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STATE OF ALASKA 1984 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: 2/8/84

REQUEST

Bill/Resolution No.: CSHB 455 (Res)  
Title: defects in the title of  
State Land  
Sponsor: Goll & Grussendorf  
Requestor:  
Date of Request:

FISCAL DETAIL

Agency Affected: Natural Resources  
Program Category Affected: Information &  
Record Management - Title Defense  
BRU, Program or Subprogram(s) Affected:

EXPENDITURES/REVENUES: (Thousands of Dollars)

|                        | FY 84 | FY 85 | FY 86 | FY 87 | FY 88 | FY 89 |
|------------------------|-------|-------|-------|-------|-------|-------|
| <b>OPERATING</b>       |       |       |       |       |       |       |
| 100 PERSONAL SERVICES  |       | 46.2  |       |       |       |       |
| 200 TRAVEL             |       | 1.2   |       |       |       |       |
| 300 CONTRACTUAL        |       | 4.0   |       |       |       |       |
| 400 SUPPLIES           |       | 2.0   |       |       |       |       |
| 500 EQUIPMENT          |       | 1.5   |       |       |       |       |
| 600 LAND & STRUCTURES  |       |       |       |       |       |       |
| 700 GRANTS, CLAIMS     |       |       |       |       |       |       |
| 800 MISCELLANEOUS      |       |       |       |       |       |       |
| <b>TOTAL OPERATING</b> | 0     | 54.5  | 57.7  | 61.1  | 64.7  | 68.5  |
| <b>CAPITAL</b>         | 0     | 0     | 0     | 0     | 0     | 0     |
| <b>REVENUE</b>         | 0     | 0     |       |       |       |       |

FUNDING: (Thousands of Dollars)

|               |  |      |      |      |      |      |
|---------------|--|------|------|------|------|------|
| GENERAL FUND  |  | 54.5 | 57.7 | 61.1 | 64.7 | 68.5 |
| FEDERAL FUNDS |  |      |      |      |      |      |
| OTHER         |  |      |      |      |      |      |
| <b>TOTAL</b>  |  | 54.5 | 57.7 | 61.1 | 64.7 | 68.5 |

POSITIONS:

|           |  |   |   |   |   |   |
|-----------|--|---|---|---|---|---|
| FULL-TIME |  | 1 | 1 | 1 | 1 | 1 |
| PART-TIME |  |   |   |   |   |   |
| TEMPORARY |  |   |   |   |   |   |

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

General Fund

ANALYSIS: Attach a separate page for analysis

Prepared By: Carol Shobe/Joe Burch Phone: 276-2653  
Division: Technical Services Date: 2/8/84  
Approved by Commissioner: *William D. Amundson* Date: 2/8/84  
Agency: Department of Natural Resources

Distribution (by Agency preparing fiscal note):

Legislative Finance  
Legislative Sponsor  
Requestor  
Office of Management and Budget  
Impacted Agency(ies)

12/1/83

Wrangell

Jan 26, 1984

Dear Sirs:

I am sorry I won't be able to attend  
The House Resources hearing at the Capitol,  
Room 118 on January 30<sup>th</sup> on House Bill 455.

We would all like you to know that we  
support House Bill 455 and pray for its  
unopposed passage.

Thank you

Viola Erickson

MEMBER OF

S.R.A. Council - WRANGELL

BOARD OF DIRECTORS.

Southeast ALASKA

Regional Health Corporation

STATEMENT OF ROBERT D. ARNOLD,  
DEPUTY COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES  
ON HOUSE BILL 455  
BEFORE THE HOUSE RESOURCES COMMITTEE  
JANUARY 30, 1984

Mr. Chairman, members of the Committee, I am pleased to appear in support of House Bill 455, introduced by Representatives Peter Goll and Ben Grussendorf.

This bill would authorize the Department of Natural Resources to correct defects in the State's title to lands received from the federal government. It is designed primarily to allow for the administrative settlement of Native allotment claims on State land.

The bill would authorize our department to reconvey lands that were mistakenly conveyed to the State by the federal government. To insure that the State receives credit for the reconveyed lands in its overall entitlements under the Statehood Act, the bill would also waive the provisions of AS 38.05.125 requiring reservation of the mineral estate.

The primary need for this legislation arises from the fact of more than 200 Native allotment claims on State land. In 1979, a federal district court ruled that land used and occupied by Native allotment applicants should not have been conveyed to the State, even though the allotment applications were not filed until after the State received title. Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979). The court also ruled that the federal government has a trust responsibility to recover any such lands it wrongfully conveyed to the State. Id.

The expedited settlement procedures established by the allotment applicants and the federal government provide that the State may reconvey the lands to the federal government and that the reconveyed acreage will be credited to the state's entitlements under the Alaska Statehood Act. The State desires to expedite settlement of the valid allotment claims where possible, but lacks express statutory authority to reconvey.

The State has also received defective title to lands from the federal government in a variety of other contexts. For example, through administrative error the federal government recently conveyed to the State six sections of land underlying the TAPS pipeline. This bill would authorize the department to correct those defects without the need for burdensome quiet title litigation which is now the only available means to do so. The federal government already has this type of authority.

Virtually all of Section 2 of the bill before you makes technical changes to subsection (b) of A.S. 38.05.035. The department has no objection to these changes (through line 15 of page 3). However, the Committee may want to take into account that Senator Bettye Fahrenkamp has introduced a bill that would make a large number of changes to Title 38, including a substantive change in subsection (b).

The substantive changes in the bill before you begin on line 16, page 3.

Subparagraph 9 of the bill would require a determination that the land was "wrongfully or erroneously conveyed to the State." In the case of a Native allotment claim, this would mean determining that Native use and occupancy predated State selection and that the allotment is otherwise valid. In the case of other title defects, this would mean determining that the federal government did not have the authority to transfer a tract of land to the State, owing, for instance to its title being held by others.

The following section of the bill would waive the requirement of AS 38.05.125 to reserve mineral estates. This provision is necessary because the State would not receive credit for the reconveyance if the mineral estate is reserved. Both our attorney general and the Bureau of Land Management regional solicitor are of the opinion that section 6(i) of the Statehood Act (the federal statute requiring reservation of the mineral estate) would not prohibit reconveyances made to the federal government under the bill. This section also waives the provisions of AS 38.05.32i which restricts disposal of State land classified as agricultural land.

The need for this bill has been discussed extensively with representatives from Native groups and various agencies of both the State and federal governments. It has the support of all of them. I hope the Committee will be able to promptly act on this measure.



# Alaska State Legislature

HOUSE OF REPRESENTATIVES  
COMMITTEE ON RESOURCES

JOHN RINGSTAD, CO-CHAIRMAN  
RICHARD SHULTZ, CO-CHAIRMAN  
POUCH V  
JUNEAU, ALASKA 99811  
(907) 465-3715

TO: Co-Chairman Ringstad  
From: Committee Staff *jm*  
Date: January 30, 1984  
Re: HB 455

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This afternoon's meeting will consider HB 455, by Representative Goll, which would create a mechanism in the statutes by which the state could, by quitclaim deed, convey state-selected lands back to the federal government. The feds would then settle the Native Allotment claims on those lands. Apparently the problem has arisen due to Native Allotment claims being filed on lands the state has selected, after the selection had been made and acted upon. Why the federal government did not have record of or recognize the use or occupation of the lands by the claimants is, perhaps, a matter for another discussion, but this bill would enable the current claims to be settled.

Sec. 1 is the statement of purpose, and speaks for itself.

Sec. 2 makes a number of grammatical clean-ups of AS 38.05.035(b) (the discretionary duties of the director of the division of land and water management) up to page 3, line 16, where it adds the new subsection 9.

Sec. 3 adds a new subsection to AS 38.05.125, disallowing its application to any state lands re-conveyed to the federal government under the new subsection 9. AS 38.05.125 defines the rights to the lands the state generally reserves to itself when it conveys statehood lands.

Included in the member's files on HB 455 are:

The bill  
An Attorney General's opinion on the issue, dated last Aug 12  
A letter of support for the bill  
Applicable statutes

**Sec. 38.05.035. Powers and duties of the director.** (a) The director shall

(1) have general charge and supervision of the division and may exercise the powers specifically delegated to him; may employ and fix the compensation of assistants and employees necessary for the operations of the division; and is the certifying officer of the division, with the consent of the commissioner, and may approve vouchers for disbursements of money appropriated to the division;

(2) manage, inspect and control state lands and improvements on them belonging to the state and under the jurisdiction of the division;

(3) execute laws, rules, regulations and orders adopted by the commissioner;

(4) prescribe application procedures and practices for the sale, lease or other disposition of available lands, resources, property, or interest in them;

(5) prescribe fees or service charges, with the consent of the commissioner, for any public service rendered;

(6) under the conditions and limitations imposed by law and the commissioner, issue deeds, leases or other conveyances disposing of available lands, resources, property or any interests in them;

(7) have jurisdiction over state lands, except those lands acquired by the Alaska World War II Veterans Board and the Agricultural Loan Board or the departments or agencies succeeding to their respective functions through foreclosure or default; to this end the director possesses the powers and, with the approval of the commissioner, shall perform the duties necessary to protect the state's rights and interest in state lands, including the taking of all necessary action to protect and enforce the state's contractual or other property rights;

(8) Repealed by § 20 ch 182 SLA 1978.

(9) maintain such records as the commissioner considers necessary, administer oaths, and do all things incidental to the authority imposed; the following records and files shall be kept confidential upon request of the person supplying the information;

(A) the name of the person nominating or applying for the sale, lease, or other disposal of lands by competitive bidding;

(B) before the announced time of opening, the names of the bidders and the amounts of the bids;

(C) all geological, geophysical and engineering data supplied, whether or not concerned with the extraction or development of natural resources;

(D) except as provided in AS 38.05.036, cost data and financial information submitted in support of applications, bonds, leases and similar items;

(E) applications for rights-of-way or easements;

(F) requests for information or applications by public agencies for lands which are being considered for use for a public purpose;

(10) account for the fees, licenses, taxes or other money received in the administration of AS 38.05.005 — 38.05.370 including the sale or leasing of land, identify their source, and promptly transmit them to the proper fiscal department after crediting them to the proper fund; receipts from land application filing fees and charges for copies of maps and records shall be deposited immediately in the general fund of the state by the director;

(11) select and employ or obtain at reasonable compensation cadastral, appraisal, or other professional personnel he considers necessary for the proper operations of the division;

(12) be the certifying agent of the state to select, accept and secure by whatever action is necessary in the name of the state, by deed, sale, gift, devise, judgment, operation of law, or other means any lands, of whatever nature or interest, available to the state, and shall be the certifying agent of the state, to select, accept or secure by whatever action is necessary in the name of the state any lands, or title or interest to lands available, granted, or subject to being transferred to the state for any purpose;

(13) Repealed by § 15 ch 181 SLA 1978; § 20 ch 182 SLA 1978.

(14) when he makes a written finding that the interests of the state will be best served, he may, with the consent of the commissioner, approve contracts for the sale, lease, or other disposal of available lands, resources, property or interests in them, and, in addition to the conditions and limitations imposed by law, he may impose additional conditions or limitations in the contracts as he, with the consent of the commissioner, determines will best serve the interests of the state; and no contract for the sale, lease, or other disposal of available lands or interests in them, is legally binding on the state until the commissioner formally records his consent to the contract; but if the appraised value is not greater than \$50,000 in the case of the sale of land or an interest in land, or \$5,000 in the case of the annual rental of land or interest in land, the director may approve and issue the contract without the consent or approval of the commissioner; the written finding shall be available to the public upon request; before a public hearing, if held, or in any case no less than 21 days before the sale, lease, or other disposal of available land, property, resources, or interests in them, the director shall make available to the public a written decision in which he sets out the facts and applicable law upon which he based his determination that the sale, lease, or other disposal will best serve the interests of the state; a written finding is not required before the approval of

- (A) a contract for a negotiated sale authorized by AS 38.05.115;
  - (B) the lease of land for a shore fishery site under AS 38.05.082;
  - (C) a permit or other authorization revocable by the department.
- (b) The director may

(1) delegate the administrative duties, functions or powers imposed upon him to a responsible employee in the division;

(2) grant preference rights for the lease or purchase of state land without competitive bid in order to correct the past or future errors or omissions of a state or federal administrative agency when inequitable detriment would otherwise result to a diligent claimant or applicant due to situations over which the claimant or applicant had no control; the exercise of this discretionary power operates only to divest the state of its title to or interests in land and may be exercised only with the express approval of the commissioner;

(3) grant a preference right to a claimant who shows bona fide improvement of state land, or federal land subsequently acquired by the state, and who has in good faith sought to obtain title to the land but who, through error or omission of others, has been denied title to it; upon a showing satisfactory to the commissioner, the claimant may lease or purchase the land at the price set on the date of original entry on the land or, if a price was not set at that time at a price determined by the division to fairly represent the value of unimproved land at the time the claim was established, but in no event less than the cost of administration including survey; the error or omission of a predecessor in interest or an agent, administrator, or executor which has clearly prejudiced the claimant may be the basis for granting a preference right;

(4) sell lands by lottery for less than their appraised value when, in his judgment, past scarcity of land suitable for private ownership in any particular area has resulted in unrealistic land values;

(5) when he determines it is in the best interest of the state and will avoid injustice to a person or his heirs or devisees, dispose of land, by direct negotiation to that person who presently uses and who used and made improvements to that land before January 3, 1959 or his heirs or devisees; the amount paid for the land shall be its fair market value on the date that the person first entered the land, as determined by the director; a parcel of land disposed of under this paragraph shall be of a size consistent with the person's prior use, but may not exceed five acres;

(6) dispose of an interest in land limited to use for agricultural purposes by lottery;

(7) convey to an adjoining landowner a parcel of land created by a highway right-of-way alignment or realignment, or a parcel created by the vacation of a state-owned right-of-way if

(A) he determines that it is in the best interests of the state;

(B) the parcel does not exceed the minimum lot size under an applicable zoning code; and

(C) the director and the planning authority having land use planning jurisdiction agree that conveyance of the parcel to the adjoining landowner will result in boundaries that are convenient for the use of the land by the landowner and compatible with municipal land use plans;

(8) for good cause extend for up to 90 days the time for rental or installment payments by a lessee or purchaser of state land under AS 38.05.005 — 38.05.370 if reasonable penalties and interest set by the director are paid.

(c) A parcel of land may be conveyed under (b) of this section without classification or reclassification under AS 38.05.300.

(d) A parcel of land described in (b) (7) of this section must be sold at its fair market value as determined by the director on the basis of an appraisal completed as provided in AS 38.05.310. Nothing in this subsection prevents the sale of land under AS 38.05.055 or 38.05.057 to a person not qualifying as an adjoining landowner if the adjoining landowner declines to purchase the land. (§ 5 art II ch 169 SLA 1959; am § 1 ch 57 SLA 1960; am §§ 2 — 4 ch 61 SLA 1960; am § 1 ch 55 SLA 1962; am § 1 ch 56 SLA 1964; am § 1 ch 98 SLA 1964; am § 1 ch 5 SLA 1965; am § 1 ch 58 SLA 1965; am § 1 ch 194 SLA 1968; am § 1 ch 164 SLA 1972; am §§ 2, 3 ch 257 SLA 1976; am §§ 1, 2 ch 176 SLA 1978; am § 15 ch 181 SLA 1978; am § 20 ch 182 SLA 1978; am § 1 ch 61 SLA 1980; am §§ 9 — 13 ch 113 SLA 1981)

**Revisor's notes.** — In subsection (b) (7), the word "convey" was substituted for "dispose" at the beginning of the paragraph and in subsection (d), the words "of land" were added following "parcel" by the revisor of statutes under AS 01.05.031.

**Effect of amendments.** — The first 1978 amendment, in subsection (b), substituted "sell lands by lottery" for "dispose of lands by competitive bid" in paragraph (4) and inserted "suitable for private ownership" in paragraph (4).

The second 1978 amendment, in subsection (a), repealed paragraph (13), which related to the powers of the director to select, administer, and dispose of mental health lands for the support of the mental health program. The third 1978 amendment, in subsection (a), repealed paragraphs (8) and (13), which related to the power of the director to administer the Land Registration Law and to select, administer, and dispose of mental health land for support of the mental health program, respectively. Section 28 of this amendatory act makes the repeal of paragraph (13) effective July 1, 1978, while § 30 of the act makes the repeal of paragraph (8) effective July 19, 1978.

The 1980 amendment added "except as provided in AS 38.05.036" at the beginning of subparagraph (a)(9)(D).

The 1981 amendment substituted "\$50,000" for "\$10,000" preceding "in the case of the sale of land," substituted "\$5,000" for "\$1,000" preceding "in the

case of the annual rental of land," substituted semicolons for periods preceding "the written finding" and preceding "before a public hearing," added "a written finding is not required before the approval of" following "interest of the state" and added subparagraphs (A)-(C) in subsection (a)(14). In subsection (b)(3), the amendment added "the price set on the date of original entry on the land or, if a price was not set at that time at" preceding "a price determined by the division." In subsection (b)(5), the amendment substituted "on the date that the person first entered the land" for "as of that date" preceding "as determined by the director." The amendment also added paragraphs (7) and (8) of subsection (b) and added subsections (c) and (d).

**Editor's notes.** — Section 7, ch. 182, SLA 1978, purported to amend this section by adding a paragraph (7) of subsection (b). Section 27 of ch. 182 made this amendment effective on the date that the Board of Regents voted to approve the matters under consideration as provided in § 24 of the act.

The Board of Regents disapproved all matters on August 17, 1978. Consequently, this amendment was ineffective.

**Opinions of attorney general.** — The interaction of AS 38.05.030(b), 38.05.035(a)(7) and (12), AS 35.05.040(1), and AS 35.20.010 was examined to determine (1) which agency of the state had authority to accept title to land transferred

### Article 5. Reservation of Rights to Alaska.

#### Section

125. Reservation

127. Access to navigable or public waters

130. Damages and posting of bond

**Sec. 38.05.125. Reservation.** Each contract for the sale, lease or grant of state land, and each deed to state land, properties or interest in state land, made under AS 38.05.315 — 38.05.325, 38.05.045 — 38.05.120, 38.08.010 — 38.08.120, or 38.50.010 — 38.50.170 except as provided in AS 38.50.050 is subject to the following reservations: "The party of the first part, Alaska, hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, all oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils of every name, kind or description, and which may be in or upon said lands above described, or any part thereof, and the right to explore the same for such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils, and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, the right to enter by itself, its or their agents, attorneys, and servants upon said lands, or any part or parts thereof, at any and all times for the purpose of opening, developing, drilling, and working mines or wells on these or other lands and taking out and removing therefrom all such oils, gases, coal, ores, minerals, fissionable materials, geothermal resources, and fossils, and to that end it further expressly reserves out of the grant hereby made, unto itself, its lessees, successors, and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain, and use all such buildings, machinery, roads, pipelines, powerlines, and railroads, sink such shafts, drill such wells, remove such soil, and to remain on said lands or any part thereof for the foregoing purposes and to occupy as much of said lands as may be necessary or convenient for such purposes hereby expressly reserving to itself, its lessees, successors, and assigns, as aforesaid, generally all rights and power in, to, and over said land, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved." (§ 1 art VII ch 169 SLA 1959; am § 14 ch 61 SLA 1960; am § 1 ch 42 SLA 1966; am § 3 ch 240 SLA 1976; am § 2 ch 175 SLA 1980)

**Effect of amendments.** — The 1980 amendment inserted the reference to AS 38.08.010 — 38.08.120, and "as" preceding "provided in AS 38.50.050" near the beginning of the section, inserted

"geothermal resources" wherever it appears throughout the section, and substituted "attorneys" for "attorney" near the middle of the section.

**Editor's notes.** — As to declaration of

Cities with AGUILAR class members

Aleknagik  
Anchorage  
Angoon  
Aniak  
Barrow  
Bethel  
Bellingham ✓  
Chignik Lagoon  
Chugiak  
Clark's Point  
Copper Center  
Delta Junction  
Dillingham  
Dot Lake  
Ekwok  
Emmonak  
English Bay  
Fairbanks  
Gakona  
Glennallen  
Grayling  
Haines  
Homer  
Hoonah  
Juneau  
Kake  
Kaktovik  
Kaltag  
Kenai  
Ketchikan  
Klukwan  
Kodiak

Koliganek  
Kotzebue  
Minto  
Montana Creek  
Naknek  
Nenana  
New Stuyahok  
Nondalton  
Nulato  
Old Harbor  
Pedro Bay  
Petersburg  
Pilot Point  
Pilot Station  
Port Bailey  
Port Graham  
Port Lions  
Portage Creek  
Powell Butte  
Quinhagak  
Saint Mary's  
Saint Michael  
Seldovia  
Skagway  
Soldotna  
South Naknek  
Spenard  
Tacoma ✓  
Tanacross  
Tanana  
Tok  
Tuluksak  
Tyonek  
Wrangell

# STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

## DEPARTMENT OF NATURAL RESOURCES

POUCH M  
JUNEAU, ALASKA 99811  
PHONE: 907-465-2400

OFFICE OF THE COMMISSIONER

February 7, 1984

The Honorable John Ringstad  
Co-Chairman  
House Resources Committee  
Pouch V  
Juneau, AK 99811

Dear Representative Ringstad:

At last week's Resources Committee hearing on HB 455, Representative Bussell asked what costs the State would bear in quitclaiming lands to the federal government for reconveyance to valid claimants. Although I responded in summary fashion to the question, I am providing more information for the consideration of Committee members.

The subject lands are largely Native allotments that the State must, by court finding, return to the federal government for reconveyance. The State has no choice but to return the lands. Whatever the value of the lands, they must be reconveyed to the federal government.

In most cases (for allotments on general grant selection lands) the State's outstanding land selection entitlement will be increased to reflect this reconveyance, so that there will be no net loss to the State. In other cases (for Mental Health grant lands and University grant lands), the deadline for state selections has passed, and federal legislation would be required to allow the State to recoup selection rights. There is no provision for the federal government otherwise to reimburse the State for retaking of these lands. The State has explored the possibility of federal legislation to achieve these purposes, and may press for it.

In summary, the State may not know what values it will give up in allowing these lands to be reconveyed to valid claimants, but it must reconvey them and it serves an important public purpose in doing so. Additionally, the legislation provides a new, less expensive mechanism for the process, saving the State legal costs that would have been associated with the processing of each claim that the State would have found itself unable otherwise to convey without court settlement.

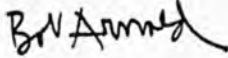
The Honorable John Ringstad

-2-

February 7, 1984

Thank you for your interest. I will be available for further questions at Wednesday's hearing. Please contact me if I may provide any information before then.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. D. Arnold".

Robert D. Arnold  
Deputy Commissioner

# YAK-TAT KWAAN, INC.

PHONE 907-784-3335

P.O. BOX 416

YAKUTAT, ALASKA 99689

February 3, 1984

The Honorable John Ringstad, Co-Chairman  
House Resources Committee  
ALASKA STATE LEGISLATURE  
Pouch V (MS 3100)  
Juneau, AK 99811

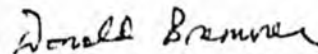
Re: House Bill No. 455

Dear Mr. Ringstad:

Yak-Tat Kwaan, Inc. is a Native Corporation formed under ANCSA. On behalf of our Shareholders and Native Allotment applicants, we would like to encourage the House Resources Committee to support House Bill No. 455 by Goll and Grussendorf. Our understanding is that this bill will enhance Native Allotment applicants. Any efforts to expedite Native Allotment applications is a worthy cause and should be supported.

Sincerely,

YAK-TAT KWAAN, INC.



Donald Bremner  
Vice-President

/sb

cc: Representatives  
Richard Shultz  
Peter Goll  
Rich Uehling  
Tony Vaska  
Ron Larson  
Charlie Bussell  
John Cowdery  
John Liska

# MEMORANDUM

State of Alaska

TO: Tom Hawkins  
Division of Land and Water Management  
DNR - Anchorage

DATE: August 4, 1983  
FILE NO: 166-683-83  
TELEPHONE NO: 276-3550

FROM: NORMAN C. GORSUCH  
ATTORNEY GENERAL

By: Barbara L. Malchick *BML*  
Assistant Attorney General  
AGO - Anchorage

SUBJECT: Settlement of Haines  
Aguilar allotment  
claims.

Gary Gustafson, formerly of the Division of Research and Development, requested our opinion regarding the State's authority to settle five allotment claims on state patented lands in the Haines area under the settlement provisions of Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979). Under existing statutes, it is unclear whether the State has authority to implement the Aguilar settlement procedures. There are, however, other options available to the State. Of these options, it is our opinion that new legislation would be the best means of settling Aguilar allotment claims.

After a background discussion of Aguilar, three broad problem areas are discussed: (1) the State's authority to convey patented lands; (2) the State's ability to recoup selection rights; and (3) the existence of third-party rights on the patented lands. Although this memorandum focuses primarily on the five particular allotments in Haines, the issues discussed are applicable to the more than 220 other Aguilar allotments statewide.

## I

### BACKGROUND

Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), was a class action suit brought by Natives whose allotment applications were rejected because the land they applied for had previously been conveyed to the State. Although the Natives claim that they used and occupied the land before the State selected it, their applications were not filed until after the state selections were made. The court held that if the land was used and occupied by Natives, it should not have been conveyed to the State. The court further held that the federal government has a trust responsibility to recover for the Natives any land

Tom Hawkins  
Re: 166-683-83  
Settlement of Haines  
Aguilar allotment claims.

August 5, 1983  
Page 2

wrongfully conveyed to the State. The State was not a party to the suit.

The plaintiffs and the federal government stipulated to procedures to implement the court's order. Under the procedures, BLM first conducts an informal adjudication to determine whether an allotment application is valid. If the application appears valid, BLM recommends that the U.S. Attorney bring suit against the State to cancel the State's patent. The stipulated procedures also provide for expedited settlement, whereby the State quitclaims all or part of its interest in the land to the federal government, which in turn grants the allotment to the Native applicant. The expedited procedures further provide that the acreage quitclaimed by the State shall be credited to the state entitlement under which the lands were originally conveyed.

Last year, the Commissioner's office indicated its intention to expedite settlement of some of the Aguilar claims in the Haines area. DNR divided the allotments into three categories: (1) those where the State is willing to quitclaim its entire interest; (2) those where the State is willing to quitclaim its interest with a reservation of an access easement; and (3) those where the State has an important interest and will insist upon full adjudication. One of the Haines area allotments that DNR proposes to quitclaim is from the first category, and four are from the second. The five parcels are on lands that were patented to the State under the Alaska Mental Health Enabling Act.

## II

### AUTHORITY

#### A. Existing Statutes.

Article VIII, Section 9 of the Alaska Constitution specifies that "the Legislature may provide for the sale or grant of state lands ...." Article VIII, Section 10 provides that "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." In order to implement Section 10, the Legislature enacted the Alaska Land Act, AS 38.05. DNR, through the Commissioner and the Director of

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the Division of Lands, is the agency charged with administering the Alaska Land Act. AS 38.05.005.

DNR, as any administrative agency, has only those powers that are expressly granted or necessarily implied by statute. See, e.g., Washington State Human Rights Commission v. Cheney School District No. 30, 641 P.2d 163, 167 (Wash. 1982). The Alaska Land Act does not explicitly authorize DNR to quitclaim its interest in the land described in the five allotment applications. Arguably, however, the proposed conveyances fall within the terms of the public and charitable use statute. Moreover, the authority to quitclaim may be a "necessarily implied" power of the Commissioner's or the Director's.

1. Disclaimer

DNR has suggested that it simply "disclaim" its interest to the allotment lands. Where DNR is convinced of the validity of an allotment application, a disclaimer would in effect merely correct the mistake made by the federal government in granting the land to the State in the first place.

There is no express authority that would allow DNR to disclaim. Moreover, the Alaska Land Act already provides a procedure for correcting mistakes made by the federal government. Under AS 38.05.035(b)(2), DNR is authorized to grant a preference right to a diligent applicant for the purchase of state land in order to correct past errors of a federal agency.<sup>1/</sup> The very fact that the Legislature provided a method for dealing with federal mistakes may be a "positive inhibition" against correcting the mistakes except by compliance with the preference

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<sup>1/</sup> This is not the procedure specified in Aguilar, and it is probably not a viable option for settling the Aguilar claims. Because the preference right would be given directly to the applicant rather than to the federal government, the property conveyed to the applicant would not have the trust status that allotments have. It is therefore questionable whether allotment applicants and the federal government would agree to this option.

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right statutes. See Hughes v. City of Torrance, 175 P.2d 290 (Cal. App. 1946).

## 2. Public and Charitable Use Statute

The public and charitable use statute provides that the State may dispose of land to a government agency for less than the appraised value if it is "fair and proper and in the best interests of the public ...." AS 38.05.315(a). Quitclaiming the land at issue here may be in the best interests of the public since it would settle the allotment claims without time-consuming and expensive litigation. Moreover, quitclaiming the land to the federal government may be in the public interest since it would allow BLM to discharge its duty as trustee for the Native applicants.

In determining whether a disposal to a government agency is in the public interest, "due consideration [must be] given to the nature of the public services or function rendered by the agency ...." AS 38.05.315(a). The statute's focus on an agency's public function implies that the Legislature envisioned that the ultimate use of the land would be in the public interest. Likewise, the title of the statute implies that the land will be used for a public and charitable purpose. Here, the federal government would be conveying the land into private ownership, rather than using the land for the benefit of the public.

In determining whether there is a public interest, due consideration must also be given to "the terms of the grant under which the land was acquired by the state." AS 38.05.315(a). The land at issue here was acquired by the State under the Mental Health Enabling Act. Under the terms of the grant, mental health lands "shall be administered by the Territory of Alaska as a public trust and [the] proceeds and income [therefrom] shall first be applied to meet the necessary expenses of the mental health program of Alaska." Thus, a conveyance of these lands for less than their appraised value would be contrary to the terms of the grant under which they were acquired. However, a superior court judge in Fairbanks recently upheld a state statute which in

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effect treats mental health lands as general grant lands.<sup>2/</sup> Since the State is not obligated to administer general grant lands as a trust, this requirement may not be a problem.

In summary, it is unclear whether the proposed conveyances fall within the scope of the public and charitable use statute. For the protection of the State and the allotment applicants, we therefore do not recommend this option.

### 3. Implied Authority

The Director of the Division of Lands is authorized, with the consent of the Commissioner, to approve contracts for the sale, lease, or other disposal of available lands "when he makes a written finding that the interests of the State will be best served." AS 38.05.035(a)(14).<sup>3/</sup> The Alaska Supreme Court has interpreted this statute as giving the Director broad discretion in deciding whether to approve a disposal. Moore v. State, 553 P.2d 8, 31 (Alaska 1976). It is possible that a court would construe the statute as a grant of authority sufficiently broad to encompass the proposed conveyances.

There are several problems with this approach, however. First, the Supreme Court interprets Article VIII, Section 10 of the Constitution as reflecting "the framers' recognition of the importance of our land resources and of the concomitant necessity for observance of legal safeguards in the disposal or leasing of

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<sup>2/</sup> The court went on to hold that the State is obligated to reimburse the trust for the full value of any lands transferred from it. See Weiss v. State of Alaska, 4FA-83-2208 Civ., June 15, 1983. It is unknown at this time whether the State will appeal this decision.

<sup>3/</sup> Although this responsibility falls on the Director, the Commissioner may assume the responsibility if she does so in a clear and explicit manner. Moore v. State, 553 P.2d 8, 37 (Alaska 1976).

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state lands." Alveska Ski Corporation v. Holdsworth, 426 P.2d 1006, 1011 (Alaska 1967). Thus, a court may be reluctant to find authority to dispose of land unless it is expressly delegated by statute.

Further, a court may not interpret the statute as an independent grant of authority. Rather, the statute may be procedural (requiring the Director to make a written "best interest" finding), and may only apply where the disposal is otherwise authorized by law. This reading would be consistent with AS 38.05.035(a)(6), which provides that the Director shall, "under the conditions and limitations imposed by law and the commissioner, issue deeds, leases or other conveyances disposing of available lands, resources, property or any interest in them."

Finally, even if subsection (a)(14) is read as a broad grant of authority, a decision to quitclaim the lands at issue may not best serve the interests of the State. As discussed above, the State's interest may be served in that the allotment claims would be settled without time-consuming and expensive litigation. However, the interests of the State would not be served in that the State would not receive anything in return for the conveyances. This is so because the State must reserve the mineral estate and thus could not be credited for the surface estate acreage conveyed (see Section III, A. below) and because the State is precluded from selecting additional mental health lands to replace the conveyed lands (see Section III, B. below).

### B. Other Options.

#### 1. New Legislation.

In our opinion, the best option available to the State is to draft new legislation specifically authorizing the proposed conveyances. Once the legislation is passed, the State would be authorized to quitclaim its interest in the lands pursuant to the stipulated procedures of Aguilar. The tremendous advantage to this option is that the legislation would apply to settlement of all of the more than 220 Aguilar claims across the State. It is likely that this new legislation would be supported by the allotment applicants and Alaska Legal Services Corporation, and would be popular in the Legislature. Under this option, however,

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the State may lose its ability to recoup selection rights unless companion federal legislation is passed (see below).

## 2. Land Exchange.

Another option available to the State is to enter into a land exchange with the federal government. Under this option, the State would exchange the allotment lands for other lands in federal ownership. The land exchange statutes require that "exchanges shall be for the purpose of consolidating state land holdings, creating land ownership and use patterns which will permit more effective administration of the state public domain, facilitating the objectives of state programs, or other public purposes." AS 38.50.010. The general purpose of settling Native allotment claims would seem to fall within the "public purpose" language of the statute.

As discussed below, one advantage to this option is that the State would not lose its ability to recoup selection rights since it would be receiving specified lands in return for the allotment lands. The land exchange option does present procedural problems, however. It is time-consuming, since land must be identified, appraisals must be performed, public notice must be given, and public hearings must be held. Moreover, DNR has indicated that most of the remaining BLM lands in Alaska are undesirable. If the lands proposed for the exchange are of unequal value, the State would also need legislative approval before the exchange could take place. In addition, although the federal government is authorized to enter into such a land exchange (ANCSA § 22(F)), this is not the procedure specified in Aguilar. The Solicitor's office has indicated that BLM is unwilling to enter into a land exchange because of the time and expense involved.

## 3. Settlement of Litigation.

An additional option available to the State is to allow the federal government to proceed with the Aguilar procedures and

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bring suit in federal court to cancel the State's patents.<sup>4/</sup> The Attorney General would then have the authority to settle the litigation by agreeing to a court order cancelling the patents. Any such settlement, of course, must be done in good faith and free from fraud.

### III

#### RECOUPMENT OF SELECTION RIGHTS

The Aguilar stipulated procedures provide that if the State quitclaims its interest, the acreage shall be credited to the state entitlement under which the lands were originally conveyed. This provision, however, may be unenforceable. First, the requirement that the State reserve the mineral estate may prevent the State from receiving credit for the quitclaimed acreage. Secondly, the five allotment claims involved here are on mental health lands and the time for selecting mental health lands has passed.

#### A. Mineral Estate.

Under AS 38.05.125, the State must reserve the mineral estate in conveyances of land made under the Alaska Land Act (AS 38.05). Where the State receives a mineral estate, DLM must charge the acreage against the State's acreage entitlement. Thus, DLM would not be able to credit the State for the surface estate acreage conveyed, regardless of the provisions of the Aguilar settlement. Accordingly, if the State conveys the allotment lands under the Alaska Land Act (for example, under the public and charitable use statute), the surface acreage will simply be lost.

The requirement to reserve the mineral estate may not be a problem under the three other options discussed above. New legislation could specify that the State is authorized to convey

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<sup>4/</sup> Indeed, the State may be forced into this option by default. DLM recently sent out the "90-day letters" specified in the Aguilar procedures for the five allotment claims at issue.

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the mineral estate, along with the surface estate, to the federal government.<sup>5/</sup> Likewise, in a land exchange, the State can exchange mineral rights to the extent authorized by applicable federal law (AS 38.50.050); section 22(f) of ANCSA authorizes the State to transfer the mineral estate in exchanges with the federal government. Finally, there would be no mineral estate problem under the settlement of litigation option since the

State's patent would be cancelled and the mineral estate would merely revert to the federal government.

### B. Mental Health Lands.

The Aguilar procedures provide that the quitclaimed acreage shall be credited to the state entitlement under which the lands were originally conveyed. Under the terms of the Mental Health Enabling Act, however, the time for selecting mental health lands has expired. According to the Solicitor's office, DLM does not have the authority to extend the time for the State to select mental health lands. This was not considered at the time the Aguilar procedures were drafted.

Under any of the options other than a land exchange, the State would thus lose its ability to recoup its selection

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<sup>5/</sup> This problem may not be so easily solved for other than mental health lands. The Alaska Constitution specifies that grants of state land must contain such reservations to the State of all resources as may be required by Congress or the State. In Section 6(i) of the Alaska Statehood Act, Congress required the State to reserve the mineral estate when disposing of general grant lands. Thus, if the State wished to quitclaim Aguilar lands that are general grant lands, federal legislation in addition to state legislation may be required. See State v. Lewis, 559 P.2d 630 (Alaska 1977). We note, however, that if the State does dispose of the mineral estate, Section 6(i) provides that the mineral estate will be forfeited to the federal government in an action brought by the U.S. Attorney. Since the federal government would be getting the mineral estate anyway, such an action would be meaningless.

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rights and the acreage will simply be lost.<sup>6/</sup> However, the fact that the time for selecting mental health lands has passed would not result in a loss of acreage if the State enters into a land exchange because the State would be receiving specified lands in return for the allotment lands.

The inability to recoup selection rights is not a problem, of course, if the State has selected more than its statutory entitlement of one million acres of mental health lands. While DNR is convinced that the State is in fact under-selected, BLM maintains that the State is over-selected. The actual situation will not be known for years.

#### IV

#### THIRD-PARTY RIGHTS

The State has created many types of third-party rights on its patented Aguilar lands, including mining claims, special use permits, rights-of-way, disposals of resources from the land, and disposal of the land itself. Because the title reports for the five allotment claims involved here indicate that a timber sale contract was the only third-party interest created, the other types of interests will not be discussed in this memorandum. These interests and the State's ability to protect them must, of course, be considered as the situations arise.

In 1979, the State entered into a contract with the Schnabel Lumber Company. The contract describes a large area of land near Haines and provides that Schnabel is entitled to cut 10.2 million board feet (mmbf) of timber per year from this land. The five parcels at issue here are included in the contract, as are many other Aguilar allotment claims. Under the terms of the contract, the State may reserve lands from cutting, but the State is still obligated to provide 10.2 mmbf for harvest.

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<sup>6/</sup> It is possible that federal legislation could be drafted allowing the State to select replacement mental health lands in this situation.

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The Division of Forestry is currently developing a management plan for the area. This involves inventorying the land available for cutting to determine the annual allowable cut; i.e. the amount that would permit timber to be harvested on a sustained yield basis. Forestry is hopeful that the annual allowable cut will be greater than the 10.2 mmbf specified in the contract even if the Native allotment lands are considered unavailable for cutting. Forestry will not be able to determine the allowable cut until late summer or fall.

Shortly after the Schnabel timber contract was signed, a lawsuit was brought by Southeast Alaska Conservation Council (SEACC). The basis of the lawsuit was SEACC's assertion that the contract volume of 10.2 mmbf per year would violate the constitutional requirement that timber be harvested on a sustained yield basis. SEACC argued in part that Forestry's allowable cut calculation was incorrect because the amount of land available for cutting was actually much lower than the amount used by Forestry in making its calculation. The Alaska Supreme Court recently held that the allowable cut calculation was "reasonable". However, if the State conveys the allotment lands to the allotment applicants, thousands more acres may be unavailable for cutting. This could potentially re-open the SEACC lawsuit.

V

#### CONCLUSION

There are more than 220 known Aguilar claims statewide, affecting well over 25,000 acres of general grant, mental health, university, and school lands. There is currently no explicit authority for the State to settle the claims by quitclaiming its interest in the lands. However, colorable arguments can be made that the Commissioner has implied authority to quitclaim or that the proposed conveyances are within the scope of the public and charitable use statute. It is our recommendation that new legislation specifically authorizing the Commissioner to settle Aguilar claims be drafted and presented to the Legislature as soon as possible. Whatever option is chosen, the State's ability to protect third-party rights and its statutory prerogative entitlements should be carefully considered.