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## Alaska

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# ONE J

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## ALASKA



*Steven A. Rhodes & Zachary H. Barrett \**

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### *I. Introduction*

The following is an update on Alaska legislative activity and case law relating to oil, gas, and mineral law from August 1, 2016 to July 31, 2017.

### *II. Legislative and Regulatory Developments*

The following is a discussion of notable legislation:

#### *A. Senate Bill 30*

Section 1 of Senate Bill 30 (“SB 30”) amends the uncodified law of the State of Alaska by adding a new section approving and ratifying the agreement for the sale and purchase of state royalty oil between and among the State of Alaska and Petro Star Inc. and Arctic Slope Regional Corporation, and reciting that this section constitutes legislative approval under AS 38.06.055.<sup>1</sup>

Section 2 of SB 30 established that Section 1 of SB 30 take effect immediately under AS 01.10.070(c).<sup>2</sup> The Governor signed SB 30 into law on August 7, 2017.<sup>3</sup>

#### *B. House Bill 111*

House Bill 111 (“HB 111”)—Oil Royalties; Tax Credit; Etc.—is a bill that addresses royalty and tax credit incentives relating to the oil and gas industry. Below are some of the more notable changes.

##### *1. House Bill 111, Section 4: Amendment to Alaska Statutes Section 43.20.044(a)*

Section 4 of HB 111 amends AS Section 43.20.044(a) by adding a new subsection, AS Section 43.20.044(a)(1), that allows under the Alaska Net Income Tax Act an alternative tax credit for oil and gas exploration earned by the taxpayer under AS 43.55.025 for exploration expenditures incurred for work performed on or after July 1, 2016.<sup>4</sup>

Sections 4 of this Act takes effect immediately under AS 01.10.070(c).

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1. S.B. 30, 30th Leg., Reg. Sess. (Alaska 2017).

2. *Id.*

3. 2017 Alaska Sess. Laws Ch. 20. (S.B. 30).

4. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 3; *see also* ALASKA STAT. § 43.20.044(a).

*2. House Bill 111, Section 6: Amendment to Alaska Statutes Section 43.55.023(c)*

Sections 6 of HB 111 amends AS Section 43.55.023, and by adding a new subsection, AS 43.55.023(c)(3), that allows a credit or portion of a credit under AS Section 43.55.023, regardless of when the credit was earned, to satisfy a tax, interest, penalty, fee, or other charge that is related to the tax due under AS Section 43.55.023 for a prior year, except for a surcharge under AS 43.55.201-43.55.299 or 43.55.300 or the tax levied by AS 43.55.011(i) or 43.55.014; and has not been subject to an administrative proceeding or litigation.<sup>5</sup>

Section 6 of this Act takes effect immediately under AS 01.10.070(c).

*3. House Bill 111, Section 7: Amendment Alaska Statutes Section 43.55.023(d)*

Section 7 of HB 111 amends AS Section 43.55.023(d) by limiting the ability of a tax payer to obtain a cash payment under AS 43.55.028 to those credits received for a lease expenditure incurred before July 1, 2017.<sup>6</sup>

Section 7 of this Act is retroactive to July 1, 2017.

*4. House Bill 111, Section 9: Amendment Alaska Statutes Section 43.55.023(e)*

Section 9 of HB 111 amends AS Section 43.55.023(e) and by adding a new subsection, AS Section 43.55.023(e)(2) that allows a transferable tax credit certificate issued under AS Section 43.55.023(d) regardless of when the credit was earned, to satisfy a tax, interest, penalty, fee, or other charge that is related to the tax due under this chapter, except for a surcharge under AS 43.55.201-43.55.299 or 43.55.300 or the tax levied by AS 43.55.011(i) or 43.55.014; is for a calendar year before the year in which the certificate is applied; and has not been subject to an administrative proceeding or litigation.<sup>7</sup>

Section 9 of this Act takes effect immediately under AS 01.10.070(c).

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5. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 4; *see also* ALASKA STAT. § 43.55.023(c).

6. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 4-5.

7. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 5-6; *see also* ALASKA STAT. § 43.55.023(e).

*5. House Bill 111, Section 7: Amendment Alaska Statutes Section 43.55.023(d)*

Section 7 of HB 111 amends AS Section 43.55.023(d) by limiting the ability of a tax payer to obtain a cash payment under AS 43.55.028 to those credits received for a lease expenditure incurred before July 1, 2017.<sup>8</sup>

Section 7 of this Act is retroactive to July 1, 2017.

*6. House Bill 111, Section 11: Amendment Alaska Statutes Section 43.55.025(a)*

Section 11 of HB 111 amends AS Section 43.55.025(a) by allowing the tax credits created under that section to apply against the taxes levied under Alaska Net Income Tax Act<sup>9</sup> for exploration expenditures incurred for work performed on or after July 1, 2016.

Section 11 of this Act takes effect immediately under AS 01.10.070(c).

*7. House Bill 111, Section 15: Amendment Alaska Statutes Section 43.55.025(g)*

Section 15 of HB 111 amends AS Section 43.55.025(g) by preventing the any tax payer who is the recipient of a transferred production tax credit from applying it against taxes levied under Alaska Net Income Tax Act<sup>10</sup>

Section 15 of this Act takes effect immediately under AS 01.10.070(c).

*8. House Bill 111, Section 16: Amendment Alaska Statutes Section 43.55.025(h)*

Section 16 of HB 111 amends AS Section 43.55.025 by adding a new subsection, AS Section 43.55.025(h), that allows the purchaser of a production tax credit certificate to receive a credit against its production tax liability for the full amount of the credit, in a later calendar year and regardless of when the credit was earned, to satisfy a tax, interest, penalty, fee, or other charge that is related to the tax due under this chapter, except for a surcharge under AS 43.55.201-43.55.299 or 43.55.300 or the tax levied by AS 43.55.011(i) or 43.55.014; is for a calendar year before the year in which the certificate is applied; and has not been subject to an administrative proceeding or litigation.<sup>11</sup>

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8. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 4-5.

9. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 7; *see also* ALASKA STAT. § 43.20.

10. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 12; *see also* ALASKA STAT. § 43.20.

11. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 12-13; *see also* ALASKA STAT. § 43.55.025(h).

Section 16 of this Act takes effect immediately under AS 01.10.070(c).

*9. House Bill 111, Section 17: Amendment Alaska Statutes Section 43.55.025(i)*

Section 17 of HB 111 amends AS Section 43.55.025(i) by adding a new subsection, AS Section 43.55.025(i)(2), allowing the tax credits created under that section to apply against the taxes levied under Alaska Net Income Tax Act<sup>12</sup> for exploration expenditures incurred for work performed on or after July 1, 2016.<sup>13</sup>

Section 17 of this Act takes effect immediately under AS 01.10.070(c).

*10. House Bill 111, Section 19: Amendment Alaska Statutes Section 43.55.025*

Section 19 of HB 111 amends AS Section 43.55.025 by adding a new subsection, AS Section 43.55.025(q), which directs the Department of Revenue, upon receipt of an application for a tax credit certificate is submitted under Section 43.55.025(f), to issue a conditional tax credit certificate. Section 19 of HB 111 further established that said conditional tax credits may be used to apply for the purchase of a tax credit certificate under AS 43.55.028(e) if the conditional tax credit certificate is for exploration expenditures incurred before July 1, 2017, that they are non-transferable, and that they expire on the day on which the department issues a transferable tax credit certificate under (f) of this section.<sup>14</sup>

Section 19 of this Act takes effect immediately under AS 01.10.070(c).

*11. House Bill 111, Section 20: Amendment Alaska Statutes Section AS 43.55.028(a)*

Section 20 of HB 111 amends AS 43.55.028(a) by adding a provision whereby the oil and gas tax credit fund is restricted from purchasing a tax credit certificate for a for a credit earned under AS 43.55.028 for activity occurring on or after July 1, 2017.<sup>15</sup>

Section 20 of this Act takes effect immediately under AS 01.10.070(c).

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12. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 13; *see also* ALASKA STAT. § 43.20.

13. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 13; *see also* ALASKA STAT. § 43.55.025(i).

14. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 14.

15. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 14; *see also* ALASKA STAT. § 43.55.028(a)

*12. House Bill 111, Section 28: Amendment Alaska Statutes Section 43.55.165*

Section 28 of HB 111 amends AS Section 43.55.165 by adding seven new subsections, AS Section 43.55.165(m), AS Section 43.55.165(n), AS Section 43.55.165(o), AS Section 43.55.165(p), AS Section 43.55.165(q), AS Section 43.55.165(r), and AS Section 43.55.165(s).<sup>16</sup>

AS Section 43.55.165(m) allows a tax payer to apply all or a portion of a carried-forward annual loss or carry any unused portion forward, after application of a producer's lease expenditures that are incurred in that calendar year.<sup>17</sup>

AS Section 43.55.165(n) establishes that, before the application of any credits under AS Section 43.55.165, the maximum amount of carried-forward annual loss that a taxpayer may apply in a year is equal to the amount, when combined with the lease expenditures of the current year and any credits under this chapter, necessary to reduce the amount calculated under AS 43.55.011(e) to the equivalent amount of tax due under AS 43.55.011(f).<sup>18</sup>

AS Section 43.55.165(o) establishes that a carried-forward annual loss may only be applied to determine the production tax value of oil or gas for a category for which a separate annual production tax value is required to be calculated under AS 43.55.160(a) or (h) if the lease expenditure resulting in the carried-forward annual loss was incurred in the same category. AS Section 43.55.165(o) further establishes that a carried-forward annual loss may only be applied beginning in the calendar year in which regular production of oil or gas from the lease or property where the lease expenditure resulting in the carried forward annual loss was incurred commences.<sup>19</sup>

AS Section 43.55.165(r) tasks the Alaska Oil and Gas Conservation Commission with determining the commencement of regular production for purposes of AS Section 43.55.165(o)(2) and AS Section 43.55.165(p) of this section.<sup>20</sup>

The Governor signed H.B. 111 into law on July 27, 2017.<sup>21</sup>

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16. 2017 Alaska Laws 2nd Sp. Sess. (H.B. 111) at 18-19.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

### III. Judicial Developments

#### A. United States Bankruptcy Court

##### 1. *In re Cook Inlet Energy LLC*<sup>22</sup>

In this case, the United States Bankruptcy Court, District of Alaska, addressed the interpretation and scope of the dump lien statute, Alaska Statute § 34.40.140, and specifically whether providing labor and services to access the gas located within a reservoir, without extracting the gas from said reservoir, is sufficient for a dump lien to attach to such gas.<sup>23</sup>

The court held that providing labor and services to access gas that remains in its natural reservoir is not sufficient for a dump lien to attach to said gas.<sup>24</sup>

##### a) *Facts and Proceedings*

Cook Inlet Energy, LLC (“Cook Inlet”) operates several oil and gas wells subject to this litigation (“North Fork wells”).<sup>25</sup> In February 2014, Cook Inlet granted Apollo Investment Corporation (“Apollo”) security interests in substantially all of its assets, including the North Fork wells.<sup>26</sup>

On November 19, 2014, Cook Inlet entered into a contract with All American Oilfield Associates, LLC, the predecessor of All American Oilfield, LLC (together, “All American”), to drill, complete, engineer and/or explore three wells on three oil and gas leases held by Cook Inlet, known as the North Fork field.<sup>27</sup> All American completed its obligations under the contract, and on June 11, 2015 recorded a Claim of Oil and Gas Lien in the amount of \$322,284.51 against Cook Inlet.<sup>28</sup> The lien purported to attach (1) to Cook Inlet’s gas wells pursuant to Alaska Statute § 34.35.125; (2) to mills or machines under Alaska Statute § 34.25.130; and (3) to the dump or mass of minerals produced from the North Fork wells under Alaska Statute § 34.35.140.<sup>29</sup> On August 6, 2015, Cook Inlet

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22. *In re Cook Inlet Energy LLC*, Case No. A15-00236-GS, 2017 WL 1082217 (Bankr. D. Alaska Mar. 21, 2017).

23. *Id.* at \*1.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at \*2.

29. *Id.*



consented to an involuntary chapter 11 bankruptcy that was initiated by creditors of Cook Inlet.<sup>30</sup>

On January 14, 2016, All American commenced an action to determine the validity and priority of its secured claims,<sup>31</sup> arguing that due to the labor and services it provided for the North Fork wells, pursuant to Alaska Statute § 34.35.140, it holds a priming dump lien against all remaining gas in the native reservoirs under the wells, and that Alaska Statute § 34.35.140(c) gives its lien priority over Apollo and other previously secured creditors.<sup>32</sup> Cook Inlet acknowledges that All American provided such labor and services, but argues that because the gas remains in its native reservoir, there was no “dump” to which the lien may attach, and that All American’s lien does not qualify as a priming dump lien.<sup>33</sup> Each party filed Motions for Summary Judgment.

*b) Analysis*

The existence and priority of All American’s dump lien depends upon the interpretation of two statutes: Alaska Statute § 34.35.140, which creates a dump lien, and Alaska Statute § 34.35.170, which defines the terms “dump” and “mass.”<sup>34</sup>

Alaska Statute § 34.35.140(a) provides those performing work on a mine or well with a lien on the dump or mass<sup>35</sup>, defined in Alaska Statute § 34.35.170(a)(1) as being “the mineral-bearing sands, gravel, earth, ore, stone, coal, oil, gas, other fluids or minerals *extracted, hoisted, and raised* from a mine or mining claim, while in mass at the mine or on the mining claim or adjacent to it, whether it is deposited in dumps or piles, or placed in hoppers, tanks, or reservoirs, or in sluice boxes or bunkers or other receptacles and whether partially or wholly reduced from its primary state or not.”<sup>36</sup> A dump lien is given priority over all other liens or encumbrances regardless of whether it arises before or after those encumbrances.<sup>37</sup>

When interpreting statutory language, Alaska courts apply a sliding scale approach,<sup>38</sup> in which the plainer the language of the statute, the more

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30. *Id.*

31. *Id.*

32. *Id.* at \*3.

33. *Id.*

34. *Id.* at \*6.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (citing *Moody-Herrera v. State Dep’t of Nat. Res.*, 967 P.2d 79, 84 (Alaska 1998)).

convincing contrary evidence must be.<sup>39</sup> The courts avoid interpreting a statute in a manner that would render other provisions in the statute meaningless.<sup>40</sup>

*(1) All American cannot establish the existence of a dump to which its lien may attach.*

The court focused heavily on the statutory scheme established by the legislature pertaining to mining liens. The legislature created three separate and distinct classes of mining liens:<sup>41</sup> (1) a lien that attaches to the “mine or mining claim, oil, gas, or other claim or well,” which extends to “all valuable mineral deposits, including coal, oil, gas, or other fluid, and all lodes, veins, or rock in place containing minerals;”<sup>42</sup> (2) a lien that attaches to mills or machines;<sup>43</sup> and (3) a that attaches to the dump or mass of “the mineral-bearing sands, gravel, earth, ore, stone, coal, oil, gas, other fluids or minerals *extracted, hoisted, and raised* from a mine or mining claim, while in mass at the mine or on the mining claim or adjacent to it.”<sup>44</sup>

The court reasoned that an interpretation of the term “dump” which included gas remaining in its native reservoir would (a) ignore the plain language of Alaska Statute § 34.35.170(a)(1) requiring that the minerals to be “extracted, hoisted, and raised” from a mine or mining claim to be considered a dump or mass; (b) would be contrary to the statutory scheme of having three separate and distinct classes of mining liens, by making the gas in its native reservoir subject to both the general mine and mining claim lien, and to the dump lien; and (c) would render the general (non-priority) mine and mining claim lien meaningless as to gas in its native reservoir because such gas would also always be subject to the higher priority dump lien.<sup>45</sup>

*c) Conclusion*

The court held that (1) All American failed to show that a dump or mass exists to which its lien claim could attach; (2) although All American has a

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39. *Id.* at \*6.

40. *Id.*

41. *Id.* at \*7.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at \*9.

valid, perfected lien against the mine, including the natural gas remaining in place, such lien is junior and subordinate to Apollo's secured interests.<sup>46</sup>

Cook Inlet's motion for summary judgment was granted, and All American's cross motion for summary judgment as to the priority of its lien was denied.<sup>47</sup>

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46. *Id.* at \*10.

47. *Id.*