



Governor Mike Dunleavy  
STATE OF ALASKA

December 19, 2022

Radhika Fox  
Assistant Administrator  
1200 Pennsylvania Ave. NW  
Mail Code: 4608T  
Washington DC 20460

Re: Supplemental Objections to EPA 404(c) Authority  
And Determination Affecting Alaska's Mineral Rights  
On Statehood Lands

Dear Assistant Administrator Fox:

The State of Alaska supplements its previous position and concerns with the following points of law and facts:

**I. EPA Cannot Use Its' 1977 Clean Water Act - 404(c) "Veto" Authority To Prevent Alaska From Exercising Mineral Rights Congress Agreed To Provide As Part Of The 1959 Statehood Compact.**

When Congress enacted the statehood Act in 1959, it granted Alaska title to minerals **AND** the right to "**prospect for, mine, and remove**" those minerals from statehood lands. *Section 6(i), Alaska Statehood Act*. Congress further agreed mining activity on statehood lands would be governed by laws set by the state legislature. *Id.* The state legislature has provided such rules, including standards for protection of anadromous fish and their habitat from mining and other activities. *AS 16.05.871-901*.

Because Congress agreed, as part of the "unalterable" 1959 statehood compact with Alaska, to provide the state with the rights to mine and remove minerals from statehood lands, EPA cannot use its 1977 authority under section 404(c) to destroy those mineral rights.

## **A. Congress Has Authority Under The Property Clause To Promise A State Unique Rights In Statehood Lands And Bind Itself Forever.**

Black letter law of the United States Supreme Court for over a century and a half holds Congress has the authority under the Property Clause of the U.S. Constitution to provide a state with enforceable and unalterable rights in lands as part of a statehood agreement and compact. See, *Cooper v. Roberts*, 59 U.S. 173 (1855) (Federal government's agreement to provide Michigan to choose statehood lands with minerals was an "unalterable condition" and was "obligatory upon the United States"); *Beecher v. Wetherby*, 95 U.S. 517 (1877) ("With that Constitution, the State was admitted into the Union in May, 1848. It was therefore an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State ... should be granted to the State for the use of schools"); *Idaho v. United States*, 533 U.S. 262, 280 n.9 (2001) ("Congress cannot, after statehood, reserve or convey ... lands that 'have already been bestowed' upon a State"); *Andrus v. Utah*, 446 U.S. 500, 507 (1980) (The grant of lands by Congress to a state as part of a statehood compact is a "solemn agreement" between the people of the new state the rest of the Union); *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) (Federal legislation "would raise grave constitutional concerns if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union").

The Alaska Supreme Court and State of Alaska Department of Law have consistently agreed with U.S. Supreme Court precedent that statehood act promises by Congress are enforceable as part of a compact with a new state. See, *State v. Lewis*, 559 P.2d 630 (Alaska 1977); 1995 Alaska Op. Att'y Gen. (Inf.) 355; 1988 Alaska Op. Att'y Gen. (Inf.) 327; 1987 Alaska Op. Att'y Gen. (Inf.) 121; 1986 Alaska Op. Att'y Gen. (Inf.) 363; 1981 Alaska Op. Att'y Gen, File No. J-66-556-81.

The legislative record shows Congress knew -- when it was debating the Alaska statehood bill that promises in the bill made to Alaska could not be changed later.

"A bill which grants statehood is not some minor piece of legislation, but is a major function of the national legislature. We cannot undertake to perform that function without reminding ourselves that we are asked to make a grant which cannot be revoked.

We cannot, therefore, consider these bills as we would ordinary legislation in the sense that ordinary legislation may be amended or changed in subsequent years as experience dictates.”

Senator Butler (MD), arguing against statehood, 85 CONG. REC. 12316-17 (1958); and see,

“The admission of a new state is a matter of the greatest concern ... The admission of a State is an irrevocable act.”

Rep. Davis, (GA) - House Debate on H.R. 7999 (Alaska Statehood Bill), 85 CONG. REC. 9494, (1958)

“The importance of this issue [statehood for Alaska] lies in the fact that the decision will be final. The grant of statehood becomes an irrevocable act. We are playing for keeps, and if a mistake is made it can never be corrected.”

Rep. Fisher (TX) – House Debate on H.R. 7999, 85 CONG. REC. 9501 (1958)

Promises by Congress to grant rights in statehood lands as part of a compact can vary from state to state based on “diversities ‘in the economic aspects of the several States” and are not required to be the same or “equal” for all states. *Texas v. Louisiana*, 74 S.Ct. 481 (1954) (“The power of Congress to cede property rights to one state without corresponding cession to all states has been consistently recognized.”) A decision by Congress to provide unique property rights is a decision that is entrusted entirely to Congress and cannot be second guessed later by a court or a federal agency. *United States v. California*, 332 U.S. 19 (1947)

**B. Congress Agreed To Provide Alaska With Ownership Of Minerals On Statehood Lands, The Right To “Prospect for, Mine, and Remove” Those Minerals, And The Right To Decide Whether Development Should Occur Under Certain Lease Terms.**

The legislative record is absolutely clear. Congress promised Alaska the strongest mineral rights possible on statehood lands and the right to access and

remove those minerals. It delegated authority to decide whether statehood lands would be developed to Alaska. See, *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.ed 1216 (9<sup>th</sup> Cir. 1978) (Hawaii statehood act “was intended to transfer complete ownership and responsibility of the program and home lands to Hawaii. ... we rely upon the laws and institutions of Hawaii to ... assure the proper use of state-owned lands ...”)

See, H.Rept. No. 624, 85<sup>th</sup> Congress, 1<sup>st</sup> Session, June 25, 1957:

“H.R. 7999 ... makes the new State master in fact of most of the natural resources within its boundaries ...”

“MAJOR PROVISIONS OF THE BILL ... Sales, grants, deeds, and patents shall be subject to, and contain a reservation to the State of all minerals ...”

“During the first session of the 80<sup>th</sup> Congress, the House Committee on Public lands held hearings on the subject of statehood ... The hearings Impressed the committee with the importance to the United States of Alaska and its resources and convinced the committee that only by granting statehood could these resources be developed to the fullest in the interests of the United States as a whole.”

“ALASKA’S PECULIAR PROBLEMS In order to understand clearly the necessity for certain different provisions in the Alaska statehood bill, it is advisable to have in mind some of the basic facts about Alaska’s peculiar situation. 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 the 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, 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.”

“A third serious problem facing the new State, if statehood is granted – and in some respects, the most serious of all – is that of financing the basic functions of State government.”

“In Alaska very little land has passed out of Federal title and there seems to be little chance of any marked change in this situation under existing Federal policies.”

“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.”

“To attain this result, the State is given the right to select lands known or believed to be mineral in character ... It is also specifically given the right to select lands which may now be under lease for oil and gas or coal development ...”

“As previously noted, tremendous acreages of land in Alaska have been tied up in the status of Federal reservations and withdrawals for various purposes. The committee feels strongly that this practice has been carried to extreme lengths in Alaska, to a point which has hampered the development of such resources for the benefit of mankind. As a result, a long list of potential basic industries in the Territory, including ... various other minerals can exist in Alaska only as tenants of the Federal Government, and on the sufferance of the various Federal agencies. The committee considers that to be an unhealthy situation.”

“The failure of these industries to grow under such a restrictive policy is a proof of its unwisdom. The committee feels that this policy must be changed if statehood for Alaska is to be a success.”

“The grant of statehood means the grant to the people of Alaska of the right to manage their own internal affairs ... It is therefore a measure in support of the principle of local government of local affairs embodied in American legal philosophy under the concept of States rights. Behind the idea of States rights and local self-government lies the conviction that matters of local concern can best be determined and most efficiently managed by those most directly affected.”

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. As previously pointed out, 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.”

“As to the problem of resource development, the committee has incorporated in H.R. 7999 major changes from all previous statehood bills which are designed to facilitate the development of Alaska’s resources.”

Delegate Bartlett (AK) – House Debate on H.R. 7999, Congressional Record, 9514-9518

“[In response to criticism] Is it a giveaway to transfer to the State government of Alaska land for the development and well-being of the State and of its citizens and thus incidentally of all the citizens of the United States?”

“Is it contrary to the American system to make land available for use, constructive use?”



Indeed, it is not. No area can make proper headway unless it has a land base. ... [t]here is no land anywhere locked up so effectively, put into the deep freeze, so completely kept out of production."

"No one knows exactly how much land the Federal Government owns in Alaska out of this 365 million acres. All we do know is that it is somewhere between 99 percent and 99.9 percent. The plain fact of the matter is that Alaska's resources have been locked up, tightly bottled, since the fore part of this century."

"Much of the best land in Alaska is already federally reserved and may not be taken by the State of Alaska. Those reserves total the astounding amount of 92 million acres, or approximately 25 percent of all the land that is in Alaska. Will that not protect the Federal interest? I should think so."

"It is true that most of the Western states were given the surface of the land only. But any such statement would not be literally true. The Oklahoma enabling act was so phrased as to give that State its minerals. The Republic was not shattered by what was done there and I for one have never heard that Oklahoma is to be reprimanded and castigated for its management of these minerals instead of having them exclusively under the jurisdiction of Washington which I maintain is in contradiction of States rights."

"Resources are what count and the application of labor and capital to those resources. Considering the fact that Alaskan resources have been virtually in a deep freeze, the wonder of it is that the production is as high as it has been. Give us statehood and you will see what we do then."

"Every Delegate to Congress from Alaska since 1912 has sought, and unsuccessfully, to revitalize the law and to permit Alaskans to do for themselves what Washington cannot or is not willing to do. To repeat, every last campaign for real gains in this direction has met with failure."

"Statehood will unharness the hidden riches of Alaska's soil and subsoil for the benefits and security of the whole Nation. Statehood will promote

good husbandry of the treasures of sea and stream for the benefit of this and future generations.”

Representative Dawson (UT) – House Debate on H.R. 7999, Congressional Record, 9607

“It is true as the gentleman from Virginia has stated that this is a much larger land grant, even with the reduction that is now proposed than any other State in the Union has had. I feel, however, that this amount of land is needed in order to give the new State a sufficient tax base to allow a reasonable assurance of its future existence.”

Representative Miller (NE) – House Debate on H.R. 7999, Congressional Record, 9607

“I think we might well say that one reason the gentleman’s State has not grown very much is that so much of the land is owned by the Federal government.’

The State has not grown very much because the Federal government has seen fit to hold onto all of the land. In my humble opinion, if you want to develop a territory, turn it over to the State and let us hope that there is wise economic and political leadership in the State so that they, in turn, will turn it back to the people who will come there from every state in the Union.”

“If we say the Federal government is going to hold onto most of the land it will not be developed. ... A State, to grow and develop must have most of its’ land.”

## **II. Conclusion.**

As of 1959 and Alaska statehood, Congress promised Alaska -- as part of a sacred and unalterable compact -- the state would have the right to remove minerals from statehood lands and make development decisions without interference or obstruction from the federal government. Congress did not have the right, 17 years later, in the Clean Water Act Amendments (1977) to give EPA



or the Army Corps authority to disregard the 1959 statehood promises and veto Alaska's mineral rights on statehood lands.

Sincerely,

A handwritten signature in black ink, appearing to read 'Randy Ruaro', written in a cursive style.

Randy Ruaro

Special Assistant / Statehood Defense