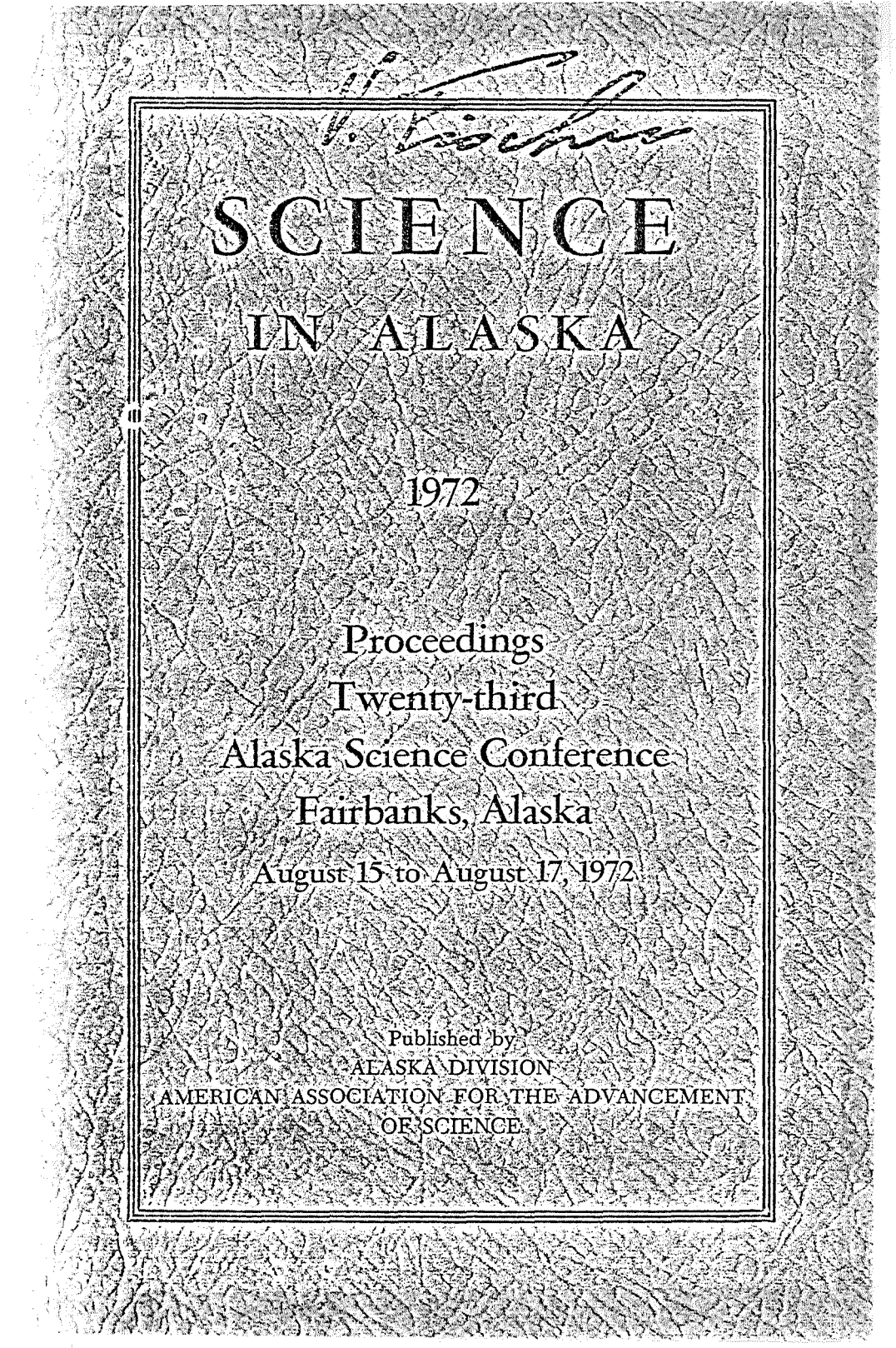

Comments on the Joint State-Federal Land Use Planning Commission

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As chairman, I was not scheduled to make a speech here. But many of you are from out-of-state and after hearing these two presentations on somewhat distinctive features of land use planning in Alaska, I feel some of the audience might be a bit confused. So I shall abuse my position as chairman to give a little background to this afternoon's subject.

The issues with which the joint State-Federal Land Use Planning Commission is concerned are not mainly those issues at the center of "land use planning" outside Alaska. It has no police power or regulatory jurisdiction over the private uses of land and no management authority over public lands. The implementation of any plan has to be carried out either by the federal or state agencies that become the proprietors of land, or by state agencies which can utilize their police powers - regulatory powers - to determine or control the private uses of land. The Commission is dealing principally with land disposal, that is, with the question of what agency, individual, or private group shall become the proprietor or manager of various lands in Alaska which are being transferred as a result of the Statehood Act and the Alaska Native Claims Settlement Act.

The first thing to understand is how the Commission's unique function developed, why it is necessary in Alaska, and how it relates to land use planning in its more common meaning. It is worthwhile to see what the status of lands in Alaska was prior to the passage of the Alaska Native Claims Settlement Act. As the least settled and most undeveloped of all the states of the Union, Alaska had almost its entire land area in the unreserved, unclassified public domain. In 1968, something like 97 percent of the state's land area was still in federal title; about four-fifths of this was public domain administered (but hardly "managed") by the Bureau of Land Management, and subject to appropriation under a host of land laws. Generally no statuatory framework existed for establishing priorities among land uses or land disposal. The rule was first-come, first-served. For example, a person could enter a homestead on public land without prior permission from any agency.

He established his homestead and by doing certain things to his land, planting a crop or claiming to plant a crop, he acquired an equitable title to that land. Subject to certain other conditions, he could then get a patent, that is, fee ownership. A similar situation existed in respect to mining claims. A person could locate a mining claim and by locating that claim, got a certain kind of equitable property right in the land. However, the miner's right depended on his being there first. If somebody had a prior homestead entry, it took precedence in law over the claim.

The state got into the scramble to be first, also. Under the terms of the Statehood Act, it had the right to select 103.5 million acres of the unreserved public domain in Alaska, provided somebody else did not get to it first. The state, whatever it selected, took the land subject to what entries or locations had been made by private parties under various land laws or mining laws. Moreover, the land was subject to the Mineral Leasing Act of 1920, which provides, in the absence of a known geological structure of a producing oil and gas well, that an oil and gas lease can be granted over-the-counter to the first person who applies for it. Regardless of the value of a lease, there is no provision for competitive sale. This provision had two effects on the state's interest. A federal noncompetitive lease meant that although the state received 90 percent of the royalties and rentals, it lost the potential lease bonuses that it would have gotten from a competitive sale. Also, federal leasing affected the state's selection rights because five years after the Statehood Act, the state was no longer entitled to select land under federal mineral lease. So, somebody applying for a mineral lease on the unreserved public domain in Alaska could preclude the state from selecting it.

On top of all these priority rights to appropriate land and resources, were the rights of various federal agencies, which could reserve land for themselves for special purposes simply by filing a withdrawal order in the Federal Register. For instance, the Department of Defense could, by making application to the Secretary of the Interior and filing a notice in the Federal Register, establish a military reservation. Various Interior Department agencies could make withdrawals for administrative reasons. There were Executive Order withdrawals, administrative withdrawals, and a few reservations by Act of Congress, like national forests and national parks. These withdrawals were all like the rights created by the initiative of private persons: first come, first served.

That was not all. On top of all these preemptory laws and rights was a big question mark. Who was really there first? What lands were still owned by the Natives by virtue of their aboriginal use and occupancy? Even if the Natives did not have any title to the lands they had historically occupied, did the treaty with Russia, or the Organic Act of 1884, or the Statehood Act forbid the transfer of these lands to other parties, including the state? There were no clear legal answers to these questions, so that there was potentially a cloud over every homestead, mining claim, mineral lease, state selection, or federal withdrawal not consummated by Congress. Beginning in 1966, the Bureau of Land Management took the position that it could not issue mineral leases or approve state selections on lands on which there was a Native claim, because those lands were not clearly unreserved and unappropriated public lands. The "land freeze" imposed by the Secretary of the Interior in 1968 was a general withdrawal to avoid lawsuits over every individual land

filing in the state. Until the question of whether the disputed lands were Native-owned or not was resolved, the Department had few choices: doubt had been cast over the implementation of any of the preemptory land laws by the existence of Native claims, a general withdrawal order was made, and a general resolution of Native claims depended upon action by Congress.

It became apparent that, once the freeze was lifted, no matter which lands were granted to the Natives, a free-for-all over the remaining public domain would again ensue. Meanwhile there had been an enormously valuable oil discovery in the state and its lands had become many times more valuable than they were before the "freeze." But there was still no mechanism for resolving the priority among state selection, among various private uses, and whatever new type of Native proprietorship was to be established by the forthcoming legislation.

At the time the Claims legislation was being looked at in Congress, there was a general anticipation that there would be major changes in the public land laws extending throughout the country. The responsible committees of both houses of Congress did not want to write special legislation for Alaska with respect to the public lands. But at the same time, they did not want a land rush or administrative chaos when the land freeze was lifted. So a joint commission was established for the purpose of examining potential conflicts and preventing land from being rapidly disposed of for uses contrary to the public interest. The Secretary of the Interior was directed to make two kinds of withdrawals. One, a general public interest withdrawal, would in effect freeze the land from disposal until the Land Use Commission had time to look at how it should be disposed of. In particular, the land would not go to private mineral lease (which would prevent the state from selecting it) or be disposed of under the Homestead Act (and other laws of that sort) until it could be looked at to see whether it should be administered by the Bureau of Land Management or some other federal agency on the basis of a classification for priority use, or whether the state should select it. Under this public interest withdrawal, location for metallic minerals was allowed to continue. The second type of withdrawal was for examination for possible incorporation into the so-called "four systems" - the National Parks, the Wildlife Ranges, the National Forests, and Wilderness and Wild and Scenic Rivers. These latter are withdrawn not only from disposition under the Homestead Act, Mineral Leasing Act, state selection, and Native selection, but also from mining.

Much of the Commission's responsibility relates to technical administration of the actual grant of lands to the Natives and adjudication of issues with respect to Native lands. Apart from these, the principal responsibility of the Land Use Commission is to provide a bargaining forum for the various interests which want to get land in this great division. Alaska is still a major part of the federal domain and each of the various federal land management agencies wants part of the action. The state wants to complete its land selection entitlement to get what it regards as the most valuable land. And it appears that the state administration, at least, wants as much as possible of the remainder left open to private appropriation. The national wildlife and environmental movement wants as little as possible open to commercial development. The state is going to have one kind of land selection strategy and the Natives will have another. Out of this division we're going to get a situation where there will probably be new national parks, new national monuments, a tripling or quadrupling of the amount of state land, and an increase

in the amount of private land in the state by over fifty times. I think this matter of private land is an aspect that has been given too little attention. The Native lands will not be public lands; they are private lands. Private land ownership in Alaska prior to the Settlement Act was something in the area of 800 thousand acres. It will now increase to over 40 million acres. Almost all private lands that will be created anywhere in Alaska in the foreseeable future will probably be those granted under the Native Claims Settlement Act.

To return to the commission, what it is dealing with is not use, but disposal. The various parties want particular lands because of the uses for which they might become valuable. My impression is that the biggest area of policy conflict is going to be over use for mining. The state places a very heavy, an almost irrationally disproportionate, emphasis on whether or not lands will be opened for mining use. So do the environmentalists. Both sides probably overestimate both the economic benefit and the environmental insults that mining will produce. But the bitterness of the polarization is partly a result of the fact that the federal law provides no intermediate ground between the Wild West, let 'er rip, situation of lands open to mining, and total closure. Federal lands open to mining are subject to the terms of the 1872 Mining Law, which allows all initiative to be taken by the miner and provides no management authority or virtually no control on the part of federal agencies.

The state's laws with respect to its own lands do provide authority for environmental controls in respect to mining, but so far this authority has not been exercised in a way to give environmentalists confidence that state management is a tolerable middle ground between lassiez faire and total closure. The future of mining is certainly the nub of conflict between the proposals of the various federal preservation agencies (particularly the Park Service) and the state with respect to areas like the Wrangell Mountains or north and south of Mt. McKinley.

I will have to correct Commissioner Brewer on one point. The land use legislation before Congress has very little to do with this question of disposition of public lands. The National Land Use Planning Bill would place its greatest emphasis on strengthening the regulatory powers of the state with respect to private lands. The bill would require each state, under penalty of loss of matching funds for various federal programs, to establish a statewide plan and to preempt some of the zoning functions now concentrated at the local level. The legislation would prevent the zoning powers of individual communities from being used against one another. Otherwise, whole regions can end up without any usable open space, and as each community tries to zone out land uses which it considers undesirable, like power plants, pipelines, powerline rights-of-way, refineries, and low-income housing, their location may end up being worse for everybody.

Someone asked yesterday whether there isn't a conflict between the Land Use Planning Bill, which induces each state to set up a planning process, and the joint State-Federal Land Use Planning Commission established under the Native Claims Act? I would say that they have two quite separate functions. To

summarize my earlier points, the Joint Land Use Planning Commission deals mainly with disposal, and only by one remove, by anticipation of what the Park Service or the Natives or the state would do with the land disposed of, does the commission deal with land use.

APPENDIX

APPENDIX

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