HB

455

COMMITTEE REPORT

SENATE

FURTHER:

Date _____

Mr. President

The Committee on _____ considered _____

_____

and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass

[ ] do pass with attached amendment(s)

[ ] replace with/or adopt CS for _____
[ ] new title
[ ] same title and recommends _____

[ ] and attached a "LETTER OF INTENT" [ ] NEW FISCAL NOTE

[ ] reports it back without recommendation

[ ] recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

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MEMBERS HAVING
OTHER RECOMMENDATIONS

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_____
Chairman

_____
Chairman recommendation

-FILE-

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

LABOR AND COMMERCE COMMITTEE, CHAIRMAN
RESOURCES COMMITTEE
JUDICIARY COMMITTEE
FISHERIES SUB-COMMITTEE

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MEMORANDUM

TO: Senator Bill Ray, Chair
Senate Judiciary Committee

FROM: Senator Dick Eliason

DATE: May 14, 1984

RE: HB 455

The purpose of HB 455 is to provide a mechanism to settle Native Allotment Claims. When the Commissioner of Natural Resources makes a determination that land or interest in land was wrongfully or erroneously conveyed to the state by the federal government, the commissioner may quitclaim land or an interest in land to the federal government. Currently, the only way to return lands with Native claims on them to the federal government is through the courts.

On April 24, 1984, the Senate favorably considered the language embodied in HB 455 when SB 375, "An Act relating to land disposal and management", passed the Senate 16 to 0. Currently, SB 375 is in House Finance and I am hopeful that this legislation will pass both houses this session. However, in the event SB 375 does not make it this year, it is important that the Commissioner of the Department of Natural Resources be granted authority to "quitclaim" native allotment claims.

I strongly recommend passage of HB 455 to ensure that native allotment claims are settled as expediously as possible.

From Sen. Ferguson
2-8-84

In 1979 a federal court found that the federal government transferred land to the state which was eligible for selection under the 1906 Native Allotment Act. That act granted up to 160 acres to Native Alaskans who used the land for at least five years. The act was extinguished with the passage of the Native Claims Settlement Act but claims that were pending at that time were still eligible for the land grant.

HB 455 would provide a means to return valid allotment lands improperly transferred to the state by the federal government to the U.S. Department of the Interior.

The state will review the disputed land and return to the federal government lands with valid allotment claims. The state will then re-select other federal lands to replace the land given back to the federal government for allotments.

In instances where the state has already turned disputed tracts over to municipalities or other parties, arrangements would be made by the state to negotiate settlements. The state would ensure that parties would receive equal or better parcels of land and be compensated for any improvements on the land. In many cases, though, there is no third party interest and the transfer could be easily accomplished.

Allotment claims that will benefit from this legislation stretch from Barrow to Ketchikan.

11-30-83
Sheila - Elicson's office
incorporate into SB 222 or new leg.
~~she has more back up~~

BILL SHEFFIELD, GOVERNOR

1031 W. FOURTH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 276-3550

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

September 15, 1983

Ron Swanson, Head
Retained Lands Unit
Division of Land and Water Management
Department of Natural Resources
Pouch 7-005
Anchorage, AK 99510

Dear Ron:

Enclosed is a draft bill giving DNR the authority to quitclaim land back to the federal government. The proposed bill is designed to resolve two types of problems currently troubling the state: (1) the need to correct errors made in conveyances; and (2) the desire to settle native allotment claims without litigation. The bill would also allow DNR to correct other similar kinds of title defects that have arisen or may arise. I anticipate that Sec. 2 of the bill would be codified as one of the director's discretionary powers under AS 38.05.035(b).

The proposed language requires the director to determine that the land to be quitclaimed was "wrongfully or erroneously conveyed to the state." In the case of a native allotment claim, this would mean determining that native use or occupancy predated state selection and that the allotment is otherwise valid. In my view, however, a full-scale investigation or adjudication of the claim is not necessary. Rather, the director may rely on BLM's assertion that the allotment is valid or make his own determination based on the documentation in the file.

Sec. 3 of the proposed bill waives the state statutory requirement to reserve the mineral estate. The Solicitor's office agrees with our interpretation that §6(i) of the Statehood Act (the federal statute requiring the state to reserve the mineral estate) does not apply to conveyances to the federal government. The Solicitor's office has agreed to issue an opinion to that effect. Thus, the state would be able to quitclaim both the surface estate and the mineral estate to the federal government, and would not be charged with the acreage. When general grant lands are involved, the state thus will not lose its ability to recoup selection rights. (Unfortunately, however, the state still will not be able to recoup selection rights when mental health lands are involved, since the time for selecting mental health lands has run. This problem cannot be

solved with state legislation, and warrants further discussion as to possible solutions.)

I would like to point out several important subjects that this draft bill does not address, including requirements for giving public notice, for protecting third party rights, and for protecting the ability to recoup selection rights. These subjects were left out because I believe they are adequately covered in existing statutes.

The Alaska Constitution requires public notice before any "disposal" of state land is made. Quitclaims for the purpose of correcting mistakes, where the federal government will promptly reconvey, would not constitute disposals, and no notice would be required. However, quitclaims for the purpose of settling native allotment claims would be disposals, and the public notice provisions of AS 38.05.345 would apply. The determination of whether a "disposal" is involved must be made on a case-by-case basis.

The director is also required to make a finding that disposals will be in the best interests of the state. AS 38.05.035(a)(14). No such finding is necessary when DNR is simply correcting patents. However, a "best interests" finding must be made in quitclaims of native allotment lands. The existence of third party rights on lands to be quitclaimed should be considered in making the finding. Likewise, the ability to recoup selection rights for the quitclaimed acreage should be considered in determining whether the state's interests will best be served. Of course, however, the existence of third party rights or the inability to recoup selection rights does not necessarily preclude a best interests finding.

If you have any questions regarding the draft bill or my comments in this letter, please let me know.

Sincerely,

NORMAN C. GORSUCH
Attorney General

By: Barbara L. Malchick
Assistant Attorney General

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
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

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

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.1/ 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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1/ 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.

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

effect treats mental health lands as general grant lands.2/ 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).3/ 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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2/ 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-83-2206 Civ., June 15, 1983. It is unknown at this time whether the State will appeal this decision.

3/ 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).

state lands." Alyeska 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,

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

bring suit in federal court to cancel the State's patents.4/ 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, DLI must charge the acreage against the State's acreage entitlement. Thus, DLI 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
be a problem under the three other option
legislation could specify that the State

4/ Indeed, the State may be forced into
DLI recently sent out the "90-day lette
Aguilar procedures for the five allotment

the mineral estate, along with the surface estate, to the federal government.5/ 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, BLM 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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5/ 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.

rights and the acreage will simply be lost.6/ 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.

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

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 acreage entitlements should be carefully considered.