SB

125

ALASKA STATE LEGISLATURE

Senator Rick Halford

President of the Senate

While in Session:
State Capitol
Juneau, AK 99801-1182
907-465-4958

While in Interim:
P.O. Box 670190
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Sponsor Statement
Senate Bill 125

"An Act relating to land entry under state reservation of oil, gas, mineral, and related interests"

Barring only a few exceptions, all privately held land in Alaska is subject to a publicly owned subsurface mineral reservation. In essence, this means that while any given private party owns the *surface* estate for land in Alaska, the *subsurface*, or mineral estate, belongs to the State of Alaska. This subsurface estate includes all oil, gas, and other valuable minerals below the surface. For the past 40 years, the Alaska Land Act has served as the principal body of law governing how the state's subsurface lessees and private landowners interact with one another. During most of these years, direct conflict between the two parties has generally been isolated.

However, several recent instances of conflict have occurred between various state subsurface lessees and private surface owners, in at least two separate regions of our state. These conflicts have pointed to serious weaknesses in the current laws protecting private property owners from the activities of the state's subsurface lessees. In particular, the current language of AS 38.05.130, the key statute controlling surface owner and subsurface lessee relations, says little about what damages a property owner may claim after a subsurface lessee has entered their property. The law also provides no clear standard for the amount of notification a property owner should receive before a state subsurface lessee enters their property and begins operations. The amount of the surety bond posted before entry onto the property, the liability of a private property owner for the actions of a state subsurface lessee, and the amount of legal authority a private landowner has to hold a state subsurface lessee accountable for their actions are all matters which also are given inadequate attention in Alaskan law.

SB 125 is landmark legislation that addresses the above concerns and revises Alaskan law in order to give stronger protections to Alaskan private property owners. It is *not* the intention of SB 125 to dampen or otherwise create a negative impact on Alaska's valuable oil, gas, and mining industries. Rather, the principal goal of SB 125 is to clarify the relationship between the State of Alaska, private landowners, and the state's subsurface lessees in a manner that is helpful to all parties. At the same time, this legislation recognizes the high value Alaskans place on the enjoyment and privacy of their own land. Please join me in support of SB 125. With your help, I feel confident that we can improve the balance between the desire of the state to develop its oil, gas, and mineral resources and the needs of Alaska's private property owners in a manner that benefits all Alaskans.

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Senate Bill 125
Questions and Answers

Why do we need a better definition of 'damages' under AS 38.05.130?

The current definition of damages under AS 38.05.130 is vague and non-specific. Recent conflicts between subsurface lessees and surface owners have shown that without a more specific definition of damages that takes into consideration the concerns of private property owners, certain state subsurface lessees will make no effort to cooperatively work with landowners before entering their property to carry out operations.

Why do we need to provide more notification to private property owners about imminent subsurface lessee activities on their property?

Without timely and thorough notification to private landowners about imminent subsurface lessee activities planned for their property, such landowners lack the basic tools they need to carry out an informed discussion with the state's lessees about potential damages to their land, as required by AS 38.05.130. In addition, common sense tells us that all private property owners deserve to know what activities other parties are carrying out on their land.

Why do we need to provide a minimum bond amount of $100,000, or, for that matter, why do we need to provide a 'minimum' bond amount at all?

If a property owner and the state's subsurface lessee cannot settle on an amount of damages prior to entry onto the site, the lessee can 'force' entry onto the property by posting a surety bond, as laid out in AS 38.05.130. If DNR uses assessed values to set this bond, the bond amount should be at least $100,000, as this is the *minimum* figure needed for private landowners to attract and secure legal services in order to gain access to the bond, should actual damages occur. In addition, this bond needs to cover the *entire* parcel of land, as it is clearly foreseeable that a subsurface operator can damage the value of an entire parcel of property simply by their actions on one portion of the land.

Why do we need to address this problem now?

Lease administrators at the Division of Oil and Gas are deeply concerned that the current conflicts between subsurface lessees and surface owners will spread into the new Shallow Natural Gas Program, which was brought online in 2000. The division reports that of the 305 lease applications they have received thus far for this program, 194 are located in the railbelt zone, i.e. Talkeetna to Homer, with a large number located in the Mat-Su Valley, a residential area. Of the 305 pending leases statewide, roughly 75% are located on privately owned surface estate. Given this information, it is not surprising to hear lease administrators at the division report that increased conflict is a given.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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MEMORANDUM March 7, 2001

SUBJECT: Senate Bill 125, legislation prescribing a definition of "damages" that a landowner may claim for injury to or interference with the owner's use of property by a person entering upon the land under the state reservation of mineral rights, directing preparation of notice to the landowner for subsurface activities on the land, and setting a limitation on actions against a landowner resulting from entry upon land under the state reservation of interests -- sectional analysis. (22-LS0470\F)

TO: Senator Rick Halford
Attn: Alex Kopperud

FROM: Jack Chenoweth
Assistant Revisor of Statutes

With respect to state land, section 6(i) of the Alaska Statehood Act requires the state to retain its mineral rights in land to which it obtains title under the Act that is known to be mineral in character. Consistent with that requirement, under AS 38.05.125(a), when the surface and mineral estates in that land are severed, the state reserves an interest in the minerals in its lands:

> (a) Each contract for the sale, lease, or grant of state land, and each deed to state land, properties, or interest in state land, made under AS 38.05.045 - 38.05.120, 38.05.321, 38.05.810 - 38.05.825, AS 38.08, or AS 38.50 except as provided in AS 38.50.050 is subject to the following reservations: "The party of the first part, Alaska, hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, all oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils of every name, kind or description, and which may be in or upon said land above described, or any part thereof, and the right to explore the same for such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils, and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, the right to enter by itself, its or their agents, attorneys, and servants upon said land, or any part or parts thereof, at any and all times for the purpose of opening, developing, drilling, and working mines or wells on these or other land and taking out and removing therefrom all

> such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils, and to that end it further expressly reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain, and use all such buildings, machinery, roads, pipelines, powerlines, and railroads, sink such shafts, drill such wells, remove such soil, and to remain on said land or any part thereof for the foregoing purposes and to occupy as much of said land as may be necessary or convenient for such purposes hereby expressly reserving to itself, its lessees, successors, and assigns, as aforesaid, generally all rights and power in, to, and over said land, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved."

This legislation extends the protections provided to the surface owner when rights are to be exercised under that state reservation. Those protections are now only summarily addressed in existing AS 38.05.130. In addition, the legislation adds a new notice provision when entry is to be made upon the land of the owner under the state reservation.

Bill section 1 amends existing AS 38.05.130--this provision would become AS 38.05.130(a) when reprinted in the Alaska Statutes--to break down into its separate components what a person--a lessee, assign, or applicant, or a successor to a lessee, assign, or applicant--entering under the state reservation must do: either to secure the landowner's consent and make provision directly with the owner for settling any possible damages or, alternatively, to post a surety bond as may be determined by the Department of Natural Resources to secure payment for any damages. Both paragraphs (1) and (2) consider the matter of damages

Bill section 2 adds a series of new subsections to AS 38.05.130 --

-- Subsection (b) prescribes a definition for "damages" for the section; the definition is drawn from the Model Surface Use and Mineral Development Accommodation Act, a document adopted in 1990 by the National Conference of Commissioners on Uniform State Laws.

-- Subsection (c) sets out a manner of measuring damages, again based on the Model Act, taking into consideration, in (c)(1), damages to compensate for a loss of or injury to property value, and in (c)(2), damages attributable to interference with or interruption of the owner's use of the property.

-- Subsection (d): A principal Alaska court case examining "damages" in the context of mining claims is Hayes v. A.J. Associates, 960 P.2d 556 (Alaska 1998). The majority opinion in the case noted the availability of additional existing statutory

protections under the treble damages provisions relating to wrongful cutting of timber and wrongful entry or trespass "to gather geotechnical data or [to] take mineral resources," and, in (d)(1), these protections are specifically retained. In addition, under (d)(2), the owner may recover punitive damages against a person entering under the state reservation in each of the two circumstances described there--entry without first complying with the requirements of AS 38.05.130(a)(1)--securing the consent of the owner and settling with the owner on possible damages, or securing a surety bond--or entry followed by wilful noncompliance with any plan of operation to which the person may be subject under current law or regulation.

-- Subsection (e) authorizes an owner and a person preparing to make entry under the state reservation to agree on a different measure of damages than as set out in subsection (c).

-- Subsection (f): If the person proposing to enter under the state reservation cannot first obtain consent of the owner and settle with the owner on possible damages, the person may enter on to the land under the reservation by posting a surety bond in "the form, amount, and security" determined by the director of the division of lands. Subsection (f) indicates to the director how the amount of the security bond is to be determined. It permits, but does not require, a valuation based on the value of the property as assessed for property tax purposes, setting a floor at the greater of the entire value of the parcel or $100,000, and specifically authorizes the director to consider other factors or attributes of the property apart from its assessed value.

-- Subsection (g) prohibits the bringing of a civil action against the owner "for an injury or damages resulting from the entry onto the land by a [person] in the exercise of a right described in [the subsection setting out the state reservation]" unless the owner is also the person making the entry or unless certain activity taken by the owner contributes to the injury or damage.

Bill section 3 adds a notice provision, intended to give the owner some indication that rights are to be exercised under the state reservation. In many instances, under statute law or regulation, a person may exercise rights under the state reservation only under a plan setting out terms governing the concurrent uses of the surface and subsurface estates of the land. If so, the commissioner of natural resources is required to provide to the owner a copy of the approved plan, together with a summary of the anticipated activity that the person may exercise under the reservation and plan and a brief description of the owner's legal rights with respect to the entry and operation under the reservation and plan.

JBC:glc
01-225.glc

Memorandum

UNOCAL 76

March 13, 2001

TO: Judy Brady
Executive Director
Alaska Oil and Gas Association

FROM: Marc Bond
Assistant Counsel
Union Oil Company of California

Senate Bill 125
Damage to Surface Estate due to Exploration or Development of Mineral Estate

Background:

AS 38.05.130 deals with the severance of the mineral estate from the surface estate on lands owned by the State of Alaska. The current statute requires an oil and gas lessee (among others) to make provision to pay to the surface owner "full payment for all damages sustained by the owner by reason of entering upon the land." If the surface owner refuses or neglects to settle with the mineral entrant, the mineral entrant can post a surety bond as set by the DNR, and may sue the surface owner to resolve the amount of the damages.

Senator Rick Halford has now introduced Senate Bill 125. The bill defines the term "damages," permits a surface owner to sue for trespass, cutting timber, and punitive damages, and sets the amount of the surety bond to be the greater of the assessed value of the property or $100,000. The bill also forbids suit against the surface owner in connection with activities conducted by the mineral owner or lessee, unless the surface owner is grossly negligent or engages in intentional misconduct. Finally, the bill requires DNR to provide notice to the surface owner prior to the mineral entry on the land.

ANALYSIS

1. Current Law

Under common law, the surface estate is subservient to the mineral estate. This means that the owner or possessor of the mineral estate may make such use of the surface estate (including damaging it) as may be reasonable and necessary to develop the minerals present on or under the surface of the land.

> At common law, the scope of a mineral owner's rights to the surface estate was "determined by reasonableness: the mineral owner [was] entitled to use as much of the surface estate as [was] reasonably necessary to obtain access to the minerals. Conduct [was] reasonable if it [was] consistent with the practices of the extraction industry." Ronald W. Polston, *Surface Rights of Mineral Owners--What Happens When Judges Make Law and Nobody Listens?*, 63 N.D.L.Rev. 41, 42 (1987). *Norken Corp. v. McGahan*, 823 P.2d 622, 628 (Alaska 1991). Thus, the mineral interest was the dominant estate, and "the mineral owner [had] no obligation to pay the surface owner for the reasonable amount of surface consumed in the development of the mineral estate." *Id.*; *see also* Michelle A. Wenzel, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 Am.U.L.Rev. 607, 622 (1993).

Parker v. Alaska Power Authority, 913 P.2d 1089, 1090 (Alaska 1996).

The situation is different when the State of Alaska owns the land in question, and the State has conveyed the surface estate to a third party, reserving the mineral estate. State law specifies the rights of the mineral estate holder (whether the State or a lessee of the State's interest), and requires the payment of damages to the owner of the surface estate.

> The common law rule is not applicable to lands owned by or devolving from the State of Alaska. Alaska Statute 38.05.125 reserves minerals from every land grant. Thus, much land in Alaska is divided into surface and mineral estates. A mineral rights owner has a right to surface uses of the land containing the minerals he owns. Such uses shall be "limited to those necessary for the prospecting for, extraction of, or basic processing of mineral deposits and shall be subject to reasonable concurrent uses." AS 38.05.255. Further, before mineral rights are exercised under a reservation of mineral rights made pursuant to AS 38.05.125, the mineral rights owner must "make provision to pay the owner of the land full payment for all damages sustained by the owner, by reason of entering upon the land." AS 38.05.130.

Parker v. Alaska Power Authority, 913 P.2d 1089, 1090-91 (Alaska 1996).

AS 38.05.130 requires the surface owner be paid "damages" resulting from the entry upon the land by the mineral owner. AS 38.05.130 provides in full:

> **AS 38.05.130. Damages and posting of bond.** Rights may not be exercised by the state, its lessees, successors, or assigns under the reservation as set out in AS 38.05.125 until the state, its lessees, successors, or assigns make provision to pay the owner of the land full payment for all damages sustained by the owner, by reason of entering

> upon the land. If the owner for any cause refuses or neglects to settle the damages, the state, its lessees, successors, assigns, or an applicant for a lease or contract from the state for the purpose of prospecting for valuable minerals, or option, contract, or lease for mining coal or lease for extracting geothermal resources, petroleum or natural gas, may enter upon the land in the exercise of the reserved rights after posting a surety bond determined by the director, after notice and an opportunity to be heard, to be sufficient as to form, amount, and security to secure to the owner payment for damages, and may institute legal proceedings in a court where the land is located, as may be necessary to determine the damages which the owner may suffer.

DNR has made it clear that any such damages are to be paid by the mineral lessee. 11 AAC 83.155 provides: "Each lessee, licensee of a state-issued oil and gas exploration license, or permittee is required to pay any damage that becomes payable under AS 38.05.130 and shall indemnify Alaska and hold it harmless from and against any claims, demands, liabilities, and expenses arising from or in connection with the damage."

The Alaska Supreme Court has held that the purpose of the statute is not to prevent mineral entry, but to afford financial indemnification for damages suffered by the owner of the surface estate.

> [S]ection .130 protects landowners financially, but does not allow them to completely close their lands to mineral exploration. Consequently, it is enough that landowners be placed in the same position they would have enjoyed had the statute been observed, and an agreement reached or a bond posted. Indemnification, not ejectment, is the appropriate remedy for failing to reach agreement or post a bond. This result sustains the locator's right of entry, and preserves both the locator's incentive to satisfy the requirements of section .130 and the landowner's incentive to act reasonably during negotiations with the locator.

Hayes v. A.J. Associates, Inc., 960 P.2d 556, 567 (Alaska 1998).

2. Senate Bill 125

SB 125 makes several significant changes to the current Alaska law. First, it attempts to define the term "damages" suffered by the surface owner by reason of the used of the land by the mineral entrant. Second, it expressly permits the surface owner to bring suit to recover damages for cutting timber, trespass, and, interestingly, punitive damages for failure to comply with the bonding requirement of AS 38.05.130, or with a material term or condition set out in a plan approved by DNR. Third, the amount of the bond must be the greater of the assessed value of the land or $100,000. Fourth, the bill would prohibit a claim against the surface owner based upon entry by the mineral estate holder in the absence of gross negligence or intentional misconduct by the surface

owner. Fifth, the bill requires DNR to notify the surface owner when DNR has adopted a plan for mineral entry. The notice must include a copy of the approved plan and set forth the rights of the owner of the surface estate established in AS 38.05.130.

a. Definition of "Damages"

Section 2 of SB 125 provides two elements of damage available to the owner of the surface estate. The first item of damage is the "loss of or injury to the value of the owner's property, improvements, or personalty" which is defined as "the actual cost of repair, relocation, replacement, or restoration of the property, improvements, and personalty, not to exceed the fair market value." The second item of damage is "the interference with or interruption of the owner's access to or use of the property or improvements" which "must be based on the owner's actual use of the property and improvements immediately preceding the entry and is, for the period or duration of the interference or interruption, the greater of (A) the loss of income to the owner; or (B) the loss of the value of the use by the owner."

The first element appears appropriate. The measure of damages as the actual cost of repair, relocation, replacement or restoration" is appropriate given the objective of financially indemnifying the surface owner for the disturbance. The cap of "fair market value" in the first element is akin to the damages to be paid for condemnation of property under AS 09.55.330. State v. Alaska Continental Development Corp., 630 P.2d 977 (Alaska 1980). Of course, in condemnation, the condemnor (usually the State, but occasionally a private company for a right-of-way) becomes the owner of the condemned property.

The second element has an inappropriate measure for the loss of the use of the property. First, the use of the phrase "loss of the value of the use by the owner" is highly ambiguous, and appears to impose the subjective value to the owner, rather than a measurable, objective value of the use of the land. The measure should be the loss to the owner under some objective measure. Otherwise, highly subjective testimony and evidence will be permitted, allowing a landowner to speculate concerning the hedonistic value of the use of the land to him.

Second, the use of the phrase "loss of income to the owner" does not take into account the fact that the owner may be making little or no profit from his use of the land. The measure should more appropriately be limited to profits lost that are directly related to the mineral use, and limited to the period during which the mineral use prevents earning profits. Such lost profits must be "reasonable certain." This is the measure available when land is condemned under AS 09.55.330. *State v. Hammer*, 550 P.2d 820, 823-27 (Alaska 1976).

Put together, the damages for the use of surface estate during the life of an oil or gas field could be quite onerous. To the extent such damages exceed the fair market value of the surface estate, the mineral estate holder should have the option of condemning the land, perhaps through an addition to AS 09.55.240(a) (which lists the

uses which list the permitted uses for eminent domain). Such an addition could read as follows: "(13) for the location of improvements, including, but not limited to, oil and gas wells, gathering lines, treatment facilities, offices, boarding camps, and associated facilities, for the purpose of exploration for, or the development and production of natural gas, crude oil, or associated substances." A mineral estate holder who believes his activities will result in "damages" under AS 38.05.130 which exceed the fair market value of the property could then undertake eminent domain action to take title to the surface estate of the land.

b. Express Authorization to Make Additional Claims

Section 2 of SB 125 also adds a new subsection (d) to AS 38.05.130. This subsection authorizes a surface estate owner to sue a mineral lessee for damages for cutting timber, trespass, or punitive damages. These all appear to be a violation of the initial purpose of the statute (financial indemnification of the surface owner), or they allow the surface owner to claim damages twice (or more) for the same loss, or both. This section should be eliminated.

The statute currently permits the provision of "damages" for the use of the surface estate by the holder of the mineral rights. With some modifications as noted above, the definition of available damages could bring certainty to both the owner of the surface estate and the mineral estate. However, permitting the surface estate owner to claim additional sums for trespass or cutting timber both grants the surface estate owner too much, and creates substantial uncertainty regarding what damages must be paid by the mineral estate owner.

In adopting AS 38.05.130, the legislature was attempting to assure those to whom it sold or otherwise transferred the surface estate that they would be made whole in the event the development of the mineral estate damaged the surface estate. A mineral estate owner who seeks to develop his estate is not "trespassing" on either the mineral or the surface estate when making reasonable use of the surface in connection with the development of the minerals.

AS 09.45.735 provides:

> **AS 09.45.735. Trespass related to geotechnical surveys and mining.** A person who trespasses upon the land of another to gather geotechnical data or take mineral resources is liable to the owner of the land for treble the amount of damages that may be assessed in a civil action. If the trespass is unintentional or involuntary or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, only actual damages may be recovered.

This statute is obviously directed at someone who does not own the mineral

estate of the subject land. In addition, any such liability must be to the holder of the mineral estate. The surface estate owner has no interest in the "mineral resources," while the mineral estate owner (or lessee) has such an interest. In addition, the mineral estate owner has a legitimate interest in restricting information regarding the nature, quality and amount of such resources. An interloper who determines that there is no oil or gas under a parcel has "condemned" that land and reduced or eliminated the opportunity of the mineral estate owner to sell exploration and development rights to others. It is improper to include any reference to this statute in "rights" granted to a surface owner.

AS 09.45.730 provides:

> **AS 09.45.730. Trespass by cutting or injuring trees or shrubs.** A person who without lawful authority cuts down, girdles, or otherwise injures or removes a tree, timber, or a shrub on (1) the land of another person or on the street or highway in front of a person's house, or (2) a village or municipal lot, or cultivated grounds, or the commons or public land of a village or municipality, or (3) the street or highway in front of land described in (2) of this section, is liable to the owner of that land, or to the village or municipality for treble the amount of damages that may be assessed in a civil action. However, if the trespass was unintentional or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done, or where the timber was taken from unenclosed woodland for the purpose of repairing a public highway or bridge on or adjoining the land, only actual damages may be recovered.

This statute is directed at those who have no right to cut down trees, timber or shrubs on the subject property. A mineral estate owner has the right to do so where such actions are reasonably necessary to the proper development of the minerals. Permitting the surface estate owner to make a claim for damages for removing trees or shrubs — especially a claim which has the potential for treble damages — in addition to the damages for entry afforded under the current AS 38.05.130 has no basis in logic. Any such provision is a windfall for the surface estate owner, and creates additional unjustified expense and uncertainty for the holder of the mineral estate.

Finally, permitting the imposition of punitive damages for entry before a bond is posted, or for noncompliance with a provision of a plan of development, is completely unnecessary. The purpose of the deviation from the common law regarding the dominance of the mineral estate on State land is to compensate the owner of the surface estate. There is no reason to punish the holder of the mineral estate. In conducting mineral exploration and development on State land, the holder of the mineral interests is already required to compensate the surface estate owner for damages to the surface estate, whether or not a bond is posted and whether or not the development plan is followed. In conducting such operations, the mineral estate holder

may commit torts or other civil wrongs, for which compensatory and punitive damages may be separately available. There is no need to create additional causes of action which deter mineral development and unjustly enrich a surface estate owner.

c. Amount of the Bond

Current law requires the DNR to set the amount of the bond in a sufficient amount to secure to the surface estate owner payment for the damages. AS 38.05.130. In setting the amount of the bond, DNR has on occasion made reference to the assessed value of the affected parcel for tax purposes.

Section 2 of SB 125 would provide that if DNR sets the amount of the bond with reference to the assessed value, the amount of the bond must be the greater of the assessed value of the entire parcel, or $100,000. The provision allows DNR to set the amount of the bond by "tak[ing] into consideration factors and attributes apart from the property's assessed value." Presumably, but not explicitly, this would permit DNR to set the bond at less than the assessed value, and less than $100,000. At the very least, this should be clarified so that DNR does not automatically set the bond at $100,000.

As noted above, the mineral estate holder should have the option of exercising the power of eminent domain in the event the damages or bond exceed the value of the land involved.

d. Prohibition of Claim Against the Surface Owner

Section 2 of the bill prohibits an action against the surface owner "for injury or damages resulting from the entry onto that land by" the mineral estate holder. The provision states the prohibition does not apply if the surface estate owner is also the mineral estate holder, or if the surface estate owner engages in gross negligence or intentional misconduct.

There is no justification for shielding the owner of the surface estate from liability for his own negligence. The development of the mineral estate is not a license for the surface estate owner to commit torts that harm either the mineral estate holder or others.

If the intention is to prevent a claim being brought against the surface estate owner for actions undertaken by the mineral estate holder, then such a result is more easily and more directly attained by so providing. For instance, a provision could be written as follows: "The owner of the surface estate may not be held liable for the acts or omissions of the state, a state lessee, successor, assign, or applicant described in (a) of this section."

e. Notice to Surface Estate Owner

Section 3 of SB 125 requires DNR to issue a notice to the owner of the surface

estate when DNR has adopted a plan of operations for the exploration or development of the mineral estate. The notice must be issued before entry on the land. The notice must contain a copy of the plan, and must also set forth "a brief description in writing of the legal rights of the owner, including the rights of the owner set out in AS 38.05.130."

Providing such notice appears to be appropriate. However, there are many legal rights of the owner of a surface estate in land. The section should be amended to provide that the notice must include a copy of AS 38.05.130 and a copy of the plan. This creates certainty regarding the contents of the notice, and does not require DNR to provide legal advice to surface estate owners.

f. Additional Considerations

The statute is ambiguous in many respects. For instance, the statute refers to the "owner of the land," but does not recognize that where the mineral and surface estates have been separated, there are at least two "owners of the land," the owner of the surface estate and the owner of the mineral estate. To be sure, the current statute suffers this defect, but because of its limited length, there is little actual ambiguity. This should be clarified.

In addition, the first phrase of the section providing for additional damage claims is indecipherable. As noted above, it clearly appears the intent is to award a surface estate owner double damages for certain injuries to the surface estate. The language on this score is less than clear, and would provide fertile ground for extensive litigation.

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The proposed statutes go far beyond the common law rule regarding the dominance of the mineral estate. The bill would create great uncertainty and expense in the development of the State of Alaska's mineral wealth, and thus unnecessarily deter such development. As written, it provides a potential windfall for surface estate owners and plaintiffs' attorneys.

A fair definition of the term "damages" would assist the State, surface estate owners, and lessees of the State's mineral interests. The term should confine available damages to allow only for "financial indemnification" for losses to the surface estate suffered directly due to the development of the mineral estate. No additional claims should be permitted. The surface estate owner should not be protected from claims where the surface estate owner negligently damages the interests of the mineral estate holder. If a notice is to be required, it should be confined to providing a copy of the plan of development and the statute providing for compensation for damages to the surface estate.

ARTICLE VIII.
NATURAL RESOURCES.

SECTION 9. SALES AND GRANTS. Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

Excerpted From: The Constitution of the State of Alaska. Article 8, Section 9.

Sec. 38.05.130. Damages and posting of bond. Rights may not be exercised by the state, its lessees, successors, or assigns under the reservation as set out in AS 38.05.125 until the state, its lessees, successors, or assigns make provision to pay the owner of the land full payment for all damages sustained by the owner, by reason of entering upon the land. If the owner for any cause refuses or neglects to settle the damages, the state, its lessees, successors, assigns, or an applicant for a lease or contract from the state for the purpose of prospecting for valuable minerals, or option, contract, or lease for mining coal or lease for extracting geothermal resources, petroleum, or natural gas, may enter upon the land in the exercise of the reserved rights after posting a surety bond determined by the director, after notice and an opportunity to be heard, to be sufficient as to form, amount, and security to secure to the owner payment for damages, and may institute legal proceedings in a court where the land is located, as may be necessary to determine the damages which the owner may suffer. (§ 2 art VII ch 169 SLA 1959; am § 15 ch 61 SLA 1960; am § 3 ch 175 SLA 1980)

Excerpted From: November 2000 Alaska Statutes, Volume 8, Pg. 580.

Dick Lowman
Box 873481
Wasilla, AK 99687

12 March, 2001

Senator Rick Halford
State Capitol
Juneau, Alaska 99801-1182

Fax (907) 465-9828
Phone (907) 465-4958

Re: **SB 125**

Dear Senator Halford:

Thank you for the opportunity to comment. I request that this letter be provided for the record in Friday's hearing.

Your bill is an excellent start towards providing equitable common use of separately held land interests. I generally support your effort. I still do have a few concerns that I request be considered during the hearing on Friday.

Section 38.05.130 as amended retains one serious weakness from the landowner's standpoint. The language states:

....If the owner for any cause refuses or neglects to settle the damages, the [lessee]
(1) may enter upon the land in exercise of the reserved rights after posting a surety bond....

Nowhere is there any enforceable clause that requires the lessee to make any reasonable attempt to notify the landowner of their specific development plans or to negotiate fairly. I recognize that Section 3 of your bill provides some general awareness to the landowner, but the timeliness of that notice is not specified. And more important, nowhere does it provide the owner notice of specific development plans.

In the case of Unocal entering the Vine Road (Wasilla) properties in 1999, landowner "notification" consisted of the lessee sending out an innocuous sounding notice of public hearing. In my opinion, the notice was deliberately crafted to be deceptive. I am a civil engineer and can competently read maps. I read the notice sent and was unaware that they intended to drill on my property. Likewise the neighbors were unaware. Since the notice did not appear to affect us, none went to the one public hearing that was held approximately one month before they

mobilized. My neighbor became aware of Unocal's intent after they were mobilized and working on his property. Unocal then posted a bond when he refused to "settle" for a no-cost right to entry. (That was Knik Landscaping, 376-4847, if you wish to check the facts.)

Unocal also intended to enter my property but never once approached me about either their specific plans or a fair settlement for damages. In fact when I called them, they flatly refused to give me the specifics of their development plans. Their attitude was extremely arrogant, almost contemptuous.

Thus on Vine Road, it is my opinion that Unocal made the business decision in advance of mobilization that they would simply post whatever bonds were needed and not "bother" with the landowners. They are fully aware that landowners are ill equipped to recover damages in court against the legal staff of a multi-billion dollar oil company. The bonds are nothing more to them than a restricted bank account that they will recover when the landowner is unable to surmount the impossible legal hurdles of recovering damages. I don't believe the bill as written would prevent that from happening again. The difference, under your bill, will be that the state will in the future give the landowner general notification of planned entry.

Unless a landowner has knowledge of what specifically is being done to his property and what long-term restrictions the development will place on the property, there is no way he can reasonable "negotiate" any settlement. Think about it. Suppose you are the landowner. Suppose someone comes to you and says:

> ***"I am entering your property today. I know approximately where on the property I think I want to locate, but am uncertain about that. I will take whatever property I need. I will do whatever damage I wish. Construction will run around the clock and will be extremely noisy. I may be 200 feet from your bedroom, but I will not have the courtesy to shut down at night. The trees that you value for privacy have no value to me except for firewood. Your lifestyle and your privacy cannot be quantified, therefore are worthless. After construction is complete, I will continue to enter the property night or day whenever I choose for as long as the lease continues. All other details of what I will do to your property are proprietary and confidential. I will not tell you, or will give you answers so evasive that they are worthless. Tell me how much you will settle for now, today, allowing me to continue to do what I wish when I wish where I wish. If you do not settle immediately for my price, I will simply exercise my right to post a bond until you are unable to prevail over my legal machine."***

What would you settle for? What is the price of that? How can a landowner determine any fair price?

Similarly, the bill contains no enforceable provision requiring the lessee to make reasonable attempt to minimize damages to the landowner. Section 38.05.130 (g) provides recourse to the lessee if the owner "acts in a manner that is grossly negligent or that constitutes intentional misconduct...." but nowhere is the owner given that same defense against the lessee. It that really your intent? On Vine Road it was the lessee who came in ripping and tearing with zero concern about the landowner's rights, but not one landowner retaliated in kind. If this issue is important enough to protect the lessee against gross negligence and intentional misconduct, why can't the landowner be protected with the same language written into the law? Is SB 125 implying that the lessee should have greater rights than the surface holder?

I respectfully request that you consider modifying Section 38.05.130 (a) (1) to read

(1) may enter upon the land in the exercise of the reserved rights after
(A) providing evidence that the owner has been served with 90 days written notice of all damages that may occur to the land, and
(B) providing evidence that reasonable attempt has been made to minimize damages to the owner, considering the owner's development plans, and
(C) posting a surety bond determined by the director, after notice and opportunity to be heard, to be sufficient as to form, amount, and security to secure to the owner payment for damages; and

Finally, I would request that you give some thought to protecting intangible values of a homeowner. I own two parcels totaling 55 acres. They represent a unique combination of features. The land is large enough and flat enough for an on-site airstrip, it is in the Mat-Su core area (short commute to work), soils are excellent, and on-site native vegetation provides privacy and beauty. Gas drilling on the property would destroy the natural beauty of the 100-year old vegetation. Privacy will be lost to construction workers, and later to utility workers routinely coming and going across the property without restriction. The land I own cannot be replaced for any reasonable amount of money. The assessed value of the land does not fairly reflect the value as a homesite.

I understand that the language cannot be crafted to allow the surface holder to make opportunistic profits. I ask that you consider some way of protecting those of us legitimately have chosen the land as a homesite. That homesite has value above and beyond market value. I am not looking for profit. I would willingly pay to protect certain rights. Unless language is in the law making it financially impractical for the lessee to destroy a homeowner's lifestyle, I am fearful that other future lessees will be as callous as Unocal has been to those of us who have homes on Vine Road.

Thank you for the opportunity to comment.

I sincerely appreciate that Mr. Kopperud of your staff made the effort to advise me of this pending bill.

Sincerely,

Dick Lowman
Landowner, Vine Road, Wasilla

Fax (907) 745-9825
Phone (907) 232-3988

3-12-01

to Alex Kopperud
from Jake Marquez Land owner with Gas Well on my property

I Think your Bill is A Good Idea
I Think The State oil companyies. Need to Compensate Surface owners for land they Render useless once The well is There.
also sirs in my situation. I Have ask ocean energy. tunical for written Restriction around Well Head located on my property. such as. How close can I Build to it. fires & other Activity's. They Have Ignored That Request. your Help would Be Greatly Appeciated.

Jake Marquez
907 376-4847