may be only dimly perceived. The "risk" and "safe" rates are no less affected by judgmental considerations than are the estimates of a mining property's future life and income. They depend, after all, on a forecast of future inflation, interest rates, and the risk of particular mining ventures, the accurate prognosis of which consistently eludes even the most knowledgeable observers.

It is not just the intrinsically speculative character of the mining income capitalization formulas that raises questions about the reliability of the valuations they produce. It is also that minor differences in the estimates of any one of the components (or subcomponents) of the formula can create dramatic variations in the determination of the fair market value of the property. For example, suppose a mine produces 100 million pounds of ore per year, at a cost of $0.36 per pound and a price of $0.40 per pound, thereby generating annual gross income of $40 million and annual net income of $4 million.[9] Assuming a twenty year life for the mine and a "safe" rate of six percent, increasing the "risk" rate from six to eight percent will reduce the fair market value of the property under the Hoskold formula from $45.9 million to $37.1 million, a change of more than twenty five percent. Increasing the "risk" rate just one percent from eight to nine percent will reduce the property's fair market value under the Hoskold formula from $37.1 million to $34.1 million, still a change of nearly ten percent. Increasing the "safe" rate from four to six percent under the same assumptions (and an assumed "risk" rate of ten percent) produces about a five percent change in the fair market value of the property. And varying the property's productive life from three to five years, from fifteen to twenty years, and from forty-five to fifty years under a ten percent single rate capitalization formula produces respective increases in the property's fair market value from $9.9 million to $15.1 million (thirty-four percent), from $30.4 million to $34.1 million (eleven percent), and from $39.5 million to $39.7 million (one-half percent). When these variations are considered in light not only of their cumulative impact but also the uncertainty surrounding the estimates of the underlying figures, the margin for error in the determination of the fair market value of any particular property becomes apparent.

Despite the problems inherent in the income approach to determining the fair market value of producing natural resource property, that is the prevailing method in most of the jurisdictions that seek to ascertain that value for property tax purposes. In Arizona, which has been the nation's leading producer of copper since 1910,[13] the use of Hoskold and similar formulas for determining the fair market value of the state's copper mines is a well-entrenched tradition. In the early twentieth century, the state endured a bitter and protracted struggle—typical of those experienced by other Western states—over the appropriate approach to taxing its mineral resources. Proponents of the ad valorem approach prevailed, and, as a result, the mining industry in the state has been subject to the general ad valorem property tax ever since Arizona achieved statehood in 1912.[14] By 1932, the Arizona Supreme Court had put its imprimatur upon the income method of valuing mineral interests:

> the trial court in fixing the value of the mine in question followed the usual and correct rule of estimating the probable gross revenue to be received from the ore presumably contained in the mine, deducting therefrom the probable cost of extraction, reduction, and selling the product of the ore, including therein all factors of cost, and reducing the difference, which would be the net value of the product, to its present worth, based upon such net value and the length of time it would probably take to produce it. It is conceded, as it must be, that this formula is the proper one to be used in determining the actual cash value for taxation of a producing mine at any particular time.[15]

The court's commitment to these principles has not waned in the course of the ensuing half century of litigation over them.[16]

The ease with which the basic principles of valuation may be stated must

* In practice, the use of a single rate income capitalization formula utilizing the same rate for both return on and return of investment is employed much more commonly in the mining industry today than either the Hoskold or other multiple rate formulas.[10]

obscure the difficulties that have been encountered in their implementation. The Arizona cases are illustrative. In one instance, four "experienced mining and valuation engineers"[39] testifying on behalf of the taxpayer and basing their testimony on estimates of a mine's reserves, its economically productive life, and its future net profits, reached fair market value judgments ranging from $5.2 million to $7.1 million[40]—a variation of thirty-seven percent. In another, the mining company's six expert witnesses produced valuations of a mining property ranging from $7.2 million to $8.45 million[41]—a variation of fifteen percent. And all these valuations were advanced by the taxpayers' own witnesses! The discrepancies among them pale by comparison to those produced by opposing sets of experts whose assumptions tend toward antipodal extremes, shaped as they are by the litigating posture of the party by whom they have been retained. For example, in one case decided in 1978, the taxpayers' witnesses testified to a valuation of $15.9 and $19.7 million for a mining property that was valued at $93.7 and $79 million by the state's experts.[42] One could recount similar tales in other jurisdictions that rely on an income capitalization approach to determining the fair market value of natural resources under the property tax.[43]

The familiar observation drawn from these experiences that the income approach to valuation of natural resources works imperfectly[44] does not necessarily stand as a blanket indictment of it. Indeed, it might instead elicit Dr. Johnson's reaction to the sight of a dog walking on its hind legs. "It is not done well, but you are surprised [to] find it done at all."[45] With respect to oil and gas, for example:

> the extreme difficulties attendant upon making any sort of realistic evaluation of reserves has led the states, either formally or informally, to the use of methods which, for all practical purposes, have converted the property tax into something that bears a very close resemblance to a severance tax.[46]

Yet some important oil-producing states, notably California, Texas, and Kansas, remain committed to assessing oil and gas interests on the basis of their fair market value for property tax purposes.

The California property tax regulations provide:

> The market value of an oil and gas mineral property interest is determined by estimating the value of the volumes of proved reserves. Proved reserves are those reserves which geological and engineering information indicate with reasonable certainty to be recoverable in the future, taking into account reasonably projected physical and economic operating conditions. Present and projected economic conditions shall be determined by reference to all economic factors considered by knowledgeable and informed persons engaged in the appraisal and buying or selling of such properties, e.g. capitalization rates, product prices and operation expenses.[47]

California has developed detailed guidelines to aid assessors and taxpayers to conform to these regulatory objectives,[48] and it employs a staff of specialized professionals to appraise oil and gas property.[49] In the view of Robert Paschall, a distinguished petroleum engineer and veteran of California's property tax

administration, the system functions satisfactorily, even if it may be characterized as "half science and half art."[50] Like California, Kansas provides guidance for the application of its income based approach to valuing oil and gas property under the local property tax.[51] There is some question, however, whether it has adopted an authentic income capitalization formula for determining the fair market value of such property.[52]

In Texas, the determination of the fair market value of oil and gas property for ad valorem tax purposes for many years resisted description as a "system." Although the same basic "engineering" approach to valuation was employed in Texas as in California, there was no tradition in Texas of relying on detailed administrative guidelines implemented by a staff of state-employed experts to assist local assessors in the appraisal process. Instead, as suggested in Chapter 2, the ascertainment of fair market value has depended largely on "a long and involved series of conversations culminating in a determination of just how much the producer eventually pays over to the taxing jurisdiction."[53] Local Texas taxing districts have historically relied on independent appraisers to value oil and gas property. As described by one oil company attorney:

> I doubt if there is any other field in taxation that has a phenomenon like the ad valorem tax expert in Texas. He is a self-appointed, independent contractor who makes an arrangement with a county or taxing jurisdiction to provide services in connection with oil and gas tax valuations. In return he receives either a flat fee or in many instances a percentage of the total amount of taxation which he produces. This is somewhat similar to paying a juror a certain percentage of the verdict he renders against the defendant.[54]

In practice, the fair market value determinations of oil and gas properties provided by these experts to the assessment district were the result of negotiations between the experts and the taxpayers over the quantity of remaining oil or gas reserves, the future price of oil or gas, the future costs of extraction, and the appropriate rate for discounting to present value the future income from the property.[55]

Mineral property valuation in Texas still depends on the outcome of negotiations between representatives of the mineral industry and independent appraisal firms hired by local assessing authorities. But these negotiations are now informed by an appraisal manual issued by the State Property Tax Board, which was created in 1980 when Texas' property tax procedures were revised and modernized.[56] The manual details sophisticated income capitalization techniques, relying on discounted cash flow analysis, for guidance to assessors in appraising oil and gas property. These guidelines are beginning to have a significant impact on traditional local assessment practices, even though the state does not maintain a staff to administer the guidelines. Professional appraisal firms across the state are applying premises and appraisal techniques incorporating the economic and engineering principles embodied in the guidelines.[57] Moreover, their incentives to arrive at lofty valuations have no doubt been cooled by the Texas Property Tax Code which now provides

> A contract for private appraisal services to void if the amount of compensation to be paid the private appraisal firm is contingent on the amount of or increase in appraised, assessed, or taxable value of property appraised by the appraisal firm.[38]

The income method, while predominant, is not the only mode of valuing natural resource properties in jurisdictions that seek to place it on the tax rolls on the basis of its fair market value. Pennsylvania, with its abundant deposits of coal, is typically a jurisdiction in which the income approach to valuation is held in disfavor.[39] Instead, a variety of factors—comparable sales, the location, quality and quantity of the property, demand for the product, and economic conditions, to name just a few—are all accorded weight in the ultimate value judgment. Pennsylvania's animosity toward the income approach is usually traced to these remarks of the state supreme court:

> It is unnecessary for the purposes of this case to review these various elements of value and the weight to be given to them in determining assessments. However, there is no doubt that it would contravene well established principles to reduce the assessments of the company's properties in exact proportion to the number of tons of coal removed from each tract. . . . We have repeatedly condemned the use of such mathematical shortcuts in the making of assessments. As we said [in an earlier case] "... Scientific formulas, arithmetical deductions, and mental contemplations have small value in making assessments under our practical system of taxation."[40]

In fact, the ad valorem taxation of mineral resources in Pennsylvania has defied generalization. Administered on a county by county basis with no guidance from the State further than the general injunction to assess property at its "actual value"[41], the "system" has been rooted in customary local practice.[42] Methods for valuing coal and other natural resources have run the gamut from comparable sales to a multiple of the preceding year's production to a fixed amount per acre to a "band of value" approach (whereby the value of the resource varies with its geological characteristics and proximity to the mine shaft).[43]

Yet even Pennsylvania, with its historical antipathy for the "scientific" approach to property tax valuation of mineral resources, may be changing its ways. Beginning in the mid-1970's, some of the coal-rich counties, aided by an expert appraisal firm, undertook to value their coal bearing property on a more systematic basis. Producing properties were appraised by discounting to present value the future expected income from the properties. Nonproducing properties, i.e., properties in which mineral rights had been purchased but for which no mining permits had been issued, were valued on the basis of comparable sales. Despite vigorous opposition from the coal companies in the initial phases of the assessment process,[44] the revised appraisals have provided the basis for increased assessments. Here, as elsewhere, however, the ultimate value determinations were the outcome of extended negotiations between representatives of the taxpayer and the taxing authority.[45]

For many years, Pennsylvania's neighboring state of West Virginia had taken a similar approach to the ad valorem taxation of its mineral property, and its practices spawned critical comment.

> The methods for valuing coal property for ad valorem taxation in West Virginia have been as many and as varied as the number of county assessors who have held office in the coal bearing counties of the State. The lack of any semblance of standardized methods of evaluation by assessors has resulted in inequities among assessed coal property values.[46]

Dissatisfaction with this state of affairs led the West Virginia State Tax Department in 1971 to undertake a mass appraisal of the state's coal properties. It rejected the cost approach as "obviously not conducive to mineral valuation"[47] and the income approach as unsuitable for the "vast area of nonproducing, reserve coal."[48] The Department settled instead on a market data methodology for valuing the coal in the state's forty coal bearing counties. Relying on maps of the state's coal seams and records of transactions in coal property, the Department arrived at an average county-wide value per acre of coal, based on seam thickness, British Thermal Unit (BTU) content, royalty rates, land sales, and an average per acre tonnage estimate. In the early 1980's, the appraisal process was still in the throes of adjustment. The State Tax Department was nevertheless sufficiently happy with the results, which produced a substantial increase in the assessed value of the state's coal property, that one of its spokesmen predicted that "[oil, gas, limestone, and timber will be the center of the Department's] future attention."[49] The verdict on the results of West Virginia's reappraisal program was not unanimous, however. Characterizing the reform efforts as "unsuccessful,"[50] one observer noted that barely more than half of the state's coal producing counties have been reassessed, that the three largest coal producing counties remain untouched, and that the mapping techniques and valuation formulas are open to question.

Before we conclude this section, two additional features of ad valorem taxation of natural resource property warrant brief consideration. The first is the distinction between producing or developed property, on the one hand, and nonproducing or undeveloped property, on the other. There are conspicuous differences between the patterns of valuation and taxation of the two types of property in many states' ad valorem taxing schemes. Thus the income approach to valuation, which is susceptible to criticism even in its familiar application to producing property, has proven to be virtually worthless as applied to nonproducing property.[51] Before development has occurred or in the early stages of exploration, knowledge of geologic structures, estimates of recoverable reserves, anticipated costs of extraction, and projected income are speculative in the extreme. At the same time, the market data approach, widely regarded as unsuitable for valuing established mines that seldom are sold, has been found useful in valuing undeveloped mineral property which changes hands with relative frequency. As noted above, the market data method is now being employed to value such properties in Pennsylvania and West Virginia, and it is indicated in other jurisdictions as well.[52]

Even more important than the variations in the methods of valuing producing and nonproducing property is the fact that many states do not include the mineral content of nonproducing property within the ad valorem tax base at all. States that generally attempt to tax natural resource property on the basis of its fair market value but nevertheless fail to tax the mineral value of nonproducing property presumably do so for one or more of the reasons articulated by the Mississippi Legislature in exempting interests in nonproducing mineral property from ad valorem taxation, namely,

> [t]o encourage the purchase of leases upon and interests in oil, gas and other minerals, . . . to encourage drilling for and production of such minerals, and to relieve the taxing officials of the counties of the state of the onerous duties of assessment for, collection of and sale for ad valorem taxes for such interests (which the legislature finds are generally . . . not commensurate with the services required of such officers). [34]

Jurisdictions that rely on proceeds-based measures of natural resource property in their ad valorem tax base exclude nonproducing property by definition, and they frequently refrain as a matter of law or practice from including the mineral value of nonproducing property in the tax base by some other means. This observation applies as well to jurisdictions that impose production taxes on natural resources in lieu of the ad valorem levy. Although full consideration of such jurisdictions will be taken up below, it is worth emphasizing at this juncture the pervasive character of the distinction between producing and nonproducing natural resource property in state and local tax structures.

A second significant aspect of the ad valorem taxation of natural resource property that we have yet to consider is the treatment of separate interests in the property. As a practical matter, the treatment of these interests is intimately related to the question we have just addressed, because the mineral value of undeveloped property will normally escape the attention of the taxing authority unless a mineral lease or other interest in the property has been conveyed and publicly recorded. The two issues exist independently, however, because there are known deposits of undeveloped minerals held in undivided ownership and because the problem of taxing separate interests in mineral-bearing property extends to interests in producing property.

Separate interests are frequently created in natural resource property when the owner of the undivided (or "fee") interest in the property conveys part of the interest to others while reserving part for himself. Indeed, natural resources are not usually extracted by the owner of the surface land.[35] The separate interest conveyed or reserved by the landowner may consist of the rights to all the minerals in the property, rights to a portion of those minerals, rights to specific types of minerals, or interests such as royalties, overriding royalties, and payments-in-kind. Most jurisdictions require that these interests be separately listed on the property tax roll and separately taxed to the person who is determined to be the owner of the interest.[36] This generalization should be read with several cautionary notes in mind, however. First, there is a bewildering maze of variations among the states, often rooted in arcane concepts of traditional property law, in the classification of these separate interests as real or personal property. These variations may have implications as to where and, in some cases, as to whether the property may be taxed. Second, there are striking differences among the states in their determination whether particular mineral interests are taxable to the surface landowner or to the person to whom the interest has been conveyed or by whom it has been reserved. Finally, as suggested above, insofar as these separate interests represent interests in nonproducing property, they frequently will not be taxed at all.

Several conclusions emerge from this discussion of the efforts of some jurisdictions to determine the fair market value of natural resources under the ad valorem property tax. First, the search for value is, at best, a delicate undertaking, fraught with uncertainties that belie the image of mathematical precision created by the formulas normally employed to determine such value. At worst, the search can degenerate into a self-serving appraisal based on "magic engineering calculations, sinking fund guesswork, ore reserve estimations, machinery improvement projections, labor gyrations or foreign economic considerations."[38] Second, even among those states that share the premise that natural resource property should be assessed on the basis of its fair market value, there is marked diversity among states (and, sometimes, among counties within states) in their choice and implementation of valuation methods. Although the discussion here has emphasized the common themes that may be identified in the states' approaches, it is not designed to paper over the unruly reality that lies underneath, some appreciation of which may be gained by even a brief glance at the Appendix. Third, it is noteworthy that several taxing jurisdictions historically identified as among the least systematic in their efforts to ascertain the fair market value of their natural resources under the local property tax have begun to take steps to rationalize their regimes in this regard. They have thus recognized the self-evident proposition—yet one often ignored in this context—that a system of ad valorem property taxation can function as such "only when all property subject to taxation has been valued."[39] Finally, however detailed or sophisticated the legislative or administrative guidelines utilized for ascertaining the value of natural resource property, the determination of fair market value often rests, in the end, on a negotiated compromise between representatives of the taxpayer and the taxing authority.

C. *Treating Natural Resources Differently from Other Property for Ad Valorem Tax Purposes: Proxies for Value*

Many jurisdictions have abandoned the search for the fair market value of natural resource property in their property tax regimes. They rely instead on proxies for value to be included in the ad valorem tax base. Such proxies typically amount to one year's gross or net proceeds, to a multiple or fraction of such proceeds, or to an arbitrary per acre value. These deviations from the market value standard may reflect a considered judgment that the search for the fair market value of natural resource property is futile or at least not worth the

ATTACHMENT B

MEMORANDUM State of Alaska

TO: Hon. Emil Notti, Commissioner
Department of Community and
Regional Affairs

DATE: April 29, 1986

FILE NO.: 663-86-0456

THRU:

TELEPHONE NO.: 465-3600

FROM: HAROLD M. BROWN
ATTORNEY GENERAL

By:
Deborah Vogt
Assistant Attorney General

SUBJECT: Power of borough to levy severance tax on minerals

You have asked for our review of an opinion submitted to your office by Mr. Thomas Klinkner of Wohlforth & Flint regarding the authority of a first class borough to levy a severance tax on minerals. With some reservations, we agree with the conclusion of that opinion.

At the outset, we note that neither your request nor the opinion of Mr. Klinkner set out the language of a proposed tax, and as a result our analysis is in the abstract. We understand that the primary concern of the proposed borough is with the ability to tax the DeLong Mountain enterprise, which is on privately owned Native corporation land. Mr. Klinkner's conclusion is limited to the authority of the borough to levy a tax on minerals mined from lands in which the mineral estate is privately owned.

The framers of the Alaska Constitution were aware that the powers, particularly the taxing powers, of local governments had been construed very narrowly in other states. As the Alaska Supreme Court noted in Liberati v. Bristol Bay Borough, 584 P.2d 1115 (Alaska 1978), the second sentence of article X, section 1, appears in the Alaska Constitution specifically to overrule the common law rule of narrow construction. 584 P.2d at 1120 & n.19. That provision reads: "A liberal construction shall be given to the powers of local government." 1/ As the court noted, the

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1/ The section in its entirety provides:

> Section 1. Purpose and Construction. The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.

framers placed the provision in what is now section 1 so that it would apply to general law municipalities as well as home rule municipalities. Id. at 1120-21 & n.19.

The Alaska Legislature has provided for two types of municipalities: home rule municipalities and general law municipalities. A home rule municipality "has all legislative powers not prohibited by law or charter." AS 29.04.010. A general law municipality "has legislative powers conferred by law." AS 29.04.020. I understand that the Northwest Arctic Borough would be a general law municipality and therefore limited to the powers specifically granted by the legislature.

AS 29.35.010 grants general powers to all municipalities, subject to other provisions of law. Among those powers is the power "to levy a tax or special assessment, and impose a lien for its enforcement." AS 29.35.010(6). It could be argued that the general power to levy a tax must be combined with a specific grant such as those found in chapter 45, authorizing property and sales taxes, in order for a general law municipality to levy a particular tax. However, we do not believe that the state supreme court would adopt such an interpretation. In Liberati, the court read the predecessor of this section, former AS 29.48.010(7) (which authorized municipalities "to levy taxes"), to be a "broad grant of taxing authority, limited only by other provisions of law" and to be "consistent with the second sentence of article X, section 1 which requires that '[a] liberal construction shall be given to the powers of local government.'" Liberati, 584 P.2d at 1120.

Chapter 45 of title 29 delineates specific provisions for municipal property taxes and sales taxes, and for the enforcement of tax liens. Those provisions include some limitations on property taxes and sales taxes, but are silent as to severance taxes. Thus, it appears that the general power to tax granted by AS 29.35.010(6) has not been limited by any other provision of title 29.

Nor do we find a limitation on this power to tax in any other statute. Nothing in the mining license tax specifically prohibits a municipality from levying a severance tax. In this regard, it should be noted that the legislature may limit the ability of a municipality to levy a tax, including a severance tax, and that it has done so in the past. AS 43.55 levies production taxes on producers of oil and gas. AS 43.55.017 specifically provides that the taxes imposed by that chapter "are in place of all taxes now imposed by the state or any of its municipalities, and neither the state nor a municipality may

impose a tax upon [production of oil or gas or oil and gas in place]." Similarly, AS 43.56 levies a property tax on oil and gas production and pipeline transportation property, and permits local taxation of that property subject to limitations. AS 43.56.030 provides that the taxes imposed in the chapter "are in place of ... all other ad volorem [sic] or other taxes imposed by a municipality on property subject to tax under this chapter ...."

Our inquiry would end here with the conclusion that the general power to impose a severance tax on minerals has not been limited by the legislature were it not for the concerns expressed by Justice Rabinowitz in his dissent in Liberati. In that case, the Bristol Bay Borough had levied a three percent tax on the sale of all raw fish caught within the borough. The challengers argued that the tax was a severance tax, and was prohibited by the provisions of article VIII of the Alaska Constitution. The majority of the court concluded that the tax at issue was a sales tax and did not reach the issue of whether a severance tax is prohibited by article VIII of the constitution. Justice Rabinowitz, however, concluded:

> In my opinion, the severance tax imposed by Bristol Bay Borough does violate the provisions of Article VIII of the Alaska Constitution which reserve the benefits from, and control over management of the fisheries resource to all the people of the state. The effect of the borough's ordinance is to exclusively appropriate to its own benefit, and that of its residents, the use of a natural resource which is reserved to all of the people of the state for their common use. Article VIII, Section 2 of the Alaska Constitution reserved to the legislature, not the borough, the authority to act as to this resource. Absent a delegation by the legislature to the borough, I conclude that the ordinance contravenes Alaska's Constitution.

Liberati, 584 P.2d at 1124-25 (footnote omitted).

Mr. Klinkner concludes that this prohibition, if adopted by the court, would not apply to a tax levied on minerals mined from a privately owned mineral estate in real property. He further states that such private interests would include mineral estates patented under state or federal public land laws. We have some difficulty with his analysis at this point.

A severance tax is a general revenue tax levied on the activity of severing natural resources within the taxing jurisdiction. 2/ The power to levy this type of tax comes from a jurisdiction's sovereign, statutory or constitutional power to levy taxes, and not from the jurisdiction's proprietary interest in the resource. It is levied on the producer of the natural resource regardless of the ownership of the land from which the resource is produced. Thus, the severance tax at issue in Commonwealth Edison v. Montana, 453 U.S. 609 (1981), was levied by the State of Montana primarily on production from coal leases on federal lands. Alaska's oil and gas production taxes apply to oil and gas produced from state, federal and private land within the state. AS 43.55.011; 43.55.016.

Alaska is prohibited by the Statehood Act from alienating the mineral interest in mineral lands (1981 Op. Att'y Gen. #10 (Oct. 20). 3/ If mining activity were to take place within the borough on state lands, the state would retain ownership of the minerals, just as the state retains ownership of the oil on state oil leases until the oil is severed. Thus, since it appears that any borough-wide severance tax would tax the production of state-owned minerals, we believe that the concerns raised by Justice Rabinowitz must be addressed in more detail.

One reading of Justice Rabinowitz's conclusions would be that the constitution reserves to the legislature all legislation dealing with natural resources in the state, whether those resources occur on public or private land. This reading appears consistent with Justice Rabinowitz's language that article VIII, section 2, reserves to the legislature "the power to act as to this resource." It would imply that, since the state has the power to levy a severance tax on minerals, that power resides solely in the legislature. We believe this reading to be too broad. The constitutional provision explicitly relied

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2/ "Alaska's Oil and Gas Tax Structure: A Study with Recommendations for Improvement," Alaska Department of Revenue (1977), describes the Oil and Gas Properties Production Tax as "a tax on the activity of producing oil and gas in Alaska." Id. at II-2.

3/ Contrary to Mr. Klinkner's representation, the state does not, and may not, patent mineral lands. 1981 Op. Att'y Gen. #10 (Oct. 20).

on by Justice Rabinowitz was article VIII, section 2, which provides:

> Section 2. General Authority. The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

It is clear from the minutes of the Constitutional Convention that this section was intended to apply only to the state's proprietary interest in natural resources, and not to a general, overall interest in resources within the state regardless of ownership. 4/ At the Constitutional Convention, that provision was developed from section 2 of Committee Proposal No. 8/a. During the floor debate of that section, the following discussion took place:

> DAVIS: Mr. Riley, in Section 2, line 14, or actually lines 12, 13 and 14, it says, "The State of Alaska shall provide for the utilization, conservation and development of all of the natural resources, including lands and waters belonging to the State." It appears to me that as that is written it is broad enough to cover all natural resources, no matter whether they are privately owned, publicly owned, or what they may be. I am wondering if you did not intend to put a comma

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4/ The Commentary on what was then section 1 of Committee Proposal 8 (Natural Resources) read:

> (Sec. 1. States' Proprietary Interest)
> This section is a general grant of authority to the state for the utilization and development of all resources over which the state has a proprietary interest. This includes all game fish, wildlife, fisheries, waters and those lands and related land uses including mineral rights, etc., that may be acquired by the state through grants from the United States or by other means. Authority over private lands and resource interest is not provided in this article except as that authority is generally reserved in Section 18 [dealing with Private Ways of Necessity].

> after the word "waters" at the end of line 14, so that it would then become clear that we are only talking about natural resources belonging to the state.
>
> RILEY: That would be my conception of it, Mr. Davis.
>
> DAVIS: There wasn't any intention that the state is going to develop natural resources on either federal land or privately owned land, is that right?
>
> RILEY: No. The sections covered in the commentary states all resources over which the state has a proprietary interest, and I think the point is well taken.

4 Proceedings of the Alaska Constitutional Convention at 2499 (January 18, 1956). The provision was amended so that the words "belonging to the state" modified "natural resources" rather than only "lands and waters." Id. at 2500. Thus, it is clear that the framers intended the provision to apply only to the proprietary interest of the state, and not to all the natural resources that might be found within the boundaries of the state. It then follows that the article cannot be read to prevent any severance tax levied by a municipality on any minerals within the state.

Another possible reading would be that apparently subscribed to by Mr. Klinkner -- that the legislature retains the exclusive authority to act (including tax) as to resources in which the state retains a proprietary interest. The difficulty with this approach is that a severance tax is not a tax on minerals (state-owned or otherwise), but rather is a tax on the (private) activity of production. Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1922) ("[the tax] is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore"). As a result, there does not seem to be any neat distinction between a sales tax levied on state owned resources (after they are captured by a private party) and a severance tax levied on the private producer of minerals on state land. The tax at issue in Liberati was on fish -- a resource "reserved to the people for common use" by article VIII, section 3. The tax was levied exclusively on this resource. If the Rabinowitz language were read to prohibit a borough from acting (including taxing) as to resources in which the state has once had a proprietary interest (even after those resources are

captured by a private party), it would seem that this sales tax would be prohibited also. The majority of the court, however, had no difficulty finding that tax constitutional.

If the constitution were construed to prohibit only a municipal severance tax as applied to the production of state-owned minerals, then two identically situated private companies, one producing minerals under a lease on state lands and another producing minerals under a lease on private lands, would be treated very differently. The justification for this difference would have to be that article VIII impliedly limits municipal authority in this area. But, as set out above, the constitutional framers intended that municipal powers should be broadly construed, and made this intent explicit. The majority of the court in Liberati held that "we should not be quick to imply limitations on the taxing power where none are expressed." 584 P.2d at 1121.

We believe that a better reading of the restrictions of article VIII, and particularly section 2 of that article, is that the provisions reserve to the legislature the exclusive authority to act as to the state's proprietary interest in natural resources. Thus, a borough would be prohibited from entering into a royalty contract for the production of minerals on state lands, from issuing grazing leases, and from appropriating water. 5/ An entity's power to tax is separate from its proprietary interest. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 145-46 (1982). We do not believe that, after full briefing, the full Alaska Supreme Court would hold that article VIII limits taxing authority, whether that authority is exercised by the state or by a municipality.

It may well be that, as a policy matter, the legislature will conclude that the production of mineral resources in the state should benefit the people of the state as a whole, and not just the people of the municipality in which the natural resources occur. The legislature may prohibit a local severance tax altogether, as it has done in AS 43.55. Or, it may devise a particular plan for distributing the revenue from a type of tax between the municipality and the state, as it has done in

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5/ The Department of Law has advised that this provision prohibits a municipality from exerting authority over the appropriation of water. 1974 Inf. Op. Att'y Gen (Apr. 4; James Reeves).

AS 43.56. Absent a restriction by the legislature, we believe that a borough may exercise the power to levy a severance tax.

DV:jf

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

September 2, 1987

MEMORANDUM

TO: Representative Kay Brown

ATTN: Eric Myers

FROM: Brad Pierce
Legislative Analyst

RE: Alaska Mining Issues
Research Request 88.013

In light of the recent Alaska Supreme Court decision (Trustees for Alaska vs. State) which ruled that the present location system for mining claims on State land violates Section 6 (i) of the Alaska Statehood Act (because it does not require the payment of rent or royalties by hardrock miners), you asked that we provide research discussing several interrelated mining issues:

(1) Rents and royalties from minerals on State land.

- How do other states address the issue of mineral rents and royalties from State lands?
- Which states use a lease system?
- Which states use a location system?
- Which states use a combination lease/location system?

(2) Administrative implications of a change in the current State system.

- What would be the potential advantages of a single, comprehensive leasing system in terms of management costs and administrative simplicity?
- What are the potential disadvantages of a comprehensive leasing system?

(3) Economic rent from mining on State land.

- Review applicable studies that quantify the potential for economic rents from mining on State land.

- Is there a discernible relationship between the price of specific metals (especially gold), mining activity on State land and potential economic rent?

(4) Reclamation of State mineral lands.

- Review applicable reclamation standards or requirements for State land.

We first briefly discuss the implications of the recent Alaska Supreme Court decision on State mineral leasing practices and then focus on the issues you raised. Several attachments provide background material. Attachment A is the text of Trustees of Alaska vs. State. Attachment B contains an Alaska Journal of Commerce and Pacific Rim Reporter article, "Court Decision May Hold Serious Consequences for Placer Miners." Attachment C is a Department of Natural Resources (DNR) study, "Report on Selected Mining Leasing Systems in the United States and Canada." Attachment D contains the annual permits, paperwork and fees that must be filed with DNR by placer miners. Attachment E is DNR's outline of options for responding to the Supreme Court decision. Attachment F contains the sections of the Alaska Administrative Code that deal with reclamation of mining sites. Attachment G is a statement of "Interagency Placer Mining Enforcement Priorities 1978" signed by the commissioners of the Departments of Environmental Conservation (DEC), Fish and Game (ADF&G) and Natural Resources (DNR).

Trustees for Alaska vs. State

Under the traditional "location system," a miner is allowed to locate a mining claim on State land when a mineral deposit is found. The federal 1872 Mining Law is the basis for the location system in Alaska. A miner stakes the corners of his claim (typically less than 40 acres per claim) and records the location with the Department of Natural Resources (DNR) district recording office. A mining claim on State land may be maintained by performing $200 worth of annual labor per claim or location. Miners do not have to pay rent or royalty to the State as long as the minimal amount

of annual labor is performed as documented in the annual labor report filed with the district office (see Attachment D). All locatable minerals on State land are open to claim staking under the location system, unless specifically restricted to mining under a lease.[1]

In 1983, a coalition of environmental, Native and fishing groups challenged the State's location/leasing system for the extraction of hardrock minerals on the grounds that it violated the Statehood Act (see Attachments A, B, and E). On May 1, 1987, the Alaska Supreme Court ruled that the coalition was entitled to bring this lawsuit because the potential revenues the State is giving up by not charging rent are of "public significance". According to the appellants in the case, about 50,000 existing mining claims in Alaska are affected and the State is illegally giving up over $100,000 in royalties.[2]

The court ruled that rent or royalties must be paid to the State by any miner operating on State "mineral lands" and that labor in lieu of rent was invalid. The court defined "mineral lands" to include all State lands that were known to be "mineral in character" at the time they were selected by the State. Much of the current legal controversy over the Court's decision revolves around the interpretation of the "mineral in character" definition--exactly when State land was known to contain mineral prospects and what criteria determine which are mineral lands. According to DNR, the traditional test is "known or believed to be valuable in minerals," which leaves a wide range of possibilities for a State leasing program (see Attachment E).

As noted by attorney Rick Johannsen in Attachment B, the Supreme Court decision raises more questions than it answers. It is very likely that any statutory or regulatory changes made to bring the State into compliance with the court's decision will face further legal challenge. The State has appealed the case to the U.S. Supreme Court and Trustees for Alaska is also cross-petitioning the Court to review the decision. The DNR has asked the Attorney General's Office to come up with a supportable definition of "mineral in character."

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[1]There is a very small amount of State land that is not open to claim staking and in restricted to mining under lease.

[2]The court's decision does not affect the majority of placer claims in the state; over 80 percent of placer mining claims in Alaska are on federal land and most of these date to pre-statehood.

Rents and Royalties from State Mineral Lands

In 1981, the Alaska Department of Natural Resources--Division of Research and Development--conducted a survey of mineral leasing alternatives used in 16 western states and four Canadian provinces, as well as on federal acquired lands and Alaska's submerged lands (Attachment C). According to this study, there are three basic leasing systems in use: mining location with subsequent conversion to lease; noncompetitive leasing through preference-right conversion of prospecting permits; and direct leasing through an application process or competitive bidding.

Three states and three provinces use location as a first step in leasing, allowing miners to hold claims for terms of 60 days to three years before converting to a lease agreement. (Attachment C contains a chart that provides a comprehensive list of mineral leasing systems in the western states and Canada.) In nine states and two provinces, as well as on federal acquired lands and Alaska's submerged lands, miners apply for prospecting permits as a first step to leasing. The terms of prospecting permits vary from six months to ten years. Six states allow miners to apply directly for a lease without prior claim or prospecting permit. In 12 states and on federal acquired land, competitive lease sales may be held. Lease terms range from three to 99 years in western states, with the most common duration being 10 - 20 years. Canadian lease terms are 21 years.

Seventeen of the 22 governmental entities surveyed by DNR charge a royalty on minerals removed from their leases. A mineral royalty is a percentage of the value of the minerals produced from a mine. Royalties may be paid in addition to rent on mineral leases, though in some cases rent is deducted from royalty payments. Royalty rate schedules vary widely among the various states and provinces. Depending on the commodity and state, royalties may be assessed on the basis of volume of minerals mined and removed from the leased premise or as a percentage of the gross or net value of minerals removed. In some states and on federal acquired lands, royalty rates are negotiated for each individual lease.

Administrative Implications for Changes in the Current State Lease System

The present location system is very easy to administer. The system virtually runs itself and DNR has only to maintain district recording offices for claims and other paperwork to be filed and fees to be collected. Any change from the present system is likely to encounter stiff opposition from miners, who naturally do not want to pay more to maintain their claims. On the other hand, the paperwork associated with an annual rental payment should be at least as simple as the current "Affidavit of Annual Labor" form procedure (see Attachment D for copies of the forms).

The DNR's general policy goals for a revised mineral leasing system include: consistency; fairness; avoiding further litigation which may jeopardize mining on State land; and ensuring a fair and reasonable return for use of State land and minerals. Attachment E contains a cursory analysis by DNR staff of four options for a revised mineral leasing system. One option, which the State is already pursuing, is to ask the U.S. Supreme Court to review the decision. Another would be to convert the present system to a simple leasing arrangement, where miners simply pay an annual rental fee on their claims.

The two remaining options are based on how broadly the definition of "mineral in character" is interpreted. Under a broad definition, most mining claims would fall under the leasing system and be subject to rent and/or royalty payments. Those lands which were not known to be "mineral in character" would remain under the present location system. Under a narrow definition, few claims would be included in the leasing system. Both of these options would entail increased administrative costs and result in a combination system where some miners would fall under the leasing system and others could remain under the location system. A two-track system could be challenged in court on the grounds of fairness.

Objectively, the "mineral in character" criteria may be specious. Presumably a miner stakes a claim on State land because he thinks the land might contain mineral deposits, regardless of when or if the State government knew of it. This issue will likely be decided in court. The two-track leasing system options that would be a consequence of the "mineral in character" criteria do not appear to meet any of the DNR policy goals stated above. The simplest and easiest leasing system to administer would be one which charged a flat annual fee per claim. Such a system would also discourage speculative holding of claims and would be likely to reduce the total number of active claims considerably. From a practical standpoint, DNR is understaffed and would have a very difficult time administering any program that requires staff time in addition to the present work load.

If a simple leasing system is chosen as the preferred option, then the question of whether to charge royalty payments for minerals removed from State leases "to ensure a fair and reasonable return for use of State land and minerals" needs to be resolved. As enumerated in Attachment C, there are many different royalty systems. The easiest way to categorize them is whether they are calculated on gross or net volume/value of minerals removed. There are advantages and tradeoffs to each system that are related to the cyclical swings in mineral commodity prices.

Royalty payments on gross volume/value of minerals removed have the advantage of being easy to administer but may encourage "high grading" and discourage mining and employment during periods of depressed mineral prices (explained in the next section). Royalty payments on the net value of minerals removed allow the State to share in the increased profits when mineral prices are high. Net value royalty systems are difficult and costly to administer because the State must have detailed knowledge of the mining operation. Simple net value royalty approaches fail to distinguish between profits necessary to provide a competitive return to capital and "excess profits" or economic rent (explained below). By requiring a share of the returns necessary to attract adequate funding for a mining project, the net value approach can also discourage capital investment in marginal projects. Some states use a sliding scale on the gross volume/value or net returns to encourage mining of marginal projects and capture a share of increased profits during periods of high commodity prices. Of course, this type of royalty system has the disadvantage of being complicated to administer.

Economic Rent from Mining on State Lands

Economic rent can be defined as the excess of revenues over the costs of mining and processing, where costs include a profit sufficient to attract capital funds to the project. The degree to which a leasing policy extracts economic rent is an appropriate criterion for comparing different leasing systems.[3] It is the only measure by which the State and mining companies can receive appropriate returns, without discouraging mine development and employment. Theoretically, with adequate competition and precise information regarding ore location, quality and ultimate production costs, the share represented by economic rent would be offered freely by mining companies for the right to mine a certain tract. In other words, economic rent represents the maximum amount any company could pay for the right to mine. Ideally, under a leasing policy that extracts economic rent, companies will not earn excessive returns on high quality deposits and will not be discouraged from mining low grade deposits.

"High grading" is the practice of mining only higher grade ores and leaving lower grade ores unmined. High grading may occur under several leasing systems, but is most easily illustrated with royalty systems. In this case, the required payments become a cost of producing each ton of ore and can be avoided only by leaving the ore unmined. It is in the interest of

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[3]"Evaluation of Minnesota Mineral Leasing," State of Minnesota, Office of the Legislative Auditor, Program Evaluation Division, June 24, 1982, p. 15.

each mining company to establish a minimum grade of ore which is profitable to mine under a given lease, taking royalty or other payments into account as a cost of production. Having established such a cutoff grade, a company will choose not to mine ores which fall below that grade. One effect of high grading is that companies reduce the scope of their operations, resulting in reduced output, employment and mining revenue for the State. Thus an important measure of the success of any leasing system is the extent to which it avoids the adverse effects of high grading.

There are no existing studies that quantify the potential economic rent from State mineral lands in Alaska. As explained above, economic rent is a theoretical concept that is in large part determined by the quality of mineral deposits on State land, commodity price cycles and the regulatory environment (including State leasing terms). According to Jerry Gallagher, DNR-Director of Mining, there are 48,000 existing claims on State land. If we assume a simple leasing system charging $1.25 per acre annual rent on 40-acre claims, such a system would generate $2.4 million in annual State revenue. Obviously, mining activity increases when commodity prices (especially gold) are high and therefore potential leasing revenues from new claims and potential royalty payments for operating mines (economic rent) increases proportionally. We do not have information to make estimates of potential royalty payments and therefore cannot estimate potential economic rent.

Reclamation of State Mineral Lands

There is no current statutory or regulatory language in State law that explicitly deals with reclamation of placer mining operations. Placer miners operate under a miscellaneous land use permit, which is issued by DNR in response to the miner's annual placer mining application. The Department of Natural Resources charges miners $100 to distribute the annual application form to 13 State and federal agencies for appropriate permits. Attachment F contains the Alaska Administrative Code regulations (11 AAC 96.010 - 96.250) concerning reclamation of State mineral lands under a miscellaneous land use permit. These regulations require miners to return the land to as near the original state as possible, (i.e., reclaim their tailings area and recover topsoil so the site can be revegetated). Reclamation requirements are stipulated in each miner's permit and plan of operations. For mining activities on special priority streams, permits are given close scrutiny and higher level reclamation stipulations may be required.

The commissioners of DNR, ADF&G and DEC have signed an enforcement priorities agreement for placer mining operations which directs field staff to "inspect all mining operations on priority streams and as many mining operations for which time and funding are available on nonpriority streams" (Attachment G). According to Mr. Gallagher, the special priority streams covered in this agreement are inspected monthly by DNR field staff. The DNR staff do not routinely inspect other mining sites for reclamation compliance, though they do conduct inspections in response to citizen or other agency complaints.

The DNR-Division of Mining staff will begin rewriting Chapter 96 of the Alaska Administrative Code to explicitly include placer mining in early 1988. The process should take approximately one year to complete and promulgate. Because a rewrite of the miscellaneous land use regulations involves several other divisions, the process will take a long time. According to Mr. Gallagher, having placer mining regulations explicitly laid out in the code should eventually increase the administrative efficiency of the Mining Division because reclamation stipulations will not have to be included in each individual permit.

* * *

We hope we have provided enough information for your purposes. We have limited our discussion of possible rent and royalty alternatives to those which seemed appropriate to Alaska and workable for placer miners. We have collected a good deal of information on mining issues in our library which we will share upon request. Please call if you have questions or if we can be of further assistance.

Attachments

ATTACHMENT A
Trustees of Alaska vs State, et al.

Mr. Anderson argues that the specific statute, the Limited Entry Act, controls the general statute, the Exemptions Act, because where two statutes conflict, the specific statute should prevail regardless of whether it was passed prior to the general statute, "unless it appears that the legislature intended to make the general act controlling." *State, Department of Highways v. Green*, 586 P.2d 595, 602 (Alaska 1978), *aff'd sub. nom., 823 Square Feet v. State*, 660 P.2d 443 (Alaska 1983). As we conclude from our analysis of the legislature's intent in enacting the relevant statutes, we believe the legislature intended the general Exemptions Act to prevail in this type of case.

III. CONCLUSION

The expressions of legislative intent in combination with the clear provisions of the 1982 Exemptions Act persuade us that the legislature meant what it said in permitting a parent with past due child support claims to execute against an otherwise exempt limited entry permit. Therefore, we REVERSE the superior court's denial of Mrs. Anderson's motion to execute on Mr. Anderson's limited entry permit for past due child support, and REMAND with instructions to grant her motion.

REVERSED and REMANDED.

legislature's statement of findings and purpose. The legislature found that

> a disproportionately high percentage of lower-income, single-parent families are headed by women. The difficulties in obtaining child support from noncustodial parents contributes significantly to the hardship of those families....
>
> The legislature also finds that the hardship experienced by children in families who may rely on support from a noncustodial parent should not be a necessary condition that must be endured by those families. Statutory tools have been provided to enable the child support enforcement agency to collect unpaid child support owed by a parent....

Ch. 144, § 1, SLA 1984. One of the statutory tools provided in the 1977 Act was the provision that exemptions under the Exemptions Act do not apply to proceedings to enforce the payment of child support. AS 47.23.250(i).

TRUSTEES FOR ALASKA, Nunam Kitlutsisti, Dinyea Corporation, Village of Minto, Alaska Independent Fishermen's Marketing Association, Alaska Center for the Environment, Southeast Alaska Conservation Council, Friends of the Earth, Plaintiffs/Appellants,

v.

STATE of Alaska, Alaska Department of Natural Resources, Esther Wunnicke, Commissioner, Department of Natural Resources, Defendants/Appellees,

Alaska Miners Association, Fairbanks North Star Borough and Joseph E. Vogler, Defendants-Intervenors/Appellees.

No. S-1142.

Supreme Court of Alaska.

May 1, 1987.

Coalition of environmental, Native, and fishing groups filed action seeking declaration that State's mineral leasing system violated mineral leasing requirement of Alaska Statehood Act in that State did not require payment of either rent or royalties in leases of lands and that State incorrectly construed restrictions to apply only to lands known to contain minerals at time of State selection. The Superior Court of the Third Judicial District, Anchorage, Douglas Serdahely, J., ruled that plaintiffs did not have standing. Plaintiffs appealed. The Supreme Court, Matthews, J., held that: (1) plaintiffs had standing as taxpayer-citizens to maintain action; (2) mineral leasing requirement in Alaska Statehood Act, mandates system under which State must receive rent or royalties for its mining leases; (3) because Alaska's mineral leases do not

require rents or royalties, in that value of required annual labor may be credited against rental, leasing laws do not meet mineral leasing requirement of Act; and (4) grant language in first sentence of section of mineral leasing requirement was intended to convey only mineral deposits in selected lands whose mineral character was known at time of selection.

Reversed and remanded with directions.

1. Action ⇐13

Basic requirement for standing in Alaska is adversity.

2. Action ⇐13

Under interest-injury approach standing, plaintiff must have interest adversely affected by conduct complained of; degree of injury to interest need not be great, and interest may be economic or may be intangible, such as aesthetic or environmental interest.

3. Municipal Corporations ⇐987

Taxpayer-citizen status is sufficient basis on which to challenge allegedly illegal government conduct on matters of significant public concern.

4. Municipal Corporations ⇐987

Taxpayer-citizen standing cannot be claimed in all cases as matter of right; instead, each case must be examined to determine if several criteria have been met: case in question must be one of public significance and plaintiff must be appropriate in terms of degree of interest, adversity of interest, and ability to competently advocate position asserted.

5. Declaratory Judgment ⇐294

Coalition of environmental, Native, and fishing groups had standing as taxpayer-citizens to maintain action for declaratory judgment that State's mineral leasing system violates Alaska Statehood Act because it does not require payment of rent or royalties on mining leases, and that State incorrectly construed lease restrictions in Act to apply only to those lands known to have been mineral in character at time of State selection; case was one of public significance in that, if plaintiffs prevailed, State would have to change its method of making State land available for mining, and plaintiffs were appropriate parties to bring suit. Alaska Statehood Act, § 6(a, b, i), 48 U.S.C.A. prec. § 21.

6. Mines and Minerals ⇐5.2(1)

Congress did not intend to preclude all litigation concerning meaning of mineral lease section of Alaska Statehood Act by enacting forfeiture proviso applicable when lands or minerals are disposed of contrary to provisions section; Congress intended only that United States Attorney General could bring forfeiture proceedings and that such proceedings could be brought only in United States District Court for the District of Alaska. Alaska Statehood Act, § 6(a, b, i), 48 U.S.C.A. prec. § 21.

7. Declaratory Judgment ⇐296

Taxpayer-citizens could maintain declaratory judgment action for interpretation of mineral lease section of Alaska Statehood Act. Alaska Statehood Act, § 6(i), 48 U.S.C.A. prec. § 21.

8. Public Lands ⇐62

Primary purpose of grant of right to Alaska to select 103,350,000 acres of land from United States under Alaska Statehood Act was to ensure economic and social well-being of new State. Alaska Statehood Act, § 6(a, b), 48 U.S.C.A. prec. § 21.

9. Mines and Minerals ⇐5.2(1)

Mineral leasing restriction in Alaska Statehood Act was intended to further goal of State revenue production. Alaska Statehood Act, § 6(i), 48 U.S.C.A. prec. § 21.

10. Mines and Minerals ⇐5.1(1)

Federal Mineral Leasing Act was passed rejecting location system for certain minerals in order to provide revenue to United States. Mineral Lands Leasing Act, §§ 1–25, 30 U.S.C.A. §§ 181–263.

11. Mines and Minerals ⇐5.2(1)

Mineral leasing requirement in Alaska Statehood Act, considered in context of School Lands Act and Mineral Leasing Act, other statehood mineral grants, and mineral leasing systems in other states, man-

dates system under which State must receive rent or royalties for its mining leases. 43 U.S.C.A. § 870(b); Alaska Statehood Act, § 6(i), 48 U.S.C.A. prec. § 21; Mineral Lands Leasing Act, §§ 1–25, 30 U.S.C.A. §§ 181–263.

12. Mines and Minerals ⇐5.2(1)

Because Alaska's mineral leases do not require rents or royalties, in that value of required annual labor may be credited against rental, State hard rock mineral leasing laws do not meet mineral leasing requirement of Alaska Statehood Act. Alaska Statehood Act, § 6(i), 48 U.S.C.A. prec. § 21; AS 38.05.185, 38.05.205, 38.05.-205(b), 38.05.210.

13. Mines and Minerals ⇐5.2(1)

Grant language in first sentence of section of mineral leasing requirement of Alaska Statehood Act was intended to convey only mineral deposits in selected lands whose mineral character was known at time of selection. Alaska Statehood Act, § 6(i), 48 U.S.C.A. prec. § 21.

Eric Smith and Robert W. Adler, Anchorage, for plaintiffs/appellants.

Robert M. Maynard and Mark P. Worcester, Asst. Attys. Gen., Anchorage, Harold M. Brown, Atty. Gen., Juneau, for defendant/appellee State of Alaska, Alaska Dept. of Natural Resources, and Esther Wunnicke, Com'r, Dept. of Natural Resources.

James N. Reeves, Bogle & Gates, Anchorage, for defendant/appellee Alaska Miners Ass'n.

Ronald A. Zumbrun, Robin L. Rivett, and James S. Burling, Pacific Legal Foundation, Sacramento, Cal., and Michael B. Markham, Borough Atty., Fairbanks, for defendant/appellee Fairbanks North Star Borough.

Thomas R. Wickwire, Fairbanks, for defendant/appellee Joseph E. Vogler.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MATTHEWS, Justice.

Alaska was granted the right to select 103,350,000 acres of land from the United States under section 6(a) and (b) of the Alaska Statehood Act, Pub.L. No. 85–508, 72 Stat. 339 (1958) (set out in a note preceding 48 U.S.C. § 21 (1982)). Mineral deposits in selected lands were also conveyed, subject to certain restrictions. Section 6(i) of the Act 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 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.

This case presents issues concerning the meaning of the section 6(i) grant and restrictions, and of appellants' standing to bring an action in state court to construe the meaning of the Alaska Statehood Act.

I. PROCEEDINGS BELOW

The appellants are a coalition of environmental, Native, and fishing groups. They filed an action in superior court seeking a declaration that the state's mineral leasing system violates section 6(i) in that the state does not require payment of either rent or royalties in leases of lands subject to section 6(i), and that the state has incorrectly construed the section 6(i) restrictions to apply only to lands known to contain minerals at the time of state selection rather

than to all selected lands which contain minerals.[1]

All parties moved for summary judgment. The trial court ruled that the appellants did not have standing, that section 6(i) is enforceable only by the Attorney General of the United States, and that the state's mineral management system does not violate section 6(i). The court did not rule on the question whether the section 6(i) restrictions apply to all state-selected lands containing minerals or merely to those known to contain minerals at the time of selection.

We conclude that appellants have standing to maintain this declaratory judgment action, that the state's mineral leasing system violates section 6(i) because it does not require the payment of rent or royalties on mining leases, and that section 6(i) applies only to those lands known to have been mineral in character at the time of state selection.

II. STANDING TO MAINTAIN DECLARATORY JUDGMENT ACTION

A. *Standing*

[1] "Standing questions are limited to whether the litigant is a 'proper party to request an adjudication of a particular issue....'" *Moore v. State*, 553 P.2d 8, 24 n. 25 (Alaska 1976) (quoting *Flast v. Cohen*, 392 U.S. 83, 100–01, 88 S.Ct. 1942, 1952–53, 20 L.Ed.2d 947, 961 (1968)). Standing in our state courts is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions. *Id.* The basic requirement for standing in Alaska is adversity. *Id.*

The concept of standing has been interpreted broadly in Alaska. We have "departed from a restrictive interpretation of the standing requirement," *Coghill v. Boucher*, 511 P.2d 1297, 1303 (Alaska 1973), adopting instead an approach "favoring increased accessibility to judicial forums." *Moore v. State*, 553 P.2d at 23; *see also State v. Lewis*, 559 P.2d 630, 634 n. 7 (Alaska) (and cases cited therein), *cert. denied*, 432 U.S. 901, 97 S.Ct. 2943, 53 L.Ed.2d 1073 (1977). Our cases have discussed two different kinds of standing. One is interest-injury standing; the other is citizen-taxpayer standing.

[2] Under the interest-injury approach, a plaintiff must have an interest adversely affected by the conduct complained of. Such an interest may be economic, *Moore*, 553 P.2d at 24; *Wagstaff v. Superior Court, Family Court Division*, 535 P.2d 1220, 1225 (Alaska 1975), or it may be intangible, such as an aesthetic or environmental interest. *Lewis*, 559 P.2d at 635. The degree of injury to the interest need not be great; "'[t]he basic idea ... is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'" *Wagstaff*, 535 P.2d at 1225 & n. 7 (quoting Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613 (1968)).

In the instant case, the appellants assert that they have standing as citizens or taxpayers, rather than because their interests are injured. In prior cases, we have often permitted taxpayers or citizens to challenge governmental action based on their status as taxpayers or citizens. In many such cases, standing has been assumed and not discussed.[2] We have, however, explic-

1. Appellants also contend that section 6(i) has become part of the Constitution of Alaska, and has created public trust duties. Thus, appellants argue, to the extent that section 6(i) has been violated, so has the Alaska Constitution and the public trust.

2. *E.g., Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (land grant initiative challenged by citizens and taxpayers); *Abrams v. State*, 534 P.2d 91 (Alaska 1975) (taxpayer and citizen suit challenging legislative formation of Eagle River-Chugiak Borough); *Boucher v. Engstrom*, 528 P.2d 456 (Alaska 1974) (citizen suit to enjoin placement of capital move initiative on ballot); *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972) (citizen challenge to the wording of a referendum question); *Jefferson v. Asplund*, 458 P.2d 995 (Alaska 1969) (taxpayer suit challenging public professional service contract); *Jefferson v. Greater Anchorage Area Borough*, 451 P.2d 730 (Alaska 1969) (taxpayer suit challenging a bond issue); *Suber v. Alaska State Bond Committee*, 414 P.2d 546 (Alaska 1966) (taxpayer suit

itly addressed taxpayer-citizen standing on other occasions. For example, in *Coghill v. Boucher*, 511 P.2d 1297 (Alaska 1973), registered voters (one of whom was also a poll watcher) were allowed to challenge certain proposed vote-counting procedures. In finding standing, we stated:

> In the case at bar, we conclude that a retreat to restrictive notions of standing, as urged by appellee, would not advance the public's vital interest in maintenance of the integrity of vote-tallying procedures during statewide elections. Denial of standing to appellants in the instant case would have the effect of unduly limiting the possibility of a popular check upon executive control of the election process. If registered voters and poll watchers are foreclosed from seeking judicial review of administrative regulation of this sensitive aspect of our governmental system, then it may well be that any review of executive activity in this area would be completely foreclosed, particularly in the event that candidates or political parties were unwilling to challenge such administrative actions. We decline to restrict the public's access to Alaska's courts in such a manner.

Id. at 1304.

We also discussed the question of taxpayer standing in *Lewis*, 559 P.2d 630. At issue was the legality of a three-way land trade between the state, the federal government, and a native regional corporation. Our characterization of the plaintiffs' interest in *Lewis* applies in this case. "Here, plaintiffs are seeking to protect mineral resources in land originally selected from the federal government under the Statehood Act. Their interest in the state's retention of mineral rights in state lands is no less significant than the aesthetic and environmental values sought to be vindicated in *Sierra Club* [*v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)] and [*United States v.*] *SCRAP* [,412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)]." 559 P.2d at 635. We declined to decide whether standing should be allowed in all taxpayer or citizen actions, but we allowed taxpayer standing in *Lewis*. Several factors influenced our conclusion: the land transfer allegedly violated specific constitutional limitations, the transfer was significant in size and in its potential economic impact on the state, and no one seemed to be in a better position than the plaintiffs to complain of the illegality of the transaction. *Id.*

In *Carpenter v. Hammond*, 667 P.2d 1204 (Alaska), *appeal dismissed*, 464 U.S. 801, 104 S.Ct. 45, 78 L.Ed.2d 67 (1983), we affirmed, in an alternative holding, the standing of a citizen to challenge the reapportionment of a House District in which she did not reside or vote. We stated:

> In the instant case, Carpenter alleges that District 2 violates a specific constitutional limitation and that the disputed transaction (the drawing of election district lines) arguably will have a significant impact on the state. Here the dispute over District 2 has been fully briefed, argued at trial and on appeal, and there is no one in a better position than Carpenter to litigate these issues. In our view, Carpenter also meets the standing criteria of *Lewis*.

Id. at 1210 (footnote omitted).

Gilman v. Martin, 662 P.2d 120 (Alaska 1983), involved a challenge to a municipal sale of land. We upheld taxpayer standing, stating that "[a]ny resident or taxpayer of a municipality has a sufficient interest in the disposition of a significant number of acres of the municipality's land to

challenging public mortgage adjustment program); *Walters v. Cease*, 394 P.2d 670 (Alaska 1964) (citizen suit to enjoin referendum relating to formation of local government units); *DeArmond v. Alaska State Development Corporation*, 376 P.2d 717 (Alaska 1962) (taxpayer suit challenging the legality of public corporation); *Starr v. Hagglund*, 374 P.2d 316 (Alaska 1962) (citizen suit to enjoin capital move initiative).

Some of these cases were subsequently recognized as taxpayer standing suits. *See K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 353 n. 1 (Alaska 1971) (characterizing *Jefferson v. Asplund*, 458 P.2d 995, and *Greater Anchorage Area Borough v. Porter and Jefferson*, 469 P.2d 360 (Alaska 1970), as taxpayer standing actions); *Moore*, 553 P.2d at 24 n. 26 (citing *Jefferson v. Greater Anchorage Area Borough*, 451 P.2d 730, as an example of taxpayer standing).

seek a declaratory judgment as to the validity of the disposition." *Id.* at 123.

In *Hoblit v. Commissioner of Natural Resources*, 678 P.2d 1337 (Alaska 1984), we held that plaintiff did not have standing as a taxpayer to challenge the sale of some twenty acres of state land. We distinguished *Gilman* on the grounds that the amount of acreage involved in *Hoblit* was not "significant." 678 P.2d at 1341. Similarly, we distinguished *Lewis* because the " 'magnitude of the transaction and its potential economic impact on the State' which were determinative in *Lewis* are simply lacking here." *Id.* We remanded for a determination as to whether or not the plaintiff had standing because of his status as an adjoining land owner. *Id.* at 1341–42.

[3] This review of taxpayer-citizen standing in Alaska clearly demonstrates that taxpayer-citizen status is a sufficient basis on which to challenge allegedly illegal government conduct on matters of significant public concern. Taxpayer-citizen standing has never been denied in any decision of this court, except on the basis that the controversy was not of public significance,[3] or on the basis that the plaintiff was not a taxpayer.[4] However, *Lewis* and *Carpenter* suggested, without deciding, that taxpayer-citizen standing may be denied even in cases of public significance under certain circumstances.[5]

[4] In our view, taxpayer-citizen standing cannot be claimed in all cases as a matter of right. Rather, each case must be examined to determine if several criteria have been met. First, the case in question must be one of public significance.[6] On measure of significance may be that specific constitutional limitations are at issue, as in *Carpenter* and *Lewis*. That is not an exclusive measure of significance, however, as statutory and common law questions may also be very important.[7] Second, the plaintiff must be appropriate in several respects. For example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit. The same is true if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action.[8] Further, standing may be denied

3. *Hoblit*, 678 P.2d 1337.

4. *Greater Anchorage Area Borough v. Porter and Jefferson*, 469 P.2d 360.

5. The Utah Supreme Court relied in part on *Lewis* and adopted a discretionary denial approach in *Jenkins v. Swan*, 675 P.2d 1145, 1150–51 (Utah 1983):

> If the plaintiff does not have standing under the first step [that is, interest-injury standing], we will then address the question of whether there is anyone who has a greater interest in the outcome of the case than the plaintiff. If there is no one, and if the issue is unlikely to be raised at all if the plaintiff is denied standing, this Court will grant standing. *See, e.g., State v. Lewis*, Alaska, 559 P.2d 630, 635 (1977). When standing is predicated on the assertion that the issues involve "great public interest and societal impact," we will retain our practical concern that the parties involved have the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions. The Court will deny standing when a plaintiff does not satisfy the first requirement of the analysis and there are potential plaintiffs with a more direct interest in the issues who can more adequately litigate the issues.
>
> The third step in the analysis is to decide if the issues raised by the plaintiff are of sufficient public importance in and of themselves to grant him standing. The absence of a more appropriate plaintiff will not automatically justify granting standing to a particular plaintiff. This Court must still determine, on a case-by-case basis, that the issues are of sufficient weight, *see Jenkins v. Finlinson*, Utah, 607 P.2d 289 (1980), and that they are not more properly addressed by the other branches of government. Constitutional and practical considerations will necessarily affect our decisions in cases where a plaintiff who lacks standing under step one nevertheless raises important public issues. These are matters to be more fully developed in the context of future cases.

6. *See, e.g., Carpenter*, 667 P.2d at 1210; *Gilman*, 662 P.2d at 123; *Lewis*, 559 P.2d at 635.

7. *See, e.g., Coghill v. Boucher*, 511 P.2d 1297 (taxpayer's challenge of lieutenant governor's promulgation of regulations under elections statute).

8. *See Flast v. Cohen*, 392 U.S. 83, 100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, 962 (1968) ("federal courts will not entertain friendly suits ... or those which are feigned or collusive").

if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted.[9]

The instant case is undoubtedly one of public significance. If appellants prevail, the state must change its method of making state land available for mining. Some 50,000 existing mining claims may be affected. Under the current system, according to the appellants, the state is illegally giving up more than $100,000 annually in royalties. Further, the state is at risk of forfeiting to the United States extensive areas of state lands. The state has correctly acknowledged the significance of this case.

We turn now to consider whether appellants are appropriate parties to bring this suit. They are well represented by competent counsel who have forcefully presented their position. They are not sham plaintiffs; their sincerity in opposing the state's mineral disposition system is unquestioned. On the other hand, the state argues that there is a potential plaintiff with a more direct interest in the validity of the state's system. The state contends that the Attorney General of the United States may bring a forfeiture proceeding under section 6(i) and that this possibility means that appellants lack standing.

In our view, the mere possibility that the Attorney General may sue does not mean that appellants are inappropriate plaintiffs. In *Carpenter*, a resident and voter of the House District in question would theoretically have been more interested in litigating the question whether the district was malapportioned than was the non-resident plaintiff in that case. However, no such person had filed suit. We noted that the issues had been fully presented at trial and on appeal by the plaintiff, and held that she had standing. 667 P.2d at 1210. Similarly, in *Coghill v. Boucher*, we suggested that candidates or political parties might be more interested than registered voters and poll watchers in challenging the vote-counting procedures at issue. However, they had not done so. We noted that if the plaintiffs were not afforded standing, "it may well be that any review of executive activity in this area would be completely foreclosed." 511 P.2d at 1034. Thus, the crucial inquiry is whether the more directly concerned potential plaintiff has sued or seems likely to sue in the foreseeable future. The Attorney General has not sued nor are there any indications that he plans to do so.

Moreover, the appellants' interest in this suit is different than the Attorney General's would be if suit were brought in the United States District Court pursuant to section 6(i). Appellants are interested in preserving to the state the economic value of these lands. The Attorney General, however, would be bringing an action for forfeiture of these lands, contrary to appellants' interest.

[5] For these reasons we conclude that appellants have standing as taxpayer-citizens to maintain this action.

B. *A Declaratory Judgment Action Interpreting the Provisions of Section 6(i) May be Maintained.*

[6] There has been much litigation concerning the meaning and scope of various statehood act land grants and their restrictions.[10] There have been frequent questions of ownership of the granted lands as between private or governmental contest-

9. One reason for the adversity requirement is to insure that the issues are well presented. As the Utah Supreme Court said, "When standing is predicated on the assertion that the issues involve 'great public interest and societal impact,' we will retain our practical concern that the parties involved have the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions." *Jenkins*, 675 P.2d at 1150–51.

In the analogous context of class action suits, one important criterion of a party's ability to effectively represent the class is its capacity, for economic and other reasons, to competently advocate its position. *See* 3B J. Moore and J. Kennedy, *Moore's Federal Practice* § 23.07[1.–1], at 23–215 (1985) (under Fed.R.Civ.P. 23(a)(4), "it has become routine to inquire into the competence, experience and vigor of the representative's counsel").

10. *E.g., Boyce v. Pima County*, 24 Ariz. 259, 208 P. 419 (1922); *Jensen v. Dinehart*, 645 P.2d 32 (Utah 1982); *cf. State v. University of Alaska*, 624 P.2d 807 (Alaska 1981).

ants.[11] Much of this litigation has occurred in the state courts. The question presented in this case is whether Congress intended to preclude all litigation concerning the meaning of section 6(i) by enacting the proviso which reads:

> 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.

In our view, this question must be answered in the negative. It is clear that Congress intended that only the U.S. Attorney General could bring forfeiture proceedings and that such proceedings could only be brought in the United States District Court for the District of Alaska. No inference can be drawn, however, from either the context or the history of the Statehood Act that forfeiture proceedings were meant to be the only means by which a judicial interpretation of the meaning of section 6(i) could be obtained.

[7] The sole reference to the land grant forfeiture provision which we have found in the legislative history appears in the Senate Report accompanying a 1954 bill providing for the admission of Alaska into the Union, S. 50, 83d Cong., 2d Sess. (1954):

> 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.

S.Rep. No. 1028, 83d Cong., 2d Sess. 32 (1954). This reference is to the forfeiture clause of the Act of January 25, 1927 (commonly called the School Lands Act of 1927, 44 Stat. 1026, codified at 43 U.S.C. § 870(b) (1982)), which extended to public land states grants of certain numbered school sections which were mineral in character.[12] This clause has not prevented judicial interpretation of the School Lands Act in non-forfeiture proceedings.[13] We hold that the identical language in section 6(i) has a similar, non-preclusive effect. It would be unusual in the extreme if a state court could not construe the meaning of its state's Statehood Act. In the absence of any indication that Congress intended to bar our state courts from interpreting section 6(i), we conclude that appellants' declaratory judgment action seeking an interpretation of section 6(i) may be maintained.

III. THE STATE'S DISPOSITION OF MINERALS VIOLATES SECTION 6(i) OF THE STATEHOOD ACT

Having determined that appellants have standing to bring this declaratory action, we now turn to their arguments on the merits. Their arguments may be summa-

11. *E.g., Rodgers v. Berger*, 55 Ariz. 433, 103 P.2d 266 (1940) (appeal from suit by private mining claimant against state and other private claimants to quiet title in mining claim on land granted under statehood act; in trial court, state alleged it was owner because land was a school section; state did not appeal trial court's judgment for plaintiff); *Texas Pacific Coal & Oil Co. v. State*, 125 Mont. 258, 234 P.2d 452 (1951) (corporation's suit against state to quiet leasehold title to oil and gas deposits under certain school land acquired by state under state enabling act); *cf. Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967) (appeal from Arizona Supreme Court ruling in case between two state executive agencies to compel compensation to trust created under New Mexico-Arizona Enabling Act); *State v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956) (suit between State Highway Commission and Commissioner of Public Lands concerning rights of way or easements over state trust lands granted under New Mexico Enabling Act); *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 P. 3 (1924) (suit between governor and trustees concerning land granted and confirmed by act of admission for university purposes).

12. The proviso in the School Lands Act states:
> 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.

43 U.S.C. § 870(b) (1982). This proviso is discussed in more detail in part IIIB of this opinion, *infra* p. 333.

13. *E.g., Rodgers*, 103 P.2d 266; *Jensen*, 645 P.2d 32.

rized as follows. Section 6(i) of the Statehood Act provides that the state must reserve to itself all of the minerals in the mineral lands granted to the state pursuant to section 6(a) and (b) of the Act. Furthermore, section 6(i) provides that "[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." Appellants argue that because the state does not require the payment of rent or royalties from those miners whom the state permits to locate and extract hardrock minerals, the state violates section 6(i) of the Act. Appellants also argue that the state has violated section 6(i) by defining "mineral lands" subject to the lease requirement to mean those lands known to be of mineral character at the time of state selection, rather than all lands selected which are ultimately discovered to be of mineral character.

The appellants' arguments raise questions concerning the meaning of section 6(i), and of Congress's intent in granting the state mineral rights on the one hand, but restricting the state in its method of disposing of those minerals on the other. To answer these questions, we look to the plain language of section 6(i), to the legislative history of the Statehood Act, and to cases construing section 6(i). We also look to general principles of mining law to understand the framework within which section 6(i) must be analyzed.

A. *General Principles of Mineral Disposition*

When Congress passed the Alaska Statehood Act, there were three methods for disposition of minerals located on federal lands: location, lease, and sale. Only locations and leases are relevant in the instant case.[14]

The location system is the oldest method of mineral disposition. It originated on the public domain as a matter of custom and was institutionalized by various statutes, the most important of which was the Mining Law of 1872.[15] Under the location system, the first claimant who discovers a valuable mineral deposit on unappropriated public domain, stakes and files a mining claim, and pursues it, has a legally protected interest. The locator is entitled to produce minerals from the deposit without paying rent or royalties, and has the right to obtain fee simple title by means of a patent issued by the United States government. 1 American Law of Mining § 30.01, at 30–3 (2d ed. 1985) (all references to American Law of Mining are to the 1985 edition unless otherwise noted).

Mineral leasing is the primary alternative to the location system. The Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181–263 (1982), is the most important statute governing mineral leases; in many respects it has become the model for other federal mineral leasing acts. 1 American Law of Mining § 20.01, at 20–6–7. The Mineral Leasing Act was passed to supersede the location system as to the minerals it covers because of Congress's perception that important revenues were being lost under the older system.[16]

Under the Mineral Leasing Act, competitive leases are issued on lands known to contain valuable mineral deposits. 30 U.S.C. §§ 262, 272, 283. Bidders buy competitive leases from the government for a premium established at a public sale. 43 C.F.R. §§ 3521.2–2, 3521.2–4, 3521.2–5 (1985). Where valuable mineral deposits are not known to exist, a prospecting permit may be issued to the first qualified applicant. *See* 43 C.F.R. § 3510.0–3. If the permittee discovers a valuable mineral deposit, the permittee may be rewarded with a preference right lease. 43 C.F.R. § 3520.1–1. No premium is charged the lessee of a preference right lease for the privilege of leasing. However, both com-

14. The sale method pertains to certain varieties of sand and gravel and other common materials. 30 U.S.C. § 601 (1982).

15. Act of May 10, 1872, ch. 152, 17 Stat. 91. Portions of the Mining Act appear at 30 U.S.C. §§ 22–24, 26–30, 33–35, 37, 39–42, 47 (1982).

16. "[R]oyalties and rentals" were required "so that the Government may not be passing to title the natural resources without receiving something in return therefor." H.R.Rep. No. 1059, 65th Cong.3d Sess., at 20. (1919).

petitive and preference right lessees must pay an annual rental fee [17] and a production royalty, which is a specified percentage of the gross value of the leased substance produced. 30 U.S.C. §§ 262, 283.

Appellants contend that although section 6(i) requires the state to *lease* mineral lands, and presumably to obtain rents or royalties, the state does not in fact receive any revenues when it grants miners the right to produce hardrock minerals from state lands. Thus, appellants argue that the state's mineral disposition method is for all practical purposes a *location* system, except that miners may not receive patent to the mineral estate.

The state responds that section 6(i) does not require a revenue-producing rent or royalty; rather, that choice is left to the state legislature's discretion. The state also asserts that it receives as consideration the continued exploration and development of its lands and the benefits that come from an active mining industry.

We shall next consider the language of section 6(i) and its legislative history to glean Congress's intent in its grant and restriction of mineral lands.

B. *Origin of Section 6(i)*

As we have already explained in part IIB of this opinion, the restrictive language in section 6(i) was derived from the 1927 School Lands Act.[18] In *Lewis*, we discussed the School Lands Act in another context:

> In 1955, the Territory of Alaska, through its legislature, provided for a constitutional convention. Elected delegates adopted a Constitution on February 5, 1956, which was ratified by the people of Alaska on April 24, 1956. This Constitution adopted by the people of Alaska served as the basis for subsequent petitions to Congress for statehood and constituted an offer to accept the privileges and responsibilities of that status in accordance with its terms.
>
> Throughout the process of drafting the Constitution and its adoption, there was considerable public controversy surrounding the issue of federal control over Alaska's power to dispose of its mineral resources. In statehood legislation for other states, Congress had limited land grants to non-mineral lands. Public lands, which were known to be chiefly valuable for commercial mineral production at the time of the grants, were retained in federal ownership for management and disposition under a theoretically unified system of federal mineral law. In part to avoid the litigation over titles which had resulted from this policy, Congress passed the School Lands Act of 1927, 43 U.S.C. § 870. This act extended the original statehood land grants to embrace lands mineral in character. These additional grants, however, were made subject to a mineral alienation condition which prohibited state disposal of land without a reservation of minerals and permitted a forfeiture action instituted by the Attorney General on behalf of the United States in the event of such disposal [43 U.S.C. § 870(b)].

17. The fees usually vary from 25¢ to $1.00 per acre, depending on the mineral. 1 American Law of Mining § 20.09[5]; *see also* 30 U.S.C. §§ 262, 283.

18. Act of January 25, 1927 (An Act Confirming in States and Territories Title to Lands in Aid of Common or Public Schools), ch. 57, 44 Stat. 1026, 43 U.S.C. §§ 870–71 (1982).
43 U.S.C. § 870(b) (1983) provides:
The additional grant made by this section is 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 the 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. Mineral rights in such lands shall be subject to lease by the State as the State legislature may direct, the proceeds and rents and royalties therefrom to be utilized for the support or in aid of the common or public school: *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.

> Although the constitutions of most states were written after passage by Congress of the relevant enabling acts, Alaska's Constitution was drafted in the absence of a pre-existing act. While the delegates were therefore unsure of the particular restrictive language which might be chosen by Congress, they were aware of the history of federal control over state disposition of mineral lands and the likelihood that the United States would insist on retaining its usual powers. To many of the delegates and the people of the state, these restrictions were unpopular.

559 P.2d at 636 (footnotes omitted). Thus, we see in the School Lands Act language echoed fifty-one years later in section 6(i) of the Alaska Statehood Act: a requirement that grantee states reserve the mineral interest when disposing of granted lands, and a provision allowing grantee states to dispose of minerals only by lease.

Implicit in this quotation from *Lewis* are several points which must be emphasized. First, prior to the enactment of the School Lands Act, the statehood land grants of many western states did not include certain "school lands" sections which were known to be mineral in character at the time for vesting.[19] *Andrus v. Utah*, 446 U.S. 500, 508, 100 S.Ct. 1803, 64 L.Ed.2d 458, 465 (1980); *see also* 3 American Law of Mining § 60.06[2], at 60-11-13. Second, if lands vested which were in fact of mineral character, *but whose mineral character was not known at the time of vesting*, the state owned the lands and minerals contained therein. *United States v. Wyoming*, 331 U.S. at 443, 67 S.Ct. at 1321, 91 L.Ed. at 1593. Third, in *United States v. Sweet*, 245 U.S. 563, 572-73, 38 S.Ct. 193, 195, 62 L.Ed. 473, 481 (1918), the Supreme Court held that congressional grants of school lands to a state conveyed no title to lands known to be of mineral character, even if the grant did not expressly reserve such mineral lands to the federal government. In other words, states received title to lands of known mineral character only when Congress expressly granted "mineral lands." Finally, the School Lands Act of 1927 served as an express congressional grant of school lands of known mineral character. Most importantly, the term "mineral lands" as used in the School Lands Act[20] is a term of art, and refers to the *time* that the mineral character of the lands was appreciated, not to the ultimately discovered nature of the lands.[21] *See also* Slaughter Memorandum *infra* p. 340.

C. *Alaska Constitutional Response to Section 6(i)'s Restrictions*

The School Lands Act restrictions had already been incorporated into the Alaska statehood bills pending in the 84th Congress when the delegates for the Alaska Constitutional Convention met in the winter of 1955-56. The restrictions were controversial because they signalled a change from the existing location-patent system to a leasing system. Ultimately, however, the benefits of statehood were seen to outweigh the doubts of some of the delegates concerning the section 6(i) restrictions. The state constitution was adopted containing a provision expressly consenting to the section 6(i) restrictions.[22]

However, the framers also sought to preserve key elements of the existing location-patent system should Congress permit.

19. Title to surveyed sections vested at statehood; title to unsurveyed sections vested upon completion of an official survey. *United States v. Wyoming*, 331 U.S. 440, 443, 67 S.Ct. 1319, 1321, 91 L.Ed. 1590, 1593 (1947).

20. And as used in the Alaska Statehood Act § 6(i). *See* part IIIE of this opinion, *infra* p. 339.

21. The School Lands Act did not completely eliminate litigation of the question whether lands were of known mineral character at the time of survey, however, because the state's interest in lands of known mineral character vested on the effective date of the School Lands Act, rather than at the time of survey. *See, e.g., Rogers*, 130 P.2d 268.

22. Alaska Const., art. XII, § 13 states:

> 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 or conditions of the grants of lands or other property, are consented to fully by the State and its people.

Thus, they adopted Article VIII, § 11, which provides:

> 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.

According to one commentator (also a delegate to the Constitutional Convention):

> 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.

V. Fischer, *Alaska's Constitutional Convention* 134 (1975).

Congress did not recede from the section 6(i) restrictions. The people of Alaska ratified the constitution in 1956. The Statehood Act was passed by Congress and signed into law on July 7, 1958. Section 8(b) of the Act required the voters to vote in favor of three propositions, one of which was that:

> (3) All provisions of the Act of Congress approved [July 7, 1958] reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people.

Alaska Statehood Act § 8(b)(3). The voters accepted each proposition at the election held on August 26, 1958, and Alaska subsequently became a state on January 3, 1959. *See generally Lewis*, 559 P.2d at 636–39.

Having examined the origin of section 6(i) and the unsuccessful efforts of Alaska's Constitutional Convention to avoid its restrictions, we now turn to the legislative history for an understanding of Congress's intent underlying section 6(i)'s grant of mineral lands and leasing restrictions.

D. *Congress Intended that Alaska Receive Rents and Royalties from Section 6(i) Mineral Leases to Ensure the New State's Economic Viability*

[8] The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state. *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir.1968), *cert. denied*, 393 U.S. 1118, 89 S.Ct. 990, 22 L.Ed.2d 123 (1969); *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1016, 1021 n. 47 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888, 101 S.Ct. 243, 66 L.Ed.2d 113 (1980). One of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government. For example, opponents of statehood claimed that "Alaska is not capable of sustaining statehood unless it is heavily subsidized by the other 48 States of the Union." 104 Cong.Rec. 9498 (1958) (statement of Rep. Smith). Similarly, another opponent to statehood argued that "The prevailing doubt of Alaska's ability to support itself is

evidenced by the generous special considerations which are made for it in this statehood act." 104 Cong.Rec. 12,297 (1958) (statement of Senator Talmadge).

The congressmen who favored statehood conceded that it would impose an additional financial burden on the territory, but they maintained that the Statehood Act sufficiently provided for Alaska's financial well-being. The land grant of 103,350,000 acres was perceived by these congressmen as an endowment which would yield the income that Alaska needed to meet the costs of statehood. Representative Dawson said that.

> All grants include the mineral rights, but these rights must be retained by the State if the lands pass into private ownership. In other words, the mineral rights will always belong to the people of Alaska, and never to private individuals....
>
> These provisions are the foundation upon which Alaska can and will build to the enormous benefit of the national economy shared by her sister States. We cannot make Alaska a "full and equal" State in name and then deny her the wherewithal to realize that status in fact.

104 Cong.Rec. 9361 (1958). The importance of mineral revenue to the new state is also highlighted by the following colloquy between Representative Miller and Alaska Territorial Senator William Egan:

> Miller: Do you see where you would get much income out of this 103 million acres you might select around, bearing in mind most of the forests and good land has been set aside by the Government now, or by the military? How much income would you derive from that to begin with?
>
> Egan: As to how much income would be derived, that would be entirely problematical, depending on the values that would be found there.... There are known deposits of almost every type of mineral.
>
> ....
>
> ... I feel there would be development....

Statehood for Alaska: Hearings Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 85th Cong., 1st Sess. 201–02 (1957) (remarks of Rep. Miller and William Egan, Alaska Territorial Senator and President of the Alaska Constitutional Convention).[23]

23. *See also* 104 Cong.Rec. 9360–61 (1958) (further remarks of Rep. Dawson; remarks of Rep. O'Brien); 104 Cong.Rec. 12,012 (1958) (remarks of Sen. Jackson).

The 103,350,000 acre grant ultimately provided in section 6(a) and (b) of the Statehood Act was one of unprecedented size whether considered either absolutely or as a percentage of the total land area of the state. H.R.Rep. No. 624, 85th Cong., 1st Sess. (1957), *reprinted in* vol. 1 Alaska Statutes "History of Alaska Statehood," at 20. As the colloquy between Representative Miller and William Egan suggests, another rationale for the unprecedented size was that the federal government had already reserved the most valuable land and the new state would, in effect, have second choice. In the House, Representative Saylor said that "the choice areas, more than 95 million acres, have been reserved for Federal agencies." 104 Cong. Rec. 9340 (1958). In Senate discussion of the federal reservations, Senator Robertson read a portion of the House report on the Act: "[T]his tremendous acreage of [federal] withdrawals might well embrace a preponderance of the more valuable resources needed by the new State to develop flourishing industries with which to support itself and its people." 104 Cong.Rec. 12,019 (1958). Thus, the large grant of 103 million acres was deemed necessary because the lands available for state selection were perceived to be only marginally productive.

Furthermore, Congress recognized that the agricultural potential of the statehood grant land was limited. In debate, Senator Byrd commented: "In all of the more than 365 million acres of land in Alaska, only 2 million or about one-half of 1 percent, are arable." 104 Cong. Rec. 12,336 (1958). Because Congress realized that agricultural development would not yield the revenue that Alaska would need to support statehood, the Act contained the provision granting the new state title to the mineral estate underlying the land grants. Senator Kuchel said in debate:

> I believe, however, on the basis of the values of property in Alaska as they have been estimated, the tremendous wealth in the ground in minerals ..., the State of Alaska will be able to make maximum use of the property which it will obtain under the bill from the Federal Government. This provision constitutes one additional assurance. I feel sure that economically the new government will succeed.

That Congress recognized the financial burden awaiting the new state is clear from its debates. It is equally clear that the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden. Congress, then, granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government.

104 Cong.Rec. 12,035 (1958).

[9, 10] The leasing restriction [24] in section 6(i) was intended to further the goal of state revenue production. As we have discussed, the restriction was taken from the 1927 School Lands Act. That language was copied advisedly so that Alaska would be on an equal but not a favored footing with other public land states with respect to the disposition of mineral lands.[25] The School Lands Act leasing requirement was expressly intended to be productive of pro-

ing of mineral rights on all lands reserved to the new State of Alaska.

....

We ... 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....

We believe that the well-intended actions contained in the enabling legislation will have an adverse effect and the *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....

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....

All lands so claimed [by the state] 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.

Statehood for Alaska: Hearings on H.R. 50, H.R. 628, and H.R. 849 Before the Subcommittee on Territorial and Insular Affairs, 85th Cong., 1st Sess. 217–18 (1957) (statement of Glen D. Franklin, Chairman, Legislative Committee, Alaska Miners Association) (emphasis added) (hereafter "*Hearings on H.R. 50*"). Thus, it is clear that the Miners Association recognized in 1957 that section 6(i)'s provision requiring that mineral lands be subject to leasing was a mandatory provision. Their argument to the contrary today is without merit.

24. Appellants and the state agree that the third sentence of section 6(i) requires that mineral deposits be disposed of only by lease. Intervenor Alaska Miners Association argues that the "shall be subject to lease" language is merely permissive: "[A]ll that this sentence requires is that 'leasing' be one of the mechanisms through which these lands would be made available for mining development. It does not require that leasing be the *only* disposal mechanism." (Emphasis in original.)

The Miners' position on this point is contradicted by the structure of section 6(i). If the third sentence was not meant to express the exclusive method of mineral disposition, it need not have been set forth at all. Further, the legislative history demonstrates a uniform belief that section 6(i) required leasing. For example, the Senate Committee Report concerning language that eventually became section 6(i) states:

Subsection (k) [of S. 50, 83d Cong., 2d Sess. (1954)] 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 2,550,000-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.

S.Rep. No. 1028, 83d Cong., 2d Sess. 32 (1954) (emphasis added).

The Miners' argument that Congress intended the "shall be subject to lease" provision to be permissive is belied by the Miners' testimony objecting to this provision before the House Subcommittee on Territorial and Insular Affairs on March 15, 1957:

Following is the statement of the Alaska Miners Association relative to *mandatory leas-*

25. In other words, the thought was that Alaska should be allowed to obtain mineral lands only if it would administer them in substantially the same manner that States now having mineral land grants are required to administer the lands obtained by them under those grants. This is evident from the close parallelism between the conditions proposed to be imposed upon Alaska and those contained in the 1927 [School Lands] act.

Memorandum from Herbert J. Slaughter, Chief, Branch of Reference, Division of Legislation, Department of the Interior to the Honorable E.L. Bartlett, at 7–8 (Nov. 7, 1955) (regarding the mineral lands provision of the Alaska Statehood bills) (hereafter "Slaughter Memorandum").

ceeds, rents, and royalties, and congressional history indicates that the same result was intended in Alaska.[26] Further, in congressional hearings, the section 6(i) leasing requirement was equated with the "leasing procedures as provided under the Leasing Act of 1920." [27] As previously noted, the federal Mineral Leasing Act was passed rejecting the location system for certain minerals in order to provide revenue to the United States.

[11] Moreover, although the mineral leasing systems of other states differ from the federal mineral lands leasing system, they are uniform in requiring the payment of rent, or royalties, or both. 3 American Law of Mining § 63.054(d), at 63–28.

State statutes may be divided into two principal categories describing the manner of payment of consideration for a lease; first, those that require both rents and royalties but credit the former against the latter or cease rental when the payment of royalties begins; second, those that require both rents and royalties as distinct and independent considerations.

Id. at 63–29 (footnotes omitted). We therefore conclude that the leasing requirement in section 6(i), considered in the context of the School Lands Act, the Mineral Leasing Act, other statehood mineral grants,[28] and mineral leasing systems in other states, mandates a system under which the state must receive rent or royalties for its mining leases.[29]

26. S.Rep. No. 1028, *supra* n. 24 (noting the "similar provision for the protection of the mineral school lands," in the School Lands Act); Slaughter Memorandum, *supra* n. 25. In *State v. Lewis*, we explained that

> The lands to be selected by the state included mineral lands so as to be consistent with the rights granted other states as a result of the School Lands Act of 1927.... The restrictions placed by Congress on alienation of Alaska's lands were of the same import as those set forth in that Act and applicable to other states.

559 P.2d at 638.

27. Hearings on H.R. 50, *supra* n. 24, at 220 (Rep. Aspinall); *see also id.* at 231 (Rep. Abbott).

28. *See, e.g.*, Oklahoma Statehood Act, Act of June 16, 1906, 34 Stat. 267, 273 (expressly including mineral lands, but prohibiting state from disposing of such mineral lands except by short-term lease). Statehood mineral grants are to be considered in light of the mining policies in existence at the time the grants are enacted. *Utah v. Bradley Estates*, 223 F.2d 129, 130 (10th Cir.1955).

29. The state argues that the language in the third sentence of section 6(i), "as the state legislature may direct," gives the state the discretion not to charge rent or royalties. It cites as authority for this proposition language from the Slaughter Memorandum. The memorandum first discusses earlier Alaska statehood proposals allowing the state to sell lands it selected, including mineral rights, with a reservation of a royalty on all minerals produced therefrom. Concerning these proposals, the memorandum states:

> These earlier proposals, it will be noted, differ in a number of respects from the restrictions contained in the bills now pending. In particular, the current language expressly calls upon Alaska to adopt a mineral leasing system, while the earlier versions permitted the mineral deposits to be disposed of along with the surface, provided a royalty interest was reserved by the State. On the other hand, the current language does not attempt to prescribe maximum or minimum rates of royalty as did the earlier versions, but appears to leave the terms of leasing wholly to the discretion of the State legislature. From a practical standpoint, this second difference may be more important than the first, since if the Alaska legislature is left, as H.R. 2535 and S. 49 now intend to provide, with the untrammelled [sic] right to frame its own mineral leasing laws, it can, if it so ch[o]oses, 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.

Slaughter Memorandum, *supra* n. 25, at 9–10.

We are unable to read this language in Slaughter's memorandum as broadly as the state suggests. The memorandum does not suggest that the state was free from the duty to charge rent or royalties. In fact, Slaughter states that "Alaska should not be accorded greater freedom in the administration of mineral lands than that accorded existing States having Congressional land grants." *Id.* at 2. As noted previously, other states under the School Lands Act were required to lease mineral lands in order to generate rents and royalties.

[12] Although Alaska law requires mining leases for extracting hardrock minerals on those mineral lands thought to be subject to section 6(i),[30] the statutes do not require the payment of rent or royalties. AS 38.05.205, .210. Alaska Statute 38.05.205(b) speaks of an annual rental of not less than the annual labor requirement which would be imposed if the lease were a location. However, no rent actually needs to be paid, because the lessee may credit the value of annual labor performed against the rental. Annual labor is required to ensure that the claim is worked so that the miner does not locate numerous claims and obtain the right to exclude others. 2 American Law of Mining § 7.2, at 102 (1st ed. 1983); *Chambers v. Harrington*, 111 U.S. 350, 353, 4 S.Ct. 428, 430, 28 L.Ed. 452, 453 (1884) ("Clearly, the purpose was ... to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith and to show that he was not acting on the principle of the dog in the manger."). It is not a source of revenue to the landowner. Alaska's mineral leases are in substance indistinguishable from state mining locations.[31] Because they do not require rents or royalties, the state hardrock mineral leasing laws do not meet the leasing requirement of section 6(i).

E. *The Section 6(i) Leasing Requirement Applies Only to Statehood Grant Lands Whose Mineral Character was Known at the Time of State Selection.*

The appellants argue that the section 6(i) leasing requirement applies to all lands granted under section 6(a) and (b) which contain minerals. Their argument may be summarized as follows. Under the first sentence of section 6(i), all mineral deposits in selected lands are conveyed regardless of when the deposit's existence is first known. The term "mineral lands" in the second sentence of section 6(i), to which "such lands" in the third sentence of section 6(i) relates, refers to the same subject as the "mineral deposits" grant of the first sentence. Thus, all lands containing minerals are subject to the leasing requirement, regardless of when the minerals are discovered.

[13] We agree with appellants that the grant language of the first sentence of section 6(i) contains the key to understanding the scope of the leasing requirement. We do not agree, however, that the grant language was intended to convey mineral deposits in selected lands whose mineral character was unknown at the time of selection. Unknown deposits would be conveyed automatically as a part of the section 6(a) and (b) grants without the use of the section 6(i) grant language. The section 6(i) grant was necessary so that *known* mineral deposits would be conveyed. *See* notes 19–21 and accompanying text, *supra*.

This interpretation is confirmed by the Senate Report on an early statehood bill (S. 50, 83d Cong., 2d Sess., (1954)) which states:

> By the terms of previous statehood bills, and of S. 50 as introduced, the State was to have been permitted, under the land-grant provisions of those bills, to select large acreages of land, but in all previous bills, the State would have been estopped from choosing ... those lands known or even believed to be mineral in character. These severe limitations in previous statehood bills on the State's right to select were not always apparent from the bare language of those measures. Yet they existed within the legal and judicial interpretations which have

30. "Hardrock" minerals are those which were subject to location under federal mining laws as of the beginning of statehood, January 3, 1959. A.S. 38.05.185.

31. A letter authored by John Sims, Director of State Office of Mineral Development, described the proposed state leasing system which is now reflected in AS 38.05.205 as a system "which allows a miner on State land virtually all the rights and privileges of the 1872 Federal Mining Law with the express exclusion of patent right." Letter from John Sims, Director, Alaska Office of Mineral Development, to Howard J. Grey, Executive Director, Alaska Miners Association (Feb. 23, 1981).

heretofore been given as to the meanings of certain words and phrases of these previous proposed statehood bills.

If all the resources of value were withheld from the State's right of selection, such selection rights would be of little value to the new State. As a part of this new approach toward statehood, your committee has felt obligated to broaden the right of selection so as to give the State at least an opportunity to select lands containing real values, instead of millions of acres of barren tundra.

To attain this result, the State is given the right to select lands known or believed to be mineral in character (subsection k of section 5)....[32]

S.Rep. No. 1028, *supra* n. 24, at 6. The Report explains that subsection 5(k), the precursor to section 6(i), "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." *Id.* at 32.

The need for and the meaning of the grant language is also confirmed in the Slaughter Memorandum:

The bills in the 84th Congress for the admission of Alaska into the Union contain a provision which affirmatively declares that the land grants made or confirmed by those bills shall include mineral deposits, and which then proceeds to impose certain express restrictions upon the manner in which Alaska may administer any mineral lands so obtained by it....

The reasoning which prompted the adoption of the provision in question by the Senate Committee is understood to be (1) that mineral deposits must be expressly mentioned in order for mineral lands to be encompassed by a Congressional land grant to a State; and (2) that Alaska should not be accorded greater freedom in the administration of mineral lands than that accorded existing States having Congressional land grants....

With respect to those situations where, as was true of the Utah grants and the California school section grant, the law making the grant neither affirmatively included nor affirmatively excluded mineral lands, the Supreme Court has held that the failure to mention mineral lands was tantamount to an express exclusion of them from the grant....

The members of the Senate Committee on Interior and Insular Affairs who took an active part in the study of S. 50, 83d Congress, considered that, in the light of the holdings of the Supreme Court, statutory language expressly including mineral deposits within the contemplated land grants to Alaska would probably be necessary in order for these grants to encompass mineral lands.

Slaughter Memorandum, *supra* n. 25, at 1–6 (citation omitted). Thus, the grant of mineral deposits in the first sentence of section 6(i) and the term "mineral lands" as used in the second sentence of section 6(i) both relate to mineral deposits in lands of known mineral character.

Appellants cite as support for their interpretation testimony of a representative of the Alaska Miners' Association before the House Subcommittee on Territorial and Insular Affairs on March 15, 1957. The representative, Mr. Franklin, assumed that mandatory leasing applied to all lands selected under what is now section 6(a) and

32. The report of the Committee on Interior and Insular Affairs on H.R. 7999, which became the Statehood Act, in language reminiscent of the Senate Report makes the same point:

> If the resources of value are withheld from the State's right of selection, such selection rights would be of limited value to the new State. The committee members have, therefore, broadened the right of selection so as to give the State at least an opportunity to select lands containing real values instead of millions of acres of barren tundra.
>
> To attain this result, the State is given the right to select lands known or believed to be mineral in character (sec. 6(i)).

H.R.Rep. No. 624, 85th Cong., 2d Sess. (1957), *reprinted in* 1958 U.S.Code Cong. & Admin. News 2933, 2939. The Committee thus used the phrase "lands known or believed to be mineral in character" as synonymous with the "mineral deposits" language in the first sentence of section 6(i).

(b) of the Statehood Act. *See supra* n. 24. Several congressmen seemed to join in this assumption. However, the question whether all lands selected under section 6(a) and (b), or merely those lands known to be mineral in character at the time of selection, would be subject to mandatory leasing was not addressed.

Appellants also point out that S. 50, as amended by the Committee on Interior and Insular Affairs (83d Cong., 2d Sess. (1954)), and H.R. 2536 (83d Cong., 2d Sess. (1954)), which closely followed the language of S. 50, contained a final sentence which provided: "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." This language was stricken at the request of Delegate Bartlett who stated:

> That amendment is offered at the suggestion of the Governor of Alaska and the Land Commissioner of Alaska. They were somewhat 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.

Hawaii-Alaska Statehood: Hearings Before the Committee on Interior and Insular Affairs, 84th Cong., 1st Sess. 332 (1955) (statement of Delegate Bartlett) (hereafter "*Interior Committee Hearings*"). The committee chairman asked Delegate Bartlett: "It is your view, Mr. Bartlett, that language is surplusage and is not necessary?" Delegate Bartlett answered: "I do not think it is surplusage, but I will agree with the Governor and the Commissioner of Lands of Alaska, that had best be deleted." *Id.* The appellants argue that by agreeing to the deletion of this language, Congress must either have intended to utilize the traditional test of mineral lands or to define mineral lands as those containing minerals no matter when the minerals are discovered. The argument continues that since Congress was aware that considerable litigation had resulted under the enabling acts of other states as to whether lands were or were not mineral in character, Congress could not rationally have intended to employ the traditional test.

While we agree that administrative problems would be avoided if the section 6(i) limitations applied to all lands granted under section 6(a) and (b), we think it is reading too much into the deletion of the quoted language to conclude that Congress meant by the deletion to change the meaning of "mineral lands" as used in the second sentence of the section. The "determination at patent" language demonstrates that Congress intended the section 6(i) limitations to apply only to section 6(a) and (b) lands of known mineral character. If this were not so there would be no reason for the determination of mineral character at patent. There is no suggestion that Congress intended to change the meaning of "mineral lands" in the second sentence by deleting the final sentence. Both the Chairman and Delegate Bartlett referred to this amendment as "pro forma," a characterization which could not accurately be used if the amendment were intended to change the definition of mineral lands. *Interior Committee Hearings, supra* p. 341, at 331, 333.

Appellants' final point is that construing "mineral lands" to mean all lands where minerals are found would further the congressional policy of assuring that the State of Alaska not squander the resources which it was granted. While it is true that the broader definition of mineral lands advocated by appellants would extend the protection of the section 6(i) restrictions, that does not mean that those restrictions were meant to have the reach which appellants contend. The context and history of section 6(i) heretofore cited persuades us that its restrictions were intended to apply only to lands whose mineral character was known at the time of selection.[33]

CONCLUSION

We conclude that appellants have standing to maintain this declaratory judgment

33. For convenience, we have referred to the relevant event as the time of selection. Wheth-

action, that the state's mineral leasing system violates section 6(i) of the Statehood Act because it does not require the payment of rent or royalties on mining leases, and that section 6(i) applies only to those lands known to have been mineral in character at the time of state selection. Appellants' state constitutional and public trust theories depend on the meaning of the grant and restrictions of section 6(i). Since section 6(i) directly controls, we have no occasion to examine those theories further. For the above reasons, the judgment is REVERSED and this case is REMANDED with directions to enter a declaration in accordance with this opinion and for such other further proceedings as may be appropriate.[34]

Sang SUH, Appellant,

v.

PINGO CORPORATION, Employer, Pacific Marine Insurance Company, Mukluk Freight and Alaska Pacific Assurance Co./INA, Appellees.

Joseph JERKOVICH, Appellant,

v.

PINGO CORPORATION, Employer, Pacific Marine Insurance Company, Mukluk Freight and Alaska Pacific Assurance Co./INA, Appellees.

Nos. S-1247, S-1259.

Supreme Court of Alaska.

May 1, 1987.

Claimants sought declaratory judgment as to retroactive application of decision in *Grant* with respect to calculation of permanent partial disability benefits. The Superior Court, Third Judicial District, Anchorage, Milton Souter, J., entered summary judgment against the claimants, holding that decision in *Grant* applied prospectively only, and claimants appealed. The Supreme Court, Moore, J., held that: (1) decision in *Grant*, entitling a claimant with both scheduled and unscheduled injuries to separate awards of permanent partial disability provided loss-of-earning capacity resulting from scheduled disability is separated from loss-of-earning capacity resulting from unscheduled injury, applies retroactively to controverted cases in which the award issues or the payments commence on or after date of decision and also applies retroactively to all cases, whether or not controverted, in which an appeal from a compensation order was pending on the date of decision, provided the point has been argued at hearing so as to preserve it for appeal, and (2) as to claimants who received compensation for their disabilities prior to date of decision, and who did not argue point at hearing so as to preserve point on appeal, decision in *Grant* was not retroactive.

Affirmed.

Matthews, J., dissented and filed opinion in which Rabinowitz, C.J., joined.

1. Courts ⇐100(1)

Decision in *Grant*, entitling a claimant with both scheduled and unscheduled injuries to separate awards of permanent partial disability provided loss-of-earning capacity resulting from scheduled disability is separated from loss-of-earning capacity resulting from unscheduled injury, applies retroactively to controverted cases in which the award issues or the payments com-

er this is the time that the state files its selection application, or some later event such as the tentative or final approval of the selection, is not an issue in this case or on which we express an opinion. Further, we observe that there is room for debate concerning how much must be known about the mineral character of selected lands to qualify them as mineral lands. We also intimate no view on this question as it is not before us.

34. The intervenors raise several other points in defense of the judgment below. We have examined each of them and find that they lack merit.

ATTACHMENT B
"Court Decision May Hold Serious Consequences
for Placer Mining"

LAWYER'S POINT OF VIEW

By RICK JOHANNSEN

Court decision may hold serious consequences for placer mining

The Alaska Supreme Court recently issued a decision (Trustees for Alaska v. State) that has serious consequences for placer mining on lands owned by the state.

In litigation that has been pending since 1983, a coalition of environmental, Native and fishing [illegible] challenged the state's [illegible] system. [illegible] erals located on state lands [illegible] leasing system violates the Alaska Statehood Act because it does not require the payment of rent or royalties to the state by those who mine hardrock minerals [illegible]

[illegible] lands. The performance of labor [illegible] fee of rent was held to be valid [illegible] The court's decision [illegible] working on state [illegible] lands [illegible] pay rent or royalty [illegible] claim was staked under the location system [illegible] Finally, the [illegible] consist of all state lands which were [illegible] at the time the lands were [illegible] by the state. This decision [illegible]

[illegible] ticular mining claims or locations are not on "mineral lands."

Although the state's overall mining system is of [illegible] significance, the state's conclusion as to whether or not rent or royalty must be paid on a particular claim or location may not be significant enough to allow a court challenge.

If a mining claim or location is on "mineral lands," the court has ruled that some rent and/or royalty must be paid to the state. The court gives little guidance, however, as to how much rent or royalty will be legally sufficient.

In addition, [illegible] whether rents and royalties must be paid retroactively and whether payments must commence upon discovery and [illegible] or only upon commercial production.

The court's decision also opens up the possibility of [illegible] the state's hardrock mining laws to allow the [illegible] of mining [illegible] or to allow the [illegible] of minerals on state land as long as that land was not known to be mineral in character at the time of state "selection."

In addition, although the state has traditionally retained ownership of minerals when state land is conveyed to municipalities, the court's decision means that municipalities may currently have a right to receive minerals with municipal land grants as long as the land selected by the municipality is not "mineral land."

This recent Alaska Supreme Court decision raises more questions than it answers, and statutory and regulatory changes will be necessary to deal with these uncertainties. Unfortunately, the court's decision creates so many difficult questions that additional litigation may not be avoidable even after appropriate statutory and regulatory changes have been made.

[illegible]

Page 6, Alaska Journal of Commerce & Pacific Rim Report; Week of July 20, 1987.

ATTACHMENT C

Report on Selected Mining Leasing Systems In the United States and Canada

Department of Natural Resources

January 1981

REPORT ON SELECTED MINING LEASE SYSTEMS IN THE UNITED STATES AND CANADA

Prepared by:

Division of Research and Development
Department of Natural Resources
State of Alaska
323 East 4th Avenue
Anchorage, Alaska 99501

January 1981

ACKNOWLEDGEMENT

The Alaska Department of Natural Resources gratefully acknowledges the assistance of land administrators in the western states and Canada, without which this report would not have been possible.

ABSTRACT

The State of Alaska is in the process of developing a leasing system for hardrock minerals on the 104 million acres of uplands it owns. (A leasing system is already in effect for Alaska's tidelands and submerged lands.) As part of that process, the Alaska Department of Natural Resources, Division of Research and Development, conducted the following study of mineral leasing alternatives used by other public land owners. Mineral leasing in sixteen western states and four Canadian provinces, as well as on federal acquired lands and Alaska's own submerged lands, is described.

Three basic types of leasing systems are in use: mining location with subsequent conversion to lease, noncompetitive leasing through preference-right conversion of prospecting permits, and direct leasing through an application process or competitive bidding. Three states and three provinces use location as a first step in leasing. In those three states, miners are permitted to stake claims with the right to hold them from 60 days to two years before converting to a lease agreement. In one province miners must convert their claims to leases within ten years; in the other two they may hold their claims indefinitely and may produce limited amounts of minerals without a lease. In nine states and two provinces, as well as on federal acquired lands and Alaska's submerged lands, miners apply for prospecting permits as a first step to leasing. On state lands and federal acquired lands, prospecting permits are for terms ranging from six months to ten years. In Alberta and the Northwest Territories, the terms are three to five years. Six states allow miners to apply directly for a lease without a prior claim or prospecting permit. In 12 states and on federal acquired lands, a competitive lease sale may also be held.

In the western states, lease terms range from three to 99 years with the most common duration being 10 to 20 years. The Canadian lease terms are 21 years.

Lease royalty rates are individually negotiated in some states; in other states and in Alberta, they range from four percent of net production to 25 percent of the gross, with the most set at five to ten percent. Three Canadian provinces collect lease royalties as a tax on profits, and all but four states impose at least one special tax on the mining industry.

The following pages contain a brief definition of common lease elements: mining location, prospecting permits, competitve leasing, noncompetitive leasing, term, filing fees, rental rates, royalty rates, bonuses, and bonding. Following the definitions is a summary of selected mineral leasing systems and a comparative chart of mineral lease activity.

COMMON LEASE ELEMENTS AND TERMS

MINING LOCATION

Under a mining location system a miner is allowed to locate a claim on state-owned lands when a mineral deposit is found. The miner stakes the corners of his claim, which typically does not exceed 40 acres, and records the location. The process is similar to that under the 1872 Mining Law. Under the state systems, however, such claim staking is preliminary to a lease agreement and never leads to a patent.

PROSPECTING PERMITS

A prospecting permit is issued prior to lease. It generally allows exclusive right to explore a specified tract of land and, in the event valuable minerals are discovered, gives the prospector the right to lease.

COMPETITIVE LEASING

Competitive lease awards are generally made to the bidder submitting the highest bid by means of sealed or oral bid at a public sale. Lands subject to competitive leasing may be categorized as such for a number of reasons: 1) competitive interest; 2) physical or geologic evidence indicating potential for production; 3) actual production in the vicinity; and 4) classification as "competitive" for some reason other than potential for production.

NONCOMPETITIVE LEASING

Lands not classified for competitive leasing are leased through a noncompetitive system. There are several methods by which such sales are made: 1) mining location and subsequent conversion to a lease, 2) prospecting permit with a preference right to lease, 3) a simultaneous open filing period after which a lottery is held in case of multiple applications for the same area, and 4) over-the-counter on a first-come, first-served basis.

DURATION OF LEASE

Most leases have ten to twenty year primary terms. However, if commercial production is obtained during the primary term, the term of the lease will extend as long thereafter as commercial production continues.

FILING FEES

Filing fees are a charge intended to cover part of the administrative costs in connection with processing a mineral lease.

RENTAL RATES

Leases generally require an annual rental payable in advance. The rental rate is assessed at a specific amount per acre per year. Some states require an escalating rental.

ROYALTY RATES

The mineral royalty is a percentage of the value of minerals produced from a mine to be paid to the lessor by the lessee. Royalty schedules vary considerably. Depending on the commodity and the state, royalties may be assessed in one of the following ways: 1) on the basis of volume of minerals mined and removed from the leased premise, 2) on the basis of weight of minerals mined and removed, and 3) as a percentage of the gross or net value of the minerals produced from the leased premises.

BONUS

A bonus is a cash payment, in addition to rental and royalty, made by the successful bidder for a mineral lease.

BONDING

The agencies administering mineral rights generally require a miner to post a bond commensurate with the amount it might take to reclaim the surface and restore improvements in the event of default by the lessee or permittee.

SPECIFIC REQUIREMENTS OF SELECTED MINERAL LEASE SYSTEMS

Although all mineral leasing systems studied follow traditional competitive or noncompetitive patterns and show obvious similarities, there is considerable variation in the details of each system. Following are specific leasing requirements for Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming, Alaska's submerged lands, federal acquired lands, Alberta, British Columbia, Northwest Territories, and Yukon Territory. This information is current as of January 1981 and was acquired by telephone interview and literature survey during December 1980 and January 1981. For more details on specific mineral disposal systems, please contact the appropriate governing agency.

ARIZONA

Arizona has 10 million acres of subsurface holdings which are administered by the State Land Department. There is a little-used provision for locating claims by staking up to twenty acres, posting, and recording notice. To hold the claim one must perform validation work. The locator must provide proof of a valuable mineral discovery and convert the claim or claims to lease within 90 days.

There is also a little-used provision for competitive lease sales. More often miners acquire mineral rights by a prospecting permit which is granted to the first qualified applicant. A prospecting permit is for not more than 640 acres and the duration is five years with no renewal. However, a permittee can reapply for a new permit. A rental of $2 per acre is charged for the first two-year term and $1 per acre per year for years three through five. A bond of at least $1,000 for less than 160-acre holdings and $2,000 for more than 160-acre holdings required for each permittee.A work obligation of at least $10 per acre per year during each of the first two years and $20 per acre per year during each of the last three years is required. Upon proof of valuable discovery, the permit can be converted to a lease, which is for a renewable term of 20 years. The rental is $15 per 20 acres per year, plus a royalty charge of 5% of the net. A plan of operations is required and upon suspension of work the lease may be revoked. A lease bond as well as reclamation may be required.

Arizona uses an ad valorem property tax for the mineral industry; it has no severance or production taxes. Mines, smelters, railroads, mills, and lumber are assessed at 60% of market value. A special tax on the mineral industry was enacted in 1967. A tax of 1.5% of gross proceeds or gross income was levied on every person in the state in the business of mining, smeltering, quarrying, or producing for sale or commercial use any oil, natural gas, limestone, sand, gravel, copper, gold, silver, or other mineral product, compound, or combination of mineral products. Arizona also levies a mining privilege tax at the rate of 1% of the gross receipts.

In 1980 Arizona had a total of 664 leases covering 29,698 acres. There were few claims held, but the low number is probably because claims must be converted to leases within 90 days. However, there were 502 prospecting permits issued covering 174,000 acres. In 1980 the state received $191,500 in rentals and, because 25 of the leases are producing, received $9,061,000 in royalties. Most of the royalty monies come from four large copper mines. Arizona state lands support more mining than those of any other state researched.

CALIFORNIA

California has four million acres of subsurface holdings which are administered by the State Land Department. The method for acquiring mineral rights to those lands is by prospecting permit and lease. If the area is known to be mineralized the area is disposed of by competitive lease. Otherwise, a prospecting permit is granted to the first qualified applicant. The size limitation is 640 acres and the duration is two years with a single extension allowed. A rental of $1 per acre per year is charged. A negotiated performance bond may also be required. There is also a work obligation which requires the miner to begin work within six months and to work at least 160 person/days in the first year and 320 person/days in the second year. Upon proof of a valuable mineral discovery the permit can be converted to a lease which is for a term of 20

years, with a possible extension not to exceed 10 years. However, automatic extension will be granted upon production. The rental fee is a minimum of $1 per acre per year with a negotiated royalty of not less than 10% of the gross. Negotiated reclamation requirements and lease bonds may be required. Leasing of submerged lands is handled in a similar manner, except that there is an acreage limitation of 160 acres and all such leases must be submitted to and approved by the attorney general of California.

An ad valorem tax of 1% of market value or 4% of assessed value is charged on all mines in California. This is the sole mining tax. However, changing to a severance tax system is under consideration.

By the end of 1980 California had issued a total of three leases covering 20,000 acres and five permits. Approximately $20,000 was collected in 1980 from rentals. With one operating mine, $230,000 was collected in royalties. There is little mining activity on California state lands.

COLORADO

Colorado has four million acres of subsurface lands which are administered by the State Board of Land Commissioners. Colorado has a seldom-used provision for locating claims by posting notice, notifying the state, and obtaining a lease within 60 days. The claim size is not fixed, but is generally 640 acres. The typical method of acquiring mineral rights is by competitive leases affecting quarter-quarter sections or multiples thereof as determined by the Board. Mining leases are for a term of 10 years and are renewable. The rental is $1 per acre per year for years one through five, $6 per acre for year six, $7 per acre for year seven, $8 per acre for year eight, $9 per acre for year nine, and $10 per acre for year ten. There is a sliding scale royalty of 4% of gross on less than $50 per ton, 6% gross on $50 to $100 per ton, 8% gross on $100 to $150 per ton, and 10% gross on anything valued at more than $150 per ton. There is no work obligation. However, diligence is required in order to renew the lease agreement. Both a plan of operations and reclamation are stipulations of the lease.

Colorado has a severance tax of 2.25% of gross on all mineral incomes greater than $11 million. There is also an ad valorem tax of 25% of gross proceeds.

Colorado has 286,312 acres under lease and issues approximately two to three new leases per month. There are approximately 40 active mines bringing in $213,831 in royalties in 1980. Colorado has also collected $236,040 in rentals and $242,525 in bonuses. Of the bonus monies $200,000 was for uranium. Recent activity on Colorado state lands has been due to an increased interest in uranium.

IDAHO

Idaho has 3.6 million acres of subsurface holdings which are administered by the Board of Land Commissioners. Idaho has a provision for locating 20-acre mining claims by discovery, monumenting the corners, posting notice, and recording them with the County and State. Assessment work and recording proof of labor are also required. The claims must be converted to a lease after two years. Competitive lease sales are also held. Lease sizes are up to 640 acres and are for a duration of ten years. Renewals are allowed. Lease rental is $1 per acre per year with a minimum of $160. The rental can be credited against the royalty. Royalty is negotiated on an individual basis. The only work obligation is that the miner begin work within ten years. A plan of operations is required but there is no penalty for suspension of work. Reclamation is required and a lease bond of $5,000 per lease or $50,000 statewide must be posted. Idaho imposes a mining license tax of 1% of the net value of ore mined.

Recent mining activity on state lands has been limited to small operations. By the end of 1980 Idaho had issued 230 mineral leases and miners had staked 723 claims. The period 1979-1980 saw a sudden increase in the number of claims staked. This is probably due to the increase in silver and gold prices. Idaho received $60,000 in rentals in 1980. There are five small mines just beginning production and during 1980 Idaho received royalties from one, totaling $2,500. Mining on Idaho state lands is active but limited to small operators.

MONTANA

Montana has 6.2 million acres of subsurface holdings which are administered by the Board of Land Commissioners. There is no provision for claim staking or prospecting permits. Most expioration rights are acquired by a lease which may be issued to the first qualified applicant. The lease size is 640 acres and the duration is 10 years. Leases can be renewed. The rental fee is $1 per acre per year and the royalty is 5% of the gross proceeds or 10% of the net return, whichever is greater. Although a plan of operations is not required, there is a reclamation requirement. A lease bond of $1,000 per lease must be posted.

Montana places three special taxes on the mining industry. There is a special tax amounting to $25 plus 5% of the gross proceeds in excess of $5,000, a license tax equaling $1 plus a gross production levy, and an ad valorem tax of 3% of gross proceeds.

Montana has issued 44 leases, 16 of them in the last year. However, in April of 1980 a freeze was put on the issuance of leases. Lease applications are pending while new regulations are being written. The 1980 revenues, however, came to $17,550 in rentals and, with one producing mine, $1,005 in royalties.

NEBRASKA

Nebraska has 3.5 million acres of subsurface land which is administered by the Board of Education Land and Funds. Nebraska does not have provisions for either staking of claims or prospecting permits, but leases for three years are obtained by submitting an application, and then participating in oral bidding at a public auction which is held after advertising the sale. Rental is a minimum of 50 cents per acre per year, and the royalty is 5%-25% of the gross depending on the specific mineral. There is no lease work obligation. However, a reclamation requirement is negotiated. A bond of $1,000 per lease must be posted. Nebraska does not levy any special taxes on the mineral industry. Nebraska has issued no leases for minerals on state lands.

NEVADA

Nevada has .13 million acres of subsurface land which is administered by the State Division of Lands. Like Nebraska, Nevada does not have provisions for either claim staking or prospecting permits. Instead, one must go directly into a lease agreement. Competitive lease sales may be held. Almost all of the terms of the lease are negotiated; the size, duration, work obligation, royalty, and lease bond. A lease rental is set at $1 per acre per year and reclamation will be required. Nevada places two taxes on the mining industry: a net proceeds tax and an equipment improvement tax. There have been no leases issued.

NEW MEXICO

New Mexico has 13.3 million acres of subsurface lands which are administered by the Commissioner of Public Lands. New Mexico has no provision for claim staking or prospecting permits. Exploration rights are acquired by lease and the Commissioner reserves the right to issue the lease to the party offering the highest bonus bid by oral or sealed bids at an advertised sale. Most leases are issued competitively. Noncompetitively, the size of the lease is negotiated and is often restricted by the parcel size of the trust lands under consideration. The duration of the lease is fifteen years with no renewal except by production. The rental fee is 5 cents per acre per year for years one through three, 50 cents per acre per year for years four through five, and $1.50 per acre per year from year six until discovery or year ten, whichever is first. After discovery the rental is $3.00 per acre per year. If the lessee fails to make a discovery during the first ten years of the lease, he will pay $10 per acre per year rental plus an advanced royalty computed as follows: for the 11th year $10 per acre, for the 12th year $20 per acre, for the 13th year $30 per acre, for the 14th year $40 per acre, and for the 15th year $50 per acre. These fees are credited against the base royalty. The royalty charged is set at the time of lease sale. No plan of operations is required and there are no reclamation requirements. There are three taxes placed on the mining industry in New Mexico. They are a severance tax on gross proceeds, a resource excise tax, and an ad valorem tax.

New Mexico has issued 2,000 leases by competitive bid. There have been no lease sales since April of 1980. The state land commissioner is assessing the mineral potential of state lands. During 1978-1979, however, $453,147 was collected in bonus bids, $749,000 in rentals, and $141,000 in royalties from two uranium-producing leases.

NORTH DAKOTA

North Dakota has 2.6 million acres of subsurface lands which are administered by the Board of University and School Lands. There are no provisions for staking claims and although the Board regulations provide for a one-year prospecting permit on a maximum of 640 acres, this method is very seldom used because conversion of a permit to a lease is not assured. The prospecting permit, however, does have a one-year renewal and costs $10 per permit plus $25 per drill hole. A permit work obligation and bond may be required. The lease agreement is obtained competitively and provides for a maximum lease size of 640 acres and a duration of 10 years. The lease may be renewed. The lease rental is $1 per acre per year with no set royalty. There is a reclamation requirement and there may be a negotiated work obligation. However, there is no need to post a lease bond. There are also no special taxes on the mining industry in North Dakota. There have been no prospecting permits or leases issued.

OKLAHOMA

Oklahoma has 1.5 million acres of subsurface holdings which are administered by the Commissioner of Lands. Oklahoma has no provisions for the staking of claims. One must obtain a prospecting permit which carries with it a preference right to a lease if the prospector choses to match the highest bid at a lease sale. The prospecting permit is for a duration of six months with six-month extensions. The rental fee is $1 per acre per year and a permit bond of $12,500 per permit is required. Both the prospecting permit and the lease have no limit to the amount of acreage allowed. The lease duration is for five years and the lease is only renewable upon production. The rental fee is $1 per acre per year and the royalty is 7% of the net proceeds. A plan of operations is not required but there is a reclamation requirement. A lease bond of $12,500 must be posted. Oklahoma places one mining tax on the mining industry, a severance tax of .75% of the gross proceeds. Oklahoma has issued no prospecting permits or leases on state lands.

OREGON

Oregon has 3 million acres of subsurface holdings which are administered by the Division of State Lands. It has no provisions for the staking of claims and requires a prospecting permit as a first step toward leasing. However, the prospecting permit has no preferential right to lease. There is no limit to the acreage allowed under one permit but the duration is for three years and the lease may be renewed if diligence is shown. The permit fees are 50 cents per acre per year for years one through three and $5 per acre per year thereafter. There is no permit work obligation except for renewal. A permit bond is required and is usually $1,000 per permit. The lease size is 640 acres and can be held for 10 years with extensions up to 50 years. After that time the lease can only be held by production. The lease rental is $1 per acre per year and the royalty is 5% of the gross at the mine mouth. There is also a work obligation of $1 per acre for the first year, $2 per acre for the second year, and $3 per acre for the third year. If work is suspended for more than 30 days without notifying the Division of State Lands, the miner may lose his lease. A lease bond is required and the amount is negotiable. Reclamation will also be required. Oregon places no special taxes on the mining industry. Oregon has issued no leases. However, 18 prospecting permits have been issued, 11 of them in the last year. Rentals collected in 1980 equaled $23.392.

SOUTH DAKOTA

South Dakota has 5.2 million acres of subsurface lands which are administered by the Commissioner of School and Public Lands. The state has no provisions for claim staking but does issue prospecting permits covering a maximum of 640 acres, for a term of one year with a provision for two extensions and a rental of 50 cents per acre per year. A tentative schedule of exploration must be submitted but a permit bond is not required. After having been issued a prospecting permit, a miner can obtain a lease for a period of five

years. The lease can be extended through diligence. The rental is $1 per acre per year and the royalty is negotiated as a percent of the gross. There is a lease work obligation and a reclamation requirement. A lease bond must be posted but the amount is negotiated. South Dakota has a mineral license tax of 4% of the net profits greater than $100,000. There have been no leases issued but there are 70,000 acres held under permit for uranium prospecting.

TEXAS

Texas has seven million acres of subsurface holdings which are administered by the Office of Land Resources. Texas has no provisions for claim staking but does provide for competitive leasing and prospecting permits as an optional first step to leasing. The maximum size of prospecting permits is 704 acres but the size generally used is 640 acres. The permit duration is for one year and the lease allows a four-year extension. The rental fee is 50 cents per acre per year. Quarterly reports of diligence must be filed. There is no permit bond required. The lease size can be no larger than that of the permit. Its duration is for five years and it can only be extended through production. The lease rental fee is negotiated but is usually $1 per acre per year and the royalty is 6.25% of the gross. There is no work obligation except reasonable development. A plan of operations is required as well as general reclamation. There is no lease bond. Texas has no special taxes on the mining industry.

UTAH

Utah has four million acres of subsurface holdings which are administered by the State Land Board. The state does not have provisions for the staking of claims or obtaining prospecting permits but leases are issued to the first qualified applicant unless the lands are recently acquired by the state or a previous lease has been terminated, in which case sealed bids are received at an advertised sale. Leases can include a maximum of 2,560 acres and are issued for a term of ten years, renewable only by production. There is a rental of $1 per acre per year. The royalty amount depends on the specific mineral but is usually 4% of the gross value. There is no work obligation although a plan of operations may be required. There are reclamation requirements and a miner must post a bond of $20,000 to $25,000 any time the surface is disturbed. Utah places two taxes on the mining industry: a severance tax which equals 2% of the gross proceeds and a mining occupation tax which equals 1% of the gross in excess of $50,000.

There are currently 342,890 acres under lease with 15,854 acres under production. Bonuses and rentals in 1979-80 totalled $239,000 and royalties equalled $344,171. However, there has not been much recent exploration on state lands.

WASHINGTON

Washington has 4.2 million acres of subsurface holdings which are administered by the Department of Natural Resources, Division of Lands. The state has no provisions for claim staking but does issue prospecting permits as a first step to leasing. The permits vary in size from 40 to 640 acres. The duration of a permit is two years and the permit can be renewed for a second two-year term. However, the second term is deducted from the twenty-year lease. The permit rental is 25 cents per acre per year for the first two years, 50 cents per acre per year for the third and fourth years. There is a work obligation of $1.25 per acre per year for the first four years and $2.50 per acre per year thereafter. Although a plan of operations is not required, reclamation is mandatory. A lease bond of $500 per lease must be posted and the royalty charged is 4% of the net smelter return. The state of Washington also imposes a business and occupation tax which is .44% of the gross income. A leasehold tax is also charged.

Washington has issued 300 prospecting permits and 200 leases. There are three active mines which each return approximately $1,000 to the state annually. In 1980 the state also collected $97,000 in rentals. Leases are often assigned to other parties and little new exploration or development is going on.

WYOMING

Wyoming has 4.2 million acres of subsurface holdings which are administered by the Board of Land Commissioners. There are no provisions for the staking of claims or the issuance of prospecting permits. Exploration rights are issued through leases of up to 1,280 acres. They are awarded to the first qualified applicant for a term of ten years, with a rental of 50 cents per acre per year through year five or discovery, whichever is first. After discovery or five years, the rental is $1 per acre per year, and a minimum of 5% of the gross proceeds is charged. A bond of $5,000 per lease must be posted as well. Wyoming also levies a mining excise tax of 2% of the gross proceeds.

Wyoming has issued 2,354 uranium leases; 17 gold, silver, and copper leases; 3 iron leases; and 8 jade leases. Wyoming is revising its regulations and so there has been a moratorium on leasing since February 1980. There are 30 to 40 applications pending.

ALASKA: TIDE AND SUBMERGED LANDS

Alaska has 60 to 70 million acres of tidelands and submerged lands. Claim staking is not allowed on these lands. However, the state does allow for competitive lease sales and will issue prospecting permits as a first step towards leasing. A prospecting permit is awarded for 10 years and may be renewed. Its size is 2,560 acres. Neither a work obligation nor a permit bond is required. The permit rental fee is 50 cents per acre per year for the first two years and $1 per acre per year thereafter. The maximum lease size is the same as that of the prospecting permit: 2,560 acres and the lease duration is for up to 55 years and is renewable. The rental is $1 per acre per year and no royalty is charged. Work expenses can be credited against the rental fees. A lease work obligation and a plan of operations may be required. However, there is no reclamation requirement. Alaska levies a 7% mining license tax on net proceeds after the first $100,000.

Alaska has issued eight leases and 74 prospecting permits. However, because changes are being considered at the present leasing system, action on submerged lands has been frozen since 1975. There are 33 prospecting permits pending conversion to lease and 348 prospecting permits pending authorization. During 1980 approximately $9,200 was received in rentals.

FEDERAL GOVERNMENT ACQUIRED LANDS

Under special circumstances such as purchase, condemnation, or donation, Federal agencies may acquire title to lands from a private owner. The federal government has 52 million acres of acquired lands. Claim staking is not allowed on these lands. However, the federal government does issue prospecting permits and leases. A prospecting permit is awarded for a size of 2,560 acres and for a duration of two years with one extension. There is no work obligation. A bond for a minimum of $10,000 must be posted for each permit. The rental fee is $20 for each permit plus 25 cents per acre per year. Leases may be issued competitively. Their size is the same as the permit size and they are issued for 20 years with extensions of successive 10-year periods. The rental fee is $1 per acre per year with a $20 minimun. A lease work obligation as well as a plan of operations is required. There is a reclamation requirement as well as a bond requirement of a minimum of $5,000 per lease. The royalty payments are negotiated.

ALBERTA

Alberta has 130 million acres of subsurface holdings which are administered by the Department of Energy and Natural Resources. Claim staking is not allowed. However, prospecting permits and leases are issued. A prospecting permit covers an area of 50,000 acres and lasts for three years. Its renewal is subject to fulfilling a plan of exploration. The rental is $125 for each 10,000 acres and a permit bond of $1,000 for each 10,000 acres must be posted. Lease size is unrestricted. The lease expires after 21 years but is renewable. For years one through five the rental is 26 cents per acre per year and $1 per acre per year for the balance of the term. There is no work obligation, reclamation requirement, or bond requirement. There is no royalty but there is a 12½% tax on gross income.

BRITISH COLUMBIA

British Columbia has 224 million acres of land. Claim staking is allowed and limited production is permitted on a claim. There is no time constraint for how long one may hold a claim. Each claim is 51.65 acres. Claims may be combined and converted to a lease as large as 2,066 acres. The lease extends for 21 years and may be renewed. The rental is $50, plus the costs of publishing notice, surveying, and a $20 recording fee. There is a work obligation of $400 per lease per year. A plan of operations and reclamation is required, although no bond need be posted. There is provision in the law for royalties; however, only taxation is being used as a method of acquiring revenue. The tax is 17% on profits. British Columbia has 55,252 quartz claims and 3,007 placer claims, 970 quartz leases and 3,640 placer leases. In 1980 British Columbia received $94,176 Canadian in rentals and $651,860 Canadian for cash in lieu of work obligation.

NORTHWEST TERRITORIES

The Northwest Territories have 162 million acres which are administered by the Department of Indian and Northern Affairs. Claim staking is permitted. Prospecting permits and leases are issued as well. A claim is for 2,500 acres and must be converted to a lease within 10 years. A prospecting permit is for 45,000 acres. If the permit area is north of 68° latitide, the permit is issued for five years because of the short field season. However, if the permit area is south of that latitude the permit expires in three years. There is no permit renewal. The rental fee is 10 cents per acre for the first year, 20 cents per acre for the second, and 40 cents per acre for the third. After the third year there is no rental fee but a $25 permit fee is charged and there is a work obligation of $4,500 per year. The lease size is slightly larger: 2,582.5 acres. Its duration extends for 21 years with provision for extension. The rental is $1 per acre per year for the first 21-year term and $2 per acre per year thereafter. There is no lease work obligation, plan of operations requirement, or lease bond. Rental fees, however, can be credited to the royalty. The royalty structure is the same as that of the Yukon Territory. The Northwest Territories have 850 leases, 200 prospecting permits and 54,859 claims on its lands. In 1978-79 the Northwest Territories collected $182,523 Canadian in lease rentals, $605,641 Canadian in fees, and $1,467,276 Canadian in royalties.

YUKON TERRITORY

The Yukon Territory has 131 million acres which are administered by Department of Indian and Northern Affairs. Claim staking is allowed and production is permitted on a claim. The claim size is 51.65 acres. There is no time limit on how long one may hold a claim but a lease option is available. The lease size is the same as that of the claim, 51.65 acres. The lease is for 21 years and may be renewed. The rental fees are 4 cents per acre per year with no lease work obligation, plan of operations requirement, or reclamation requirement. There is no royalty. However, there is a tax on profits above $10,000.The rate is 3% on profits of $10,000 to $1 million, 5% on profits of $1 million to $5 million, and 6% on profits of $5 million to $10 million. Above $10 million the tax rate is increased by 1% per million up to 12%.

The Yukon recorded 45,213 quartz claims and 2,181 placer claims in 1980. In 1979-80 $889,837 Canadian was received for fees, $21,420 Canadian for rentals, and $461,769 Canadian for royalties.

A COMPARATIVE CHART OF MINERAL LEASE ACTIVITY

STATE OR PROVINCE	TOTAL # LEASES (last year reported)	TOTAL # PROSPECTING PERMITS OR CLAIMS (last year reported)	TOTAL # PRODUCING LEASES	RENTALS	ROYALTIES BONUSES	TOTAL # OF MILLION ACRES OF FEDERAL ACQUIRED LANDS	FEDERAL ACQUIRED LANDS, MINERALS OTHER THAN OIL AND GAS AS OF 9/78 # OF LEASES	FEDERAL ACQUIRED LANDS, MINERALS OTHER THAN OIL AND GAS AS OF 9/78 # OF ACRES LEASED
ARIZONA	664(20)	502 prospecting permits, very few claims	25	$191,500	$9,061,000 in royalties	.4	0	0
CALIFORNIA	3(2)	5(2) prospecting permits	1	$20,000	$230,000 in royalties	3.4	4	819
COLORADO	286,312 acres # leases not available		40	$236,040	$213,831 in royalties, $242,525 in bonuses	2.2	34	36,889
IDAHO	230(50)	723 claims	5	$60,000	$2,500 in royalties	.8	3	560
MONTANA (moratorium since 4/80)	44(16)		1	$17,550	$1,005 in royalties	2.4	5	8,698
NEBRASKA	0		0	0	0	.5	0	0
NEVADA	0		0	0	0	.2	0	0
NEW MEXICO (moratorium-no sales since 4/80)	2,000		2	$749,000	$141,000 in royalties, $453,147 in bonuses	1.7	2	608
NORTH DAKOTA	0	0	0	0	0	2.2	17	25,595
OKLAHOMA	0	0	0	0	0	1.4	0	0

OREGON	0	18(11) prospecting permits	0	$23,392	0	1.4	0	0
SOUTH DAKOTA	0	70,000 acres prospecting permits	0	$35,000	0	1.9	0	0
TEXAS	0	50 prospecting permits	0	$16,000	0	3.5	0	0
UTAH	342,889 acres		15,854 acres	$239,000 in bonuses and rentals	$344,171	.6	0	0
WASHINGTON	200	300	3	$97,000	$3,000	1.8	0	0
WYOMING	2,354 uranium 17 gold, silver, copper 3 iron, 8 jade		0	not available	0	.7	6	3,120
ALBERTA	27(15) quartz leases	34(21) quartz prospecting permits	0	no available	0			
BRITISH COLUMBIA	9[illegible] quartz leases, 3,640 placer leases	55,252 quartz claims, 3,007 placer claims	not available	$94,176 rentals, $651,860 cash in lieu	not available			
NORTHWEST TERRITORIES	850	54,859 claims, 200 prospecting permits	8	$182,523 in rentals, $605,641 in fees	$1,647,276			
YUKON TERRITORY	0	45,213 quartz, 2,181 placer claims	not available	$21,420 in rentals, $889,837 in fees	$461,769 in royalties under the Quartz Mining Act			

ATTACHMENT D
"Annual Placer Mining Application Land Use and
Water Use Permits and Mining Leases"
"Factsheet: Annual Placer Mining Application
Permitting Process" and
Affidavit of Annual Labor"

Affidavit of Annual Labor

United States of America
STATE of Alaska } ss.

.....being first duly sworn on his oath
Print name of person who did the work

deposes and says:

1. I am well acquainted with.....claim(s) known as.....
Placer or lode Name of claim

on....., a tributary to.....In the.....
Name of stream, mountain, etc.

Mining District and.....Recording Precinct, Alaska, and I know that

.....is the owner of said claim(s). The claim(s) lies
Print name of claim owner

.....
Describe location of claim with reference to a well known or easily found landmark or land survey

.....

.....

2. That I performed.....days of work and labor.....said claim doing
Upon or for

.....
Describe actual work accomplished, amounts dealt, and time spent on each item.

.....

.....

.....; such work and labor is reasonably worth

the sum of $.....; and the work was done at.....
Actual location of work on or with reference to claim

3. Said work and labor was performed by me between the.....day of

....., 19....., and.....day of....., 19....., or upon the following days.....

4. Said work and labor was performed by me at the instance and request of said

....., owner of said claim, who did actually pay me

the sum of $..... for said work and labor.

5. Said work and labor was done for and as assessment work for the benefit of said claim for the assessment year ending at noon on the first day of....., 19.....

.....
Signature of person who did the work

Subscribed and sworn to before me this.....day of....., 19.....

.....
Notary Public in and for Alaska.

(Notarial Seal)

My commission expires.....

Note: The affidavit may be sworn to before the local postmaster.

20-93
sed 9/83)
16-64

AFFIDAVIT OF ANNUAL LABOR
FOR STATE MINING CLAIMS OR ROYALTY IN LIEU OF RENTAL FOR LEASEHOLD LOCATIONS

Please type or print

Please read instructions on reverse before completing this form.

id States of America)
) ss:
e of Alaska)

This affidavit of annual labor is for the assessment year (for claims) or rental year (for leasehold locations) which ended at noon on September 1, 19____.

NAMES OF CLAIMS OR LEASEHOLD LOCATIONS	ADL NUMBERS

(Attach additional sheet if more space is needed.)

These claims or leasehold locations are located in the following Meridian(s), Township(s), Range(s) and Section(s): _____

NAME(S) OF CURRENT OWNER(S)	CURRENT MAILING ADDRESS(ES)

Excess work in the amount of $_____ is to be applied from previous years.

If only excess work is being claimed this year, do not fill in lines 6 through 11.

Work was performed on the following dates: _____

The number of person-days worked was: _____

The work performed and improvements made are described as follows: _____

The value of the above-described work excluding the value of claim maintenance is: $_____

NAME(S) OF THE PERSON(S) WHO DID THE WORK	CURRENT MAILING ADDRESS(ES)

If the labor was done by other than the owner or the owner's lessee, the amount paid for the work and improvements made was $_____, and _____ made the (Name) payment.

I, _____, swear under penalty of perjury that the foregoing is true.
(Print name here.)

X _____
(Sign name here.)

Subscribed and sworn to before me this _____.
(Date)

Signature of Notary: _____

My commission expires: _____

Recorder's Office Use On

. This affidavit may be used to meet the State of Alaska's statutory and regulatory equirements for recording annual labor on state mining claims or work instead of rental on tate leasehold locations. Leasehold locators are required to pay an annual rental, but may se labor as credit against the rental. The annual labor for claims and the annual rental or leasehold locations is a minimum of $200.00 per claim or leasehold location each ssessment year. If you have questions about your mining claim or leasehold location, ontact the Division of Minerals and Energy Management (DMEM) at 276-2653 in Anchorage, 79-2243 in Fairbanks, or Pouch 7-034, Anchorage, AK 99510.

. Throughout the instructions, we will use "claim" to refer to both mining claims and easehold locations.

. This affidavit may be filled out by the owner of a claim or by some other person having nowledge of the facts.

. This affidavit must be recorded in the recording district where your claim is located ithin 90 days after the end of the assessment year. Usually the last day to record is ovember 30. Failure to timely and properly record results in the abandonment of your clai

. The first assessment or rental year begins at noon on the September 1 after the date th otice of location was posted and ends at noon on the September 1 of the following year. or example, if you located your claim on August 30, 1980, your first assessment year began eptember 1, 1980 and ended September 1, 1981. If you located your claim September 2, 1980 our first assessment year began September 1, 1981 and ended September 1, 1982.

. Alaska statutes allow miners on state claims to carry over the value of excess work up o a maximum of $800 per claim. You must, however, file an affidavit of annual labor each ear. You may combine excess work from previous years with work from this assessment year.

. Claim maintenance (brushing lines and reposting) is considered a duty that Alaska tatute 38.05.265 imposes on the claimant in addition to the annual labor requirement. herefore, maintenance work is not acceptable as annual labor. If your affidavit lists wor equired to maintain the claim in good standing, be sure to indicate that it is not include n the declared value of your annual labor.

. You may use one affidavit of annual labor for a group of claims.

. For information about mineral locations under federal mining law, please contact the ureau of Land Management.

INSTRUCTIONS

ne numbers listed below match the numbers on the affidavit.

. Fill in the year for which you are claiming annual labor.

List all claims by name and ADL number. You need not list each individual claim; grou claims whenever possible (for example, Gold Rush 1-10, ADL 390000 - 390009).

. List the meridian(s), township(s), range(s) and section(s) in which the claims are located.

List the names and mailing addresses of all current owners. DMEM will usually send notices and decisions about your claim to the first name and address listed. Under Alaska regulations, it is your responsibility to be sure that DMEM has your current address.

Fill in the amount of excess work to be applied from previous years, if any. If you are combining excess work from previous years with work from this assessment year, complete the rest of this form. If you are using only excess work from previous year(s), go on to #12.

List each day that work was done. For example, only list August 6 through 28 if work was done each day during that time period.

List the total number of days worked by all persons. (Number of days x number of workers = total number of person-days worked).

Describe the work performed in as much detail as necessary to support the value you declare in #9; for example, "sunk shaft 10 feet," "stripped 150 cubic yards of overburden with a D-6 cat in preparation for mining," "core drilling 150 feet," "sluiced 5000 cubic yards of gravel."

Declare the full value of work you have done. Remember that excess work may be carri over to future assessment years (see #). Do not include brushing lines or reposting part of the declared value of your annual labor.

. List the name(s) and address(es) of the person(s) who did the work.

. Fill in the actual amount paid for the work and improvements and, if paid by other th the owner's lessee, give the name of the person who made the payment.

. The person signing the affidavit must print and sign his/her name before a notary or other authorized person. Generally, the following persons are authorized to take an oath, affirmation, or acknowledgement in this state: a justice, judge, magistrate, clerk, or deputy clerk of the court of the State of Alaska or of the United States, a notary public, and a U.S. postmaster. For a more complete list, see Alaska Statute 09.63.010. If an authorized person is not available, you may amend the statement in to read as follows: "I, (print your name), swear under penalty of perjury at (location) on (date) that no official empowered to administer oaths is available and that the foregoing statements are true." You must sign this statement. It is advisable but not required that a witness sign also. The witness's address should al be included.

Alaska Department of
NATURAL
RESOURCES

DIVISION OF MINING
APRIL 1986

Factsheet:

ANNUAL PLACER MINING APPLICATION PERMITTING PROCESS

In order to operate a placer mine in the State of Alaska, permits and licenses are required by as many as twelve State and Federal agencies. To assist the industry with applications in the complex permitting process, the State designed the Annual Placer Mining Application (APMA) popularly known as the Tri-agency form.

Each year a miner intends to operate, an APMA should be filled out and submitted to the Division of Mining no later than mid-February. A $100 filing fee is required by the Department of Natural Resources(DNR). Division of Mining reviews the form for completeness and, when accepted, makes distribution of twelve copies of the application to the appropriate State and federal agencies. This process relieves the placer miner of having to understand the details of the permitting process, as DOM does much of the red tape paper work. Permits may or may not be required and issued by the various agencies, but they are all given the opportunity to make that decision. These agencies review the APMA and either 1) issue the required permit with applicable stipulation(s), 2) request more information from the operator before a permit is issued, or 3) deny the permit under their statutory and regulatory authority.

A listing of these agencies and the respective permits/license that they manage is as follows:

AGENCY	PERMIT
Department of Fish and Game	Fish Habitat and Special Areas Permit
Department of Environmental Conservartion	Wastewater Discharge Permit
Department of Revenue	Mining License (to track your State tax obligation)
DNR, Division of Mining	Miscellaneous Land Use Permit (surface use permit)
DNR, Division of Land and Water Management	Water Permit
DNR, Division of Land and Water Management	Miscellaneous Land Use Permit (for access across state land)
Office of Management and Budget	Coastal Zone Consistency Determination
DNR, Division of Parks	Special Park Use Permit
U. S. Forest Service	Approved Plan of Operation
DNR, Division of Forestry	Timber purchase may be required
U. S. Parks Service	Approved Plan of Operation
Bureau of Land Management	Approved Plan of Operation

IMPORTANT NOTE!!! The Environmental Protection Agency's National Pollutant Discharge Elimination System Permit (NPDES) is not issued under the APMA process. A separate application (EPA Short Form C) must be submitted directly to the Environmental Protection Agency.

COMMONLY ASKED QUESTIONS

1. If I already have some of my permits, do I need to fill out a new Annual Placer Mining Application each year?

   Yes. Many of the permits are only issued for one year. The distribution process performed by the Division of Mining will insure that you have all the required permits issued under the current statutes and regulations.

2. I have my mining license. Isn't this really the only permit I need?

   No. A mining license is the Alaska Department of Revenue's way of tracking your income tax obligation to the State (you have no tax obligation for the first three and one-half years of production) It is not a mining permit and has nothing to do with authorizing surface disturbance or waste water discharge from a mining operation. You must obtain surface use, water use, habitat, and NPDES permits before you begin work.

3. If I pay $100.00 for the Annual Placer Mining Application, do I have to pay for other permits?

   No. The $100.00 fee covers the application costs of all DNR permits obtained through the APMA.

4. Will the APMA form get me every permit I need?

   No. The NPDES permit for water discharge must be applied for directly from the Environmental Protection Agency.

STATE OF ALASKA

ANNUAL PLACER MINING APPLICATION
LAND USE AND WATER USE PERMITS AND MINING LICENSE

GENERAL INFORMATION

1. For most exploration and mining operations, the completion of this form should satisfy the application requirements for the following permits:
   - Wastewater Discharge Permit - Issued by the Department of Environmental Conservation
   - Habitat Protection Permit - Issued by the Department of Fish & Game
   - Miscellaneous Land Use Permit - Issued by the Department of Natural Resources
   - Water Use Permit - Issued by the Department of Natural Resources
   - Alaska Mining License - Issued by the Department of Revenue

   This form also will be accepted by Federal Agencies for the following requirements:
   - Annual Notice or Plan of operation - For the U.S. Bureau of Land Management
   - Annual Plan of Operation - For the U.S. Environmental Protection Agency
   - Notice of Intent and Plan of Operation - For the U.S. Forest Service

   If more detailed information is required, you will be contacted by the appropriate agency.

2. Applications should be submitted early to assure the issuance of permits before annual operations in the field begin. Only permitted operators should be working in the field.

3. The permits which are issued will authorize the work described in this application. Changes in your operation will require another application to describe the operation and may result in amended permits.

4. This application does not serve as the application for other permits which may be needed for your operation.

5. If you do not intend to perform exploration or mining work at the claim or transport equipment to the claim do not file this application.

6. If mining operations or access to the claims cross state park lands, please contact the Department of Natural Resources, Division of Parks, 225 Cordova, Building A, Anchorage, Alaska 99501; Telephone (907) 276-2653.

INSTRUCTIONS

1. Please type or print responses in black ink. Answers to all of the questions are necessary to expedite processing of your permits. If a question does not apply to your operation, indicate with N/A.

2. If space provided on the form is not enough for your written response, please use an additional sheet of paper. Identify this sheet as part of the application by putting your name and the 5 digit application number on the top of the sheet. (Additional space may be needed for listing claim names, ADL or BLM serial numbers.)

3. With this application form, attach a copy of the appropriate USGS 1:63360 Map. Please identify this map as part of the application by putting your name and the 5 digit application number on the top of the map.

4. On the USGS Map please provide the following information:

   (a) The Claim name and the ADL or BLM serial number for all claims in this claim group. Each claim will be specifically named on the water permit or certificate so it is important that the list is complete.
   (b) The location of all claims
   (c) The identification of those claims which will be worked this year
   (d) The location of your camp
   (e) The location of the access routes to your claims (include airstrips)

5. Submit this application, as well as attachments, to the office of the Department of Natural Resources, Division of Mining, which is nearest to the claim.

ANCHORAGE	FAIRBANKS	JUNEAU
Frontier Building	794 University Ave.	State Office Building
3601 "C" Street	(Basement)	400 Willoughby
10th Floor, Suite 1088	College, AK [illegible]	Juneau, AK 99811
Pouch 7-005	(907) 474-7062	(907) 465-3400
Anchorage, AK 99510		
(907) 276-2653, Ext. 2205		

STATE OF ALASKA

ANNUAL PLACER MINING APPLICATION
LAND USE AND WATER USE PERMITS AND MINING LICENSE

No. ~~850590~~

APPLICANT AND SITE INFORMATION

DO NOT MARK IN THIS SPACE

Do you plan to do the following work on the claim(s)?
☐ Explore ☐ Mine ☐ Transport Equipment

Is claim patented?
☐ Yes ☐ No

Are the mining claims:
☐ Federal ☐ State

Check box(es) and list number(s) if you have had any of the following permits for these claims:

- ☐ DNR Land Use Permit No.:
- ☐ Fish & Game - Habitat Protection Permit No.:
- ☐ DNR - Water Use Permit ADL No.:
- ☐ DEC - Wastewater Discharge Permit No.:
- ☐ Revenue - Alaska Mining License No.:
- ☐ EPA-NPDES Wastewater Discharge Permit No.:

Check the mining district in which the claims are located:

- ☐ Circle
- ☐ Fairbanks
- ☐ Forty Mile
- ☐ Hot Springs
- ☐ Iditarod
- ☐ Innoko
- ☐ Koyukuk
- ☐ Kuskokwim
- ☐ Seward
- ☐ Seward Peninsula
- ☐ Other (Specify):

Check the box to indicate who controls the land on which the claim(s) are located and which is crossed for access:

- ☐ U.S. National Park Service
- ☐ U.S. Military
- ☐ U.S. Forest Service
- ☐ U.S. Bureau of Land Management
- ☐ U.S. Fish & Wildlife Service
- ☐ State of Alaska
- ☐ City (Specify):
- ☐ Borough (Specify):
- ☐ Native Corporation (Specify):
- ☐ Other (Specify):

Claim Owner's Full Legal Name		Street Address or P.O. Box		
City	State	Zip Code	Home Telephone	Office Telephone
Name of Lease Holder (if rights to claim are leased)		Street Address or P.O. Box		
City	State	Zip Code	Home Telephone	Office Telephone
Name of Operating Company or Authorized Representative in Field		Street Address or P.O. Box (Specify if Summer Address is different from Winter)		
City	State	Zip Code	Home Telephone	Office Telephone
Employer I.D./Social Security Number	Month Start Up This Year	Month Shut Down This Year	Number of People Working Claim	
On what creek(s) are your claim(s) located?		Claim(s) Location: Section(s), Township(s), Range(s), Meridian:		

DESCRIPTION OF OPERATION

List type, size, purpose and number of pieces of equipment to be used on the claim.

Which equipment listed above is used for the removal of overburden?

Which equipment listed above will be used in the stream?

Beginning and ending dates for transportation of equipment across country TO a claim:	If using a hydraulic giant, list nozzle size, number of nozzles, feet of head and total amount of water CFS or GPD:
Beginning and ending dates for transportation of equipment across country FROM a claim:	
List type and amount of explosives to be used:	If explosives will be used in or near streams or other bodies of water, indicate when, where and why they will be used;

Type of overburden: (O.K. to check more than one)
☐ Rock ☐ Sand ☐ Silt ☐ Clay ☐ Organic Material
☐ Other (Specify):

Depth of Overburden

Amount of Overburden to be removed:
Number of acres:
Average depth in feet:

No. 850590

PLACER MINING METHOD

Check method of mining and processing: (O.K. to check more than one.)

☐ Suction Dredge Intake Size _____(in.) Pump Capacity _____(GPM)

☐ Sluice Pump Intake Size _____(In.) Pump Capacity _____ (GPM)

☐ Bucket Line Dredge Size of Buckets _____ (cu. ft.)

☐ Washing Plant Type _____ Vol. Material Processed/hr. _____(cu. yd.)

☐ Sluice Box Length ____(ft.) Width ____(in.)

Depth of Water in Box ____ (In.) Slope _____ (In./ft.)

☐ Chemical Treatment ☐ Mercury ☐ Cyanide ☐ Other

Describe process on a separate sheet.

Daily Volume of Material Processed: _____(cu. yds.)

WATER SUPPLY

Type of Dam (Exclude settling ponds):

☐ Earthfill ☐ Timbercrib ☐ Concrete ☐ Other: _____

☐ Temporary ☐ On-stream

☐ Permanent ☐ Off-stream

Size of Dam (in feet)

Length Width at Crest Width at Base Height

Storage Capacity: (Indicate Length and Width of Area and Depth of Water)

Spillway Dimensions (in feet)

Depth Width at Base Side Slope

FUEL

Fuel Stored: (List type of fuel)

Amount of fuel stored:	Distance from stored fuel to nearest body of water:
Method of transporting fuel:	Amount of fuel transported per trip:

RECLAMATION

Indicate method of reclaiming area of operation.
(O.K. to check more than one)

☐ Level tailings piles ☐ Reestablish stream channels

☐ Regrade contours ☐ Remove toxic materials

☐ Respread topsoil ☐ Other: (Specify)

☐ Revegetate or reseed

WATER USAGE

What % of a natural stream is diverted for any reason: %	What % of diverted water is used for mining: %	Of water used for mining what % is recycled: %

Amt. of water required: Qty: ☐ GPM ☐ GPD ☐ CFS	Usage: Hours/Day	Usage: Days/Week

Date commenced operations: Month Year	Years needed to mine out claim:

If water is not used for mining, is it routed around the treatment pond? ☐ YES ☐ NO	When wastewater is returned to a stream, is it treated? ☐ YES ☐ NO

Condition of stream above claim, prior to discharge of wastewater:

☐ Clear ☐ Murky ☐ Muddy

If "muddy", is it: ☐ Natural ☐ Manmade

☐ Other: (Describe)

Method of taking water:

☐ Diversion Ditch ☐ Headgate ☐ Capacity _____ (GPM)

WASTE WATER TREATMENT

Capacity of Settling Pond(s): Indicate length and width of area and depth of water for each pond.

1. 2.

3. 4.

ACCESS

If access roads or airstrips will be built to the claim, indicate:

Length _____ (ft.) Depth of Material _____ (ft.)

Width _____ (ft.) Kind of Material Used _____

DRILLING

Estimated maximum depth: (ft.)	Number of holes drilled:
Diameter of holes drilled: (in.)	Type of drill used:

CLAIM LISTING

Please list all claim names within this claim group. If claim numbers are not known, attach copies of location notices. Each claim will be specifically named on your water permit or certificate. You may use the number of each claim on your sketch and USGS map for convenience.

No.	CLAIM NAME	ADL/BLM No. If known	No.	CLAIM NAME	ADL/BLM No. If known
1.			9.		
2.			10.		
3.			11.		
4.			12.		
5.			13.		
6.			14.		
7.			15.		
8.			16.		

Signature of Applicant	Relationship to Claim(s): ☐ Owner ☐ Lessee ☐ Operator	Date

No. ~~850590~~

SKETCH SHEET In the area below sketch the area of operation; locate and label the following information.

1. Camp site including all buildings and structures used for housing, operations, and storage.
2. Access routes within area of claim(s).
3. Natural waterways within claim(s).
4. Name of creek.
5. Water source.
6. Any stream diversion.
7. Point of withdrawal of water.
8. Water ditches, pipelines, pumpsites, and discharge points.
9. Settling ponds and water supply reservoirs.
10. Where water is used.
11. Sluice.
12. Area to be mined this year.
13. Overburden disposal site.
14. Tailing disposal site.
15. Other disposal sites. (Solid waste or hazardous materials or sanitary waste.)
16. Fuel storage site.
17. Airstrips

Name of USGS Map(s) Used:

SCALE: 1" = ¼ Mile

FACTS TO KNOW ABOUT COMPLETING THE ANNUAL PLACER MINING APPLICATION

WHO SHOULD APPLY - Anyone planning any type of mining activity (exploring, mining, transporting equipment or developing access) should submit this application. Using black ink and 8 1/2" X 11" paper will simplify distribution, and therefore speed up the process.

APPLICATION FEE - Submit a separate application for each operation site. A user fee of $100 is required (effective January 1, 1986 per 11 AAC 05.010) for each application. Make checks payable to the Department of Revenue.

COMPLETE ALL BLANKS - If a particular blank does not apply to your operation, please indicate "N/A".

SKETCH SHEET - This sketch should show the details of your mine site. Ensure that the sketch sheet addresses all seventeen items listed at the top of the page, even if the response is "N/A" (see example on the reverse side of this sheet). Do not color code mine features; color will not copy and makes duplicates unuseable.

This sketch should be of <u>your actual operating site</u> and to a scale that will fit on the page. If you don't know the scale, indicate approximate distances between the various mine features on the map. For example: write down the dimensions of the area to be mined, the size of your ponds, length of pipe lines, the distance between your treatment system and the receiving waters, etc.

TOPOGRAPHIC MAP - Attach a U.S.G.S. 1:63,360 topographic map (1"=1 mile) showing the location of your claims, <u>which of the claims will be worked</u> (indicate by claim name(s) and serial number(s)), the location of your camp and access route(s) to your claims (including airstrips). A photocopy of the topo map is acceptable but make sure your access from a main road is clearly shown.

LOCATION - Ensure that a complete legal location description is provided (township, range, meridian and section).

CLAIM NAMES - Be sure to include all claim names and assigned "ADL" or "F" serial numbers.

LODE MINES - This application currently is used for both lode <u>and</u> placer operations. The lode miner may attach any additional information that may be helpful to further explain the plan of operation.

12/11/85

EXAMPLE

No.

SKETCH SHEET In the area below sketch the area of operation; locate and label the following information.

1. Camp site including all buildings and structures used for housing, operations, and storage.
2. Access routes within area of claim(s).
3. Natural waterways within claim(s).
4. Name of creek.
5. Water source.
6. Any stream diversion.
7. Point of withdrawal of water.
8. Water ditches, pipelines, pumpsites, and discharge points.
9. Settling ponds and water supply reservoirs.
10. Where water is used.
11. Sluice.
12. Area to be mined this year.
13. Overburden disposal site.
14. Tailing disposal site.
15. Other disposal sites. (Solid waste or hazardous materials or sanitary waste.)
16. Fuel storage site.
17. Airstrips

Name of USGS Map(s) Used:

For Example

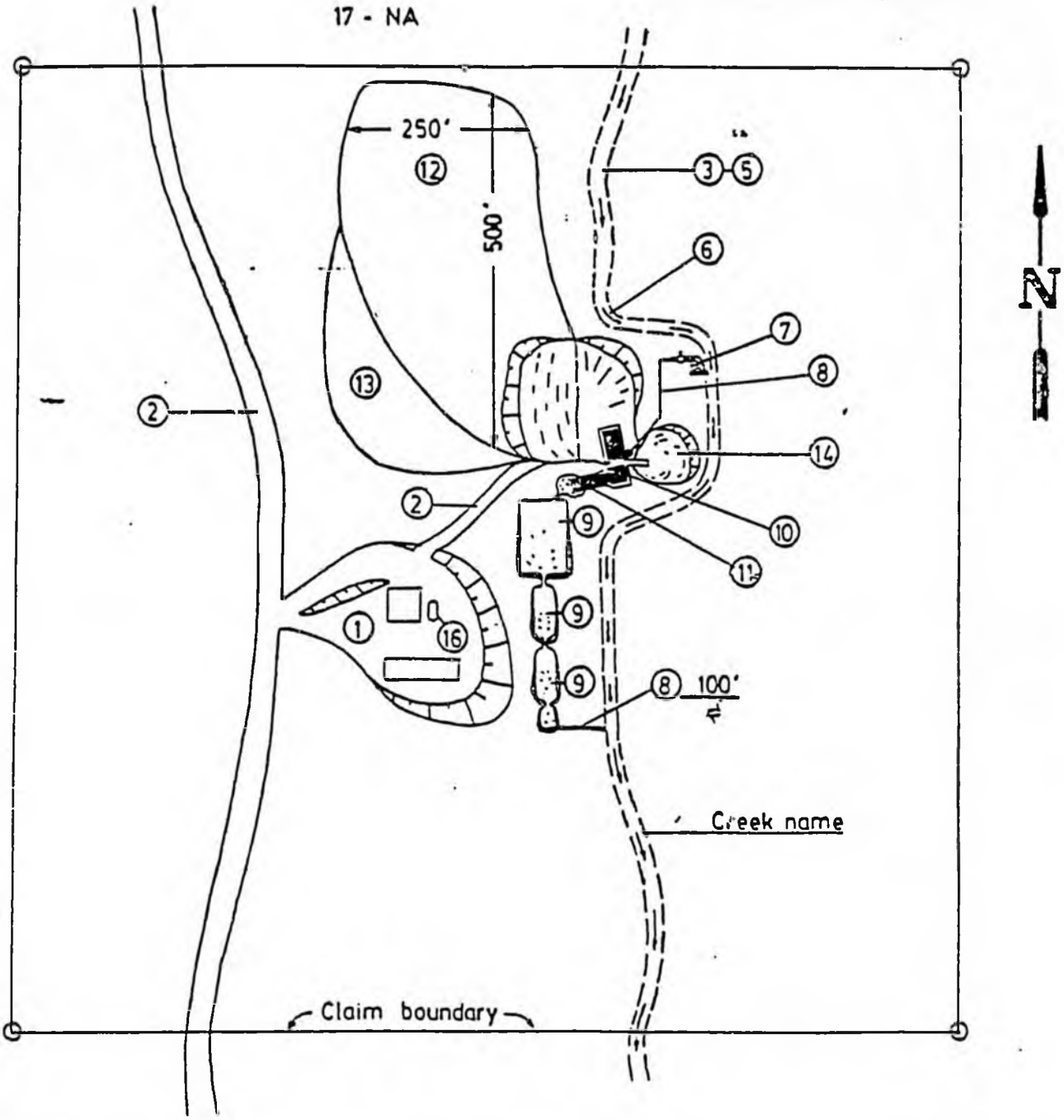
Circle C-3

SCALE: 1" = 220 ft.

Prepare map at scale suited to the size of your operation

15 - NA

17 - NA



Claim name:.....

TO BE COMPLETED BY DNR

COASTAL ZONE CONSISTENCY CERTIFICATION
PROJECT INFORMATION SHEET - ANNUAL PLACER MINING APPLICATION

Applicant: _____

Project Title: Placer Mining APMA Number _____

State ID Number: _____*

Project Location: _____

Coastal District: _____ Approved Plan: Yes/No

State or Federal Approvals: Any number of state and federal approvals may be necessary depending upon the project. It is the responsibility of the reviewer to notify the OMB office circled below which permits will be required.

REVIEWER MILESTONES:

Day 1: _____*
Review Schedule: 30 Days (State Claim) or 50 Days (Federal Claim)
Request for additional information by: _____*
Comments due by: _____*
Project status notification by: _____*

Project Coordinator: _____

Please direct all responses and questions to the circled Office of Management and Budget, Division of Governmental Coordination office:

Southeast Office	Southcentral Office	Northern Office
Div. of Govt. Coordination	3600 Denali St.,#700	675 Seventh Ave.,
Pouch AW	Anchorage, AK 99503	Station H
Juneau, AK 99811	(907) 272-3504	Fairbanks, AK 99701
(907) 465-3562		(907) 456-3084

* This information will be supplied by the OMB regional office via telephone on the day the APMA is ready for distribution.

0878v

Dear Miner,

If your proposed project is located in the coastal zone, it will be necessary for you to sign the certification statement below, answer the questions about federal permits, and then enclose this sheet with your completed Annual Placer Mining Application. This statement will be forwarded to the Office of Management and Budget, Division of Governmental Coordination to be kept in your project file. Should a federal permit require this certification, a copy will be sent to the appropriate federal agency. Section 307(c)(3)(A) of the Coastal Zone Management Act of 1972 as amended by 16 USC 1456(c)(3) requires that applicants for federal permits to conduct activities affecting land or water uses in Alaska's coastal area must provide certification that the activities will comply with the standards of the Alaska Coastal Management Program.

So that you may determine if your proposed project is in the coastal zone, a set of maps showing the coastal zone boundries are available for your inspection in each Division of Mining Information Office. Prior to signing this statement you should review the Alaska Coastal Management Program, pertinent statutes and regulations, and approved coastal management plans to assure your project is consistent with these programs. Each Division of Mining Information Office has this information available for your review.

Certification Statement

I certify that, to the best of my knowledge and belief, the proposed activity described in my annual placer mining permit application complies with the approved Alaska Coastal Management Program, and will be conducted in a manner consistent with such program.

_____ _____

Signature of Applicant Date

Have you applied for any federal permits? (Please note each federal agency and date. Thank you.)

EPA? _____

BLM? _____

Corps of Engineers? _____

Other? _____ Which agency? _____

0S79v

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF MINING

USER FEES

FOR ANNUAL PLACER MINING APPLICATION

IN EFFECT JANUARY 1, 1986

As of January 1, 1986, DNR will require user fees for some permits for land and water use. A $100.00 fee will be required for the Annual Placer Mining Application which will cover the costs of all DNR permits issued under this application. If permits are applied for individually, fees are $50.00 each.

Alaska Department of
NATURAL
RESOURCES

ATTACHMENT E
"Department of Natural Resources Proposed Options
for Responding to Alaska Supreme Court 6
(i) Decision"

Summary of Alaska Supreme Court 6(i) Decision

6(I) provides "mineral deposits in [mineral] lands shall be subject to lease. . ." Trustees argued that meant a cash rental or royalty was required. The State argued no cash rental or royalty was required. The Court ruled in favor of Trustees.

Trustees argued that "mineral lands" meant all lands that contained minerals no matter when they were discovered. . The state argued that mineral lands meant only those lands which were known to be "mineral in character" at the time of state selection. The Court ruled in favor of the state.

Question remaining: What is " mineral in character?" Traditional test is " known or believed to be valuable for minerals." This leaves a wide range of possible applications.

Department of Natural Resources
Proposed Options for Responding to Alaska Supreme Court 6(i) Decision
May 5, 1987

DNR Goals: Consistency; fairness; avoiding further litigation which may jeopardize mining on state land; ensuring a fair and reasonable return for use of state lands and minerals.

Option A: Using a broad definition of "mineral in character," establish a mineral leasing system on those lands.

Approximately equal amounts of state lands managed under each system, but most state mining claims would fall within the leasing system.

Moderate geologic analysis required prior to implementation.

Advantages: Probably complies with Supreme Court Decision; moderate rental/royalty will produce income to state.

Disadvantages: Would result in two separate systems of mineral location, increasing complexity of administration for private and public sector; may be challenged in courts.

Option B: Using a narrow definition of "mineral in character," establish a mineral leasing system on those lands.

Very few mineral deposits will meet this test; therefore, very little state land managed under this program.

Detailed geologic analysis required prior to implementation.

Advantages: Impacts only a few mineral development projects.

Disadvantages: Likely to be challenged in court; few miners would carry the total rental/royalty burden for all state miners.

Option C: Convert the whole system to "leasing," while maintaining the important aspects of the location systems.

A single system for all state lands would result; no geologic analysis needed.

Advantages: Will comply with Supreme Court Decision; will generate reasonable rental payment from all state mineral claims, regardless of designation; may reduce long-term "holding" of claims with little development activity.

Disadvantages: Major change in Alaska's mining law.

Option D: Ask U. S. Supreme Court to review decision. U. S. Supreme Court has discretion to review or not review the case.

ATTACHMENT F
Alaska Administrative Code Regulations on
Reclamation of State Mineral Lands, AAC 96.010 - .250"

(29) "surface waters" means ponds and lakes greater than 10 acres in size, and streams, creeks, and rivers which are valuable for domestic use, spawning, rearing, or migration of fish, or have value to protect water quality;

(30) "upstream debris" means slash or debris located 50 feet or less upstream from a culvert or bridge that may reasonably be expected to plug the inlet or damage the structure; and

(31) "waiver" means a deviation from standards set out in 11 AAC 95.100 — 11 AAC 95.180 which is approved by the state forester with the concurrence of the Department of Fish and Game and the Department of Environmental Conservation. (Eff. 2/15/81, Reg. 77; am 11/21/82, Reg. 84)

Authority: AS 41.15.050 AS 41.17.020
AS 41.15.060 AS 41.17.080
AS 41.15.090

CHAPTER 96. MISCELLANEOUS LAND USE

Article

1. Provisions for General Land Use Activity (11 AAC 96.010—11 AAC 96.150)
2. Additional Provisions for Seismic Exploration and Stratigraphic Tests (11 AAC 96.210—11 AAC 96.240)
3. General Provisions (11 AAC 96.250)

ARTICLE 1. PROVISIONS FOR GENERAL LAND USE ACTIVITY

Section

10. Operations requiring permits
20. Equipment use not requiring a permit
30. Application
40. Term and conditions
50. Effective date
60. Bonds
70. Completion of operations
80. Confidential status of information
90. Inspection of operation
100. Penalty
110. Appeals
120. Purpose
130. Applicability
140. General stipulations
150. (Repealed)

11 AAC 96.010. OPERATIONS REQUIRING PERMITS. (a) A permit is required for the following activities on state lands:

(1) activity requiring

(A) the use of explosives and explosive devices, except firearms;

(B) the use of any equipment not included in the list specified in 11 AAC 96.020;

(C) the use of hydraulic prospecting or mining equipment methods;

(D) drilling to a depth in excess of 300 feet, including exploratory drilling or stratigraphic test wells on state land not under oil or gas lease;

(E) geophysical exploration for minerals subject to lease under AS 38.05.135 — AS 38.05.181;

(2) activity that the director determines may result in unnecessary harm to land having special scenic, historic, archaeologic, scientific, biological, recreational, or other special resource values; and

(3) activity on land under mineral permit, lease, or claim by a person other than the holder of the permit, lease or claim, or his authorized representative, if the parties cannot agree on what constitutes unnecessary or unreasonable interference as provided in 11 AAC 96.140(11).

(b) The activities for which a permit is required under (a)(2) of this section will be listed, and the land designated as special use lands on the official records of the division, the records will be available in all state land offices. Activities requiring a permit on land designated as special use land is not a violation of this chapter unless the user has received written notice of the designation or the designation has been effective for 90 days. (Eff. 1/1/70, Reg. 32; am 3/2/81, Reg. 77; am 5/8/83, Reg. 86)

Authority: AS 38.05.020 AS 38.05.180
AS 38.05.035 AS 41.20.020

11 AAC 96.020. EQUIPMENT USE NOT REQUIRING A PERMIT. (a) A current list of equipment types the use of which does not require a permit under 11 AAC 96.010(a)(1)(B) will be maintained and available in all state land offices. A permit is required for the use of all equipment types not appearing on this list unless otherwise authorized by the director.

(b) This list will include but is not limited to the following:

(1) light portable field equipment; such as, hand-operated picks, shovels, pans, earth augers and backpack power drills and augers;

(2) vehicles such as snow machines, jeeps, pickups and weasels. Augers and drills may be mounted on such equipment;

(3) airborne equipment;

(4) marine equipment, except equipment which will disturb the submerged land.

(c) This section does not apply to areas designated under 11 AAC 96.010(a)(2). (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.030. APPLICATION. (a) The application for permit must contain the following information in sufficient detail to allow evaluation of the planned activities' effect on the land:

(1) a map showing the general location of all activities and routes of travel of all equipment for which a permit is required;

(2) a description of the proposed activity and the type of equipment that will be used.

(b) The permit application shall be acted on promptly. If the permit is not issued within 30 days of receipt of a proper application, the applicant may proceed with his operations subject to the provisions of 11 AAC 96.140 and the provisions of the permit when issued. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.040. TERM AND CONDITIONS. Permits will be granted for any term requested not to exceed one year. The permit may be extended for any number of consecutive periods, each period not to exceed one year. Proposed modifications in the original plan shall be indicated in writing. The director may modify existing stipulations or require additional stipulations in the approval of an extension or modification. Each permit issued is subject to the provisions of 11 AAC 96.140 and any other provisions the director determines necessary to assure compliance with these regulations. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.050. EFFECTIVE DATE. The effective date of the permit shall be the first day of the month following the date on which the permit was signed on behalf of Alaska; provided,

however, upon request by the applicant, the permit may be dated the first day of the month in which the permit was signed on behalf of Alaska. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.060. BONDS. The permittee may be required to furnish a personal or corporate surety bond, acceptable to the director and conditioned upon compliance with all the terms of the permit. The director shall determine the amount of the bond, if required, based on the scope of the activity planned. The director shall maintain a schedule showing the amount of bond required by type of operation so that the permittee may submit the bond with the application. Operations requiring a bond shall not commence until an acceptable bond has been filed. The director shall give notice of any such bond required within 30 days of receipt of a proper application. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.070. COMPLETION OF OPERATIONS. Upon completion of the operations under a permit and its extensions, the permittee shall file a map showing the location of all permit activities which were not shown in the permit plan, or any modifications of the permit plan, and include a detailed statement of cleanup and restoration work at the site. Within 90 days of filing an acceptable completion statement, the permittee will be notified of any cleanup and restoration work required. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.080. CONFIDENTIAL STATUS OF INFORMATION. All information required to be filed under these regulations shall be held confidential as provided by AS 38.05.035(a)(9). (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.090. INSPECTION OF OPERATION. All operations under 11 AAC 96.010 — 11 AAC 96.150 are subject to inspection by the director. The permittee is not obligated to provide transportation or lodging for inspection personnel. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.100. PENALTY. Any activities on state lands done in violation of 11 AAC 96.010 — 11 AAC 96.150 shall be considered waste, trespass, or injury to state lands under AS 38.05.360. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.110. APPEALS. A person aggrieved by an order, decision or other action of the director, may appeal to the commissioner of the Department of Natural Resources. The notice of appeal must be received at the principal office of the division of lands within 20 days after receipt of notice of the director's decision. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.120. PURPOSE. The purpose of 11 AAC 96.010 — 11 AAC 96.150 is to provide controls over activities on State of Alaska lands in order to minimize adverse effects on the land and its resources. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035
AS 41.20.020

11 AAC 96.130. APPLICABILITY. 11 AAC 96.010 — 11 AAC 96.150 apply to all land use activities on Alaska state lands except activities authorized under any State Division of Lands administered permit, lease, or contract, by the permit, lease, or contract holder, or his authorized agent and except lands which have, by administrative action or act of the legislature, been reserved from multiple-use management. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035

11 AAC 96.140. GENERAL STIPULATIONS. All land use activities are subject to the following provisions:

(1) Activities employing wheeled or tracked vehicles shall be conducted in such a manner as to minimize surface damage.

(2) Existing roads and trails shall be used whenever possible. Trail widths shall be kept to the minimum necessary. Trail surface may be cleared of timber, stumps and snags. Due care shall be used to avoid excessive scarring or removal of ground vegetative cover.

(3) All activities shall be conducted in a manner that will minimize disturbance of drainage systems, changing the character, polluting, or silting of streams, lakes, ponds, water holes, seeps, and marshes, or disturbance of fish and wildlife resources. Cuts, fills, and other activities causing any of the above disturbances, if not repaired immediately, are subject to such corrective action as may be required by the director.

(4) The director may prohibit the disturbance of vegetation within 300 feet of any waters located in specially designated areas as prescribed in 11 AAC 96.010(2) except at designated stream crossings.

(5) The director may prohibit the use of explosives within one-fourth mile of designated fishery waters as prescribed in 11 AAC 96.010(2).

(6) Trails and campsites shall be kept clean. All garbage and foreign debris shall be eliminated by removal, burning, or burial, unless otherwise authorized.

(7) All survey monuments, witness corners, reference monuments, mining claim posts, and bearing trees shall be protected against destruction, obliteration, or damage. Any damaged or obliterated markers shall be reestablished in accordance with accepted survey practice of the division.

(8) Every reasonable effort shall be made to prevent, control, or supress any fire in the operating area. Uncontrolled fires shall be immediately reported.

(9) Holes, pits, and excavations shall be filled, plugged, or repaired to the satisfaction of the director. Holes, pits, and excavations necessary to verify discovery on prospecting sites, mining claims, and mining leasehold locations may be left open but shall be maintained as required by the director.

(10) No person may engage in mineral exploratory activity on land, the surface of which has been granted or leased by the State of Alaska, or on land for which the state has received the reserved interest of the United States until good-faith attempts have been made to agree with the surface owner or lessee on settlement for damages which may be caused by such activity. If agreement cannot be reached, or lease or surface owner cannot be found within a reasonable time, operations may be commenced on the land only with specific approval of the director, and after making adequate provision for full payment of any damages which the owner may suffer.

(11) Entry on all lands under mineral permit, lease, or claim, by other than the holder of the permit, lease, or claim, or his authorized representative, shall be made in a manner which will prevent unneccessary or unreasonable interference with the rights of the permittee, lessee, or claimant. (Eff. 1/1/70, Reg. 32)

Authority: AS 38.05.020
AS 38.05.035
AS 38.05.130

11 AAC 96.150. DEFINITIONS. Repealed 3/21/81.

ARTICLE 2.
ADDITIONAL PROVISIONS FOR SEISMIC EXPLORATION AND STRATIGRAPHIC TESTS

Section
210. Submission of seismic exploration data and stratigraphic test data
220. Confidential status of information
230. Reimbursement for seismic exploration data
240. Liability

11 AAC 96.210. SUBMISSION OF SEISMIC DATA AND STRATIGRAPHIC TEST DATA. In order to assist the department in managing the leasing, exploration, and development of oil and gas resources underlying state land, and to achieve the purposes of AS 38.05.180(a), the director will, under the following circumstances, require submission of seismic exploration data and stratigraphic test data as a condition of the issuance of a land use permit to conduct seismic exploration field operations or to drill a stratigraphic test well:

(1) Within 30 calendar days after termination of any seismic exploration, the permittee shall notify the director, in writing, of all seismic exploration data obtained under the permit. Within 30 days after completion of the initial processing of the seismic exploration data, the permittee shall notify the director, in writing, of the availability of these processed seismic exploration data. The director reserves the right to inspect and require submission of seismic exploration data obtained under the permit for five years after notification by the permittee that initial processing has been completed. The permittee shall provide access to and upon request submit a reproducible copy of all sesmic exploration data that are required by the director.

(2) Unless the director grants an extension upon the permittee's written request, the permittee shall provide access to and upon request submit a reproducible copy of all test data acquired from a stratigraphic test well not later than 30 dyas after the well is plugged or abandoned. (Eff. 3/21/81, Reg. 77; am 8/19/84, Reg. 91)

Authority: AS 38.05.020 AS 38.05.180
AS 38.05.035 AS 38.05.850

11 AAC 96.220. CONFIDENTIAL STATUS OF INFORMATION. All seismic exploration data and stratigraphic test data submitted under this chapter will be kept confidential upon the request of the person supplying the information. This confidentiality requirement is subject to the following provisions:

(1) The director will disclose confidential seismic exploration data or stratigraphic test data, submitted under this chapter, to a third party only if the disclosure is for the storage, processing, reprocessing, and interpretation of the data for the state. However, before the disclosure, the third party must agree in writing that it will not disclose the data or associated information derived or generated from the data to any other party and that it will not acquire any interest in the land evaluated by the data. The third party shall execute and post a bond in an amount to be determined by the director. The bond must be to the benefit of the state and the permittee.

(2) If the director obtains the consent of the permittee in writing, the director will, in his or her discretion, disclose confidential seismic exploration data or stratigraphic test data submitted under this chapter to the Minerals Management Service and the Bureau of Land Management of the United States Depatment of the Interior, without reference to the purpose for which the disclosure is made. However, before the disclosure, a responsible officer of the United States Department of the Interior must agree in writing to keep the data and any associated information derived or generated from the data confidential. Copies of the data submitted under this chapter will not be given to the Minerals Management Service or the Bureau of Land Management; however, the Minerals Management Service and the Bureau of Land Management may, on the premises of the department, participate in the interpretation of the data. (Eff. 3/21/81, Reg. 77; am 8/19/84, Reg. 91)

Authority: AS 38.05.020 AS 38.05.180
AS 38.05.035 AS 38.05.850

11 AAC 96.230. REIMBURSEMENT FOR SEISMIC EXPLORATION DATA. (a) The state will reimburse the permittee for all reasonable costs directly incurred by the permittee because of the submission of seismic exploration data to the division under 11 AAC 96.210(1). Reimbursable expenditures are the costs of reproduction and shipping related to the submission of seismic exploration data to the division.

(b) The state will not reimburse the permittee for any indirect costs incurred by, or indirect effects on, the permittee for the time, personnel, or equipment used to prepare the seismic exploration data for submission to the division.

(c) The division will initiate reimbursement to the permittee for costs described in (a) of this section within 30 days after receipt of a legible copy of the seismic exploration data. (Eff. 3/21/81, Reg. 77; am 8/19/84, Reg. 91)

Authority: AS 38.05.020 AS 38.05.180
AS 38.05.035 AS 38.05.850

11 AAC 96.240. LIABILITY. (a) If, after submission of the seismic exploration data or stratigraphic test data, the permittee determines that errors exist in the data submitted, the permittee shall inform the division of the errors and, as soon as practicable, shall submit any corrected data.

(b) The permittee is not responsible for any actions the division takes in the interpretation or use of the seismic exploration data submitted by the permittee. (Eff. 3/21/81, Reg. 77; am 8/19/84, Reg. 91)

Authority: AS 38.05.020 AS 38.05.180
AS 38.05.035 AS 38.05.850

ARTICLE 3.
GENERAL PROVISIONS

Section
250. Definitions

11 AAC 96.250. DEFINITIONS. In this chapter

(1) "land use activity" means any use of or entry on state land for any purpose, including but not limited to exploration, hunting, recreation, and access;

(2) "director" means the director of the division of lands in the Department of Natural Resources, or an authorized representative of the director;

(3) "department" means the Department of Natural Resources;

(4) "processing" means the preparation of data, by computer or other device, which enhances the data;

(5) "seismic exploration" means the survey of the earth's surface or the use of seismic methods to gather data that may be used to determine subsurface geologic characteristics;

(6) "seismic exploration data" means data, including information necessary to locate and identify that data, derived from seismic exploration of state land and initially processed to a level comparable to that of the data distributed to participants in a group seismic survey by use of techniques used to render the data in a format ready for geological interpretation for the first time; such techniques include but are not limited to amplitude recovery, deconvolution, static corrections, velocity analysis, normal moveout corrections, common depth point stacking, digital filtering and migration. "Seismic exploration data" may include navigation tapes, velocity spectra, final stack sections, true amplitude sections and migrated sections: but does not include, and the applicant is not required to submit to the director

(A) magnetic tapes other than navigation tapes; and

(B) data that would otherwise be included, but which the permittee or a contractor working on behalf of the permittee does not obtain or prepare;

(7) "stratigraphic test" means the drilling of a well to a sufficient depth to measure the geologic, geophysical, and engineering parameters used for determining an area's oil and gas potential;

(8) "stratigraphic test data" means all logs, surveys, samples, and tests taken in association with the drilling and testing of a stratigraphic test well and includes but is not limited to, mud logs, electrical logs, density logs, sonic logs, neutron logs, gamma logs, dip-meter surveys, velocity surveys, directional surveys, core descriptions, sample descriptions (including descriptive palynology and paleontology), fluid analyses, drillstem tests, formation tests, and periodic drilling and operations reports. (Eff. 1/1/70, Reg. 32; am 3/21/81, Reg. 77; am 8/19/84, Reg. 91)

Authority: AS 38.05.020 AS 38.05.180
AS 38.05.035 AS 38.05.850

Editor's Note: 11 AAC 96.250(1) and (2) are derived from former 11 AAC 96.150 which was repealed in 3/21/71. The history note set out after this section includes the history of 11 AAC 96.150 before the repeal of that section.

ATTACHMENT G
Interagency Placer Mining Enforcement
Priorities 1987"

INTERAGENCY

PLACER MINING ENFORCEMENT PRIORITIES

1987

State of Alaska

Department of Environmental Conservation

Department of Fish and Game

Department of Natural Resources

ENFORCEMENT PRIORITIES
1987 INTER-AGENCY PLACER MINING GUIDELINES

During the 1987 placer mining season, the state will emphasize both protection of water resources, including community drinking water sources, fish and recreational uses, and technical assistance to miners to help them meet enforcement standards. As in 1986, the enforcement guidelines will be focused on priority streams. Criteria used to define "priority streams" and a listing of these streams are found in Section II. Other streams will be visited based on reported water quality problems (i.e., complaints).

The state's placer mining enforcement policy will focus on flagrant violators who do not implement minimum pollution control measures. Water quality samples will be taken upstream of mining operations to ascertain background levels of natural or human caused pollutants. The state will not take enforcement action against a miner for a violation of water quality standards where the violation results from upstream sources.

The State of Alaska will retain three of the designated priority drainages across the state (Chatanika and George Rivers, and Peters Creek) as special areas for an intensive effort to achieve compliance with Alaska Water Quality Standards again during the 1987 mining season. Miners operating on these streams will receive special assistance, upon request, to develop plans of operation. Tri-agency applications and plans of operation for mines in these watersheds will receive an intensive coordinated review and analysis for adequacy and likelihood of meeting water quality criteria. Applications and plans judged unlikely to achieve substantial compliance with water quality standards will be rejected. Sites for which state authorizations are issued after approval of technically adequate plans of operation will be monitored for compliance on a regular basis throughout the mining season.

Section I. - GENERAL

A. During the summer field season of 1987, the state resource agencies will carry out the following tasks subject to available funding.

   1. Field monitoring will focus on priority streams, which are listed in Section II of this directive. It is the state's goal for its field staff to inspect all mining operations on priority streams and as many mining operations for which time and funding are available on nonpriority streams.

2. Miners who are in substantial, but not full compliance with water quality standards, are encouraged to contact the appropriate state agencies for technical assistance to aid in achieving full compliance.

3. Field trips will be coordinated among ADEC, ADF&G, and ADNR. Each agency will maintain a log of where site visits have been conducted by staff.

4. Agency staff will respond to complaints to the extent practicable. ADEC will maintain a log of all complaints and follow-up actions taken by the state agencies.

5. To the extent practicable, field surveillance, monitoring, and enforcement will be coordinated between state agencies, EPA, and federal land management agencies (e.g., BLM and NPS). ADEC will also maintain a log of where site visits have been conducted by federal agency staff.

6. Upon arrival at a mining site, agency staff will, when practical, first attempt to contact the responsible operator and present identification. The miner will be urged to accompany agency staff during inspections.

7. Field trip reports, including data analysis on any water samples taken, will be completed for each trip and copies will be provided to state and federal agencies. Copies of any Notices of Violation will be provided to state and federal agencies as soon as possible after issuance.

Agency staff will advise miners that, upon request by a miner, they will be provided with a sealed set of duplicate samples taken at the same time and location as the samples to be used in a possible enforcement action.

B. Enforcement actions will generally fall into one of two categories, as listed below:

1. Formal Notice of Violation (Noncompliance will be formally documented in writing. When an NOV is issued, follow-up actions or additional site visits will occur);

2. Formal Legal Action (Assistance will be solicited from the Department of Law for legal actions).

C. Criteria for selection of enforcement action will be as follows.

The initial threshold of enforcement action will be based upon the specific circumstances of the observed violation

and may include initial formal legal action. In general, however, the following criteria will be utilized for selecting appropriate initial action.

1. Notices of Violation (NOVs) will be issued for the following situations:

   a. violations of State Water Quality Standards for sediment as measured by Imhoff Cone upstream and downstream of operations or discharges;

   b. on the "special priority" streams listed in Section II.B.1, violations of State Water Quality Standards for turbidity when associated with noncompliance with approved plans of operation;

   c. failure to comply with timing restrictions or operational procedures or stipulations that refer to restoration, rehabilitation, erosion control, etc. set forth in state and federal permits;

   d. blockages of fish streams; or

   e. violations of settling pond effluent limits for settleable solids as certified in NPDES permits.

   NOVs will usually be issued on-site at the time of inspection. NOVs may advise a series of steps or actions that a miner may take to correct the violation and indicate a date for reinspection. Issuance of or compliance with an NOV does not preclude further or separate legal action based upon violations described in the NOV.

2. Under any of the following situations, formal legal action usually will be taken:

   a. failure to obtain agency permits or certifications;

   b. acts which result in significant blockage or destruction of a fish steam;

   c. failure to construct a settling pond or a bypass around an active mining site;

   d. failure to maintain properly a settling pond, as shown by Imhoff cone testing of solids in pond effluents;

   e. failure to comply with an NOV issued according to the guidance of the previous section.

If a legal action is pursued because of a violation described in "a" through "e" of this section, the Department of Law may, in its course of action, seek an injunction or allege or bring into court an action which specifies all violations of water quality standards, including turbidity, any violations of permit stipulations and conditions, and any other violations of any regulations or permits.

3. As circumstances allow, legal action will be determined after consultation with DEC, DNR, DF&G, and the Department of Law. Consultation with appropriate federal agencies such as the Environmental Protection Agency, National Park Service, Bureau of Land Management (BLM), and Fish and Wildlife Service may occur. Generally, the type of legal action depends upon

   a. the degree of severity of violation, as measured against the Water Quality Standards, and

   b. the sensitivity of and degree of impacts to receiving waters.

Section II. - PRIORITY DRAINAGES

A. Criteria for selection of priority drainages include

1. use as sources of drinking water;

2. designation of stream as important to spawning, rearing, or migration of anadromous fish (AS 16.05.870);

3. potential for blockage of movements by anadromous fish (AS 16.05.840) or resident fish;

4. actual presence and abundance of fish and quality of fish habitat;

5. designation by ADF&G as an "index stream" used in aerial surveys of returning spawning salmon;

6. potential for conflicts involving commercial or recreational fishery uses;

7. potential for conflicts involving subsistence use, including fish, waterfowl, furbearer, and domestic uses;

8. likelihood of conflicts involving canoeing, kayaking, and other boating uses;

9. existence of naturally clear water, with a natural background turbidity of less than three NTU; and

10. history of significant complaints regarding water quality problems.

B. Proposed priority drainages will be announced at the Placer Mining Annual Conference in Fairbanks in the spring of 1987.[1]

1. The following streams have been designated "special priority" streams for the purposes of enforcement in 1987. For mines on these streams, Tri-Agency applications and plans of operation will receive an intensive and thorough review by the agencies to ensure that best mining practices are being implemented. Miners who operated on special priority streams in 1986 under approved plans should resubmit the approved plans for that operation to the agency reviewers. For new operations or those not operating in 1986, miners may be asked to visit agency offices to discuss their applications and modify their proposed plans of operation, if necessary, prior to mining. State agency field staff will inspect the mining operations on these streams as needed to ensure compliance with the approved plans of operation. Field staff will routinely sample and monitor the water quality of these streams to measure the expected improvements.

   a. Northern Region:
      Chatanika River (except Goldstream Creek)

   b. Southcentral Region:
      Peters Creek

   c. Western Alaska:
      George River

Note: This list is unchanged from 1986.

2. The following streams have been designated "priority" streams. Agency staff will review Tri-Agency applications and plans of operation and offer technical assistance to miners to encourage good mining practices.

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[1] The following "inactive" priority streams are expected to have little or no mining activity occurring in 1987. As time allows, agency staff will sample these streams to determine natural or background conditions. Northern Region: Salcha River, Hogatza River, Bearpaw River, Goodpaster River, Boulder Creek, American Creek/Fish Lake, Beaver Creek, Tozitna River. Southcentral Region: Lake Creek, Little Susitna River, Kenai River, Theodore River, Lewis River, Sixmile River.

Agency field staff will inspect mining operations on these streams to ensure compliance with the settling pond effluent standard of 0.2 ml/l settleable solids. Water quality monitoring is planned for these streams.

a. Northern Region:
   - Chena River
   - Solomon River
   - South Fork of the Koyukuk
   - Cripple River
   - Minook Creek
   - Tolovana River
   - Fortymile River
   - Birch Creek [2]

b. Southcentral Region:
   - Willow Creek
   - Chunilna Creek
   - Cache Creek
   - Resurrection Creek
   - Crescent Creek
   - Quartz Creek

c. Western Alaska:
   - Tuluksak River
   - Salmon River
   - Taylor Creek
   - Crooked Creek

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[2] The BLM has indicated an interest in devoting extra effort in an overall attempt to increase the level of compliance in the Birch Creek watershed. To the extent feasible, state resource agencies will assist the BLM in its efforts.

Adopted by:

Dennis D. Kelso
Commissioner, DEC

March 20, 1987
Date

Don W. Collinsworth
Commissioner, DF&G

3-21-87
Date

Judith M. Brady
Commissioner, DNR

3-23-87
Date

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

October 19, 1984

MEMORANDUM

TO: Representative Bob Bettisworth

FROM: Gretchen Keiser, Legislative Analyst

RE: State Revenues and Secondary Benefits from Mining Operations
Research Request 85-029

You requested this agency to provide information on recent and projected State revenues from mining operations. You asked us to consider various mining projects, including Red Dog, Quartz Hill, Greens Creek, Usibelli Coal, Beluga Coal, and Alaska Asbestos. We were also asked to provide information on secondary benefits, such as employment and royalties to Native corporations.

This memorandum summarizes information obtained during conversations with mining company representatives and State officials in the Departments of Revenue, Commerce and Economic Development, Law, and Natural Resources. In addition, we reviewed several State analyses and federal environmental impact statements on various mining proposals.

The first section of this memorandum briefly discusses the sources of State revenues from mining operations and summarizes the revenues over the past few years. The second section presents projections of State revenues from currently active operations as well as revenues and secondary benefits from various mining proposals which have been recently analyzed (i.e., Red Dog, Quartz Hill and Greens Creek). The final section discusses several additional mining prospects which are currently being investigated to some degree but are less fully analyzed than the three previously mentioned proposals.

Recent State Revenues from Mining Operations

State revenues are generated from mining operations from the following sources:

- Alaska [Corporate] Net Income Tax (AS 43.20)
- Mining License Tax (AS 43.65)
- Coal Lease Bonus, Royalty and Rental (AS 38.05.150)
- Upland Mineral Leasing Rental and Royalty (AS 38.05.205)
- Offshore Prospecting Permit and Lease Rentals (AS 38.05.250)
- Sale of Sand and Gravel

The Alaska [Corporate] Net Income Tax is derived from a corporation's federal taxable income. Income of less than $90,000 is subject to the State's graduated tax rate to a maximum tax liability of $4,500. If taxable income exceeds $90,000, the tax is $4,500 plus 9.4 percent of the taxable income over $90,000. The resultant Alaska gross corporate tax is adjusted for investment and job credits and yields the Alaska Corporate Net Income Tax payable to the State.

In 1982, 54 tax returns from mining operations (of which 19 had taxable income) generated about $21,000 in tax revenues. This represents one-tenth of one percent of the nonpetroleum corporate income tax revenues which were collected in 1982 ($21.1 million). Table 1 summarizes the corporate net income taxes paid to the State by the mining sector in 1980 and 1982.[1] The reduction in tax revenues between 1980 and 1982 reflects, in part, changes in Alaska corporate tax law in 1981. The amendments reduced the tax rates and increased the allowable investment tax credit to the first $20 million in qualified investments.

In 1984, the Alaska Legislature further amended Alaska corporate tax law to allow a special industrial incentive tax credit on "...the first $250 million of qualified investment for each taxable year after December 31, 1984 for exploration, drilling of wells, development, or mining of the minerals and other natural deposits other than sand and gravel..." [AS 43.20.042(b)]. The major effect of this new investment tax credit will likely be to reduce potential State tax revenue in the 1990s when the various large mining projects (with considerable capital investments) commence production. Estimates of reduced tax revenues from the Red Dog and Quartz Hill proposals due to the investment tax credit are considered in Table 2 in the next section of this memorandum.

The Mining License Tax is a net income tax which incorporates a graduated tax rate schedule up to a maximum liability of $4,000 plus seven percent of the taxable income over $100,000. Mining operations are exempt from this tax for the first three and one-half years after production commences. The above-mentioned special industrial investment tax credit will also apply against a mining corporation's tax liability under the Mining License Tax.

State revenues from the Mining License Tax averaged about $125,000 per year between FY 80 and FY 83 and increased to about $340,000 in FY 84 (Table 1). The dramatic increase in FY 84 revenues is due, to a large extent, to the increased sand and gravel mining operations to accommodate the demand for these construction materials in Southcentral Alaska.

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[1]1982 is the most recent year for which detailed nonpetroleum corporate tax revenue data are available from the Alaska Department of Revenue.

TABLE 1

State Revenues From Mining Activities: 1980 - 1984

REVENUE SOURCE	1980	1981	1982	1983	1984
Alaska Corporate Net Income Tax[a]	$ 29,600	n/a	$ 21,000	n/a	n/a
Mining License Tax[a]	138,300	$56,000	158,800	$ 148,800	$341,800
Coal Lease Sale Bonuses[b]	-0-	-0-	-0-	-0-	-0-
Coal Lease Royalties[b]	89,000	80,000	81,000	73,400	78,400
Coal Lease Rentals[b]	51,000	52,000	52,000	85,200	83,200
Upland Mineral Lease Rentals[b]	-0-	-0-	-0-	-0-	-0-
Offshore Prospecting Permits and Leases[b]	n/a	18,900	20,200	30,600	29,600
Sale of Sand and Gravel[c]	n/a	n/a	n/a	3,600,000	2,500,000

[a]Actual revenues obtained from the Alaska Department of Revenue.

[b]Estimated revenues based on information obtained from the Division of Mining, Alaska Department of Natural Resources.

[c]Actual revenues obtained from the Division of Land and Water Management, Alaska Department of Natural Resources.

* * * * *

Coal Lease Bonuses, Royalties and Rentals are collected as a result of the sale, exploration and production of coal leases on State lands. The State has not received any bonuses over the past five years because no competitive leases have been sold. Annual coal royalties have averaged about $80,000 between 1980 and 1984 and reflect the relatively stable production from the Usibelli Mine in Healy. Annual rentals have increased in the past two years because newer leases carry a $3/acre rental rather than the $1/acre rental on older leases.

Upland Mineral Lease Rentals have not generated any State revenues in the past five years for a number of reasons. Most of the State's upland acreage is open to mineral entry rather than mineral leasing. Under mineral entry, an individual makes a discovery, stakes and records a

claim, and then owns the mineral deposit as long as annual labor requirements are fulfilled. The State receives no royalties or rentals on this mineral acreage developed under this locatable mineral approach.[2]

Furthermore, most miners working other State lands which are designated for mineral leasing have received waivers of lease requirements (including rental payments) through 1985. Upland mineral leases also do not include provisions requiring the payment of royalties to the State. Finally, labor expenses can be credited against a lessee's annual rental on the mineral leases.

Offshore Mineral Prospecting Permits and Leases generated about $22,000 in State revenues in FY 84. Prospecting permits yield $3/acre in annual fees and leases $1/acre in annual rentals, although expenses can be credited against annual rentals. As in the case of upland mineral leases, the offshore mineral leases do not include provisions for royalty payments to the State should offshore mining production commence in the future.

Sale of Sand and Gravel located on State lands generates considerable annual revenue compared with other mineral activities. Prices range from 50¢/cubic yard to $1.00/cubic yard depending upon location, with much of the revenues stemming from material sales in the vicinity of the North Slope oil fields.

Projected State Revenues From Future Mining Operations

Table 2 summarizes the fragmentary information available on projected State revenues from various mining activities. In the near-term, the State may see a four-fold increase in revenues from the sale of sand and gravel to roughly $10 million annually in FY 85 and FY 86 provided that the Lisburne and Endicott Projects proceed on the North Slope. Another considerable increase in mineral revenues will result from the phasing in of a higher coal royalty rate on renegotiated leases which are expiring in the Healy field in FY 87 and FY 88. The old leases carry a 5 to 10¢/ton royalty rate, whereas newer leases yield five percent of the adjusted gross value, or roughly 50¢/ton. Under the present system of mineral entry on most State mineral lands, future non-tax revenues to the State are estimated to be minimal. However, a lawsuit which has been filed to compel the State to establish a mineral leasing system on State lands could change this revenue picture in the

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[2]According to Mary Kaye Hession, Leasing Manager, Division of Mining, Department of Natural Resources, Alaska is the only state which follows this locatable mineral approach; all other states follow leasing procedures which generate annual revenues from mineral royalties and rentals.

future.[3] Oral arguments are scheduled before Superior Court Judge Serdahley in November in this "6i lawsuit", referring to the section of the Alaska Statehood Act which the plaintiffs argue requires the State to dispose of mineral deposits through a leasing approach.

Estimated revenues from the proposed mining projects at Red Dog, Quartz Hill and Greens Creek would greatly augment existing mineral revenues to the State. Very rough estimates suggest that these three projects could generate annual corporate and mining license tax revenues of approximately $10 million (in 1989) to $21.5 million (in 1992 - 1996).[4] These projections assume that the projects will begin production as currently scheduled in 1987 (Greens Creek) and 1988 (Red Dog and Quartz Hill) and will reach targeted mine production levels.

Analyses of the Red Dog, Quartz Hill and Greens Creek mining projects identify secondary benefits which would result from these developments. These benefits are briefly discussed below:

The Red Dog Zinc-Lead-Silver Mine[5] is estimated to create 350 to 400 permanent jobs with an annual payroll of roughly $11 to $13 million once full production is attained in 1993. Approximately 50 to 75 percent of the jobs would be held by regional residents, with another 10 to 40 percent of the jobs being held by other Alaskans. In addition, about 225 secondary and indirect jobs would be created.

Under a most probable metal price scenario, the Office of Management and Budget (OMB) estimated that the NANA Regional Corporation will receive average annual advance royalties of $25 million prior to 1991 and thereafter, average annual net proceeds royalties of $49 million. OMB estimates that about $5.8 million will be paid in annual State taxes on the royalties received in the 1990s.

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[3]Trustees for Alaska, a public interest law firm, filed the suit on behalf of the village of Minto; Dinyea Corp. (Stevens village corporation); Nunam Kitlutsisti (nonprofit native organization in Bethel); Alaska Independent Fishermen's Marketing Association and several conservation organizations.

[4]These mineral revenues represent considerably less than one percent of the State's projected petroleum revenues in those same years: 1989 ($3.07 billion) and 1992 ($2.96 billion).

[5]The information presented is based on the Red Dog Project Analysis, Alaska Department of Commerce and Economic Development, February 1984.

TABLE 2

Projected State Revenues From Future Mining Activities
(In Thousands of Dollars)

Revenue Source	1985	1986	1987	1988	1989	1990	1991-2000
SHORT-TERM							
Alaska Corporate Net Income Tax	n/a	n/a	n/a	n/a			
Mining License Tax	300	300	n/a	n/a			
Coal Lease Sale Bonuses	10	10	0	n/a			
Coal Lease Royalties[1]	0	48	213	800			
Coal Lease Rentals	93	103	103	n/a			
Upland Mineral Lease Rentals	Anticipated to be minimal						
Offshore Prospecting Permits and Leases	22	20	82	n/a			
Sale of Sand & Gravel	10,600	10,000	5,700	n/a			
LONGER-TERM							
Red Dog Mine (production in 1988)[2]							
CIT	-	-	-	estimated average: $4,100/yr			
MLT	-	-	-	no MLT until 1991; $4,600/yr			
Quartz Hill Mine (production in 1988)[3]							
CIT	-	-	-	estimated average: $4,500/yr			
MLT	-	-	-	no MLT until 1991; $7,000/yr			
Greens Creek[4]							
CIT	-	-	estimated total taxes of $12.5 million between 1987 and 1996				
MLT	-	-					

CIT = Alaska Corporate Income Tax
MLT = Mining License Tax

Source: House Research Agency, October 1984.

Footnotes Accompanying Table 2

[1]Previous overpayments of royalties by Usibelli Mine are to be credited in FY 85 and 86. The doubling of Usibelli production, which reflects the estimated 800,000 ton annual coal shipments to Korea beginning in 1985, will in fact increase State royalty revenues considerably. The increases in FY 87 and 88 royalties also represent the new five percent adjusted gross royalty rate to be applied to expiring leases which will be renegotiated.

[2]The annual tax payments are based on November 1983 estimates from Cominco presented in the Red Dog Project Analysis (February 1984, Department of Commerce and Economic Development). The earlier estimates were adjusted to 1984 dollars and reduced by $2 million/year (about 18 percent) to reflect about $22 million in tax savings between 1989 and 1999 estimated by Cominco under the recently enacted investment tax credit.

[3]The annual tax payments are based on May 1982 estimates from U.S. Borax presented in the State Fiscal Analysis Quartz Hill Molybdenum Project (May 1982, Office of the Governor Policy Analysis Paper No. 82-5). The annual estimates were adjusted to 1984 dollars and reduced by 18 percent to reflect an estimated tax savings under the new investment tax credit.

[4]State tax estimates were obtained from Mr. Pete Richardson, Greens Creek Project Manager based in Juneau.

Cominco estimates that capital investments of $390 million will be required at the mine site and to construct transportation infrastructure. If the port facilities are used for regional freight hauling, regional residents are estimated to save $2 to $3 million annually in shipping costs, or roughly $418 per resident each year.

The Quartz Hill Molybdenum Project would provide about 1,000 permanent mine jobs once full production of 80,000 tons/day is reached in about 1993. The Draft Environmental Impact Statement (DEIS) prepared by the U.S. Forest Service estimates an additional 1,000 indirect and secondary jobs under full mine production. A direct employees' payroll of $48 million annually is estimated between 1990 and 2005. The project is located on federal lands and therefore no mineral royalties would accrue to the State or regional native corporation, unlike the Red Dog Mine which would be located on NANA land.

U.S. Borax currently estimates capital investments of roughly $970 million in the mine and processing facilities and transportation infrastructure. The Ketchikan Gateway Borough would receive property and sales tax revenues from the project-induced population increase of an estimated 2,500 people and from greater business activity. The mine site, however, is located outside the borough boundaries and would not generate local property tax revenues.

The Greens Creek Zinc-Lead-Silver-Gold Mine is quite modest in comparison with the other two mining proposals. According to Pete Richardson, Greens Creek Project Manager, the 600 ton/day underground mine would provide 136 permanent jobs beginning in late 1987 or 1988. The mine is currently estimated to have a 10 to 12-year life, with the potential for a 17 to 20-year mine life.

The annual direct payroll would be roughly $6.5 million for workers, all of whom would commute from Juneau (18 miles to the Northeast). Secondary employment is estimated at 142 jobs. The Final EIS prepared by the U.S. Forest Service in 1983 estimated about $1 million in local tax revenues for the City and Borough of Juneau from property and sales tax growth induced by the mine operation.

Update on Other Mining Proposals

There are several other mineral deposits across the state which have been the subject of exploratory activity to varying degrees over the past few years. Some projects have also been analyzed for their economic feasibility. Available information on several of these projects is presented below:

Bering River Coal Project exploratory activities continued in 1984 and will also occur in 1985. Depending upon the extent and location of mineable reserves, the project could commence production at one million tons/year in the early 1990s. The joint venture between Chugach Native

Inc. and KADCO (a Korean corporation) could eventually ship up to 2 million tons/year to Korea. The project could provide roughly 500 permanent jobs and contribute to the construction of a multipurpose port facility. The mine would also provide annual royalties to the native corporation which owns the land.

Matanuska Coal Field is being explored by the Valley Coal Company (a partnership of Hawley Resource Group, Rocky Mountain Energy and Sun Eel Shipping Co). According to Chuck Hawley, operator for the partnership, the coal mine could begin production in 1991 if the permitting process commences in 1985. A 600,000 tons/day mine would employ 80 people and may be feasible as the supplier for a mine mouth coal-fired power plant. According to Mr. Hawley, near-term export of Matanuska coal to the Far East does not appear to be very likely because of more competitive coal prices from South Africa, Australia and Canada. According to internal feasibility figures, a 600,000 tons/year mine supplying a mine mouth utility could generate roughly $300,000 in royalties and $145,000 in taxes to the State each year.

The Beluga Coal Field has been the site of exploratory activities by both Placer U.S. and Diamond Alaska Coal Company (in a joint venture with Chuitna Coal Company). Diamond Alaska completed baseline studies in 1984 and may begin construction in late 1986. An initial coal production of 2-4 million tons/year could be attained by 1988 or 1989, depending upon the marketing strategy. It has been estimated by the State Office of Mineral Development that full development of all Beluga coal properties could eventually result in 1,000 permanent jobs.

The Alaska Asbestos Project in eastern interior Alaska did not sustain any field activity in 1984. Production timetables have slipped from earlier estimates of 1990 primarily because of the weakness in world asbestos prices. Environmental health problems with asbestos have also negatively affected domestic markets.

Considerable exploratory activity has occurred at a number of other mineral deposits in the state. The Ambler Mining District in the Kobuk River valley in northwest Alaska is a mineral rich province with a combined reserve base of roughly 100 million tons. The Delta mineral belt in the eastern Alaska Range contains at least 35 base-metal massive sulfide deposits. In addition, the Noatak zinc belt in northwest Alaska near the Red Dog project appears to be a very good deposit in comparison with lead-zinc properties elsewhere in the world. The remoteness of these deposits, which necessitates considerable capital investments in transportation systems, and/or the world metal prices and markets appear to place production and subsequent State revenues from these mineral deposits well into the future.

We hope that this information will be useful. Please contact us if we can be of further assistance.

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MINERAL TITLE EXAMINATION

by

TERRY S. MALEY

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Mineral Land Publications
P.O. Box 1186
Boise, Idaho 83701
(208) 343-9143

I. Mineral in Character

Land and Mineral Cases Requiring Mineral in Character Classifications

Prior to enactment of FLPMA on October 21, 1976, disposals under the mining laws and public land laws required that the land be classified as either mineral in character or nonmineral in character. One exception to this requirement was disposals under the Stockraising Homestead Act. In this type of homestead, no mineral classification was necessary because all minerals were reserved to the United States.

Land Disposals

A determination that lands are mineral in character generally results in a decision by the Interior Department rejecting the application for entry under the public land laws. Since passage of FLPMA, most of the homestead and land disposal laws requiring a mineral in character determination have been repealed. Among the few land actions that still require a mineral in character determination are Indian allotments, Carey Act grants, desert land entries, railroad selections and certain disposals in Alaska. Land sales under section 203 and 206 of FLPMA require a mineral potential report.

Land Exchanges

Prior to FLPMA, all exchanges required a mineral in character determination. The purpose of this determination was to establish whether locatable, salable or leasable minerals existed in sufficient quantities to warrant a classification of mineral in character. Also if mineral values were present, they were appraised to ascertain their value. Either party may reserve minerals; however, generally where both the federal and the nonfederal lands are mineral in character and the values are comparable, neither party will reserve minerals. The land exchange is one of the few types of land actions where the United States has a variety of options available to consummate an exchange.

Mill Sites

R.S. 2337, as amended by the Act of March 18, 1960 (30 USC 42) authorizes the location of mill sites only on lands nonmineral in character.

Legal Basis for Mineral Reservation

The legal basis for reserving mineral lands from disposal under the public land laws originates in the Act of July 4, 1866 (14 Stat. 86) where it is stated "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." RS 2318; 30 USC 21 (1976).

Types of Minerals

Mineral lands not only include metalliferous lands, but all lands that are chiefly valuable for deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture. *Northern Pacific Railway Co. v. Soderberg*, 188 US 526 (1903). In *Laden v. Andrus*, 595 F2d 482 (1979), the Court discussed the *Northern Pacific Railway* case as follows:

> The difficulty in ascribing a meaning to the word "mineral" in a given statutory context was early recognized in *Northern P. R. Co. v. Soderberg*, 1903, 188 US 526, 530. There the issue was whether a deposit of granite rendered certain lands "mineral" and as such excepted from a grant of territory from the United States to the plaintiff railroad. The Court said:
>
> > "The word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals, gold and silver, would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary: 'any constituent of the earth's crust;' and that of Bainbridge on Mines: 'All the substances that now form, or which once formed, a part of the solid body of the earth.'

Definition of Mineral in Character

There is no definition of "mineral in character" in the statutes; however, over the years, the courts have defined it in a variety of ways. Perhaps the most authoritative and enduring test for determining the mineral character of land was announced by the United States Supreme Court in *Diamond Coal & Coke Co. v. U.S.*, 233 US 236 (1914). The Court said at 239-240:

> [I]t must appear that the known conditions... were plainly such as to engender the belief that the land contained mineral deposits of such quality and quantity as would render their extraction profitable and justify expenditures to that end.

This same test was quoted with approval in *U.S. v. Southern Pacific Co.*, 251 US 1, 14 (1919), *Laden v. Andrus*, 595 F2d 482, 488 (9th Cir 1979), *McCall v. Andrus*, 628 F2d 1185, 1188 (9th Cir 1980) and numerous other Interior Department and Federal court cases.

Definition May Include Evidence for Determination

In *Southern Pacific Co.*, 71 ID 224, 233 (1964), the Secretary published a definition that not only included the language used in *Diamond Coal & Coke Co., supra*, but also included the type of evidence that may be used to establish mineral in character. The basis for this evidence was derived from earlier court cases. The significance of the acceptable evidence for establishing mineral in character provided by earlier court cases is described in following several pages. The Secretary's definition of "mineral in character" in *Southern Pacific Co., supra* at 233 is consistent with the two Supreme Court cases cited above; and is probably a better and more complete definition because it includes the necessary evidence which was also held to be acceptable by the two Supreme Court cases. The Secretary stated at 233:

> It is not essential that there be an actual discovery of mineral on the land. It is sufficient to show only that known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act.

This definition from *Southern Pacific Co., supra*, was recently quoted with approval in *U.S. v. Southern Pacific Transportation Co.*, 56 IBLA 191, 192-193 (1982).

Evidence Supporting Mineral in Character

In order to understand what is meant by "mineral in character," it is essential to have a good understanding of the types of evidence determined to establish mineral in character by the several important court cases. The applicable language from each of these cases is quoted below:

1. *Diamond Coal & Coke Co. v. U.S.*, 233 US 236, 248-249 (1914):

> An exposure to the eye of coal upon the particular lands was not essential to give them a then present value for coal mining. They were all adjacent to the outcrop and above the plane of the coal-bearing strata dipping under the valley. In alternate even-numbered sections they substantially paralleled the outcrop for 7 miles, and in two places were separated from it by only a few rods. Those to the north were opposite the company's developed mine (No. 4), and those to the south were opposite the tract acquired through Lees, upon which good coal was disclosed. The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands. These conditions were open to common observation, and were such as would appeal to practical men, and be relied upon by them in making investments for coal mining.
>
> There is no fixed rule that lands become valuable only through actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

2. *U.S. v. Southern Pacific Co.*, 251 US 1, 14 (1919):

> The observable geological and other physical conditions at the time of the patent proceedings, as shown by the evidence, were as follows: The area called the Elk hills was about 6 miles wide and 15 long, and constituted an anticlinal fold or elongated dome, — an occurrence favorable to the accumulation and retention of oil. The lands in suit were about its center. From 5 to 10 miles to the west was the Temblor range, the main uplift of that region. Along the east flank of that uplift for a distance of 30 miles was a series of outcrops or exposures of Monterey (diatomaceous) shales, the source of oil in California, and porous sandstone in which oil generally finds its ultimate reservoir. These strata were of exceptional thickness, and it was apparent that oil in considerable quantity had been seeping or wasting from the sandstone. The dip of the strata was towards the Elk hills, and there were no indications of any faulting or thinning in that direction. Between the outcrop and the Elk hills upwards of two hundred wells had found the oil-bearing strata and were being profitably operated, several of the wells being on a direct line towards the lands in suit and within 3 or 4 miles of them. In and beyond the Elk hills were oil seepages and other surface indications of the existence of oil in the underlying strata, one of the seepages being near the lands in suit. Two wells had been sunk in the Elk hills, but obviously had not gone to an adequate depth and were not productive, although some oil was reached by one.
>
> Other geologists and oil operators, called by the company, gave it as their opinion that the lands were not, under the conditions stated, valuable for oil; but, as respects the

testimony of some, it is apparent that they were indisposed to regard any lands as within that category until they were demonstrated to be certainly such be wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping. This is a mistaken test, in that it takes no account of geological conditions, adjacent discoveries, and other external conditions upon which prudent and experienced men in the oil mining regions are shown to be accustomed to act and make large expenditures.

3. *Laden v. Andrus*, 595 F2d 482, 489-490 (9th Cir 1979):

> There is no fixed rule that lands become valuable . . . only through . . . actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.
>
> To paraphrase *Diamond Coal & Coke*, the relevant issue is whether the known conditions existing in 1901 were sufficient to engender the belief that the Wedekind tract contained minerals of a quantity and quality that would render their extraction profitable and justify expenditures to that end. Briefly summarized, the evidence supporting the DOI's finding that the conditions in 1901 were sufficient to engender such beliefs includes: (1) the Wedekind tract is located in the heart of the so-called Wedekind mining district, which bears the name of appellants' ancestor who, in 1896-97, located the first mining claim in the area on two sections of land adjacent to the Wedekind tract; this claim later yielded a producing mine; (2) an expert mining geologist and engineer testified that the areas which were most favorable for mineralization from a geological standpoint fully covered the Wedekind tract, as well as adjacent lands from which actual production was recorded; (3) extensive mine workings existed in 1901 on sections adjacent to the southeast corner of the Wedekind tract; (4) Wedekind and other family members located, bought, and sold mining claims covering portions of the Wedekind tract during the period between 1900-1901; (5) Wedekind located yet another mining claim extending into the Wedekind tract two months after he purchased the land from the CPRC; four months after his purchase, Wedekind sold his producing mine on the adjacent property along with the various mining claims which he had located that covered portions of the Wedekind tract; and (6) miners and prospectors other than the Wedekind family located and or purchased mining claims on the Wedekind tract during the period between 1900-1902. This is enough to require that we hold substantial evidence supports the DOI's determination.

4. *U.S. v. Southern Pacific Transportation Co.*, 66 IBLA 191, 195 (1982):

> We agree with the Administrative Law Judge that the Government presented a prima facie case that the land in question was mineral in character between the date the railroad line was definitely fixed (1866) and the date of purchase by Birce (1888). The 1900 map by Lindgren indicates that the area was underlain by auriferous gravels, which also covered significant portions of the Gold Run Mining District. Past mining activity in the general vicinity indicates that these auriferous gravels contained significant values of gold which clearly "would render their extraction profitable and justify expenditures to that end." *See Southern Pacific Co., supra* at 233. Furthermore, part of the land involved in this patent application had been the site of past mining activity. Finally, in 1896, the Department canceled a patent application which included the lands in question because the land contained minerals. In view of the fact that the determination was fairly contemporaneous with the date of purchase (October 4, 1888), it is entitled to great weight.

The above-quoted cases all agree that actual discovery of minerals within the tract is not required; and that the following types of evidence support a determination of mineral in character:

1. discoveries or mines in adjacent land;
2. other external conditions that cause prudent and experienced men to act and make expenditures; and
3. favorable geological conditions within the tract.

Distinction Between "Discovery" and "Mineral in Character"

A small number of Interior and Federal court cases have distinguished between "discovery" and "mineral in character." One of the most recent Federal court statements on this subject is found in *McCall v. Andrus*, 628 F2d 1185 (1980), *cert denied* 450 US 996 (1981). The Court said at 1188 that "proof of 'discovery' requires a showing of an exposed mineral deposit on the claim while 'mineral in character' may be proved by geological inference coupled with marketability." Other pertinent cases on this subject are quoted below:

1. *State of California v. Rodeffer*, 75 ID 176, 178-179 (1968):

> Although it has been customary in contests of mining claims for the contestants to make the dual charges that no discovery has been made and that the lands embraced in mining claims are nonmineral in character, a finding

on one of the issues is normally dispositive of a controversy and makes it unnecessary to make a finding on the other issue. The reason for this is fairly obvious. Proof of the discovery of a valuable mineral deposit is concurrent proof of the mineral character of the land on which the discovery is made, and, where a discovery is shown, there is no occasion to make a separate finding with respect to the mineral character of the land on which the discovery has been made. On the other hand, a finding that there has not been a discovery normally renders moot the question of mineral character, since the discovery of a valuable mineral deposit is indispensable to the validity of any mining claim and a finding that land in a mining claim is mineral in character can not validate the claim in the absence of a showing of discovery. A finding that land is not mineral in character, of course, is necessarily a finding that a discovery has not been made upon that land.

2. *U.S. v. Bechthold*, 25 IBLA 92 (1972):

A finding that public lands were previously mineral in character does not constitute evidence of discovery. The tests, though somewhat similar conceptually, have different evidentiary standards. Furthermore, a finding of mineral in character fails to reach the issues of sufficient quantity and quality required under the prudent man test. *Converse v. Udall*, 399 F2d at 619. Also, changes in prices, costs, condition of the mine, et., must be considered since the time the previous determination was made.

3. *U.S. v. Harper*, 8 IBLA 364 (1972):

Although a finding that land is nonmineral in character is sufficient to invalidate a mining claim, the reverse is not true. To establish the mineral character of land it is not necessary to show that the land contains a valid claim, whereas to prove the validity of a claim it must be shown that a discovery has been made of a valuable mineral deposit physically exposed within the limits of the claim. The character of a tract of land as mineral may be inferred through geological inference, by the presence of minerals in substantial quantities on adjacent lands, or by other external conditions.

4. *U.S. v. Meyers*, 17 IBLA 313, 317 (1974):

Two elements must be shown under this test: (1) the quantity and quality of minerals on the claim; and (2) the prospect of success in removing, extracting and marketing the mineral. Unlike in those cases where discovery is an issue, *Henault Mining Co. v. Tysk*, 419 F2d 766 (9th Cir 1970), in a mineral character determination the quantity and quality of mineral on a claim may be established *without* the physical exposure of the mineral on the claim. A finding that land is mineral in character may be based

wholly on inferential evidence: geological conditions; discoveries of minerals in adjacent land; and other observable external conditions upon which a prudent and experienced person would rely. *Southern Pacific Co.*, 71 ID 224, 233 (1964); *U.S. v. Tobiassen*, 10 IBLA 379, 383-84 (1973). The acceptance of these kinds of less reliable evidence to support a determination that land is mineral in character distinguishes this test from the discovery standard approved in *U.S. v. Coleman*, 390 US 599 (1968).

5. *Laden v. Andrus*, 595 F2d 482, 487 (9th Cir 1979):

...appellants argue that there must exist an actual "discovery" of valuable minerals on land before it may properly be classified as being "mineral" in character, and that the test for determining "mineral land" is more stringent than the test for proving a "discovery." Although it is true that a "discovery" has always been considered a prerequisite to the location of a mining claim under American mining law, "proof of known mineral character is not dependent upon a showing of actual discovery." *Standard Oil Co. v. U.S.*, 107 F2d 402, 414-15 (9th Cir), *cert. denied*, 309 US 654, 673.

Mineral in Character and the Ten Acre Rule (Placer Claims Only)

In *Ferrell v. Hoge*, 29 ID 12, 13, 15 (1889), The Secretary discussed the rationale for inquiring into the mineral character of placer mining claims upon establishing that a discovery is made on one portion of the claim:

> It is contended...that a discovery of placer mineral deposits will support a location of twenty acres by a single individual or one hundred and sixty acres by an association of eight persons whether the mineral deposits extend throughout the entire claim or are confined to the immediate locality of the discovery.
>
> Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.
>
> It would not comport with the spirit of the mining laws to hold that where a placer mineral deposit is discovered in

any forty acre subdivision of the public lands, an association of eight persons is authorized to embrace in a mining location founded upon such discovery three other contiguous forty acre subdivisions of nonmineral land and to receive a patent for the same as a part of their mining claim, and yet this would logically follow if the contention of these claimants were sustained.

In *U.S. v. Meyers*, 17 IBLA 313 (1974), the Board held that each 10-acre subdivision of an association placer claim must be mineral in character; if a 10-acre tract is nonmineral in character, it must be excluded from the patent. The Board also applied this 10-acre rule to an association gold placer claim. In this example the Board said:

> A discovery on one 10-acre portion of an association placer mining claim does not establish the mineral character of the entire claim. Even though there is a discovery on one 10-acre portion, if any other 10-acre part is nonmineral in character, that part or parts of the claim must be excluded from the patent.
>
> The gold-bearing gravels on the clear listed area are located on or near the S 1/2 SE 1/4 NW 1/4 NE 1/4 and appear to extend into that five-acre parcel (Tr. 43, Ex. 1). Certainly the inference that it does is properly drawn. In addition, in the northern-most trench on the 5-acre tract, Meyers testified that one sample taken in that area indicated values of $10 per cubic yard (Tr. 110), and other sampling also indicated gold values (Tr. 67). The presence of all these factors in combination is sufficient to engender the belief that this five-acre section is mineral in character even though there is insufficient *exposure* of minerals to justify the finding of a discovery. We find that the S 1/2 SE 1/4 NW 1/4 NE 1/4 is mineral land.
>
> Although there are some differences in the proof available to show that the remaining 10-acre parcels are mineral lands, the proof for each is essentially similar. Limited sampling has revealed generally low gold values (*i.e.* from nothing to $.35 per cubic yard) and only small isolated pockets of potential gold-bearing values. These values are in stark contrast to high values found on the clear listed portion or to the recovery of 100 ounces of gold on the parcel the Judge declared mineral in character. The stream below the bend from the center of the clear listed area to the south is almost entirely devoid of gravel (Tr. 25). The finding of traces of gold or low-grade gold-bearing gravels in limited quantities does not demonstrate, without more, that land is mineral in character.

In *McCall v. Andrus*, 628 F2d 1185 (9th Cir 1980), *cert. denied* 450 US 996 (1981), the Ninth Circuit Court upheld the ten-acre rule and also that only one discovery is required for a claim, regardless of size. The Court said at 1188:

> ...30 U.S.C. §§35 and 36 restrict the *maximum* size of a placer mining claim to twenty acres per individual, up to 160 acres for an association claim. These sections do not provide, however, that land within a placer claim that does not contain valuable minerals can be purchased under §22. The Interior Department has held:
>
> > Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent.
>
> *American Smelting & Refining Co.*, 39 LD 299, 301 (1910). The Department established a rule that, when challenged, the claimant must show that each ten-acre tract on his claim contains a valuable mineral. *Id.*; *U.S. v. Bunkowski*, 79 ID 43, 54-55 (1972). Since federal land is platted in ten-acre tracts, ten acres is a reasonable unit. "A court faced with a problem of statutory construction should give great deference to the interpretation of a statute by the... agency charged with its administration." *Brubaker v. Morton*, 500 F2d 200, 202 (9th Cir 1974).
>
> [3-5] The validity of a mining claim is established either by the granting of a patent upon application by the claimant or through contest proceedings initiated by the government. *See Ideal Basic Industries, Inc. v. Morton*, 542 F2d 1364, 1367-68 (9th Cir 1976). If the validity of the claim is contested, the claimant must prove that he has made a "discovery" of a valuable mineral deposit thereon. To do so, the claimant essentially must show that the mineral is "marketable" in that it can be mined, removed and disposed of at a profit. *Verrue v. U.S.*, 457 F2d 1202, 1203 (9th Cir 1972). Only one discovery per claim must be shown. 43 CFR §3842.1-1. However, if the character of the land is also challenged in the contest complaint, the claimant must show that each ten-acre tract contains a deposit of the mineral under the ten-acre rule. The rule does not require, as McCall argues, that a discovery be made on each ten-acre tract contrary to regulation.

Ten-Acre Rule Applies to Individual Placers

In *U.S. v. Lara*, 67 IBLA 48, 50 (1982), it was held that "the 10-acre rule is equally applicable to individual and association placer claims." Therefore the Department should examine the mineral character of every 10-acre tract, even if the claim is an individual claim consisting of only 20 acres.

Quantity of Mineral

Mineral lands do not include those vast areas of the country that contain precious metals in small quantities, but not in sufficient value to justify their exploitation. In *Davis v. Weibold*,

138 US 507, 519 (1891), it was said that the exceptions of mineral land from entry under the homestead laws or grants under the public land laws "are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant." In *Deffenback v. Hawk*, 115 US 392, 404 (1885), quoted with approval in *Diamond Coke & Coal v. U.S., supra* at 240, the United States Supreme court also stated the following:

> We say 'land *known* at the time to be *valuable* for its minerals,' as 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.

And in a more recent Interior Department case it was held that where land is shown to contain minerals in such limited quantities that their extraction would not justify the cost, the land is not mineral in character. *John M. DeBevoise*, A-28099, 67 ID 177 (1960).

Agriculture v. Mining Purposes

To determine whether land is agricultural or mineral in character depends on whether the land is more valuable for agricultural or mining purposes. *Barden v. Northern Pacific R. Co.*, 154 US 288 (1894). In *Davis v. Wiebbold*, 139 US 507, 521 the Court held that "... if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver."

It has never been the policy of Congress to dispose of mineral lands under the agricultural or nonmineral laws. *Ivanhoe Mining Co. v. Consolidated Mining Co.*, 102 US 167 (1880). And title to known mineral land cannot be acquired under an agricultural or nonmineral entry. *Deffeback v. Hawke*, 115 US 392, 402 (1885).

Valuable for Minerals at Time of Sale

In *Davis v. Weibold, supra* at 524, it was held that "the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were, at the time of the grant, known to be so valuable for their minerals as to justify expenditure for their extraction." In *Deffeback v. Hawke, supra* the Supreme Court again said the following:

> We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of 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.

No Retroactive Effect If Minerals Later Found

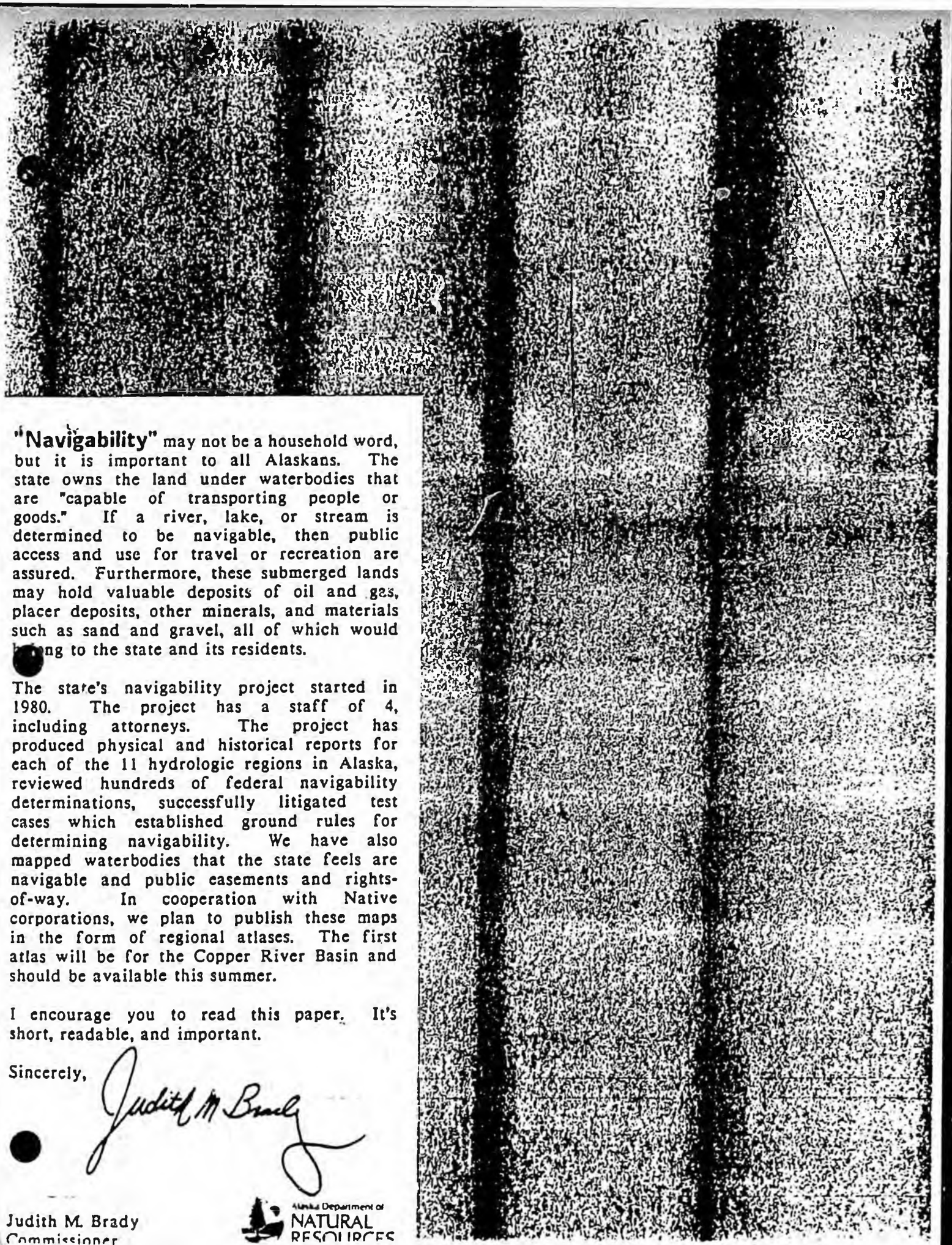
A decision by the Interior Department that lands are nonmineral in character will not be disturbed if the lands are patented and are later found to be mineral in character. *Lane v. Watts*, 1 App DC 139 (1913), *affirmed* 234 US 525. In *Deffeback v. Hawke, supra*, the Supreme Court said:

> We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which years afterwards rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the preemption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

Marketability Applied in Determining Mineral in Character

In *McCall v. Andrus, supra* at 1188, it was held that "mineral in character may be proved by geological inference coupled with marketability." The Court expanded on the marketability requirement as follows:

> McCall's contention that the Board based its decision on the absence of actual mining is incorrect. The Board adopted the conclusion of the hearing examiner who stated:
>
> > It is only those tracts with a deposit which can be extracted, processed, and marketed at a profit in competition with other deposits that are valuable and mineral in character. The contestees believe that the caliche material can be blasted and processed at a competitive price at the present time. (The contestees) have received a patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years.
> >
> > The contestees offered no evidence to suggest that they had a market for any more than this amount of material either in 1948, 1953, or 1955. Without an expanded market it was not economically feasible to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955.
>
> This is a proper application of the test for determining whether land is mineral in character.



"Navigability" may not be a household word, but it is important to all Alaskans. The state owns the land under waterbodies that are "capable of transporting people or goods." If a river, lake, or stream is determined to be navigable, then public access and use for travel or recreation are assured. Furthermore, these submerged lands may hold valuable deposits of oil and gas, placer deposits, other minerals, and materials such as sand and gravel, all of which would belong to the state and its residents.

The state's navigability project started in 1980. The project has a staff of 4, including attorneys. The project has produced physical and historical reports for each of the 11 hydrologic regions in Alaska, reviewed hundreds of federal navigability determinations, successfully litigated test cases which established ground rules for determining navigability. We have also mapped waterbodies that the state feels are navigable and public easements and rights-of-way. In cooperation with Native corporations, we plan to publish these maps in the form of regional atlases. The first atlas will be for the Copper River Basin and should be available this summer.

I encourage you to read this paper. It's short, readable, and important.

Sincerely,

Judith M Brady

Judith M. Brady
Commissioner

Alaska Department of
NATURAL
RESOURCES

Policies and Procedures On OWNERSHIP AND MANAGEMENT OF NAVIGABLE AND PUBLIC WATERS

August 1987

State ownership of the beds of navigable waters is an inherent attribute of state sovereignty protected by the United States Constitution. Montana v. United States, 450 U.S. 544 (1981). Consistent with that principle, ownership of the beds of navigable waters in Alaska vested in the newly formed State of Alaska in 1959. Under the Alaska Constitution, the state also has power and control over all waters in the state regardless of navigability. The waters are held and managed by the state in trust for the use of the people. The primary purpose of this paper is to describe the State of Alaska's policies and procedures for identifying and protecting the state's title to the beds of navigable waters. In addition, this paper outlines the legal and policy considerations which guide the management of the state's submerged lands and public waters.

IDENTIFYING AND PROTECTING STATE TITLE TO THE BEDS OF NAVIGABLE WATERS

Identification and management of the beds of navigable waters is an important policy of the State of Alaska. Unfortunately, there are differences of opinion regarding the navigability of many of Alaska's lakes, rivers, and streams. Perhaps the greatest reason for this disagreement is the lack of any hard and fast rules for determining navigability. Navigability is a question of fact, not a simple legal formula. Factual variations in waterbody use that result from different physical characteristics and transportation methods and needs must be taken into account in determining navigability. Although there are many legal precedents for determining navigability in other states, the courts are just beginning to provide the necessary legal guidance for accurate navigability determinations in Alaska.

In 1980, after passage of the federal Alaska National Interest Lands Conservation Act (ANILCA), the state established a comprehensive navigability program in response to federal land conveyances and land management activities under the Alaska Native Claims Settlement Act (ANCSA) and the Alaska Statehood Act. Navigability determinations are required to determine whether the state or the federal government owns the submerged lands. Navigability determinations are also required prior to state land disposals to insure that adequate public use easements are reserved.

The purpose of the state's program is to protect the state's sovereign ownership of the beds of navigable waters. Because state and ANCSA land selections and federal conservation units blanket the state, navigability questions have arisen for rivers, lakes and streams throughout Alaska. The navigability or nonnavigability of many of those waterbodies has been agreed upon. There are hundreds of others, however, where navigability remains at issue. The princi-

Alaska Department of Natural Resources
Division of Land & Water Management
P.O. Box 107005
Anchorage, Alaska 99510-7005

Alaska Department of NATURAL RESOURCES

pal goal of the navigability program is to identify the proper criteria for determining title navigability in Alaska and to gather sufficient information about the uses and physical characteristics of individual waterbodies so that accurate navigability determinations can be made now and in the future as disputes arise. Other important aspects of the program include monitoring federal land conveyances and management programs to identify particular navigability disputes, seeking cooperative resolution of navigability problems through negotiations and legislation, and preparing for statewide navigability litigation.

Navigability Criteria

The physical characteristics and uses of a waterbody -- or criteria -- which are used by the state for asserting navigability are based upon the legal principles established by the federal courts. Those criteria are applied taking into account Alaska's geography, economy, water-based transportation methods and the physical characteristics of Alaska's rivers, lakes, and streams. The State of Alaska bases its navigability program upon the following interpretations of the federal test of title navigability.

■ *The Waterbody Must Be Usable As A Highway For The Transportation of People or Goods.* The courts have ruled that the central theme of title navigability is that the waterbody be capable of use as a highway which people can use for transporting goods or for travel. Neither the types of goods being transported nor the purpose of the travel matter. Transportation associated with recognized commercial activities in Alaska, such as mining, timber harvesting, and trapping, is evidence of navigability. The use of a waterbody for transportation in connection with natural resources exploration or development, government land management, management of fish and game resources or scientific research is also evidence of navigability. Likewise, travel by local residents or visitors for the purpose of hunting, fishing and trapping or as a means of access to an area can be used to establish navigability. The same is true for recreational transportation, including personal travel as well as professionally guided trips.

■ *Waters Which Are Capable of Being Used For Transporting Persons and Goods, Although Not Actually Used, Are Navigable.* It is not necessary that a waterbody be actually used for transportation to be found navigable. It is enough that it is susceptible (i.e., physically capable) of being used. Whether a waterbody is susceptible of use for transportation depends upon the physical characteristics of the water course such as length, width, depth and, for a river, current and gradient. If those physical characteristics demonstrate that a waterbody could be used for the transportation of persons or goods, it is legally navigable. The susceptibility element of title navigability is very important for the identification of navigable waterbodies in Alaska. Because of sparse population and lack of development, there is often little or no evidence of actual use for transportation purposes, although many remote waterbodies are physically capable of such use.

■ *Transportation Must Be Conducted In the Customary Modes of Trade and Travel On Water.* A finding of navigability does not require use or capability of use by any particular mode of transportation, only that the mode be customary. The courts have held that customary modes of transportation include all recognized types and methods of water carriage. Unusual or freak contrivances adapted for use only on a particular stream are excluded. Customary modes of trade and travel on water in Alaska include, but are not limited to, barges, scows, tunnel boats, flat-bottomed boats, poling boats, riverboats, boats propelled by jet units, inflatable boats, and canoes. In places suitable for harvesting timber, the flotation of logs is considered a customary mode of transportation.

The mode of travel must also be primarily waterborne. Boats which may be taken for short, overland portages qualify. However, the courts have ruled that the use of a lake for takeoffs and landings by floatplanes is insufficient, in and of itself, to establish navigability.

Preliminary court decisions have indicated that the use of a river or a lake as a highway in its frozen condition, travelling on the ice, may not be evidence of naviga-

bility. If upheld, the practical significance of those rulings is unclear. It appears that most waterbodies in Alaska that are used as highways in winter can also be travelled by small boats in the summer and are navigable on the basis of the summer use.

■ *Waters Must Be Navigable In Their "Natural and Ordinary Condition".* A waterbody which can be used for transportation only because of substantial man-made improvements is not navigable for title purposes. However, if transportation does or may occur on the waterbody and the improvements would only make transportation easier or faster (e.g., dredging), it is still considered navigable for title purposes.

The presence of physical obstructions to navigation (rapids, falls, log-jams, etc.) does not render a waterway nonnavigable if the obstruction can be navigated despite the difficulties or if it can be circumvented by other means, such as portaging, lining, or poling past the obstruction. A waterbody is also navigable even though, due to seasonal fluctuations in the water level, it is not navigable at all times. However, a waterbody which is only navigable at infrequent and unpredictable periods of high water is not normally considered navigable.

■ *Title Navigability Is Determined As of The Date of Statehood.* To be considered navigable for title purposes, the waterbody must have been navigable in 1959 when Alaska became a state. This element of the navigability test focuses on the physical characteristics of the waterbody and whether those characteristics have changed significantly since statehood. Because only a short amount of time has passed since Alaska became a state, most waterbodies have not changed enough since statehood to alter their navigability. A waterbody which is navigable today was probably navigable in 1959. Exceptions might include the creation, by natural or man-made causes after statehood, of a totally new lake now used for navigation; such a lake would not be considered navigable for title purposes. Conversely, a waterbody which was navigable in 1959 but, because of natural or man-made physical changes, is no longer navigable, would still be considered navigable for title purposes.

Navigability Criteria Disputes

Because of differing legal interpretations of court navigability decisions, some aspects of the state's navigability criteria position are disputed by the federal government. The result has often been that waterbodies considered navigable by the state were determined nonnavigable by the federal government.

The primary criteria dispute has centered on the type or purpose of the transportation. For many years the federal government has asserted that a waterway must be used or capable of use for transporting commerce to be considered navigable; "noncommercial" transportation uses were considered insufficient to establish navigability. In this context, the federal government claimed that the only relevant "commercial" transportation is the distribution of goods for sale or barter, or the transportation for hire of people or things. With respect to professionally guided transportation services provided by Alaska's tourism industry, the federal government has admitted that these services constitute commerce. However, the federal government has argued that the waters are not being used as a navigable "highway" when recreation is involved, but rather more as an amusement park. The federal government therefore claimed that waters used only for commercial recreation are legally nonnavigable, even though they may be navigable in fact.

The federal government has also argued that aluminum boats, boats propelled by jet units, inflatable boats and canoes are not customary modes of travel for the purpose of determining navigability in Alaska. As a result, many waterbodies navigated by these types of watercraft have been found legally nonnavigable by the federal government. The federal government's argument is that these boats represent post-statehood technological advances, are too small to be considered "commercial", or that most "commercial" use of the watercraft developed after statehood.

Another navigability criteria dispute involves remote, isolated lakes. The federal government has found many of these lakes legally nonnavigable even though they are physically capable of being navigated. The federal government's theory is that a navigable connection to another area is required to make travel on a remote lake worthwhile. Otherwise, the federal government views the lack of development in the area around the isolated lake as an indication that the lake will never be used for commercial transportation.

To resolve these navigability criteria disputes, the state has actively pursued a limited number of court cases challenging particular findings of nonnavigability by the federal government. With the exception of floatplane use, the courts have agreed with the navigability criteria presented by the State of Alaska and have rejected the limitations suggested by the federal government. A review of these cases follows:

Gulkana River. This recent federal court decision rejected the federal government's requirement of commercial transportation and its restrictive definition of commerce. Ruling for the state, the court stated that to demonstrate navigability, it is only necessary to show that the waterbody is physically capable of "the most basic form of commercial use: the transportation of people or goods." The court also rejected the federal government's restrictive interpretation of the "customary mode of transportation" element of the title navigability test. The decision stated that the test of navigability is not limited to the types of watercraft customarily used at the time of statehood. It determined that contemporary watercraft use must be considered along with past use, and observed that on the Gulkana River, modern power boats, including jet unit craft and aluminum riverboats, "are the craft most commonly used, followed by inflatable rafts and canoes." Because the Gulkana River can be used for the transportation of people or goods using these customary craft, the Gulkana River was found navigable. That decision is now on appeal. Alaska v. United States. No. A80-358 Civil (D. Alaska Dec. 16, 1986), appeal docketed, No. 87-3555 (9th Cir. Jan 26, 1987).

Kandik and Nation Rivers. In this administrative appeal, the State of Alaska and Doyon Limited, a Native regional corporation, successfully established that the use or susceptibility of use of a river or stream by an 18 - 24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish navigability. Based upon the use of these types of boats for the transportation of goods and supplies by fur trappers, as well as extensive historic and contemporary canoe use, the court found the Kandik and Nation Rivers, in Interior Alaska, navigable. Appeal of Doyon, 86 I.D. 692 (ANCAB 1979).

Alagnak River. In this federal district court case, the Alagnak River, the Nonvianuk River, Kukaklek Lake and Nonvianuk Lake were all found navigable. These interconnected waterbodies are located in the Bristol Bay region of Alaska, south of Lake Iliamna. Their primary transportation use is for commercially guided hunting, fishing, and sightseeing and for government research and management. These rivers and lakes also serve as a means of access for local residents to their homes and to the surrounding areas for subsistence hunting and fishing. After several years of litigation, the federal government conceded navigability. Alaska v. United States, No. 82-201 (D. Alaska Feb. 2, 1985).

Matanuska River. The recommended decision in this administrative appeal agreed with the State of Alaska's position that post-statehood commercial river rafting operations are sufficient to establish navigability. Based upon that type of use, the administrative law judge who heard the case has recommended that the Matanuska River, in Southcentral Alaska, be found navigable. The Secretary of Interior, over the state's objections, stayed implementation of the recommended decision. Appeal of Alaska, No. 82-1133 (IBLA rec. decision Aug. 18, 1983).

Slopbucket Lake. The state claimed that the extensive use of floatplanes on

Slopbucket Lake, a twenty acre lake adjacent to Lake Iliamna, was sufficient to establish navigability. The federal courts rejected this view. The courts reasoned that floatplanes do not use the lake as a navigable highway; they just take off and land there. Alaska v. United States, 754 F.2d 851 (9th Cir.), cert. denied, 106 S. Ct. 333 (1985).

Identification of Navigable Waters

Even if the criteria for determining navigability in Alaska were totally agreed upon, it still would be difficult to prepare a complete list of all of the navigable lakes, rivers and streams in the state. Much of Alaska has not yet been surveyed and many of out-of-date. It is an immense and complex task simply to locate and identify all of the thousands of named and unnamed lakes, rivers and streams in the state which might be considered navigable. Furthermore, once a potentially navigable lake, river or stream has been identified, detailed information about the size and uses of that waterbody is necessary to make an accurate navigability determination. Because of Alaska's undeveloped and remote character, gathering that information is both time-consuming and expensive. Finally, administrative navigability determinations made by the state or the federal government are subject to legal challenge, since only the courts can authoritatively determine title to submerged lands.

Despite these difficulties, the state and federal governments issue navigability decisions for nearly every federal land conveyance under ANCSA or the Alaska Statehood Act. The purpose of the navigability decision is to determine the extent of state-owned submerged lands within the area intended to be conveyed. Similarly, nearly every federal Conservation System Unit (CSU) management plan addresses the navigability issue. These federal navigability decisions are reviewed by the state (average 30-45 per month) to insure that the available information sources were used and interpreted correctly. Where the federal government determines nonnavigable a waterbody which is considered navigable by the state, the state provides supplemental information about the uses and characteristics of the waterbody to obtain a redetermination of navigability. In addition, the state makes its own navigability determinations if there is a need to, such as for an oil and gas lease, material sale, mining claim, or other resource use requiring an ownership determination.

In the 1960s and 1970s, the federal government generally made navigability determinations on a township by township or parcel by parcel basis in connection with individual land conveyances. This often required several looks at a single waterbody which extended across a township or parcel boundary. The result was a duplication of efforts and, occasionally, inconsistent navigability determinations. For example, there were instances in which the upper reaches of a stream were determined navigable while the lower reaches were not. In 1979, in order to achieve more uniform results, an agreement was signed between the state and the federal government to cooperate in performing navigability research on a regional hydrologic basis. Today, navigability reports are done by hydrographic region or drainage and include historic, hydrologic, and other physical characteristics information. Altogether there are 11 different hydrological regions in Alaska. Examples include the Arctic, Bristol Bay and Copper River regions.

In compiling these regional reports, the state and federal governments research published and unpublished materials concerning the past and present uses and physical characteristics of all waterbodies within the particular region. A report is then prepared that summarizes the information on the basis of individual waterbodies and by the nature of the transportation use. These reports are prepared independent of the legal disagreements on the proper criteria for determining navigability. All types of waterbody use are reported. The regional reports provide information which can be used to make navigability and other land management decisions.

In addition to preparing the regional reports containing waterbody use data, the state is graphically depicting navigable waters in Alaska on U.S.G.S. maps (1:63,360

scale). When completed, the maps will include those waters determined navigable by the state, the federal government, or by any court. The maps are based on a review of existing navigability determinations. If no formal determination has been made previously, the state may make a new determination based upon the physical characteristics of the waterbodies, the regional hydrologic reports, the transportation use information taken from the regional historical reports, and application of the state's navigability criteria. Time and resources permitting, the state may also contact individuals with specific knowledge of the mapped area and its waterbodies for additional information.

In many of the large, undeveloped regions of Alaska there may be little or no accurate waterbody use or physical characteristics information available for making these navigability determinations. When no other information is available and the state nevertheless must make a navigability determination, the state is forced to rely solely upon the physical characteristics shown on the U.S.G.S. maps. In those cases, the state identifies as navigable all streams depicted on the U.S.G.S. maps with double lines (generally at least 100 feet wide) and having an average gradient over the length of the stream of no more than 25 feet per mile. With rare exceptions, the state's experience has been that streams of this type are deep enough and wide enough to be navigable by boats carrying persons or goods and must therefore be considered legally navigable. Streams depicted with single lines, although narrower in width, may also be listed as potentially navigable if they have gradients of substantially less than 25 feet per mile and are at least 10 miles long without excessive meanderings.

With respect to lakes, if there is no public use or physical characteristics information readily available, those lakes which are shown on the U.S.G.S. maps as having a navigable water connection with other navigable waters, or which are accessible by short overland portages, are considered navigable regardless of the size of the lake. These lakes are part of a system of interconnected navigable waters. If a lake is shown on the U.S.G.S. map to be totally isolated, it will be included on the state's navigability maps if it is at least 1 1/2 miles long. That length insures that the lake can be used as a "highway" for transporting persons and goods. Future judicial decisions interpreting the "highway" requirement for isolated lakes could shorten or lengthen this 1 1/2 mile "rule of thumb."

The state recognizes that, under some circumstances, lakes smaller than 1 1/2 miles long can be and are used as navigable highways. In those cases, when known, these smaller lakes are also depicted on the state's navigability maps. Moreover, as a matter of administrative policy and convenience only, the state may sometimes make an exception to the 1 1/2 mile standard in the extremely wet regions of the state, including some areas in the Yukon-Kuskokwim Delta, Yukon Flats and on the North Slope. In these areas, an isolated lake might need to be 2-3 miles long to be included on the state's navigability maps. Although smaller lakes in these areas are capable of being used for transportation and should be found navigable by the courts, the presence of so much water in these areas suggests that the numerous larger lakes may provide adequate water-based public transportation routes at this time. Therefore, the state has decided to concentrate its limited resources in protecting these larger waterbodies first.

Riparian Rights and Statute of Limitations

Disputes over ownership of submerged lands in Alaska arise under a variety of circumstances. However, the most common in Alaska is the product of the survey and acreage accounting system used by the federal government for conveying land to the state and ANCSA corporations.

Accurate determinations of the amount of land selected by and conveyed to the State of Alaska or Alaska Native Corporations require that the selected areas be surveyed; acreage figures used prior to survey are simply estimates. Under traditional land survey and conveyance procedures, only uplands are surveyed and conveyed, not submerged lands. Bodies of water are

excluded from the surveys and the water acreage is not included in computing the amount of land involved in the conveyance. In Alaska, however, the federal government has not consistently followed these survey rules. Instead, the federal government has often treated bodies of water like uplands, surveying and charging submerged lands against the total acreage entitlements. Since the state owns the beds of navigable waters, the federal government issued navigability decisions for many bodies of water within selected areas. If a waterbody was believed to be nonnavigable, however, the submerged lands were conveyed and the acreage was charged against the state or ANCSA corporations' acreage entitlement.

Because of these conveyance procedures, the navigability of waterbodies in Alaska have been issues of contention since the enactment of the Alaska Statehood Act and ANCSA. In addition to the problems caused by a lack of information about many waterbodies, the situation was aggravated by the narrow definition of navigability used by the federal government. These narrow definitions have been rejected by the courts, including the recent decision in the Gulkana River case. Alaska v. United States, No. A80-359 Civil (D. Alaska Dec. 16, 1986). Thus, many of the submerged lands that the federal government attempted to convey to Native corporations should have been recognized as belonging to the state. The state appealed many conveyances to protect its title. Native corporations also found it necessary to challenge erroneous federal navigability decisions to insure they would not be deprived of any portion of their entitlements by being charged for submerged land owned by the state.

In an effort to resolve these inequities, the state, United States Department of Interior and the Alaska Federation of Natives agreed that the standard rules of survey, as found in the 1973 edition of the Manual of Instructions for the Survey of the Public Lands of the United States, should be followed for land conveyances in Alaska. The standard rules of survey require that navigable lakes, rivers, and streams regardless of size, and all lakes 50 acres or larger and rivers and streams three chains (198) feet in width or wider, regardless of navigability, must be meandered and segregated or excluded from the public lands. The recipients of conveyances from the federal government are charged only for the amount of public land, or uplands, identified by the survey. These procedures have been consistently followed in Alaska since 1983.

The use of these survey procedures has eliminated many of the problems associated with land conveyances in Alaska. Submerged lands are no longer being conveyed to fulfill acreage entitlements. Thus, with the exception of lakes smaller than 50 acres and streams narrower than 198 feet, navigability determinations are not required prior to land conveyances. Determinations of ownership of submerged lands, where this survey procedure is used, can be put off until a natural resource use requires resolution, such as an oil and gas lease or a gravel sale.

The decision to use the standard survey procedures for land conveyances in Alaska has been challenged by two environmental groups in the court case of The Wilderness Society v. Carruthers, No. 84-1823 Civil (D.D.C., June 30, 1986), appeal docketed, No. 86-5205 (D.C. Cir. Feb. 28, 1986). Their lawsuit was dismissed by the federal district court in Washington, D.C. for lack of standing, since the environmental organizations could not demonstrate that they were personally affected or injured by the use of these standard survey procedures. The State of Alaska is actively defending the case, along with the federal government, the Alaska Federation of Natives, and several ANCSA corporations.

Even if the state and ANCSA corporations win that lawsuit, however, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are hundreds of erroneous nonnavigability decisions and the resulting submerged land conveyances made to Alaska Native Corporations in previous years. Those nonnavigability decisions and submerged land conveyances are subject to the statute of limitations in Section 901 of ANILCA, which requires

the state to file federal court litigation challenging every erroneous non-navigability finding or risk losing state title to the submerged lands.

Section 901 of ANILCA was an attempt to guarantee that ANCSA corporations would not lose a portion of their land entitlement under ANCSA as a result of judicial rulings of navigability. Specifically, that section provides that the ownership by a ANCSA corporation of a parcel of submerged land, or a decision by the Secretary of Interior that the water covering such a parcel is not navigable, shall not be subject to a judicial determination unless a civil action is filed in the United States District Court within five years after the date of the execution of the involved conveyance, if the conveyance was made after December 2, 1980. A seven year statute of limitations from date of the conveyance would apply if the conveyance occurred before December 2, 1980.

These original five and seven year periods have been twice extended by Congress to avoid the necessity for extensive navigability litigation while Congress searches for a better and more permanent solution to the submerged lands problems in Alaska. The statute of limitations periods now expire eight and nine years from December 2, 1980 respectively. However, it is inevitable that, if there is a limitation on the time within which the state must assert its title, the state will eventually be required to file a large number of navigability cases each year to preserve its claim of title to submerged lands.

This artificially induced litigation would be costly and time consuming, not just for the state but also for the federal government and ANCSA corporations. The judicial system would also be inundated by litigation that would often be unnecessary but for the statute of limitations. Moreover, extensive navigability litigation taking many years to resolve would perpetuate the conflicts and uncertainties regarding acreage chargeability and ownership of submerged lands in Alaska.

Under the survey procedures now being used in Alaska, submerged lands are no longer being conveyed and charged against the state and ANCSA corporations acreage entitlements. Thus, the Section 901 statute of limitations is no longer necessary to insure that ANCSA corporations do not lose a portion of their entitlement because of navigability findings. Recognizing this, the state, the Alaska Federation of Natives and the Department of the Interior are working together in Washington, D.C. to legislatively repeal the Section 901 statute of limitations and to confirm the 1983 decision to use the standard survey procedures for acreage accounting purposes under the Alaska Statehood Act and ANCSA.

If Section 901 is not repealed, the magnitude of the task of identifying all the parcels of submerged land that might be subject to the limitations period in sufficient time to bring an action under Section 901 would put an immense burden on the state. There is also continuing uncertainty concerning the criteria for determining naviga- bility in Alaska. In addition, much of the land being conveyed by the federal government in Alaska has yet to be surveyed. Prior to survey, many land transfers have been accomplished by interim conveyances or tentative approvals which may be inaccurate because of poorly prepared or outdated maps, aerial photography, or lack of mapping.

For these reasons, the State of Alaska filed suit in November 1981, challenging the constitutionality of Section 901(a) on equal footing and due process grounds. Alaska v. United States, No. A81-483 (D. Alaska filed Nov. 25, 1981). The case was stayed at the request of all of the parties in the spring of 1983 so that alternative remedies could be pursued in Congress. There has been no further activity on the case since that time, although it will be renewed if the legislative effort to repeal Section 901 is unsuccessful.

Navigable Waters Within Pre-Statehood Federal Withdrawals

Although disputes over which waters in Alaska are navigable are the most frequent cause of submerged land ownership disputes, there is another major legal issue which

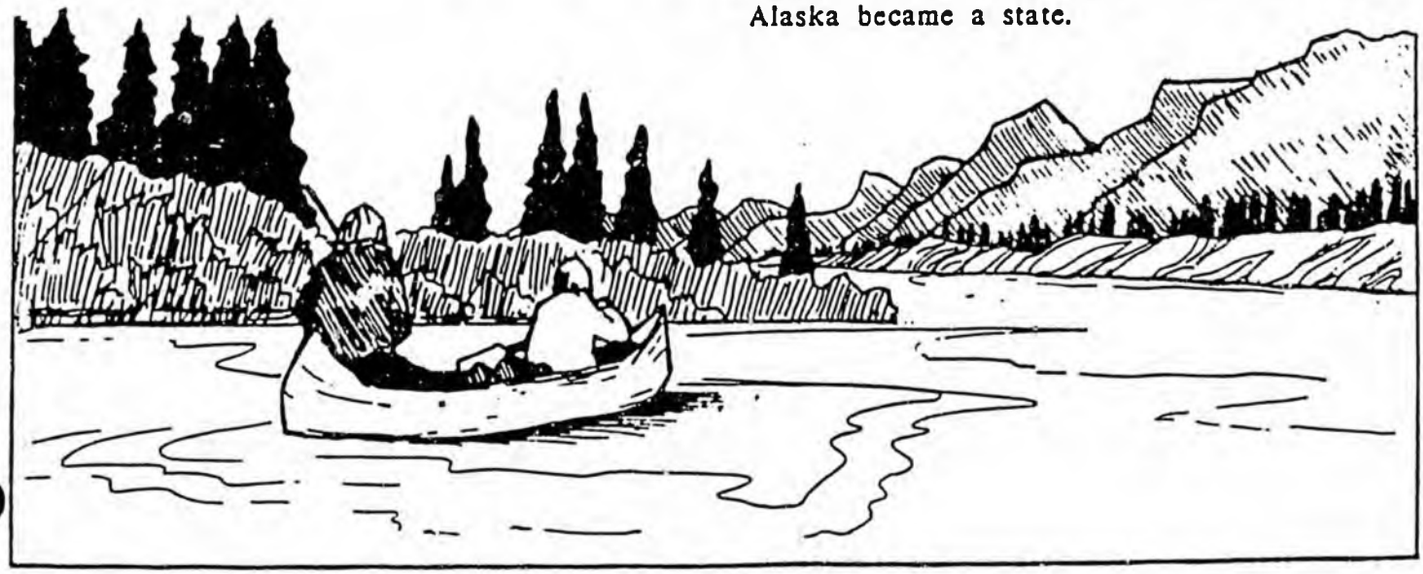
also threatens Alaska's sovereign claim to the beds of navigable waters. Even where navigability is conceded, the federal government often contends that title to submerged lands did not vest in the state if the submerged lands were withdrawn or reserved by the federal government on the date of statehood. The federal government has used this argument to attempt to convey the beds of navigable waters within prestatehood withdrawals or reservations to third parties. Within state selections, the federal government has often attempted to charge the acreage of "reserved" submerged lands against the state's entitlement.

The state strongly disagreed with this federal claim and actively pursued a number of court challenges to resolve the issue. In addition to numerous appeals from federal decisions to convey or charge for the beds of navigable waters, the state was involved as a friend of the court in one case and continues to be involved in another United States Supreme Court case which present this issue. The case pending is United States v. Alaska, U.S. Supreme Court 84 Original (filed June, 1979).

On June 8, 1987 the Court issued its decision in Utah v. United States, No. 85-1772 (filed Oct. 14, 1986). In this case the federal government, in 1976, issued oil and gas leases for land underlying Utah Lake, a navigable waterbody located in Utah. The suit sought a declaratory judgement that Utah, rather than the United States, had title to the lake bed under the "equal footing doctrine". Under that doctrine, the United States holds the land under navigable waters in the territories in trust for future states, and, absent a prior conveyance by the federal government to third parties, a state acquires title to such land upon entering the Union on an "equal footing" with the original 13 states.

The Supreme Court held that title did pass to the state upon Utah's admission to the Union. They held that there is a strong presumption against finding congressional intent to defeat a state's title, and, in light of the longstanding policy of the federal government's holding land under navigable waters for the ultimate benefit of future state absent exceptional circumstances, an intent to defeat a state's equal footing entitlement could not be inferred from the mere act of the reservation itself. The United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation, but would additionally have to establish that Congress affirmatively intended to defeat the future state's title to such land.

This decision has significant ramifications within Alaska, since over 95 million acres - more than 25% of the total area of the state - was enclosed within various federal withdrawal and reservations at the time Alaska became a state.



Public Trust Doctrine

The state has special duties and management constraints with respect to state owned land underlying navigable waters. These special duties and management constraints arise from the Alaska Constitution. The Alaska Constitution contains numerous provisions embracing the principles commonly known as the public trust doctrine. That doctrine, as it has evolved in court decisions over hundreds of years, requires the state to exercise authority to insure that the paramount rights of the public to use navigable waters for navigation, commerce, recreation and related purposes is not substantially impaired.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1892), involved a grant by the State of Illinois of one thousand acres of the bed of Lake Michigan, constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The U.S. Supreme Court held that the grant was revokable, that the state held the land in trust for the public, and that it was powerless to relinquish its rights as trustee.

The court went on to say that land underlying navigable waters is much more than a simple property right.

> [I]t is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

Courts in other states over the years have defined in somewhat different ways the public uses that are permitted and protected by the public trust as it applies to submerged lands. In reviewing these other cases, it can clearly be seen that through time an ever expanding definition of the public uses protected by the public trust doctrine is being adopted. The California Supreme Court recently held that:

> Although early cases had expressed the scope of the public's right in (lands subject to the public trust) as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the (public trust) lands in their natural state as ecological units for scientific study. City of Berkeley v. Superior Court of Alameda, 606 P. 2d 362, 365 (Cal. 1980).

The Alaska Supreme Court has never had occasion to directly address the application of the common law public trust doctrine in Alaska. However, several provisions in Art. VIII of the Alaska Constitution provide similar protections - protections which cannot be disregarded by the legislature or overruled by the courts. For example, Art. VIII, Sec. 3 provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

The 1985 Alaska legislature recognized the constitutional application of public trust doctrine principles in Alaska. In an Act

relating to the public or navigable waters of the state, the legislature found that "the people of the state have a constitutional right to free access to the navigable or public waters of the state" and that the state "holds and controls all navigable or public waters in trust for the use of the people of the state". 85 SLA Ch. 82. In the same act, the legislature ruled that submerged lands are "subject to the rights of the people of the state to use and have access to the waters for recreational purposes or any other public purposes for which the water is or capable of being used consistent with the public trust."

It is clear under the Alaska Constitution that the State of Alaska has the responsibilities of a trustee with respect to management of land underlying navigable waters. Moreover, the Alaska legislature has adopted a broad view of the public uses protected or permitted by the public trust. Accordingly, the Alaska Attorney General's Office has determined that, until the Alaska Supreme Court rules on the question, the state should assume that a broad definition of public rights protected by the Alaska Constitution and the public trust doctrine applies in Alaska, similar to the one adopted by the California Supreme Court. 1982 Atty. Gen. Op. No. 3 (June 10, 1982).

Navigable Waters Within ANILCA Conservation System Units

On December 2, 1980, the Alaska National Interest Lands Conservation Act became law. This Act created or added 104.3 million acres to various federal conservation system units. Because these "withdrawals" occurred after the date of statehood, there is no disagreement between the state and federal governments that navigable waters within the various CSU's are owned by the state. However, there is some disagreement on the amount of authority the federal land managers may have to regulate these state owned submerged lands.

The U.S. Constitution gives Congress certain limited powers to control uses on state owned submerged land. These are known as the Property Clause, Navigational Servitude and the Commerce Clause. The extent of these powers involves complex legal questions. However, even assuming that Congress has the power to regulate state-owned submerged lands in Alaska, the United States Supreme Court has ruled that Congress may choose not to exercise that power, thus leaving regulation totally up to the state. Escanaba Co. v. Chicago, 107 U.S. (17 Otto.) 678 (1883). Whether Congress has done that can only be determined by examining the federal laws passed by Congress dealing with Alaska lands. Another possibility is that the state and federal governments have concurrent jurisdiction, sharing the authority to regulate submerged lands.

In ANILCA, Congress did not take away the state's power to regulate stateowned submerged lands within federal CSU's in Alaska. Numerous provisions in ANILCA recognize and respect the state's authority over state-owned land. In some cases, however, Congress may have attempted to give the federal land managers some concurrent authority to regulate navigable waters within CSU's. The state has taken the position that, where possible, cooperation rather than confrontation will be used with the federal land managers. This cooperation usually takes the form of a memorandum of understanding that discusses management issues and how they will be resolved.

Public Waters

It is not only the beds of navigable waters in Alaska that are reserved in public ownership for public use. Under Article VIII, section 3 of the Alaska Constitution, all waters occurring in their natural state are reserved to the people for common use. Article VIII, section 14 of the Alaska Constitution also provides for the broadest possible access to and use of state waters by the general public.

> Section 14. *Access to Navigable Waters.* Free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by

general law regulate and limit such access for other beneficial uses or public purposes.

Pursuant to this grant of authority, the Alaska State Legislature, in AS 38.05.365(12), defined "navigable waters" as follows:

> "navigable waters" means any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes.

This definition of navigable waters does not define state ownership of submerged land in Alaska. The definition of navigability for ownership purposes was discussed earlier in this paper. This definition, however, does define what types of waterbodies in Alaska are available for public use under the Alaska Constitution and fall under various protection clauses found in the Alaska statutes.

The Alaska State Legislature has broadly construed the constitutional protections for public use of the waters of the state. In an Act (85 SLA chap. 82, codified as AS 38.05.128) relating to the navigable or public waters of the state, the state legislature found:

> (a) The people of the state have a constitutional right to free access to the navigable or public waters of the state.
>
> (b) Subject to the federal navigational servitude, the state has full power and control of all of the navigable or public waters of the state both meandered and unmeandered, and it holds and controls all navigable or public waters in trust for the use of the people of the state.
>
> (c) Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purposes for which the water is used or capable of being used consistent with the public trust.
>
> (d) This Act may not be construed to affect or abridge valid existing rights or create any right or privilege to the public to cross or enter private land.

Thus, under the Alaska Constitution and this statute, any surface waters capable of use for the public purposes defined in AS 38.05.365(12) are available to the public, irrespective of streambed ownership. Further, such public use is not considered a taking and is not subject to inverse condemnation action. Private ownership is subject to the public rights that are protected by the public trust. In two recent Montana Supreme Court cases involving the nature of public rights where the submerged lands are privately owned, the court ruled that the public has the right to use the area between the high water marks for floating, wading, fishing, portaging, anchoring, and other uses incidental to the use of the water. The court also found that if travel on the water or streambed is obstructed, the public is allowed to use the adjacent private land to portage around the barrier in the least intrusive way possible, avoiding damage to the private property holder's rights. However, the public does not have the right to enter into or trespass across private property in order to enjoy the recreational use of state owned

waters. The State of Alaska agrees with this ruling and believes a similar ruling would be made by our state courts.

Boundaries of Navigable Waters

The state is often asked where the public portion of a navigable lake or stream ends and private ownership rights begin. The boundary between public and private ownership is the ordinary high water mark. According to the Alaska Supreme Court, the ordinary high water mark is a natural physical characteristic placed upon the lands by the action of the water. It is not a highly technical boundary requiring a surveyor to locate. It has been defined as the mark along the bank or shore where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to leave a natural line impressed on the bank or shore. That line may be indicated by erosion, shelving, changes in soil characteristics, destruction of terrestrial vegetation, or other distinctive physical characteristics. See State, Department of Nat. Resources v. Pankratz, 538 P.2d 984, 988-89 (Alaska 1975).

The same question often arises in the case of wide, braided streams. A braided stream is simply a river with numerous channels that are constantly changing. See Oklahoma v. Texas, 260 U.S. 606, 634-36 (1923). Thus, the test for determining the boundary is the same. Is the area so regularly covered with water as to deprive it of terrestrial vegetation? If so, it is considered part of the bed of the stream and is subject to the public rights of use. On the other hand, if upland vegetation has taken hold, the area should be considered part of the adjacent uplands or, if isolated, an island. Islands are not part of the riverbed and, if privately owned, are not subject to the same public rights. However, newly formed islands belong to the owner of the river bed. Thus, islands which have risen since the date of statehood from the beds of state-owned navigable rivers belong to the state and may be used by the public. If the river is nonnavigable and the bed is privately owned, a newly formed island belongs to the private owner.

Conclusion

This paper enunciates the state's policies and procedures for managing and protecting state submerged lands and public waters. As further legal and practical developments occur in this area, these policies and procedures will be reexamined by the state and, if necessary, appropriate changes will be made.

Alaska State Legislature

Please enter into the record my testimony to the House Resources committee name

committee on HB 99 bill/subject . dated 1/26/89 .

TO: HOUSE RESOURCE COMMITTEE FOR 1/26/89 HEARING ON H.B.99

REFERENCE MADE TO "IMPLEMENTATION OF 6(1) COURT DECISION," PAGES 3-4, 1989 ALASKA MINERALS COMMISSION REPORT. IMPORTANT IS "SETTING OF RENTAL AND/OR ROYALTY FEES FOR MINING CLAIMS ON SUBJECT STATE LANDS SHOULD NEITHER PENALIZE CLAIMANTS NOR CREATE DISINCENTIVES FOR INDIVIDUALS OR COMPANIES DOING MINERAL EXPLORATION," THANKS FOR CONSIDERATION.

EARL H. BEISTLINE
ALASKA MINERALS COMMISSION

Signed: Earl H Beistline
Testifier

Representing (Optional)

P.O. Box 80148, Fbx AK 99708
Address

479-6240
Phone No.

ALASKA MINERALS COMMISSION
Earl H. Beistline, Chairman
P. O. Box 80148
Fairbanks, AK 99708

January 19, 1989

The Honorable Curt Menard
House of Representatives
P. O. Box V, CT-606
Juneau, AK 99811

Dear Mr. Menard:

Please find a copy of the 1989 report of the Alaska Minerals Commission enclosed. This is the third report submitted by the Commission since its creation in 1986. As a result of legislation passed and signed into law last year, the Commission will continue to submit annual reports through 1994.

During 1988, the legislature and the administration took several positive steps to address regulatory and policy issues of importance to the industry. An Alaska Mineral Policy Act encouraging the development of the state's abundant mineral resources was passed by the legislature and signed into law by Governor Steve Cowper on June 8, 1988. The Department of Environmental Conservation promulgated new mixing zone regulations for water discharges that are to be implemented during the 1989 season, and has begun work on new regulations for start-up variances.

These positive developments, both in industry and government, have come at an opportune time. The international market forces which have brought new investment in Alaska's minerals and the willingness of the legislature and administration to address legitimate concerns of the industry have helped to promote economic growth and diversification at a time when the state must begin to overcome its economic dependency on oil field development and oil production revenues.

Additional issues will challenge the continued growth of Alaska's mining industry in 1989 and beyond. Of primary concern is the legislative implementation of the Alaska Supreme Court's decision on a lawsuit regarding the interpretation of section 6(i) of the Alaska Statehood Act. The Commission's recommendations on this and other issues are addressed in the attached 1989 report.

Please do not hesitate to contact myself or other members of the Minerals Commission if you would like to discuss the recommendations of this report or other issues concerning Alaska's mining industry.

Sincerely,

Earl H. Beistline
Chairman
Alaska Minerals Commission

EHB:nm
Enclosure

Report of the

ALASKA MINERALS COMMISSION

to

Governor Steve Cowper

and the

Alaska Legislature

January 1989

FOREWORD

The Alaska Minerals Commission was created by the 14th Legislature and signed into law on June 6, 1986, through the enactment of Chapter 98 of the 1986 Session Laws of Alaska.

The enabling legislation instructs the Commission to make recommendations to the Governor and Legislature on ways to mitigate the constraints, including governmental constraints, on the development of minerals, including coal, in the state. The Commission's Statement of Purpose can be found in Appendix A.

The Commission presented its inital report to the Governor and the Legislature in January 1987, presented its interim report in January 1988, and was charged with making a final report to the first session of the 16th Legislature in January 1989 after which the Commission was to expire. However, during the second session of the 15th Legislature, House Bill 561 was enacted. The bill amended the enabling legislation by extending the Commission's charter through January 1994 and by providing that one member reside in a rural community (Appendix B).

Commission members are appointed by the Governor, the President of the Senate and the Speaker of the House. The current members include representatives of the placer, hard rock and coal mining industries and come from diverse areas of the state. Administrative and staff support to the Commission is provided by the Division of Business Development, Department of Commerce and Economic Development.

I would like to thank all members of the Commission, staff and those members of the public who have provided their comments and worked on committees for their contributions in preparing this report. I would also like to thank Governor Cowper and the Alaska Legislature for the support they have provided the Commission.

Earl H. Beistline
Chairman

Report of the

ALASKA MINERALS COMMISSION

January 1989

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ALASKA MINERALS COMMISSION

Chairman

Earl Beistline
Mining Consultant
Fairbanks, Alaska

Vice Chairman
Joseph E. Usibelli, Chairman
Usibelli Coal Mine, Inc.
Healy, Alaska

Del Ackels, Owner-Operator
Goldust Mines
Fairbanks, Alaska

Irene Anderson, Land Planner
Sitnasuak Native Corporation
Nome, Alaska
(Appointed September 1988)

G.G. (Jerry) Booth
Manager, Alaska Exploration
Cominco Alaska Exploration, Inc.
Anchorage, Alaska

Roger Burggraf, Owner
Grant Mine
Fairbanks, Alaska

Tom Crafford, Mine Geologist
Greens Creek Mining Company
Juneau, Alaska
(Appointed December 1988)

Don Finney, Ketchikan Manager
U.S. Borax and Chemical Corp.
Ketchikan, Alaska

Karl Hanneman, President
Alaska Placer Development, Inc.
Fairbanks, Alaska

Jenny Hawley, Vice President
Hawley Resource Group, Inc.
Anchorage, Alaska
(Resigned, December, 1988)

Ron C. Sheardown, President
Greatland Exploration, Ltd.
Anchorage, Alaska
(Appointed, May 1988)

Ernest N. Wolff
Mining Consultant
Fairbanks, Alaska

Staff

Charlie Green
Division of Business Development
Department of Commerce and
Economic Development
1001 Noble Street, Suite 360
Fairbanks, Alaska 99701

Jim Deagen
Division of Business Development
Department of Commerce and
Economic Development
P.O. Box D
Juneau, Alaska 99811

INTRODUCTION

In its initial report to the Governor and Legislature in January 1987, the Alaska Minerals Commission presented findings and recommendations addressing the range of fundamental issues critical to Alaska's mineral industry. The Commission would like to refer interested readers to that report and would like to express continued support for the comprehensive recommendations made in it. In this report, as in the January 1988 report, the Commission has chosen to focus and to present recommendations on those issues of the most timely importance.

In 1988, a rebound in the production of gold and in expenditures made on Alaska exploration programs highlighted renewed interest in Alaska's precious metals. Additionally, Alaska continued its unique exports of subbituminous coal to Pacific Rim countries. In 1989, the Greens Creek mine and the Red Dog mine are scheduled to begin production, establishing the state as an international supplier of silver, zinc and lead.

During 1988, the Legislature and the administration took several positive steps to address regulatory and policy issues of importance to the industry. An Alaska Mineral Policy Act encouraging the development of the state's abundant mineral resources was passed by the Legislature and signed into law by Governor Steve Cowper on June 8, 1988. The Department of Environmental Conservation promulgated new mixing zone regulations for water discharges that are to be implemented during the 1989 season and has begun work on new regulations for start-up variances.

These positive developments, both in industry and government, have come at an opportune time. The international market forces which have brought new investment in Alaska's minerals and the willingness of the Legislature and administration to address legitimate concerns of the industry have helped to promote economic growth and diversification at a time when the state must begin to overcome its economic dependency on oil field development and oil production revenues.

Additional issues will challenge the continued growth of Alaska's mining industry in 1989 and beyond. Of primary concern is the legislative implementation of the Alaska Supreme Court's decision on a lawsuit regarding the interpretation of section 6(i) of the Alaska Statehood Act. Certain state laws governing the location of mining claims must be amended during the 1989 legislative session to reflect the court's directives.

A workable and reasonable legislative implementation of the Court's 6(i) decision has been identified as the highest priority of the Alaska Minerals Commission's subcommittees for hard rock mining, placer mining, coal mining and industrial minerals. The Commission's recommendations for the implementation of the 6(i) decision are found under the Legislative Priorities section of the report.

Additional recommendations in the legislative priorities section, as well as those under other section headings, represent other actions that the Commission feels will demonstrate the state's desire to expand its mineral industry and to provide a reasonable regulatory and tax climate for business. These actions will do much to attract exploration and development in the short-term, and in turn, will provide widespread economic benefits for the state and its residents over the long-term.

RECOMMENDATIONS OF THE ALASKA MINERALS COMMISSION

I. LEGISLATIVE PRIORITIES

Implementation of the 6(i) Court Decision

- The highest priority of the Alaska Minerals Commission is the fair and equitable implementation of the Alaska Supreme Court's interpretation of section 6(i) of the Alaska Statehood Act. (For a summary of the 6(i) issues and lawsuit, see Appendix C.)

  The Commission supports the positions of both the Alaska Miners Association[1] and Governor Steve Cowper[2] on the following three critical aspects of any legislation to be enacted.

  1. The traditional discovery, location and recordation system recognizes the unique nature of mineral resource development as well as the needs of individuals and companies carrying out mineral exploration and development. The right of self-initiation is guaranteed by the Alaska Constitution and no fundamental changes should be made in the way preferential minerals rights are initiated on state land.

  2. Because of the long lead time commonly required between the discovery of a deposit and its initial production, there should be no arbitrary time limits placed upon the tenure of a mining claimant on state lands. This is especially important in Alaska where the need to construct basic infrastructure and to await financial and market "windows" will often result in longer development lead times than in more developed states and countries.

  3. The setting of rental and/or royalty fees for mining claims on subject state lands should neither penalize claimants nor create disincentives for individuals or companies doing mineral exploration. In Alaska, exploration, development, capital and operating costs are commonly higher than in more developed states and countries. Alaska's cumulative mineral tax schedule, including existing corporate income taxes, mining license taxes and new rental and/or royalty fees should not unduly burden the small miner nor increase total development costs to the point where diminished economic feasibility precludes mine development or mineral exploration on subject state lands.

  A fourth aspect of the implementation of the 6(i) court decision is the definition of lands to which the new legislative provisions will apply. The Commission agrees with Governor Cowper that it is in the interests of both the state and the mining industry that this aspect be resolved in a manner that minimizes the risk of lengthy and expensive litigation. As the Alaska Supreme Court ruled that the 6(i) provisions are applicable only to those state lands "known to be mineral in character at the time of state selection," the Commission also recommends that a clear definition of such lands be developed, and that workable and expeditious procedures be developed to allow timely classification of lands and claims subject to 6(i).

  Finally, the Commission strongly recommends that proposed legislation implementing the 6(i) court decision be limited to only those issues specifically required by the court.

---

[1] *Communication from Richard A. Hughes, President, Alaska Miners Association to Governor Steve Cowper, September 9, 1988.*

[2] *Communication from Governor Steve Cowper to Richard A. Hughes, President, Alaska Miners Association, October 19, 1988.*

Allowance for Flexible Work Weeks

- The passage of legislation allowing work schedules to be set on the basis of project specific considerations will allow for more efficient use of labor and provide more desirable time-off patterns for employees. This will be particularly significant for mines in remote locations with employees who reside in communities distant from the work site.

Extension of Underground Work Hours

- Legislation is required to amend current statutes limiting shifts at the work face of underground mines from the current maximum of eight hours to a maximum of ten hours. The antiquated statute presently in effect does not recognize the implementation of modern safety programs and penalizes mine efficiency and employee time-off schedules on remote mining projects.

Multiple Use of State Lands

- The Commission would like to reemphasize four recommendations made in the Commission's 1987 report regarding the management of state lands.

  1. Alaska Statute 38.05.300 should be amended as follows:

     Classification of lands. (a) The commissioner shall, where considered necessary and proper, classify land for surface use. This section does not prevent reclassification of land, where the public interest warrants reclassification, nor does it preclude multiple use of land whenever different uses are compatible. State land, water, or land and water area may not, except by act of the state legislature, be closed to multiple use or to mineral entry if the area involved contains more than 640 acres.

  2. The Legislature should redefine, to conform with constitutional intent, the various definitions of "multiple use" in the Alaska Statutes to require the management of state lands for the use of all resources rather than allocating or selectively denying resource use.

  3. The Legislature should only make closures of land to mineral entry where documented and demonstrated incompatible use is proven and only when preceded by a mineral assessment.

  4. The Legislature and Governor should periodically review lands closed to mineral entry to assess the need for continued closure and, if there is no longer a compelling need for closure, return the land to multiple-use designation.

Amending the Reporting Requirements of the Minerals Policy Act.

- Sec. 44.99.110(2) should be amended to require each department, board, commission, or agency, including the University of Alaska, to fulfill its reporting requirements as set out in this section on an annual basis through 1994 rather than once only in 1989.

Industrial Minerals Inventory

- The Legislature should reintroduce and enact legislation similar to SB 71 (or companion legislation HB 69), Senate Concurrent Resolution 4 and House Concurrent Resolution 5 as introduced during the Second Session of the 15th Legislature. These bills and resolutions address the need for systematic identification, inventory and reserve of sand and gravel resources to meet the present and future needs of transportation systems, populated areas and large-scale developments within the state and Pacific Rim.

II. ADMINISTRATIVE PRIORITIES

Public Information on Water Quality Progress

- Increased public awareness of the progress being made on improving water quality will assist in providing support for the administrative actions needed to provide for greater flexibility in the state's water quality regulations. To follow up on his March 1987 placer mining directive[3], the Governor should instruct his agencies to make a special effort to inform other water user groups and the general public on the progress that has been made by miners on improving water quality.

Improve Flexibility of Water Quality Regulations

- The Department of Environmental Conservation should aggressively pursue implementation of the six areas identified by the Water Quality Task Force as having the potential to increase regulatory flexibility while complying with the Clean Water Act and protecting downstream users. These include the use of mixing zones and start-up variences, the reclassification of drainages, the restructuring of water uses, the revision of water quality criteria and the assumption of the NPDES program.

  For there to be significant progress toward the objective of having flexible water quality management, the rate of progress on these issues should be accelerated to the point where each tool can be used appropriately and collectively to solve the problem. The recently completed Tolovana reclassification study is of minimal practical value and is an example of the time and expense that will be wasted unless these various tools are used in a concerted approach to a solution. Similarly, until a water quality criteria review is conducted and the 5 NTU drinking water standard is changed to 25 NTU, the new mixing zone regulations may not provide meaningful relief as the existing standards may still be unattainable. These tools must be used collectively to reach a solution and to date this is not being done.

  The new mixing zone regulations that became effective September 15, 1988 must be implemented to achieve the objectives outlined in the Governor's March 1987 directive: maximize flexibility under the law while protecting downstream users. The Department of Environmental Conservation is currently making progress toward this end, and the Governor should direct the Alaska Department of Fish and Game, Habitat Division to contribute workable solutions to the implementation of mixing zones.

Reclassification of Drainages

- The Tolovana reclassification study did not seek to utilize the maximum flexibility available. For example, sampling on the Tolovana River and Livengood Creek both showed that existing natural bacterial contamination justified eliminating the 5 NTU drinking water turbidity standard. However, instead of using this data to appropriately and legally justify relief from the most stringent turbidity standards, the Department of Environmental Conservation chose to discount the data. In the future, the department must undertake reclassification studies with the objective of using all valid regulatory means to grant relief when conditions justify reclassification and downstream users remain protected. To date this is not being done.

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[3] *Memorandum from Governor Steve Cowper to Department Commissioners Judith Brady, Don Collinsworth and Dennis Kelso, March 30, 1987.*

Offshore Dredging

- The following three recommendations have the objectives of stimulating new offshore mining activity and resolving current regulatory issues concerning the analysis and permitting of offshore mining operations.

  1. The Governor should direct the Division of Mining to work closely with industry to develop workable offshore applications and leasing procedures in state waters, and to begin processing offshore applications and leases under those procedures.

  2. The Governor should encourage the Environmental Protection Agency and the Army Corps of Engineers to develop a Memorandum of Understanding that would classify material discharged from offshore dredges as dredged material regulated under Section 404 of the Clean Water Act, rather than as industrial waste under Section 402 as currently classified.

  3. The Office of the Governor should ensure that future coordinating groups, such as the Norton Sound Federal/State Task Force, be organized so as to provide greater accountability by the sponsoring agency to the participating groups. Some participants in the Norton Sound task force have been critical of the failure of the sponsoring agency to specifically respond to comments made by reviewing groups.

Resource Development in National Petroleum Reserve Alaska

- The Governor should urge the opening of the federal National Petroleum Reserve Alaska to coal and mineral development.

Transportation and Infrastructure

- The lack of an established transportation system and associated infrastructure is a primary impediment to mineral development in Alaska. While there have been many discoveries of world class deposits made in Alaska over the last two decades, lack of access has delayed or will definitely postpone their development.

  1. The Governor should reaffirm Alaska's rights of access as provided by RS 2477 and assert several pivotal rights-of-way which are vital for access to Alaska's remote mineralized areas.

  2. The Governor should adopt and implement a statewide infrastructure and transportation plan which includes the identification and development of access corridors within the state.

Coal Development Policy

- The appropriate state agencies, in consultation with the Legislature and the coal industry, should undertake a broad based review of coal development issues, including tax reform and unitary tax repeal, royalty and rental schedules, coal leasing programs, coal mining and reclamation programs, and future domestic energy demands. The objective of the review should be the establishment of a state coal development policy that will provide direction for the expansion of Alaska's coal industry and will provide guidance for policy decisions concerning future energy sources and international coal exports.

Clean Coal Technology

- The state should support appropriate research and development on clean coal technology that will benefit domestic power generation and the export of high-value coal through support of the newly created Alaska Science Foundation and through cooperative, political initiatives on behalf of the administration, Legislature, and congressional delegation to secure research and development funding and demonstration project grants from the federal Department of Energy Clean Coal Technology Program.

III. SUPPORT FOR MINERAL PROGRAMS AND SERVICES

Mineral Resource Education

- The Legislature and the Governor have continued to demonstrate support for the "Alaska Resources Kit: Minerals" by establishing a position in the Department of Education to oversee and implement the mineral resource curriculum that was jointly developed and funded by industry and by the state. Private industry, through the Alaska Mineral and Energy Resource Education Fund, shares in the annual cost of the newly created position and provides the annual costs of producing, maintaining and updating the educational kits. The Department of Education should be granted incremental funding to equally share as a full partner with industry in the cost of this educational program.

Professional and Technical Training

- To maximize job opportunities for residents and improve public acceptance of the industry, the professional education, vocational, and technical training services within the state should be strongly supported including enhancement of the School of Mineral Engineering at the University of Alaska Fairbanks.

  The Commission specifically recommends that the Governor and the Legislature support the budgets set forth by the Board of Regents for the University of Alaska Southeast and for the Mining and Petroleum Training Service (MAPTS) to allow these institutions to continue the entry level training program for underground mining and milling employees. The initial training programs have been highly successful at placing graduates into jobs at the Greens Creek Mine and an expanded program is needed to train additional residents for new mining jobs in Alaska. The direct support for the University of Alaska Southeast program will allow MAPTS to be more effective in its ongoing training programs in other areas of the state.

State Mineral Programs

- Geological mapping, geologic surveys, mineral assessments and the publication of geologic reports are critical to the state's ability to maintain and expand its mining industry as well as providing for the health and benefit of the residents of the state. The Division of Geological and Geophysical Surveys should be funded at a level sufficient to allow its existing professional staff to work on a full-time basis and to provide operating funds for field mapping projects, including the continuation of the five-year sand and gravel inventory program, quadrangle mapping, and other essential services.

- The basic level of services provided by the Division of Mining should be supported, and budgetary increments be provided to review and rewrite (if necessary), and to implement the state's offshore mineral leasing program.

- The mineral services and functions within the Department of Commerce and Economic Development, Division of Business Development, should be supported. Incremental funding should be provided to allow the division to conduct research and publish a report on potential export markets for Alaska industrial minerals and products, and on the availability of industrial mineral resources in Alaska.

Appendix A.

ALASKA MINERALS COMMISSION
STATEMENT OF PURPOSE

The Alaska Minerals Commission was created by the 14th Legislature in Chapter 98 of the Session Laws of 1986 and was established to make recommendations to the Governor and to the Legislature on ways to mitigate constraints on the development of minerals in the State.

The minerals industry offers the greatest potential of any Alaska industry for expanding and diversifying the State's economic base; for increasing Statewide employment; and for generating new wealth to create businesses and provide revenues for State and local governments.

However, Alaska has a complex pattern of land ownership and management; has overlapping and uncertain regulatory requirements; has unique geographic, geologic and climatic conditions; and has an underdeveloped transportation system.

To attract the capital necessary for the exploration and development of new mines; to ensure that mines can be developed feasibly and in timely fashion; and to ensure that producing mines remain viable—constraints on the industry must be mitigated.

The Alaska Minerals Commission will prepare annual reports recommending to the Governor and to the Legislature the adoption of legislation and the implementation of administrative policy that will best accomplish the statement of policy found in Article VIII, of the Constitution of Alaska:

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

and the statement of policy found in the President's National Materials and Minerals Report to Congress of April 5, 1982:

> "It is the policy of this Administration to decrease America's mineral vulnerability by taking positive action that will promote our national security, help ensure a healthy and vigorous economy, create American jobs, and protect America's national resources and environment."

The goals of the recommendations of the Alaska Minerals Commission are to assure that the Legislature and the state administration encourage and promote development of a viable mining industry in the state.

Appendix B.

Chapter 98
Session Laws of Alaska, 1986
As Amended by
Chapter 71
Session Laws of Alaska, 1988

AN ACT

Relating to the Alaska minerals commission; and providing for an effective date.

Section 1. (a) The legislature finds that the minerals industries, including metallic minerals, industrial minerals, and hydrocarbons, have been traditionally and continue to be the major source of wealth and income in the state.

(b) The legislature further finds that there are major constraints on the continued development of a diverse mineral industry in the state, including the Environmental Protection Agency's effluent guidelines, state water quality standards and improperly classified streams and rivers, restrictions on surface access, complex and numerous permitting requirements, and limited access to minerals through mineral closing orders and restrictions on multiple use through state and federal land use plans.

Sec. 2. ALASKA MINERALS COMMISSION ESTABLISHED. (a) The Alaska Minerals Commission is established in the Department of Commerce and Economic Development.

(b) The commission is composed of 11 members. The commission shall be composed of individuals who have at least five years' experience in the various aspects of the minerals industries in the state. The governor shall appoint five members of the commission, one of whom must reside in a rural community. The President of the Senate shall appoint three members of the commission. The speaker of the House of Representatives shall appoint three members of the commission. Each member serves at the pleasure of the appointing authority.

(c) The commission shall make recommendations to the governor and to the legislature on ways to mitigate the constraints, including governmental constraints, on development of minerals, including coal, in the state.

(d) The commission shall report its recommendations each year to the governor and the legislature during the first 10 days of the regular session of the legislature.

Sec. 3. This Act is repealed February 1, 1994.

Sec. 4. This Act takes effect immediately in accordance with AS 01.10.070(c).

Appendix C.

Summary of the 6(i) Lawsuit *

Section 6(i) of the Statehood Act (P.L. 85-508) 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 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.

The state and the Legislature have, since 1980, been aware that the state's mining laws (AS 38.05.185—.275) may not fully comply with section 6(i). In 1982, the Legislature adopted AS 38.05.207, creating the requirement for a miner to apply for a "Production License" prior to the commercial production of minerals. This license requires a public notice and was enacted in hopes of curing the 6(i) deficiencies.

In 1983, a coalition of environmental, Native and fishing groups challenged in State Court that Alaska's mining laws were not in compliance with section 6(i). On May 1, 1987, the Alaska Supreme Court found that:

- Alaska's mining leasing system violates section 6(i) because it does not require the payment of cash rents or royalties; and

- Section 6(i) applies only to lands known to have been mineral-in-character at the time of state selection. (The Supreme Court specifically avoided the issue of what constitutes state selection and the meaning of the term mineral-in-character.)

All parties asked the U.S. Supreme Court to review the Alaska Supreme Court's decision. The state argued primarily that the state court should not have allowed these private interest groups standing to argue the case. The Trustees for Alaska, on behalf of the conservation groups, argued primarily that the term "mineral lands" refers to all state land. The U.S. Department of Justice submitted a brief which argued that 1) the Alaska Supreme Court erred in limiting the 6(i) lease requirement to lands that were known to be mineral-in-character at the time of state selection, and 2) that the Alaska court decision was advisory and final resolution could occur only in the federal courts. On May 1, 1988, the U.S. Supreme Court declined to consider this case.

Legislative action will be necessary to cure this defect. The significant questions to be addressed are:

1. Should the proposal include only "mineral lands" or all state land?
2. Should the proposal include rent, or royalty, or both?
3. What are the appropriate levels of rent and/or royalty?

* Prepared by the Department of Natural Resources, Division of Mining, September 1, 1988.

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802 907-586-2345

HB 99 Mining Rents and Royalties

A combination of legal decisions on both the state and federal levels have determined that the state of Alaska must collect rents and royalties from mining claims on state land under Section 6(i) of the Alaska Statehood Act. The intent of 6(i) was to guarantee some revenue for the operation of the new state. Other extractors of non-renewable resources, namely the oil and gas and the coal industries, are already required to pay rents and royalties to the state.

HB 99 would require both rents and royalties be paid for mining activity on state lands, including submerged lands, but not including offshore lands. For rents and royalties to be equitable and straightforward to administer they should apply to all state lands: uplands, submerged, tidal, and offshore. While the proposed revenues would help defray the cumulative costs to the state of managing its mineral resources, they do not adequately reflect the loss to the state of a non-renewable resource. Reclamation is another cost of using the public land, but HB 99 does not include any reclamation language.

There is no doubt that HB 99 will have an economic impact on the miners. But those who profit from the extraction of resources which are a part of the public trust must provide some payment for that privilege. The mining license tax does not address this issue. In 1987 hardrock mining had a gross income of $105 million. In that same year the mining license tax provided a revenue of only $34,000 to the state.

Rents and Royalties

The sliding rental rate proposed in HB 99 should be increased so that the minimum rent starts at $1.00/acre for the first five years, increases to $2.50/acre for the next five years and finally goes to $5.00/acre for claims held ten years or more. These rental rates would put Alaska more on line with what other mineral states charge. We would also propose that there be a minimum rental payment of $500.00. The $500.00 minimum would better address the issue of discouraging speculation on state lands.

The mining royalties proposed in HB 99 would be either a minimum royalty based on gross income or a percentage of net income, whichever is higher. It is our position that the royalties should be based on gross income. Net income calculations are subject to various manipulations in the form of deductions. For example, the allowable deductions for the purposes of calculating net income for the mining license tax include: operating expenses, both direct and indirect, depreciation, depletion, wages and salaries, state corporate income tax, and royalties. Most mineral states charge royalties which range between 5 and 8% of gross or adjusted gross income. But there is a more compelling reason why Alaska's mining royalties should be based on gross income. The mineral resources of Alaska belong to the people of this state and are therefore part of the public trust. If the state based its royalties on net profits, it would be compensated only if the mine showed a profit. However, by basing royalties on gross income, the state insures that some compensation would occur, regardless of profitability. There are some who would argue that the state can stand to lose revenue in return for the benefits of employment and economic activity in rural areas. But the state must receive just compensation for the resources it owns, for the common ground we all have an interest in as citizens of Alaska.

The royalties suggested in HB 99 are too low. As an example, based on the table on page four of the proposed legislation, a mine that grosses over $2 million could pay as low as a 1% royalty. As stated previously, most states charge between 5 and 8% of gross.

Reclamation

Mining without reclamation destroys the value of the land for other uses and users. When the state commits land held in the public trust to a single use, statutory reclamation requirements would guarantee that the land will retain its multiple use capacity after mining is complete. Reclamation language must be included in HB 99. Such language can be found in federal statutes which require mining operations to restore the land.

AEL Position

Our position is that all miners on all state lands should make substantial payments towards use of public lands and extraction of non-renewable resources on those lands. Miners must also be required to reclaim the land before they return it to the people of Alaska for common use.

Sitnasuak Native Corporation

Post Office Box 905 • Nome, Alaska 99762
(907) 443-5296 • (907) 443-2632 • Fax: 443-3083

FEB 0 1 1989

February 1, 1989

Honorable Richard Foster
State of Alaska
House of Representatives
P.O. Box V
Juneau, Alaska 99811

Honorable Richard Foster,

Hello. Thanks for the call earlier this week. I will be unable to attend the teleconference hearings on House Bill No. 99 or Senate Bill No. 129. The following should be considered as comments from SNC on this bill:

Sec. 38.05.211 **ANNUAL RENTAL.** The rate of $ .50 should be used for all of the years. The increased rate from 6 to 21 years and more is too expensive. Please keep in mind that in many cases mining claims, leasehold locations, and mining leases are held by small operators who spend seasonal parts of the year to do work on the land; and could actually take years to get the resources to operate a full capacity mine. Also the idea of years does not make sense in a climate where operators generally work for 120 days a year (or 1/3 of a calendar year) due to conditions of nature. Many claims are currently held by family operators who have spent two or three generations mining. The wording of 21 years + would require an annual payment of over $10,000.00 per year for a first generation miner if he held 50 claims. The rates suggested would probably be no problem for big companies with backing from the "Lower 48", but would be devastating on small operators.

Sec. 38.05.212 **PRODUCTION ROYALTY.** The rates seems reasonable for royalty.

However, why both? Why not just ROYALTY? The Alaska Supreme Court found that the mining leasing system needs to require cash rents or royalties.

What happened to mineral-in-character? The Alaska Supreme Court found that this section of the Statehood Act should apply to only lands known to be mineral-in-character at the time of selection. Should not this bill be written to require that the Department of Natural Resources review the original land selection files to correctly make this determination? Should not this bill also define mineral-in-character?

Why include ANNUAL LABOR in this bill? This specific bill should only address the concerns of the Alaska Supreme Court decision. Another bill should address Annual Labor. Should not the State consider dropping Annual Labor if the Rent or royalty is in place?

Sec. 38.05.242 DEFINITIONS. Should not the section for definitions include information on mining claims, leasehold location, and mining leases?

Sitnasuak's concern on this bill is that our lands neighbor the State's and fairness for all is necessary to ensure that the industry does not fail. The State should pass a revised version of this bill to meet the requirements of Section 6(i) of the Statehood Act which identifies the responsibility of the Department of Natural Resources as well as the miners. A seperate bill should be passed to delete Annual Labor, if rent or royalty is determined to be realistic.

If further information is needed, please do not hesitate to contact me, or Irene Anderson at our Land Department. Please keep us updated on the rewrites, so we may respond as necessary.

Thank you for your work on this issue.

Respectfully,

Robert L. Fagerstrom
President

RLF/IA/ia

. . . Resources . . .

Minerals Briefing: Legislation and Policy Issues

At least four bills will be before legislators this spring dealing with a new state mineral claim-staking program. The state's current program, modelled on the federal mining claims-staking system, has been ruled invalid by state courts, and must be replaced with the mineral leasing program, complete with royalty and annual rental provisions.

Currently, no form of rental (other than annual work requirements, similar to the federal program) is required on state mining claims. Nor is there a production royalty required on state claims, although there is a mining license tax that is based on net profits.

If Legislature D..esn't Act

If the legislature fails to act this spring, Trustees for Alaska and other groups who brought the original litigation may push for an injunction halting all new claim filings, or even operations on existing state claims. As the case now sits, they'll have good chance of getting some form of injunction, Department of Natural Resources officials believe.

So far, it appears the administration will introduce one measure; Sen. Jack Coghill (R-Nenana) plans a second bill; the Alaska Miners Association has prepared a bill which someone may introduce; lastly, environmental groups have their own version to offer.

Alaska's 100 million-plus acres of state-owned lands are increasingly important to minerals exploration companies because many of the federal lands with good mining potential, particularly the mountainous areas that are also very scenic, are now in national park or refuge systems and are, for all practical purposes, closed to mining.

Alaska state lands, as well as privately-owned Native lands, now offer the best prospects for major new minerals discoveries. *Getting the uncertainty over the state's claim system settled is important, because land tenure and establishing rights to a discovery are fundamental to resource explorers.*

Background on Controversy

Trustees for Alaska brought the original litigation, successfully arguing that the current state claims-staking system violates section 6i of the federal statehood act. That law gives Alaska the right to select and dispose of state-owned lands, but requires that mineral title be reserved to the state and 'leased' through some mechanism derived by the legislature.

The state administration, and Alaska miners, unsuccessfully argued in state courts that the existing claims program, which had been established in law by legislators, satisfied that requirement. But the state superior and supreme court disagreed, and further required that a mineral royalty and rental system be established along the lines of the state's oil and gas leasing system.

The court also, however, required the new system be used on lands of mineral character' at the time of state selection. But the court left it to legislators to define that term, which raises another point in controversy: Miners groups want a very narrow, conservative application, defining 'mineral in character' as determined by presence of an existing mining claim or a mineral ore body indicated, for example, by a federal or state geological survey bulletin.

Lands 'Mineral in Character'

Environmental groups, on the other hand, will want a very wide application of the lease program, and would like to see 'mineral in character' defined as applying to almost all of Alaska's 100-million acres of state land selections. How the term is defined will determine whether a new state mining lease program, complete with royalty and annual land rentals, *(Cont. Pg. 7)*

Fisheries:

New Tax On Offshore Floaters?

Watch for new bills to be introduced extending the state's raw fish tax to offshore floating processors who transport fish through state waters. Alaska's current raw fish tax applies now, for all practical purposes, only to onshore processors. Thinking behind the bill is that offshore processors use community port facilities, but pay little toward the cost of public services. Also, the current tax puts onshore processors at a competitive disadvantage against offshore floaters. The administration estimates the bill could net $40 million to the state.

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From AK Leg Digest No 22/88

. . . Resources . . .

State Mining Claims System *(Cont.)*

(Continued from Page 2) will apply to a small number of acres with essentially proven mineral discoveries, or whether it will apply to almost all state lands. Environmental groups already have one strong argument for a 'wide' application of the term, one that could also be used in court if the legislation isn't to their satisfaction on this point:

State land selections are made according to several criteria, with mineral potential high on the list. With 'mineral potential' listed as a justification for selection of given areas, it would be reasonable, it will be argued, that those lands were considered 'mineral in character' at the time of state selection. In fact, the administration has already bought off on the application of the term to all state-selected lands, in its proposed bill.

Administration "6i" Bill

Basic concepts behind the administration's bill are an annual rental provision of 50 cents/acre, escalating to $5/acre in 20 years (an inducement for companies not to just 'sit' on claims). For 40-acre state mining claims, this is $20/yr. for a claim, increasing to $200/claim in 20 years. The royalty is based on net-profits with a sliding-scale according to gross revenues, similar to the current mining license tax. There is also a minimum cash royalty, however. This gives the state a guaranteed 'floor' to revenues.

Environmental groups will likely urge a gross royalty, similar to those applied in oil and gas leases, rather than a net-profits royalty. The administration and miners will resist this, arguing that a gross royalty, because it takes money 'off the top' has a particularly harsh effect on marginal or high-cost producers. Another feature environmental groups will push strongly, which is opposed by the administration, is a reclamation requirement on state mining claims. DNR argues reclamation is a separate issue, appropriate for a different bill.

Early Action Needed

Resolving "6i", hopefully early in the session, is important, state resources officials say. With miners gearing up for the 1989 summer exploration season, they need to know as soon as possible what the new rules will be. DNR hopes to get a new system in place by September 1, to fit the present reporting period for annual work assessment. It will take time to adopt the necessary regulations and hold hearings, DNR says.

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Oil and Gas Issues *(Cont.)*

(Continued from Pg. 3) and, in all likelihood, a costly buried submarine pipeline to shore. Because of these, and an unusually high state net profits royalty covering the North Star tracts, the prospect is not economic at this time. Last year AHC Chairman Leon Hess proposed a plan to Gov. Steve Cowper involving state tax and royalty abatements as an incentive to get North Star development going. Cowper rejected the idea, but some variation of it may be back before DNR officials later this month. Senior AHC officials are scheduled to meet with DNR in late January.

Gas Liquids Royalty Charges

Another royalty cost-accounting controversy is brewing between the state and the three major North Slope producers - Arco Alaska, Exxon and Standard Alaska Production. This involves charges by the companies for handling about 55,000-60,000 barrels/daily of natural gas liquids being produced along with oil in the Prudhoe Bay and Lisburne fields, and being processed through special process units built on the North Slope. Under the Prudhoe lease terms, producing companies are allowed to charge processing fees, in this case through new plant units, and apply those costs against the value of hydrocarbons, in this case NGLs, at the 'wellhead' for purposes of paying royalty and tax.

The issue here is that DNR feels charges are excessive, ranging from $3 to $7/barrel of NGLs in Prudhoe and up to $19/barrel in Lisburne. This means there is likely a 'zero' wellhead value, and no royalty paid on those NGL barrels. The revenue effect is about $17 million yearly to the state in royalty loss, and probably an equivilent amount in severance tax loss, DNR says. In comparison, the companies pay 60 cents/barrel as a processing charge for crude oil. That figure was established by agreement several years ago, as part of a settlement of 'upstream' litigation affecting oil. DNR has urged some kind of compromise on the issue, but the producers are hanging tough, the agency says. Ultimately, it may have to be resolved in court.

Arctic National Wildlife Refuge

In Congress, new bills to open ANWR to oil exploration are being introduced. The state administration will be involved in reviewing legislation and taking positions on issues like third party land exchanges and environmental stipulations. *There are reports that a new approach to land exchanges may be in the offing.*

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Nos. 87-205, 87-206 and 87-371

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALASKA MINERS ASSOCIATION, PETITIONER

v.

TRUSTEES FOR ALASKA, ET AL.

STATE OF ALASKA, PETITIONER

v.

TRUSTEES FOR ALASKA, ET AL.

TRUSTEES FOR ALASKA, ET AL., CROSS-PETITIONERS

v.

STATE OF ALASKA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

ROGER J. MARZULLA
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

Section 6(i) of the Alaska Statehood Act provides that mineral interests in lands selected by the State of Alaska pursuant to Section 6(a) or (b) of that Act may be disposed of only by "lease," and that any lands or minerals disposed of in violation of Section 6(i) shall be forfeited to the United States in a suit brought by the Attorney General of the United States in the United States District Court for the District of Alaska.

The United States will address the following questions:

1. Whether respondents have the standing necessary to permit this Court to exercise jurisdiction under Article III of the Constitution.

2. Whether private parties such as respondents are barred by Section 6(i) from bringing an action in state court seeking a declaratory judgment that the State's mining laws governing the disposition of mineral interests in selected lands do not comply with Section 6(i).

3. Whether Alaska's mining laws violate the restriction in Section 6(i) of the Alaska Statehood Act that minerals may be disposed of only by a "lease" because they permit a person to extract "hard rock" minerals under a location system, similar to that established by the federal Mining Act of 1872, without payment of rents or royalties to the State.

4. Whether the restriction in Section 6(i) of the Alaska Statehood Act that permits minerals in lands selected by the State under that Act to be disposed of only by lease is limited to those lands that were known to be mineral in character at the time they were selected by the State from the United States.

is, in substance, a mineral location system, rather than a true "lease" system. Resolution of any questions concerning the permissible contours of a true "lease" system under Section 6(i) should await future amendments by the Alaska Legislature.

4. There is considerable force to respondents' contention in their cross-petition (87-371 Cross-Pet. 9-20) that the Alaska Supreme Court erred in holding that Section 6(i) applies only to lands that were known to be mineral in character when they were selected by Alaska (Pet. App. B71-B84). Section 6(i) states that "[a]ll grants" made by the Act "shall include mineral deposits"; that the grants under Section 6(a) or (b) are made on the condition that all dispositions shall be subject to a reservation of mineral interests to the State; and that "[m]ineral deposits in such lands shall be subject to lease by the State as the State legislature may direct." There is no indication that this all-inclusive language was intended to apply only to those lands whose mineral character was known when they were selected. To the contrary, as respondents point out (87-371 Cross Pet. 16-17), a provision that would have required the mineral character of the land to be determined when the patent issued to the State was deleted by the House Committee. See Pet. App. B79-B82. Moreover, the underlying purpose of Section 6(i)—to furnish a substantial financial base for the State—suggests that its all-inclusive language means what it says.

Despite the reference in the first sentence of Section 6(i) to the inclusion of mineral deposits in "[a]ll grants," the Alaska Supreme Court held that deposits *unknown* at the time of selection were not covered by Section 6(i) and instead were included in the grants of land made by Section 6(a) or (b). The Court reasoned that lands that were not known to be mineral in character were included in the original grants of school sections to other States and that the purpose of the 1927 Act, on which Section 6(i) was based, was only to include known mineral lands in those grants. See Pet. App. B43-B45, B72-B76. In those other States, however, the exclusion from the 1927 Act of lands whose mineral character was not known at the time of statehood did not reflect a decision by Congress to exempt the mineral deposits in such lands from *all* restrictions on their use and disposition. Lands whose mineral character was unknown at the time of statehood were not covered by the 1927 Act because

they were *already* part of the original grant of school lands made by the relevant statehood Act itself (cf. *United States* v. *Wyoming*, 255 U.S. 489, 500-501 (1921); *United States* v. *Sweet*, 245 U.S. 563, 572-573 (1918)); for this reason, any mineral deposits that were later discovered in such lands while they remained in state ownership presumably were *already* subject to the requirements in the relevant statehood Act that the lands be held in trust and be disposed of for school purposes. By contrast, the Alaska Supreme Court's decision limiting the reach of Section 6(i) appears to have the effect of excluding mineral deposits in lands whose mineral character was not known at the time of selection from *all* restrictions, and of allowing the States to give away the hard-rock minerals in such lands—unless Section 6(a) or (b) of the Statehood Act also imposes a trust obligation on the State to exact some rental or royalty payments for the extraction of minerals from lands selected by the State pursuant to those provisions.

Of course, even if the application of Section 6(i) does not turn solely on knowledge concerning the mineral character of particular land at the time it was selected (or the patent was issued (see Pet. App. B84 n.33)), the State might be free to classify land definitively as either mineral or non-mineral at a later date, such as immediately prior to a proposed sale or lease. But it does not necessarily follow that Section 6(i) should be construed to exclude lands in which mineral deposits are discovered by a mining claimant prior to such a formal classification and prior to any sale, lease or other disposition by the State, simply because those deposits were not identified at the time the lands were selected by or patented to the State, perhaps many decades earlier.

We do not propose here a definitive view of the proper interpretation of Section 6(i) in this regard. Respondents have filed their cross-petition on a conditional basis, urging that it be granted only if the Court grants the principal petitions filed by the State and the Alaska Miners Association. See 87-371 Cross Pet. 9-10; Trustees Br. in Opp. 10 n.3. Because we believe that the principal petitions should be denied, we submit that the cross-petition should be denied as well (see this Court's Rule 20.5). That course would permit the Alaska Legislature to address the issues raised by the cross-petition when it considers

whatever amendments to the State's mining laws it believes are required by the Alaska Supreme Court's decision on the other issues in the case.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
PETER R. STEENLAND, JR.
Attorney

MAY 1988

· LARGE LOW GRADE MINES, JUNEAU BOROUGH

	ALASKA	NEVADA	IDAHO
OREBODY TONNAGE	100,000,000	100,000,000	100,000,000
TPD PRODUCTION	15,000	15,000	15,000
ORE GRADE	0.05	0.05	0.05
DAYS PRODUCTION	360	360	360
TONS / YEAR	5,400,000	5,400,000	5,400,000
OZ PRODUCED	270,000	270,000	270,000
GOLD PRICE	400	400	400
LEASOR NSR	3.0%	3.0%	3.0%
CAPITAL COSTS	150,000,000	150,000,000	150,000,000
MINING COSTS/TON	10	10	10
% LABOR	40%	40%	40%
# PERSONAL	400	400	400
SALES TAX RATE	4.0%	5.3%	5.0%
PROPERTY TAX RATE	1.06%	0.00%	1.79%
FED CORP TAX RATE	34.0%	34.0%	34.0%
STATE CORP TAX RATE	9.4%	0.0%	8.0%
STATE MINING TAX	7.0%	1.9%	2.0%
STATE ROYALTY	3.0%	0.0%	0.0%
% DEPLEATION RATE	15.0%	15.0%	15.0%
COST DEPLEATION RATE /TON	0.45	0.45	0.45
DEPRECIATION EXP	1.00	1.00	1.00
PROPERTY GROSS	108,000,000	108,000,000	108,000,000
LEASOR ROYALTY	3,240,000	3,240,000	3,240,000
MINE GROSS	104,760,000	104,760,000	104,760,000
MINING COSTS	54,000,000	54,000,000	54,000,000
MINE NET	50,760,000	50,760,000	50,760,000
DEPRECIATION	5,400,270	5,400,270	5,400,270
DEPLEATION	15,714,000	15,714,000	15,714,000
TAXABLE INCOME	29,645,730	29,645,730	29,645,730
FED INCOME TAXES	10,079,548	10,079,548	10,079,548
STATE INCOME TAXES	2,786,699	0	2,371,658
STATE MINING LIC TAX	2,075,201	563,269	592,915
BOROUGH PROP TAX	1,594,500	0	2,650,328
STATE ROYALTY	889,372	0	0
TOTAL TAXES	17,425,320	10,642,817	15,694,449
EMPLOYEE SALES TAXES	1,036,800	1,384,128	1,036,800
COMPANY SALES TAXES	648,000	865,080	810,000
STATE & LOCAL GROSS	9,030,572	2,812,477	7,461,701

	ALASKA	NEVADA	IDAHO
OREBODY TONNAGE	1,000,000	1,000,000	1,000,000
TPD PRODUCTION	500	500	500
ORE GRADE	0.30	0.30	0.30
DAYS PRODUCTION	360	360	360
TONS / YEAR	180,000	180,000	180,000
OZ PRODUCED	54,000	54,000	54,000
GOLD PRICE	400	400	400
LEASOR NSR	5.0%	5.0%	5.0%
CAPITAL COSTS	15,000,000	15,000,000	15,000,000
MINING COSTS/TON	65	65	65
% LABOR	60%	60%	60%
# PERSONAL	100	100	100
SALES TAX RATE	4.0%	5.3%	5.0%
PROPERTY TAX RATE	1.06%	0.00%	1.79%
FED CORP TAX RATE	34.0%	34.0%	34.0%
STATE CORP TAX RATE	9.4%	0.0%	8.0%
STATE MINING TAX	7.0%	1.9%	2.0%
STATE ROYALTY	3.0%	0.0%	0.0%
% DEPLEATION RATE	15.0%	15.0%	15.0%
COST DEPLEATION RATE /TON	4.50	4.50	4.50
DEPRECIATION EXP	10.00	10.00	10.00
PROPERTY GROSS	21,600,000	21,600,000	21,600,000
LEASOR ROYALTY	1,080,000	1,080,000	1,080,000
MINE GROSS	20,520,000	20,520,000	20,520,000
MINING COSTS	11,700,000	11,700,000	11,700,000
MINE NET	8,820,000	8,820,000	8,820,000
DEPRECIATION	1,800,090	1,800,090	1,800,090
DEPLEATION	3,078,000	3,078,000	3,078,000
TAXABLE INCOME	3,941,910	3,941,910	3,941,910
FED INCOME TAXES	1,340,249	1,340,249	1,340,249
STATE INCOME TAXES	370,540	0	315,353
STATE MINING LIC TAX	275,934	74,896	78,838
BOROUGH PROP TAX	159,450	0	352,407
STATE ROYALTY	118,257	0	0
TOTAL TAXES	2,264,430	1,415,146	2,086,847
EMPLOYEE SALES TAXES	336,960	449,842	336,960
COMPANY SALES TAXES	93,600	124,956	117,000
STATE & LOCAL GROSS	1,354,741	649,694	1,200,553

oil royalty schedule simulate royal.prc

minimum income	maximum income	minimum net income royalty	percent	effective rate on minimum	effective rate on maximum
1	+9,999	200	1.0%	20000.0%	0.4%
50,000	99,999	750	2.0%	1.5%	0.8%
100,000	249,999	2,000	2.0%	2.0%	0.8%
250,000	499,999	5,000	2.0%	2.0%	1.0%
500,000	2,499,999	22,500	3.0%	4.5%	0.9%
2,500,000	99,000,000	50,000	2.0%	1.2%	.0%

net profits as % of gross adjusted to income levels

20% minimum	20% maximum	30% minimum	30% maximum	40% minimum	40% maximum
0	100	0	150	0	200
200	400	300	600	400	800
400	1,000	600	1,500	800	2,000
1,000	2,000	1,500	3,000	2,000	4,000
2,000	10,000	3,000	15,000	4,000	20,000
15,000	594,000	22,500	891,000	30,000	1,188,000

oz gold production at $400.00

minimum	maximum
0.0025	125
125	250
250	625
625	1250
1250	6250
6250	247500

Neil McKinnon
Houston Petroleum

KENT DAWSON COMPANY

P.O. Box 20790
Juneau, Alaska 99802
Phone: (907) 463-2533
FAX: (907) 586-8328

January 23, 1989

Include in Comm Packets CM

The Honorable Curt Menard
Co-Chairman
House Resources Committee
Pouch V
Juneau, AK 99811

Dear Mr. Menard:

Attached are some position papers and comments by the Alaska Miners Association relative to the 6 (i) issue.

The Alaska Miners Association is in the process of drafting legislation which will reflect these positions.

Sincerely,

V. Kent Dawson

ALASKA MINERS ASSOCIATION, INC.
501 W. Northern Lights Blvd., Suite 203, Anchorage, AK 99503 (907) 276-0347

MEMORANDUM

TO: R. Hughes

FROM: P.S. Glavinovich

RE: 6(i) Presentation - Abstract

Section 6(i) of the Alaska Statehood Act requires that mineral deposits in mineral lands granted to the State shall be subject to lease by the State as the State legislature may direct.

In 1984 the Trustee's for Alaska filed a lawsuit that challenged the State's mining claim location system as not being in compliance with Section 6(i). The State of Alaska was named as the defendant in the lawsuit but the Alaska Miners Association quickly intervened. In 1985, the Alaska Superior Court rejected the Trustee's arguments and found the State's location system to be incompliance with Section 6(i). The Trustee's appealed to the Alaska Supreme Court. The Alaska Supreme Court reversed the Superior Court and found that Alaska must recover rent or royalties from mining leases on lands that were mineral-in-character at the time of State selection. The State and AMA appealed the Supreme Court's opinion to the U.S. Supreme Court. Notwithstanding the recommendations of Alaska's congressional delegation and the Department of Interior to take the case, the U.S. Supreme Court refused to grant writ.

The current guidelines for the resolution of the 6(i) question come for the Superior Court'd Declatory Judgment of Nov. 11, 1987. In that Judgment Judge Serdahley ruled that:

> To comply with Section 6(i) of the Alaska Statehood Act, the State's mineral leasing system must include some process for determining which lands were of known mineral character at the time of selection and must further require the payment of rents or royalties for the extraction of mineral deposits from such lands.

The AMA has developed a definition and test that will identify those lands that could be judged to be mineral-in-character at the time that the land was selected by the State. We are

also drafting rent and/or royalty parameters that we feel will satisfy the court order but will not jeopardize a viable mining operation.

The AMA committee responsible for developing a solution to the 6(i) question has concluded that a satisfactory resolution of the 6(i) issue must provide for:

1. The right of self initiation.

2. Tenure of the claimant.

3. Fair rent or royalty to the State from those lands that were mineral-in-character at the time of State selection.

4. An honest definition of mineral-in-character.

P.S.G.
10/14/88

ALASKA MINERS ASSOCIATION, INC.
501 W. Northern Lights Blvd., Suite 203, Anchorage, AK 99503 (907) 276-0347

Sept. 9, 1988

The Honorable Steve Cowper
Governor, State of Alaska
P.O. Box A
Juneau, Alaska 99811

Re: Implementation of Superior Court Order, November 19, 1987, re Section 6(i) of the Statehood Act

Dear Governor Cowper:

The State Supreme Court has concluded that the State's current mineral location system is not in compliance with Section 6(i) of the Statehood Act because it does not require the payment of rent or royalty on mining leases. The Court further concluded that Section 6(i) applies only to those lands known to have been mineral in character at the time that they were selected by the State.

The Department of Natural Resources is currently studying several methods by which the State's location system may be brought into compliance with the Supreme Court opinion and the Superior Court's order. The Alaska Miners Association considers the State's implementation of the 6(i) decision critical to the future of mining on state lands. We would like to identify several components that we feel must be a part to any rational solution to the 6(i) question.

1. The right of self initiation - the State constitution requires that a prospector, individual or a corporate that risks considerable time and money must be given a preferrential right to mine the discovery. Any departure from the current discovery philosophy will seriously erode any incentive to explore upon state land.

2. Tenure - a claimant must be assured that he will not be subjected to some arbitrary time limit within which he must place the claim into production or lose it. Mining history is replete with examples of discoveries that required fifteen to thirty years before they could be developed as profitable producers. This is particularly true of operations in the northern environs.

3. Fair rent or royalty - the AMA believes that the Supreme Court erred in deciding that the State must require additional rent or royalty from mining leases. We continue to believe that

the mining license tax constitutes an adequate and fair production royalty and that the annual labor requirement of $200 per claim represents an adequate rent. Nevertheless, in order to comply with the Supreme Court's opinion, we strongly recommend that the State develop a rent or royalty schedule that will; (1) satisfy the Superior Court Order and, (2) not jeopardize nor act as a disincentive to the constructive development of state mining claims. We caution that in seeking a solution to the 6(i) issue, that State not adopt requirements that will penalize a claimant upon state land.

4. Mineral in character - the State Supreme Court specifically concluded the Section 6(i) applies only to those lands known to have been mineral in character at the time of state selection. Judge Serdahley, in his Declaratory Judgement, ordered that the "... State's mineral leasing system must include some process for determining which lands were of known mineral character at the time of selection".

We do not know how the State proposes to effecuate Judge Sedahley's order but we suggest that mineral in character be determined with a prescribed procedure such as that which we have developed and present to you in the form of the enclosed attachment.

The current developments at Red Dog and Greens Creek have sent a signal to the mining industry that mines can be made in Alaska. We, as concerned Alaskans, do not wish to see the State implement a mineral management system that will jeopardize or impede rational and responsible resource development upon state lands. We are prepared to assist you and your people develop a workable solution to the 6(i) issue.

Sincerely,
ALASKA MINERS ASSOCIATION

Richard A. Hughes
President

ATTACHMENT: Mineral in character language

cc: Paul Glavinovich
Jim Burling
Judy Brady
Jerry Gallagher

Oct. 13, 1988
C. McVee

RENT OR ROYALTY ISSUE - STATE MINING CLAIMS

The State Supreme Court has concluded that the State's current mineral location system is not in compliance with Section 6(i) of the Statehood Act because it does not require the payment of rent or royalty on mining leases.. The Court further concluded that Section 6(i) applies only to those lands known to have been mineral in character at the time that they were selected by the State.

The Alaska Miners Association considers the Legislatures implementation of the 6(i) decision critical to the future of mining on state lands. We feel any solution must recognize:

1. The right of self initiation - the State constitution requires that a prospector, individual or a corporation that risks considerable time and money must be given a preferrential right to mine the discovery.

2. Tenure - a claimant must be assured that he will not be subjected to some arbitrary time limit within which he must place the claim into production or lose it. Mining history is replete with examples of discoveries that required fifteen to thirty years before they could be developed as profitable producers.

3. Fair rent or royalty - the AMA believes that the Supreme Court erred in deciding that the State must require additionsl rent or royalty from mining leases. We continue to believe that the mining license tax constitutes an adequate and fair production royalty and that the annual labor requirement of $200 per claim represents an adequate rent.

4. Mineral in character - the State Supreme Court specifically concluded the Section 6(i) applies only to those lands known to have been mineral in character at the time of state selection. Judge Serdahley, in his Declaratory Judgement, ordered that the "...State's mineral leasing system must include some process for determing which lands were of known mineral character at the time of selection".

We do not know how the State proposes to effecuate Judge Sedahley's order but we suggest that mineral in character be determined with a prescribed procedure such as that which AMA has developed.

AMA 12-7-88

AN ACT RELATING TO THE ASSESSMENT OF RENTS AND ROYALTIES ON STATE MINERAL LANDS

This Act establishes a procedure for assessing rents and royalties on State mineral lands which is equitable and consistent with public policy objectives, including the policies adopted by the Alaska Legislature to encourage mineral exploration and development.

1. Prior to the commencement of production on State mineral lands, rentals should be charged according to the following schedule:

(a) Years one through ten - $.25 per acre;
(b) Years ten through twenty - $.50 per acre;
(c) All years after twenty - $.75 per acre.

2. Upon commencement of production, the lessee should be required to pay to the State of Alaska a two percent (2%) net profits royalty. Net profits and reporting requirements shall be determined as set forth in AS 43.65.010 through AS 43.65.060.

3. Upon commencement of production, the lessee should pay a minimum royalty equal to the rental set forth in Paragraph 1 if such amount is greater than the yield to the State of Alaska from the two percent (2%) net profits royalty. The lessee should not be compelled to pay both the minimum royalty and the two percent (2%) net profits royalty.

4. All rents and/or royalties paid in satisfaction of the requirements of Section 6(i) of the Alaska Statehood Act should be credited against any taxes payable to the State of Alaska under the Mining License Tax set forth in AS 43.65.010, et seq.

5. State mineral lands or lands deemed to be mineral in character shall be determined by the following procedure.

(a) A state mining claim is deemed to be located on land that is mineral is character if, at the date of state selection, the land underlying the claim was known to have contained valuable mineral in sufficient quantities such that a prudent person would expend time and resources towards the development of the mineral deposit, with a reasonable belief that such minerals in the deposit would be marketable at a profit.

(b) The Commissioner of the Department of Natural Resources shall find a claim to be of mineral in character if, based upon facts known at the date the land was selected by the state, the claim:

1. Contains an actual exposure of valuable minerals capable of being marketed at a profit at date of state selection, or
2. is contiguous to a claim with an actual exposure of valuable minerals capable of being marketed at a profit at date of state selection, or,
3. if a placer deposit, is within one mile from a placer deposit that has existing reserves that were producing or were capable of producing valuable minerals at a profit at the date of selection, or,
4. if a lode deposit, is on and within one mile of a known mineral deposit that has produced or is capable of producing valuable minerals at a profit at the date of state selection.

(c) If a claim fails to meet the tests of subsection (b), then the claim is conclusively presumed not to be of mineral character.

6. The Commissioner shall make mineral character determinations on a mining claim within three years of a request for such determination from a claim owner. If no request is received within one year from the enactment of this chapter, or within one year of the location of any mining claim, whichever is later, the claim shall be considered to be mineral in character for purposes of determining rents and/or royalties under this Act.

7. From the date of the enactment of this Act, or from the date a claim is located, whichever is later, a claim owner shall be responsible for the payments of rents and/or royalties that would be payable as if the claim were mineral in character. If the Commissioner determines that a claim is not mineral in character, then those rents and/or royalties, based as if the claim were mineral in character, shall be refunded to the claim owner. If the Commissioner fails to make a mineral character determination within three years from the date of a request for determination, those rents and/or royalties shall be reduced by 50% from the time that a determination was requested to the time that the determination is made.

MINING ..D THE 6(i) LAWSUIT

The Alaska Supreme Court issued a ruling in May 1987 which will require Alaska to rewrite its laws governing mining on state-owned lands. The ruling stems from a suit initiated by the Trustees for Alaska which contended that the State of Alaska is in violation of federal law by not requiring rents or royalties to be charged on state lands subject to Section 6(i) of Alaska's Statehood Act.

Section 6(i) of the Alaska Statehood Act requires that:

> The grants of mineral lands to the State of Alaska . . . are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the state of all 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.

The Trustees argued that "mineral lands" subject to the 6(i) leasing provision were all lands granted to the state containing minerals, whether the presence of the minerals was known at the time of selection or not. The Trustees also argued that, since the state's mining claim system did not require cash rents or royalties, it was not a leasing system as required by the Statehood Act.

The State of Alaska argued that the 6(i) leasing provision applied only to lands known to be "mineral lands" at the time of their selection. The state also maintained that the Statehood Act does not specifically require a revenue producing rent or royalty, rather that choice was left to the discretion of the State Legislature and, furthermore, that economic activities on state mining claims represent a benefit to the state comparable to revenue generated from rents or royalties.

Finding merit in both arguments, the Alaska Supreme Court ruled that the state must charge a rent or royalty for minerals mined on lands subject to 6(i), but only those lands known to be "mineral in character" at the time of state selection were subject to the 6(i) leasing provision.

The Alaska Supreme Court ruling was appealed to the U.S. Supreme Court but was denied a hearing. As a result, the state will be required to amend its statutes during the upcoming legislative session to bring its mining system into compliance with the court ruling. If appropriate legislative action is not taken, the State Superior Court indicated during motions made last year that it would entertain a request for an injunction against all mining activity on state lands.

At the September meeting of the Alaska Minerals Commission concern was expressed that the conditions attached to the use of state land, including mineral rents, royalties and other requirements might act as disincentives, encouraging potential investment in Alaska mineral development to flow to other states and countries. Four major components were identified by the industry that they believe must be included in changes to the laws in order to maintain a viable mining system.

1. Individuals (and corporations) must be able to self-initiate the exploration for minerals on available state lands and a preferential right to mine must be attached to a valid mineral discovery.
2. As the time between the discovery of a mineral deposit and the profitable production of the deposit may take many years, there should be no arbitrary time limit imposed upon the right of tenure.
3. The amount of rent or royalties charges should not be a disincentive nor penalize a mining claimant.
4. The ruling should be applied only to mining claims active at the time of state selection or to lands within one mile of a known mineral deposit that, at the time of selection, had produced — or was capable of producing — valuable minerals at a profit.

On the other hand, Rural Alaska Community Action Program and several other organizations interested in 6(i) legislation including, the Tanana Chiefs Conference, the Bering Sea Fishermen's Association, the Northern Alaska Environmental Center, the Alaska Center for the Environment, Nunam Kitlutsisti, and the Trustees for Alaska have indicated that three principles should guide the implementation of 6(i):

1. The new leasing requirements should be applied to all state lands to minimize problems with implementation and to maximize revenues to the state.
2. Both rents and royalties should be charged to maximize revenues to the state.
3. The legislation should also contain provisions requiring state review of mining operations and land reclamation.

Although the federal government owns twice as much land in Alaska as is owned by state government, there is twice as much state land presently open to mineral and other resource development as federally-owned lands. Legislation on how this land is handled will play a crucial role in shaping the development of the minerals industry in Alaska for the foreseeable future.

6i

Alaska was granted the right to select 103,350,000 acres of land from the United States under section 6(a) and (b) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (set out in a note preceding 48 U.S.C. § 21 (1982)). Mineral deposits in selected lands were also conveyed, subject to certain restrictions. Section 6(i) of the Act 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 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.

STATEMENT OF THE CASE

This action arises under Section 6(i) of the Alaska Statehood Act, the act of admission under which Alaska became a State in 1959. Section 6 of the Statehood Act is the land grant provision, under which the new state obtained the right to acquire more than 103 million acres of land from the federal government. To Alaska and the federal government alike, this provision is of paramount importance both politically and economically. Subsection (i) of this land grant provision imposes a limitation upon the State's ability to alienate to third parties its title to certain of its Statehood Act grant lands -- those are "mineral lands." This "mineral lands" provision is nearly identical to that found in the School Lands Act of 1927. The legislative history of the Alaska Statehood Act establishes that Congress intended to follow the School Lands Act in the land grant provision of the Alaska Statehood Act. Thus, judicial interpretation of Section 6(i)'s "mineral lands" provision may have broad significance for all of the public land grant states that received title to federal lands under the School Lands Act of 1927.

The mining industry has historically been an important contributor to the very limited private sector economy in the State of Alaska. The Alaska Miners Association ("AMA"), is a non-profit public interest corporation having more than 1,800

members throughout the State. Since its organization in 1939, the AMA has worked effectively for the improvement of the administration of state and federal mining laws. The AMA's membership shares with the public at large an interest in maintaining valid statutes and regulations to assure sound title to mining properties and a clear definition of the relative rights of mineral locators, the State of Alaska and third parties. To these ends, the AMA sought and obtained leave of the state trial court to intervene in this case in 1984.

In the late 1950s, anticipating the imminent attainment of statehood, the legislature of the Territory of Alaska enacted a comprehensive code for the management of state lands, the Alaska Land Act (Alaska Statute 38.05). This statute establishes a system for the acquisition of the right to explore for and develop minerals in state lands. Under this system, a person may initiate rights to mine by entering state lands, discovering valuable minerals and physically locating a mining claim. This system of initiating the right to acquire minerals in state lands is required by the Alaska Constitution. It is based upon the well-established federal mining claim system under the Mining Law of 1972; but with one difference which is essential to the understanding of this case. Alaska's state law, unlike its federal counterpart, does not allow for the acquisition of title to the land in which mining rights are held. The owner of a

federal mining claim may, upon proof of compliance with applicable laws, obtain fee title to the land by patent from the United States; the owner of a state mining claim under Alaska law, however, may not "go to patent." The State retains title to the land pursuant to state statute. AS 38.05.125.

This system for the acquisition of the right to mine lands acquired by the State of Alaska under the Alaska Statehood Act, established by Alaska Constitution and the Alaska Land Act on the eve of statehood, is the foundation upon which tens of thousands of state mining claims have been acquired, maintained and developed by the mining industry for 30 years in Alaska. In the decision from which this petition is taken, the Alaska Supreme Court held that this system of state mining law is a violation of Section 6(i) of the Alaska Statehood Act -- and therefore unconstitutional under the Supremacy clause.

Section 6(i) has three distinct provisions whose meaning and interaction are at issue in this case:

1. The so-called "mineral alienation condition," which is set forth in the second sentence of the subsection. This part of the statute 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 reservation of minerals.

2. The "subject to lease" provision appearing 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."

3. The proviso at the end of the subsection authorizing the U.S. Attorney General to proceed in the United States District Court for the District of Alaska for forfeiture of "lands or minerals hereafter disposed of contrary to the provisions of this section."

The self-styled "public interest" environmental organizations that filed this action against the State of Alaska contend that the entire mining law system in effect in Alaska for the last 30 years is invalid under this federal statute.[1/]

The mechanism for enforcing the "mineral alienation condition" of Section 6(i) of the Alaska Statehood Act is crafted to give the United States the exclusive authority to determine

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1/ The plaintiffs also argued in state court that the state mining law is invalid under the Alaska constitution, a contention which if sustained would have served as an adequate and independent state law ground for the result reached in the Alaska Supreme Court. This state constitutional argument was rejected by the Supreme Court. Its opinion is unequivocally grounded upon the plaintiffs' federal statutory claim only. Thus, there can be no doubt as to this Court's jurisdiction to grant review under 28 U.S.C. § 1257.

how to respond in the event of a violation. Under the statute, the United States has retained a right of entry in all "mineral lands" acquired by the State of Alaska under subsections (a) and (b) of the Statehood Act land grant provision. This right of entry reserved to the United States may be invoked at the discretion of the United States Attorney General, by filing an action in the United States District Court for the District of Alaska. Though the plaintiffs in this case believed that the state mining law system violated Section 6(i)'s mineral alienation condition, they did not attempt to persuade the U.S. Attorney General to exercise the statutory right of entry. They did not make formal demand upon the United States to enforce the law as they interpret it; nor did they sue the U.S. Attorney General in federal district court under the mandamus statute. Instead, they elected to proceed by filing an action in state court. In effect, this is an attempt to adjudicate questions concerning the content and scope of the real estate interest retained by the United States of America under Section 6(i) without notice to or participation by the United States itself. The outcome is a detailed pronouncement by the Alaska Supreme Court as to the interpretation and application of Section 6(i), in an action to which the real party in interest, the United States of America, did not participate and by which it cannot be bound. The Alaska Supreme Court's decision may be to require

wholesale changes in the state mining law sytem in order to avoid the possible forfeiture of state lands to the United States through exercise by the United States of its right of entry under Section 6(i). Yet, ironically, the holder of that right of entry (the United States) has never asserted it, and was never given an opportunity to participate in any fashion in the state court proceedings that resulted in this broad inquiry into the nature and scope of the federal property interest retained under Section 6(i).