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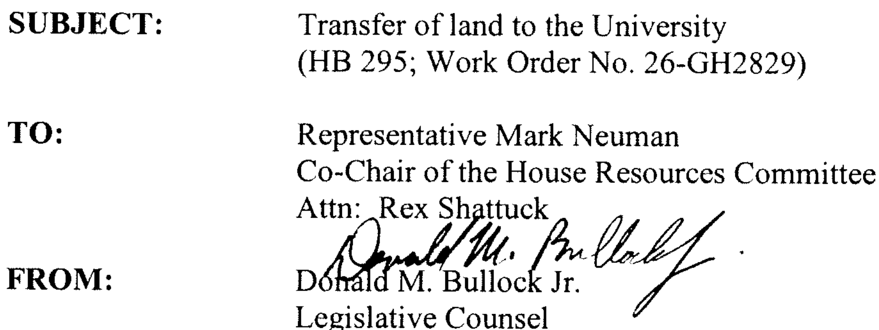

SUBJECT: Transfer of land to the University
(HB 295; Work Order No. 26-GH2829)

TO: Representative Mark Neuman
Co-Chair of the House Resources Committee
Attn: Rex Shattuck

FROM: Donald M. Bullock Jr.
Legislative Counsel

HB 295 proposes to transfer land to the University of Alaska. The bill was introduced after the Alaska Supreme Court found that a prior bill conveying land to the University of Alaska (University) was unconstitutional.[1] The court found that ch. 8, FSSLA 2005 violated art. IX, sec. 7 by dedicating the proceeds from university lands to the endowment trust fund.[2]

HB 295 does not dedicate the proceeds from the land transferred to the University. Instead, the amendment to AS 14.40.491 in sec. 10 of CSHB 295(CRA) treats "receipts from lands conveyed to the University" as university receipts, subject to appropriation by the legislature.

A problem with the 2005 University Lands Act was that it dedicated all land proceeds to the University's endowment fund. Since the court struck down all dedication of funds generated by university lands as contrary to the prohibition of dedicated funds in art. IX, sec. 7, the court never discussed whether some of the proceeds should have been directed to the permanent fund under art. IX, sec. 15. The governor's bill attempts to provide for a dedication to the permanent fund, in sec. 13, where AS 37.13.010(a) is amended to require, "25 percent of all mineral lease rentals, royalties, royalty sale proceeds, net profit shares derived from lands conveyed to the University of Alaska under AS 14.40.365 and 25 percent of all bonuses derived by the University of Alaska from mineral leases on these lands" to be deposited in the permanent fund. I write the bill "attempts" because the paragraph that is amended -- AS 37.13.010(a)(1) -- applies to certain payments received from leases issued on or before December 1, 1979 and bonuses from leases issued on or

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[1] *Southeast Alaska Conservation Council v. State of Alaska*, 202 P.3d 1162 (Alaska 2009).

[2] 202 P.3d at 1177.

before February 15, 1980. Compare paragraph (1) with paragraph (2) in the same section; AS 37.13.010(a)(2) provides for inclusion in the permanent fund of payments received after the dates in AS 37.13.010(a)(1). Paragraph (2) makes no mention of deposits from land conveyed to the University. I suggest the administration should explain to the committee what is intended by the amendment to AS 37.13.010 in the bill. AS 37.13.010(a), in sec. 13, needs to be amended to at least address the time period issue and the obligation to contribute mineral-related proceeds to the permanent fund.

Another issue raised by *Southeast Alaska Conservation Council v. State of Alaska* relates to how land transferred to the University is to be managed. The court stated that, as state land, university land must be administered and disposed of according to law under art. VII, sec. 2, Constitution of the State of Alaska. That part of the decision, reads as follows:[3]

> We considered the meaning of article VII, section 2 in *State v. University of Alaska* [624 P.2d 807, 814]. There, we held that the state could take land that Congress had granted to the University to be held in trust for it under the federal 1929 act, but that the state had to compensate the University with monetary damages or equivalently valuable land. Our opinion emphasized article VII, section 2's command that "property shall be administered and disposed of according to law," and noted that "'according to law' refer[s] to the legislature's power to make laws." *Thus, even when the University has title to land, "only the legislature can make laws effecting the disposal of land, not the Board of Regents."* We further observed that "[t]he natural resources article of the Alaska Constitution grants extensive powers to the legislature to control lands," which makes "clear that [the University lands received under the 1929 act] 'belong' to the state." The conclusion we reached in *State v. University of Alaska,* that University land is state land, applies even more readily to the present case because the University land involved here is not shielded by a federal trust obligation. Statutory language treating University lands differently from other state land does not overcome this constitutionally based conclusion.

CSHB 295(CRA) contains legislative findings and purpose in sec. 1. Paragraph (2) in that section refers to art. VII, sec. 2, Constitution of the State of Alaska, but paraphrases the constitutional provision in a somewhat confusing manner. Paragraph (2) states that the legislature finds:

> (2) article VII, sec. 2 of the Constitution of the State of Alaska provides that the University of Alaska shall have title to all real property conveyed to it and that *the legislature shall prescribe how university property shall be administered according to law;*

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[3] 202 P.3d at 1171 (footnotes omitted, emphasis added).

(Emphasis added.) The actual constitutional provision, addressed in the court's opinion, is:

> SECTION 2. State University. The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. *Its property shall be administered and disposed of according to law.*

Although the court stated, "Thus, even when the University has title to land, only the legislature can make laws effecting the disposal of land, not the Board of Regents[,]" the amendment to AS 14.40.291(a) in sec. 4 of CSHB 295(CRA) requires the land to be managed "**in accordance with** [AS NONTAXABLE TRUST LAND UNDER] AS 14.40.365 - 14.40.367 *and policies of the Board of Regents*." [Emphasis added.]

AS 14.40.366 is repealed and reenacted in sec. 6 of CSHB 295(CRA), and addresses the management requirements for university land to be transferred under the bill. That section gives general direction to the Board of Regents to manage the lands; the board is to "adopt policies that require the preparation of land development plans and land disposal plans," "offer first refusal to the closest municipality" on land offered for sale, and "adopt policies requiring public notice before approval of land development plans and land disposal plans." Whether this law -- AS 14.40.366 -- rises to the level of a law effecting the disposal of land under art. VII, sec. 2, in light of the discretion granted to the Board of Regents, should be examined as this bill progresses. When comparing AS 14.40.366 with AS 38.05 (Alaska Land Act), there is a considerable difference in the laws providing for the administration and disposal of state land. For example, AS 38.05.180 contains extensive provisions relating to oil and gas leasing. What provisions would apply to oil and gas leasing on land conveyed to the University in light of AS 38.05.030(f) that exempts "[l]and owned by the Board of Regents of the University of Alaska"?[4]

Section 15 of CSHB 295(CRA) would ratify conveyances that were made before the court's decision on ch. 8, FSSLA 2005. The Alaska Supreme Court remanded the case to the superior court with instructions to order reconveyances to the State of the land transferred under the act and order the return of any net proceeds received from the land.[5]

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[4] Under art. VII, sec. 2, the university can hold title to land; AS 14.40.170(a), the Board of Regents is responsible for the care, control, and management of the land, but not ownership. CSHB 295(CRA) transfers land to the University, not the Board of Regents.

[5] 202 P.3d at 1177. The "net proceeds" part of the order is not clear. Since the court found that money from the land could not be dedicated, questions arise as to what funds were deducted in determining the "net proceeds" and whether costs associated with the management of the land had been appropriated by the legislature.

What follows below is an analysis of *Southeast Alaska Conservation Council v. State of Alaska* that may be helpful as you consider CSHB 295(CRA) in your committee.

***Southeast Alaska Conservation Council v. State of Alaska* and the conveyance of land to the University of Alaska under ch. 8, FSSLA 2005**

Introduction

On March 13, 2009, the Alaska Supreme Court issued a decision in *Southeast Alaska Conservation Council v. State.*[6] The decision concludes that the dedication of money to the endowment trust fund of the University of Alaska (University) generated from land conveyed to the University by ch. 8, FSSLA 2005 violated the prohibition against dedicated funds in art. IX, sec. 7 of the Alaska Constitution. The court declined to sever the land transfer provisions of the Act from the unconstitutional dedicated fund provisions because the court found the survival of those provisions "would not serve the act's main purpose and would operate strikingly differently from the original act."[7]

The court remanded the case to the superior court,

> with instructions (1) to order reconveyance to the State of the land transferred under the act, (2) to order the return of any net proceeds received from the land, and (3) to enter judgment in favor of the appellants in accordance with the views expressed in this opinion.[8]

The decision recognized the authority of the University to have title to real and personal property under art. VII, sec. 2, Constitution of the State of Alaska.[9] While the University may have title, the court concluded that the same section of the constitution requires that "[the University's] property shall be administered and disposed of according to law," and

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[6] 202 P.3d 1162 (Alaska 2009).

[7] 202 P.3d at 1176. The court identified the main purpose of the act as follows:

> The legislative findings show that the main purpose of the act was to make a land grant that would operate in a manner similar to the way that the University's federal land grant has operated since before statehood: the University is partially supported by net earnings from the [endowment trust fund], which in turn is funded by net proceeds from revenues derived from the sale or use of land grant lands.

202 P.3d at 1174 (footnote omitted).

[8] 202 P.3d at 1177.

[9] 202 P.3d at 1171.

"according to law" refers to the legislature's power to make laws; [10] the Board of Regents does not have the power to effect the disposal of land outside of laws passed by the legislature. The court wrote:

> Thus, even when the University has title to land, "only the legislature can make laws effecting the disposal of land, not the Board of Regents." We further observed that "[t]he natural resources article of the Alaska Constitution grants extensive powers to the legislature to control lands," which makes "clear that [the University lands received under the 1929 act] 'belong' to the state." The conclusion we reached in *State v. University of Alaska,* that University land is state land, applies even more readily to the present case because the University land involved here is not shielded by a federal trust obligation. Statutory language treating University lands differently from other state land does not overcome this constitutionally based conclusion.[11]

Following the finding that University land is state land, the court found that revenue from the land is state revenue for purposes of the dedicated funds clause and would be subject to appropriation. Revenue from state land conveyed to the University could be appropriated to the University or to any other state agency. On this point, the court wrote, in the context of is severability discussion:

> The land grant provisions of the act, if allowed to stand alone, would not enhance the University's endowment. With only the land grant provisions, the legislature would appropriate on an annual basis the net proceeds gained from the sale or use of the land. The appropriation could be directed in whole or in part to the University or any agency. The appropriated proceeds would be available for immediate use. They would not be capitalized and preserved. If the University were to sell the land, which would be likely given the legislature's goal of encouraging development, the land could be substantially disposed of within a few decades. Because the net proceeds from the land would be spent rather than saved, the benefits from the land grant, far from lasting in perpetuity, could be dissipated in a relatively short period of time.[12]

In summary, the case decided that the legislature had the exclusive power to pass laws effecting the disposal of land held by the University, revenue from the land conveyed by

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[10] *Id.* (footnotes omitted).

[11] *Id.* (footnotes omitted). The quoted excerpts are from *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981).

[12] 202 P.3d at 1175.

the state may not be dedicated, and the revenue from state land conveyed to the University could be appropriated to the University or to any other state agency.

DISCUSSION

Bills conveying state land to the University

In 2000 and 2005 the Alaska legislature passed bills conveying approximately 250,000 acres to the University.[13] The 2000 legislation (SB 7) allowed the University to select 250,000 to 260,000 acres of land and required the "net income derived from the sale, lease, or management of the land selected by and conveyed to the University of Alaska" to be placed and held in the University's endowment trust fund (ETF).[14] Governor Knowles vetoed SB 7, the legislature overrode the veto by less than a three-fourths majority. The veto override was challenged on the basis that the conveyance of land was an appropriation requiring a three-fourths majority for override. On appeal, the Alaska Supreme Court concluded that the bill's provisions were not an appropriation and that the veto had been overridden by the legislature.[15] The case considering the veto of SB 7 did not address provisions of the Act relating to the dedication of funds.

In 2005, the legislature passed HB 130. HB 130 differed from SB 7 by identifying the specific land to be transferred to the University rather than have the University select the land. Similar to SB 7, HB 130 retained the requirement that net proceeds from the land be placed in the ETF. HB 130 also established a "University Research Forest" for advancing research into forest practices, ecology, wildlife management, and recreation.[16]

University land is state land; revenue from University land is state revenue

"Our case law establishes that University lands are state lands."[17] "Because University land is state land, revenue from University land is state revenue for purposes of the dedicated funds clause."[18] These two sentences are at the heart of the supreme court's decision. The two conclusions are critical for determining the laws that are applicable to

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[13] Ch. 136, SLA 2000 (HCS CSSB 7(FIN) AM H); Ch. 8, FSSLA 2005 (CCS HB 130(efd fld S)).

[14] 202 P.3d at 1164 - 66.

[15] *Alaska Legislative Council .v Knowles*, 86 P.3d 891 (Alaska 2004).

[16] 202 P.3d at 1166. The establishment of the University Research Forest is the only part of HB 130 that survived the court's decision on HB 130. *Id.* at 1176.

[17] 202 P.3d at 1171.

[18] 202 P.3d at 1172.

the management and disposition of University land and the use of revenue derived from University land.

The conclusion that University land is state land is grounded in art. VII, sec. 2, Constitution of the State of Alaska. Justice Matthews, writing for the court, wrote:

> Article VII, section 2 establishes the University, declares it a "body corporate," provides that the University "shall have title to all real and personal property now or hereafter set aside for or conveyed to it," and states that "[i]ts property shall be administered and disposed of according to law." We considered the meaning of article VII, section 2 in *State v. University of Alaska.*[19] There, we held that the state could take land that Congress had granted to the University to be held in trust for it under the federal 1929 act, but that the state had to compensate the University with monetary damages or equivalently valuable land.
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> . . .
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> The conclusion we reached in *State v. University of Alaska,* that University land is state land, applies even more readily to the present case because the University land involved here is not shielded by a federal trust obligation. Statutory language treating University lands differently from other state land does not overcome this constitutionally based conclusion.[20]

The fact that University land is state land under art. VII, sec. 2 leads to the second conclusion, that revenue for University land is state revenue and therefore subject to the prohibition against dedicated funds in art. IX, sec. 7, Constitution of the State of Alaska. Two historical sources cited by the court further support the court's conclusion. First, the decision quotes Governor Egan's statement in 1959 that he made after vetoing a bill intended to reserve lands for the support of the University. The governor wrote:[21]

> I am vetoing [the bill], a bill intended to reserve lands for the support of the University of Alaska, because I believe it wrong in principle, inconsistent with constitutional concepts and not in the public interest. In so saying, I may add that I would act similarly on any bill which sought, as this does, to make special disposition of the proceeds of public lands in aid of one public function to the exclusion of others.
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[19] *State v. University of Alaska,* 624 P.2d 807, 814 (Alaska 1981).

[20] 202 P.3d at 1171 (notes and citations by the court omitted).

[21] 202 P.3d at 1172, quoting Governor Egan's Statement in 1959 House Journal 1186, 1186 - 87.

> To return now, by the enactment of [this bill], to a proposal whereby lands are given piecemeal earmarking for various state functions would be a distinct step backward.
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> If we are to return to the "internal improvement" concept of earmarking state lands, can we in good conscience limit the practice to the University? . . . Certainly, this bill invites similar treatment for other state responsibilities. By this bill the door would be opened to an unplanned disposition, or dissipation, of the resource without regard to relative need and without regard to the clear constitutional and congressional intent.

The second historical support for the court's conclusion is found in a letter from Senator Bob Bartlett to William Egan in 1964.[22] With regard to the position for further dedication of land after Alaska achieved statehood, Senator Bartlett wrote:

> [A]t many times during the consideration of the statehood bill, efforts were made to set aside this amount of land or that amount of land for the common schools and for other educational uses. I always resisted these and, as it turned out, successfully. My conviction was--and is--that notwithstanding the possible need for such reservations in the early statehood bills, the reasons for such have long since evaporated. . . . [I]f dedication is made for one institution or one purpose, what argument could be made against expanding? None, of course.[23]

Both historical quotes relate to both the dedication of land for a particular purpose and the disfavor of dedicating revenue from that land.

Proceeds from University land transferred from the state may not be dedicated

The lower court's decision found that the proceeds from state land are not "proceeds of any state tax, or license" that may not be dedicated under the literal reading of art. IX, sec. 7, Constitution of the State of Alaska.[24] That provision reads as follows:

> **Dedicated Funds.** ***The proceeds of any state tax or license shall not be dedicated to any special purpose***, except as provided in section 15 of this article or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

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[22] Letter from Bob Bartlett to William Egan (June 8, 1964), quoted and cited in 202 P.3d at 1172.

[23] *Id.*

[24] 202 P.3d at 1167.

(Emphasis added.) One of the three exceptions to the prohibition is art. IX, section 15, which authorizes the dedication of a certain amount of mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State to the Alaska Permanent Fund.[25]

In analyzing the extent of the prohibition in art. IX, sec. 7, the court reiterated its statement in *State v. Alex*, that the prohibition is "intended . . . to prohibit not only the dedication of taxes, but also such revenue as the proceeds from the sale of state lands."[26] Regarding *Alex*, the court wrote:[27]

> We reaffirm the reasoning and language of *Alex*. In *Alex*, we struck down a statute authorizing aquaculture associations to collect assessments from commercial salmon fishermen because it violated the dedicated funds clause. Our opinion considered the meaning of the word "tax" and concluded that "the sense in which 'tax' is used in *article IX, section 7 of the constitution* must be determined from its context, both in the text and according to the discussion at the constitutional convention which adopted the wording." We then turned to constitutional history, noting that the studies on which Constitutional Convention delegates relied encouraged adopting a prohibition on earmarking because the dedication of funds "curtailed the exercise of budgetary controls and simply amounted to an abdication of legislative responsibility." We also remarked that the commission's studies "used the terms revenues, funds, and taxes interchangeably" in discussing this issue. We interpreted an amendment to the proposed provision that inserted "proceeds of any state tax or license" in the place of "all revenues" as an effort to "allow for the setting up of certain special funds, such as sinking funds for the repayment of bonds," rather than "to exempt some sources of revenue from the prohibition." Thus, we held "that since the constitution prohibits the dedication of any source of revenue," the assessments in question could not be earmarked.
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> We see no reason to hold differently now. In addition to the history described in *Alex*, the amendment to *article IX, section 7* creating

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[25] Although the court did not address the issue of dedicating similar revenues to the ETF rather than the Permanent Fund when generated from University land, I believe that such dedication would have also been unconstitutional under art. IX, sec. 15. The court did not need to reach this issue after concluding that no revenue from University land could be dedicated to the ETF.

[26] 202 P.3d at 1169 (quoting *State v. Alex*, 646 P.2d 203, 210 (Alaska 1982)).

[27] 202 P.3d at 1169 - 70 (footnotes omitted, emphasis added).

> an exception for the Permanent Fund indicates that the prohibition is meant to apply broadly. If only revenue collected as taxes or license fees were included, there would have been no need to expressly exempt "all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State" to ensure that placing those revenues in the Permanent Fund did not violate the constitution.

The court also rejected the arguments by the State that:[28]

> the grant of land and proceeds from it does not violate the dedicated funds clause because the grant of land and proceeds is not a dedication of revenue but rather an asset conveyance. The State asks us not to rely on *State v. Alex* but to rule that this case should follow what it contends is the reasoning of *Myers v. Alaska Housing Finance Corp.*

In *Myers v. Alaska Housing Finance Corp.*[29] the court "upheld the state's sale of future proceeds from settlement with tobacco companies against a challenge under the dedicated funds clause."[30] The court described the situation in *Myers* as legislative authorization of "the sale of the right to future proceeds from the settlement for a lump-sum amount based on the present value of the future proceeds."[31] The court continued:[32]

> The legislature appropriated the lump sum in a single year for various purposes. No dedicated fund was created nor were revenues placed in a pre-existing dedicated fund. Accordingly, we concluded that "[b]ecause the legislature sold the tobacco settlement and then appropriated the resulting income, it did not directly violate the anti-dedication clause." Nonetheless, we were concerned that the transaction might be contrary to the spirit of the clause; ultimately, however, we found no constitutional violation.
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> Thus *Myers* neither holds nor suggests that revenue from state property can be placed in a dedicated fund. Likewise, it does not imply that there is an exception to the dedicated funds clause applicable to revenue from state property. *Instead, Myers suggests that the reach of the dedicated funds clause might be extended to statutes that, while not directly violating the*

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[28] 202 P.3d at 1170 (footnote omitted).

[29] *Myers v. Alaska Housing Finance Corp.*, 68 P.3d 386 (Alaska 2003).

[30] 68 P.3d at 391 - 393.

[31] 202 P.3d at 1170.

[32] *Id.*

> *clause by dedicating revenues, in some other way undercut the policies underlying the clause.*

(Emphasis added.)

The court distinguishes the dedication of funds specifically prohibited under art. IX, sec. 7 from the allocation of revenue by statutes that undercut the policy behind the section. The court seems to emphasize that in *Myers,* no dedicated fund was created and the revenues from the tobacco settlement were not placed into a dedicated fund. That situation is factually distinguishable from the University land conveyance in which the revenues from University land conveyed by the state were to be deposited in the University's endowment trust fund. The court described the nature of the trust fund as a dedicated fund by stating, "State law mandates that the principal of the trust fund be held in perpetuity and that '[t]he total return from the [ETF] shall be used exclusively for the University of Alaska.'"[33]

University land must be administered and disposed of according to law

As noted above, the court reiterated the requirement in art. VII, sec. 2 that University land "shall be administered and disposed of according to law" and "'according to law' refer[s] to the legislature's power to make laws."[34] The court continued, "Thus, even when the University has title to land, 'only the legislature can make laws effecting the disposal of land, not the Board of Regents.'"[35]

The Alaska Land Act, AS 38.05.005 - 38.05.990, was enacted pursuant to art. VIII, sec. 10, Constitution of the State of Alaska.[36] That section of the constitution reads as follows:

> No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

Managing land conveyed to the University using the provisions in the Alaska Land Act would be consistent with the court's decision; managing University land under any policy established by the Board of Regents that is inconsistent with the Alaska Land Act or other laws passed by the legislature relevant to the management of State land violates the

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[33] 202 P.3d at 1166 (referring to AS 14.40.400(a) and (c)).

[34] 202 P.3d at 1171 (notes and citations omitted).

[35] *Id.*

[36] *Moore v. State,* 553 P.2d 8, 21 (Alaska 1976).

"according to law" requirement in art. VII, sec. 2.[37]

Conclusion and summary

While the legislature may convey land to the University and the University may hold title to that land, there seems to be little benefit to the University from the transfer. The land would continue to be "state land" and have no special status or exclusion from the requirement that the land be managed according to law. The University would have to manage the land consistent with laws passed by the legislature, such as the Alaska Land Act. Management pursuant to policies adopted by the Board of Regents that are inconsistent with law violates art. VII, sec. 2, Constitution of the State of Alaska.

Revenue from land conveyed to the University is state revenue for purposes of the prohibition against dedicated funds in art. IX, sec. 7, Constitution of the State of Alaska and is subject to appropriation. While revenue from University land may be appropriated to the University, appropriations could also be made for any other public purposes.

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[37] The requirement that University land be "administered and be disposed of according to law" is consistent with the public trust doctrine adopted by the Alaska Supreme Court in *CWC Fisheries v. Bunker*, 755 P.2d 1115, 1117 - 18 (Alaska 1988) and AS 38.05.502. Both the doctrine and the statute reiterate that the state holds land in trust for the people of the state; the policies for management of that land determined by the legislature are consistent with that principle.