COMMENTS

The Alaska Statehood Act Does Not Guarantee Alaska Ninety Percent of the Revenue from Mineral Leases on Federal Lands in Alaska

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I. INTRODUCTION

Alaska is the largest state in the Union.[1] At over 365 million acres, it is one-fifth as large as the contiguous forty-eight states.[2] Alaska also has a proportionately large share of federal land within its borders.[3] The U.S. government owns 220.8 million acres in Alaska, which is over sixty percent of the land in the state.[4]

It is significant for Alaska that such a large amount of the state's land is under federal control because Alaska's economy depends on natural resource use. In particular, oil fuels the state's economic engine and contributes about eighty percent of the tax revenues for state government.[5] Alaskan oil is also important to the rest of the country because it accounts for about fifteen percent of domestic production.[6] The most likely, and perhaps last, site for development of a major new oilfield in Alaska is in the coastal plain of the Arctic

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1. CLAUS M. NASKE & HERMAN E. SLOTNICK, ALASKA: A HISTORY OF THE 49TH STATE 5 (Univ. of Okla. Press 1987) (1979).

2. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 226 tbl. 360 (123rd ed. 2003) [hereinafter STATISTICAL ABSTRACT].

3. *Id.*

4. *Id.*

5. STATE OF ALASKA DEP'T OF REVENUE TAX DIV., FALL 2003 REVENUE SOURCES BOOK 2 [hereinafter REVENUE SOURCES].

6. STATISTICAL ABSTRACT, *supra* note 2, at 573 tbl. 881.

National Wildlife Refuge ("ANWR").[7] Development in ANWR has been the subject of numerous recent congressional initiatives, which seek either to end the moratorium on exploration[8] or to extend the moratorium indefinitely.[9]

If ANWR is developed, and the development happens under the same terms that are currently applied to other public lands in Alaska, the State of Alaska will receive ninety percent of the proceeds that the leases and royalties generate.[10] Under this distribution formula, codified in the Mineral Leasing Act of 1920 ("MLA"), the federal government retains ten percent of the revenues for administrative purposes.[11] This arrangement has been in place since before Alaska achieved statehood in 1959 and is unique among the states.[12] However, a recurring provision in the bills to allow exploration in ANWR has been a call to change the MLA revenue distribution, as applied to ANWR, to a fifty-fifty revenue split between the federal government and the State of Alaska.[13]

Whether Congress has the authority to unilaterally alter the ninety-ten revenue distribution formula currently applied to public lands in Alaska has not been established.[14] Congress' authority to change the MLA might at first appear to be an obvious exercise of its

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7. *See* U.S. DEP'T OF THE INTERIOR, GEOLOGICAL SURVEY, THE OIL AND GAS POTENTIAL OF THE ARCTIC NATIONAL WILDLIFE REFUGE 1002 AREA, ALASKA, (U.S.G.S. Open File Report 98-34) (1999). The survey states:

> Summary and Table EA4. The most recent government study of oil and natural gas prospects in ANWR, completed in 1998 by the U.S. Geological Survey (USGS), found that there is an excellent chance (95%) that at least 11.6 billion barrels of oil are present on federal lands in the 1002 area. There also is a small chance (5%) that 31.5 billion barrels or more are present. USGS estimates that there is and excellent chance (95%) that 4.3 billion barrels or more are technically recoverable (costs not considered); and there is a small chance (5%) that 11.8 billion barrels or more are technically recoverable.

Id., *quoted in* M. LYNNE CORN ET AL., ARCTIC NATIONAL WILDLIFE REFUGE: LEGISLATIVE ISSUES 4 (Cong. Research Serv., Issue Brief for Cong. No. IB10094) (Oct. 22, 2002) [hereinafter ANWR LEGISLATIVE ISSUES 2002].

8. H.R. 39, 108th Cong. (2003) (to end moratorium and open ANWR to exploration), *noted in* M. LYNNE CORN ET AL., ARCTIC NATIONAL WILDLIFE REFUGE (ANWR): CONTROVERSIES FOR THE 108TH CONGRESS (Cong. Research Serv., Issue Brief for Cong. No. IB10111) (Aug. 19, 2003) [hereinafter ANWR CONTROVERSIES 2003].

9. H.R. 770, 108th Cong. (2003), and S. 543, 108th Cong. (2003) (to designate area as wilderness), *discussed in* ANWR CONTROVERSIES 2003, *supra* note 8.

10. 30 U.S.C. § 191 (2003).

11. *Id.*

12. Alaska v. United States, 35 Fed. Cl. 685, 693 (1996), *cert. denied*, 522 U.S. 1108 (1998).

13. H.R. 6, 108th Cong. (2003), *noted in* ANWR CONTROVERSIES 2003, *supra* note 8.

14. PAMELA BALDWIN, LEGAL ISSUES RELATED TO PROPOSED DRILLING FOR OIL AND GAS IN THE ARCTIC NAT'L WILDLIFE REFUGE (ANWR) 30 (Cong. Research Serv., Issue Brief for Cong. No. RL31115) (Apr. 22, 2003).

legislative power, but that authority is clouded.[15] The Alaska Statehood Act ("the Act"),[16] which created the State of Alaska, incorporates the MLA through section 28(b) of the Act, which states:

> Section 35 of the [Mineral Leasing] Act entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" . . . is hereby amended by inserting immediately before the colon preceding the first proviso thereof the following: ", and of those from Alaska 52 1/2 per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof."[17]

In the context of the full MLA, this amendment effectively gave the State of Alaska ninety percent of the lease and royalty revenues from mineral development on federal lands in the state.[18]

Alaska has argued that Congress purposefully incorporated the MLA into the Statehood Act through section 28(b), and in doing so, permanently granted the state ninety percent of the revenues from mineral development on federal lands.[19] Alaska asserts that the Alaska Statehood Act is a "compact" between the people of Alaska and the United States.[20] As such, the Act is akin to a contract and congressional legislation cannot unilaterally alter it.[21] Consequently,

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15. *Id.* at 31.

16. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. ch.2, refs & annos. (2003).

17. Alaska Statehood Act § 28(b).

18. *Alaska*, 35 Fed. Cl. at 693–94. See *infra* section III.C for a full explanation of Alaska's ninety percent share.

19. *See, e.g.*, 1995 Alaska Op. Att'y Gen. (Inf.) 355, 1995 WL 867851 [hereinafter 1995 Alaska Op. 355]; 1988 Alaska Op. Att'y Gen. (Inf.) 327, 1988 WL 249552 [hereinafter 1988 Alaska Op. 327]; 1987 Alaska Op. Att'y Gen. (Inf.) 121, 1987 WL 121051 [hereinafter 1987 Alaska Op. 121]; 1986 Alaska Op. Att'y Gen. (Inf.) 363, 1986 WL 81089 [hereinafter 1986 Alaska Op. 363]; 1981 Alaska Op. Att'y Gen., File No. J-66-556-81, 1981 WL 38504 [hereinafter 1981 Alaska Op.]; Videotape: Alaska vs. The United States of America: The Statehood Compact Case (Office of the Governor, State of Alaska 1994) [hereinafter Compact Case]; Videotape: Broken Promises: Alaska's Defense of its Statehood Compact (Metcalfe, Mac., Dye, Kathy; State of Alaska 1994) [hereinafter Broken Promises]; *Alaska*, 35 Fed. Cl. 685; Appellant's Reply Brief, Alaska v. United States, 119 F.3d 16 (Table, Text in WESTLAW), Unpublished Disposition, 1997 WL 33559182 (Fed. Cir. 1997) (No. 96-5124) [hereinafter Appellant's Reply Brief]; Petition for a Writ of Certiorari, Alaska v. United States 118 S. Ct. 1035, 1997 WL 33549527 (1997) (No. 97-750) [hereinafter Petition for a Writ of Certiorari]; BALDWIN, *supra* note 14, at 30–32.

20. *See, e.g.*, 1995 Alaska Op. 355, *supra* note 19; 1988 Alaska Op. 327, *supra* note 19; 1986 Alaska Op. 363, *supra* note 19; 1981 Alaska Op., *supra* note 19; Compact Case, *supra* note 19; Broken Promises, *supra* note 19; *Alaska*, 35 Fed. Cl. 685; Appellant's Reply Brief, *supra* note 19; Petition for a Writ of Certiorari, *supra* note 19.

21. *See, e.g.*, 1995 Alaska Op. 355, *supra* note 19; 1988 Alaska Op. 327, *supra* note 19; 1986 Alaska Op. 363, *supra* note 19; 1981 Alaska Op., *supra* note 19; Compact Case, *supra* note 19; Broken Promises, *supra* note 19; *Alaska*, 35 Fed. Cl. 685; Appellant's Reply Brief, *supra* note 19; Petition for a Writ of Certiorari, *supra* note 19.

from Alaska's perspective, the passage of any legislation that alters the existing revenue-sharing formula in the MLA is invalid without Alaska's consent.[22] This includes ANWR drilling proposals that would alter the MLA to Alaska's detriment.[23]

This Comment argues that Alaska's position is legally incorrect. The text of the Act simply does not support the position that mineral-lease and royalty proceeds from federal lands are part of Alaska's "compact." In addition, the legislative history of the Act does not support Alaska's position, nor does case law that has addressed related issues. Following this Introduction, Part II of this Comment expands on Alaska's position and explains Alaska's "Statehood Compact" argument. Part III reviews the historical background of the Alaska Statehood Act as it pertains to the ninety percent-ten percent revenue-sharing formula under the MLA. Part IV discusses *Alaska v. United States*,[24] a case that addressed closely related issues and likely will figure prominently in any future argument concerning Alaska's rights under the Act. Part V, after analyzing the text and legislative history of the Act and judicial treatment of statehood agreements generally, concludes the Comment by arguing that Alaska's position will not have success with the courts.

II. ALASKA'S STATEHOOD COMPACT ARGUMENT

Any discussion of Alaska's rights under its Statehood Act is ripe for disagreement and novel arguments partly because the U.S. Constitution has no mechanism that guides how new states will be admitted into the Union.[25] Consequently, after the original thirteen states joined the Union, all of the remainder entered under different circumstances and on unique terms.[26] Although parallels can be drawn between their respective admissions, the condition of each new state's entry into the United States contained elements unique to the

22. *See, e.g.*, 1995 Alaska Op. 355, *supra* note 19; 1988 Alaska Op. 327, *supra* note 19; 1986 Alaska Op. 363, *supra* note 19; 1981 Alaska Op., *supra* note 19; Compact Case, *supra* note 19; Broken Promises, *supra* note 19; *Alaska*, 35 Fed. Cl. 685; Appellant's Reply Brief, *supra* note 19; Petition for a Writ of Certiorari, *supra* note 19 .

23. 1988 Alaska Op. 327, *supra* note 19; 1986 Alaska Op. 363, *supra* note 19.

24. 35 Fed. Cl. 685 (1996).

25. U.S. CONST. art. IV, § 3, cl. 1 ("New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress."); *id.* cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.").

26. *See generally* DANA LEE THOMAS, THE STORY OF AMERICAN STATEHOOD (1961).

political circumstances of the nation at that time. Therefore, the framework for resolving conflicts between the states and the federal government over the effect of statehood acts necessarily draws on historical sources and sometimes on unconventional ideas.

Alaska's position, for instance, distinguishes between "ordinary legislation," amendable at the will of Congress, and "compacts," which Alaska says are binding on both parties in the same way that a contract would be.[27] Alaska has argued that courts should interpret compacts as they would contracts—by considering the intent of both parties—rather than looking only at Congress's intent, as for routine legislation.[28] Presumably, if the Alaska Statehood Act was created by two equal parties negotiating something like a contract, Alaska can better argue a claim based on the expectations and understanding of Alaskans at the time of statehood.

It also brings contractual and equitable issues, such as reliance, into the discussion. For example, Alaska has argued that when Alaska voters accepted its statehood package, acceptance was partly due to their reliance on certain promises of members of Congress and others.[29]

To maintain its position, Alaska must establish three basic propositions: First, it must show that a "compact" has a legal status giving the state more rights than does ordinary federal legislation. Second, it must show either that the Alaska Statehood Act is such a compact, or alternatively, that section 28(b) is an element of a compact contained within the Act. Third, if it can establish the first two propositions, it must show that the compact contains a promise to pay Alaska ninety percent of the MLA proceeds in perpetuity.

A. Alaska Is Correct: A "Compact" Provides Rights Beyond Those of Ordinary Legislation

The word "compact" is used in the Alaska Statehood Act, but it is not defined.[30] Therefore, one must look to other sources to determine the meaning and legal status of the term. Black's Law Dictionary defines a "compact" as, "An agreement or covenant between two or more parties, esp[ecially] between governments or

27. *Alaska*, 35 Fed. Cl. at 698–99; Appellant's Reply Brief, *supra* note 19, at 7; Petition for a Writ of Certiorari, *supra* note 19, at 14.

28. *See generally* Appellant's Reply Brief, *supra* note 19; Petition for a Writ of Certiorari, *supra* note 19.

29. *Alaska*, 35 Fed. Cl. at 695; Appellant's Reply Brief, *supra* note 19, at 9–10; Petition for a Writ of Certiorari, *supra* note 19, at 7–8.

30. Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C.A. ch.2, refs & annos (2003).

states."[31] The term "compact" appears in article I, section 10 of the U.S. Constitution: "No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another state . . . ."[32] The Framers apparently understood that a compact indicated some kind of an agreement between parties.

Case law also indicates that a compact is subject to different rules than ordinary legislation and is equally binding upon both parties. Two U.S. Supreme Court cases illustrate this concept.[33] First, *Beecher v. Wetherby* sets out the deference that the Court has sometimes given such compacts:

> The convention which subsequently assembled accepted the propositions, and ratified them by an article in the Constitution, embodying therein the provisions required by the act of Congress as a condition of the grants. 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, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys.[34]

Second, in an earlier case, *Cooper v. Roberts*, the Court upheld a land grant after the federal government refused to allow the State of Michigan to choose lands under the terms of its statehood agreement when those lands were discovered to be rich in minerals.[35] The Court in that case also described the applicable section of the statehood act as an "unalterable condition"[36] and as "obligatory upon the United States."[37]

Some members of Congress who debated statehood for Alaska shared the view that statehood acts rise above ordinary legislation. Arguing against statehood, Senator Butler of Maryland said:

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31. BLACK'S LAW DICTIONARY 274 (7th ed. 1999).

32. U.S. CONST. art. I, § 10, cl. 3.

33. Beecher v. Wetherby, 95 U.S. 517 (1877); Cooper v. Roberts, 59 U.S. 173 (1855); *see also* Stearns v. Minnesota, 179 U.S. 223, 244–45 (1900).

34. *Beecher*, 95 U.S. at 523 (emphasis added), *cited in* 1988 Alaska Op. 327, *supra* note 19; Appellant's Reply Brief, *supra* note 19, at 7.

35. *Cooper*, 59 U.S. at 178, *cited in* Appellant's Reply Brief, *supra* note 19, at 7.

36. *Cooper*, 59 U.S. at 178.

37. *Id.*

> 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.[38]

Finally, the court that most recently looked at this issue recognized that through a statehood compact Congress has the authority to bind itself, in perpetuity, to a particular legislative scheme.[39] Therefore, Congress could have made a compact with Alaska, promising ninety percent of the mineral revenues from public lands. In the end, though, this is not the issue on which Alaska's argument will be won or lost.

B. Alaska Is Not Correct: The Entire Alaska Statehood Act Is Not a Compact, Nor Is Section 28(b) of the Act Part of a Compact

The Alaska Statehood Act is sometimes loosely referred to as the "Alaska *Statehood Compact*," as if the entire Act is necessarily a compact.[40] However, it does not follow that the two are synonymous. Specifically, the proposition is incorrect because the text of the Act does not support the idea that the entire Statehood Act is a compact.[41] While the Alaska Statehood Act does contain the word "compact," its use is limited to a particular section of the Act.[42] The limited use of the word "compact" in the Act does not extend to section 28(b) and the MLA. Consequently, this Comment argues that Alaska's reasoning fails on this element.

Analysis of the Act's text will make this position clear, and the text is better understood in light of the Act's history. Therefore, this issue will be revisited in section V.A, following discussion of the Act's history in Part III and discussion of the case *Alaska v. United States* in Part IV. *Alaska v. United States* is important to this discussion because it shows that Alaska's argument also fails to meet its third burden: In addition to the fact that section 28(b) is not part of Alaska's

38. 85 CONG. REC. 12316–17 (1958), *cited in* 1988 Alaska Op. 327, *supra* note 19.

39. Alaska v. United States, 35 Fed. Cl. 685, 699, 703 (1996).

40. *See generally* Compact Case, *supra* note 19; Broken Promises, *supra* note 19; 1995 Alaska Op. 355, *supra* note 19, at 1–3; 1981 Alaska Op., *supra* note 19, at 1; Reply Brief for Petitioner 6, Alaska v. United States, 118 S. Ct. 1035, 1998 WL 34103198 (1997) (No. 97-750).

41. *See infra* section V.A.

42. Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C.A. ch.2, Refs & Annos (2003).

"compact," that section neither contains nor implies the promises that Alaska has claimed it does.

C. Although Congress Incorporated the MLA into the Alaska Statehood Act to Provide Alaska with a Source of Revenue, in Doing So It Did Not Promise Alaska That It Would Always Receive MLA Proceeds

Historical evidence shows that Congress included the MLA in the Act, through section 28(b), to provide Alaska with a source of revenue. For example, a Senate Report said:

> Some of the additional costs connected with statehood will be met by granting the State a reasonable return from Federal exploitation of resources within the new State. In the past the United States has controlled the lion[']s share of such resources and, in some instances, retained the lion's share of the proceeds. This situation, though it has not proved conducive to development of the Alaskan economy, may have been proper at times when the United States paid a large part of the expense of governing the Territory. However, the committee deems it only fair that when the State relieves the United States of most of its expense burden, the State should receive a realistic portion of the proceeds from resources within its borders.[43]

Alaska has cited to further evidence that it claims shows that it received MLA proceeds in perpetuity as part of its statehood grant.[44] Moreover, a number of Alaskans who were involved in the statehood movement clearly believe that 90% of the MLA proceeds were part of Alaska's grant.[45]

For example, Ernest Gruening, who used his position as appointed Governor of Alaska from 1939 until 1953 to support the statehood movement and who was one of Alaska's first U.S. Senators, thought that the MLA proceeds were part of Alaska's statehood grant. Writing some ten years after statehood was achieved, he said of Alaska's statehood package:

> Most helpful was the provision that ninety percent of the royalties and net profits from oil, gas and mineral leases on the public domain would go to Alaska. This unique benefit not enjoyed by the Western States was granted in part in compensation for the fact that Alaska was not—as they were—under the Reclamation Act. Alaska owes this provision to the efforts of the late Senator Frank Barrett, of Wyoming, who

43. 1988 Alaska Op., *supra* note 19, at 327, *citing* S. REP. NO. 85-1163 (1957).

44. *See infra* section V.B.

45. *See* Compact Case, *supra* note 19; Broken Promises, *supra* note 19.

> insisted that this larger royalty should go to Alaska and that it become part of our Statehood Act.[46]

Much of Alaska's evidence, however, is more ambiguous than it might at first appear and consequently, when scrutinized closely, does not support Alaska's position as strongly as it has argued. This issue will be analyzed further in section V.B of this Comment.

Moreover, Alaska's claim that it should always get 90% of the MLA proceeds was dealt a serious blow in *Alaska v. United States*, which decided a closely related issue: whether Alaska was entitled to ninety percent of the *gross* proceeds from mineral leases on public lands within the state (it was not). By extension, *Alaska v. United States* seems to stand for the proposition that even if section 28(b) was part of Alaska's compact, that section does not contain a promise to grant ninety percent of the MLA proceeds *in perpetuity*.[47]

Alaska v. United States is better understood in light of the history behind Alaska statehood and the MLA. An examination of the history will also help to answer the question of whether section 28(b), and consequently the MLA, is part of a compact between Alaska and the federal government.

III. A BRIEF HISTORY OF ALASKA STATEHOOD AS IT RELATES TO THIS ISSUE

A. The Creation of the State of Alaska

The United States purchased Alaska from Russia in 1867.[48] It then proceeded to largely ignore its possession, only fitfully building the civil infrastructure familiar to the states.[49] Despite its apathy towards Alaska, Congress did take progressive steps towards building civil institutions, such as in 1906 when Alaska was allowed a nonvoting delegate to Congress and in 1912 when Alaska was allowed an elected legislature.[50] However, for the most part the federal

46. ERNEST GRUENING, THE BATTLE FOR ALASKA STATEHOOD 95 (1967).

47. *See infra* section IV.C.

48. CLAUS-M. NASKE, A HISTORY OF ALASKA STATEHOOD 29 (Univ. Press of America 1985) (1973).

49. *See generally* ERNEST GRUENING, THE STATE OF ALASKA (1954) (cited in NASKE, *supra* note 48, at 69). Prior to statehood, Alaska's first Senator, Ernest Gruening, wrote THE STATE OF ALASKA. In the table of contents, he labeled the periods from 1867 to 1884 as "The Era of Total Neglect," 1884 to 1898 as "The Era of Flagrant Neglect," 1898 to 1912 as "The Era of Mild but Unenlightened Interest," and 1912 to 1933 as "The Era of Indifference and Unconcern." *Id.* at 1.

50. NASKE, *supra* note 48, at 6.

government's pre-statehood role in Alaska failed to adequately address the political and economic aspirations of the territory's people.[51]

For example, pre-statehood, Alaskans suffered from a lack of fully representative political rights at home and in Congress.[52] While Congress provided for an elected legislature for the territory, it gave it limited authority.[53] The Territorial Legislature was not permitted to regulate fish and game resources, nor was it allowed to establish state courts that would interfere with the federal courts' authority.[54] The Territorial Legislature's decisions were subject to the approval of Congress and a governor who was appointed by the President.[55] This meant that the Legislature had limited taxing and spending authority, making the territory dependant on the federal government for major governmental services, such as a court system.[56] Often, the services provided by the federal government proved inadequate and the limited authority of the Territorial Legislature made it difficult for it to supplement those institutions.[57]

Significantly, Alaskans had most of the burdens of U.S. citizenship, but not its benefits. For example, Alaskans were subject to the draft,[58] and they had to pay federal income taxes;[59] however, they could not vote in national elections,[60] they were not included in many federal spending programs,[61] and they had only one nonvoting representative in the House of Representatives.[62]

Many of the political and economic problems that Alaska faced were the result of the territory being treated as a colony.[63] As such, Alaska's resources were exploited without the controls of fully representative government enjoyed by the states.[64] Chief among the motives of Alaskans pushing for statehood was their desire to address federal laws that discriminated against the territory, often in favor of

51. *Id.* at 19.

52. *See id.* at 15–23.

53. *Id.* at 36–37.

54. *Id.*

55. *Id.* at 6–7.

56. GRUENING, *supra* note 49, at 335–54 (discussing the failure of the justice system in territorial Alaska).

57. NASKE, *supra* note 48, at 36–37.

58. See Ernest Gruening's keynote address to the Alaska Constitutional Convention, Let Us End American Colonialism, *reprinted in* ERNEST GRUENING, *supra* note 46, at 74–91.

59. GRUENING, *supra* note 46, at 77; *see also* NASKE, *supra* note 48, at 246.

60. NASKE, *supra* note 48, at 70.

61. *Id.* at 76, 99–100.

62. *Id.* at 22.

63. *Id.* at 69–70; *see also* GRUENING, *supra* note 46, at 74–91.

64. NASKE, *supra* note 48, at 93, 99–102.

Outside interests.[65] In particular, the infamous Jones Act created a monopoly for Seattle shipping companies that served Alaska, keeping prices for imports and exports artificially high.[66] The Jones Act required that materials shipped to and from Alaska ports could only be sent on American ships.[67] Even though it was often more direct and economical to ship through Canadian ports, Alaskans were required to pay higher prices to ship through Seattle.[68]

The Jones Act represented one expression of the problem that Alaska was in the control of absentee interests.[69] Alaska's fish, fur, timber, and mineral resources were exploited for the benefit of far-away corporations, whose interest in the territory did not extend beyond the profit motive.[70] Alaskans complained bitterly that they had little control over their resources and, in particular, they saw mismanaged fisheries leading to a precipitous decline in that resource.[71] These Outside interests were overbearing to the local populations in terms of economic and political grasp.[72] As a result, only the incidental benefits of the wealth of Alaska was going to the people that lived there.[73]

Another problem that Alaskans hoped to remedy through statehood was the problem of constrictive federal land ownership.[74] Prior to statehood, 99.8 percent of the land in Alaska was owned by the federal government, while only 0.2 percent (500,000 acres) was privately held.[75] This concentration of federal land ownership was an impediment to economic and community growth because of federal laws that restricted development and settlement.[76] The federal government also made significant withdrawals of federal land for such purposes as military reservations and national forests.[77] The reservations restricted that land to those specific purposes and made it further unavailable to support economic development.[78] By 1954 the

65. *Id.* at 99–101.

66. *See* 46 App. U.S.C. § 883 (2003) (the U.S. Maritime Act is commonly referred to by the name of its sponsor, Washington Senator Wesley Jones), *discussed in* NASKE, *supra* note 48, at 100.

67. NASKE, *supra* note 48, at 100.

68. *Id.* at 100–01.

69. GRUENING, *supra* note 49, at 467; NASKE, *supra* note 48, at 121.

70. NASKE, *supra* note 48, at 19, 45.

71. GRUENING, *supra* note 49, at 245–68.

72. NASKE, *supra* note 48, at 121–30.

73. GRUENING, *supra* note 49, at 467; NASKE, *supra* note 48, at 121–30.

74. GRUENING, *supra* note 49, at 323–34.

75. NASKE & SLOTNICK, *supra* note 1, at 158.

76. GRUENING, *supra* note 49, at 323–27.

77. *Id.* at 327–32.

78. *Id.* at 323–34.

withdrawals totaled 95 million acres[79] (approximately equal to the size of the state of Montana),[80] and encompassed much of the most valuable and productive land in the territory.[81]

Although there had been attempts to address these problems through statehood in the first half of the century, none of them was successful.[82] It took the Japanese invasion of Alaska in World War II to bring Alaska to the close attention of the federal government and begin the final journey to statehood.[83] Starting in 1946, every Congress until 1958 introduced an Alaska Statehood bill.[84] Although Alaskans and others aggressively supported statehood, disagreement about the effects of making Alaska a state slowed its admittance.[85] The expansive and remote geography, the small population, and a perceived political immaturity of the populous were all argued as reasons to bar Alaska statehood.[86] There were also concerns about giving such a small population representation in the Senate and the possible effect on the balance of power in Congress, particularly the effect on civil rights legislation.[87]

One of the major concerns about Alaska statehood was whether a State of Alaska would have the financial means to support itself.[88] Some opponents of statehood feared that Alaska would become a ward of the federal government because it did not have the economic base necessary for self-sufficiency.[89] On the other hand, supporters of

79. Alaska v. United States, 35 Fed. Cl. 685, 691 (1996).

80. GRUENING, *supra* note 49, at 331–32.

81. *Alaska*, 35 Fed. Cl. at 692–93; *see also* GRUENING, *supra* note 49, at 323–34.

82. *See generally* NASKE, *supra* note 48.

83. NASKE, *supra* note 48, at 78–82. For a fascinating history of the Aleutian campaign, see BRIAN GARFIELD, THE THOUSAND MILE WAR: WORLD WAR II IN ALASKA AND THE ALEUTIANS (1969).

84. *Alaska*, 35 Fed. Cl. at 687.

85. NASKE, *supra* note 48, at 235–52.

86. *Id.*; *see also Alaska*, 35 Fed. Cl. at 689–90.

87. NASKE, *supra* note 48, at 257–59. Southern Democrats feared that adding two Senators from Alaska would upset their ability to block civil rights legislation. *Id.* This issue became less significant in 1957, when Congress passed the first piece of civil rights legislation since Reconstruction. *Id.*

88. *Alaska*, 35 Fed. Cl. at 689.

89. *Id.* at 688 n.2, which contains the following illustrative remarks:

> Opponents argue that . . . the expense of statehood is too great for Alaska to bear, since the sources of revenue for Alaska as a State are so uncertain; that Federal reservations would deprive the State of revenue from, and jurisdiction over, vast areas . . . ." STAFF OF HOUSE SUBCOMM. ON TERRITORIAL AND INSULAR POSSESSIONS OF PUBLIC LANDS COMM., 80TH CONG., 1ST SESS., REPORT ON H.R. 206, A BILL TO PROVIDE FOR THE ADMISSION OF ALASKA, THE FORTY-NINTH STATE 8 (1947); "The economic conditions in Alaska are unstable . . . the resources of the Territory are not sufficiently developed to allow private enterprise to take up the slack in employment and provide necessary revenues should Federal spending be

statehood argued that Alaska would be able to carry the burden of statehood and prosper.[90] At the same time, those supporters recognized that the state would need a strong economic foundation and urged Congress to provide the future state with the means to secure financial independence.[91] Although its "statehood package" changed over the years, the primary means to ensure financial independence for the new state was a grant of some portion of the federal land to Alaska.[92] However, there were also provisions in the Act to provide Alaska with additional sources of revenue.[93]

B. Land Grants Were the Primary Component of Alaska's Statehood Package

The issue of providing Alaska with the means to economic independence is at the heart of Alaska's argument that Congress acted intentionally when it referenced the MLA in the Statehood Act. Alaska's argument is that the MLA was incorporated into the Statehood Act as a "grant" to provide the future state with an additional means of financial support, and as a set-off for the fact that much of the most productive land in the state had already been reserved by the federal government and was thus unavailable for selection by Alaska.[94] In contrast, the federal government's counter-

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abruptly curtailed." S. REP. NO. 85-1163, at 11 (1958); "I am deeply concerned about the very thin economy of Alaska . . . . Unless a more solid economic foundation is built under it, Alaska will not be able to carry on successfully its duties and obligations and to assume the full responsibilities of a State." 104 CONG. REC. 12,442 (1958) (statement of Sen. Monroney); "I do not believe the people of Alaska are able to sustain the financial burden involved," 104 CONG. REC. 12,442 (1958) (statement of Sen. Johnston).

Id. (citations reformatted).

90. 104 CONG. REC. 12,012 (1958).

Alaska is a going concern. As a matter of fact, Alaska is currently financing, by means of its own revenues, all functions and services it is permitted to carry on. The Territorial government has no debt, and actually has a cash surplus. The additional activities Alaska would engage in after statehood is granted can normally be expected to be financed through the additional revenues which would also become available to Alaska as a State.

Id. (1958) (statement of Sen. Jackson, cited in *Alaska*, 35 Fed. Cl. at 688).

91. *See generally Alaska*, 35 Fed. Cl. 685.

92. *Id.* at 690.

93. *Id.*

94. *Id.* at 691–92. The following remarks by Senator Butler of Maryland reflect this position:

Much of the best land and most valuable resources of the Territory have been reserved or withdrawn from use by private industries or corporations. There are so many land reserves and withdrawals that there has never been any complete, accurate tabulation of them all. One tabulation, which may be reasonably complete, shows a total of 98,500,000 acres in withdrawals out of the 365,481,600 acres in Alaska. This

argument is that the land grants were the primary source of financial independence for the new state. It says that the reference to the MLA in the Act was a simple administrative function to provide a seamless transition to statehood, but without providing the State any more rights than the Territory already had.[95]

Prior to statehood, a major concern of statehood proponents and opponents alike was that the large amount of Alaskan land under federal control made it impossible for Alaska to become a self-sufficient state.[96] A Senate report accompanying an earlier (failed) statehood bill summed up the problem:

> The expenses of the State of Alaska will be comparatively high, partially due to the vast land areas within the State; but the State would be able to realize revenues from only 2 percent of this vast area unless some provisions were made to modify the present land ownership conditions.[97]

In all of the statehood bills that appeared before Congress, there were provisions for providing the state with grants of some portion of the federal land.[98] The final version adopted included 103,350,000 acres for selection by the state over twenty-five years, including: a direct grant of 102,550,000 acres of vacant, unappropriated, and unreserved federal land; 400,000 acres of land located within national forests for community development and expansion purposes; and, an additional 400,000 acres to be used for community and recreation areas.[99] Although the land grants were sizable,[100] some argued that land grants alone were insufficient to support financial independence because much of the most productive, and therefore most valuable, land had already been withdrawn from Alaska's consideration by the federal government.[101] The State of Alaska has argued that this is one

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area is about the size of the State of California and represents about 27 percent of Alaska's total area. *More important, it comprises almost all of the best and most valuable resources known to exist in the Territory.*

S. REP. NO. 81-1929, at 34–35 (1950) (emphasis in original), *cited in Alaska*, 35 Fed. Cl. at 691–92.

95. *Id.* at 699; *see also* Appellant's Reply Brief, supra note 19 .

96. *Alaska*, 35 Fed. Cl. at 688.

97. S. REP. NO. 85-1163, at 2 (1957), *cited in Alaska*, 35 Fed. Cl. at 690 n.5.

98. *Alaska*, 35 Fed. Cl. at 690–91.

99. Alaska Statehood Act, Pub. L. No. 85-508, § 6, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C.A. Ch.2, Refs & Annos (2003).

100. Of the states created from the public domain, Alaska ranks seventh in percentage of its area granted at about 27.9 percent, but has the largest total acreage of any state. The land granted constituted a discontinuous area about the size of California. NASKE & SLOTNICK, *supra* note 1, at 157.

101. *Alaska*, 35 Fed. Cl. at 691.

of the reasons that the federal government promised Alaskans ninety percent of the mineral revenues from their public lands.[102]

C. *Alaska Was Already Receiving Ninety Percent of the Mineral Leasing Act Revenues Prior to Statehood*

In its current form, the MLA provides that all eligible states, except Alaska, receive a direct payment of fifty percent of the revenue generated from mineral exploitation on federal lands within their boundaries.[103] The federal government receives ten percent of the revenue and the other forty percent goes to a reclamation fund established under the Reclamation Act of 1902.[104] The Reclamation Act money is then redistributed to those states as public works projects.[105] Alaska, exceptionally, receives a direct payment of ninety percent of the revenue generated on federal lands in the state, because it is not included under the Reclamation Act.[106]

This arrangement was created to address an inequity with the MLA distribution that existed before statehood.[107] Prior to 1957, the Territory of Alaska and the states received 37.5 percent of the revenues under the MLA directly.[108] For the states, the other 52.5 percent was placed in the reclamation fund.[109] For Alaska, though, the other 52.5 percent that came from its federal lands was directed to the federal treasury without any benefit going back to Alaska.[110]

Alaska's unequal treatment under the MLA was addressed in 1957, when Alaska's nonvoting delegate to Congress, Bob Bartlett, proposed to amend the MLA to give Alaska the entire ninety percent revenue distribution from mineral leases.[111] Instead, Assistant Secretary of Interior Chilton and Senator Barrett of Wyoming recommended that an amendment to the MLA be added to the statehood legislation then under consideration, rather than as an independent bill.[112] That amendment was added as section 28(b) of the statehood bill.[113] However, the statehood bill failed to pass that

102. 1988 Alaska Op., *supra* note 19, at 2.

103. 30 U.S.C. § 191 (2003).

104. The Reclamation Act of 1902 is codified in scattered sections of 43 U.S.C. (2003). There is a historical note in 43 U.S.C. § 372 (2003).

105. *Id.* at § 391.

106. 30 U.S.C. § 191 (2003).

107. Alaska v. United States, 35 Fed. Cl. 685, 693 (1996).

108. *Id.* at 693.

109. *Id.* at 692.

110. *Id.*

111. *Id.*, *citing* H.R. 3477, 85th Cong. (1st Sess. 1957).

112. *Alaska*, 35 Fed. Cl. at 692–93, *citing* H.R. REP. NO. 85-156 at 2–3 (1957).

113. *Alaska*, 35 Fed. Cl. at 692–93.

year.[114] Rather than wait until the next attempt to pass a statehood bill to address the MLA distribution, the proposal to change the distribution was passed as a separate amendment to the MLA.[115]

The next year, 1958, a statehood bill finally passed both houses.[116] It included the same section 28(b) as was in the previous bill, but its effect was different than it would have been had the Statehood Act passed the year before. Because the Territory had already begun receiving ninety percent of the revenues, section 28(b) changed the MLA again by replacing its reference to "the Territory of Alaska" with "the State of Alaska."[117] As a practical matter, the immediate effect of section 28(b) was to apply the MLA and its ninety percent distribution to the State of Alaska on the same terms that it had applied to the Territory of Alaska.[118]

D. Statehood Was by Agreement Between Alaskans and the United States

In July 1958, President Eisenhower signed the Alaska Statehood Act.[119] The passage of the Statehood Act did not make Alaska a state, however. It required the agreement of Alaskans to be effective. Section 8(b) of the Act required Alaskans to approve statehood by assenting to the following three propositions:

> (1) Shall Alaska immediately be admitted into the Union as a State?
>
> (2) The boundaries of the State of Alaska shall be as prescribed in the Act . . . and all claims of this State to any areas of land or sea outside the boundaries so prescribed are hereby irrevocably relinquished to the United States.
>
> (3) All provisions of the Act . . . reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people.[120]

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114. *Id.* at 693.

115. *Id.*

116. *Id.*

117. Alaska Statehood Act, Pub. L. No. 85-508, § 28, 72 Stat. 339 (1958), *reprinted* in 48 U.S.C.A. Ch.2, Refs & Annos (2003).

118. *Alaska*, 35 Fed. Cl. at 693–94.

119. NASKE, *supra* note 48, at 271.

120. Alaska Statehood Act § 8.

Although passage of the Act was probably a forgone conclusion because of its broad support,[121] the vote plays a key role in the Alaska's position that the creation of the State of Alaska was a binding agreement between two parties rather than one-sided legislation amendable at the will of Congress.

On August 26, 1958, Alaskans went to the polls and by majorities of more than 5 to 1, answered yes to all three of the statehood questions.[122] On January 3, 1959, President Eisenhower signed the proclamation making Alaska a state.[123] Alaska has since argued that its citizens were urged to accept statehood based on promises made by representatives of the federal government, and that they relied on those promises in accepting statehood as a party to the "statehood compact."[124] For example, prior to the vote, Secretary of the Interior Fred Seaton traveled to Alaska and gave speeches in support of statehood.[125] In a speech in Anchorage, Seaton stated, "[T]he Act reaffirms Alaska's preferential treatment in receiving [ninety percent] of all revenues from oil, gas, and coal leasing on the public domain."[126] Similarly, in a speech in Fairbanks, he said, "Since early this year the territory has received [ninety percent] of all oil lease revenues; the State of Alaska will continue to do so."[127] These statements have been portrayed by Alaska as a pledge on the part of the federal government to share with Alaska, in perpetuity, ninety percent of the revenue from federal mineral lands.[128]

E. Oil Development on Alaska's North Slope

The most significant event to follow statehood in Alaska was the discovery of oil on state land near Prudhoe Bay in 1968.[129] It was not the first discovery of oil in Alaska, but it was by far the largest.[130] It was also well timed. Anxiety about rising oil prices in the 1970s overcame environmental concerns about drilling and about building

121. *See infra* note 122 and accompanying text. In 1946, Alaskans passed a referendum that endorsed statehood. NASKE, *supra* note 48, at 103. In 1956, Alaskans voted to accept a state constitution that they had created the year before with the hope that it would help propel Alaska to statehood. *Id.* at 228. Both of these measures were approved without consideration for or expectation of ninety percent of the MLA proceeds.

122. NASKE, *supra* note 48, at 271–72.

123. *Id.* at 272.

124. Alaska v. United States, 35 Fed. Cl. 685, 699–700 (1996).

125. *Id.* at 695.

126. *Id.* at 696.

127. Appellant's Reply Brief, *supra* note 19; Petition for a Writ of Certiorari, *supra* note 19.

128. *Alaska*, 35 Fed. Cl. at 699–700.

129. NASKE & SLOTNICK, *supra* note 1, at 241.

130. *Id.* at 241–51.

the Trans-Alaska Pipeline, and gave an incentive to settle Alaskan Natives' land claims.[131] In the first ten years of statehood, the State of Alaska had received less than $100 million from lease sales; in contrast, in 1969, in just one series of leases for state land around Prudhoe Bay it received over $900 million.[132] Through 2000, the North Slope of Alaska had produced 12.9 billion barrels of oil.[133] From 1978 to 2003, oil production in Alaska had brought the state more than $50 billion in lease and royalty revenue.[134]

Prior to statehood, opponents had complained that by being allowed to choose its lands over twenty-five years, Alaska had the luxury of waiting to see which lands proved to be most valuable and to choose among them.[135] To a certain extent, this concern proved to be accurate because Alaska selected potential oil lands on the North Slope, which have so far been the most valuable lands in the state. It should be noted, though, that the state chose from the only lands on the North Slope that had not been reserved from selection by the federal government prior to statehood. Much of the land on the North Slope had already been withdrawn from Alaska's consideration for national defense uses and for the Arctic National Wildlife Refuge ("ANWR").[136] Moreover, Alaska chose the lands on the North Slope, in part, because doing so was the easiest way to settle a problem over coastal boundaries with the federal government, not just because of their oil potential.[137]

Prior to selection in early 1964, then Governor Egan did not see a need to select North Slope lands as part of Alaska's land grant because, under the MLA, Alaska was already receiving ninety percent of the revenues from leases on the federal land there.[138] Therefore it did not seem necessary to use Alaska's grant to choose those lands.[139]

Although development did not begin in earnest until the late 1960s, after Alaska had selected potential oil lands as part of its grant, oil had been found on the North Slope by non-native explorers as early as the 1880s.[140] In 1923, President Harding created the Naval

131. *Id.* at 224–74.

132. *Id.* at 250.

133. ENERGY INFORMATION ADMINISTRATION, U.S. DEPT. OF ENERGY, FUTURE OIL PRODUCTION FOR THE ALASKA NORTH SLOPE 7 (2001).

134. REVENUE SOURCES, *supra* note 5, App. F.

135. NASKE, *supra* note 48, at 265.

136. *See infra* notes 140–152 and accompanying text.

137. JACK RODERICK, CRUDE DREAMS: A PERSONAL HISTORY OF OIL & POLITICS IN ALASKA 167–169 (1997).

138. *Id.* at 152.

139. *Id.*; *see also Alaska*, 35 Fed. Cl. at 696.

140. NASKE & SLOTNICK, *supra* note 1, at 241.

Petroleum Reserve No. 4 in an area west of Prudhoe Bay and north of the Brooks Range.[141] It is now known as the National Petroleum Reserve-Alaska ("NPR-A") and it encompasses 37,000 square miles.[142] As a national defense withdrawal, these lands were specifically excluded from selection as part of Alaska's statehood grant under section 10 of the Act.[143] Section 10 also provided that "exclusive jurisdiction over all special national defense withdrawals established under this section is hereby reserved to the United States, which shall have sole legislative, judicial and executive power within such withdrawals . . . ."[144]

Under the 1980 legislation to open NPR-A to development, the revenues from the petroleum reserve are split fifty-fifty between the federal government and the State of Alaska.[145] The reason that there is a different formula for revenue distribution for NPR-A than for other federal lands in Alaska is that the MLA specifically excludes "lands within the naval petroleum and oil-shale reserves" from its scope; therefore the ninety percent-ten percent split does not apply to development there.[146] Although this separate revenue-sharing scheme does not implicate the same statehood issues as development on other public lands in Alaska, it did set a precedent for establishing another revenue-sharing regime, albeit a political precedent rather than a legal one.[147]

To the east of the state lands at Prudhoe Bay is ANWR.[148] The creation of ANWR began in 1957 when an application was filed to

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141. *Id.* at 243.

142. M. LYNNE CORN, ARCTIC NATIONAL WILDLIFE REFUGE: BACKGROUND AND ISSUES 111, Cong. Research Serv., Libr. of Cong., RL31278 (Mar. 15, 2003) [hereinafter ANWR BACKGROUND AND ISSUES 2003].

143. Alaska Statehood Act, Pub. L. No. 85-508, § 10, 72 Stat. 339 (1958), *reprinted* in 48 U.S.C. Ch.2, Refs & Annos (2003).

144. *Id.*

145. 42 U.S.C. §§ 6501–6508 (2003). The legislation also requires Alaska to prioritize the use of revenues from NPR-A for the communities most severely or directly impacted by the development. *Id.*

146. 30 U.S.C. § 181 (2003), *cited in* 1987 Alaska Op. 121, *supra* note 19.

147. For example, in speaking before the Congressional Committee on Resources to discuss H.R. 2436, the proposed "Energy Security Act," Secretary of the Interior Gale Norton stated:

> We recognize the historical antecedents of the 90%-10% distribution. However, the legislation of two decades ago authorizing the oil and gas leasing program in the National Petroleum Reserve-Alaska provides for a 50%-50% split of lease revenues between the State and the Federal government. We believe the 50%-50% division of revenues should also apply to leasing in ANWR.

Gale Norton, Statement of Gale Norton, Secretary of the Interior, Before the Committee on Resources, U.S. House of Representatives on H.R. 2436, "The Energy Security Act" (July 11, 2001), available in Federal Document Clearing House Congressional Testimony.

148. ANWR LEGISLATIVE ISSUES 2002, *supra* note 7, at 1.

create an Arctic Wildlife Range.[149] The creation of the Range excluded these lands from Alaska's statehood grant.[150] The Arctic National Wildlife Range was formally created in December 1960.[151]

In 1980, as part of the Alaska National Interest Lands Conservation Act ("ANILCA"), the refuge was renamed the Arctic National Wildlife Refuge.[152] ANILCA also made much of the refuge a wilderness area, except for the 1.5 million acre coastal plain, and therefore off-limits to oil drilling.[153] In 1981, the coastal plain of ANWR was temporarily withdrawn from mineral leasing to review its oil and gas potential.[154] In 1987, the Interior Department completed its review, as required by ANILCA, and Secretary of the Interior Hodel recommended that the coastal plain of ANWR be opened to oil and gas leasing.[155] Two events made this recommendation almost impossible to happen at that time: First, oil prices in the 1980s fell to historic lows; second, the Exxon Valdez oil spill in 1989 steeled environmental opposition to any development in ANWR.[156] The closest that ANWR has come to drilling operations was in 1996, when President Clinton vetoed the Balanced Budget Act, which would have allowed for drilling in the Coastal Plain of the Refuge and would have split the revenues fifty-fifty.[157]

IV. *ALASKA V. UNITED STATES*: ALASKA SUES THE FEDERAL GOVERNMENT FOR NOT LIVING UP TO THE TERMS OF THE STATEHOOD ACT

The idea of drilling in ANWR, but under a different revenue-sharing formula than as for other public lands in Alaska, has been around since at least the mid-1980s.[158] In order to acquire the support of members of Congress that might not otherwise support development, the Alaska congressional delegation has supported a fifty-fifty revenue sharing plan for development in ANWR.[159] Opposed to such a measure based on its "statehood compact"

149. *Id.* at 2.

150. BALDWIN, *supra* note 14, at 2.

151. ANWR LEGISLATIVE ISSUES 2002, *supra* note 7, at 2.

152. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 302, 94 Stat. 2371 (1980).

153. *Id.* § 1002.

154. Alaska v. United States, 35 Fed. Cl. 685, 696 (1996).

155. *Id.* at 697.

156. ANWR BACKGROUND AND ISSUES 2003, *supra* note 142, at 21.

157. H.R. 2491, 104th Cong. §§ 5312–5344 (1996).

158. 1986 Alaska Op. 363, *supra* note 19.

159. Liz Ruskin, *ANWR Drilling Moves to Senate, Faces Tough Battle*, SCRIPPS-HOWARD NEWS SERV., Aug. 2, 2001, LEXIS, Nexis Library, All News File.

argument, the State of Alaska has been to court to protect its ninety percent share.[160]

A. *Alaska's Claims in* Alaska v. United States

The discussion of whether Alaska's Statehood Act is a compact, and what the parties may have intended in including section 28(b) in the Act, had few actual consequences until 1991. At that time, Congress directed the Interior Department to first deduct administrative costs from royalties received under the MLA before it distributed the proceeds to the states.[161] In 1993, Congress amended the MLA to reflect this change in policy.[162] Prior to this time, the administrative expenses had been paid out of the federal government's share, so that the states received a gross percentage.[163] The effect of Congress's decision was to reduce the states' share of royalties to a net percentage.[164]

By making a claim based on the incorporation of the MLA into the Alaska Statehood Act, Alaska was in a unique position among the states to challenge Congress' authority to change the MLA.[165] In 1993, the State of Alaska brought an action against the federal government in the United States Court of Federal Claims, charging that, under its Statehood Act, Alaska was entitled to ninety percent of the *gross* revenues from mineral development on public lands.[166]

At the same time, Alaska had been suffering from low oil prices for several years and had become increasingly dissatisfied with the slow pace with which federal lands were being opened to development. In particular, the state was frustrated with Congress's failure to open ANWR to development.[167] As a result, in *Alaska v. United States*, the state added four other claims to its MLA claim, which were based in part on the failure of Congress to act on the Department of Interior's 1987 recommendation that the coastal plain of ANWR should be opened for exploration.[168]

First, Alaska claimed that the United States had breached the Statehood Act "by its pattern of withdrawing federally owned lands in Alaska from mineral leasing and by its diminution of Alaska's [ninety

160. *See generally* 1981 Alaska Op., *supra* note 19.
161. *Alaska*, 35 Fed. Cl. at 697–98.
162. Pub. L. No. 103-66, §10201, 107 Stat. 407 (1993).
163. *Alaska*, 35 Fed. Cl. at 697.
164. *Id.*
165. *Id.* at 698.
166. *Id.* at 687.
167. *Id.* at 697.
168. *Id.* at 697, 705.

percent] share of mineral leasing revenues."[169] Second, Alaska claimed that the people of Alaska had relied on the federal government's promise to develop federal mineral lands in Alaska and that its failure to do so was a breach of contract.[170] Third, Alaska claimed that Congress breached its covenant of good faith and fair dealing by failing to develop mineral lands in Alaska.[171] Fourth, Alaska claimed that Congress' failure to develop mineral lands in Alaska constituted a taking of the revenues that Alaska would have received from that development.[172]

In summary, Alaska argued that the federal government had granted Alaska ninety percent of the mineral leasing revenues from public lands and that this was to be an unalterable financial foundation of the new state.[173] It argued that the grant was ninety percent of the *gross* revenues at the time of statehood, and so it should remain.[174] It also argued that the federal government had an implied duty to permit a reasonable amount of leasing to effect the purpose of the grant of leasing revenue.[175] The State of Alaska claimed $2,330,456.15 in improperly deducted administrative expenses under the MLA claim,[176] and $29 billion in contract damages under the other claims.[177]

B. The Court of Claims Assumed, Without Deciding, that Section 28(b) of the Alaska Statehood Act Was Binding on Both Parties

The Court of Claims first thoroughly reviewed the history of the Statehood Act as it relates to this issue, and then turned to some of the U.S. Supreme Court cases that have analyzed other statehood acts, to see if such acts are truly binding and unalterable.[178] The Court of Claims determined that statehood acts have been found to have "the character of contracts in some respects, and in other respects, the character of normal legislation."[179] Without going into a detailed analysis, the court cited examples of cases where the Supreme Court treated certain provisions as binding, such as *Andrus v. Utah* where the

169. *Id.* at 687.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 698.
175. *Id.* at 687 n.1.
176. *Id.* at 697–98.
177. Brief for Appellee 10–11, Alaska v. United States, 119 F.3d 16 (Table, Text in Westlaw), Unpublished Disposition, 1997 WL 33512967 (Fed. Cir. 1997) (96-5124).
178. *Alaska*, 35 Fed. Cl. at 698.
179. *Id.*

Court said that Utah's land grant was a "'solemn agreement' which in some ways may be analogized to a contract between private parties."[180] In contrast, the Court of Claims also cited to a Ninth Circuit case where that court said that section (6)(e) of the Alaska Statehood Act, which gave control of fish and wildlife to the State of Alaska, is subordinate to the federal government's management of fish and wildlife on federal lands.[181]

In a footnote, the Court of Claims also pointed out that some sections of the Statehood Act were clearly intended to be alterable, such as section 12(b) which provided for the locations of federal courts (which has changed since statehood) and which also provided that Alaska shall be one judicial district (which Congress could presumably change as necessary).[182] In its appeal of *Alaska v. United States*, however, Alaska distinguished those provisions that can be altered without its express approval when it is to the State's benefit, while retaining the right to challenge changes that are made to its detriment.[183]

The Court of Claims declined to rule on whether the entire statehood act is a contract, saying it was unnecessary to do so because statehood acts can have "particular provisions that are binding and unalterable" as against Congress, without the entire act being so.[184] It said that it was enough to determine if section 28(b) was a binding contractual provision in the way that Alaska claimed.[185]

To this end, the court briefly reiterated both side's positions. The federal government's position was that section 28(b) was merely a technical amendment, intended to make a clean transition for Alaska to continue to receive MLA funds in the same way that it had as a territory, and that section 28(b) was not intended to permanently bind the federal government.[186] Alaska charged that section 28(b) was a contractual provision that was an essential monetary function of the new state and was relied upon by Alaskans when they approved the Statehood Act.[187]

The federal government countered that section 28(b) could not have been an incentive for Alaskans to choose statehood because the Territory of Alaska was already receiving ninety percent of the MLA

180. *Id.* at 698 (citing Andrus v. Utah, 446 U.S. 500, 507 (1980)).
181. *Id.* (citing Alaska v. Andrus, 429 F. Supp. 958 (D. Alaska 1977)).
182. *Id.* at 698 n.25.
183. Appellant's Reply Brief , *supra* note 19, at 8; *see also* 1981 Alaska Op., *supra* note 19.
184. *Alaska*, 35 Fed. Cl. at 698.
185. *Id.* at 699.
186. *Id.*
187. *Id.*

funds when the Statehood Act was created, and pointed to statements by congressional representatives that indicated that the inclusion of section 28(b) was a mere technical amendment.[188] Alaska returned with congressional history that indicated it was to be part of the financial base upon which the new state was built.[189] Alaska also cited to the speeches made by Secretary of the Interior Seaton[190] as evidence that Alaskans relied on promises of the federal government in accepting statehood.[191]

The court rejected both parties' positions as flawed.[192] It said that Alaska had overstated its position, that the revenue sharing provision "was not viewed as the key component of financial viability for the State."[193] But it also said that it could not accept the federal government's position that section 28(b) was not a substantive part of the compact, because section 28(b) "was plainly viewed as one component in an effort to ensure that Alaska was financially viable."[194] The court settled on a middle ground:

> Ultimately, the subject matter of the Statehood Act—entry into a union of states—is *sui generis* and cannot be strictly compressed into a contractual or legislative mold. It is neither a garden-variety contract nor routine legislation. The statehood debate cannot be analogized to the normal negotiations between parties to commercial contracts. The Act was not negotiated in the same way as a normal contract. There were not two distinct parties. The plebiscite on statehood and the debate on the pros and cons of statehood concerned what was fundamentally a political issue.[195]

The court ended its discussion of the contractual implications of the Statehood Act by saying that it was unnecessary for it to determine whether section 28(b) was contractually binding or "mere legislation."[196] The court said that it was prepared to assume Alaska's view that section 28(b) was a contractually enforceable provision of the Statehood Act.[197] The court then asked, if it was an enforceable provision, did section 28(b) contain a promise by the federal

188. *Id.*
189. *Id.* at 699–700.
190. *See supra* notes 125–127 and accompanying text.
191. *Alaska*, 35 Fed. Cl. at 700.
192. *Id.*
193. *Id.*
194. *Id.* at 700.
195. *Alaska*, 35 Fed. Cl. at 701.
196. *Id.*
197. *Id.*

government to pay a gross percentage of revenues, in perpetuity, as Alaska asserted?[198]

C. Section 28(b) Was Held Not to Contain a Promise to Pay Alaska Ninety Percent of the Gross Revenues Under the MLA

The Court of Claims then weighed the arguments as to whether Alaska was entitled to a gross share of revenues under section 28(b).[199] As support for its position, Alaska pointed out that in contrast to section 28(b), which is silent on the issue of gross or net, section 28(a) of the Act gave Alaska ninety percent of "[a]ll *net* profits from operation of government coal mines . . . ."[200] The court agreed with Alaska, citing to the U.S. Supreme Court case *Russello v. United States*, in which the Court said, "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[201] Although the Court of Claims does not specifically say so, it seemed to accept Alaska's argument that a gross calculation was originally intended, because it next changed directions and asked if Alaska, unique among the states, had the right to insist in perpetuity on "the particular legislative scheme then extant?"[202]

"Plainly it is possible for Congress to makes such a promise . . . " the Court of Claims said, referring to the claim that Congress bound itself to the terms of the MLA as they were in 1958 (at least as it relates to Alaska).[203] But it stressed that such "a promise not to alter legislation is not one that should be lightly inferred into a contract [with the federal government]."[204] The court then declared that what section 28(b) accomplished was to plug Alaska into a pre-existing legislative scheme that gave it ninety percent of the gross proceeds "at that time."[205] But Congress, according to the court, made no promises as to the future:

> While it is true that the inclusion of revenue sharing provisions was an important part of the mix of provisions necessary to address concerns about how the new state would be financed, it

198. *Id.*
199. *Id.* at 702–03.
200. *Id.*
201. *Id.* (citing *Russello*, 464 U.S. 16, 23 (1983)).
202. *Id.* at 703.
203. *Id.* (citing Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *cert. granted*, 516 U.S. 1087 (1996)).
204. *Id.* (citing Trapper Mining Inc. v. Lujan, 923 F.2d 774, 778 (10th Cir. 1991)).
205. *Id.*

> is also inescapable that there were no expectations or intent that Alaska's position would be privileged as against other States, at least in this respect.[206]

In short, the court held that there was "no promise on the part of the federal government to pay Alaska, in perpetuity, 90 percent of the *gross* mineral leasing revenues from federal mineral leases in Alaska."[207]

The court threw out that claim, as well as the rest of Alaska's claims, on summary judgment for the United States.[208] The Court of Appeals upheld the decision,[209] and the Supreme Court denied certiorari.[210] In 2000, Congress changed the MLA distribution back to a gross calculation in favor of the states.[211]

V. ALASKA'S CLAIMS ARE NOT SUPPORTED BY THE TEXT OF THE ALASKA STATEHOOD ACT, ITS LEGISLATIVE HISTORY, OR CASE LAW ANALYZING STATEHOOD ACTS

The Court of Claims limited its holding in *Alaska v. United States* to the narrowest possible terms. In doing so, it left many questions unanswered. In particular, the court avoided answering the question raised in section II.C of this Comment: are MLA proceeds under section 28(b) a part of Alaska's statehood compact? The answer to this question can be found in the text of the Act, and is supported by the legislative history of the Act and judicial precedent: The federal government made promises to Alaska in the Statehood Act, but an unalterable right to any percentage of revenues from mineral leases on public land was not one of them.

A. The Text of the Alaska Statehood Act Does Not Support a Claim That Section 28(b) Is Part of Alaska's Statehood Grant

Alaska has repeatedly claimed that the Alaska Statehood Act is a "compact," and has commonly referred to it as "the Statehood

206. *Id.*

207. *Id.*

208. *Id.* at 706.

209. Alaska v. United States, 119 F.3d 16 (Table, Text in WESTLAW), Unpublished Disposition 1997 WL 382032 (Fed. Cir. 1997) ("[A]ffirmed on the basis of the reasoning set forth in the lengthy, detailed, precise and correct opinion of Judge Bruggink. Judge Bruggink's scholarly opinion is thoroughly supported with cited and quoted authority and record evidence. Nothing more need be said.").

210. State of Alaska v. United States, 522 U.S. 1108 (1998).

211. Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. No. 106-393 § 503, 114 Stat. 1607 (amending 30 U.S.C. § 191(b) (2000)) (current version at 30 U.S.C. § 191(b) (2003)).

Compact," as if the Act is synonymous with "compact."[212] However, if there is any authority for the proposition that an entire statehood act is necessarily a compact, Alaska has not brought if forth. Analysis of the text of the Alaska Statehood Act does not support a claim that the entire document is a "compact," binding on both the State of Alaska and the federal government. Analysis of the text further shows that section 28(b) is not a part of a compact. While one section uses the word "compact," and certain sections have language that binds both the federal government and Alaska, section 28(b) is not among them.

Section 1 of the Act recites a brief declaration admitting Alaska into the Union.[213] Sections 2 and 3, respectively, set the boundaries of the State as those of the Territory, and require Alaska to always have a constitution that is republican in form.[214]

Section 4 is the only section in the Act that uses the word "compact." It states:

> [A]s a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act . . . .[215]

Although it is phrased in the negative, by its plain language, this section creates a "compact" between Alaska and the United States concerning Alaska's right to those "lands or other property . . . granted or confirmed" to Alaska under the Act. The scope of the compact is limited to "lands or other property . . . granted or confirmed" and does not implicate the entire Act.[216]

It is clear what the word "lands" means, but the term "other property" in section 4 is ambiguous. The Act does not provide a definition of "other property," but later in section 4, it clarifies that

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212. *See supra* note 40 and accompanying text.

213. Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C.A. Ch.2, Refs & Annos (2003).

214. *Id.* §§ 2–3.

215. *Id.* § 4.

216. Compare this language with the language in section 4 of Hawaii's statehood act, which was passed the next year and follows a similar form:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner.

Hawaii Statehood Act, Pub. L. 86-3, § 4, 73 Stat. 4 (1959), *reprinted in* 48 U.S.C.A. Ch. 3, Refs & Annos (2003).

"other property," as it relates to land held in trust for Native Alaskans, includes fishing rights.[217]

The definition of "other property" is important to Alaska's argument for two reasons: First, a right to ninety percent of the revenue under the MLA could certainly be considered "other property," as much as fishing rights are. Therefore, it is possible that section 28(b) is implicated by the reference to "other property" in section 4 of the Statehood Act. Second, one of the questions that was placed before Alaskans when they were asked to approve statehood, under section 8, was whether to consent to "[a]ll provisions of the Act . . . prescribing the terms or conditions of the grants of land or other property . . . ."[218] Alaskans went to the polls and accepted the terms of the "compact" by agreeing to the promise of "lands or other property." What remains is to determine what section 4 means by "other property," and whether it includes proceeds under the MLA from section 28(b).

The discussion of property in the Act continues in section 5, which states:

> The State of Alaska and its political subdivisions respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.[219]

"Title" is a concept so nebulous and ambiguous that its exact meaning in this context would be very difficult to define. And the federal government could have granted mineral rights to the public lands in Alaska, under the MLA, without having given up title to those lands. However, the placement of this section suggests that the drafters meant to limit the property that was being given up by the federal government to that which it granted in section 6.

Section 6 lists out the "lands" that are referred to in section 4, as well as "other property."[220] It starts by making two 400,000-acre land grants and the 102,550,000-acre grant. The "other property" transferred to Alaska in this section included several blocks of land in Juneau, the state capital, and real and personal property used in fish and wildlife protection.[221] It also included seventy percent of the

217. Alaska Statehood Act § 4.
218. *Id.* § 8.
219. *Id.* § 5.
220. *Id.* § 6.
221. *Id.*

revenue from the seal and sea otter skins trade, and five percent of the proceeds of sales of public lands for the support of public schools.[222] Most important among the "other property" to go to Alaska, subsection 6(i) specifically granted Alaska the rights to mineral deposits on those lands it chose.[223]

While the term "other property" is not explicitly defined in the Act, the property in section 6, including mineral rights to lands granted, is clearly implicated by the references to "other property" in section 4 and section 8. Arguably, though, if the mineral rights to land granted to Alaska under section 6 are "other property," then revenue from federal lands under the MLA in section 28(b) can be "other property" as well.

Although the Act does not expressly limit "other property" to mean that property *exclusively* listed in section 6, the operative language used in that section to grant property is not used in other parts of the Act, including section 28. In describing land and other property to be given to Alaska under section 6, the Act uses very concrete granting language that reflects the language of section 4 and section 8. In reference to the public lands granted to Alaska in section 6(a), the Act uses the specific word "granted," stating, "the State of Alaska is hereby granted and shall be entitled to select . . . ."[224] The mineral rights to those lands under section 6(i) are also referred to as "grants."

Additionally, the language used to describe the other property listed in section 6 also follows the same pattern of explicit transfer. The blocks of land in Juneau were "granted."[225] The property used in fish and wildlife management was "transferred and conveyed."[226] For the revenue from fur seals and from the sale of public land, the operative phrases are "shall be paid to said State"[227] and "shall pay to the State of Alaska,"[228] respectively. In short, the grants of "lands or other property" in section 6 are unequivocal and use concrete language that reflects the clear intent of both Congress and Alaskans.

In contrast to the granting language used in sections 4, 6, and 8, section 28(b) has no such language. The operative phrase in section 28(b) is that the MLA is "hereby amended."[229] Similar language is

222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* § 28(b).

used in other sections of the Act that amended existing legislation so as to incorporate Alaska.[230] The legislation that was amended included numerous changes to Titles 18 and 28 of the United States Code; changes to the Federal Reserve Act; the Immigration and Nationality Act; the Merchant Marine Act; as well as the MLA.[231] In all of these instances, the Statehood Act had a transitional or housekeeping function that assured the new State of Alaska was subject to existing legislation that had applied to the Territory. The Act uses similar non-granting language throughout to achieve this end.

If Congress intended to make a grant of the mineral revenues from public lands, or if Alaskans expected to be granted such a right under section 28(b), it is remarkable that section 28(b) does not expressly state such a grant—especially when the drafters were so explicit about the grants in section 6. It is also telling that such an arguably important provision, unprecedented in the history of the United States, would be found among the administrative and housekeeping provisions at the end of the Act, instead of prominently featured within section 6, alongside the other rights in property that the Act granted.

In short, the text of the Act supports the idea that there was a "compact" between the United States and the State of Alaska and that the compact is contained within the Alaska Statehood Act. This compact was an agreement that promised Alaska "lands and other property." It appears from a plain language reading that Alaskans' rights to "lands or other property" under the compact are limited to those in section 6.

The purpose of section 28(b) was to amend existing legislation to incorporate the new State of Alaska into that legislation, and not a binding provision in the same way that the grant of lands and other property in section 6 was. It did not provide Alaska with any more rights as a state than it had as a territory.

B. The Legislative History of the Statehood Act Does Not Support the Claim That Section 28(b) Is Part of Alaska's Compact

Although the text of the Alaska Statehood Act does not support the claim that section 28(b) of the Act is part of the "statehood compact," Alaska has claimed that there are statements in the legislative history which show that Congress intended to permanently grant Alaska ninety percent of the mineral revenues from public lands.

230. *See, e.g.*, *id.* §§ 12, 22–27.

231. *Id.* §§ 12, 19, 22, 27–28.

How can these two seemingly contrary positions be reconciled? The answer is that some of those statements do not support Alaska's position as strongly as Alaska has argued.

One problem with citing congressional statements that seem to support certain interpretations of the Statehood Act is that there were many statehood bills over the years, and some remarks refer to earlier bills that never became law. For example, an Alaska State Attorney General Opinion[232] cites to Senator Barrett of Wyoming, who authored section 28(b), as support for the inviolate nature of that section. Senator Barrett said:

> So I think it would be eminently fair and just and right and proper, when we write this bill up, that we . . . let the Federal Government retain the title to the minerals except such public lands as are granted to you, but give the Territory now and the State of Alaska-to-be [ninety percent] of the income from the minerals under the Leasing Act royalties that come in *from now on out*.[233]

Reliance on this citation is misplaced, however, because it refers to a statehood bill that was before a Senate hearing in 1957, but which did not pass into law.[234] After that statehood bill failed to pass in 1957, Congress amended the MLA to grant the territory of Alaska the ninety percent distribution via ordinary legislation.[235] Even assuming that Senator Barrett's comments can be construed to mean that Alaska was to be granted the ninety percent provision in perpetuity under that version of the Act, it does not follow that the same intent attached to the Statehood Act that passed a year later.

Some statements in the legislative history that refer to the bills that became the Statehood Act are ambiguous as to whether they actually support Alaska's position. For example, Senator Butler of Maryland said, "My research has also developed that there is contained in the bill provisions which have the effect of giving away more revenue and more property than has ever been given to any State in its enabling act."[236] Alaska has argued that the "revenue" to which he refers is that from section 28(b).[237] However, Senator Butler could just as well have been talking about the revenue provisions in section

232. *See generally* 1988 Alaska Op. 327, *supra* note 19.

233. 1988 Alaska Op. 327, *supra* note 19, at 5 (*citing* Hearings on S. 49 and S. 35 Before the Senate Comm. on Interior and Insular Affairs, 85th Cong., 1st Sess. 30–31 (1957)) (emphasis added).

234. *See supra* section III.C.

235. Alaska v. United States, 35 Fed. Cl. 685, 693 (1996).

236. 85 CONG. REC. 12,316–17 (1958).

237. Appellant's Reply Brief, *supra* note 19, at 11–12.

6, including the revenue from seals and the sale of public lands and from the mineral rights that Alaska was granted. Section 28(b) is not necessarily implicated by his statement.

One reason that references in the legislative history to "revenue" or "other property" are ambiguous, is because Alaska's land grant was considerably more generous than any state's that had preceded it.[238] First, the size of the grant was larger than any other state had received, as this was to be the foundation upon which Alaska would become a state.[239] Just the amount of state-owned land in Alaska would make it the second largest state.[240] Second, Alaska had the unprecedented right to choose whatever unreserved lands it wanted, while previous statehood grants had been limited to particular sections within townships.[241] Third, Alaska also had the right to select mineral lands and keep all the revenues from those mineral lands, which was not typically the case with land grants.[242] Finally, Alaska was allowed to dispose of the land it chose without the revenues being dedicated to any specific purpose.[243] Other statehood grants typically required a new state to use its selected lands for support of education.[244] Seen in this light, the sentiments of Senator Butler and others take on new meanings. The "revenue" to which he refers to does not have to include revenue under the MLA in section 28(b), because an unprecedented amount of revenue was given to Alaska under section 6.

One statement from a central figure in Alaska's statehood process unambiguously supports Alaska's position. Senator Ernest Gruening asserted that ninety percent of the mineral lease revenues from federal land were "part of our Statehood Act."[245] The problem with Senator Gruening's statement is that courts disfavor after-the-fact statements of congressional representatives as being valuable legislative history.[246] Although there is no reason to impugn Senator Gruening's view on the subject, especially written almost two decades

238. Brief for Appellee, *supra* note 177, at 5; *see also* NASKE & SLOTNICK, *supra* note 1, at 157.

239. *Alaska*, 35 Fed. Cl. at 690.

240. *See supra* note 2 and accompanying text.

241. Andrus v. Utah, 446 U.S. 500, 506–07 (1980), *cited in* Brief for Appellee, *supra* note 177, at 5.

242. *Andrus*, 446 U.S. at 508–09.

243. Alaska Statehood Act, Pub. L. No. 85-508, § 6, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C.A. Ch.2, Refs & Annos (2003).

244. 35 Fed. Cl. at 690; *see also* Brief for Appellee, *supra* note 177, at 5; NASKE *supra* note 48, at 49, 96.

245. GRUENING, *supra* note 46, at 95.

246. GWENDOLYN B. FOLSOM, LEGISLATIVE HISTORY: RESEARCH FOR THE INTERPRETATION OF LAWS 30–41 (1972).

before it appears to have become an important issue, there is still a presumption that time and personal interests cloud recollection. Therefore, courts will weigh such evidence, if at all, much less than evidence that was contemporaneous with the Act.[247]

In summary, there is evidence in the legislative record that shows that Alaska's statehood package entitles it to ninety percent of the mineral revenues from public lands, but that evidence is not strong enough to overcome the presumptions in favor of the federal government. This is the lesson of *Alaska v. United States*, in which Alaska's best arguments came up lacking.

C. Case Law Analyzing Other Statehood Acts Does Not Support Alaska's Position

Although *Alaska v. United States* did not shut the door on the courts upholding Alaska's claimed right to revenues from public land under section 28(b), the court's reasoning shows that Alaska was not promised ninety percent of the MLA revenues in perpetuity.[248] Moreover, the remaining judicial support for Alaska's position is thin.

The courts have not provided a "strict taxonomy" to guide to a ready solution of disputes involving statehood acts.[249] As the Court of Claims said in *Alaska v. United States*, compacts have been "construed to partake of the character of contracts in some respects, and in other respects the character of normal legislation."[250] On first inspection, the language of some prominent U.S. Supreme Court cases seems to support Alaska's claim that the Statehood Act is a binding compact. Upon closer examination, however, much of the Court's discussion of statehood compacts as inviolate refers only to the land grants as compacts and not to the acts as a whole as compacts.

For example, in *Beecher v. Wetherby*, with regard to Wisconsin's statehood, the Court said, "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, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools."[251] The "unalterable condition" the Court discusses is the discrete issue of the land grants. [252] Similarly, in *Cooper v. Roberts*, with regard to Michigan's statehood, when the

247. *Id.*

248. BALDWIN, *supra* note 14, at 31; ANWR LEGISLATIVE ISSUES 2002, *supra* note 7, at 9; ANWR CONTROVERSIES 2003, *supra* note 8, at 11.

249. Alaska v. United States, 35 Fed. Cl. 685, 698 (1996).

250. *Id.* at 698.

251. Beecher v. Wetherby, 95 U.S. 517, 523 (1877).

252. *Id.*

Court talked about "terms of compact" as being "unalterable except by consent," it was also the land grants that were the issue.[253] And in *Andrus v. Utah*, the Court describes land grants for the support of schools as a "'solemn agreement' which in some ways may be analogized to a contract between private parties."[254] While the courts have elevated these specific land grants within statehood acts to a higher status, there is no reason to extend these references to necessarily encompass all statehood acts in their entirety.

There is additional case law that indicates that section 28(b) is not a part of a binding compact between Alaska and the United States. In *Watt v. Alaska*, the Court upheld a lower court's interpretation of a conflict between the MLA and the Wildlife Refuge Sharing Act ("WRSA"), as it applied to oil leases in wildlife refuges.[255] Had the WRSA controlled, rather than the MLA, the State of Alaska would have received none of the proceeds from drilling in the Kenai National Moose Range in South-Central Alaska.[256] In dicta, arguing that the case never should have been before the Court in the first place, Justice Stevens said:

> The question of how to divide the revenues from oil and gas leases on public lands in the Kenai Peninsula is clearly a matter for Congress to decide. If Congress is displeased with the decisions of this Court and the Court of Appeals, it may promptly reverse them by revising the relevant statutes.[257]

This statement has been cited to show that Congress has the power to unilaterally determine how the proceeds from ANWR should be divided.[258] However, it is important to note that this case was about the interpretation of two conflicting statutes; a statehood compact argument was not before the Court.[259] But if such an argument occurred to Justice Stevens, he did not give it any weight.

In summary, there are cases where the U.S. Supreme Court has held statehood compacts to a higher level than ordinary legislation, but those cases are limited in scope. They do not stand for the proposition that an entire statehood act is necessarily a compact. Although the case law does not by any means exclude the possibility that section 28(b) was part of Alaska's "compact," neither can it be

253. Cooper v. Roberts, 59 U.S. 173, 178 (1855).

254. Andrus v. Utah, 446 U.S. 500, 507 (1980).

255. Watt v. Alaska, 451 U.S. 259, 273 (1981).

256. *Id.* at 272.

257. *Id.* at 274.

258. Brief of the United States in Opposition at 13–14, Alaska v. United States, 118 S.Ct. 1035, 1998 WL 34102975 (1998) (No. 97-750).

259. 1986 Alaska Op. 363, *supra* note 19, at 4.

used to show that any section of the Act was necessarily a part of Alaska's compact merely by virtue of having been included in the Act.

D. Revenue Sharing Is a Political Decision

The reason that most Alaskans support drilling for oil in ANWR is simple economics. As predicted before statehood, the cost of providing state services in Alaska is high–twice as high as the next most costly state, Hawaii, and more than five times the national average.[260] This is due to the large geographic area served and the fact that Alaska has a small, dispersed population, thus making it difficult to distribute the fixed costs of government services over a broad tax base.[261] Most troubling for Alaskans, the production of oil in Alaska has been in decline since 1987.[262] Since Alaska receives eighty percent of its tax revenue from oil, the state's economic base is shrinking, with potentially serious consequences to the social fabric of the state.

Moreover, declining oil production on the North Slope means that Alaska will eventually not be able to produce enough oil to keep the Trans-Alaska Pipeline functioning.[263] For this reason alone, a compromise to accept half of the royalty revenues from ANWR might seem very desirable if oil from ANWR can help to extend the life of the of the oilfields on state land around Prudhoe Bay, from which Alaska gets all the lease and royalty revenue.

Although the electorate in Alaska does not have much say in whether ANWR is opened to development, to a certain extent they control their own destiny concerning revenue sharing. In 1996, in reaction to the decision in *Alaska v. United States*, voters amended the Alaska Constitution. The Alaska Constitution now requires a two-thirds approval of both houses of the Alaska legislature, or a majority vote of the people, for Alaska to support a federal statute if it affects an interest of Alaska under the Statehood Act.[264] Presumably, this

260. STATISTICAL ABSTRACT, *supra* note 2, at 290 tbl. 447.

261. NASKE, *supra* note 48, at 273–74.

262. ANWR BACKGROUND AND ISSUES 2003, *supra* note 142, at 21.

263. Alaska v. United States, 35 Fed. Cl. 685, 697 (1996).

264. ALASKA CONST. art. 12, § 14, which states:

> [A] federal statute or proposed federal statute that affects an interest of this State under the Act admitting Alaska to the Union is ineffective as against the State interest unless approved by a two-thirds vote of each house of the legislature or approved by the people of the State. The legislature may, by a resolution passed by a majority vote of each house, place the question of approval of the federal statute on the ballot for the next general election unless in the resolution placing the question of approval, the legislature requires the question to be placed before the voters at a special election. The approval of the federal statute by the people of the State is not effective unless the federal statute described in the resolution is ratified by a majority of the qualified voters of the State who vote on the question. Unless a summary of the question is

means that Alaska would not be able to participate in development in ANWR under a fifty-fifty split without one of the prescribed methods of agreement by Alaskans.[265] Moreover, without Alaska's acquiescence, development would be very difficult.

On the other hand, the amendment gives the Alaska Legislature the authority to make such a decision as well. Arguably, it did not have such authority without the amendment because it was the people of Alaska who accepted the terms of the Alaska Statehood Act and not the Legislature.[266] Perhaps in adopting this amendment to their constitution Alaskans gave away a right that many believe they were granted at statehood.

VI. CONCLUSION

There is little doubt that Congress has the authority to permanently bind itself to the terms of a "statehood compact." However, the text of the Alaska Statehood Act does not support the idea that Alaska's statehood compact includes ninety percent of the revenues from mineral leases and royalties on federal lands. Even if another reading of the Act reaches the opposite conclusion, the Court of Claims decision in *Alaska v. United States* strongly suggests that section 28(b) of the Statehood Act does not contain a promise by the federal government to pay Alaska, in perpetuity, ninety percent of the revenues under the MLA.

How does one reconcile the two notions that (1) Congress purposefully incorporated the MLA into the Statehood Act, but (2) did not make the MLA part of the compact contained within the Act? The answer is that Congress did intend for ninety percent of the revenues from mineral leases to be part of the financial foundation of Alaska, but that Congress did not intend to grant this right in perpetuity. Congress did not give up its right to later change the distribution formula in the MLA as it sees fit.

And if the late Senator Gruening and other statehood activists are correct—that the federal government did promise that Alaska would always get ninety percent of the revenues from mineral development on federal lands—then they made a critical mistake: they did not get it in writing.

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provided in the resolution passed by the legislature, the lieutenant governor shall prepare an impartial summary of the question. The lieutenant governor shall present the question to the voters so that a "yes" vote on the question is a vote to approve the federal statute.

265. Bruce Melzer, *State Rights on Line; But Prop 1 May Not Help; Campaign 96*, ANCHORAGE DAILY NEWS, Nov. 3, 1996, at B1.

266. *Id.*