

# **Federal Laws Affecting Alaska Lands and Resources**

## Chapter 5.-- FEDERAL LAWS AFFECTING ALASKA LANDS AND RESOURCES

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# Federal Laws Affecting Alaska Lands and Resources

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## ALASKA STATEHOOD ACT

On January 3, 1959, Alaska became the 49th and largest State of the Union,<sup>1</sup> some 90 years after the District of Alaska was purchased for \$7 million from Russia<sup>2</sup> and some 47 years after it became an organized territory.<sup>3</sup> The Alaska Statehood Act<sup>4</sup> was approved on July 7, 1958 following more than a decade of active congressional consideration. This approval came only after the major objections to statehood had been overcome—the lack of contiguity with the rest of the States, a small population, and economic dependency on Federal Government expenditures for construction projects and military bases.<sup>5</sup> Congressional concern over the last of these objections resulted in provisions endowing the State with unprecedented grants of public lands and a generous share of Federal revenues from mineral leases and the Pribilof Island fur trade.<sup>6</sup> The House report on the Statehood Act indicates that the intent of these provisions was:

To enable Alaska to achieve full equality with existing States, not only in the technical juridical sense, but in practical economic terms as well. It does this by making the new State master in fact of most of the natural resources within its boundaries, and making provisions for appropriate Federal assistance during the transition period. <sup>7</sup>

Note: Footnotes for this section appear on pp. 112-114.

This section examines the major provisions of the Alaska Statehood Act, its legislative intent, and the history of the implementation of its promises.

The Alaska Statehood Act set forth the procedural requirements necessary for admission.<sup>8</sup> Upon satisfaction of these requirements, Alaska was admitted into the Union on “an equal footing with all other States in all respects whatever.” The new State included all of the lands and territorial waters of the Territory of Alaska.<sup>9</sup> Alaska was admitted to the Union on January 3, 1959, when President Eisenhower issued a Presidential proclamation that all the procedural requirements for statehood had been satisfied.<sup>10</sup>

## NATIVE CLAIMS

As a compact with the United States, section 4 of the Statehood Act requires that the State and the people of Alaska disclaim any rights to any land, the right or title to which is held by the United States, except for those lands granted or confirmed by the Statehood Act.<sup>11</sup> Alaska also disclaims any rights to any lands or other property (including fishing rights) that are held by Alaska Natives or by the United States in trust for them.<sup>12</sup> The



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United States retains absolute jurisdiction over these Native lands. These Native lands are not subject to State taxation except as provided by Congress.<sup>13</sup> Lands that are conveyed to an Alaska Native without restraint on alienation under the Alaska Native Allotment Act are not subject to this absolute Federal jurisdiction and may be treated substantially the same as other private lands.<sup>14</sup>

The settlement of Native claims was expressly deferred. The Statehood Act specifically provides that it does not affect or address the validity of any Native claims. "Any such claim shall be governed by the laws of the United States applicable thereto."<sup>15</sup> The House report states that this provision relates to the issue of Native claims:

Congress does not concern itself with the legal merits of indigenous rights but leaves the matter in status quo for either further legislative action or judicial determination.<sup>16</sup>

Conflicts over Native land claims eventually led to a virtual freeze on State selection during the sixties and threatened to impede construction of the Trans-Alaska Oil Pipeline.<sup>17</sup> These claims were extinguished by direct congressional action in 1971 by the Alaska Native Claims Settlement Act<sup>18</sup> (ANCSA). Alaska Natives received, in exchange, the right to select 44 million acres of public land and a Native fund of \$962.5 million to be paid over a period of years.<sup>19</sup> Native selection rights were given priority over State selection rights. However, State selections that were tentatively patented, tentatively approved, or identified by the State prior to January 17, 1969 are recognized and protected by ANCSA.<sup>20</sup>

### LAND AND REVENUE GRANTS

Section 6 of the Alaska Statehood Act grants to the State of Alaska the right to

select a total of 103,550,000 acres of Federal lands.<sup>21</sup> It also confirms previous grants to the territory of Alaska and transfers certain Federal lands and buildings to the State. Extension of the Submerged Lands Act of 1953 gave Alaska title to from 35 million to 40 million acres of submerged lands under the Territorial seas and inland navigable waters.<sup>22</sup> The Statehood Act also conferred on Alaska the right to receive a generous portion of Federal revenues from mineral leasing on Federal lands<sup>23</sup> as well as a share of the revenues of the Pribilof Island fur trade.<sup>24</sup> All land selections are to be made within 25 years of admission, that is, by 1984.<sup>25</sup> The Statehood Act does not affect:

Any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.<sup>26</sup>

Any lands subject to such valid existing rights are not available for State selection.

Section 6(a) granted the right to select up to “400,000 acres from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection.”<sup>27</sup> Alaska was also given the right to select an additional 400,000 acres from “public lands which are vacant, unappropriated, and unreserved at the time of their selection.”<sup>28</sup> All the lands selected under these grants must be “adjacent to established communities or suitable for prospective community center and recreation areas.”<sup>29</sup> All selections must be approved by the Secretary of the Interior, and national forest lands must be approved by the Secretary of Agriculture.<sup>30</sup>

The existing national forests in Alaska are the Tongass National Forest and the Chugach National Forest. The Alaska Statehood Act does not restrict State selection rights to those national forests existing on the date of admission. Any national forest lands in Alaska could be selected by the State under the community expansion and recreation

grants of section 6(a)—subject to the approval of the Secretary of Agriculture.

Alaska was also given the right to select 102,550,000 acres of public lands that were “vacant, unappropriated, and unreserved at the time of their selection.”<sup>31</sup> These selections must also be completed within 25 years of admission. All lands available for selection are subject to valid existing rights, including Native claims based on aboriginal use or occupancy, mining claims, homesteads, or equitable claims.<sup>32</sup>

The Act did not restrict the power of the U.S. Government to dispose of Federal lands in order to accommodate the State selection rights. The United States is free to make additional reservations or withdrawals of Federal lands for various purposes, or to sell or dispose of Federal lands under the public land laws, the mineral leasing laws, and other authorities. Thus, until the State actually selects lands or communicates its intent to select particular tracts, the lands are open to other disposition.

The availability of public lands for State selection is further limited by the restrictions on State selections in an area in northern and western Alaska where the President is authorized to make national defense withdrawals.<sup>33</sup> No State selections may be made in this region without the approval of the President or his designate. In practice, no State selections north or west of this national defense line known as the Porcupine-Yukon-Kuskokwim line or PYK line have been rejected.<sup>34</sup>

To date, the State of Alaska has selected approximately 72 million acres of public lands. The Federal-State Land Use Planning Commission has observed that, based on the emerging pattern, the State selection policy has three principal objectives:

- provision of lands to meet existing and future settlement needs;
- control of lands along major highway corridors; and
- selection of lands with high potential for natural resource development.<sup>35</sup>

## MINERAL RIGHTS

The Alaska Statehood Act provides that all lands granted or confirmed under the Act include the full mineral rights.<sup>36</sup> The Act further stipulates that these land grants are made on the condition that, in all subsequent conveyances of selected lands, the State must reserve all mineral rights and the right to enter and to remove the minerals.<sup>37</sup> The State may never sell nor convey the mineral rights. The Act authorizes the Federal Government to initiate forfeiture proceedings against State lands conveyed without such reservation.<sup>38</sup>

The State of Alaska has a system of locatable and leasable minerals similar in many

respects to the Federal mining and mineral leasing laws.<sup>39</sup> Locators on State lands receive the right to develop certain minerals found there. All statehood lands are conveyed without the mineral rights subject to the right of the State to enter and extract the minerals. Alaska has closed certain areas to mineral location and leasing where mineral extraction might conflict with surface uses of the lands.<sup>40</sup>

As a further "incentive" to the development of Alaska's land and resources, section 6(g) permits the State to execute conditional leases on mineral lands after a selection has received the tentative approval of the Secretary of the Interior.<sup>41</sup>



Photo Credit: OTA Staff

The Kennicott Copper Mine near McCarthy, Wrangell-St. Elias region, produced high-grade copper concentrate from 1911 to 1938

Under section 6(h), Alaska received the right to select public lands that were subject to outstanding leases under the Mineral Leasing Act of February 25, 1920, or the Alaska Coal Leasing Act of October 20, 1914.<sup>42</sup> This selection right must be exercised within 10 years of admission. If the State selects all lands under such lease, permit, or contract, it then receives all the interests of the United States in the leased areas including the right to all leasing proceeds.<sup>43</sup> If, however, the State selects only some of such mineral lands, the mineral rights are reserved by the United States and do not pass to the State until termination of the lease, permit, or contract.<sup>44</sup> The continued validity of any outstanding lease, permit, or contract on the lands selected by the State is protected.

### SUBMERGED LANDS

Section 6(m) of the Statehood Act extends the Submerged Lands Act of 1953 to the State of Alaska.<sup>45</sup> Under this provision, title to “lands beneath the navigable waters” within the boundaries of Alaska and their natural resources vested automatically in the State on admission to the Union.<sup>46</sup>

The Submerged Lands Act provides that “lands beneath navigable waters” means:<sup>47</sup>

- All lands within the boundaries of each of the respective States which are covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union . . . up to the ordinary high water mark . . . ;
- All lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line . . .

However, this definition is limited by a further provision:

The term “lands beneath navigable waters” does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States, if

such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to beds of such streams was lawfully patented or conveyed by the United States or any State to any person.<sup>48</sup>

The definition of “lands beneath navigable waters” in Alaska has been the subject of numerous disputes between the State, the Federal Government, and, in some instances, Alaska Natives. Title to submerged lands includes the natural resources.<sup>49</sup> The Submerged Lands Act provides that: “The term “natural resources” includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life, but does not include water power, or the use of water for the production of power.”<sup>50</sup>

At stake in the dispute over the definition of lands beneath navigable waters is the title and ownership of the submerged lands and the potential wealth to be derived from the oil, gas, and other mineral resources.

### OTHER LAND GRANTS

The Alaska Statehood Act also provided for the transfer of certain federally owned lands and facilities to the State. These included the Federal buildings<sup>51</sup> and the Federal jail in Juneau,<sup>52</sup> certain Federal properties used for conservation and protection of fish and wildlife,<sup>53</sup> and all other lands or buildings to which the Territory of Alaska held title.<sup>54</sup>

The Act confirmed previous land grants to the territory of Alaska of mental health, university, and school lands.<sup>55</sup> These land grants include an estimated 1.1 million acres of public lands in the State.

### STATE SELECTION PROCESS

All State land selections are to be made in accordance with regulations issued by the Secretary of the Interior specifying the pro-

cedures for identification and approval of selections.<sup>56</sup> Except for the community expansion and recreation grants made under section 6 of the Act, all selections are to be made in reasonably compact tracts of 5,760 acres. This size requirement may be waived where a selected tract is isolated from other lands open to selection.<sup>57</sup> Tracts are not considered compact when they exclude other lands open to selection within their exterior boundaries.<sup>58</sup>

The State may only select lands that are vacant, unappropriated and, except for certain national forest lands, unreserved at the time of selection.<sup>59</sup> The term “lands” includes retained interests in lands.” The State may thus select the mineral rights in any lands that have been disposed of by the United States with a reservation of all or any of the mineral rights.

State selections must be submitted to the Bureau of Land Management (BLM) accompanied by a small filing fee, a description of the lands selected, and statements supporting the availability of the land for selection.” If the selection includes national forest lands, the application must have the approval of the Secretary of Agriculture.<sup>62</sup> The BLM reviews the State application and issues a tentative approval if it is determined that there is no bar to passing legal title in the lands to the State other than the need to survey the lands or to issue a patent.<sup>63</sup> After the BLM has issued a tentative approval, the State of Alaska may make conditional sales or leases of the lands and resources selected.<sup>64</sup>

## REVENUE GRANTS

The land grants of over 104 million acres provide Alaska with sources of revenue from State-owned lands and land-based resources. The Alaska Statehood Act also gave the State a substantial share of the proceeds derived from Federal lands and resources.

The Alaska Statehood Act repealed the school land grants under which the territory

received two sections of each surveyed township.<sup>65</sup> All school land grants previously made to the territory (about 106,000 acres) were confirmed.<sup>66</sup> In lieu of these land grants, section 6(f) of the Act provides that Alaska is entitled to receive 5 percent of the proceeds from the sale of public lands in the State.<sup>67</sup> These revenues are to be used for the support of public education. None of the proceeds may be used for the support of any sectarian institution.<sup>68</sup>

Section 28 of the Alaska Statehood Act amended the Mineral Leasing Act of 1920 to provide that 52½ percent of the annual net proceeds from sales, bonuses, royalties, and rentals of the public lands in Alaska, except the naval petroleum reserve, are to be paid to the State for disposition by the legislature.<sup>69</sup> This grant of revenues was in lieu of participation in the Reclamation Fund.<sup>70</sup> Under the Mineral Leasing Act, Alaska as a State (and previously as a territory), also has the right to receive 37½ percent of the mineral leasing profits for public roads and educational purposes.<sup>71</sup> This statehood grant raised Alaska’s share of Federal leasing revenues generated from public lands in the State to 90 percent. The Reclamation Act of 1902 provides that 52½ percent of the Federal mineral leasing revenues from 17 Western States are to be deposited in the Reclamation Fund to be used for reclamation and water projects.<sup>72</sup> The remaining 10 percent of the proceeds is retained by the Federal Government.

Section 28 of the Alaska Statehood Act also amends the Alaska Coal Leasing Act of 1914 by providing that 90 percent of the net profits from Government coal mines and all bonuses, royalties, and other payments under the Act are paid to Alaska for disposition by the State legislature.<sup>73</sup> Section 20 of the Act repealed those sections of the 1914 Coal Leasing Act that withdraw certain Federal coal lands in Alaska, and made these lands available for State selection. This special Alaska Coal Leasing Act was eventually repealed so that coal deposits on Federal lands now fall under provisions of the Mineral Leasing Act of 1920.<sup>74</sup>



Alaska was also given a 70-percent share of the net profits derived from the sale of fur seals and sea otter skins from the Pribilof Islands in the Bering Sea.<sup>75</sup> This fur trade is governed by several international treaties. At the time of the Alaska Statehood Act, the proceeds of the fur trade, after payment of all operating costs and administrative expenses, ranged from \$1 million to \$2 million per year.<sup>76</sup> This grant was intended to “be of material help to Alaska in meeting the anticipated greater costs of statehood.”<sup>77</sup>

The Statehood Act gave Alaska a stake in mineral development both on non-Federal and on Federal lands. Alaska received the full mineral rights to lands conveyed under the Statehood Act and a full 90-percent share of net proceeds from Federal mineral leases in the State. This right applies to profits from deposits for coal, phosphates, sodium, potassium, oil, oil shale, native asphalt, bitumen, bituminous rock, and gas.<sup>78</sup> As a practical matter, only oil, gas, and coal deposits are presently important as revenue sources in Alaska. The Mineral Leasing Act does not apply to metallic or industrial minerals that are acquired by the location of mining claims.<sup>79</sup>

## CONGRESSIONAL INTENT

The House report accompanying the Alaska Statehood Act indicates that these grants of lands and revenues were intended to overcome two major objections to statehood: that Alaska did not have a viable economy apart from the Federal expenditures for construction projects and military bases, and that Alaska could not support the costs of self-government from the resources from which revenue could be generated.<sup>80</sup>

At the time of statehood, approximately 99 percent of Alaska was in Federal ownership. Only about 600,000 acres were privately owned. The public land laws, although applicable to Alaska, for all practical purposes had not operated to transfer lands to non-Federal ownership prior to statehood as they had in other States.

A grant of this size to a new State, whether considered in terms of total acreage or of a percentage of the area of the State, is unprecedented. On the occasion of the admission of the existing States, land grants have usually amounted to but 2 to 4 sections per township, or a maximum of 6 to 11 percent of the land area. In many instances, however, much of the acreage had already passed into private taxpaying ownership, or was in the process of so passing at Federal title and there seems to be little chance of any marked change in this situation under existing Federal policies.<sup>81</sup>

The land and revenue grants were to provide the new State with a stable economic base and were made in lieu of grants to new States for internal improvements,<sup>82</sup> swamp-land grants,<sup>83</sup> and grants provided by the Merrill Act of 1862.<sup>84</sup> The House report notes that these grants were necessary to address “Alaska’s peculiar problems.”<sup>85</sup>

Over 99 percent of the land area of Alaska is owned by the Federal Government. The committee believes that such a condition is unprecedented at the time of the admission of any of the existing States.

The public land laws of the United States, including those providing for the disposal of the public domain to private individuals, theoretically are generally applicable to Alaska. The committee, however, found that the beneficial effects of these laws have been and are vitiated to a large degree by the Federal policies of the last half century, of withdrawing from public use many of the more valuable resources of the territory through the creation of tremendous Federal reservations for the furtherance of the programs of the various Federal agencies. Thus, approximately 95 million acres—more than one-fourth of the total area of Alaska—is today enclosed within various types of Federal withdrawals or reservations. Much of the remaining area of Alaska is covered by glaciers, mountains, and worthless tundra. Thus, it appeared to the committee that this tremendous acreage of 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.<sup>86</sup>



Photo Credit: OTA Staff

The village of Kodiak, Kodiak Island, Alaska, has been a center for fishing activities since the days of Russian colonization

To remedy what the committee report terms “unhealthy” and “distorted” landownership patterns in Alaska, the House committee proposed land grants of 182,800,000 acres.<sup>87</sup> In the Alaska Statehood Act, this figure was reduced to 102,550,000 acres of general grants and 800,000 acres of community expansion grants.<sup>88</sup> The committee also proposed that these selection rights be enhanced by several additional provisions.

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.<sup>89</sup>

Consequently, the State was given the right to select lands “known or believed to be mineral in character,”<sup>90</sup> lands “under lease for oil and gas or coal development or which may even be under production for those products,”<sup>91</sup> and a “preference right of selection over lands returned to the public domain from withdrawal status.”<sup>92</sup> Withdrawals of coal lands under the Alaska Coal Leasing Act of 1914 were also terminated to permit the State to select these lands.<sup>93</sup>

The committee report also observes that a serious problem facing the new State—“and in some respects the most serious of all”—is that of financing the basic functions of State government.<sup>94</sup> “Of these functions, road maintenance and road construction assume a key importance both because of the heavy cost and because of the crying need in Alaska for additional roads to facilitate economic development.”<sup>95</sup> The report notes with approval provisions of the Federal Aid to Highways Act of 1956 that allows Alaska to participate in the apportionment of funds for primary and secondary highway systems. These provisions specify that only one-third of Alaska’s area will be used as the area factor in the formula used for apportionment of highway funds.<sup>96</sup>

The report states that the high percentage of Federal ownership had “hampered the development of (such) resources for the benefit of mankind.”<sup>97</sup> A long list of “potential basic industries in the territory, including the forest industries, hydroelectric power, oil and gas, coal, various other minerals, and the tourist industry” could only exist in Alaska “as tenants of the Federal Government, and on the sufferance of the various Federal agencies.”<sup>98</sup> The failure of these industries to grow under territorial government was attributed to Federal ownership of land and resources.<sup>99</sup> The Alaska Statehood Act provisions were seen as necessary changes in Federal policy to assure the success of statehood.

Concretely, the grant of statehood will mean some saving to the Federal Government as the people of Alaska take over part of the burden of supporting certain Government functions now borne by the United States Treasury.

From the standpoint of economic development, the committee believes that statehood will permit and encourage a much more rapid growth in the economy of the territory than would be possible under Territorial status. Many witnesses have testified to the committee regarding the wealth of untapped resources in Alaska.

It is apparent from the history of the last 88 years that the extreme degree of Federal domination of Alaskan affairs has not resulted in the maximum development of the territory . . . the committee has included in this bill provisions which it believes will open up many of the resources of Alaska for the use of mankind.<sup>100</sup>

The result of these provisions was to transfer to the State ownership of approximately 104 million acres of onshore lands and resources, and 35 to 40 million acres of submerged lands and resources. Not only was Alaska given a stake in the development of its lands and resources, but revenue grants gave the State an interest in the development of resources on Federal lands as well.

## FOOTNOTE REFERENCES FOR ALASKA STATEHOOD ACT

<sup>1</sup>Proc. No. 3269, Jan. 3, 1969, 24 F.R. 81, 73 Stat. c16 (1959).

\*Treaty of Mar. 30, 1867, 15 Stat. 539.

<sup>3</sup>Act of August 24, 1912, Ch. 387, 37 Stat. 512, Most Alaskans date Alaska's territorial status from the Organic Act of 1884, Act of May 17, 1884, 23 Stat. 24, which established Alaska as a public land district and provided that the laws of the United States relating to mining claims were to have full force and effect. The Act of August 24, 1912 extended the laws and Constitution of the United States to Alaska and created a territorial legislature. Acts of the legislature were subject to review by the U.S. Congress.

<sup>4</sup>Act of July 7, 1958, Public Law 85-508, 72 Stat. 339, 48 U.S.C.Prec. § 21 (1970). For an anecdotal history of the campaign for Alaska Statehood, see Clause-M. Naske, *An Interpretative History of Alaskan Statehood (1973)*, Ernest Gruening, *The Battle for Alaska Statehood (1967)*.

<sup>5</sup>See H. Rept. 624, 85th Cong., 2d sess. (1957), reprinted in 1958 U.S. Code Cong. & Ad. News. 2933 at 2944. (No Senate report was submitted with this legislation, ) In 1954, nearly one-half of Alaska's labor force was employed by the military. In 1960, over one-half of State labor force was federally employed (including military), University of Wisconsin School of Natural Resources, Center for Resource Policy Studies and Programs, *Federal Land Laws and Policies in Alaska, Vol. IV: A Summary of Issues and Alternatives*, pp. 4-5 (1970). (This multivolume study was prepared for the Public Land Law Review Commission.)

<sup>6</sup>H. Rept. 624, 1958 U.S. Code Cong. & Ad News 2933-35.

<sup>7</sup>Id., at 2933-34,

Public Law 85-508 requires a republican form of State government, the acceptance and ratification of the State Constitution by the U.S. Congress, the approval of Statehood and the new constitution by Alaska citizens by referendum, a presidential proclamation that the foregoing steps have been completed, and the election of two senators and one at-large representative to Congress.

<sup>8</sup>Public Law 85-508, section 2, 72 Stat. 339 (1958).

<sup>9</sup>Proc. 3269, 24 F.R. 81, 73 Stat. c16 (1959).

<sup>11</sup>Public Law 85-508, section 4, 72 Stat. 339, as amended by the Act of June 25, 1959 (The Alaska Omnibus Act), Public Law 86-70, section 2(a), 73 Stat. 141, codified at 48 U.S.C.Prec. § 21 (1970).

<sup>12</sup>Id.

<sup>13</sup>Id.

<sup>14</sup>Act of May 17, 1906, 34 Stat. 197, as amended by the Act of August 2, 1956, 70 Stat. 954, previously codified at 43 U.S.C. 270-1 to 270-3, repealed by Public Law 92-203, section 18(a), 85 Stat. 710 (1971).

<sup>15</sup>Public Law 85-508, section 4, 72 Stat. 339.

<sup>16</sup>H. Rept. 624, 1958 U.S. Code Cong. & Ad. News at 2934.

<sup>17</sup>See Public Land Order 4582, 34 F.R. 1025, Jan. 17, 1969. See also Mary Clay Berry, *The Alaska Pipeline: The Politics of Oil and Native Land Claims* [ 1975].

<sup>18</sup>Act of December 18, 1971, Public Law 92-203, 85 Stat. 688, 43 U.S.C. 1601, (supplement IV, 1974).

<sup>19</sup>See 43 U.S.C. 1605, 1608, 1611, 1613, 1615, and 1618.

<sup>20</sup>Section 3(e) of ANCSA, 43 U.S.C. 1602(e) defines "public lands" as "all Federal lands and interests therein located in Alaska except: . . . land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969." By definition, State selections are generally unavailable for Native selection under ANCSA; however, certain unpatented State selections, in or near Native villages are made available for Native selection by sections n(a)(2) and 12 of ANCSA, 43 U.S.C. 1610(a)(2) and 1611.

<sup>21</sup>Public Law 85-508, section 6, 72 Stat. 340 (1958).

<sup>22</sup>Id.

<sup>23</sup>Public Law 85-508, section 28, 72 Stat. 351 (1958).

<sup>24</sup>Public Law 85-508, section 6(c), 72 Stat. 340 (1958).

<sup>25</sup>Public Law 85-508, section 6, 72 Stat. 340 (1958).

<sup>26</sup>Public Law 85-508, section 6(a), 72 Stat. 340 (1958).

In *Alaska v. Udall*, 420 F. 2d 938 (9th Cir. 1969), the State of Alaska challenged the Udall land freeze. The Court of Appeals for the Ninth Circuit ruled that lands claimed by Alaska Natives were not, as a matter of Law, "vacant, unappropriated, and unreserved," and thus open to statehood selection. An identical provision is contained in section 6(b), 72 Stat. 340 (1958).

<sup>27</sup>Public Law 85-508, section 6(a), 72 Stat. 340.

<sup>28</sup>Id.

<sup>29</sup>Id.

<sup>30</sup>Id.

<sup>31</sup>Public Law 85-508, section 6(b), 72 Stat. 340 (1958).

<sup>32</sup>Public Law 85-508, sections 4, 6(b), and 6(g), 72 Stat. 339 to 342 (1958).

<sup>33</sup>Public Law 85-508, section IO(a), 72 Stat. 345 (1958).

<sup>34</sup>University of Wisconsin, School of Natural Resources, Center for Resource Policy Studies and Programs, *A Study of Federal Land Law and Policies in Alaska, Vol. I*, at 141 to 143 (1970).

<sup>35</sup>Federal State Land Use Planning Commission for Alaska, "The D-2 Book": *Lands of National Interest in Alaska*, 9 to 11 (1977).

<sup>36</sup>Public Law 85-508, section 6(i), 72 Stat. 342 (1958).

<sup>37</sup>Id.

<sup>38</sup>Id.

<sup>39</sup>Alas. Stat. 38.05.185 to 38.05.280. See Herbert, *Alaska Mining Law Manual*, (1970), published by the Mineral Industry Research Laboratory of the University of Alaska. The leasable minerals under Alaska law are oil, gas, coal, sulfur, oil shale, bitumen, phosphate,

sodium, and potassium. Locatable minerals include metals, ores of metals, as well as nonmetallic minerals which have special values such as asbestos, limestone, building stone, magnesite, silica, and the like. Herbert, at 1.

<sup>4</sup>See, for example, 11 Alaska Administrative Code 86.135(b).

<sup>41</sup>Public Law 85-508, section 6(g), 72 Stat. 341 (1958).

<sup>42</sup>Public Law 85-508, section 6(h), 72 Stat. 342 (1958), as amended by Public Law 88-289, 78 Stat. 168 (1964). The Mineral Leasing Act of 1920 is codified at 30 U.S.C. 181 et seq. The Alaska Coal Lands Leasing Act of 1914, c.330, 38 Stat. 741, formerly codified at 48 U.S.C. 432 et seq., was repealed by the Act of September 9, 1959, Public Law 86-252, 73 Stat. 490.

<sup>43</sup>Public Law 85-508, section 6(h), 72 Stat. 342 (1958), as amended by Public Law 88-289, 78 Stat. 168 (1964).

<sup>44</sup>Id. See also, 43 CFR 2627.3(b)(4).

<sup>45</sup>Public Law 85-508, section 6(m), 72 Stat. 343 (1958). The Submerged Lands Act of May 22, 1953, ch. 65, title 1, section 2, 67 Stat. 29, is codified at 43 U.S.C. 1301 et seq. (1970).

<sup>46</sup>43 U.S.C. 1311(a) (1970).

<sup>47</sup>43 U.S.C. 1301(a) [1970].

<sup>48</sup>43 U.S.C. 1301(f) (1970).

<sup>49</sup>43 U.S.C. 1311(a) (1970).

<sup>50</sup>43 U.S.C. 1301(e) (1970).

<sup>51</sup>Public Law 85-508, section 6(c), 72 Stat. 340 (1958).

<sup>52</sup>Public Law 85-508, section 6(d), 72 Stat. 340 (1958).

<sup>53</sup>Public Law 85-508, section 6(e), 72 Stat. 340 (1958).

<sup>54</sup>Public Law 85-508, section 5, 72 Stat. 340 (1958).

<sup>55</sup>Public Law 85-508, section 6(k), 72 Stat. 343 (1958).

<sup>56</sup>Public Law 85-508, section 6(g), 72 Stat. 341 (1958).

These regulations are found at 43 CFR 2627.

<sup>57</sup>Id.

<sup>58</sup>43 CFR 2627.3(c)(3).

<sup>59</sup>Public Law 85-508, section 6, 72 Stat. 340 (1958).

<sup>60</sup>Public Law 85-508, sections 6(a) and 6(b), 72 Stat. 340 (1958), as amended by the Act of September 14, 1960, Public Law 86-786, 74 Stat. 1024. See also 43 CFR 2627.3(a)(l).

<sup>61</sup>43 CFR 2627.3(c).

<sup>62</sup>43 CFR 2627, 1(b).

<sup>63</sup>43 CFR 2627.3(b).

<sup>64</sup>Public Law 85-508, section 6(g), 72 Stat. 341, (1958) and 43 CFR 2627.

<sup>65</sup>Public Law 85-508, section 6(k), 72 Stat. 343 (1958). The school land grants were authorized under section 1 of the Act of March 4, 1915, 38 Stat. 1214, 48 U.S.C. 353, as amended.

<sup>66</sup>Public Law 85-508, section 6(k), 72 Stat. 343 (1958).

<sup>67</sup>Public Law 85-508, section 6(f), 72 Stat. 341 (1958).

<sup>68</sup>Public Law 85-508, section 6(j), 72 Stat. 342 (1958).

<sup>69</sup>Public Law 85-508, section 28(b), 72 Stat. 351 (1958). The revenue provisions of the Mineral Leasing Act of 1920 are codified at 30 U.S.C. 191.

<sup>70</sup>H. Rept. 624, 1958 U.S. Code Cong. & Ad. News, at 2940, 2956.

<sup>71</sup>30 U.S. C, 191. Prior to its amendment in 1976, section 28 provided that: "all monies received from sales,

bonuses, royalties, and rentals of public lands under the provisions of this chapter shall be paid into the Treasury of the United States; 37½ per centum thereof shall be paid by the Secretary of the Treasury as soon as practicable after December 31 and June 30 of each year to the State within the boundaries of which the leased lands or deposits are or were located; . . ."

In 1976, section 28 was amended by Public Law 94-273, section 6(2), 90 Stat. 377 (Apr. 21, 1976); Public Law 94-377, section 9, 90 Stat. 1090 (Aug. 4, 1976); Public Law 94-422, Title III, section 301, 90 Stat. 1323 (Sept. 28, 1976); and Public Law 94-579, Title HI, section 317(a), 90 Stat. 2770 (Oct. 21, 1976).

As amended, section 28 now provides, simply, that 90 per centum of leasing revenues be paid to the State of Alaska. 30 U. S.C.A. 191 (1978 supp.).

<sup>72</sup>43 U.S.C. 391, Act of June 17, 1902, c. 1093, section 1, 32 Stat. 388, codified at 43 U.S.C. 391, as amended. Monies deposited to the Reclamation Fund are to be used for the reclamation of arid and semiarid lands and for certain other specified purposes. Public Law 94-377 reduced the amount of leasing revenues to be paid into the Reclamation Fund from 52 to 40 percent. Public Law 94-377, section 9, 90 Stat. 1090 (Aug. 4, 1976), 43 U.S.C.A. 191 (1978 supp).

<sup>73</sup>Public Law 85-508, section 28(a), 72 Stat. 351 (1958).

<sup>74</sup>The Alaska Coal Leasing Act, formerly 48 U.S.C. 432, was repealed by the Act of September 9, 1959, Public Law 86-252, section 1, 73 Stat. 490.

Leasing of Federal coal deposits in Alaska is now governed by the Mineral Leasing Act of 1920, codified at 30 U.S. C. 201 et seq.

<sup>75</sup>Public Law 85-508, section 6(e), 72 Stat. 340 (1958) as amended by the Fur Seal Act of 1966, Public Law 89-702, Title IV, section 408(b), 80 Stat. 1098. The Administration of the Pribilof Island fur trade by the U.S. Government was a scandal for many years. As late as 1950, Natives were paid only in food commodities and received a yearly bonus never higher than \$500 for the best hunters. The Native families lived in isolation in a restricted area. No one could visit the islands without a permit from the Government. It was not until 1966, that the last vestiges of what had been called "virtual slavery" were lifted. See Cooper, Alaska—The Last Frontier, 191 (1973). See also 16 U.S.C. 1151 et seq., especially 46 U.S. C. 1168 which provides civil service retirement benefits for Natives engaged in the fur trade and their survivors.

<sup>76</sup>H. Rept. 624, 1958 U.S. Code Cong. & Ad. News 2940.

<sup>77</sup>Id.

<sup>78</sup>See the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 181 et seq.

<sup>79</sup>See the General Mining Law of 1872, as amended, codified at 30 U.S. C, 21-54, 161, 162, 541-541 ii, and 621-625 (1970).

<sup>80</sup>H. Rept. 624, 1958 U.S. Code Cong. & Ad. News at 2944 to 2947.

<sup>81</sup>Id. at 2931,

<sup>82</sup>Public Law 85-508, section 6(l), 72 Stat. 343 (1958).  
See Act of September 4, 1841, section 8, 5 Stat. 455,  
Revised Stat. sections 2378, 2379, 43 U.S.C. 857.

<sup>83</sup>See Act of September 25, 1850, 9 Stat. 520, Revised  
Stat. 2479, 43 U.S.C. 857.

<sup>84</sup>The Act of July 2, 1862, 12 Stat. 503, 7 U.S.C. 301 to  
308, grants new States 30,000 acres of public lands for  
each Senator and Representative.

<sup>85</sup>H. Rept. 624, 1958 U.S. Code Cong. & Ad. News  
2937.

<sup>86</sup>Id. at 2937 to 2938.

<sup>87</sup>Id. at 2938.

<sup>88</sup>Public Law 85-508, section 6, 76 Stat. 340 (1958).

<sup>89</sup>H. Rept. 624, 1958 U.S. Code Cong. 1\$ Ad. News at  
2939.

‘See Public Law 85-508, section 6 (i), 72 Stat. 342  
(1958).

<sup>91</sup>Id. See also, section 6(b), 72 Stat. 340 (1958).

<sup>92</sup>Public Law 85-508, section 6(g), 72 Stat. 341 (1958).

<sup>93</sup>Public Law 85-508, section 20, 72 Stat. 351 (1958).

<sup>94</sup>H. Rept. 624, 1958 U.S. Code Cong. & Ad. News at  
2938.

<sup>95</sup>Id.

<sup>96</sup>Id. See 23 U.S.C. 101 et seq.

<sup>97</sup>H. Rept. 624, 1958 U.S. Code Cong. & Ad. News at  
2939.

<sup>98</sup>Id.

<sup>99</sup>Id.

<sup>100</sup>Id. at 2941.

## ALASKA NATIVE CLAIMS SETTLEMENT ACT

The Alaska Native Claims Settlement Act (ANCSA)<sup>1</sup> extinguished all Native claims to lands and hunting and fishing rights based upon aboriginal title or use.<sup>2</sup> In compensation, ANCSA gave Alaskan Indians, Aleuts, and Eskimos \$962.5 million and the right to select 44 million acres of Federal lands in the State.<sup>3</sup> Native Regional and Village Corporations were established to administer land selections and fund distributions.<sup>4</sup> Conflicts over the Native land claims had slowed State land selections under the Alaska Statehood Act and threatened to impede construction of the Trans-Alaska Oil Pipeline. ANCSA removed a major obstacle to the pipeline and paved the way for conveyances to the State and Native groups that will shift approximately 40 percent of Alaska's land to non-Federal ownership.

ANCSA also addressed the future management of the remaining Federal lands in the State. Section 17(d)(2) directed the Secretary of the Interior to withdraw up to 80 million acres of land that he deemed suitable for potential inclusion in the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems.<sup>5</sup> The Secretary was to study these lands and make recommendations to Congress. To protect the national interest in these lands, commonly called "d-2" lands, prior to congressional action, they were withdrawn from all forms of appropriation under the public land laws, the mining and mineral leasing laws, and from selection by the State or Native Regional Corporations.<sup>6</sup> Statutory authority for these withdrawals expired in December 1978.<sup>7</sup>

Many proposals for Alaska National Interest Lands have been introduced in Congress in addition to the original "d-2" recommendations made by Secretary Morton in December 1973.<sup>8</sup> During the 95th Congress, extensive hearings on Alaska Lands were held before House and Senate Committees in Washington, D. C., Alaska, and other locations across the country. On May 19, 1978,

<sup>1</sup>Note: Footnotes for this section appear on pp. 125-128.

after 3 days of debate, the House of Representatives passed H.R. 39 which would designate over 100 million acres as national parks, forests, wildlife refuges, wild and scenic rivers, and wilderness areas.<sup>9</sup> In October 1978, the Senate adjourned without acting on Alaska Lands. Alaska National Interest Lands legislation will be reintroduced in the 96th Congress.

### HISTORICAL OVERVIEW

Once, Alaska Indians, Aleuts, and Eskimos had dominion over all of Alaska's 375 million acres. Alaska's harsh climate and isolation combined with Government policies to protect the Natives in the use and enjoyment of Alaska's lands, waters, and wildlife. When the United States purchased Alaska from Russia in 1867, the treaty provided: "The uncivilized tribes in Alaska will be subject to such laws and regulations as the United States may from time to time adopt in regard to the aboriginal tribes of that country."<sup>10</sup> However, from 1867 to 1900, the United States paid scant attention to the Natives in Alaska. The Organic Act of 1884, which established Alaska as a public land district, acknowledged the existence of aboriginal claims but reserved any settlement of these claims for a future time:

... the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire the title to such lands is reserved for future legislation by Congress."

By 1900 the United States began to take notice of Alaska and its Natives. By this time, the era of negotiating Indian treaties had ended. The circumstances that dictated the establishment of Indian reservations in the lower 48 had not existed in Alaska. Alaska Native groups were never officially recog-

nized as tribes. The issue of indigenous rights was consistently sidestepped by the Federal Government. As a 1968 report of the Federal Field Committee for Development Planning in Alaska observed, the Alaska Natives were left in an “anomalous position:”

They were omitted from the General Allotment Act, which was a method of attaining citizenship for American aborigines. They were omitted from the Homestead Act as being neither citizen nor alien capable of attaining citizenship. They were forbidden by Congress to enter into treaties with the United States for the cession of some lands and the retention of others. Physically they comprised the major part of Alaska’s population. Officially they were invisible. The mood of the land was to procrastinate about Alaska which was far away and would never be a State or have a white resident population to contest national decisions.<sup>12</sup>

It was not until passage of the Alaska Statehood Act in 1958 that Alaska Natives began to be threatened in their use of the lands and subsistence resources.<sup>13</sup> The Statehood Act did not settle the issue of aboriginal land claims, but left it for future legislative or judicial action.<sup>14</sup> The Federal Field Committee report summed up the position of Alaska Natives at statehood:

The time for filing claims before the Indian Claims Commission had passed. Claims must have arisen prior to August 13, 1946, and have been filed within 5 years to be heard. The aboriginal title of the Natives of Alaska had received no formal recognition, except that granted in the jurisdictional act for the Tlingit-Haidas in 1935. Again the need in Alaska was arising when there were no laws on the books to provide a remedy. Now many areas of Alaska were feeling the encroachment of the white man. The grants were no longer a string of townsites, a scattering of homesteads, a few hundred mining claims—they were in the millions of acres, and, more importantly, over all of the resources upon which the Native peoples depended for their livelihood. Anglo-Saxon land ownership was foreign to Alaska Natives. They might claim and use the land on which their homes, fish camps, and landing sites were situated, with the same protectiveness of any other land-

owner; but the fruit of the land was more important than the land itself. Important were the fish, fur-bearing animals, caribou, and moose—and, even more important than land animals for Coastal Eskimos—the fruits of the sea.<sup>15</sup>

By 1959, when the State was given its selection rights to about 104 million acres of public lands, over 92 million of the 375 million acres in Alaska had been withdrawn for public purposes. These Federal withdrawals included: the Tongass and Chugach National Forests; Mt. McKinley National Park and Glacier Bay, Katmai, and Sitka National Monuments; the Kenai National Moose Range and a number of small wildlife refuges; Naval Petroleum Reserve No. 4; and several major defense installations. Eighty percent of the Federal lands in Alaska were under the jurisdiction of the Bureau of Land Management (BLM). These lands were, and are, the major part of the Nation’s public domain. Since statehood, the unreserved public domain in Alaska has been further reduced by the creation, in 1960, of the 9-million-acre Arctic National Wildlife Range.

As Alaska began to make land selections, Native groups began to protest. Beginning in late 1961, the Bureau of Indian Affairs filed protests on behalf of some Native villages, totaling approximately 5,860,000 acres and conflicting with 1,750,000 acres of State selections. The filing of individual or village protests continued through 1966. By fall of 1966 the rate of filings accelerated. By April 1, 1968, there were 40 recorded protests covering 296,600,000 acres.<sup>16</sup>

In 1966 because of these conflicting land claims, Secretary of the Interior Stewart Udall imposed an informal freeze on all Alaska public lands. This freeze halted any further Federal withdrawals, State selections, and appropriations under the public land laws. In January 1969, this freeze was formalized by Public Land Order 4582, which withdrew all unreserved Federal lands in Alaska pending congressional consideration of legislation on Alaska Native land claims.<sup>17</sup> With discovery of oil at Prudhoe Bay, pres-



sure for resolution of the Native claims increased. Because of the land freeze, the Secretary could not grant a permit for construction of a pipeline to transport oil from the North Slope. Finally, on December 18, 1971, the Alaska Native Claims Settlement Act was signed into law.

## SETTLEMENT OF NATIVE CLAIMS

ANCSA was passed in congressional recognition of “an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based upon aboriginal land claims.”<sup>18</sup> ANCSA is more than a public land law. In section 2(b) of ANCSA, Congress declares, in part, that “the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, (and) with maximum participation by Natives in decisions affecting their rights and property.”<sup>19</sup> ANCSA extinguished all Native claims of aboriginal title to lands in Alaska and, in exchange gave Alaska Indians, Aleuts, and Eskimos an Alaska Native Fund of \$962.5 million and the right to select 44 million acres of Federal lands.

Section 4 of ANCSA provides that any and all aboriginal titles and claims of aboriginal title to lands in Alaska are extinguished.<sup>20</sup> All conveyances of public lands and waters including tentative approvals of land selections under the Alaska Statehood Act are to be regarded as extinguishing any aboriginal title to the lands involved.<sup>21</sup> All Native claims of aboriginal title in Alaska based on indigenous use or occupancy of lands, including submerged lands, and any aboriginal hunting and fishing rights were extinguished.<sup>22</sup> All claims against the United States, the State of Alaska, and any persons that were based on aboriginal title or use or on the laws of the United States or other Nations were also extinguished.<sup>23</sup>

### Native Enrollment

Section 5 of the Act requires that all Alaska Natives must enroll in 1 of 13 Native

regions established by section 7 in order to be eligible for participation in the settlement.<sup>24</sup> (See figure 5.) The original period of enrollment ended on March 30, 1973; however, ANCSA was amended in 1976 to allow additional Native enrollments.<sup>25</sup> About 70,000 eligible Natives were registered during the first enrollment period.<sup>26</sup> An Alaska Native, as defined in section 3(b) of ANCSA, is:

A citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group. Any decision of the Secretary regarding eligibility for enrollment shall be final.<sup>27</sup>

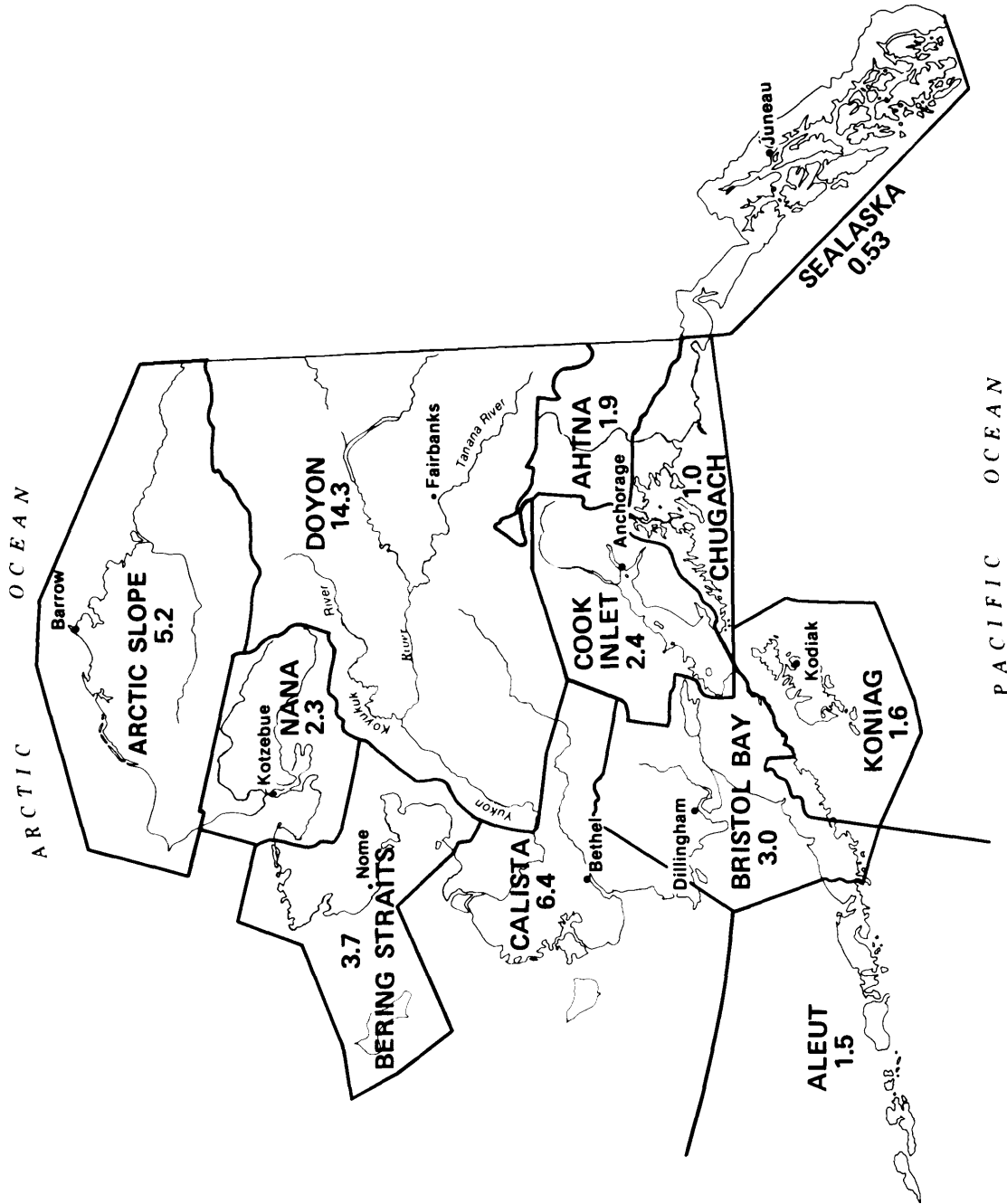
Natives residing in Alaska are also enrolled in a Native village.<sup>28</sup> Natives who live outside of Alaska and who choose not to enroll in their ancestral regions may join a 13th region.<sup>29</sup> The 13th region contains no villages.

### Native Corporations

ANCSA requires the organization under Alaska corporation law of a profit-making Native Regional Corporation for each region.<sup>30</sup> The Act further requires the organization of a Village Corporation for each village.<sup>31</sup> These corporations administer land selections and cash distributions from the Alaska Native Fund.<sup>32</sup> As profit-making business entities, Native Regional Corporations manage other business enterprises and investments.<sup>33</sup> Individual Natives are shareholders in the Native Regional and Village Corporations of their enrollment.

The stock in Native Corporations may not be transferred by a living shareholder before

Figure 5.—Approximate Boundaries of Native Regional Corporations Established Under ANCSA and Estimated Combined Regional and Village Corporation Entitlements (in million of acres)



SOURCE: Federal-State Land Use Planning Commission for Alaska, 1977.

December 18, 1991, except under a court decree of separation, divorce, or child support.<sup>34</sup> When a Native shareholder dies, however, the stock passes as other personal property and may be inherited by a non-Native.<sup>35</sup>

### Alaska Native Fund

The Settlement Act provides that Alaska Natives are to receive \$962,500,000. Of this amount, \$462,500,000 is to be appropriated by the Congress over a period of 11 years.<sup>36</sup> The remaining \$500 million will be derived from a 2-percent royalty on Mineral Leasing Act revenues produced from State and Federal lands.<sup>37</sup> The Native royalty is subtracted from Federal lease revenues before deducting Alaska's statehood share of 90 percent of the profits.<sup>38</sup> Royalty payments will cease when \$500 million have been paid.<sup>39</sup> These monies are to be deposited to the Alaska Native Fund in the U.S. Treasury.<sup>40</sup>

The monetary settlement provided by the Act is to be distributed quarterly to the Regional Corporations in proportion to the numbers of their shareholders.<sup>41</sup> Each Regional Corporation, in turn, is required to redistribute one-half of its receipts from the Native Fund to each Village Corporation for its members and pro rata to Native shareholders who are not members of Village Corporations.<sup>42</sup>

The 12 Regional Corporations that are eligible to receive lands under the Act are required to share the revenues derived from the timber and mineral resources on selected lands.<sup>43</sup> Each of the 12 landholding Regional Corporations must divide 70 percent of the revenues from its timber and mineral resources with the other 11 Regional Corporations. This division of revenues is proportional to the number of shareholders. As in the case of the monetary compensation provided by the Act, each Regional Corporation is required to redistribute one-half of the revenues it so receives among its shareholders and Village Corporations.<sup>44</sup> The 13th Regional Corporation, which is composed of nonresident Natives, is ineligible to receive

land and thus does not share in the inter-regional revenue sharing.<sup>45</sup>

### Land Selections

Under various provisions of ANCSA, Alaska Natives will receive title to approximately 44.8 million acres of public lands in Alaska.<sup>46</sup> Of these lands, the surface estate to about 22 million acres is to be conveyed to about 200 Native Village Corporations organized under the Act.<sup>47</sup> The subsurface estate to these 22 million acres and fee simple title to some 18 million acres is to be divided among the 12 resident Native Regional Corporations.<sup>48</sup> [The term "subsurface estate" is roughly equivalent to "mineral rights.") Although Regional Corporations hold the subsurface rights, mineral exploration can occur within the boundaries of any Native village only with the consent of the Village Corporation.<sup>49</sup>

The Village Corporation selections were to be chosen by December 18, 1974, from lands in and around existing Villages.<sup>50</sup> The village land entitlements outside of southeast Alaska are made on the basis of population.<sup>51</sup> The 11 Regional Corporations outside southeast Alaska were to select the lands to which they are entitled by December 18, 1975.<sup>52</sup> Regional Corporation entitlements are made under a complex formula.<sup>53</sup>

The Secretary of the Interior was directed to issue patents "immediately" after the Native Corporations have made their selections.<sup>54</sup> Conveyances of Native selections have been delayed by administrative problems, by disagreement between Native Corporations and the Department of the interior, and by litigation.<sup>55</sup>

### Withdrawals for Native Selections

Subsection Ii(a) of ANCSA withdrew the 25 townships surrounding any Native village outside southeastern Alaska from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection by the State.<sup>56</sup> Similarly, subsection 16(a) of ANCSA withdrew the nine

townships surrounding certain Native villages in southeastern Alaska.<sup>57</sup> These withdrawals were made to form a pool of land from which Native selections could be made.<sup>58</sup> The withdrawals included some lands already selected by or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act.<sup>59</sup> National parks, national monuments, and land withdrawn for military purposes (other than Naval Petroleum Reserve No. 4) were excluded from these withdrawals. The Secretary of the Interior was directed to withdraw additional “deficiency” land from the nearest unreserved, vacant, and unappropriated public lands if the statutory withdrawals were not sufficient to satisfy Native selection rights.<sup>60</sup>

Approximately 108 million acres were withdrawn for Native selection purposes by subsections 11(a) and 16(a).<sup>61</sup> Section 16 authorizes Native village selections of 230,400 acres in southeastern Alaska from lands withdrawn under that section.<sup>62</sup> Section 12 authorizes selection by Native Village Corporations outside southeastern Alaska of 22 million acres from the land withdrawn by subsection 11(a).<sup>63</sup> Section 12 further authorizes selection by Native Regional Corporations of an additional 16 million acres, less the amount of land selected by the Native Village Corporations in southeastern Alaska, from the land withdrawn by subsection 11(a), excepting land selected by the State prior to ANCSA’s enactment.<sup>64</sup>

A limited amount of the 26 million acres selected by the State prior to ANCSA’s enactment was made available for Native selection under sections 11(a)(2) and 12(a)(1) of ANCSA.<sup>65</sup> It is estimated that 2.6 million of these acres will pass into Native ownership.

Subsection 14(h) authorizes the Secretary to withdraw an additional 2 million acres of unreserved and unappropriated public land located outside the areas withdrawn by subsections 11(a) and 16(a) and to convey such land for certain specified purposes with the balance remaining to be shared by all 12 resident Native Corporations on the basis of population.<sup>66</sup>

Approximately 4.8 million additional acres will pass to the Natives as a result of two open-ended provisions in ANCSA. Section 18 provides for approval of Native allotment applications under prior statutes pending at the time ANCSA was adopted.<sup>67</sup> All allotments so approved count against the 2 million acres to be conveyed to the Natives under subsection 14(h), but only if approved prior to December 18, 1975.<sup>68</sup> Of an initial 1.2 million acres encompassed by pending allotment claims, it is estimated that 200,000 acres are covered by invalid claims. Another 200,000 acres represent claims approved prior to December 18, 1975. This leaves 800,000 acres to be conveyed that will not count against the 2 million allowed under subsection 14(h).<sup>69</sup>

Section 19(b) provides an option to those Village Corporations located on former “Indian Reserves” to take fee title to the “Reserve” and forego other benefits of ANCSA or to take the benefits of ANCSA.<sup>70</sup> Six such corporations elected to take title to four former reserves. These reserves are: St. Lawrence Island (1.2 million acres); Elim (0.3 million acres); Venetie (1.4 to 1.7 million acres); and Tetlin (0.75 million acres). This acreage, about 4 million, is in addition to the 40 million acres covered by sections 12, 14, and 16.<sup>71</sup>

All together, these provisions authorize selection of approximately 44.8 million acres by various Native groups in Alaska from around 110 million acres of withdrawals.

As permitted by the Department of the Interior’s regulations, the Natives greatly over-selected in order to protect themselves from loss of expected acreage due to preexisting rights or subsequent land surveys.<sup>72</sup> Around 80 million acres were so selected. Pursuant to subsection 22(h) of ANCSA, all withdrawals made for Native selection purposes terminated on December 18, 1975, except for land actually selected by, but not yet conveyed to, the Natives.<sup>73</sup> Approximately 30 million acres of unselected public lands remained. These lands are covered by the withdrawals authorized by section 17(d)(1) of ANCSA.<sup>74</sup>

The Regional Corporations have emphasized mineral potential in making their land

selections. In fact, several of them have obtained extensive mineral surveys of land available to them for selection. These surveys were usually performed in return for certain development rights in the land eventually selected.<sup>75</sup>

Generally, the 44.8 million acres of Native land will be available for mineral exploration and development. The Regional Corporations will control the minerals on 40 million acres. Some of the Regional Corporations will likely favor development. Other Native groups will control the minerals in the 4.8 million acres conveyed under sections 18 and 19, and, since these acres will probably encompass culturally significant areas, these groups may be somewhat less favorable to mineral activity.

### **ALASKA NATIONAL INTEREST LANDS**

Section 17(d)(2) of ANCSA authorized the Secretary to withdraw up to 80 million acres of unreserved public lands to be studied for possible addition to the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems.” The Act required the lands to be withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, from State selection under the Alaska Statehood Act, and from selection by Native Regional Corporations under ANCSA.<sup>77</sup> Native Regional and Village Corporation selections, however, were allowed where the “d-2” withdrawals overlapped the statutory subsection 11(a) withdrawals for Native selection purposes.<sup>78</sup> The Secretary withdrew the full 80 million acres.” Section 17(d)(2) also required that the Secretary submit his recommendations concerning those lands to Congress by December 18, 1973.<sup>80</sup>

On December 17, 1973, Secretary Morton recommended that 83.5 million acres be added to the four conservation systems in Alaska.<sup>81</sup> Approximately 65 million of these 83.5 million acres were lands previously

withdrawn pursuant to section 17(d)(2). These section 17(d)(2) withdrawals remain in effect until Congress acts on the recommendations or until December 18, 1978, whichever is earlier.<sup>82</sup> The section 17(d)(2) withdrawal terminated on December 18, 1973, for the 15 million acres not recommended. The other 18.5 million acres recommended for inclusion are lands that were withdrawn pursuant to subsection 17(d)(1).<sup>83</sup>

The 80-million-acre limitation in withdrawal authority of section 17(d)(2) does not impose any limitation either on the total number of acres that may eventually be included in Alaskan conservation systems or on the number of acres that the Secretary may withdraw under other authority for congressional consideration or classification. Similarly, the 80-million-acre limitation on the withdrawal authority of section 17(d)(2) does not impose any restriction on congressional designations of Alaska National Interest Lands.

### **ALASKA PUBLIC INTEREST LANDS**

Section 17(d)(1) of ANCSA directs the Secretary of the Interior to “review the public lands of Alaska and determine whether any portion of these lands should be withdrawn under authority provided for in existing law to insure that the public interest in these lands is properly protected.”<sup>84</sup> The section authorizes him “to classify or reclassify any lands so withdrawn and to open such lands to appropriation under the public land laws in accord with his classifications.”<sup>85</sup> Withdrawals pursuant to subsection 17(d)(1) do not affect State and Native selection rights in those areas withdrawn for Native selection pursuant to section 11.<sup>86</sup> The section 11 withdrawals, however, precluded State selection in such areas, at least until the section 11 withdrawals terminated in December 1975.<sup>87</sup>

During 1972, the Secretary withdrew almost all public lands in Alaska that were not already reserved from State and Native selections.<sup>88</sup> Most of these so-called “d-1” withdrawals simply backed up other with-

drawals, such as the statutory withdrawal for Native selection purposes. Thus, any areas not selected by the Natives or recommended for inclusion in the four conservation systems remain withdrawn under subsection 17(d)(1) despite the termination of the more specific withdrawals. There is no time limit on the section 17(d)(1) withdrawals, which will probably be maintained until the land is classified or disposed of.

Certain areas were left open to State selection only.<sup>89</sup> Others were left open to location for metalliferous minerals as well as State selection. Fifteen million acres were made available for entry under the public land laws, with a 90-day preference to the State to select areas it desired. However, the available acreage was generally in areas not suited for habitation or productive development, and attempted settlement led to hardship, death, and abandoned entries. In 1974 the 12.4 million acres of remaining unselected and unentered public lands were closed until they could be classified.<sup>90</sup>

The State will eventually seek to complete its statehood selections from these d-1 lands. Public lands withdrawn for possible Native selection under ANCSA and lands withdrawn under section 17(d)(2) as national interest lands that are not included in national conservation systems will revert to a public land d-1 status because of overlapping d-1 withdrawals.

Section 603 of the Federal Land Policy and Management Act of 1976 requires that all public lands managed by the BLM must be inventoried and studied for their wilderness potential by 1991.<sup>91</sup> Under this provision, some of the remaining public lands in Alaska may be added to the National Wilderness Preservation System. Wilderness review of Alaska's public lands will be deferred until after completion of Native land conveyances and congressional consideration of national interest land proposals called for in section 17(d)(2).<sup>92</sup>

## JOINT FEDERAL-STATE LAND USE PLANNING COMMISSION FOR ALASKA

Section 17(a) of ANCSA established the Joint Federal-State Land Use Planning Commission for Alaska.<sup>93</sup> This Planning Commission is composed of 10 members—5 members representing the State of Alaska and 5 members representing the United States. The Alaska members include the Governor or his designate and four other persons appointed by the Governor.<sup>94</sup> At least one of these State appointees must be a Native as defined in the Act.<sup>95</sup> The five members representing the Federal Government include one member appointed by the President with the advice and consent of the Senate and four members appointed by the Secretary of the Interior.<sup>96</sup> The Governor (or his designate) and the Presidential appointee serve as cochairmen of the Commission.<sup>97</sup> All decisions of the Commission require concurrence by the cochairmen.<sup>98</sup> All members serve at the pleasure of the appointing authority.<sup>99</sup>

The Planning Commission has no regulatory or enforcement responsibilities, but has important advisory functions. \*W The Commission was to expire on December 31, 1976. However, Public Law 94-204, approved January 2, 1977, provides that the Commission will continue in existence until May 30, 1979.<sup>101</sup>

ANCSA provides that the Planning Commission shall:

(A) undertake a process of land use planning, including identification of and the making of recommendations concerning areas planned and best suited for permanent reservation in Federal ownership as parks, game refuges, and other public uses, areas of Federal and State lands to be made available for disposal, and uses to be made of lands remaining in Federal and State ownership;

(B) make recommendations with respect to proposed land selections by the State under the Alaska Statehood Act and by Village and Regional Corporations under this Act;

(C) be available to advise upon and assist in the development and review of land use plans for lands selected by the Native Village and Regional Corporations under this Act and by the State under the Alaska Statehood Act;

(D) review existing withdrawals of Federal public lands and recommend to the President of the United States such additions to or modifications of withdrawals as are deemed desirable;

(E) establish procedures, including public hearings, for obtaining public views on the land use planning programs of the State and Federal Governments for lands under their administration;

(F) establish a committee of land use advisers to the Commission, made up of representatives of commercial and industrial land users in Alaska, recreational land users, wilderness users, environmental groups, Alaska Natives, and other citizens;

(G) make recommendations to the President of the United States and the Governor of Alaska as to programs and budgets of the Federal and State agencies responsible for the administration of Federal and State lands;

(H) make recommendations from time to time to the President of the United States, Congress, and the Governor and legislature of the State as to changes in laws, policies, and programs that the Planning Commission determines are necessary or desirable;

(I) make recommendations to insure that economic growth and development is orderly, planned and compatible with State and national environmental objectives, the public interest in the public lands, parks, forests, and wildlife refuges in Alaska, and the economic and social well-being of the Native people and other residents of Alaska;

(J) make recommendations to improve coordination and consultation between the State and Federal Governments in making resource allocation and land use decisions; and

(K) make recommendations on ways to avoid conflict between the State and the Native people in the selection of public lands. \*02

## EASEMENTS ACROSS NATIVE LANDS

Section 17(b) provides that “the Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access, and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.”<sup>103</sup> In identifying these public easements, the Commission is to consult with State and Federal agencies, review proposed transportation plans, and receive and review statements from interested groups and individuals on the need for and the proposed location of public easements.<sup>104</sup> The Secretary of the Interior must consult with the Planning Commission and reserve “such easements as he determines are necessary” in any patent conveying lands to a Native Village or Regional Corporation under the provisions of ANCSA.<sup>105</sup>

Section 17(c) provides that “in the event that the Secretary withdraws a utility and transportation corridor across public lands in Alaska pursuant to his existing authority, ” the State and Native Village and Regional Corporations will be precluded from selections in the areas withdrawn.<sup>106</sup> This provision refers to right-of-way corridor withdrawals for a construction haul road and an oil pipeline to transport oil from the North Slope.

In February and March 1976, the Secretary of the Interior issued orders establishing the departmental policies and guidelines on the reservation of extensive easements across lands conveyed to Native Corporations.<sup>107</sup> These easements provoked strong reactions from several Native Corporations and have been the subject of litigation.

Order No. 2982 deals with local easements, that is, all public easements other

than those used in interregional or interstate commerce, in the transportation of natural resources, or in interstate communications systems.<sup>108</sup> The order specifies the policy, guidelines, and procedures for reserving easements. This order includes easements to provide: access to public lands and resources; a continuous 25-foot easement along the marine coastline; access and recreational use easements along “highly significant” recreational streams and rivers; and easements for utility, communications and weather purposes, for landing and docking sites, and for “overnight” camp and rest areas, etc.<sup>109</sup> Guidelines include standards, widths, uses, and purposes. These easements are to be reserved to protect the public interest in land conveyed to Natives under ANCSA and to meet the requirements of public law.<sup>110</sup> Several of the easements specified in this order were challenged by Natives and overturned by a Federal District Court decision.<sup>111</sup>

Order No. 2987 establishes guidelines for reserving easements for the transportation of energy, fuel, and natural resources.<sup>112</sup> This order establishes the so-called “floating” easements, that is, easements which are not specifically located but rather are reserved “in behalf of the United States to cross all the land conveyed pursuant to the ANCSA . . .”<sup>113</sup> The specific location of easements reserved by this order is to be determined after consultation with and consent of the non-Federal owner.<sup>114</sup> The order provides that the United States may exercise the right of eminent domain if consent is not given.<sup>115</sup>

This order subjects all lands conveyed to Alaska Natives to a “floating” or “blanket” easement for federally owned energy transmission systems or for the transportation of federally produced or purchased energy, fuel, or natural resources.<sup>116</sup> Native lands in the Aleutian Islands and the southeastern

panhandle were excluded from the easement provision because prior studies of potential transportation routes disclosed that few areas in these regions would be used for energy and natural resource transportation systems.<sup>117</sup>

Order No. 2987 specifically provides that such easements will not be available for access across Native lands for development of resources on non-Federal lands:

Privately owned energy, fuel, and natural resources that are being developed for a profit should not be afforded extraordinary privileges across private property. Therefore, easements should not be reserved by the United States in conveyances to Alaska Natives for the benefit of such privately owned energy, fuel, and natural resources.<sup>118</sup>

Subsequently, the Alaskan Natives filed suit, contesting the validity of sections of both orders.<sup>119</sup> On July 7, 1977, the Federal District Court in Alaska ruled that several aspects of Order 2982 were invalid.<sup>120</sup> In particular, the court found that the “continuous 25-foot marine coastline easement” and a major portion of the linear easements on “highly significant recreational rivers and streams were illegal.”<sup>121</sup> The court also ruled that Order 2987, the “floating” easement for transportation corridors, was void in toto.<sup>122</sup>

Because the court viewed ANCSA as a settlement act and not a public land law, certain specific statutory easements reserved on all lands conveyed out of Federal ownership were also overturned. These easement reservations for railroads, communications lines, and ditches and canals were held to be preempted by section 26 of ANCSA.<sup>123</sup> The Justice Department filed a protective notice of appeal, and several of the plaintiffs also appealed.<sup>124</sup> A tentative settlement of the easement litigation was announced in early 1978. Order 2987 was revoked in May 1978.<sup>125</sup>



## FOOTNOTE REFERENCES FOR ALASKA NATIVE CLAIMS SETTLEMENT ACT

<sup>1</sup>Act of December 18, 1971, Public Law 92-203, 85 Stat. 688, codified at 43 U.S.C. 1601 (Supp. IV 1974).

<sup>2</sup>43 U.S.C. 1603.

<sup>3</sup>See 43 U.S.C. 1605, 1608, 1611, 1613, 1616, and 1618.

<sup>4</sup>43 U.S.C. 1606, 1607.

<sup>5</sup>43 U.S.C. 1616(d)(2)(A).

<sup>6</sup>*Id.*

<sup>7</sup>43 U.S.C. 1616(d)(2)(D).

<sup>8</sup>The major Alaska Lands Bills introduced in the 95th Congress are:

H.R. 39, The Alaska National Interest Lands Conservation Act, introduced by Representative Udall and supported by the Alaska Coalition, an alliance of environmental, conservation, and recreation organizations (comparable measures include H.R. 1974 and H.R. 2976);

S. 1500, Senate version of H.R. 39 introduced by Senator Metcalf (comparable measure, S. 500);

S. 1787, Alaska National Interest Lands Act, introduced by Senator Stevens of Alaska and supported by Representative Young of Alaska and by Governor Hammond of Alaska;

S. 499, H.R. 6564, the original Morton proposal first introduced in the 93d Congress, Dec. 17, 1973; and

S. 2944, Alaska Lands Conservation and Management Act, introduced by Senator Gravel of Alaska.

The Carter Administration did not offer a separate D-2 proposal, but, instead recommended a series of technical amendments to H.R. 39 in hearings before the House and Senate Committees.

For a description and comparison of Alaska Lands legislation introduced in the 94th Congress, see Federal State Land Use Planning Commission for Alaska, "The D-2 Book" Volume II: Lands of National Interest in Alaska—A Comparative Analysis, November 1977.

<sup>9</sup>H.R. 39, 95th Cong., 2d sess., 124 Cong. Rec. H4329 (daily ed. May 19, 1978). See also House Rept. 95-1045, pts. I and II (Alaska National Interest Lands Conservation Act of 1978). On Oct. 15, 1978, the Senate adjourned without acting on its version of Alaska Lands legislation. S.Rept. 95-1300, reported Oct. 9, 1978. See also 124 Cong., Rec. S19135 to S19141 (daily ed. Oct. 14, 1978, pt. IV).

<sup>10</sup>Treaty of March 30, 1867, 15 Stat. 539.

<sup>11</sup>Act of May 17, 1884, section 8, 23 Stat. 24.

"Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land*, 434 (1968).

<sup>12</sup>Act of July 7, 1958, Public Law 85-508, 72 Stat. 339, 48 U.S.C. Prec. § 21 (1970).

<sup>13</sup>*Id.*, section 4.

<sup>14</sup>*Alaska Natives and the Land*, *supra* note 12, at 439. Without Federal recognition of their rights, Alaska Natives faced the threat that their aboriginal lands might be disposed of by the Federal Government with-

out payment of just compensation. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

<sup>15</sup>*Alaska Natives and the Land*, at 440. By 1968, these protests covered 80 percent of the lands in the State. See Statement of Asst. Secretary of the Interior, Guy Martin, before the Subcommittee on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, page 2, July 21, 1977. (Hereinafter Statement of Asst. Secretary Martin).

<sup>16</sup>34 F.R. 1025, Jan. 17, 1969. At his confirmation hearings, Interior Secretary-Designate Walter Hickel, the former Governor of Alaska, agreed to honor the Udall land freeze for 2 years.

<sup>17</sup>43 U.S.C. 1601(a).

"43 U.S.C. 1601(b).

<sup>18</sup>43 U.S.C. 1603.

<sup>19</sup>43 U.S.C. 1603(a).

<sup>20</sup>43 U.S.C. 1603(b).

<sup>21</sup>43 U.S.C. 1603(c).

<sup>22</sup>43 U.S.C. 1604. The 12 regions, recognized in section 5(a), roughly correspond to the geographic areas represented by the Native associations existing at passage of ANCSA. 43 U.S.C. 1606(a). The 13th region includes all nonresident Natives who chose not to enroll in the 12 geographic regions. 43 U.S.C. 1606(c).

<sup>23</sup>43 U.S.C. 1604, as amended by the Act of January 2, 1976, Public Law 94-204, section 1, 89 Stat. 1145.

<sup>24</sup>Morgan, "From Ketchikan to Barrow," *Alaska Magazine*, May 1977, at 9.

<sup>25</sup>43 U.S.C. 1602(b).

<sup>26</sup>43 U.S.C. 1605(b).

<sup>27</sup>43 U.S.C. 1606(c). originally, the Secretary ruled that a majority of nonresident Natives had elected not to form an optional 13th region under section 7(c) of ANCSA. This decision was challenged and reversed. *Alaska Native Ass'n of Oregon v. Morton*, Civil Action No. 2133-73; *Alaska Fed'n of Natives Int'l v. Morton*, Civil No. 2141-73 (D. D. C., filed Dec. 30, 1974). See also Public Law 94-204, section 8, 89 Stat. 1149.

<sup>28</sup>43 U.S.C. 1606(d), Section 7(e), 43 U.S.C. 1606(e), requires that the original articles of incorporation and bylaws of the corporation must be approved by the Secretary of Interior within 18 months of the enactment of ANCSA. The articles of incorporation may not be amended within 5 years of establishment of the Regional Corporation without the approval of the Secretary.

Thirteen Native Regional Corporations were formed under section 7 of ANCSA, 43 U.S.C. 1606. These corporations and their enrolled membership as of March 23, 1978 are:

Region	Enrolled membership
Ahtna, Inc. . . . .	1,057
Aleut Corporation. . . . .	3,124
Arctic Slope Regional Corporation. . . . .	3,710

Region	Enrolled membership
Bering Straits Native Corporation . . . . .	6,271
Bristol Bay Native Corporation . . . . .	5,315
Calista Corporation . . . . .	13,193
Chugach Natives, Inc. . . . .	1,881
Cook Inlet Region, Inc. . . . .	6,052
Doyon, Ltd. . . . .	8,905
Koniag, Inc. . . . .	3,267
NANA Regional Corporation, Inc. . . . .	4,761
Sealaska Corporation. . . . .	15,388
The 13th Regional Corporation . . . . .	3,997

SOURCE: Alaska Natives Regional Profiles, U.S. Dept. of the Interior, Bureau of Indian Affairs, Report No. 269, October 1978.

<sup>31</sup>43 U.S.C. 1607.

<sup>32</sup>See 43 U.S.C. 1606, 1611, and 1613.

<sup>33</sup>For a description of the business ventures of the Alaska Native Corporations, see Morgan, "From Ketchikan to Barrow," *Alaska Magazine*, May 1977 at 9 and *Alaska Native Regional Profiles*, supra, note 30.

<sup>34</sup>43 U.S.C. 1606(h)(l). On Jan. 1, 1992, all Native corporation stock issued will be canceled and each shareholder will receive new stock without any restrictions on transfer on a share for share basis. 43 U.S.C. 1606(h)(3).

<sup>35</sup>43 U.S.C. 1606(h)(2).

<sup>36</sup>43 U.S.C. 1605(a)(1).

<sup>3743</sup> U.S.C. 1605(a)(2) and 1608. See also 30 U.S.C. 191.

<sup>38</sup>43 U.S.C. 1608(d), section 6(g) of ANCSA as amended by Public Law 93-153, the *Trans-Alaska Pipeline Act*, section 407, 87 Stat. (1973), provides for advance payments to the Alaska Native Fund chargeable against mineral leasing revenues to be paid under section 9 of ANCSA, 43 U.S.C. 1608(g). These advance payments were authorized because of the delays in the construction of the *Trans-Alaska Pipeline*. Advance payments stopped once the pipeline commenced delivery of oil from the North Slope in the late summer of 1977.

<sup>39</sup>43 U.S.C. 1608(g).

<sup>40</sup>43 U.S.C. 1605(a).

<sup>41</sup>43 U.S.C. 1605(c).

<sup>42</sup>43 U.S.C. 1606(d).

<sup>43</sup>43 U.S.C. 1606(i).

<sup>44</sup>43 U.S.C. 1606(j).

<sup>45</sup>See 43 U.S.C. 1606(i) and 1611. In the 95th Congress, hearings were held before the Indian Affairs Subcommittee of the House Committee on interior and Insular Affairs on H.R. 12529, a bill providing for an equitable distribution of land to the 13th Regional Corporation.

<sup>46</sup>43 U.S.C. 1611 (22 million acres to Native villages, 16 million acres to Regional Corporations); 43 U.S.C. 1613 (2 million acres); 43 U.S.C. 1615 (230,400 acres to Southeast Natives); 43 U.S.C. 1618 (4 million acres of former Native Reserves). In addition, some 800,000 acres will pass to individual Natives under applications made under various Native allotment acts and approved after Dec. 18, 1975. See 43 U.S.C. 1617.

<sup>47</sup>Eligibility qualifications for Native village selections are set forth in section n(b)(2) (43 U.S.C.

1610(b)(2)), section 12 (43 U.S.C. 1611), section 14 (43 U.S.C. 16) and section 16 [43 U.S.C. 1615] of ANCSA.

Of over 200 Native villages, 195 were determined to be eligible for village selections (however, the eligibility of one of these villages has been challenged in litigation brought by some Alaskan residents). Ten more villages are involved in litigation with the Department of the Interior over eligibility. Three more villages which had filed selections under section 12(a) were found ineligible by the Department. Statement of Asst. Secretary Martin, supra, note 16 at page 16.

<sup>48</sup>See 43 U.S.C. 161 l(a) and (b); 43 U.S.C. 1613(h); 43 U.S.C. 1615.

<sup>49</sup>43 U.S.C. 1613(f).

<sup>50</sup>43 U.S.C. 1611(a)(l); 43 U.S.C. 1615(b).

<sup>51</sup>43 U.S.C. 1613(a), section 14(a), 43 U.S.C. 1613(a) provides for village land entitlements for first round selections under section 12(a) on the basis of population:

Native population in 1970 census between	Entitlement
25 and 99. . . . .	69,120 acres
100 and 199. . . . .	92,160 acres
200 and 399. . . . .	115,200 acres
400 and 599. . . . .	138,240 acres
600 or more. . . . .	161,280 acres

Native villages in southeast Alaska receive 23,040 acres regardless of population; 43 U.S.C. 1615. Second-round village selections are to be allocated among villages by the Regional Corporations "on an equitable basis after considering historic use, subsistence needs, and population;" 43 U.S.C. 1611(b).

<sup>52</sup>43 U.S.C. 1611(c)(3).

<sup>5343</sup> U.S.C. 1611(c), The 11 resident Regional Corporations outside southeast Alaska will share in approximately 16 million acres distributed according to a "land lost" formula based on the geographic area of each region set forth in section 12(c), 43 U.S.C. 1611(c). Land selections under section 14(h)(8), 43 U.S.C. 1613(h)(8), will be allocated among all 12 resident Regional Corporations on the basis of population.

<sup>54</sup>43 U.S.C. 1614.

<sup>55</sup>By 1977, less than 5 million acres of Native selections had been conveyed by the United States. See discussion of these delays in Statement of Asst. Secretary Martin, supra, note 16. See also, Hearings on Alaska Natural Resource Issues Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st sess. (1977) and Lazarus and West, "The Alaska Native Claims Settlement Act: A Flawed Victory," 40 *Law & Contemp. Prob.* 132 (1976).

<sup>56</sup>43 U.S.C. 1610(a).

<sup>57</sup>43 U.S.C. 1615(a).

<sup>58</sup>43 U.S.C. 1611.

<sup>59</sup>43 U.S.C. 1610(a)(2). The purpose of these withdrawals is explained in the ANCSA Conference Committee Report:

Section 11 of the conference report withdraws lands around villages, including villages located on lands selected by or tentatively approved to the

State. This section also provides for the withdrawal of in lieu lands adjacent to the 25 township area to insure that the land selection rights of Native Villages and Regional Corporation will be fully protected and will not be frustrated by competing State selections or the creation of new interests in lands under the public land laws.

S. Rept. 92-581, 92d Cong., 1st sess., reprinted in Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st sess., Background Information for Alaska Lands Designations (Comm. Print No. 4, 1977) at 72.

<sup>60</sup>43 U.S.C. 1610(a)(3).

<sup>61</sup>43 U.S.C. 1610(a), 43 U.S.C. 1615(a). These lands and others were withdrawn under Public Land Orders 5169 to 5188, 37 F.R. 5572-5591, Mar. 16, 1972.

<sup>62</sup>43 U.S.C. 1615, section 16(b), 43 U.S.C. 1615(b), authorizes selection of 23,040 acres by each of nine Native villages listed in section 16(a), 43 U.S.C. 1615(a). The Native village of Klukwan is entitled to select 23,040 acres by section 16(d), 43 U.S.C. 1615(d), as amended by Public Law 94-456, section 1(b), 90 Stat. 1934, Oct. 4, 1976. The villages in southeast Alaska had already participated in a monetary judgment against the United States and therefore were given a smaller land settlement than other Native regions under ANCSA. See 43 U.S.C. 1615(c).

<sup>63</sup>43 U.S.C. 1611(a) and (b).

<sup>64</sup>43 U.S.C. 1611(c).

<sup>65</sup>See 43 U.S.C. 1610(a)(2) and 43 U.S.C. 1611. See Background Memorandum on section 17(d)(2) of the Alaska Native Claims Settlement Act to Members, Senate Comm. on Interior and Insular Affairs from Steven P. Quarles, Counsel, Nov. 12, 1975 at 7 (hereinafter "Memorandum"). Other State selections are protected by the definition of "public lands" in section 3(e) of ANCSA, 43 U.S.C. 1602(e):

"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installations, and (2) land sections of the State of Alaska which have been patented or tentatively approved under Sec. 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969.

<sup>66</sup>43 U.S.C. 1613(h). When the land selections regulations were developed in 1973, an allocation formula for this 2 million acres was agreed upon between the Department and Native representatives. This allocation (43 CFR 2653.1(a)) provides the following:

- 500,000 acres—25,000 acres to each region;
- 200,000 acres to regions on population percentile, cemetery and historical sites, groups, and individual Native residents;
- 92,160 acres—23,040 acres to each of the four urban corporations;
- 400,000 acres—for Native allotments approved

by December 1975 (195,000 acres actually approved);

Balance—to regions on population basis.

See Statement of Asst. Secy. Martin, *supra* note 16, at 22.

<sup>67</sup>43 U.S.C. 1617(a). These Native allotments were authorized by the Alaska Native Land Allotment Act, Act of May 7, 1906, c.2469, 34 Stat. 197, as amended by the Act of August 2, 1956, c.891, 70 Stat. 954 (repealed by section 18(a) of ANCSA, 85 Stat. 710) and by the general allotment provisions of 25 U.S.C. 334 and 337. The Alaska Native Land Allotment Act provided for an allotment of 160 acres of nonmineral land to Alaska Natives meeting certain residency requirements. From passage of the Act to 1960, only 80 allotment patents—most of them in southeastern Alaska—were issued. Allotment applications covering approximately 1.2 million acres were pending on passage of ANCSA.

<sup>68</sup>43 U.S.C. 1617(b).

<sup>68</sup>Based on acreage figures supplied by the Department of the Interior to Richard W. Wright of the OTA Materials Program staff in July 1977.

7043 U.S.C. 1618(b).

<sup>71</sup>43 U.S.C. 1618(b). See Statement of Asst. Secy. Martin, *supra*, note 16 at 22.

<sup>72</sup>See 43 CFR 2651.4(f) (village selections); 43 CFR 2652.3(f) (Regional Corporation selections); and 43 CFR 2653.9(b) (section 14(h) selections).

Approximate Entitlements & Overselections  
(in millions of acres)

Type	set. entitlement	Est. selection
Village first round (12(a) & 16(b), (includes southeast)) . . . . .	18-20	30
Village second round (12(b)) . . . . .	4-2	30
Regional (12(c)) . . . . .	16	35
Miscellaneous (14(h)) . . . . .	2	10
Former reserves (19(b)) . . . . .	4	4
Total . . . . .	44	110*

\*Overlaps between types of selections occurred. The total of 110 million acres is the estimated net area selected.  
SOURCE: Statement of Asst. Secy. Martin, *supra*, note 16 at 5.

<sup>73</sup>43 U.S.C. 1621(h).

<sup>74</sup>43 U.S.C. 1616(d)(1). See Public Land Orders 5169 to 5188, 37 F.R. 5572-5591, Mar. 16, 1972 and subsequent amendments.

<sup>75</sup>See, for example, the arrangements by Bristol Bay Native Corporation, Arctic Slope Regional Corporation and Chugach Natives, Inc. described in Morgan, *supra*, note 26. Doyon Ltd. is planning to exploit asbestos deposits in the Yukon-Charley region. H.R. 39 as passed by the House on May 19, 1978 included a special provision authorizing rights-of-way through the proposed Forty Mile Wild and Scenic River area to accommodate Doyon's mineral enterprise. See H.R. 39, section 501, 95th Cong., 2d sess. (1978).

<sup>76</sup>43 U.S.C. 1616(d)(2).

<sup>77</sup>Id.

<sup>78</sup>Id.

"Public Land Order 5179, 37 F.R. 5579, Mar. 16, 1972, modified because of a consent agreement be-

tween Dept. of Interior and the State of Alaska. See Public Land Orders 5250 through 5257, 37 F.R. 18730, Sept. 15, 1972, 37 F.R. 18911 to 18916, Sept. 16, 1972 and 37 F.R. 19370, Sept. 20, 1972. The text of the settlement of State of Alaska et al. v. Morton is reprinted in the House Report on H.R. 39, H. Rept. 95-1045, pt. I, 95th Cong., 2d sess., 403 (1978).

<sup>80</sup>43 U.S.C. 1616(d)(2).

<sup>81</sup>The Morton proposal was originally introduced in the 93d Congress as H.R. 12336 and S. 2917. It was reintroduced in the 94th Congress as H.R. 6089 and S. 1617. In the 95th Congress, the Morton proposal was introduced as H.R. 6564 and S. 499.

<sup>82</sup>43 U.S.C. 1616(d)(2).

<sup>83</sup>See Public Land order 5179 as modified, *supra*, note 79.

<sup>84</sup>43 U.S.C. 1616(d)(l).

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>43 U.S.C. 1610(a)(1).

<sup>88</sup>See Public Land Orders, *supra*, note 79.

<sup>89</sup>See, for example, Public Land Orders 5185 and 5186, 37 F.R. 5588 to 5589, Mar. 16, 1972.

<sup>90</sup>At the request of the State of Alaska, Public Land Order 5418, 39 F.R. 11547, Mar. 25, 1975 closed to further entry public lands that had been made available to selection under Public Land Order 5185, 37 F.R. 5588, Mar. 16, 1972.

<sup>91</sup>Public Law 94-579, 90 Stat. 2785, 43 U.S.C. 1782.

<sup>92</sup>BLM Draft Proposed Wilderness Policy and Review Procedure, Feb. 27, 1978, at p. 17. See also Office of the Solicitor, Application of Mining and Grazing Laws to Areas Under Review for Inclusion into Wilderness System: Section 603, Federal Land Policy and Management Act of 1976, Jan. 8, 1978 (Opinion), and the following Organic Act Directives: OAD 76-15, Dec. 14, 1976; OAD 77-21, Feb. 16, 1977; and OAD 77-29, Mar. 15, 1977.

<sup>93</sup>43 U.S.C. 1616(a)(l).

<sup>94</sup>43 U.S.C. 1616(a)(1)(A).

<sup>95</sup>*Id.*

<sup>96</sup>43 U.S.C. 1616(a)(1)(B).

<sup>97</sup>43 U.S.C. 1616(a)(2).

<sup>98</sup>*Id.*

<sup>99</sup>43 U.S.C. 1616(a)(3).

<sup>100</sup>S. Rept. 92-581, 92d Cong., 1st sess., reprinted in Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st sess., Background Information for Alaska Lands Designations (Comm. Print No. 4, 1977) at 5.

<sup>101</sup>Public Law 94-204, section 7, 89 Stat. 1149.

<sup>102</sup>43 U.S.C. 1616(a)(7).

<sup>103</sup>43 U.S.C. 1616(b)(l).

<sup>104</sup>43 U.S.C. 1616(b)(2).

<sup>105</sup>43 U.S.C. 1616(b)(3).

<sup>106</sup>43 U.S.C. 1616(c). The Secretary withdrew the pipeline right-of-way on Dec. 28, 1971, Public Land Order No. 5150, 36 F.R. 25410.

<sup>107</sup>Order No. 2982, Reservation of Local Easements, 41 F.R. 6295, Feb. 12, 1976; Order No. 2987, Reservation of Easements for the Transportation of Energy, Fuel, and Nonfuel Resources, 41 F.R. 11331, Mar. 18, 1976.

<sup>108</sup>41 F.R. 6295, Feb. 12, 1976.

<sup>109</sup>*Id.*

<sup>110</sup>Order No. 2982, Sec. 4, 41 F.R. 6295, Feb. 12, 1976.

<sup>111</sup>*Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664 (D. Alas. 1977) reprinted in Hearings on Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st sess., pt. XV, at 354 (Ser. No. 95-16, 1978),

<sup>112</sup>41 F.R. 11331, Mar. 18, 1976.

<sup>113</sup>Order No. 2987, Sec. 4, 41 F.R. 11332 (1976).

<sup>114</sup>Order No. 2987, Sec. 2, 41 F.R. 11331 (1976).

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>Order No. 2987, Sec. 4, 41 F.R. 11332 (1976).

<sup>118</sup>*Id.*

<sup>119</sup>Lawsuits were filed by the Alaska Federation of Natives and six Native Regional Corporations and separately by Sealaska Corp. in the Federal District Court in Washington, D.C. These cases were consolidated and transferred to Federal Court in Alaska and there joined with another case brought by the Alaska Public Easement Defense Fund which alleged that the Secretary had failed to reserve sufficient public easements across Native lands. See 435 F. Supp. 667, n. 1.

<sup>120</sup>*Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, (D. Alas. 1977).

<sup>121</sup>435 F. Supp. 677 to 679.

<sup>122</sup>435 F. Supp. 679 to 680.

<sup>123</sup>435 F. Supp. 680 to 681.

<sup>124</sup>See hearings on Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs, 95th Cong., 1st sess., pt. XV, at 128 (Ser. 95-16, 1978). See also, the Secretarial Issue Papers on ANCSA Easement Policy and Procedures, *Id.* at 504 to 540.

<sup>125</sup>Secretarial Order 2987 was revoked by Secretarial Order No. 3020, 43 F.R. 19726, May 8, 1978.

## OTHER LAWS

In recent years, Congress has passed three laws that establish special rules for the access use of some Federal land involved in energy-related projects.<sup>1</sup> One of these laws, which changed the management of the Naval Petroleum Reserve No. 4 in Alaska, transferred authority for making decisions on right-of-way requests from the Secretary of the Navy to the Secretary of the Interior.<sup>2</sup> It did not, however, effect any other change in the laws and regulations which control access policies for that particular Federal installation. The other two laws, which established procedures for construction of the Alaskan oil and natural gas pipelines, made wholesale changes in the procedures that were used in granting rights-of-way for such projects.

### NAVAL PETROLEUM RESERVES PRODUCTION ACT OF 1976

Four naval petroleum reserves on the public lands were created by Presidential order between 1912 and 1923.<sup>3</sup> One of these, Naval Petroleum Reserve Numbered 4 (NPR-4), was located in Alaska. Title I of the Naval Petroleum Reserves Production Act of 1976 transferred administration of the area in NPR-4 to the Secretary of the Interior and redesignated it as the National Petroleum Reserve in Alaska (NPRA).<sup>4</sup> A small tract on which the Naval Arctic Research Laboratory in Point Barrow is located and surface lands to be transferred to Native villages under ANCSA are excluded from the reserve although they are located within its exterior boundaries.<sup>5</sup>

Subject to existing rights, lands within the boundaries of the reserve were withdrawn from all forms of entry and appropriation under the public land laws, including the Mining Law of 1872 and the Mineral Leasing Act of 1920.<sup>6</sup> Areas around the Utukok River and the Teshekpuk Lake regions were placed in a special protected category.<sup>7</sup> Exploration

Note: Footnotes for this section appear on pp. 134-136.

in these areas must be conducted in a manner to preserve significant subsistence, recreational, fish and wildlife, and historic or scenic values.<sup>8</sup>

Immediate responsibility for activities related to the protection of the environment, fish and wildlife, and historic or scenic values of the lands involved was vested in the Secretary of the Interior effective on enactment of the legislation.<sup>9</sup> Other functions were transferred 1 year later so that Navy and Interior personnel could work together during a winter season to provide experience in management and ensure a smooth transfer.<sup>10</sup>

The Act provides that only exploration activities will be allowed on the reserve, and that no production or development leading to production is authorized without congressional review and authorization.<sup>11</sup> Continued operation of South Barrow field for local use is permitted. The Act directs that three studies of the area be conducted.<sup>12</sup> These include the study called for by section 164 of the Energy Policy and Conservation Act<sup>13</sup> and a Presidential study of the petroleum resource value of the area to determine the best overall plan for development, production, and transportation of petroleum resources in the reserve.<sup>14</sup> The latter report is to be made to Congress by January 1, 1980.

The third study is to be conducted by the Secretary of the Interior in consultation with representatives of Federal agencies, the State of Alaska, and Native groups, to determine the values of and the best uses for lands within the reserve. \*5 The study is specifically required to examine (1) the needs of the Natives who live or depend on lands in the reserve, (2) scenic, historic, recreational, fish and wildlife, and wilderness values, (3) mineral potential, and (4) other values. 'b The Secretary is to submit a report, including recommendations for appropriate designations of land, by April 1979.

Section 102 authorizes the Secretary to “grant such rights-of-way, licenses, and permits as may be necessary to carry out his responsibilities under this Act.”<sup>17</sup> The same section also provides that, “All other provisions of law heretofore enacted and actions heretofore taken reserving such lands as a Naval Petroleum Reserve shall remain in full force and effect to the extent not inconsistent with this Act.”<sup>18</sup> These two provisions taken together have the following effect: Right-of-way applications for access within the reserve must comply with the procedures established under the general authority of the Secretary of the Interior;<sup>19</sup> the substantive law that governs Secretarial decisionmaking will include any standards controlling the general authority as construed in light of the Reserves Act and other laws that previously applied to NPR-4.<sup>20</sup> Until such time as Congress acts on recommendations of the Secretary of the Interior for redesignation, access to non-Federal mineral resources will be a less favored use for lands in NPR-4.

## TRANS-ALASKA PIPELINE ACT

In the winter of 1967-68, a wildcat rig drilling Prudhoe Bay State Well No. 1 struck a formation that proved to be the largest oil reserve on the North American continent.<sup>21</sup> The discovery was announced on July 18, 1968.<sup>22</sup> Fourteen months later, the State of Alaska auctioned off leases on 450,000 acres of Prudhoe Bay for \$900 million.<sup>23</sup>

Even before the lease sales, the three oil companies already holding producing leases at Prudhoe Bay had organized the Trans-Alaska Pipeline System (TAPS) and filed an application with the Department of the Interior to build an 800-mile hot-oil pipeline to Valdez.<sup>24</sup> TAPS sought a waiver from the Federal land freeze imposed because of the Native claim controversy for the pipeline and a 360-mile North Slope haul road.<sup>25</sup> A waiver from the land freeze was approved in December 1969, and in early 1970 the Department of the Interior prepared to issue a permit for



*Photo Credit: The Alaska Coalition*

The North Slope Haul Road, authorized by the Trans-Alaska Pipeline Act, provides the first surface access north of the Yukon River. Extending from Fairbanks to Prudhoe Bay, the road was transferred to State ownership in the fall of 1978

the haul road when a series of lawsuits brought the project to a halt.<sup>26</sup>

In March 1970, five Native villages along the proposed route filed suit claiming ownership of the affected land by virtue of their aboriginal land rights.<sup>27</sup> Shortly thereafter, three conservation groups filed suit contending that the pipeline violated the 1920 Mineral Leasing Act—under which rights-of-way were being sought—and the newly passed National Environmental Policy Act (NEPA).<sup>28</sup> On April 13, 1970, a temporary injunction was granted in the latter case, blocking the pipeline project and prohibiting the Secretary of the Interior from issuing a permit.<sup>29</sup>

In 1971, several actions were taken by Congress and the executive branch to seek to break the impasse. Passage of the Alaska Native Claims Settlement Act (ANCSA) ended the controversy over Native landownership.<sup>30</sup> The Department of the Interior held lengthy hearings during 1971 on the environmental impact of the pipeline proposals and released an environmental impact statement (EIS) on March 20, 1972. On August 15, 1972, the temporary injunction was dissolved after an opinion by the District Court that the requirements of NEPA had been met and that the Department of the Interior could issue a special use permit to allow the pipeline builders more than the 50-foot right-of-way permitted by the Mineral Leasing Act.<sup>31</sup>

On February 9, 1973, the Court of Appeals reversed this ruling and again enjoined the Secretary from issuing a right-of-way.<sup>32</sup> It found that the Department of the Interior had exceeded its statutory authority in proposing to grant the special right-of-way and land use permits. Two months later, the Supreme Court refused to review this decision.<sup>33</sup>

This chain of events provided the impetus for the passage, on November 16, 1973, of Public Law 93-153 generally known as the Trans-Alaska Pipeline Act.<sup>34</sup> Title I of Public Law 93-153 amended section 28 of the Mineral Leasing Act, which provides rights-of-way across Federal lands for oil pipelines.<sup>35</sup> The most important amendment allows the

Department of the Interior to grant rights-of-way in excess of 50 feet where a wider right-of-way is found to be “necessary for operation and maintenance after construction, or to protect the environment or public safety.”<sup>36</sup>

Other provisions of the amended section 28 also have a bearing on the use of Federal lands for pipeline rights-of-way. Section 28 authorizes pipeline rights-of-way over all Federal lands except national parks, lands held in trust for Indian tribes or an Indian, and land on the Outer Continental Shelf.<sup>37</sup> A pipeline right-of-way may not be granted through any reserved Federal lands if the Secretary or the appropriate agency head managing the land determines that it would be inconsistent with the purpose of the reservation.<sup>38</sup> The agency head may impose appropriate regulations, terms, and conditions on the right-of-way, including provisions for environmental protection and restoration, public safety, protection of fish, wildlife, and habitat values, and subsistence resources.<sup>39</sup>

Title I also requires that the applicant demonstrate the technical and financial capability to construct, operate, maintain, and terminate the project in accordance with the statutory conditions.<sup>40</sup> Each right-of-way reserves to the Secretary or agency head the right to grant additional rights-of-way for compatible uses on or adjacent to the pipeline.<sup>41</sup> The Secretary was directed to prepare a report on the need for a national system of transportation and utility corridors across Federal lands in order to minimize adverse environmental impacts and to prevent the proliferation of rights-of-way across Federal lands.<sup>42</sup> This report was presented to the President and Congress.

Title II of Public Law 93-153 is the Trans-Alaska Pipeline Authorization Act.<sup>43</sup> It mandated expedited administrative action on the TAPS project. The Act provided that no further NEPA review was to be undertaken and contained a legislative finding of sufficiency of the final EIS issued by the Department of the Interior on March 20, 1972.<sup>44</sup>

Furthermore, it limited administrative and judicial review of any certificates, rights-of-way, permits, and licenses related to or necessary to the construction, operation, and maintenance of TAPS including roads and airstrips.<sup>45</sup> Executive agencies and departments were ordered to issue necessary permits. Judicial review was limited in scope and the time for filing claims was limited to 60 days from any contested action; this meant that opportunities for redress, review, or relief in Federal or State courts were cut off. In exchange for this limitation on judicial and administrative remedies, strict liability was imposed for incidents harming wildlife and subsistence resources and for spillage incidents.<sup>46</sup> Strict liability for harm to wildlife and subsistence was limited to \$50 million per incident and liability for oilspills was limited to \$100 million.<sup>47</sup> Damages from construction, operation, and maintenance, etc., greater than \$50 million are to be decided according to the laws of negligence. Claims greater than \$100 million for spillage are to be decided in judicial proceedings or by arbitration. A TAPS liability fund was established to pay damages from oilspills. This was to be funded by \$0.05 per barrel paid by the owner of the oil transported.<sup>48</sup>

The Act further provided that the roads and airstrips constructed for the project could be public roads or airstrips.<sup>49</sup> The contractor has arranged to turn over the pipeline haul road to the State of Alaska. It is anticipated that it will eventually be open to the public. If the State fails to operate the haul road as a public road, it may be required to pay back Federal funds received for bridge and road construction in anticipation of eventual public highway designation.<sup>50</sup>

Section 407 of the Act authorized advance payments of royalties due Alaska Natives under the terms of ANCSA.<sup>51</sup> These advance payments were provided in recognition of the delays in construction of the oil pipeline to transport North Slope crude oil. Advance payments will continue until such time as delivery of North Slope oil to a pipeline is

commenced. TAPS began operation in the summer of 1977.

### ALASKA NATURAL GAS TRANSPORTATION ACT OF 1976

The Prudhoe Bay oilfield contains over 20 trillion cubic feet of natural gas, approximately 10 percent of the known gas reserves in the United States. It is also in close proximity to similar large gas deposits in the Mackenzie Delta region of Canada. In March 1974, the Arctic Gas consortium filed applications with the Federal Power Commission (FPC) and the Canadian National Energy Board to construct a pipeline to move Alaskan and Canadian gas to the United States and Canada by an overland route.<sup>52</sup> In September 1974, El Paso Alaska Company filed an application with the FPC to transport Prudhoe Bay gas by a pipeline adjacent to TAPS to the Gulf of Alaska, liquefy it, and ship it to California by LNG tanker.<sup>53</sup> A hearing began on the competing applications before the FPC on April 7, 1975. In July 1976, a third application was filed by Alcan Pipeline Company for an Alaska-Canada overland route.<sup>54</sup>

Faced with the prospect of long administrative and judicial proceedings (the FPC hearings consisted of 45,000 pages and over 1,000 exhibits), and a protracted process of accumulating lands for the right-of-way of the approved pipeline, Congress acted in 1976. The Alaska Natural Gas Transportation Act of 1976 (ANGTA) established an expedited procedure for selecting a transportation system and facilitating its construction and initial operation.<sup>55</sup>

The steps called for by the Act in selecting a pipeline applicant have been completed. The Act suspended the proceedings before the FPC and took the authority to make a decision away from that agency.<sup>56</sup> Instead, the FPC was directed to review the applications and make a recommendation to the President by May 1, 1977.<sup>57</sup> This the Commission did, and recommended the Canadian overland



route, although it divided 2-2 on the choice between Alcan and Arctic Gas.<sup>58</sup> The Commission also prepared an EIS to accompany the recommendation.

The President was required to review the FPC recommendation and issue a decision and report to Congress prior to September 1, 1977 or within 90 calendar days if additional time was needed.<sup>59</sup> Before that decision was issued, the Council on Environmental Quality was directed to hold hearings on the EIS prepared by the FPC and transmit a report to the President on the legal and factual sufficiency of the statement.<sup>60</sup> The Presidential decision could recommend waivers of provisions of existing laws to permit expeditious construction and operation of the system.<sup>61</sup>

The President issued a decision on September 22, 1977, selecting the Alcan proposal.<sup>62</sup> The Presidential decision could only take effect if approved by a joint resolution of both Houses of Congress passed within 60 days of receipt of the decision.<sup>63</sup> In addition to affirming the Presidential decision including any waivers of law, the joint resolution prescribed in the Act contains a congressional declaration of the sufficiency of the EIS submitted by the President.<sup>64</sup> The joint resolution was approved on November 8, 1977.<sup>65</sup>

The Act contains limitations on judicial and administrative review similar to those found in the Trans-Alaska Pipeline Authorization Act. Claims alleging the invalidity of the Act must be filed within 60 days of the enactment of the joint resolution.<sup>66</sup> Judicial review of the actions of Federal officers and agencies may be had only under the provisions of section 10 of the Act.<sup>67</sup> Claims alleging that an action taken pursuant to authority granted in the Act violated constitutional rights or were in excess of statutory jurisdiction, authority, or limitations, or did not satisfy statutory rights must be brought within 60 days of the challenged action or no

later than 60 days after the complaining party has actual or constructive knowledge of the action.<sup>68</sup> All claims brought under the Act must be filed in the U.S. Court of Appeals for the District of Columbia, which is directed to expedite review of any claims.<sup>69</sup> No court has jurisdiction to consider questions relating to the environmental impact statements.<sup>70</sup>

The Act directs Federal officers and agencies to grant or issue certificates, rights-of-way, leases, and permits necessary to or related to the construction or initial operation of the system at the earliest possible date and to the fullest extent permitted by the laws administered by the agency<sup>71</sup> (without regard to any provisions of law that were waived).<sup>72</sup> All actions to which this directive applies are to be expedited and shall take precedence over similar applications and requests.<sup>73</sup>

The Act places some limitations on the conditions that may be included in certificates, rights-of-way, leases, and permits.<sup>74</sup> Officers and agencies granting such rights shall include terms and conditions required by the laws they administer (to the extent that such laws have not been waived), and shall also include provisions identified in the President's decision as appropriate for inclusion.<sup>75</sup> With respect to conditions or terms that are permitted by law, but not required, they may be included unless they "would compel a change in the basic nature and general route of the approved transportation system, or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation" of the system.<sup>76</sup>

Finally, the Act provides that any pipeline system right-of-way over Federal lands is to be issued under the authority of the Mineral Leasing Act of 1920 as amended. Thus all Federal rights-of-way will include a provision that the managing agency may allow use of the right-of-way by additional compatible users.<sup>77</sup>

## FOOTNOTE REFERENCES FOR OTHER LAWS

<sup>1</sup>Naval Petroleum Reserves Production Act of 1976, Public Law 94-258, 90 Stat. 303, Apr. 5, 1976, 42 U.S.C. 6501 et seq.; The *Trans-Alaska Pipeline Act*, Public Law 93-153, 87 Stat. 584, Nov. 16, 1973; The Alaska Natural Gas Transportation Act of 1976, Public Law 94-586, 90 Stat. 2903, Oct. 22, 1976, 15 U.S.C. 719 et seq.

<sup>2</sup>Naval Petroleum Reserves Production Act of 1976, Public Law 94-258, 90 Stat. 303, Apr. 5, 1976, 42 U.S.C. 6501 et seq.

<sup>3</sup>The reserves are: Naval Petroleum Reserve No. 1 (Elk Hills) located in Kern County, Calif., established by Executive Order, Sept. 2, 1912; Naval Petroleum Reserve No. 2 (Buena Vista) located in Kern County, Calif., established by Executive Order, Apr. 30, 1915; Naval Reserve No. 3 (Teapot Dome) located in Wyoming, established by Executive Order, Apr. 30, 1915; and Naval Petroleum Reserve No. 4, located in Alaska, established by Executive Order, Jan. 27, 1923.

<sup>4</sup>42 U.S.C. 6502 (redesignation); 42 U.S.C. 6503 (transfer of jurisdiction).

<sup>5</sup>42 U.S.C. 6502. The tract on which the Naval Arctic Research Laboratory is located is tract No. 1 as described in Public Land Order 2344, Apr. 24, 1961, 26 F.R. 3701.

<sup>6</sup>42 U.S.C. 6502.

<sup>7</sup>42 U.S.C. 6504(b).

<sup>8</sup>42 U.S.C. 6504(b). "Any exploration within the Utokok River, the Teshkepuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve."

<sup>9</sup>42 U.S.C. 6503(b).

<sup>10</sup>S. Rept. 94-708 (Conference Report) at p. 15. The Secretary of the Interior has assigned interim management responsibility for NPRA to the Assistant Secretary for Land and Water Resources. Statement of Hon. James Joseph, Undersecretary of the Interior in Hearings on Alaska Natural Resource Issues Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st sess. (Pub. No. 95-64, 1977) at 102 (hereinafter, *Alaska Natural Resource Issues*), Regulations governing NPRA are found at 43 C.F.R. 2360 (1977) and 42 F.R. 28721, June 3, 1977,

<sup>11</sup>42 U.S.C. 6504(a). Provision for the continued operation of the South Barrow gasfield is at 42 U.S.C. 6504(e).

<sup>12</sup>Public Law 94-258, section 105, 90 Stat. 305, 42 U.S.C. 6505.

<sup>13</sup>42 U.S.C. 6244.

<sup>14</sup>42 U.S.C. 6505.

<sup>15</sup>Id.

<sup>16</sup>Public Law 94-258, section 105(c), 90 Stat. 306, 42 U.S.C. 6505: "(l) The Secretary of the Interior shall establish a task force to conduct a study to determine the values of, and best uses for, the lands contained in the reserve, taking into consideration (A) the natives who live or depend upon such lands, (B) the scenic, historical, recreational, fish and wildlife, and wilderness values, (C) mineral potential, and (D) other values of such lands. (z) Such task force shall be composed of representatives from the government of Alaska, the Arctic Slope Native community, and such offices and bureaus of the Department of the Interior as the Secretary of the Interior deems appropriate, including, but not limited to, the Bureau of Land Management, the United States Fish and Wildlife Service, the United States Geological Survey, and the Bureau of Mines. (3) The Secretary of the Interior shall submit a report, together with the concurring or dissenting views, if any, of any non-Federal representatives of the task force, of the results of such study to the Committees on Interior and Insular Affairs of the Senate and House of Representatives within 3 years after the date of enactment of this title and shall include in such report his recommendations with respect to the value, best use, and appropriate designation of the lands referred to in paragraph (l)."

<sup>17</sup>42 U.S.C. 6502.

<sup>18</sup>Id.

<sup>19</sup>See 43 CFR 2361.2 (1977), See also 43 CFR 2800.

<sup>20</sup>43 U.S.C. 1601,

<sup>21</sup>Executive Office of the President, Energy Policy and Planning, Decision and Report to the Congress on the Alaska Natural Gas Transportation System, Sept. 22, 1977 (hereinafter "Decision"), pi.

<sup>22</sup>Hanrahan and Gruenstein, *Lost Frontier: the Marketing of Alaska*, 125 (1977).

<sup>23</sup>Id.

<sup>24</sup>The three companies were the Atlantic Richfield Company, Humble Oil and Refining Company (now EXXON Corporation), and British Petroleum Ltd. They filed an application with the Department of the Interior on June 6, 1969. After the lease sale, the following companies became partners in TAPS: Standard Oil of Ohio, Phillips Petroleum, Union Oil and Amerada Hess. TAPS formally incorporated as the Alyeska Pipeline Service Company, Inc.

<sup>25</sup>See generally, Mary Clay Berry, *The Alaska Pipeline: The Politics of Oil and Native Land Claims*, 102 to 123 (1975). The land freeze was imposed in 1966 by Secretary of the Interior Stewart Udall and formalized by Public Land Order 4582, 34 F.R. 1025, Jan. 17, 1969, The new Secretary of the Interior, Walter Hickel, agreed to honor the freeze for 2 years in order to allow congressional action on the Native claims issue. However, under pressure from the oil companies and the State of Alaska, Secretary Hickel set up a task force

to expedite planning and approval of the TAPS request and successfully negotiated with House and Senate Committees to obtain their consent to the TAPS waiver.

<sup>26</sup>See Public Land Order 4760, 35 F.R. 424, Jan. 7, 1970. See also Berry, *supra*, note 25 at 116 to 118.

<sup>27</sup>These villages are Stevens, Rampart, Bettles, Min-to, and Huslia-Hughes. The village chiefs had earlier negotiated with the pipeline consortium for a waiver of Native objections to the pipeline route based on land claims in exchange for an understanding by TAPS to contract with Native-owned firms and firms willing to employ Natives. When TAPS announced some of its contract awards in January 1970 that did not include Native firms, the Natives sued. See Bryan Cooper, *Alaska-The Last Frontier*, at 203 to 205 (1973). See also Berry, *supra* note 25 at 116-120. The five villages brought suit in Federal District Court in Washington, D. C., to enjoin the Department of the Interior from approving the pipeline right-of-way. Four of the five actions were dismissed. But in March 1970, a restraining order was issued on behalf of Stevens Village temporarily barring the issuance of a right-of-way for 20 miles covered by village claims located near the planned Yukon River pipeline crossing. In *Native Village of Allakaket v. Hickel*, Civ. No. 706-70 (D. D. C., Oct. 18, 1972), the District Court enjoined construction of the pipeline across Native lands.

<sup>28</sup>*Wilderness Society v. Hickel*, Civ. A. No. 928-70; The plaintiffs were the Wilderness Society, the Environmental Defense Fund, and Friends of the Earth.

<sup>29</sup>*Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

<sup>30</sup>ANSCA extinguished all Native land claims based upon aboriginal title or use, 43 U.S. C. 1703, and provided that there could be no State or Native land selections along any utility and transportation corridor withdrawn for the pipeline, 43 U.S.C. 1716(c).

<sup>31</sup>*Wilderness Society v. Morton*, 3 ELR 20583, 4 ERC 1101. In order to expedite appeals, there was never a reported decision accompanying the order lifting the injunction.

<sup>32</sup>*Wilderness Society v. Morton*, 479 F. 2d 842 (D.C. Cir. 1973).

<sup>33</sup>411 U.S. 917 (1973).

<sup>34</sup>An Act to Amend Sec. 28 of the Mineral Leasing Act of 1920 and to Authorize a Trans-Alaska Oil Pipeline and for other purposes, Public Law 93-153, 87 Stat. 576, Nov. 16, 1973.

<sup>35</sup>Public Law 93-153, section 101, 87 Stat. 576, 30 U.S.C. 185. Section 28(d) of the Mineral Leasing Act of 1920, 30 U.S.C. 185(d), as amended by Public Law 93-153, section 101, 87 Stat. 576.

<sup>36</sup>Section 28(d) of the Mineral Leasing Act of 1920, 30 U.S.C. 185(d), as amended by Public Law 93-153, section 101, 87 Stat. 577 (1973).

<sup>37</sup>30 U.S.C. 185(a), as amended by Public Law 93-153, section 101, 87 Stat. 576 (1973). See also 30 U.S.C. 185(b)(1), as amended, 87 Stat. 577 (1973).

<sup>38</sup>30 U.S.C. 185(b)(1), as amended, 87 Stat. 577 (1973).

<sup>39</sup>30 U.S.C. 185(h)(2), as amended, 87 Stat. 578 (1973).

<sup>40</sup>30 U.S.C. 185(j), as amended, 87 Stat. 579 (1973).

<sup>41</sup>30 U.S.C. 185(P), as amended, 87 Stat. 580 (1973).

<sup>42</sup>30 U.S.C. 185(s), as amended, 87 Stat. 582 (1973).

The report called for by this section was submitted to the Congress on July 1, 1975. Department of the Interior, Bureau of Land Management, *The Need for a National System of Transportation and Utility Corridors*.

<sup>43</sup>Section 201, Public Law 93-153, 87 Stat. 584 (1973). 4443 U.S.C. 1652(d).

<sup>44</sup>*Id.*

<sup>45</sup>43 U.S.C. 1653(a)(1) establishes strict liability for incidents involving the pipeline. 43 U.S.C. 1653(c)(1) establishes strict liability for oil spills from vessels loaded with oil transported through the pipeline. 43 U.S.C. 1653(c)(2) imposes strict liability for oil pipeline incidents.

<sup>47</sup>See 43 U.S.C. 1653(a)(2) and 43 U.S.C. 1653(c)(2).

<sup>46</sup>43 U.S. C. 1653(c)(4) establishes the fund; 43 U.S. C. 1653(c)(5) levies the 5 cents per barrel tax.

<sup>47</sup>43 U.S.C. 1655.

<sup>50</sup>The State of Alaska received Federal aid for the construction of the haul road with the understanding that the road would become part of the State highway system. If the haul road is not opened to public use, Alaska might have to repay some \$24 million for construction of the Yukon River bridge, \$1.5 million for construction surveillance, and \$2.8 million worth of gravel from Federal lands. Gov. Jay S. Hammond, *North Slope Haul Road Policy Statement and Background*, September 1976.

<sup>51</sup>Section 407, Public Law 93-153, 87 Stat. 591, 43 U.S.C. 1608.

<sup>52</sup>FPC Docket No. CP 74-239.

<sup>53</sup>FPC Docket No. CP 75-96.

<sup>54</sup>The Alcan application was filed after FPC administrative proceedings had commenced on the other two applications in FPC Docket No. 75-96 et al. The decision by Administrative Law Judge Nahum Litt was issued on Feb. 1, 1977.

<sup>55</sup>Public Law 94-586, 90 Stat. 2903, Oct. 22, 1976, 15 U.S.C. 719 et seq.

<sup>56</sup>15 U.S. C. 719c(a)(1).

<sup>57</sup>5 U.S.C. 719c(b)(1).

<sup>58</sup>Federal Power Commission, *Recommendation to the President: Alaska Natural Gas Transportation System*, May 2, 1977.

<sup>59</sup>15 U.S.C. 719e(a).

<sup>60</sup>15 U.S.C. 719d(d). Council on Environmental Quality, Report, July 1, 1977. Another report was prepared by an Interagency Task Force under the lead of the Department of the Interior.

<sup>61</sup>15 U.S.C. 719e(a)(4)(D).

Executive Office of the President, Energy Policy and Planning. Decision and Report to *Congress on the Alaska Natural Gas Transportation System*, Sept. 22, 1977.

<sup>62</sup>15 U.S.C. 719 f(a).

<sup>63</sup>15 U.S.C. 719 f(d)(2).

<sup>64</sup>Public Law 95-158, Nov. 8, 1977. For background on the Alaska National Gas Pipeline decision, see S. Rept.

95-567, 95th Cong., 1st sess. (1977). Many of the reports called for in Public Law 94-586 are reprinted in Senate Comm. on Energy and Natural Resources, Decision and Report to Congress on the Alaska Natural Gas Transportation System, 95th Cong., 1st sess. (Comm. Print 95-56, 1977).

<sup>68</sup>15 U.S.C. 719h(b)(1).

<sup>67</sup>15 U.S. C. 719h(a).

<sup>68</sup>15 U.S.C. 719h(b)(2).

<sup>69</sup>15 U.S.C. 719h(c)(1).

<sup>70</sup>15 U.S.C. 719h(c)(3).

<sup>71</sup>15 U.S.C. 719g(a)(1).

<sup>72</sup>15 U.S.C. 719g(a)(2).

<sup>73</sup>15 U.S.C. 719g(b).

<sup>74</sup>15 U.S.C. 719g(c).

<sup>75</sup>15 U.S.C. 719g(c), 15 U.S. C. 719g(e).

<sup>76</sup>15 U.S.C. 719g(c), 15 U.S.C. 719g(d).

<sup>77</sup>30 U.S.C. 185(p).