

HB

548

STATE OF ALASKA  
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY  
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Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. NESS

3/28/90

H. NESS

4/5/90

# HOUSE COMMITTEE REPORT

(7)

Date Referred: February 12, 1990

FURTHER REFERRALS:

Date of Committee Action: \_\_\_\_\_

RESOURCES  
FINANCE

The HEALTH, EDUCATION, & SOCIAL SERVICES Committee considered: HB 548

HOUSE BILL NO. 548                      MENTAL HEALTH TRUST

"An Act relating to the reconstitution and administration of the mental health trust."

**RECOMMENDATIONS:**

- be replaced with CS HB 548 (HFS)  the same title
- have attached amendment(s)  a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(s):                      APPROVES PREVIOUS:                      (Date/Dept)

- fiscal impact \_\_\_\_\_
- zero fiscal note DHSS
- zero with analysis \_\_\_\_\_
- fiscal note(s) \_\_\_\_\_
- zero fiscal note(s) \_\_\_\_\_
- zero fn/analysis \_\_\_\_\_

SIGNING DO PASS:

SIGNING:  
(Check approp. column)

Do Not  
Pass      No Rec      Amend

<i>[Signature]</i>			
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*[Signature]*  
Chairman's Signature

# FISCAL NOTE

REQUEST: HB548

Revision Date: \_\_\_\_\_ Agency Affected: Health & Social Services  
 Title: An Act relating to the reconstitution BRU: \_\_\_\_\_  
and administration of the Mental Health Trust  
 Sponsor: Rep. Miller Components: \_\_\_\_\_  
 Requestor: Rep. Miller

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY92	FY93	FY94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

No effect on the FY90 Budget.

Prepared by: Richard Renninger  
 Division: Administrative Services

Phone: 465-3331  
 Date: March 27, 1990

Approved by Commissioner: Myla M. Munson  
 Agency: Health & Social Services

Date: 3/27/90

Distribution (by preparer):

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

STATE OF ALASKA  
THE LEGISLATURE

POUCHY STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 13, 1990

SUBJECT: Mental health trust  
(HB 548)

TO: Representative Mike Miller

FROM: Richard A. Bradley   
Legislative Counsel

Gene Therriault has requested a sectional analysis of the above described bill.

As a preliminary matter, note that a sectional analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1 of the bill repeals and reenacts AS 37.14.011(c). AS 37.14.010 - 37.14.050 establishes the "Mental Health Trust Income Account; AS 37.14.011 also establishes the "mental health trust income account." The subsection now provides:

(c) The fair market rental value of the land constituting the mental health trust corpus is equal to eight percent of the fair market value of the land. Following the initial determination of the fair market value of the land selected by and patented to the state under sec. 202 of the Alaska Mental Health Enabling Act, the commissioner of natural resources shall redetermine the fair market value of the land constituting the mental health trust corpus at least every five years and provide the redetermined value to the commissioner of revenue and the board established under AS 47.30.661.

As repealed and reenacted (it would not have been possible to "amend" it), the section continues the value at "eight

percent of the fair market value of the land" but it affirmatively establishes a mathematical formula for that valuation. I believe that since that formula is all critical to the definition, it would be inappropriate to recast the language in a "sectional analysis" format and I believe that the four paragraphs of (c) should be read directly. While they are technical, they are understandable.

Section 2 of the bill adds a new subsection (d) to AS 37.-14.011; the subsection directs the commissioner of natural resources to "calculate the redetermined value of the trust under (c) and provide the redetermined value to the commissioner of revenue and the board."

Section 3 of the bill provides for the "reconstitution and administration of mental health land trust." Note that Section 4 of the bill repeals AS 38.05.800, a section with the same caption; in drafting this section, I made the judgement that it was not possible to "amend" existing AS 38.05.800 and hence the suggested approach was taken. In the nature of things, it will be necessary to quote much of the language directly-- and then to comment on it. I do not want to misstate any of the language in this analysis.

Sec. 38.05.801(a) states that the "value of all land selected by or patented to the state under the Alaska Mental Health Enabling Act as of September 7, 1967, is \$2,243,000,000." I do not know the source of the figure but I believe that the date is the effective date of ch. 48, SLA 1987 (CSHB 92 (Fin) am), the Act that responded to the Alaska Supreme Court's decision invalidating the earlier legislative management of the land received under the Alaska Mental Health Enabling Act, P.L. 84- 839, 70 Stat. 709.

Sec. 38.05.801(b) provides that "[a]ll land within legislative designations on the effective date of this Act and all land made subject to legislative designations in the future constitute the corpus of the mental health land trust." As I understand the usage, a "legislative designation" is an Act by the legislature that withdraws land for a particular purpose. The land established for parks, state forests, public use areas, recreational rivers, and so forth, primarily within AS 41 but also within AS 16.20 (sanctuaries, critical habitats, etc.) would be within these "designations."

The term "corpus" is legalese for the "body" or the substance of the trust.

Representative Mike Miller  
Page 3  
February 13, 1990

Thus, if this section is enacted, the future establishment of land within a "legislative designation" would, by that act, commit the land to the corpus of the trust.

Sec. 38.05.801(c) provides that "[o]n the reconstitution of the trust under this section," the remainder of the land of the state "that is not within legislative designations is removed from trust status." The provision seems self-explanatory.

Sec. 38.05.801(d) provides that the land within the "legislative designations" shall be managed under the provisions of law now governing them. The trust will be compensated under AS 37.14.011; see existing law as amended by Sections 1 and 2 of this bill.

Sec. 38.05.801(e) provides that "[b]efore the state may remove land [from a legislative designation], replacement land equal in value at the time of replacement shall be designated mental health land and added to the trust corpus." What this means is that land may not be withdrawn from a legislative designation (park, state forest, etc.) until equal value land is added to a legislative designation. The latter portion of the section outlines this procedure.

While it seems that there is a Catch 22 here in that when land is established as a legislative designation, by that designation it becomes part of the trust corpus and thus not available for use as replacement land, it seems that there may be an option for the state to establish the new legislative designation conditionally; that is, to create it subject to its use as matching land for land removed from designation. While the legislature has not removed land from a legislative designation very often, the legislature may wish to avail itself of this option prospectively to protect itself and to maintain flexibility.

Section 4 of the bill repeals AS 38.05.800. Note my comments on the repeal under Section 3.

If I may be of further assistance, please advise.

RAB:pl  
WKP2/036

# ALASKA MENTAL HEALTH BOARD

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STEVE COWPER, GOVERNOR  
STATE OF ALASKA

ST. ANN'S CENTER  
419 6th STREET, SUITE 124  
JUNEAU, ALASKA 99801  
907-465-3071

March 27, 1990

Health, Education & Social Services Committee  
Alaska State House of Representatives  
P.O. Box "V"  
Juneau, AK 99811

Honorable Representatives,

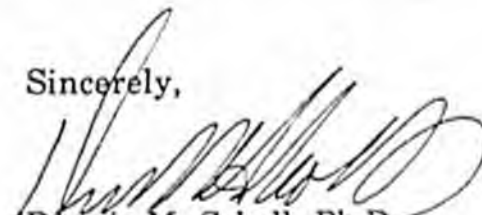
The Alaska Mental Health Board (AMHB) has reviewed HB548, "An Act relating to the reconstitution and administration of the mental health trust." At its meeting in February the AMHB took action in support of the intent of HB548 including that:

- (1) the Legislature recognize the trust value of \$2,243,000,000 established under procedures approved by the Interim Mental Health Trust Commission,
- (2) land and resources in legislatively designated areas be identified as security for the trust corpus, and
- (3) revaluation procedures be established which effectively continue to reflect the value of the original trust lands over time.

In actions related to the AMHB discussion of HB548, the Board re-affirmed its prior action supporting appointment of an independent trustee for the mental health trust and urging the appointment of an interim trustee pending final resolution of issues in the Weiss v. State litigation.

On behalf of the Alaska Mental Health Board I convey their support for the intent of HB548.

Sincerely,



Dennis M. Scholl, Ph.D.  
Executive Director

cc.  
AMHB  
Rep. Miller



# Alaska State Legislature

House Education & Social Services

Please enter into the record my testimony to the \_\_\_\_\_  
 committee name

committee on HB 548, dated April 5, 1990  
 bill/subject

Please pass HB 548. It is so important to put the land issue behind us. Those who have been working for years to resolve these issues and those of us who have been waiting for needed services for our loved ones are very discouraged at what appears to be the state's lack of good faith in arriving at a negotiated settlement.

This bill represents a last hope for a fair and equitable reconstitution and administration of the mental health trust.

Thank you for your careful consideration of this bill.

Signed: Frances R. Cater Frances R. Cater  
 Testifier

Kodiak Island Mental Health Advisory Board; Kodiak Alliance for the Mentally Ill  
 Representing (Optional) Alaska Alliance for the Mentally Ill  
 Mailing address: P.O. Box 1472 (st. address: 4254 Cliffside Rd.)

Address  
 Kodiak, Alaska 99615-1472 (907) 486-5604

Phone No.

**Senate Resources Committee Briefing: by Alaska Mental  
Health Board Lands Committee, February 14, 1990**

- **PURPOSE FOR AMHB APPEARING BEFORE RESOURCE COMMITTEES**
- **STATUS OF THE VALUATION PROCESS & STATUS OF THE LAND**
- **History of the Selections: Multiple Estates for Income Production**
- **A Review and Critique of the Process of Valuation**
- **"The Linking of the Appraisal Process"**
- **The TRUST**
- **Chapter 48 SLA 1987, The Legislature's Settlement Proposal**
- **The Opportunity for Legislative Action**

**PURPOSE FOR AMHB APPEARING BEFORE RESOURCE  
COMMITTEES**

- REVIEW REPORTS FROM THE DEPARTMENT OF NATURAL RESOURCES REGARDING THE VALUATION OF THE MENTAL HEALTH LAND TRUST AND THE STATUS OF MENTAL HEALTH TRUST LAND
- MEET WITH APPROPRIATE LEGISLATIVE COMMITTEES CONCERNING THE BOARD'S ACTIVITIES

## STATUS OF THE VALUATION PROCESS & STATUS OF THE LAND

- IMHTC Final Approved Procedures, November 7th, 1989
- IMHTC Majority Report, (Final Draft), December 20th, 1989
- Minority Report by Designee Swope, February 1, 1990
- Senate Special Committee on Mental Health Report, January 1990
- Impasse
- Final IMHTC Resolution, January 24, 1990

## History of the Selections: Multiple Estates for Income Production

- Surface Estate: Municipal Expansion
- Forrest
- Mineral

## A Review and Critique of the Process of Valuation

- Envisioned mutuality of purpose: fair market value
- The reality of IMHTC dealing with a matter in litigation

## THE LINKING OF THE APPRAISAL PROCESS

- VALUE THEORY
- VALUATION THEORY
- APPRAISAL THEORY
- VALUE PREMISE

## VALUE THEORY

- A. Answers why a particular property, or an interest therein, has worth
- B. Defines the sources and bases of an asset's worth
- C. Currently recognized elements of an asset's worth include:
  - ---Utility (both as the ability to satisfy needs and for practical use)
  - ---Scarcity (of supply)
  - ---Demand
  - ---Ratio of exchange
  - ---Ability to transfer ownership

VALUATION THEORY

- A. Valuation theory is the method of estimating, measuring and predicting a defined worth.
- B. Valuation theory enables us to focus on the various methods that are used to arrive at a value estimate.
- C. Valuation theory further allows and recognizes that there is a distinction between value and price that may be commanded in a market at a given point in time. This suggests the following:

C. Valuation theory further allows and recognizes that there is a distinction between value and price that may be commanded in a market at a given point in time. This suggests the following:

1. Value is a collection of elements that comprise worth, each of which must be defined.
2. Price is an historical fact that may or may not coincide with an assets recognized worth at the same point in time.
  - a. Some examples of Price not being representative of Value are seen during periods of economic depression and recession and in liquidation sales.

## APPRAISAL THEORY

- A. Appraisal theory is the logic format by which Value Theory is linked to Valuation Theory as it relates to a specific defined interest, i.e. any one of several estates subject to ownership in any given parcel of real property at a specific point in time.
  - 1. Appraisal theory is the logical relationship between the Source of Value and its estimation.
- B. It is perhaps the failure to recognize the theoretical underpinnings of this analysis that results in the inability to link different value concepts, such as sales comparison, income capitalization or cost approach, to an assets worth.
  - 1. There is still a lingering perception that within the many land estates that are the subject of valuation, that these approaches somehow constitute equivalent value measures. They do not.

## VALUE PREMISE

- A. DEFINITION OF VALUE PREMISE
- B. EXAMPLES OF VALUE CHARACTERISTICS
- C. POSITIONING THE VALUE PREMISE
- D. THE NATURE OF THE DEBATE

A. DEFINITION OF VALUE PREMISE

- The emphasis of the appraisal logic placed on the characteristics of value as they relate to an identified estate, i.e. timber, mineral, surface etc..

## B. EXAMPLES OF VALUE CHARACTERISTICS

1. **Surface estate:** Dependent on size, location and market activity may be valued by all three methods. Comparable sales would only be appropriate where such a market within a comparable context exists for the subject being valued.

a. Surface estates are unique in that demand must be created in place. Commodity estates (minerals, oil & gas, etc.) in theory can respond to demand anywhere within the global market place.

2. **Large mineral estate:** Typically by income approach

a. Large mineral estates have a very limited market of qualified developers.

b. Large mineral estates are usually developed via Joint Venture and leasing arrangements, not outright purchase.

c. Large mineral estates are usually promoted into development by their owners.

## C. POSITIONING THE VALUE PREMISE

Identifying the varying value premises and the different emphasis that can be placed on each value characteristic, leads to a valuation process that supports the appropriate positioning of the value premise.

1. Here is where Highest and Best Use analysis focuses.

a. The considerations in such analysis generally are:

- Is the use legally permissible?
- Is the use currently feasible?
- Is the use functionally compatible?
- Is the use most profitable?

b. Current management practices are not a consideration in this evaluation. It is assumed that a property shall be managed to its highest and best use.

2. Highest and Best Use is not a fact to be found. It is a judgment decision on the part of the valuator.

#### D. THE NATURE OF THE DEBATE

- The foregoing considerations applied to the IMHTC/DNR rendering of value for Mental Health Trust Lands shows that the debate is not one of Value or Valuation Theory, but where the parties asserted a different value premise for several estates under consideration that led to different appraisal methodologies being applied. The failure of DNR to accept the value characteristics of the mineral estate, as approved by the majority of the IMHTC, led to the most serious value diminution of the trust corpus.

## The TRUST

- The Supreme Court stated there is a Trust.
- To have a Trust there must be a Corpus.
- There appears to be no Statutory Authority to manage the Trust properly.
- Reserving: No provision for reserving for the depletion of non-renewable resources.

## Chapter 48 SLA 1987, The Legislature's Settlement Proposal

- Purpose: To reconstitute a mental health trust through identification of land in legislatively designated areas that is equal in value to the land selected by and patented to the state under section 202 of the Alaska Mental Health Enabling Act.

## The Opportunity for Legislative Action

- Return to the Courts
- SB493/ HB548

tion of particular reports, items, persons, or enterprises. (§ 5 ch 18 SLA 1980)

**Sec. 37.13.205. Regulations.** The board may adopt regulations under the Administrative Procedure Act (AS 44.62) to interpret and implement this chapter. (§ 12 ch 81 SLA 1982)

**Sec. 37.13.210. Definitions.** In this chapter

- (1) "board" means the Board of Trustees of the Alaska Permanent Fund Corporation;
- (2) "corporation" means the Alaska Permanent Fund Corporation. (§ 5 ch 18 SLA 1980)

## Chapter 14. Trust Funds.

### Article

- 1. Mental Health Trust Income Account (§§ 37.14.010 — 37.14.050)
- 2. Public School Trust Fund (§§ 37.14.110 — 37.14.170)
- 3. Alaska Children's Trust Fund (§§ 37.14.200 — 37.14.270)

Revisor's notes. — Section 4, ch. 182, SLA 1978 purported to add an article 2, entitled "University Fund," to this chapter. Section 27 of ch. 182 made that article effective on the date that the Board of Regents voted to approve the matters under

consideration as provided in § 24 of the act. However, the Board of Regents disapproved all matters on August 17, 1978; consequently, that article 2 was ineffective.

### Article 1. Mental Health Trust Income Account.

#### Section

- 11. Mental health trust income account
- 21. Utilization of the mental health trust income account

Cross references. — For legislative findings and purpose of the Act that enacted AS 37.14.011 and 37.14.021 and re-

pealed the former provisions of this article, see § 1, ch. 48, SLA 1987 in the Temporary and Special Acts.

*Sec. 37.14.010. Mental health fund established. [Repealed. § 13 ch 48 SLA 1987.]*

**Sec. 37.14.011. Mental health trust income account.** (a) The mental health trust income account is established as a separate account in the general fund.

(b) The amount determined under (c) of this section as the fair market rental of the land constituting the mental health trust corpus

the earnings of the trust and the commissioner of revenue shall annually allocate that amount from the general fund to the mental health trust income account.

(c) The fair market rental value of the land constituting the mental health trust corpus is equal to eight percent of the fair market value of the land. Following the initial determination of the fair market value of the land selected by and patented to the state under sec. 202 of the Alaska Mental Health Enabling Act, the commissioner of natural resources shall redetermine the fair market value of the land constituting the mental health trust corpus at least every five years and provide the redetermined value to the commissioner of revenue and the board established under AS 47.30.661. (§ 2 ch 48 SLA 1987)

Cross references. — For mental health land trust, see AS 38.05.800; for a transitional provision and duties of the commissioner of revenue until the mental health land trust has been reconstituted under AS 38.05.800, see § 11, ch. 48, SLA 1987 in the Temporary and Special Acts.

Sec. 37.14.020. Mental Health Fund Advisory Board created. [Repealed. § 13 ch 48 SLA 1987.]

Sec. 37.14.021. Utilization of the mental health trust income account. Money in the mental health trust income account established in AS 37.14.011(a) shall first be appropriated by the legislature to meet the necessary expenses of the mental health program of the state. In making annual appropriations from the mental health trust income account, the legislature shall consider the recommendations of the Alaska Mental Health Board established under AS 47.30.661, including recommendations regarding capital improvements. After the necessary expenses of the state's mental health program have been funded, the legislature may make appropriations from the mental health trust income account for other public purposes. (§ 3 ch 48 SLA 1987)

Secs. 37.14.030 — 37.14.050. Powers and duties of board; fund utilization; contributions. [Repealed. § 13 ch 48 SLA 1987.]

Article 2. Public School Trust Fund.

Section	Section
116. Public school trust fund established	150. Contributions
117. Public School Fund Advisory Board created	160. Duties of the commissioner of revenue
118. Powers and duties of board	170. Investments
119. Utilization of income	

Sec. 37. is established trust fund

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Title 37  
Public Finance

1 ALASKA MENTAL HEALTH BOARD INTERIM REPORT  
2 ON CHAPTER 48 REVISIONS (6.6.4)  
3 January 1990  
4

5 INTRODUCTION  
6

7 In 1987, when the Alaska State Legislature adopted revisions to Alaska law  
8 which reconstituted the Mental Health Lands Trust and created the Alaska  
9 Mental Health Board, it was with the hope that these changes would resolve  
10 the issues raised in the Weiss v. State lawsuit. All parties to the suit felt  
11 that a workable compromise was better than the continuation of litigation,  
12 and they expected that the Legislative changes set forth in Chapter 48 would  
13 form the basis of a settlement.  
14

15 The plaintiffs in the Weiss suit expected that these legislative changes  
16 would ensure that the monies set aside for the Alaska Mental Health Trust  
17 would be used first and foremost to meet the needs of the mentally ill. They  
18 contemplated that these needs would be determined by the Alaska Mental  
19 Health Board and that upon identification the Legislature would  
20 appropriate funds to meet those needs. It was their expectation that only  
21 after the basic needs of the trust beneficiaries were met would the  
22 Legislature take advantage of the statutory provisions that allowed excess  
23 revenues from the trust to be used for general expenses of the State.  
24

25 The legislative changes have not worked. First, the Greene decision  
26 identified a group of beneficiaries not contemplated by the original Weiss  
27 litigants. Not only were considerable questions raised about the proper way  
28 to identify who beneficiaries of the Trust were, but also considerable  
29 confusion was created about the role of the Alaska Mental Health Board.  
30 The Board has been forced to function in two conflicting roles at once. As  
31 the statutorily mandated body charged with responsibility to identify needs  
32 of Trust beneficiaries, it has had to act as a neutral arbiter of claims to the  
33 Trust's funds from all of the beneficiaries, including those identified in the  
34 Greene decision. At the same time, as the body charged with representing  
35 the mentally ill, the Board has been required to be an advocate on behalf of a

1 specific population that competes with other trust beneficiaries for the  
2 Mental Health Trust Funds.

3  
4 Second, and perhaps more important, there has been insufficient  
5 appropriation of Trust funds to meet the needs of the Trust beneficiaries.  
6 Over the last three years, the Alaska Mental Health Board has identified  
7 needs far in excess of those being presently met. Each year, the Board has  
8 made modest recommendations, not sufficient even to meet identified  
9 needs, but at least sufficient to begin to redress some of the severe  
10 shortcomings of Alaska's Mental Health Program. Even these minimal  
11 recommendations have not been accepted. More money has been  
12 transferred from the Mental Health Trust Lands income account into the  
13 general fund than was spent on the entire Mental Health Program. The  
14 Weiss litigants, have concluded -- reasonably in the estimate of most  
15 members of the Alaska Mental Health Board -- that the reconstitution of  
16 the Mental Health Trust has resulted in no real change in the way in which  
17 Trust revenues are spent. An additional concern, which may become more  
18 important over the years, is that the Department of Natural Resources  
19 (DNR), which has a broad range of responsibilities for the management of  
20 State lands, has full authorization over the management of Mental Health  
21 Trust lands as well. There is no agency or group with a particular  
22 mandate to represent the beneficiaries of the Trust who can review the  
23 management decisions of the DNR to make sure that, over the years,  
24 management decisions which are based solely on the best interests of the  
25 Trust are made and that the value of trust lands are not eroded over time.

26  
27 The Alaska Mental Health Board, has recognized the serious nature of  
28 these problems for some time. Beginning in July of 1988 the Board  
29 facilitated a series of meetings with affected groups to discuss the proper  
30 way to define the beneficiaries of the Trust. After this Greene group issued  
31 its report the Board adopted "A Policy Report Pertinent to the Greene  
32 Decision", a report discussing the implications of the Greene decision. In  
33 April of this year, the Board passed a resolution calling for public hearings  
34 to examine the role of the Board in light of the Greene decision. The Board  
35 delegated to its Legislative Committee the task of gathering information  
36 that might lead to proposed changes to Chapter 48. The Committee has

1 held public hearings and devoted two work sessions to the subject. The  
2 purpose of this report is to outline the conclusions and recommendations of  
3 the committee.

4  
5 BACKGROUND  
6

7 None of these issues is new. The Legislature reviewed the proper role of a  
8 mental health board and the proper mechanism for funding programs  
9 from the Trust in-depth in 1986 when originally attempting to reach a  
10 settlement of the Weiss litigation. At that time, the Joint Special Committee  
11 on Mental Health Trust Land suggested three possible alternatives. The  
12 first alternative was a "secured revenue stream". Under this proposal,  
13 eight percent of all State unrestricted general fund revenues would be  
14 dedicated to the mental health program, secured by a pledge of State assets  
15 which could be executed upon in the event that the Legislature failed to  
16 appropriate sufficient funds to meet the necessary expenses of the mental  
17 health program.<sup>1</sup>

18  
19 The second alternative was reconstitution of the Mental Health Land Trust  
20 and the creation of a Mental Health Trust Corporation which would be  
21 responsible for managing the assets of the Trust. The unencumbered Trust  
22 land would be re-transferred, and a cash settlement of lands encumbered  
23 or patented would be made. This alternative was less desirable, because of  
24 the difficulty and expense inherent in identifying, transferring, and then  
25 subsequently managing the Trust lands.

26  
27 Finally, the Legislature recognized the alternative of permitting the court-  
28 ordered reconstitution of the Trust to take place under court supervision.

29  
30 In supporting the secured income stream alternative, the Joint Committee  
31 recognized the inherent difficulty with that solution. There was no way to  
32 guarantee that the Legislature would necessarily appropriate sufficient  
33 funds each year to meet the needs of the Mental Health program.

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<sup>1</sup> See report to the Legislature of the Joint Special Committee on Mental Health Trust Land, January, 1987, pg. 14, this was the preferred alternative

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"Earmarking" Trust land income in the general fund and appropriating an amount equal to the income is permissible, but it does not insure that income will go toward funding mental health programs. Since one Legislature cannot bind future Legislatures, enactment of a law stating that income will be spent on mental health programs is subject to the will of each Legislature and dependent on annual appropriation of funds.<sup>2</sup>

The Joint Committee recommended a Statement of Legislative Intent as a means of guiding future legislatures as to the appropriate levels of funding.

At the same time, the joint Committee recognized that present funding levels were inadequate.

State appropriations for mental health programs have grown from slightly less than \$1.2 million in 1959 to slightly more than \$23.4 million in 1986. However, when an inflation factor is applied, actual State spending on mental health has declined over the last few years.

The draft Mental Health Plan, released in August 1986, estimates the cost of developing a comprehensive mental health system at \$106.9 million in annual operating costs, an increase over FY87 operating expenditures of approximately \$82.1 million. It also identifies a need for \$102.1 million in one-time capital costs.

...

[I]n the Committee's view, the draft clearly demonstrates that Alaska's current level of mental health funding is

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<sup>2</sup> *Id.* pg 8-9

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insufficient to serve our mentally ill population. It should be noted that the Alaska Alliance for the Mentally Ill has testified that the draft falls short of the goals of an adequate program.

The Committee's view is supported by testimony received from the National Conference of State Legislatures (NCSL). Their review of Alaska's mental health program led to several recommendations, primarily that our programs be expanded.<sup>3</sup>

The Interim Mental Health Trust Commission reached a similar conclusion, ultimately suggesting that a revenue-stream option be adopted by the Legislature.<sup>4</sup> The Interim Mental Health Trust Commission also recognized the necessity of binding the Legislature in a constitutionally accepted manner so that future legislatures would be required to use the revenues generated to meet the needs of the mental health program:

Furthermore, the enabling legislation should be very clear that the Legislature intends to fully fund an adequate mental health program in perpetuity. To satisfy the court-ordered reconstitution, such an arrangement would have to include collateral -- an identifiable, quantifiable entity -- which could be redeemed by the Trust in the event that the promised revenue stream failed to materialize or was somehow diverted. . . . While falling short of binding the hands of future legislatures, such a surety bond would make them always cognizant of the revenue stream legislation's original intent.<sup>5</sup>

These recommendations were the genesis of the present Chapter 48.

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<sup>3</sup> *Id.* at pg. 19-21  
<sup>4</sup> *Report to the Legislature by the Interim Mental Health Trust Commission, February 1987, at pg 199*  
<sup>5</sup> *id.* at pg., 19-21.

1  
2 As enacted, Chapter 48 did not include any provisions for enforcement.  
3 Over the last three funding cycles, funding for the mental health program  
4 has continued to be inadequate. In FY88, the Alaska Mental Health Board,  
5 recognizing the need for a phasing in of increased funding for mental  
6 health programs, recommended increased program funding of \$15,322,400  
7 over the Governor's proposed operating budget. Despite the fact that even  
8 this recommendation was far below the minimum necessary to fund an  
9 adequate program for the State and meet the goals of the Comprehensive  
10 Mental Health Plan, only \$8,868,900 in additional operating funds was  
11 appropriated. Similarly, FY89 recommendations of the Alaska Mental  
12 Health Board were \$15,791,800 in additional operating funds over the prior  
13 year's base budget. Only \$5,026,000 more than the base, was appropriated  
14 while \$47,072,733.93 was transferred from the Mental Health Trust income  
15 account into the general fund.<sup>6</sup> The result has been that mental health  
16 services throughout the state have failed to keep pace with rising demand.  
17 Similarly, the Board's recommendations to meet long standing capital  
18 improvement requirements have been rejected. The needs identified in the  
19 State Comprehensive Mental Health Plan are being funded at a fraction of  
20 the amount necessary to meet the Plan's goals.

21  
22 In 1978, when the Legislature re-designated Trust lands as general grant  
23 lands, the Legislature failed to ever make the necessary appropriations to  
24 compensate for the loss, and the Mental Health Trust was never funded.  
25 This was the reason for the Weiss suit in the first place. It is the perception  
26 of many members of the Alaska Mental Health Board, as well as of the  
27 Weiss litigants, that a variation of this situation continues to exist under  
28 the Chapter 48 revisions. Mental Health Trust funds are used for general  
29 fund purposes with little regard to the requirement that the Mental Health  
30 Trust account be spent first to meet the needs of the mental health  
31 program.

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<sup>6</sup> Letter from Milt Barker, Department of Revenue, December 1, 1989

1  
2 PROPOSED RESOLUTIONS  
3

4 The AMHB, IMHTC, relevant advocacy groups, and litigants generally  
5 agree that changes to the present structure must be made. The Legislative  
6 Committee has received a broad spectrum of recommendations. These  
7 range from recommendations that nothing be done or that the status of the  
8 Alaska Mental Health Board be diminished, to proposals that the entire  
9 way in which the State approaches funding and operation of mental health  
10 programs be modified. Some examples of proposed ways of resolving the  
11 conflicts raised by the present Chapter 48 follow.  
12

13 PROPOSAL A     Status quo with a Re-definition of the Alaska Mental  
14                     Health Board's Responsibilities  
15

16 The Legislative Committee received several suggestions to the effect that  
17 little change should be made to the present system. In response to our  
18 request for information, the Department of Natural Resources indicated  
19 that:

20  
21                     The only change the Commission anticipates at this point is  
22                     a proposal to alter the five-year reappraisal requirement.  
23                     We have indicated support for an indexing system which  
24                     would automatically adjust the value of the trust lands. As  
25                     yet, however, there has been no uniform agreement  
26                     concerning the adjustment methodology.<sup>7</sup>  
27  
28

29 Under this approach, there would be no changes to the present procedure  
30 for determining how Trust revenues are spent. The provisions of Chapter  
31 48 requiring that eight percent of the land value be place in the Mental  
32 Health Trust income account would remain in effect and the Legislature  
33 would continue to appropriate on the basis of its perception of the needs of

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<sup>7</sup>     *Letter, Rod Swope, Commissioner Designate to the Interim Mental Health Trust  
Commission, to Nelson G. Page, September 6, 1989.*

1 the mental health program of the State, with unexpended revenue going to  
2 the general fund.

3

4 The Division of Mental Health and Developmental Disabilities also prefers a  
5 limited approach.

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I would like to have the presently constituted Mental Health Board able to give its entire attention and effort to the hospital and community mental health services administered by the Division.

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The Governor's Council for the Handicapped and Gifted, the Older Alaskans' Commission, and the SOADA Board are already serving planning, advisory, evaluation and advocacy functions for the other Mental Health Trust beneficiaries, and there is no other board to provide these functions for the "mentally ill who may require hospitalization" nor for the other recipients of traditional mental health services.<sup>8</sup>

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Thus, the Mental Health Board would be divested of its present responsibility for oversight and budget recommendations regarding all trust beneficiaries. Although this would eliminate the confusion which has resulted from the Greene decision, relieving the Board from its dual, and often conflicting role of being an advocate for one group while being an umbrella organization representing all groups, it would leave no entity with responsibility for trust oversight and would tend to perpetuate a fragmented and uncoordinated approach to the delivery of mental health services.

In the Committee's view, limited modifications to the Alaska Mental Health Board's role and structure do not change the problems with the

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<sup>8</sup> Letter, Todd R. Risley, Director, Division of Mental Health and Developmental Disabilities, to Nelson G. Page, October 16, 1989.

1 present system. Rather than strengthening the level of commitment the  
2 Legislature must make to using Mental Health Trust funds for mental  
3 health programs, this approach would decrease what, in the view of many,  
4 is an already inadequate incentive on the part of the Legislature to spend  
5 Trust funds appropriately. At present, despite the conflicting nature of its  
6 role, the Alaska Mental Health Board does serve as a guardian and  
7 watchdog over the Trust and the uses for which Trust revenues are spent.  
8 There is no other group which has either the legislative mandate or the  
9 responsibility to act as an umbrella speaking on behalf of all beneficiaries of  
10 the Trust. Although a re-definition of the Alaska Mental Health Board's  
11 responsibilities would end ambiguity in the Board's role, it would also  
12 end the Board's ability to protect and defend the Trust leaving nothing in its  
13 place. For these reasons, it is the view of the Committee that an  
14 independent board of trustees whose responsibility is to the Trust, and not  
15 just to the individual constituent groups, must exist. The Committee has  
16 been struck by the unanimous nature of the consensus among all affected  
17 groups on that principle, even if the details remain to be worked out.

18

19 PROPOSAL B      Creation of a Separate Trustee  
20                      Without Operating Authority

21

22 A more extensive modification of Chapter 48 would be to create a separate  
23 board of trustees with responsibility for the Trust. Such a separate board of  
24 trustees would not have responsibility for advocacy on behalf of any one  
25 group of beneficiaries to the Trust. At a minimum, the Board would be  
26 given responsibility for oversight of the way in which the Department of  
27 Natural Resources manages Trust land, would have responsibility for  
28 ensuring that the value of the Trust lands was maintained over time, and  
29 would have responsibility for defining who are the beneficiaries of the Trust  
30 and what services can properly be funded from the Trust. The Alaska  
31 Mental Health Board would remain the advisory and planning board  
32 advocating on behalf of the "traditional" mental health programs, similar  
33 to the Governor's Council for the Handicapped and Gifted, the Older  
34 Alaskans' Commission, and the Advisory Board on Alcoholism and Drug  
35 Abuse. At the same time, however, the independent Trustee Board would

1 take over the responsibility for protecting and advocating on behalf of the  
2 Trust itself.

3  
4 Although the exact scope and nature of the independent Board of Trustees  
5 remains to be determined, at a minimum, the Board would be a separate  
6 entity with separate legal status akin to the Alaska Power Authority, the  
7 Alaska Public Utilities Commission, or the Permanent Fund Board. As  
8 such, it would have the capacity to sue and be sued and to hire its own  
9 counsel to provide independent legal representation. At a minimum, the  
10 Board of Trustees would be charged with the responsibility to :

- 11  
12 1. Oversee and approve land management decisions of the  
13 Department of Natural Resources, as they affect the Mental  
14 Health Trust lands, and to negotiate with the State when it  
15 became necessary to revalue State land. Under the present  
16 Chapter 48, such re-valuation is to take place every five years;  
17
- 18 2. Invest and oversee any designated funds, such as funds  
19 appropriated for capital improvements;  
20
- 21 3. Determine annually the extent to which the needs of the  
22 beneficiaries of the Mental Health Trust have been met, based  
23 on the goals and objectives of the Alaska State Comprehensive  
24 Mental Health Plan, and to certify annually the extent to which  
25 the needs have been met or not met;  
26
- 27 4. To review and approve expenditures from the Trust to ensure  
28 that the expenditures are properly charged to the Trust.  
29

30 This independent Board of Trustees would have the power to promulgate  
31 regulations to implement its authority, the power to hire and fire its  
32 employees, and the power to set employees salaries, as a necessary element  
33 of its independence.

34  
35 Under this proposal, the language of Chapter 48 would be amended to  
36 prohibit the expenditure of funds held in the Mental Health Trust revenue

1 account without either (1) approval of the Board of Trustees, or (2) in the  
2 event that the Board of Trustees does not approve, a specific finding from  
3 the Legislature that the expenditure is necessary and appropriate to meet  
4 the needs of the Mental Health program of the State of Alaska. In addition,  
5 Chapter 48 would be amended to provide that no reappropriation to the  
6 general fund from the Mental Health Trust revenue account could take  
7 place unless (1) the trustees had certified that the necessary expenses of the  
8 Health program had been met for the previous year, or (2) in the event that  
9 the trustees did not so certify, the Legislature had made a specific finding to  
10 that effect.

11  
12 For this structure to work, the members of the Board of Trustees would  
13 have to act with a clear fiduciary responsibility for the Mental Health Trust  
14 and the beneficiaries of that Trust. It would be essential that members of  
15 the Board of Trustees consist of individuals who could fairly, impartially  
16 and knowledgeably review and evaluate the needs of the Trust and of the  
17 beneficiaries of the Trust. Ideally, this Board of Trustees would take over  
18 the present responsibility of the Alaska Mental Health Board to ensure that  
19 the plans of the various entities and agencies responsible for the mental  
20 health program are integrated and comprehensive.

21  
22 **PROPOSAL C**      Separate Trust with Operating Authority

23  
24 Most proposals for modification of Chapter 48, however expansive, do not  
25 change the underlying way in which mental health services are provided in  
26 the State of Alaska. The services are delivered through the Department of  
27 Health and Social Services and funding levels are determined by the  
28 legislative process. Recent actions in other parts of the United States have  
29 focused attention upon the feasibility of creating a public authority or  
30 corporations into which the assets or income of the Alaska Mental Health  
31 Trust would be transferred. This public authority would be empowered and  
32 authorized to do those things set forth in Proposal B. In addition it would  
33 act as an operating authority, providing mental health services for the State  
34 of Alaska. The general outlines of the program and the goals of the  
35 program would be set by the Legislature, and additional funding, as  
36 necessary, would be available through appropriations through the

1 Legislature or, in the case of capital expenditures, through a bonding  
2 power given to the public authority. The primary responsibility for the  
3 payment for and delivery of mental health services would be with this  
4 "Mental Health Authority".

5  
6 Similar broad and sweeping changes to the method for delivering mental  
7 health services have been enacted in the states of Washington and  
8 Wisconsin. In those states, the legislature contracts through a separate  
9 authority with regional mental health entities to provide mental health  
10 services on a local level. The overriding advantage of this system is that it  
11 provides incentives for greater local responsiveness to meet individual  
12 needs and creates a system which de-emphasizes institutionalization and  
13 in which dollars more closely follow patient needs.

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## RECOMMENDATIONS

It has become obvious to the Legislative Committee that additional work needs to be done. There is a clear consensus that Chapter 48 needs to be amended, and that the Amendments need to include the creation of an independent Board of Trustees which can, at a minimum oversee the actions of the State in funding and administering the Mental Health program and the Mental Health Trust lands. It is important to remember that the Weiss lawsuit is still pending. Unless and until the Weiss litigants are satisfied that a reasonable structure has been created, there is always the possibility that a court-ordered restructuring of the Trust will be required, which all parties presently still agree is an undesirable outcome.

Realistically, it is unlikely that the necessary study and review of these issues can be completed in time for any action to be taken by this legislative session. The Legislative Committee recommends, therefore, that work be done with an eye toward creating well thought-out and comprehensive changes during the 1990/91 legislative session. In the meantime, the Board, the Legislature, and the Executive Branch, should work toward reaching a consensus on the necessary changes. Specifically, the Committee recommends the following:

**A. Approve the Recommendations of the Interim Mental Health Trust Lands Commission.**

The Legislative Committee is not prepared to recommend changing some basic aspects of Chapter 48. Specifically, the "dedicated revenue stream" approach to funding has much to recommend it. The alternative, a re-transferring of Mental Health Trust lands to create a trust corpus, has the same problems and difficulties as always: it will be difficult to do, very expensive, and may result in a situation in which Mental Health Trust dollars go to managing the Trust lands, and not toward benefitting the beneficiaries of the Trust. After 2-1/2 years of study and deliberation, the Interim Mental Health Trust Lands Commission has issued its recommendations regarding the value of Mental Health Trust lands.

1 These important recommendations are the result of careful analysis and  
2 reasoned decision-making. They are essential to making the "dedicated  
3 revenue stream" approach successful. At a minimum the Legislature  
4 should act this session to adopt procedures approved November 7,1989 by the  
5 IMHTC. Thus, the Committee's first recommendation is that the  
6 Legislature should resolve the long-standing issue of Mental Health Trust  
7 lands valuation by accepting the procedures adopted by the  
8 recommendation of the Interim Mental Health Trust Commission during  
9 this legislative session.

10

11 **B. PREPARE COMPREHENSIVE PROPOSALS FOR THE 1991**  
12 **LEGISLATIVE SESSION**

13

14 The Committee recommends that no specific changes in Chapter 48 be  
15 made during this legislative session so that a more comprehensive  
16 approach to an overhaul of Chapter 48 and of the Alaska Mental Health  
17 program can be undertaken during the following legislative session. The  
18 changes outlined in this report provide only a summary of possible options  
19 and do not purport to be a comprehensive view of the possible ways in which  
20 a separate Board of Trustees could function. Alaska is not the only state  
21 that has been faced with these issues over the last few years. There is a  
22 wealth of information and knowledge which can and should be evaluated  
23 for precedent to determine the best way to structure mental health services  
24 delivery for the State of Alaska. The Legislative Committee recommends,  
25 therefore, that the Legislature appropriate sufficient funds for the purpose  
26 of conducting a study which will lead to comprehensive recommendations  
27 for enactment of legislation during the 1990/91 session.

28

29 **C. AUGMENT THE BOARD'S COMMITTEE STRUCTURE ON AN INTERIM**  
30 **BASIS**

31

32 Finally, the Legislative Committee recognizes that if no changes are made  
33 to Chapter 48 and to the structure of the Alaska Mental Health Board at the  
34 present time, the built-in conflict between the Alaska Mental Health  
35 Board's role as an advocate for the traditional Mental Health program and  
36 its role as a neutral arbiter of claims to the Trust's funds will continue, at

1 least on an interim basis. The Legislative Committee wishes to emphasize  
2 its belief that the Alaska Mental Health Board, on the whole, has done an  
3 excellent job of attempting to juggle these conflicting responsibilities.  
4 However, those beneficiaries of the Trust who are not presently required by  
5 statute to be represented on the Alaska Mental Health Board must be made  
6 to feel that their interests are being given full and fair consideration by the  
7 Board when it acts in its capacity as planning and oversight body for the  
8 Mental Health Trust as a whole. This issue was recognized by Governor  
9 Cowper in a letter which he sent to the Board February 17, 1989, in which he  
10 requested that the Board itself make recommendations as to any changes  
11 that should be implemented in its membership and structure.

12  
13 The Legislative Committee believes that, for the time being, no formal  
14 changes need to be made to the structure and membership of the Board.  
15 Instead, in order to ensure that the interests of all of the beneficiaries are  
16 represented on an interim basis, and, as importantly, in order to ensure  
17 that these beneficiaries perceive that their interests are adequately  
18 represented, the Legislative Committee recommends that the Board take  
19 the step of augmenting its Committee structure by adding to each of its  
20 committees voting members from one or more of the affected beneficiary  
21 groups. This augmentation would be on an interim basis until final  
22 recommendations can be made as to changes in the Board's structure and  
23 in Chapter 48. This recommendation can be implemented by the Board  
24 itself, and does not require any legislative changes. The Board has already  
25 had experience with this arrangement. Its Budget Committee has been an  
26 augmented committee for the last year, and the Legislative Committee itself  
27 welcomed and benefitted substantially from the participation of several  
28 interested parties. Thus, the Legislative Committee recommends Board  
29 Committees be expanded by the Executive Committee in accordance with  
30 established Board procedures to provide reasonable representation of  
31 beneficiary groups. The Committee further recommends that the  
32 committee expansions include coordination with the three affected boards  
33 and coalition attorneys representing plaintiffs in the litigation.

34  
35  
36

1 CONCLUSION

2

3 The challenge that is faced by the Board, the State, and the Weiss litigants  
4 is to find a way to make a permanent, binding commitment that adequate  
5 funding for the State's mental health program will be provided in the  
6 future. It is disheartening that the problems which led to the present  
7 dissatisfaction with Chapter 48 as a proposed resolution to the Weiss  
8 litigation are in many respects the same problems which existed and led to  
9 the Weiss lawsuit in the first place. Without a commitment to an  
10 enforceable and workable arrangement for funding the mental health  
11 programs, the Weiss litigants have no incentive to abandon their original  
12 demand that the Trust be reconstituted in its entirety. The State has at the  
13 present time an opportunity to look carefully at the way in which mental  
14 health services should be funded and delivered in the State of Alaska. The  
15 Legislative Committee recommends that steps be taken so that the mental  
16 health program and the Mental Health Trust can be structured in a  
17 manner that is forward looking and takes into consideration the needs of  
18 the State of Alaska over the next several decades.

19 Interim Report 6.6.4

DAVID T. WALKER  
ATTORNEY AT LAW  
MENDENHALL BUILDING  
920 FOURTH STREET, SUITE B  
JUNEAU, ALASKA 99901  
(907) 580-1537

January 23, 1990

HAND DELIVERED

Senator Jack Coghill  
Senate  
Capitol Building, Room 30  
P. O. Box V  
Juneau, Alaska 99811

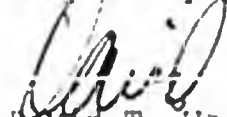
Re: Mental Health Trust Land Settlement

Dear Senator Coghill:

I have enclosed a copy of Jim Gottstein's January 19, 1990 legal memorandum addressing the status of the mental health trust lands litigation settlement under Chapter 48 (48 SLA 1987).

It remains Jim's and my fervent hope that the consequences described in the memorandum can be avoided. The Plaintiffs have followed and supported the legislative solution and proposed settlement provided by Chapter 48. Chapter 48 requires the Commissioner of the Department of Natural Resources to determine the value of the trust under the procedures approved by the Interim Mental Health Trust Commission. The Commission has established the procedures to be followed by the Commissioner in valuing the trust. Now the valuation, and necessarily the settlement, is in the hands of the Commissioner. Unless the Commissioner follows the valuation procedures established by the Interim Mental Health Trust Commission the beneficiaries will have no real choice but to pursue the remedies discussed in the memorandum to protect their interests and the trust. I will be happy to meet with you at any time to discuss this matter. I will contact you following the January 24, 1990 meeting of the Interim Mental Health Trust Commission to provide an update on the status.

Very truly yours,



David T. Walker  
Counsel for the Class

DTW:ndp

Enclosure



## LAWS OF ALASKA

1987

Source

CSHB 92(Fin) am

Chapter No.

48

### AN ACT

Relating to the Alaska Mental Health Trust; and providing  
for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1, LINE 9

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO  
THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES  
DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL  
REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY  
LINE OF EACH BILL SECTION.

Approved by the Governor June 8, 1987  
Actual Effective Date Sections 1-10 take effect July 1,  
1987, remainder of Act takes effect September 8, 1987

AN ACT

Relating to the Alaska Mental Health Trust;  
and providing for an effective date.

\* Section 1. FINDINGS AND PURPOSE. (a) The legislature finds

(1) the United States Congress passed the Alaska Mental Health Enabling Act of 1956, P.L. No. 84-830, 70 Stat. 709, "To confer upon Alaska autonomy in the field of mental health, transfer from the Federal Government to the Territory the fiscal and functional responsibility for the hospitalization of committed mental patients, and for other purposes;"

(2) in sec. 102 of the Alaska Mental Health Enabling Act, the Congress granted the territory the right to select up to 1,000,000 acres of federal land to serve as a source of funds to support the territory's mental health program;

(3) in subsection 102(e), the Congress specifically provided that the land so granted, as well as any income from the land and proceeds from dispositions of the land, were to be administered as "a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska," that "Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide," that the land may be "sold, leased, mortgaged, exchanged or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska," and that the Alaska Legislature must exercise this broad authority "in a manner compatible with

Chapter 48

the conditions and requirements imposed by this Act."

(4) In requiring that the proceeds and income of the 1,000,000-acre land grant "first be applied to meet the necessary expenses of the mental health program of Alaska," it was the intent of the Congress that additional public funds be appropriated by the legislature to supplement the proceeds and income from the land grant if those proceeds and income are insufficient to meet the necessary expenses of the mental health program of Alaska;

(5) If the proceeds and income from the 1,000,000-acre land grant exceed the necessary expenses of the mental health program of Alaska, the Congress authorized the legislature to appropriate the excess proceeds and income for other public purposes;

(6) because of the highly desirable location and character of much of the land selected by the state under the Act, for example, in and around major population centers, suitable for parks and game refuges, and other uses, and the difficulties associated with disposing of or dedicating the land for purposes that would not result in the receipt of funds that could be used for mental health purposes, for example, satisfaction of municipal entitlements, placement in parks and game refuges, and other uses, without compensation to the trust, the Tenth Alaska State Legislature enacted ch. 181 and 182, SLA 1978, which, among other things, redesignated all mental health lands as general grant lands;

(7) both ch. 181 and 182, SLA 1978, also created the mental health fund into which, as compensation to the trust, a sum equal to one and one-half percent of all revenue received from the management of state land was to be deposited and from which only the income could be appropriated exclusively for mental health purposes;

(8) a significant difference between ch. 181 and 182, SLA 1978, was that ch. 182 made the deposit of one and one-half percent of all public

income of the 1,000,000-acre land necessary expenses of the program of the Congress that the legislature to supplement those proceeds and income of the mental health pro-

the 1,000,000-acre land health program of Alaska, state the excess proceeds

location and character of Act, for example, in and game refuges, and depositing of or dedicating the receipt of funds that example, satisfaction of game refuges, and other Alaska State Legislature per things, redesignated

also created the mental trust, a sum equal to one the management of those income could be appro-

31 and 182, SLA 1978. 5 percent of all public

land revenue into the mental health fund "subject to legislative appropriation of sufficient funds";

(9) because ch. 182, SLA 1978 became law after ch. 181, SLA 1978 became law, the provisions of ch. 182, SLA 1978 have been considered controlling, including specifically the provision that deposits to the mental health fund would be "subject to legislative appropriation of sufficient funds";

(10) the legislature has never appropriated funds to the mental health fund;

(11) a class-action lawsuit, *Weiss v. State*, 7FA-82-2208, was filed on November 16, 1982, seeking a judicial determination that the Alaska Mental Health Enabling Act had established a "public trust" under which the state had received the 1,000,000-acre land grant, that the 1978 legislation redesignating mental health land as general grant land was a breach of that trust, and that the appropriate remedy was to invalidate the 1978 legislation and return mental health land to trust status;

(12) in *State v. Weiss*, 706 P.2d 681 (Alaska 1985), the Alaska Supreme Court held that the Alaska Mental Health Enabling Act established a public trust, that the 1978 legislation redesignating mental health land as general grant land was a breach of the trust, and that the appropriate remedy was to return mental health land still in state ownership to trust status and, for mental health land that the state had "sold" between 1978 and the date of the court's decision, to compensate the trust for the fair market value of mental health land so "sold" as of the date of their "sale," subject to a set-off for state mental health expenditures during the same period.

(13) while the court returned mental health land to trust status, it did not specify the nature of the state's obligations with respect to managing the trust land, leaving significant questions unanswered that may

Chapter 48

1 require additional costly and time-consuming litigation;

2 (14) continued costly and time-consuming litigation over mental  
3 health trust land management is not in the public interest because it  
4 diverts attention from the goal the Congress sought to achieve through the  
5 Act's land grant, the funding of a mental health program;

6 (15) continued costly and time-consuming litigation over mental  
7 health trust land management is not in the public interest because it has  
8 the potential to be extremely divisive, pitting the advocates of stringent  
9 mental health trust land management against those who envision state-owned  
10 mental health land managed for its highest and best use, including convey-  
11 ance to municipalities in satisfaction of municipal entitlements, placement  
12 in parks and game refuges, and other uses, without a major expenditure to  
13 compensate the mental health trust for the fair market value of the land;

14 (16) continued costly and time-consuming litigation over mental  
15 health trust land management is not in the public interest because advo-  
16 cates of stringent mental health trust land management may seek the in-  
17 validation of state conveyances of mental health land to third parties,  
18 particularly municipalities and Native corporations organized under the  
19 Alaska Native Claims Settlement Act, a course of action that at best will  
20 place a cloud on the third parties' title to those lands and at worst will  
21 result in those third parties losing title to their lands, causing economic  
22 and other harm and further dividing those who advocate stringent mental  
23 health trust land management from those who believe all state-owned land,  
24 including mental health land, should be managed for its highest and best  
25 use;

26 (17) continued costly and time-consuming litigation over mental  
27 health trust land management is not in the public interest because advo-  
28 cates of stringent mental health trust land management may seek the in-  
29 validation of legislative designations of mental health land as state

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1 parks, state game refuges, state forests, etc., placing the future use of  
2 the land for the designated purposes in doubt and further dividing those  
3 who advocate stringent mental health trust land management from those who  
4 believe all state-owned land, including mental health land, should be  
5 managed for its highest and best use;

6 (18) the failure of the Alaska legislature to deal with the  
7 current situation by properly reconstituting the mental health trust at  
8 this time will lead to continued costly, time-consuming, and divisive liti-  
9 gation, which is not in the public interest;

10 (19) the same problems that led to the 1978 redesignation of  
11 mental health land as general grant land, for example, the desirability of  
12 managing mental health land for its highest and best use, including the  
13 satisfaction of municipal entitlements, inclusion in parks and game ref-  
14 uges, will continue to pose difficulties in the state's efforts to accom-  
15 modate the public's needs generally with the obligation to administer  
16 mental health land as a trust;

17 (20) under art. VIII, sec. 2, Constitution of the State of  
18 Alaska, as construed by the Alaska Supreme Court in *State v. University of*  
19 *Alaska*, 624 P.2d 807 (1981), the legislature has the authority to remove  
20 land from trust status if the trust is compensated for the fair market  
21 value of the land;

22 (21) the state is not now, and in the foreseeable future will not  
23 be, in a position to compensate the mental health trust in money for the  
24 fair market value of mental health land;

25 (22) even if the state were able to compensate the mental health  
26 trust in money for the fair market value of mental health land, there is a  
27 substantial legal question whether that compensation, as the corpus of the  
28 trust, could be preserved in perpetuity or whether the prohibition on  
29 dedicated funds in art. IX, sec. 7, Constitution of the State of Alaska,

Chapter 48

would require that those funds be made available for appropriation by the legislature under the terms of the Alaska Mental Health Enabling Act;

(23) under art. VIII, sec. 2. Constitution of the State of Alaska, and subsection 202(e) of the Alaska Mental Health Enabling Act, the legislature has broad authority over all state land, including mental health land, and can permissibly remove mental health land from trust status if, consistent with its trust responsibilities, it simultaneously designates other state land of equivalent value as mental health land;

(24) the Congress' goal of funding a mental health program, and the public interest in having attention focused on the problems of the mentally ill and not questions regarding mental health trust land management, will be best served by establishing a mechanism for generating revenue from mental health land that minimizes the number and complexity of related land management decisions;

(25) reconstituting the mental health trust with state land that has a substantial likelihood of remaining in state ownership in perpetuity, and compensating the mental health trust for state use of that land through annual identification of an amount of state general fund revenue equal to the fair market rental value of the land as a separate account in the general fund, would minimize the number and complexity of land management decisions and would result in the following benefits to the mental health trust:

(A) it would ensure that the mental health trust corpus will be preserved in perpetuity;

(B) it would reconstitute a mental health trust corpus equal in value to the original 1,000,000-acre mental health trust corpus, with no reduction (in the nature of a set-off) for state mental health expenditures;

(C) it would make the entire mental health trust corpus

productive in that each acre of mental health trust land would produce its fair market rental value annually;

D) the mental health trust would not incur administrative expenses;

E) it would focus attention on questions related to the state's mental health programs and the levels of appropriations for those programs;

36) reconstituting the mental health trust with state land that has a substantial probability of remaining in state ownership in perpetuity would result in the following benefits to the state generally:

a) it would free all mental health land not in legislatively designated areas for nontrust uses;

b) the only significant expenditure of public funds that would be required would be appropriations for appraisal of the land to ensure equal value, an expenditure that would be required no matter what form of trust reconstitution is selected; and

c) it would establish an additional safeguard against disposal of the newly designated mental health trust land, that in those legislatively designated areas, in that, prior to such disposal, equal value replacement land would have to be identified and designated as trust land.

The legislature will best serve the public interest by reconstituting the mental health trust with land in legislatively designated areas, continuing to use that land for the legislatively designated purposes, compensating the trust for the use of the land through annual payments in an amount of general fund revenue equal to the fair market rental value of the land and designation in the general fund of that amount of funds to the special mental health trust income account, and creating a board to assist and advise the legislative and executive

able for appropriation by the  
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100-acre mental health trust  
to be a set-off for state  
  
mental health trust corpus

Chapter 48

1 branches of government on matters relating to the mental health program of  
2 Alaska.

3 (b) The purposes of this Act are

4 (1) to implement the intent of the Congress underlying sec. 201  
5 of the Alaska Mental Health Enabling Act that mental health land be admin-  
6 istered in a way that makes funds available for the support of Alaska's  
7 mental health program;

8 (2) to the extent practicable, to eliminate the need for costly,  
9 time-consuming and divisive litigation over the state's management of  
10 mental health land;

11 (3) to ensure that the attention of the public and the govern-  
12 ment is focused on mental health programs, as contemplated by the Congress,  
13 and not on issues relating to the management of mental health land;

14 (4) to reconstitute a mental health land trust through identi-  
15 fication of land in legislatively designated areas that is equal in value  
16 to the land selected by and patented to the state under sec. 202 of the  
17 Alaska Mental Health Enabling Act;

18 (5) to remove from trust status the land selected by and pat-  
19 ented to the state under sec. 202 of the Alaska Mental Health Enabling Act  
20 that is not in legislative designated areas, thereby freeing them for other  
21 uses;

22 (6) to validate each deed, contract for sale, lease, easement,  
23 right-of-way, permit, mineral lease disposal, reservation of land for  
24 public use by statute, or land management actions, including use classi-  
25 fications under AS 39.05.100 and interagency land management assignments by  
26 the Department of Natural Resources, that may have been called into ques-  
27 tion by the Supreme Court's decision in State v. Weiss, 706 P.2d 681  
28 (Alaska 1985), returning mental health land to trust status;

29 (7) to identify a portion of annual state general fund revenues

the mental health program of  
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have been called into ques-  
ice v. Weise, 706 P.2d 681  
trust status;  
state general fund revenue.

equal in amount to the fair market rental value of mental health land, as  
compensation to the trust for the continued use of the land in legisla-  
tively designated areas for the legislatively designated purposes; and

(8) to create a board to assist and advise the legislative and  
executive branches of government on matters relating to the mental health  
program of Alaska.

Sec. 2. AS 37.14 is amended by adding a new section to read:

Sec. 37.14.011. MENTAL HEALTH TRUST INCOME ACCOUNT. (a) The  
mental health trust income account is established as a separate ac-  
count in the general fund.

(b) The amount determined under (c) of this section as the fair  
market rental of the land constituting the mental health trust corpus  
is the earnings of the trust and the commissioner of revenue shall  
annually allocate that amount from the general fund of the state to  
the mental health trust income account in the general fund of the  
state.

(c) The fair market rental value of the land constituting the  
mental health trust corpus is equal to eight percent of the fair  
market value of the land. Following the initial determination of the  
fair market value of the land selected by and patented to the state  
under sec. 202 of the Alaska Mental Health Enabling Act, the com-  
missioner of natural resources shall redetermine the fair market value  
of the land constituting the mental health trust corpus at least every  
five years, and provide the redetermined value to the commissioner of  
revenue and the board established under AS 47.30.661.

Sec. 3. AS 37.14 is amended by adding a new section to read:

Sec. 37.14.021. UTILIZATION OF THE MENTAL HEALTH TRUST INCOME  
ACCOUNT. Money in the mental health trust income account established  
in AS 37.14.011(a) shall first be appropriated by the legislature to

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11 meet the necessary expenses of the mental health program of the state.  
21 In making annual appropriations from the mental health trust income  
31 account, the legislature shall consider the recommendations of the  
41 Alaska Mental Health Board established under AS 47.30.66<sup>1</sup>, including  
54 recommendations regarding capital improvements. After the necessary  
64 expenses of the state's mental health program have been funded, the  
74 legislature may make appropriations from the mental health trust  
84 income account for other public purposes.

94 \* Sec. 4. AS 38.05 is amended by adding a new section to article 11 to  
104 read:

111 Sec. 38.05.800. RECONSTITUTION AND ADMINISTRATION OF MENTAL  
121 HEALTH LAND TRUST. (a) The commissioner of natural resources, under  
131 procedures approved by the interim mental health trust commission,  
141 shall determine the fair market value, as of the effective date of  
151 this section, of all land selected by and patented to the state under  
161 the Alaska Mental Health Enabling Act. The commissioner shall report  
171 the determination of that value to the board established under AS 47.  
181 30.66<sup>1</sup>.

191 (b) The commissioner of natural resources, with the approval of  
201 the interim mental health trust commission, shall identify land within  
211 legislative designations that is equal in value to all land selected  
221 by and patented to the state under sec. 302 of the Alaska Mental  
231 Health Enabling Act that is not in legislative designations.

241 (c) All land selected by and patented to the state under the  
251 Alaska Mental Health Enabling Act that is within legislative designa-  
261 tions, together with all land identified by the commissioner under  
271 (b) of this section, constitutes the corpus of the mental health land  
281 trust.

291 (d) Upon reconstitution of the trust under this subsection, land

selected by and patented to the state under sec. 302 of the Alaska Mental Health Enabling Act that is not within legislative designations is removed from trust status.

(e) The land within legislative designations that constitutes the mental health land trust shall continue to be administered for the legislatively designated purposes. The trust shall be compensated for the continued use of the mental health trust land for the legislatively designated purposes as provided in AS 37.14.011.

(f) Before the state may remove land that is part of the mental health trust corpus from trust status, and in addition to any other requirements of law, the commissioner of natural resources, consistent with the state's trust responsibilities, shall identify replacement land, equal in value at the time of replacement, within legislative designations and incorporate them into the mental health trust corpus. The commissioner of natural resources annually shall report any actions under this subsection to the board established under AS 47.30.661.

Sec. 5. AS 39.25.10(c)(9) is amended by adding a new subparagraph to read:

(L) Alaska Mental Health Board;

Sec. 6. AS 47.30 is amended by adding new sections to read:

Sec. 47.30.661. ALASKA MENTAL HEALTH BOARD. The Alaska Mental Health Board is established. For budgetary purposes, the board is located within the Department of Health and Social Services. The board is the state planning and coordinating agency for the purposes of federal and state laws relating to the mental health program of the state. The purpose of the board is to assist the state in ensuring an integrated comprehensive mental health program.

Sec. 47.30.662. COMPOSITION. (a) The board consists of the

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1 commissioner of health and social services, or the commissioner's  
2 designee, and not fewer than nine nor more than 12 other members,  
3 appointed by the governor, with due regard for population and balanced  
4 geographic representation of the state.

5 (b) At least one-third of the members shall be consumers of  
6 mental health services, or parents or guardians of consumers.

7 (c) At least one-third of the members shall be either public or  
8 private providers of mental health services.

9 (d) The remaining members shall be representatives of the public  
10 at large.

11 Sec. 47.10.663. TERM OF OFFICE. (a) Board members serve  
12 staggered terms of three years.

13 (b) A vacancy occurring in the membership of the board shall be  
14 filled by appointment of the governor for the unexpired portion of the  
15 vacated term.

16 (c) Members may be removed only for cause, including, but not  
17 limited to, poor attendance or lack of contribution to the board's  
18 work.

19 Sec. 47.10.664. OFFICERS AND STAFF. (a) The board, by a major-  
20 ity of its membership, shall annually elect a chair and other officers  
21 it considers necessary from among its membership.

22 (b) The board will have a paid staff provided by the Department  
23 of Health and Social Services, including, but not limited to, an  
24 executive director who shall be selected by the board from candidates  
25 recommended by the department. The executive director is on the particu-  
26 larly exempt service and may hire additional employees in the particu-  
27 larly exempt service of the state. The executive director and the staff of the  
28 board shall be directly responsible to the board in the performance of  
29 their duties.

Sec. 47.30.665. BYLAWS. The board, on approval of a majority of its membership and consistent with state law, shall adopt and amend bylaws governing its composition, proceedings, and other activities consistent with state law and including, but not limited to, provisions concerning a quorum to transact board business and other aspects of procedure, frequency and location of meetings, and establishment, functions, and membership of committees.

Sec. 47.30.666. POWERS, DUTIES, AND RESPONSIBILITIES OF THE BOARD. The board shall

(1) measure the extent of the mental health need and, as necessary, conduct independent studies, evaluate the statewide mental health information system, and review the current mental health program of the state;

(2) provide a public forum for discussion of issues regarding current and potential services to persons served by the mental health program of the state;

(3) determine the needs, including those currently unmet, of the persons to be served by the mental health program of the state;

(4) review reports from the Department of Natural Resources regarding the valuation of the mental health land trust and the status of mental health trust land, from the Department of Revenue regarding allocations to the mental health income account, and from other departments regarding the current and projected revenue for the support of the mental health program of the state;

(5) subject to disclosure restrictions imposed by state or federal confidentiality or privacy laws, have access to information in the possession of state agencies;

(6) in conjunction with the Department of Health and Social Services, prepare and annually update a long-term comprehensive state

Chapter 48

1 mental health plan, to include the projected need and the services,  
2 facilities, and resources for the mental health program of the state  
3 to meet that need;

4 (7) in conjunction with the Department of Health and Social  
5 Services, develop, prepare, adopt, and periodically review and revise  
6 as necessary an annual state implementation plan to meet the needs of  
7 persons served by the mental health program of the state;

8 (8) in conjunction with the Department of Health and Social  
9 Services, and before developing the annual state implementation plan,  
10 evaluate the effectiveness of the prior year's implementation plan and  
11 evaluate program performance and recommend improvements, set priori-  
12 ties, and establish criteria to utilize in funding allocations;

13 (9) report at least annually to the legislature, governor,  
14 and commissioner of health and social services, and meet with appro-  
15 priate legislative committees, concerning the board's activities,  
16 including its evaluation of the effectiveness of the prior year's  
17 implementation plan, and its recommendations to meet the necessary  
18 operating and capital expenses of the mental health program of the  
19 state;

20 (10) serve as an advocate before the executive and legisla-  
21 tive branches of government and the public on behalf of those served  
22 by the mental health program of the state;

23 (11) discourage duplication of services and promote effi-  
24 cient and coordinated use of federal, state, and private resources in  
25 the provision of mental health services; and

26 (12) review applicable statutes, regulations, and policies  
27 and recommend appropriate changes.

28 Sec. 47.30.669. DEFINITION. In AS 47.30.661 - 47.30.669,  
29 "board" means the Alaska Mental Health Board established in

AS 47.30.6b1.

• Sec. 7. Section 1(b), ch. 132, SLA 1986, is amended to read:

(b) The commission established under (a) of this section consists of three [FIVE] members, including the commissioner of natural resources, or the commissioner's designee [AND THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES, OR THEIR DESIGNEES], and two [THREE] members and two [THREE] alternates [APPOINTED BY THE GOVERNOR] as follows:

(1) a member and an alternate representing the plaintiffs who were [,] appointed by the governor from a list of three names submitted to the governor by the plaintiffs in *Wales v. State*, + FA 82-2208 Civil;

(2) a member and an alternate representing the intervenors who were [,] appointed by the governor from a list of three names submitted to the governor by the intervenors in *Wales v. State*, + FA 82-2208 Civil [; AND

(3) A MEMBER AND AN ALTERNATE REPRESENTING THE GOVERNOR'S MENTAL HEALTH ADVISORY COUNCIL, APPOINTED BY THE GOVERNOR FROM A LIST OF THREE NAMES SUBMITTED TO THE GOVERNOR BY THE GOVERNOR'S MENTAL HEALTH ADVISORY COUNCIL.

• Sec. 8. Section 1(c), ch. 132, SLA 1986, is amended to read:

(c) The members of the commission shall elect a presiding officer. A majority of the commission constitutes a quorum. The affirmative vote of two [THREE] members is required to take official action. A vacancy does not impair the power of the remaining members to exercise the powers of the commission.

• Sec. 9. Section 2, ch. 132, SLA 1986, is repealed and reenacted to read:

Sec. 2. RESPONSIBILITIES OF THE COMMISSIONER OF NATURAL RE-

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7.30.6b1 - 7.30.6b9.  
board established in

Chapter 48

1 SOURCES AND THE COMMISSION. (a) The commission shall review proce- (e)  
2 dures proposed by the commissioner of natural resources to determine land to  
3 the fair market value, as of the effective date of AS 38.05.800, of approval c  
4 all land selected by and patented to the state under sec. 202 of the advise  
5 Alaska Mental Health Enabling Act, and review the final determination federal  
6 of the fair market value determined under those procedures. acquire  
7 based c

7 (b) The commission shall review the identification by the com- valid m  
8 missioner of natural resources under AS 38.05.800 of land within Sec. 10  
9 legislative designations that is equal in value to all land selected  
10 by and patented to the state under sec. 202 of the Alaska Mental  
11 Health Enabling Act that is not in legislative designations. Se

12 (c) In the exercise of the commission's responsibilities under sioner  
13 this section, the commission and its staff may review the records of reconstr  
14 the Department of Natural Resources that are made confidential by law AS 47.1  
15 or regulation. An individual who acquires information made confiden-  
16 tial by law or regulation in the performance of functions authorized  
17 by this Act and discloses it without proper authority violates AS 11-  
18 56.660.

19 (d) The commissioner of natural resources is responsible for the  
20 management of the mental health land of the state as a public trust  
21 under P.L. 84-830, 70 Stat. 709. Except as provided in law of this  
22 section, the commissioner of natural resources may not sell, lease, or  
23 exchange mental health trust land of the state or an interest in the  
24 mental health trust land of the state without the prior approval of  
25 the commission. In reviewing a proposal for the sale, lease, or ex-  
26 change of mental health trust land from the commissioner of natural  
27 resources, the commission may approve the proposal of the commissioner  
28 on its determination that the proposal is consistent with the terms of  
29 the trust established by the Alaska Mental Health Enabling Act.

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Commission shall review procedural resources to determine date of AS 38.05.800, or rate under sec. 202 of the law the final determination use procedures.

Identification by the commission 38.05.800 of land within value to all land selected 202 of the Alaska Mental Health designations.

responsibilities under may review the records of made confidential by law information made confidential of functions authorized authority violates AS

is responsible for the state as a public trust provided in (c) of this may not sell, lease, or or an interest in the at the prior approval of the state, lease, or ex- Commissioner of Natural Resources. of the commissioner consistent with the terms of the Enabling Act.

(e) The commissioner of natural resources may transfer trust land to the federal government under AS 38.05.035(b)(9) without approval of the commission. The commissioner of natural resources shall advise the commission of an intention to transfer trust land to the federal government and, after the transfer, shall make every effort to acquire replacement land to fulfill the state's remaining entitlement based on a prioritization, approved by the commission, of existing valid mental health selections.

• Sec. 10. Section 6, ch. 132, SLA 1986, is repealed and reenacted to read:

Sec. 6. This Act is repealed on the certification of the commissioner of natural resources that the mental health land trust has been reconstituted under AS 38.05.800 to

- (1) the Alaska Mental Health Board established under AS 47.30.661;
(2) the lieutenant governor; and
(3) the revisor of statutes.

• Sec. 11. TRANSITIONAL PROVISIONS. Beginning with fiscal year 1989 and continuing until the commissioner of natural resources certifies to the commissioner of revenue that the mental health land trust has been reconstituted under AS 38.05.800, as enacted in sec. 4 of this Act, the commissioner of revenue shall annually allocate from the general fund of the state to the mental health trust income account in the general fund an amount equal to five percent of the unrestricted revenue of the state for the fiscal year.

• Sec. 12. Notwithstanding AS 47.30.663(a), as added by sec. 6 of this Act, of the initial appointees to the Alaska Mental Health Board appointed under AS 47.30.662, as added by sec. 6 of this Act, one-third shall serve for one year terms, one-third shall serve for two year terms, and one-third

Chapter 48

1 For three year terms.

2 \* Sec. 13. AS 37.14.010, 37.14.020, 37.14.030, 37.14.040, 37.14.050,  
3 AS 47.30.605; and sec. 3, ch. 132, SLA 1986, are repealed.

4 \* Sec. 14. Sections 7 - 10 of this Act take effect July 1, 1987.

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Law offices of  
JAMES B. GOTTSTEIN

406 G STREET, SUITE 206  
ANCHORAGE, ALASKA 99501  
(907) 274-7686  
TELECOPIER: (907) 274-9999

MEMORANDUM

FROM: JAMES B. GOTTSTEIN  
TO: INTERESTED PARTIES  
DATE: January 19, 1990  
RE: LEGAL ANALYSIS OF STATUS OF MENTAL HEALTH TRUST LANDS AND RELATED ISSUES

Summary and Purpose

The Commissioner of the Department of Natural Resources is expected to announce on January 24, 1990 that she does not intend to follow the procedures to determine the fair market value of one million acres of Mental Health Trust Lands which the Interim Mental Health Trust Commission (Commission) approved pursuant to Chapter 48 SLA 1987 (Chapter 48). If this expected action occurs, the Plaintiffs in the Mental Health Trust Lands lawsuit, Weiss v. State, 4FA-82-2208 Civ., will be forced to challenge title to approximately 750,000 acres of Mental Health Trust Lands and take other actions, as necessary steps to protect their rights against the continuing breach of the trust by the State of Alaska in properly discharging its fiduciary responsibilities in managing the trust.

The land categories are:

370,000	acres designated as state parks, refuges, etc.;
40,000	acres to Municipalities;
40,000	acres to Native corporations <sup>1</sup> ;
45,000	acres to individuals;
3,000	acres to the University of Alaska; and
<u>280,000</u>	acres in less than total conveyances.
778,000	

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1. It does not appear this would include a large portion of the Beluga Coal Field conveyed to Cook Inlet Region Inc., as a result of its exchange under the Alaska Native Claims Settlement Act.

The purposes of this memorandum are to outline the relevant facts and legal authority for such actions.

## I. FACTUAL BACKGROUND

In 1956, the Congress, in order to correct a longstanding problem in providing an adequate mental health program in Alaska, granted Alaska, in trust, one million acres of land to generate income "first for the necessary expenses of the mental health program of Alaska". Unfortunately, after selecting the best lands available, Alaska never administered the trust properly. This included transferring Mental Health Trust Lands to third parties without adequate compensation. Starting in the mid-Seventies, the State began to recognize this was illegal, and at the same time there was a tremendous clamor for land by municipalities and other interested parties (without paying for it, of course).<sup>2</sup> In 1978<sup>3</sup> the legislature purported to abolish the trust by "redesignating" Mental Health Trust Lands as General Grant Lands.<sup>4</sup> While a theoretical compensatory monetary fund was established, Mental Health Trust Lands were never valued to determine the proper compensation, and more importantly, not a single penny was ever paid into this account. Immediately after the "redesignation", municipalities, Native corporations and individuals began to receive large amounts of the best Mental Health Trust Lands without paying fair value for them.

A lawsuit was brought in 1982 by the Alaska Mental Health Association, through Steve Cowper<sup>5</sup>, naming Vern Weiss and Karl Hilliker as representatives of people needing mental health services, the beneficiaries of the Mental Health Lands Trust, to declare the legislative action in abolishing the trust invalid. The Supreme Court, in 1985, did just that and ordered "the trust be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." State v. Weiss., 706 P.2d 681 (Alaska 1985). However, the state

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2.This was the period of the "Beirne Initiative" where residents were to be allowed to stake "undesigned" state land for private ownership.

3.In the same package of legislation providing land to residents enacted as a response to the "Beirne Initiative".

4.Chapters 181 and 182 SLA 1978.

5.Governor Cowper has apparently been advised by the Attorney General's Office that as former attorney for the plaintiffs it is inappropriate or improper for him to take an active role in resolving the lawsuit. This has left a policy vacuum.

desired to avoid reversing previous actions it had taken on Mental Health Trust Lands, and the plaintiffs in the lawsuit were challenging conveyances of trust lands to third parties (for the reasons set forth below). An alternative method of reconstituting the trust was agreed on between the plaintiffs and the state. This approach was enacted as Chapter 48 SLA 1987 (Chapter 48).

Among other things, Chapter 48 provided that Mental Health Trust Lands be valued and an equal value of lands in legislative designations (state parks, refuges, critical habitats, and the like) be constituted as a replacement trust, with 8% of the value being deposited every year into the Mental Health Trust Income Account. Under Section 4 of Chapter 48, the value is to be determined by the Commissioner of the Department of Natural Resources under procedures approved by the Interim Mental Health Trust Commission (Commission). On November 7, 1989, after more than two years of a tremendous amount of work, the Commission approved its final procedures for determining the value of Mental Health Trust Lands. At this time, all indications are that the Commissioner is intending to refuse to follow these procedures. If the Commissioner fails to follow the approved valuation procedures the proposed settlement of the litigation will be nullified and the plaintiffs will be forced to challenge the legal status of the hundreds of thousands of acres of Mental Health Trust Lands described above and take other steps to protect their rights.

## II. APPLICABLE LAW

A. General Considerations. In the Weiss decision (this case), *supra.*, the Alaska Supreme Court confirmed that "basic trust law principles" apply to the administration of the Mental Health Lands Trust. In doing so, at footnote 3, the court cites the United States Supreme Court case of Lassen v. Arizona, 385 U.S. 458, 87 S. Ct. 584, 17 L.Ed.2d 515 (1967), and its own previous decision in State v. University of Alaska, 624 P.2d 807 (Alaska 1981).

76 American Jurisprudence, 2d, Trusts, Section 315 describes generally the trustee's duties as follows<sup>6</sup>:

A trustee must act in good faith in the administration of the trust, and this requirement means that he must act honestly and with finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length in the workaday world, but with a punctilio of honor the most sensitive. He must act with such high good faith in the

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6. References to footnotes are generally omitted throughout this memorandum.

exercise of decisions in the administration of the trust, and in the investigation and determination of facts as a basis for his judgment and decisions. He must avoid all situations and relations tending in the least to interfere with the discharge of his duties, or in which honesty may be a strain on him. Any exceptions in his conduct to the high standard of honor governing him renders him fully liable for all ensuing damages to the trust estate. Courts of equity have been uncompromising in their hostility to any laxness on the part of a trustee and inquire in proper cases into his administration of the trust to determine his honesty and loyalty. The liberality with respect to a trustee of provisions in a trust instrument or declaration in no way diminishes the trustee's duty to act in utmost good faith.

Section 316, Trusts, 76 American Jurisprudence, 2d., describes how a trustee must act exclusively in the trust's interests:

A trustee in his administration of the trust is under the duty of acting exclusively and solely in the interest of the trust estate or the beneficiaries within the terms of the trust, and is not to act in his own interest or in the interest of a third person. He must act for and not against the trust estate or the beneficiary. In general, any act of the trustee in hostility to the interest of the trust estate is a breach of trust. He may not without breach of duty take part in any transaction concerning the trust, where he has an interest in such transaction adverse to that of the beneficiary.

A trustee is under a duty to refrain from situations wherein his own interests are brought into conflict with those of the trust, irrespective of good or bad faith on his part. He must not do anything tending to interfere with his exercise of a wholly disinterested and independent judgment.

In conformance with the above described standard of conduct by a trustee, one of the basic principles of trust law is that the trustee must keep trust property separate from his individual property. Section 179 Restatement of the Law of Trust, 2d.

Similarly, a trustee may not engage in self-dealing with trust property.

A trustee is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries, and it is a well established general rule that a trustee should not engage in self-dealing \* \* \*.

\* \* \*

The prohibition against self-dealing or mingling of funds by a trustee does not depend upon any question of fraud, but is made absolute to avoid the possibility of fraud and to avoid the temptation of self-interest.

76 American Jurisprudence, 2d., Section 319. This is not a new principle. In the 1823 United States Supreme Court case of Wormley v. Wormley, 8 Wheaton 421, 5 L.Ed 651 (1823), Justice Story wrote:

No rule is better settled than that a trustee cannot become a purchaser of the trust estate. He cannot be at once vendor and vendee. He cannot represent in himself two opposite and conflicting interests. As vendor he must always desire to sell as high, and as purchaser to buy as low, as possible; and the law has wisely prohibited any person from assuming such dangerous and incompatible characters.

In the case of the Mental Health Lands Trust, the dishonest and unscrupulous actions of the state in the administration of the trust<sup>8</sup> makes a mockery of the just enunciated standards of conduct. The following is a description of the remedies appro

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7. While the state, as a whole, has acted abominably with respect to the trust, the state is composed of many different parts, and with some notable exceptions it is hard to cast particular individuals as culpable. The 1978 legislature, for example, can say it intended to compensate the trust and no bad faith was involved. From 1973 until the lawsuit, DNR can say it was just following state law. The 1987 Legislature can say it acted in good faith in enacting Chapter 48 and expected the Commissioner of DNR to follow the procedures approved by the Commission. On the other hand, the administration's budgeting process clearly does not properly allocate trust funds "first to the necessary expenses of the mental health program", and the Legislature certainly has not corrected this in its appropriations. Similarly, DNR has not been at all concerned with making sure the trust is fairly compensated.

8. The barest outline of facts given here does not even scratch the surface of the repeated, deliberate and determined efforts of the state to avoid its trust responsibilities and convert trust property to its own use without compensation to the beneficiaries of the trust, who, after all, are among the most defenseless in the population.

priate for this breach of trust, including the rights of the beneficiaries to pursue trust property into the hands of third parties, and hold third parties accountable to the trust in the event of their participation in the breach of trust.

B. Only Purchasers For Value Without Notice Have Valid Title to Mental Health Trust Lands.

1. General Requirements.

Only bona fide purchasers -- that is people who have paid value for trust property and are without notice, either actual or imputed of the trust or the breach of trust have valid title to Mental Health Trust Lands. The reason for this rule is that as between the clearly innocent beneficiary and a third party who has obtained trust property, the beneficiary should not suffer the loss, unless the third party can prove he was innocent as well. In proving his innocence, the law charges the third party with knowledge of certain facts and with the duty to make an inquiry into other facts where he should have been wary. Bogert in *The Law of Trusts and Trustees, Revised Second Edition*<sup>9</sup>, devotes a whole chapter (43) to the "Bona Fide Purchaser Rule".

Section 881 of Bogert states the basic bona fide purchaser rule:

A most important rule which limits the power of a beneficiary or other holder of an equitable interest to pursue and claim property is the doctrine to the effect that the transfer of the legal estate in property to a bona fide purchaser for value cuts off all equities in the same property. Thus if a trustee holds under the trust the legal title to real estate (the trust not being on the record), and the trustee sells the land to a purchaser who does not know of the trust, or have reason to know of it, and who pays a valuable consideration for the legal title, the latter gets an interest free and clear of the trust, and the beneficiary cannot get the aid of a court of law or equity in obtaining the legal title or possession.

Section 887 of Bogert states:

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9. Hereafter referred to as "Bogert".

It is well settled that in order to have the benefit of the bona fide purchaser rule, the taker of the legal title must have "paid value," or must have been a taker "for a valuable consideration."

## 2. Notice.

Section 891 of Bogert discusses the various categories of notice as follows:

The cases and statutes describe the person who can qualify for the protection of the rule as "an innocent purchaser", or a "bona fide purchaser", or a "purchaser without notice" of the equity in favor of another person which, it is claimed, has been cut off. The fact of which it is alleged the purchaser had no notice may be either (1) the mere existence of the trust or other equity or (2) the extent of the powers of the trustee under a known trust. In discussing these problems the courts and writers use various words and phrases, not always consistently, for example, "knowledge", "notice", "actual notice", "implied notice", "constructive notice", "absolute notice", and "facts putting on inquiry". It is believed that confusion can be avoided by using the single word "notice", and defining it to include awareness of a fact which the party either had actually, or should have possessed, or which the law regards him as possessing.

One who is a purchaser of property which is subject to an equity may be in any one of several different situations with regard to notice as to whether the property comes to him charged with an equity or free from all equities.

(1) He may have no knowledge or information, either actual or imputed under a statute or otherwise, which would lead a reasonable man either to know that there was an equity attached or to inquire further with respect to the possibility of such equity being attached. In this case he is an "innocent purchaser," or "purchaser without notice."

(2) He may have knowledge, coming to him or his agent through the senses of sight or hearing, which shows that the property in question is being transferred to him subject to an equity. In this case he may be said to be a "purchaser with actual notice."

(3) He may have notice of an equity, imputed to him through recording or other statutes, in which case he is usually called a purchaser "with constructive notice." For purposes of public policy the statutes treat him as having notice, whether or not he is actually conscious of the existence of the equity.

(4) He may have knowledge of facts about the ownership of the property, either actually acquired by himself or his agent, or imputed to them under statutes, which, while not sufficiently strong to lead an ordinarily prudent man to a positive belief that the property is subject to an equity, is of sufficient force to compel an ordinarily careful man to inquire further regarding a possible equity. If such is the case, the purchaser is charged by the court with notice of the facts regarding the equity which a reasonable inquiry would have revealed. A purchaser of this type is one "put upon inquiry," and if the inquiry ought to have led to notice of the equity he is treated by the court as if he had had actual notice of it.

(5) A purchaser may become a purchaser with notice because of a combination of the factors of actual notice, constructive notice, and notice acquired from facts putting on inquiry. Thus he may have information from each of the three types of sources, no one of which, standing alone, would make him a purchaser with notice of an attached equity, but which, in combined effect, give him the requisite knowledge to make him a mala fide purchaser.

(Emphasis added)

Section 892 states:

If the proof shows that the purchaser was conscious of the existence of any equity against the property, there is no doubt that he cannot get the benefit of the bona fide purchaser rule.

Section 893 of Bogert "Constructive Notice under Recording Acts", states:

From the time of filing for record, all purchaser of the property involved, and in many cases creditors are charged with knowledge of the existence and contents of the document in question. It is clear that these statutes are frequently of importance in giving to a purchaser from a trustee or other holder of property subject to an equity notice of the existence and terms of the trust. This notice is generally called "constructive". It exists no matter what may be the purchaser's actual knowledge. Thus one purchasing land

is charged with notice of the terms of the recorded deed to his grantor and with the terms of all prior recorded deeds in the chain of title. If the grantor or a predecessor of the grantor is described in the deed by which he acquired title as a trustee, with or without details of the trust, the purchaser is deemed to know of the existence of such a trust and of such details as to names of beneficiaries, purposes of the trust, powers of the trustee, etc., as are given in the recorded instrument. Such facts thus treated as being known to the purchaser may give him constructive notice that he will take the property subject to an equity in favor of the beneficiary, or they may merely put him on inquiry as to whether he will get title free of the trust or not.

\* \* \*

At common law the mere pendency of some actions with regard to the title to property made a purchaser during the pendency of the action take subject to the claims of the parties as later adjudicated. Statutes now provide that in an action affecting the title to realty a notice of the pendency of the action may be filed in the real property record office, and that it shall be constructive notice to purchasers of the realty pendente lite. These statutes constitute another source of constructive notice to purchasers of realty who claim to be bona fide purchasers.

Section 894 of Bogert states:

If the prospective purchaser of the trust property, or of other property subject to an equity, learns of facts personally or through an agent which, while not conclusively showing the existence of a trust or other equity, would lead an ordinarily prudent man to a belief that there was a possibility that an equity existed, the purchaser has a duty to make a reasonable inquiry concerning the existence and nature of the possible equity, and he will be charged with knowledge of the facts concerning the equity which a reasonable investigation would have brought to light.

Section 894 of Bogert, states:

In most cases where there is a written trust instrument, and the purchaser knows of it, or could have learned of it with reasonable effort, he will be charged with the duty of examining that instrument.

\* \* \*

The duty to inquire may be merely as to the existence of a trust or other equity, or it may include also the extent of the powers of the trustee and the question whether the trustee has duly exercised the powers granted to him.

The 1823 United States Supreme Court case of Wormley v. Wormley, cited above, demonstrates again this is not a new legal principle.

The next point for consideration is, whether the defendants, Veitch, and Castleman and McCormick, were bonae fidei purchasers of the Frederick lands, without notice of the breach of trust. If they had notice of the facts, they are necessarily affected with notice of the law operating upon those facts; and their general denial of all knowledge of fraud will not help them, if in point of law, the transaction is repudiated by a court of equity. If they were bonae fidei purchasers, without notice, their title might have required a very different consideration.

\* \* \*

It appears to us therefore, that the circumstances of the case can lead to no other result than that Castleman and McCormick were not purchasers without notice of the material facts constituting the breach of trust; and that, therefore, the Frederick lands ought in their hands to stand charged with the trust in the marriage settlement.

Interestingly, in Justice Johnson's separate opinion he objected to the characterization of the transactions as being in bad faith or unfair, but nevertheless agreed with the result:

I can see nothing but liberality in the conduct of Strode towards Wormley, and little else than improvidence, caprice, and ingratitude in the conduct of the latter.

\* \* \*

Nevertheless, there are canons of the court of equity which have their foundation, not in the actual commission of fraud, but in that hallowed orizon, "lead us not into temptation."

\* \* \*

It is unquestionable, from the evidence, that both Veitch, and Castleman and M'Corrick, must be affected by both legal and actual notice of the transactions of

Strode. They are, therefore, liable to the same decree which ought to be made against the latter.

It is, however, some satisfaction to me to be able to vindicate their innocence, while I feel myself compelled to subject them to a serious loss. The rule which requires this adjudication, may, in many cases, be a hard one, but is a fixed rule, and has the sanction of public policy.

C. Identifiable Trust Property not in the Hands of a Bona Fide Purchaser Can be Returned to the Trust.

Bogert at Section 866 states:

"The law is now well settled that as between the cestui que trust<sup>[10]</sup> and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust." [citation omitted]

This doctrine has been expressed by the Supreme Court of California in the following words: "It is well settled that the beneficiary of a trust may follow and recover the trust fund if any property in the hands of the trustee or of those taking with notice can be identified either as the original property of the cestui que trust, or as the product of it."

This right of the beneficiary is not that of a lienholder or a preferred creditor. It is based on a property right in the res or its substitute. "The right of the beneficiary to pursue a fund and impose upon it the character of a trust is based on the principle that it is the property of the beneficiary, not upon any right of lien against the wrongdoer's general estate; and this, whether the property sought to be recovered is in the form in which the beneficiary parted with its possession or in a substituted form.

(Emphasis added).

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10. Beneficiary or purpose of a trust.

The court in Rogers v. Rogers 473 N.E. 226 (N.Y. 1984) stated:

[O]ne who possesses equity in an asset is entitled to restitution of the asset by a subsequent title holder who paid no value even if the latter had no knowledge of the predecessor's equitable interest.

In Paolino v. Channel Home Centers, 668 F.2d 721, 723 (3rd Cir. 1982) the court said:

If a purchaser of property from a trustee knew, or should have known, that disposition of the property was a breach of trust, the purchaser is charged with the same trust.

With respect to a donee of trust property, Section 868 of Bogert states:

A donee who receives trust property transferred to him in breach of trust, although he does not know of the breach, is liable to return the trust property or its product as long as he holds it.

That these general trust law principles apply to trust lands such as Mental Health Trust Lands cannot be seriously questioned. See Murphy v. State of Arizona, 181 P.2d 336 (Ariz. 1947). Indeed, Murphy held that deeds issued in violation of the trustee's authority were "null and void" and subsequent holders whether bona fide purchasers or not, did not have good title because there was nothing to purchase<sup>11</sup>:

If \* \* \* these enactments [conditions upon which trustee may dispose of trust property] are mandatory upon  
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11. The court in Murphy described the reasons for the trust restrictions thusly:

The sad experience of Congress with the handling by these twenty-three states of the granted lands, the sale thereof, and the investment of monies derived from a disposition of the granted lands, brought about a new policy which found expression in the Enabling Act for New Mexico and Arizona. The dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state, and these granted lands and the monies derived from a disposition thereof were so poorly administered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona.

the Board, or are jurisdictional in effect, or conditions to be performed before power vests in it to make the conveyance, then their deed is a nullity and gives rise to no rights whatever either in the grantee or in purchasers for value from him.

See also The United States Supreme Court case of Alamo Land & Cattle Co. v. Arizona, 424 US 295, 47 L.Ed 2d 1, 96 S.Ct 910 (1976) and U.S. v. 78.61 Acres, 265 F.Supp 564 (USDC Neb. 1967), which was cited with approval by the U.S. Supreme Court in Alamo.

E. Parties who have "Participated in the Breach of Trust are Liable for the Damages Occasioned Thereby.

Bogert, Section 901 states persons participating in a breach of trust can be held liable for the damages to the trust:

The wrong of participation in a breach of trust is divided into two elements: (1) an act or omission which furthers or completes the breach of trust by the trustee; and (2) knowledge at the time that the transaction amounted to a breach of trust, or the legal equivalent of such knowledge.

\* \* \*

[I]f the third party by any act whatsoever assists the trustee in wrongfully transferring the benefits of the trust property to the trustee, another person, or the alleged participant, or aids in destroying or injuring that property, there has been conduct upon which liability can be predicated, \* \* \*.

Section 868 of Bogert states:

[N]o third person shall knowingly aid the trustee in committing a breach of his duties.

\* \* \*

If a third party takes part with the trustee in a breach of trust, the alternative remedies of money claim or tracing of trust property may be applied to him and, as to the trustee, in addition to other relief.

\* \* \*

[T]he trust property or its product has been traced to the hands of the third party-participant and the beneficiary has been able to reach it there. If the bene-

ficiary believes that the third party has participated in a breach and has proceeds of the trust property in his hands, the beneficiary may obtain an accounting from the third party and may ask, in the same suit, for tracing as to all property identified and a money judgment as to the balance.

- D The State should be Enjoined<sup>12</sup> from Further Transfers of Mental Health Trust Lands and Possibly All State Lands; Receipts from All State Lands Are Subject to Impoundment; Traceable Trust Property in the Hands of Third Parties is Subject to the Trust's Claims.

Section 861 of Bogert states:

The court may order the trustee or his successor in interest to perform the trust as a whole, or to take some particular step in trust administration.

\* \* \*

The court may in its discretion require the defaulting trustee to restore to the trust fund or deliver to the beneficiary particular property other than money, by way of restitution in kind.

\* \* \*

[T]he beneficiary may claim part of a trust fund under a constructive trust theory and recover money damages for conversion or misappropriation of the other part.

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12. Under Civil Rule 65(c) a bond will normally be required to obtain an injunction in order to cover any costs which may be incurred if the injunction later turns out to have been wrongfully issued. There are numerous cases, however, which hold that such a bond is not necessary (or may be posted in a nominal amount) if the party seeking it is a public interest litigant, or is indigent. The beneficiaries of the Mental Health Lands Trust qualify under both criteria. See People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319 (9th Cir. 1985); Natural Resources Defense Counsel v. Morton, 337 F.Supp. 167 (D.C.D.C. 1971); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 331 F.Supp. 925 (D.C.D.C.. 1971); Orantes-Hernandez v. Smith, 541 F.Supp. 351 (D.C. Cal. 1982); Bartels v. Biernat, 405 F.Supp. 1012, 1019 (D.C. Wis. 1975); Bass v. Richardson, 338 F.Supp. 478 (D.C.N.Y. 1971); Denny v. Health & Social Services Bd., 285 F.Supp 526, 527 (D.C. Wis 1968).

Section 862 of Bogert states:

For a breach of trust the trustee may be directed by chancery to make a payment of damages to the beneficiary out of the trustee's own funds.

Section 865 of Bogert states:

[I]f the trustee who has defaulted has in his hands the trust res or its substitute, the right of the beneficiary to hold the trustee to personal liability may in some cases be supplemented by a lien upon the res or its substitute.

\* \* \*

And so too, if a third person has in any way rendered himself liable to the beneficiary to pay damages in money and such third person is not a bona fide purchaser but has title to part or all of the trust res, or to any property which is the successor or product of part or all of the trust property, the beneficiary may obtain a decree from the court that the beneficiary's claim for money damages be declared a lien on such property and be satisfied out of it.

\* \* \*

If the beneficiary chooses to rely on money liability plus this equitable lien on the trust property or its proceeds, he has obviously made an election inconsistent with tracing the trust property and claiming it as his equitable property. Under this lien theory the property is that of the defendant trustee or third person absolutely. Under the tracing plan the plaintiff claims that legal title to the res in question is held by the defendant but that it is equitably owned by the plaintiff. The value of the traceable property will usually determine the beneficiary's choice between the lien theory and the tracing method. If a trustee, for example, has stolen trust funds in the amount of \$10,000 and invested them in realty in his own name, and the realty has become worth more than \$10,000 it will be advantageous for the beneficiary to elect to recover that realty in complete satisfaction of the claim for conversion of trust principal. On the other hand, if the real property has decreased in market value to \$8,000, it will be expedient for the beneficiary to obtain a money judgment against the trustee for \$10,000 on account of the misappropriation of the trust principal, sell the realty under a lien and realize \$8,000 therefrom, and still have a claim for \$2,000 under his judgment.

In Moody v. Pitts, 708 S.W. 930 2d. (Texas App. 1986), the court stated:

If a trustee commingles trust funds with the trustee's own, the entire commingled fund is subject to the trust.

In Blair v. Trafco Products, Inc., 369 N.W.2d 900 (Mich. App. 1985) the court said:

[W]here mingling of trust funds with other funds occurs, the cestui que trust has a lien upon the entire fund, and the law presumes that the trust fund was not paid out so long as an amount equal to the trust fund remained.

F. Appointment of A Receiver on Mental Health Trust Lands and Replacement of the State as Trustee.

Restatement of Trusts 2d., Section 107 (a) states a trustee can be removed by a proper court. Relevant comments to that section state:

a. Removal by Court. A court may remove a trustee if his continuing to act as trustee would be detrimental to the interests of the beneficiary. The matter is one for the exercise of a reasonable discretion by the court.

b. Grounds for Removal. The following are, among others, grounds for removal of a trustee: \* \* \* the commission of a serious breach of trust

Section 108 of the Restatement of Trusts 2d., states if a trustee has been removed the court can appoint a new trustee.

Section 199(e) of the Restatement of Trusts 2d., states the beneficiaries can maintain a suit to remove the trustee. Section 519 of Bogert states, "When in the course of the administration of a trust it becomes apparent that the trustee cannot in fairness to the beneficiaries be allowed to continue in the exercise of his powers, he may be removed."

Bogert states at section 867:

Sometimes a court can be induced to appoint a receiver for the trust property in order to protect the trust and conserve its assets, pending its decision on an application for the removal of a trustee or for other relief. The rule regarding receivers has been stated by a Georgia court: "Besides it is an established rule of the Court of Chancery, that when a trust fund is in

danger of being wasted or misapplied, it will interfere on the application of those interested in the fund, and by the appointment of a receiver, or in some other mode, secure the fund from loss."

A New York court has said: "it is said that the appointing of a receiver rests in discretion. This proposition does not teach much. A receiver is proper, if the fund is in danger; and this principle reconciles the cases found in the books.

### III. APPLICATION OF THE LAW TO THE FACTS HERE

#### A. Notice Through Public Records.

There is a very strong argument that everyone is charged with notice of the trust and later the breach thereof because of the following.

(a) Deed. The Patents (deeds) to the state indicate that the grant is pursuant to the Alaska Mental Health Enabling Act.

(b) Provisions of the Alaska Mental Health Enabling Act. The Alaska Mental Health Enabling Act is a public law and all persons taking Mental Health Trust Lands should be either charged with constructive notice of the trust requirements or put on inquiry.

(c) The 1978 Trust Abolishment. The purported redesignation of Mental Health Trust Lands by the legislature in 1978 and the failure to compensate the trust one penny was a matter of public record and persons taking Mental Health Trust Lands should be either charged with constructive notice thereof or put on inquiry.

The legal result of being charged with notice is that one can not be a bona fide purchaser. Thus, under this analysis no third party can have good title to Mental Health Trust Lands, no matter how far removed down in the chain of title.<sup>13</sup> Even if the court does not conclude everyone is charged with notice, under the specifics of many cases, third party conveyees do not have good title.

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13. Of course, there very well may be a cause of action against the State for conveying bad title.

B. Specific Examples.

1. Legislative Designations (Parks, Refuges, etc).

As indicated previously, some 370,000 acres of Mental Health Trust Lands has been designated as state parks, refuges, etc. Since title remains in State ownership there can be no real argument but that these lands remain trust property. Just as clear is that the legislative designations are an improper method of management of Mental Health Trust Lands. Instead these lands have to be managed to achieve maximum income for the beneficiaries (as do all Mental Health Trust Lands). Thus, all of these lands must be commercially developed to the extent it is possible and furthers the purpose of providing income to the Trust. For example, when it will be in the best interests of the beneficiaries of the trust to do so these lands must be opened for mineral development.<sup>14</sup>

2. Municipalities

Since the municipalities were in the forefront of pressuring the state to redesignate Mental Health Trust Lands, not only must the 40,000 acres selected and/or conveyed to Municipalities be returned, but municipalities should be liable to the beneficiaries for participating in the breach of trust.

3. Native corporations.

By far, Cook Inlet Region Inc., has received the lion's share of the 40,000 acres that have been conveyed to Native corporations.<sup>15</sup> There is no question but that Cook Inlet knew of the trust status of the lands and the breach of the trust. It has been Cook Inlet's legal position that Congress authorized its receipt of the bulk of the Beluga Coal Field when it approved the Cook Inlet Land Exchange. However, counsel for Cook Inlet has not explained how Congress could give away something it no longer owned.

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14. That the lands have to be managed to produce maximum income does not mean that the trustee may sacrifice long-term income for immediate income.

15. The 40,000 acre figure does not include lands lost by the state in its lawsuit with Tyonek Native Corporation over conflicting selection rights under the Alaska Mental Health Enabling Act and the Alaska Native Claims Settlement Act Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237 (9th. Cir. 1988), nor the Beluga Coal Field lands exchanged to Cook Inlet in its exchange.

4. Individuals.

(a) Constructive Notice. As indicated above, title to all Mental Health Trust Lands is in dispute, even if formally conveyed by the state to individuals. All of these third party conveyees will be brought into the lawsuit<sup>16</sup> and notified that their rights to Mental Health Trust Lands is in dispute. They will then have to defend their title to Mental Health Trust Lands as a Bona fide purchaser. As outlined above, however, it seems that "constructive notice" of the trust and breach of the trust will be imputed to individuals on the basis of the public records by the court. Even if the court does not charge every individual recipient with constructive notice, then each person receiving Mental Health Trust Lands or interests therein must prove that he paid value for the land and that he did not otherwise have notice, either actual or constructive, of the trust or the breach.

(b) Leases. The same analysis would hold for leases.

5. University of Alaska.

There is no question but that the University of Alaska knew about the trust status of the 3,000 acres it received conveyances of. Indeed, it is particularly flagrant since it received these conveyances in settlement of its lawsuit with the state for the same breach of trust in redesignating University Trust Lands as General Grant Lands.

6. Less than total Conveyances.

Again, the same sort of analysis applies to the other 280,000 acres in less than total conveyances that have been made on Mental Health Trust Lands. However, certain categories of less than total conveyances merit discussion.

(a) Mining Leases. Since the state did not have real mining leases prior to the decision of the Alaska Supreme Court in the 6(i) case<sup>17</sup> and no rents or royalties were ever paid these

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16. Whether individually or as a member of one or more defendant classes.

17. Trustees for Alaska v. State Department of Natural Resources, 736 P.2d 324 (Alaska 1988). In this case, the Alaska Supreme Court ruled that the state's practice of granting rights to extract minerals, although denominated a "lease" was not truly a lease because no rents or royalties were due and that this violated Section 6(i) of the Statehood Act which requires a lease of mineral resources.

leases are invalid.<sup>18</sup> Of course, the operators of these mineral properties are accountable for royalties due to the trust for the minerals that have been removed and arguably for minimum royalty and/or rental payments.

(b) Oil & Gas Leases. It strains credulity to believe that oil companies did not actually know of the trust status of the lands because a detailed assessment of land status and title is normally done by any prudent potential oil and gas lessee.<sup>19</sup>

(c) Public and Charitable Uses. As described above, trust property given for a charitable purpose, where payment of value and lack of notice is not present normally must be returned to the trust.

There are many other types of transactions and circumstances that will no doubt be revealed. The foregoing, rather than intended to be exhaustive, is to illustrate the general principles involved and how they should be applied in particular circumstances.

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18. As recently as May of 1989, the United States Supreme Court held that a flat rate royalty for mineral lands was an invalid method of leasing mineral trust lands and the statute authorizing it invalid as applied to Arizona's School Trust Lands. *Asarco v. Kadish*, 490 US \_\_\_, 104 L.Ed 696, 109 S.Ct. \_\_\_ (1989). This would appear to invalidate the state's current leasing program with respect to its application to Mental Health Trust Lands (However, no new mineral leases have been issued on Mental Health Trust Lands since the Alaska Supreme Court's decision in this case in October of 1985). Interestingly, at footnote 3, the United States Supreme Court specifically acknowledged the difficulty of determining fair market value of minerals, but reaffirmed its previous pronouncements that "whatever the difficulties may be in making such appraisals with complete accuracy, it does not defeat the existence of a "market value" in mineral rights, and it does not suffice as a reason to depart from the ordinary requirements that the law imposes on such transactions.

19. The same is true for mineral properties, but to a lesser extent where the lessee is a "mom and pop" operation which is much more prevalent in mining, particularly placer.

INTERIM MENTAL HEALTH TRUST COMMISSION

DRAFT FINAL REPORT

(December 20, 1989)

on

Approved Procedures for Determining the Fair Market Value  
of  
Alaska's Mental Health Trust Lands

## I. INTRODUCTION AND BACKGROUND

In 1956, the Congress granted the Territory of Alaska the right to select one million acres of land to be managed as a public trust to produce income that would be, "applied first for the necessary expenses of the mental health program of Alaska." However, after selecting the most promising income producing potential lands available at the time, the State never actively managed these lands as a trust. There was no effort to protect the corpus from dissipation or to generate maximum income in the interest of the primary beneficiaries.

To the contrary and from the beginning, lands were conveyed from the trust at, frequently, less than fair market value and for purposes not allowed in the 1956 legislation. The Alaska Legislature even attempted to dissolve the trust in 1978. (Ch. 181, 182, SLA 1978) By October 4, 1985, of the original one million acres, only 194,672 acres of land remained in unencumbered grant land status. (Interim Mental Health Trust Commission, Report to the Legislature, February 1987, "APPENDIX C: THE MENTAL HEALTH LAND TRUST")

In 1982, beneficiaries of the trust sued the state for breach of its trust responsibilities. In October, 1985, the Alaska Supreme Court agreed the state had breached its trust responsibilities and ordered that, "the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." State v. Weiss

706 P.2d 681 (1985). This reconstitution was deemed impracticable at best by the State and it strenuously resisted the reversal of previous actions taken on mental health trust lands that would be required. Therefore, to help devise an acceptable method of alternative or constructive reconstitution of the trust, and to assure proper trust management in the interim, the legislature in 1986 created this Interim Mental Health Trust Lands Commission (Commission). See Ch. 132 SLA 1986. Under legislative auspices, discussions thereafter took place between all interested parties to seek acceptable alternative means of reconstituting the trust.

In its February, 1987 report to the Legislature, at page 10, the Commission concluded that, "[t]he number, complexity and importance of the questions raised by the Weiss Opinion's trust reconstitution instructions urges a negotiated settlement." The concurrent work of special legislative committees also all supported and adopted the concept of a negotiated resolution. This unanimity culminated in the passage of Chapter 48, SLA 1987 (Chapter 48). Chapter 48 directed a replacement trust corpus be created from lands currently in legislatively designated areas equal in value to the September, 1987, value of the original one million acres received by the State under the 1956 legislation, with the state then to pay "rent" at 8% per year on this value into the mental health trust income account.

Under Chapter 48, this Commission, composed of the Commissioner of the Department of Natural Resources (or her designee),

and two public member, Dr. George Rogers, and Dr. Lidia Selkregg<sup>1</sup> was directly charged with approving procedures on behalf of the Commissioner of the Department of Natural Resources for determining the 1987 fair market value of the original one million acres of mental health trust lands and, also, of identifying lands of equal value among eight million acres of potential replacement lands within legislatively designated areas.

Commencing with its June 9, 1987 meeting and continuing through its meeting of November 7, 1989, the Commission held over thirty public meetings or work sessions in order to evolve its finally approved procedures for determining the fair market value of the original mental health trust lands. Each meeting was public and its subject matter was noticed to all interested parties and an opportunity allowed for all to present and argue their views both orally and in writing<sup>2</sup>.

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1. The chairman of the Commission, Dr. George Rogers, is a professional resource and general economist, having his first contact Alaska resources in 1937 while working in the economics department of Standard oil of California. He has been an Alaska resident since 1945, serving as an economist with the Department of Interior, Resources for the Future and the University of Alaska where he established its Institute of Social and Economic Research in 1960-61. The other public member of the Commission, Dr. Lidia Selkregg, is a professional geologist and planner. Dr. Selkregg has served on the Anchorage Assembly and its Planning and Zoning Commission. She is also a Professor Emeritus at the University of Alaska and developed its planning curriculum. Both of these members have served on many State and Federal land use and natural resources commissions and committees and bring decades of experience in many of the issues being addressed by the Commission.

2. References to documents herein that have not been published, are to documents presented to or prepared by the Commission and kept on file by DNR, acting as the Commission's staff.

At its November 7, 1989 meeting, the Commission (with one dissent) adopted final valuation procedures in conformity with the legislative intent (copy attached as Appendix A). In all instances, standard and specific industry methodologies were adopted, as necessarily modified for use within rather severe constraints of available time and money. The procedures were then forwarded on the same date to the Commissioner of Natural Resources to make the resulting determination of fair market value for the one million acres of mental health trust lands, as required by Chapter 48. This Report is intended to provide in one document the background and rationale supporting adoption of these procedures.

## II. DISCUSSION

### A. FAIR MARKET VALUE

Chapter 48 requires the determination of the "fair market value" of the original corpus and replacement lands. While there was consensus on the general approach and procedures to be followed, the precise definition and means of determining the fair market value has caused continuing disagreement.

In legal memoranda to the Commission, attorneys for the Plaintiffs and the State agreed that "fair market value is the highest price which a hypothetical willing buyer would pay a hypothetical willing seller in a free and open market." (Gottstein, May 4, 1989, Re: Definition of Fair Market Value;" Koester, May 9, 1989, "Fair Market Value.") Additionally, they agreed

"that there is no 'inexorable rule' by which fair market value is to be determined, and that the comparable sales method is not the only one which may be used." (Koester, op. cit., page 4) All parties also agreed on the following statement at the July 12, 1989 Commission meeting:

Fair Market Value for purposes of Chapter 48 means utilization of the best information and methodology available within time and funding constraints to arrive at fair market value.

(Transcript, page 54)

While recognizing the income approach was the appropriate methodology for valuing resources, DNR applied only the market or "comparable sales" approach in valuing the mineral endowment. As late as the September 5, 1989, meeting, the lead staff member for DNR, Mr. Gustafson, stated: "The market approach [comparable sales] is what we always felt is required under terms of the legislation. There are a lot of other ways that you could put a value on this thing. We could have done that too, but we have been faithful to the market approach because that is what the Legislature required." (Transcript, page 55). The Commission does not agree the Legislature required use of only the "comparable sales" ("market") approach for valuation.

Under Congress' intent in the 1956 legislation and subsequent selection of the lands by Alaska, mental health trust lands were to be managed as a public trust for income production rather than as a repository of land for resale. Pursuant to that in-

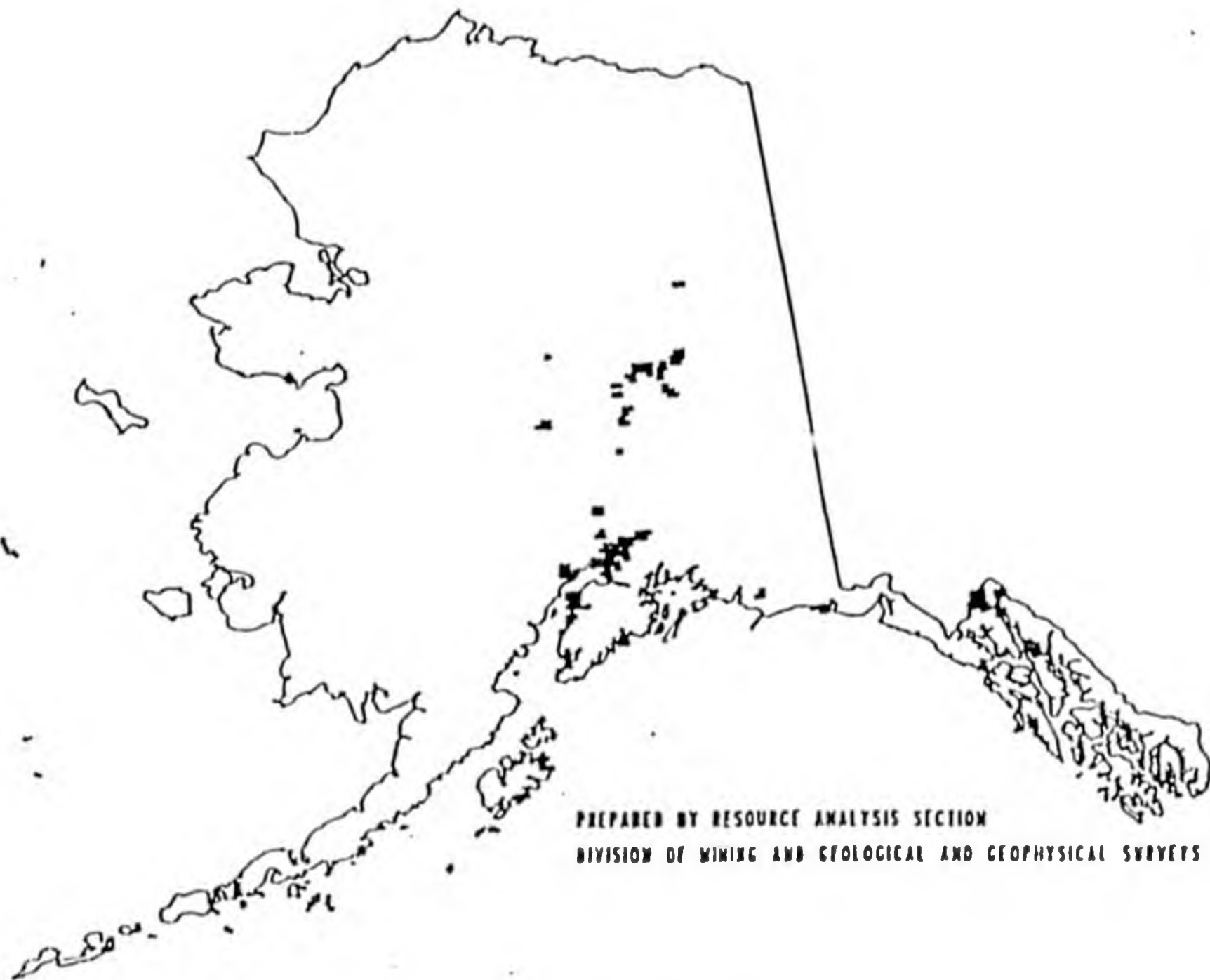
tent, the land selections made by the Territory and State of Alaska between 1956 and 1965 were based upon income analysis. Selections were anticipated to be suitable for development and targeted lands surrounding the principal urban centers and known commercially valuable natural resource lands along or adjacent to the main rail, water, highway and road transportation systems. (Refer to Figure 1).

Approximately half the mental health trust lands were urban and sub-urban lands, selected because their values would appreciate at a high rate in response to community growth. Timber lands were selected with the view that they would become the core of the State's forest system (which they are) and hydro-carbon and mineral lands were selected from the major mining areas of the State.

These selection methodologies are inherently inconsistent with an intent to base mineral value on comparable sales, as value or income would have been derived from these lands without any sales, but through mineral leases, joint ventures, and similar transactions between the trust and developers. Accordingly, rather than being restricted to the comparable sales approach, the Commission adopted procedures that are most appropriate to the valuation being performed. As noted, these are in all instances those used in practice by industry, with appropriate adjustments dictated by lack of funds and time.

FIGURE 1.

TRUST LANDS: MENTAL HEALTH GRANT (1956)



PREPARED BY RESOURCE ANALYSIS SECTION  
DIVISION OF MINING AND GEOLOGICAL AND GEOPHYSICAL SURVEYS

B. ESTABLISHING PROCEDURES

In his June 1987 Review, Commission Chairman Dr. George Rogers recommended that:

Rather than use one appraisal approach (market data) as was done in 1985 and 1986, the accepted approaches most appropriate to each classification should be used. For example the market approach would appear suited to urban residential and commercial lands while the income discounting approach would be best for. . . lands which were selected not for resale but income production management. . . [these] should be valued by contract with a firm experienced in natural resource analysis and valuation rather than another panel of real estate appraisers.

This was not acceptable to DNR but, since consensus was desired, a compromise was reached. The surface estate of the entire corpus would be valued by means of three geographic opinion-of-value panels of three appraisers each, with provision for review, questioning and mediation of any remaining differences. The "review process" of Plaintiffs submitting questions regarding valuations through their review appraisers and the subsequent consideration and resolution of these questions, was deemed

essential to the legitimacy of the process and to overcoming the demonstrated shortcomings of the opinion-of-value process<sup>3</sup>.

The natural resource endowment and value estimates would be accomplished by the natural resources division of DNR, with input from the beneficiaries. Where it was not possible to arrive at a value in-house, this task would be contracted to a consultant.

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3. In 1985 the State attempted to put a value on the trust corpus in response to the initial lower court decision in the Weiss litigation. This effort is an illuminating case study of the role of procedure design and implementing methodology in determining the outcome of a process. A rough opinion of value process was used for the surface, a token value for only part of the sub-surface endowment, and addition of 10.5% interest annually from July 1978 to July 1985. (Alaska Department of Natural Resources, May 1985, "Value Summary Mental Health Land Retained in State Ownership.") To this was added the estimated value of conveyances from the trust prior to July, 1978, giving a total estimate of approximately \$600 million as of July 1985.

There was a great deal of criticism of this 1985 opinion of value panel process, and the majority of the Commission as well as others believed the figure arrived at was too low. During their study of settlement options, for example, the 1986 special legislative joint committee and the Commission used a proxy value for the trust of \$2 Billion. According to the Commission's chairman, the low 1985 estimate was due to an inadequate and incomplete value definition and use of inappropriate methodology. (Rogers, June 19, 1987, "Analysis of Valuations and Appraisals of Mental Health Trust Lands.") Coal, oil and gas subsurface values were limited to token estimates based only on proven reserves, and no value was assigned to other resources with development potential. The surface value panel's instructions were that "only the Market Data Approach (comparable sales) will be used" as the "subject property is being valued as vacant [and unimproved] and no income stream is projected." This further biased the results toward a low value. Value of improvements on MHTL and much of the income producing values were lost without the cost and income approaches.

DNR staff did not agree with the conclusion that the 1985 opinion of value panel results were invalid and defended its exclusive use of the comparable sales approach on grounds of practicality -- it was used customarily by the State, would cost less than other approaches, and the results would not significantly differ (Gustafson letter to Rogers, July 24, 1987). Other methodologies were also deemed by the State to be speculation.

The actual task of implementation was much bigger, complicated and controversial than anyone envisioned initially and for a brief period between its April and July, 1989 meetings, the Commission explored alternative paths to valuation.<sup>4</sup> However, recognizing that none of these approaches might prove feasible, the Commission remained oriented towards completion of its mandate in Chapter 48 to approve procedures to determine the fair market value of the original mental health trust lands. In this

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4. At its May 16, 1989 meeting the Commission discussed (but did not adopt) a draft report to the Legislature which concluded: "Continuing with the Commission's currently approved valuation procedures no longer appears possible." It was proposed, alternatively, that (1) a range of values be determined for each category, (2) mediation between Commission members would attempt to narrow this range "to the maximum extent possible," (3) these values would be integrated into two sets of values, and (4) the Commissioner of Natural Resources would determine a value within these ranges (Draft of "Interim Mental Health Trust Commission Report Sixteenth Alaska Legislature", dated April 1989, submitted by G. Thomas Koester in response to a "Discussion Draft", dated April 13, 1989 with the same title submitted by J. Gottstein").

By the July 1989 meeting no significant progress had been made in narrowing the range and the Commissioner of Natural Resources indicated she would not necessarily determine the value between the range established by the procedures. Further options were then examined. The first was to go beyond Chapter 48 and negotiate a value for settlement purposes only. The Commission appointed a team (the three attorneys active in its work and the chief DNR staff member) to explore the feasibility of negotiation. The final report of the negotiating team of October 27, 1989 stated that "the parties are at impasse" and the remaining difference of more than \$1.5 billion" can not be resolved through negotiation at this time."

connection, the attorney for the State advised the Commission<sup>5</sup> that these procedures,

could be as general as . . . [saying] the Commissioner will come up with a value based on all the information of record and justify it. . . or they could be as detailed and specific as to say, with respect to mineral valuation, the Commissioner shall determine the value of the subsurface estate by employing a ten percent discount factor, assuming production begins in year five, you know, all those assumptions that go into that kind of an economic analysis. Those can be specified. It seems to me those are part of the procedures that the Commission can approve.

(July, 12, 1989, Commission Meeting Transcript, P. 59). And as observed earlier, all parties agreed such procedures could reflect compromises and abbreviations necessitated by funding and time constraints.

#### C. IMPLEMENTING THE PROCEDURES

The procedures approved match as closely as possible accepted valuation methodology for the various estates and result in an appropriate determination of fair market value for the purposes

5. The Attorney General's office, at its insistence, represents, through the same Assistant Attorney General, both the State as the Defendant in the Weiss litigation and the Commission in performing its duties under Chapter 48.

of Chapter 48. This is so despite the lack of a completed surface estate valuation and despite the lack of formal "appraisals" occasioned by the previously noted funding and time constraints.

The surface estate valuation was terminated before the first review step was completed because funds and time were exhausted. This was due, in large part, to the approximately 4,000 parcels questioned by the review appraisers<sup>6</sup>. The total fair market value of the original mental health trust lands recommended by the review appraisers was \$833.3 million. The total fair market value of the original mental health trust lands found by the panels, after adjustment to reflect as much of the review process that did occur was \$499.8 million. Recognizing that differences of this percentage magnitude between appraisers' opinions of value were not uncommon<sup>7</sup>, the Commission determined that the only reasonable procedure to approve was simply to "split the difference" between these two figures, as is more fully discussed in Appendix B.

With respect to the mineral endowment, the Alaska Division of Geological and Geophysical Services, (DGGS) provided an esti-  
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6. All of the parcels questioned by the Plaintiffs' review appraisers that were looked at by the Commission appeared to have a reasonable basis for the question.

7. Even where formal "appraisals" have been commissioned, the appraiser's "appraisal" is that appraiser's opinion of the value of the subject property. The percentage difference between the panels opinions' of value and the review appraisers' would not be unusual if full appraisals had been used in both instances. Appraisals are simply an "estimate" or "approximation" of "the highest price a willing buyer would pay a willing seller, . . .",

mate of the physical endowment for the mineral estate of mental health trust lands. However, instead of pursuing the industry standard discounted cash flow ("income") approach as agreed, DNR reverted to use of the comparable sales approach. DNR's use of the comparable sales approach first produced a zero value, as in 1985, and was later revised to approximately \$16 million on the basis of three alleged comparable sales.

The use of the comparable sales approach for valuing the mineral estate was summarily rejected by the majority of the Commission as not being in accordance with accepted industry valuation practices and, moreover, as being manifestly unreasonable and unrealistic. These lands were all within the three major active mining districts of Alaska and had been selected by a team of experts as representing the most promising lands in these areas.<sup>8</sup> (See Appendix C).

In the absence of a viable valuation of the mineral estate, a team of consultants was commissioned by the Plaintiffs to estimate the mineral endowment value using accepted industry methodology, i.e., the income approach, as originally proposed in June of 1987. Their report (Paul Metz and Colin Dixon, December 31, 1988, "Mineral, Coal and Aggregate Resource Appraisal of

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8. The reason offered by DNR for failing to utilize the income approach was DGG's estimated cost of providing a value estimate at \$53 million, which involved a surveying and drilling program. In this connection, it may be worth noting that D. Harris, the State's consultant later estimated the cost of estimating a value at \$350,000 using essentially the same data that the Commission ultimately approved (Harris, Sept. 1989).

Alaska Mental Health Trust Lands") discussed their methodology, data and assumptions and the decisions they made, based upon their professional judgments, regarding the best way to value the mineral estate under the circumstances. At the presentation of their Report to the Commission at its February 24, 1989, meeting, Metz and Dixon also reviewed for the Commission the areas of uncertainty and the "safety factors" they used to insure the value was not overstated. Their analysis resulted in an estimated \$1.5 Billion value for the mineral estate of mental health trust lands. Following intensive critical review by DNR staff and others, an independent study commissioned by DNR concluded that although not always following "best practices," the methods and assumptions were acceptable " . . . if only approximations were required and that their methods were consistent with the data available through DGGs's mineral endowment assessment" (Harris, May 30, 1989).

In the follow-up study by Harris issued in September, 1989, "Activities and Costs for the Estimation of Market Value of Mineral Resources of Alaska Mental Health Trust Lands," and the earlier study by Bradford Tuck and Matthew Berman commissioned by DNR entitled, "Review and Analysis of 'Mineral, Coal, and Aggregate Resource Appraisal of Alaska Mental Health Trust Lands' by Paul A. Metz and Colin Dixon" (March 1989), there was also agreement as to utilization of the income approach as being the appropriate methodology. DNR nevertheless remains insistent, but without any expert having indicated it was a valid methodology, that they would only accept their comparable sales approach.

Since the State's approach had no expert support, resulted in an unrealistically low value, was not pursued with any sort of rigor by the State, and was not even supported by its own independent study, it was rejected by the Commission. On the other hand, there was general agreement by all experts that the income approach used by Metz/Dixon to arrive at their valuation was the appropriate one and that, while perhaps "best practices" were not used for every element because of time and funding constraints, the methodology, data, assumptions and judgment utilized were the result of informed decisions by knowledgeable experts. Therefore, the Commission approved the procedures used in the Metz/Dixon valuation (see Appendix C for a complete description).

For the remaining land categories, the dollar differences were not so great and the Commission's basis for resolving the differences has therefore not been as controversial. The Commission approved the report of the Division of Forestry in its valuation of timber resources (August 1988). Plaintiffs argued that reforestation costs (approximately \$31 million) should not have been deducted from the value because the timber should be valued as if "sold" to the State as "standing timber." The Commission rejected their approach and agreed with DNR's position that these costs were essential to sustained yield forest management and that the original mental health trust lands selections were made with the intention that they would become the core of a State forest system (which they are).

The Division of Oil and Gas proposed a plan for valuing hydrocarbon (oil, gas and coal) potential which was accepted by the Commission (October 13, 1987). A preliminary report (July 1988) and a revised report (November 2, 1988) were criticized because they did not accomplish what the accepted plan proposed to do, and because they considered only known reserves (Vreeman, March, 1989). The range of values presented (\$135,953 to \$856,040) appears grossly low in light of the State having received over \$25 million for exploration and development rights on mental health trust lands. Although clearly needed, no attempt by the Plaintiffs was made to produce an alternative estimate. In light of the lack of any alternative estimate and the necessity of arriving at procedures for determining the fair market value of the oil & gas resources, the Commission approved as its procedures those presented by DNR, using the midpoint between the high and low range.

DNR staff bogged down in an effort to put a value on aggregate (sand, gravel and crushed rock) by first attempting to estimate the quantity and quality of the resource. The Commission ordered this halted because the task was approached from the wrong side (the supply side). Aggregate in Alaska is ubiquitous and its economic value determined by demand. DNR staff were directed to estimate demand and value this, possibly using Department of Revenue's methodology for estimating State revenues from this resource. This was not done by DNR and the Plaintiff's consultants included the task in their assignment.

There was full agreement that integration of surface and resource values would be achieved by adding the values to produce the total fair market value of the trust and replacement lands. The forest lands have been valued on the basis of sustained yield management. Metz and Dixon, while not quantifying the "multiplier" or "knock on" effects of mineral development, informed the Commission that any loss of surface value for particular acreage actually being mined, would be more than offset by increasing values of lands in the vicinity due to the increase in demand as a result of the economic activity generated by the mine. Additionally, it was noted the Surface Mining Act of 1977 requires restoration of land after completion of mineral extraction. Mineral and timber values and surface values were therefore treated as additive rather than one exclusive of the other.

### III. SUMMARY AND CONCLUSION

In presenting the final approved procedures to the Commissioner of Natural Resources, the majority of the Commission agree that they follow the law, will be fair to all parties, and accomplish the objectives of providing a reconstituted trust and removing the threat of continued litigation and resulting disruption.

APPENDIX A

INTERIM MENTAL HEALTH TRUST COMMISSION

RESOLUTION

(Final Approval of Procedures for  
Determining Fair Market Value)

BE IT RESOLVED, the Interim Mental Health Trust Commission hereby approves the following final procedures for determining the fair market value of mental health trust lands under AS 38.05.800(a):

1. Surface. The Commission previously approved procedures for determining the fair market value of the surface estate. Because of insufficient funding to conduct appraisals, these procedures provided for an opinion of value process by three geo-panels of appraisers; an opportunity for review and questioning by interested parties; referral back to the panels for reevaluation of their original values when necessary; and mediation, including the possibility of site visits.

Due to the large number of questioned values and limited funding, a sampling strategy was used for the review. The State's method of applying the southeast region's sampling results to all three regions results in a figure of \$499.8 million. The Plaintiffs' appraisers assigned a value of \$833,280,096.

The Commission is fully aware that appraisers often have such large differences in their opinions. Such differences are resolved through mediation but because of lack of funds and time, mediation of the fair market value as the original procedures contemplated was not possible. Therefore, the Commission approves as the final procedure for determining the fair market value of the surface estate that the difference between these two figures be split equally between the two values.

2. Timber. The Commission has approved as the procedures for arriving at the fair market value of the timber resource, the methodology, data, assumptions and judgments which were utilized in "An Economic Evaluation of Timber Potential on Mental Health Grant Lands and Legislatively Designated Replacement Lands - Final Report", by McMahon, Wallingford, and Wehrman, August, 1988. The Plaintiffs dispute the appropriateness of deducting reforestation costs, but the Commission has rejected their view.

3. Oil and Gas. The State has estimated the value of oil and gas resources on mental health trust lands after consultation with the Commission regarding appropriate procedures to be in a range from \$135,953 to \$856,040. The Plaintiffs have not submitted their own valuation, but assert the State's analysis did not follow the procedures approved by the Commission, and the value range appears to be grossly low in light of the State having received over \$25 million for exploration and development rights on mental health trust lands. In light of the lack of any specific valuation from the Plaintiffs

and the necessity of arriving at procedures for determining the fair market value of the oil and gas resources of mental health trust lands, the Commission hereby approves as its procedures, the methodology, data, assumptions and judgments utilized in the "Hydrocarbon Potential of Mental Health Grant (Trust) Lands and Legislatively Designated Replacement Pool Lands in Alaska", by Arie, Hansen, Kornbrath, Phillips, Ryherd and Smith, July, 1988, with the fair market value being the midpoint between the low to the high range.

4. Minerals, Coal, and Aggregate. After review of proposals by both sides, and much consideration, the Commission approves as the procedures for determining the fair market value of the mineral, coal and aggregate resources on mental health trust lands, the methodology, data, assumptions, and judgments utilized in "Mineral, Coal, and Aggregate Resource Appraisal of Alaska Mental Health Trust Lands," by Paul Metz and Colin Dixon, dated December 31, 1988.

5. Integration of Values. The Commission has approved adding the values as its procedure for integrating the surface and resource values to arrive at the total fair market value of mental health trust lands.

Approving

Commissioner Rogers  
Commissioner Selkregg

Disapproving

Commissioner Swope

Abstaining

Date: November 7, 1989

  
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George W. Rogers, Chairman

Interim Mental Health Trust Commission

## APPENDIX B: SURFACE VALUATION

### SUMMARY

When the Mental Health Lands Trust was originally selected at least half of the million acres were specifically selected for their proximity to communities. It was believed by those selecting the trust that these lands would be in demand for community expansion and the surface value would appreciate at a greater rate than more remote lands. It was also expected that active trust management of these community expansion lands would add substantially to the value of the trust.

The fair market value of the surface estate of the original one million acre Mental Health Lands Trust is thus a major component of the overall trust value. Different strategies have been tried to place a dollar value on this estate. In 1985, in response to the trial court's directive to value the land, the State used a modified opinion of value approach to establish a cash value for purposes of compensating the trust for the illegal redesignation of the Mental Health Trust Lands as general grant lands by the Legislature in 1978 (This effort is discussed in the Report above, at page \_\_\_\_).

In 1986 the State used a similar approach to value some 55,000 acres of Mental Health Trust Lands that had been approved or conveyed to Municipalities. A value of some \$100 million resulted from that effort. Traditional appraisals were done in 1987 on 15 of these parcels as a "validity check" on the opinion

of value effort. For Anchorage the appraisals ranged from 47% below to 30% above the panel's value for the same parcels. For Juneau the range of variation was from 467% above to 214% below, and in Fairbanks from 76% above to 798% below! The totals ended up within 4% of each other, however, and DNR asserted this demonstrated the opinion of value process created "offsetting errors". The plaintiffs' review appraiser reviewed these appraisals and found that where the appraisal valuation was substantially below the opinion of value valuation, the appraisal was in error. Due to the change in direction with the enactment of Chapter 48, these differences were never addressed by the Commission. In any event 800% differences in values for specific parcels are clearly cause for concern about the validity of the opinion of value panel process that does not allow for adequate review. The entire exercise reinforced the Commission's appreciation of the subjective nature of appraisals as well as the wide variation of opinions of value even of qualified appraisers.

The task of valuing the entire million acre mental health surface estate using standard appraisals was beyond the resources of funds and time available to the Commission. The previous efforts to value the surface estate of the trust had proven so unreliable that the Commission was faced with quite a challenge. To develop a surface value the Commission approved a set of procedures that relied on a panel of three expert appraisals for each of the SouthEast, SouthCentral and Northern regions in which Mental Health Trust Lands (and the replacement lands) were locat-

ed. Due to the funding and time constraints an "opinion of value" approach had to be utilized. However, in fashioning the opinion of value panel process to be utilized, certain safeguards not present in the earlier attempts were created, in an attempt to arrive at valid results.

The approach adopted by the Commission was designed to use the appraisers' regional knowledge of property values as in past opinion of value panels, with the very important check that interested parties (primarily the plaintiffs) could raise questions which would be resolved through a review and mediation process that would include site visits where necessary. The three member panels were required to value a total of approximately \_\_\_\_\_ parcels of which 7,000 were Mental Health Trust Lands and \_\_\_\_\_ were replacement lands. Only 10 minutes could be spent on each parcel. The panels were not allowed any site visits -- their examination consisting of reviewing a written description of the parcel, referencing available maps, aerial photos, plus any comparable sales information provided by DNR or the appraisers brought with them. In assigning a value to a parcel agreement between two of the three panel members was required. When the parcel was completed a written form was used to document the decision, but the basis of the valuation was normally not provided because DNR insisted the panels did not have time to do so. However, the panels' deliberations were tape recorded to provide a complete record.

Once the panels had submitted their opinions of value and they were reviewed by the State's review appraiser, the plaintiffs were provided an opportunity to review the values and raise questions by submitting a written form outlining the question and basis for a different value. These "Questioned Values" were to be submitted to the panels for a "collegial" discussion with the plaintiffs' review appraiser(s) and, hopefully, resolved at that point. Failing resolution at that point, mediation could be directed by the Commission where it deemed it warranted, including the possibility of site visit(s).

As they neared completion of their work, the SouthCentral panel sent a letter to the DNR review appraiser itemizing the limitations on their product. The first was that "our value estimates are not appraisals, and in fact they are not even 'preliminary opinions of value' as commonly understood in the appraisal profession, wherein the appraiser states that an appraisal would conclude within a stated range or near a given figure and material to support this conclusion is on file." Other comments noted the limited time, that the work was performed "within the confines of State offices", the problem with finding large parcel comparable sales, and the like (April 22, 1988).

The results of the opinion of value panels, before review, was a total of \$407,668,693, for a per acre value of \$407.67. A total of just over 4,000 parcel values were questioned by the plaintiffs' review appraisers. The result of accepting the

review appraisers' opinions with respect to the Questioned Values was to more than double the value of the surface estate by adding some \$426 million to the value for a total of \$833.28 million<sup>1</sup>.

To address all of the Questioned Values in the manner initially approved by the Commission would have required far more time and funds than available. Therefore, in order to obtain information about the validity of the opinion of value panel valuations and the validity of the Questioned Values, the Commission directed that a sample of 387 of the 2,103 Questioned Values for SouthEast proceed through the process. Another goal of this sampling process was to determine if the results could be applied to the rest of SouthEast, and perhaps the other regions. Even without any mediation the SouthEast panel increased their total value by 42% for the parcels that were questioned on the basis of comparable sales (excluding large parcels). All categories of SouthEast values questioned increased an average of 22%.

Unfortunately, the process could not even be carried through to completion with respect to these 387 parcels because of lack of time and funds. However, what did occur was illuminating. A

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1. In addition to the "Questioned Values" submitted by the Plaintiffs through their review appraisers, well over one hundred "Technical Corrections" were submitted by the Plaintiffs to correct mathematical and other errors identified through their computerized "error checking routines". In many cases, although the validity of the corrections was not challenged, DNR did not make the corrections saying that only the panels could do so. Since the panels were never called together for this purpose most of these errors were never corrected.

number of Questioned Values focused on consideration of site improvements and the proper way to value rights-of-ways (given no value by the panel). Additionally, there were a number of Questioned Values where comparable sales data presented by the review appraiser(s) seemed to support a higher value than accepted by the SouthEast panel. Perhaps the most difficult valuation problem was handling the "large parcels", that is those parcels that were larger than normally sold in the market place. Because of continuing disagreements, some 25 or so parcels were addressed by the panel members and review appraisers before the Commission in order for it to have first hand knowledge of the nature of the continuing differences. Without ever attempting to decide what the fair market value of any particular parcel was, the Commission did not find any Questioned Value that did not have a reasonable basis for the questions. While 207 parcels were recommended for mediation, a mediator was never engaged for any parcels because of lack of funds.

Because the SouthCentral region had the most large parcels, the SouthCentral panel was reconvened, with the Commission and review appraiser in attendance to consider the review appraiser's presentation of information developed regarding large parcels. Until compiled by the plaintiffs' review appraiser(s), the panel members were apparently unaware of the relatively few comparables for large parcels that did exist when the panel was doing its work. In addition, three very important large parcel sales occurred in late 1988 -- early 1989. When reconvened, the SouthCentral panel agreed the market information provided by the

review appraiser shed new light on large parcels and increased their opinion of five of the six parcels reexamined an average of 68%.

An issue never adequately addressed was the difficult one of "parcelization." In order to initiate the valuation process it was necessary to determine what parcels were to be presented to the panels for their consideration. The decision was made to simply use the parcels that in fact existed, which was a matter of historical happenstance, with the largest tract being a township. In many cases the parcel presented to the panel was a township of 22,000+ acres. While the panels were allowed to "reparcel" tracts, they did not do so, apparently due to lack of time and misunderstanding of its appropriateness. The panels thus concluded that if an entire township, or other large parcel was sold as a single parcel, the per acre value would be quite low. The plaintiffs' review appraisers, in such instances, in addition to the market information they had for some large parcels, suggested that since township size (and other large parcel) sales normally do not occur, the parcels should be valued on the size that the land involved would normally sell, taking into consideration platting requirements (or the lack of a platting requirement).

The Plaintiffs supported this approach by reference to an Alaska condemnation case where the Special Master accepted the approach and rejected the condemnor's (the State) objections to

it (Report of Master, Alaska v. 17,183 Acres and Sloboda, 3VA 86-145 Civ.). However, DNR strenuously objected. When appraisers were asked about the issue, they replied it was not up to them to decide -- that they could do it either way, but would need direction. The only other apparent method of resolving the issue was litigation. Since the Commission did not desire to be in the position of directing the panel members how to decide the issue, and litigation of the issue considered undesirable, "parcelization" was never decided. However, if resolved in plaintiffs favor, there is no doubt but that substantial additional increases in the surface value would have resulted.

In analyzing the results of the relatively small percentage of Questioned Values addressed by the panels, the State applied a 45% increase for all SouthEast parcels questioned by the review appraisers. For the other regions, the state applied a 21% increase to all Questioned Values where the acreage was under 1,000 acres and 67% where the acreage was greater than 1,000 acres. These adjustments resulted in a total increase of \$91.6 million for a new total of \$499.8 million. However, this increase does not reflect the additional increase that would have necessarily occurred if mediation had taken place (leaving aside the increase that would have occurred if parcelization had been allowed). The Plaintiffs contend that their estimate of \$833.28 million is closer to the actual total fair market value for the surface estate, and may even be low because their review appraisers also did not have an adequate opportunity to perform their work.

The Commission, lacking the necessary funds to resolve the Questioned Values, and recognizing that pursuing the process initially approved would have necessarily increased the values, approved as its final procedures for determining the fair market value of the surface estate that the difference between the \$499.8 million figure and the \$833.28 million figure should be split equally.

The Commission recognizes that in approving procedures that "split the difference" it may be perceived as having crossed over the line from approving "procedures" to approving "values" as directed by Chapter 48. However, it is the Commission's belief that "splitting the difference" was the only procedure that could logically be utilized under the circumstances. It must be remembered the original procedures promulgated called for a review and mediation process for every parcel's value that was questioned. This procedure could not be carried out due to funding deficiencies. It was clear that following the procedures as originally promulgated would have necessarily increased the surface value. Since, there was absolutely no basis to determine where the final value would have ended up between the \$499.8 million and \$833.3 million, the Commission believes "splitting the difference" was the only objective approach.

The alternative would have been to fail to achieve the legislative mandate to value the land, and more importantly, defeated Chapter 48's entire purpose of resolving the litigation.

However, in the event it is determined such a "splitting the difference" is not a procedure, the Commission strongly recommends that it be adopted as the basis for the final valuation of the surface estate.

## APPENDIX C: MINERAL ENDOWMENT VALUATION

To accomplish the mineral endowment valuation for Mental Health Trust Lands, following the August 19-20, 1987, meeting of the Commission, the Commissioner of Natural Resources directed "DGGs to assess the quantity and quality of known and potential hard rock minerals... The assessment reports will then be followed by a resource valuation process....The value of the minerals will be determined by an independent entity, likely retained under contract to the department." (Emphasis added, Brady, Sept. 29, 1987. The deleted material refers to other natural resources.)

### Mineral Endowment Estimation

In the process of discharging the task of mineral endowment estimation, DNR informed the Commission that serious budgetary, data and time constraints "will result in the deletion of numerous tracts from the mineral valuation process" (Gustafson, "Outline of Mineral Valuation Process", November 23, 1987). The first deletions were in the inventory of mineral types to be evaluated. A number of available mineral deposit models were not projected and the DGGs inventory did not include industrial and heavy minerals. Although these deletions may have had low unit values, they did constitute a deletion from the valuation of the total mineral endowment.

In its second step, DGGs ranked the Mental Health Trust Lands (MHTL) from 5 to 1 by their favorability for mineral deposits and, secondly, from 5 to 1 by the amount and quality of information available. In April, 1988, DGGs presented maps of mineral potentials of the MHTL by these rankings. A further major short-cut introduced at this point was to consider only areas with favorability rankings of 4, 5 and "super-5's" (an added sub-category) for classification by deposit types and for valuation. In discussions with staff, furthermore, it was learned that the low rankings included areas that had simply not been evaluated yet, as well as areas that had been given evaluations that their potential was low.

It was noted by Plaintiffs that the combination of these deletions and short-cuts would significantly impact the mineral valuation process and result in a lower value. "While having no solution within the budgetary constraints that exist, we must repeat our oft-stated observation that lack of sufficient appropriations and an unrealistically short time frame does not reduce the state's legal obligation to fairly value mental health lands. Please be assured, this does not change our approach which is to try and work with the administration to develop the absolutely best valuation process possible within budgetary constraints." (Gottstein, December 14, 1987, "Re: Outline of Mineral Valuation Process").

Staff compiled the following statistics for use in valuations:

"Mental Health Grant Lands -- Mineral potential

93,213 acres have high mineral potential ("4's")

15,221 acres have very high mineral potential ("5's")

47,565 acres have super high mineral potential ("Super 5's")

155,999 acres total"

Similar statistics were compiled for the replacement lands.

(McMahon, August 23, 1988).

Mineral Endowment Valuation by DNR

With this data DNR was prepared to attempt the actual valuation, but "assuming it proves impossible to complete an in-house mineral valuation (for whatever reason), we will be prepared to proceed with contract solicitation to complete the work "(Gustafson, November 23, 1987, "Outline of Mineral Valuation). The Division of Geological and Geophysical Services (DGGS) then, however, said that they could not use the information they had compiled to value the mineral endowment without an exploration program consisting of surveying and drilling all MHTLs that received mineral potential rankings of 4 or 5. DGGS proposed a program for doing so and estimating the value of the mineral endowment that cost \$53 million. (Wiltse, March 1988, "Cost of

generating valid gross metal value estimates for mineral-potential Category 4 and 5 Mental Health Trust and Replacement Pool lands").

Instead of following the agreed upon procedure to contract out the mineral valuation to qualified experts in the event DNR could not do it in-house, DNR made a valuation using only the total acres (i.e ignoring the breakdown given by rankings) and the "comparable sales" approach. DNR valued the trust's highest ranked mineral lands as having no value because they could not find any comparable sales! Later they announced that diligent search had discovered three sales which when applied to the "4's", "5's" and "Super 5's" yielded a total value of \$16,040,000 for the mineral endowment of MHTL. The MHTL mineral lands are undoubtedly the most promising in the State. Furthermore, the areas selected from this larger pool by DGGs for actual valuation were only in the high to super-high potential classifications.

The value of \$16 million did not appear to be near, let alone "in the ball park". The disclosure of the actual basis for DNR's calculation raised further basis for rejection (letter and attachments to J.B. Gottstein from G.T. Koester, August 23, 1989). The "sales" cited by the State were too small in size and few in number (three) to be statistically significant. Furthermore, their comparability was questionable. One purchase appeared to be for recovery of "construction and road gravel" from tailings. Although traces of gold were present, production was

reported as uneconomic. Another was the purchase of adjacent land by an active miner for "site expansion" and overburden disposal. In addition, other comparable sales not used by DNR, but that were identified by Metz and Dixon (October 1989) supported the Metz/Dixon valuation arrived at by the income approach.

In any event, the "comparable sales" approach for valuing mineral values for MHTLs was not supported by any economist or other mineral valuation expert and was rejected by the Commission. All the experts agreed that the comparable sales approach for valuation was inappropriate for valuing mineral endowment because of problems of comparability and the limited use of sales in large mineral transactions. Valid comparable sales are not normally available due to differences in grade, tonnage and similar factors. As noted previously, mineral rights to lands are typically subject to agreements in which the seller receives a share on production, whether through a lease, a joint venture or some other arrangement rather than simply a sale of the land or the mineral rights. All the experts agreed that a discounted cash flow method (the "income approach") was the industry standard method.

Several recent mineral discoveries and resultant mines lend additional support to the Commission's conclusion to reject comparable sales in favor of the income approach as a method of mineral valuation. The Greens Creek silver discovery 20 miles west of Juneau has proven and estimated reserves worth \$3.6

billion. As of this date the Greens Creek mine is the largest silver mine in North America. The Red Dog Mine has much greater reserves with a gross value of \$20 Billion at current market prices. Both were developed without any direct sales of surface or subsurface estates. The Greens Creek discovery was on Federal land and patented land resulted. Red Dog is a joint venture involving a Native corporation with no sale involved. These and a number of other significant discoveries have occurred and are being developed without "sales". In fact, active management of the original trust would have utilized these types of transactions to generate income.

#### Mineral Endowment Valuation by Plaintiff's Consultants

To complete the mineral valuation in accordance with the procedures originally accepted by the Commission (Brady, September 29, 1987; Gustafson, November 23, 1987), the Plaintiffs commissioned a study of the mineral, aggregate and coal potential of the MHTL by an internationally known consultant and an Alaskan mineral consultant. The consultants (Professor Paul Metz of UAF and Colin Dixon, Senior Lecturer in Mining Geology, Imperial College of Science and Technology, London) were instructed to follow as closely as data (that provided by DGGS) and time available (two months) allowed, the normal methods used by the minerals industry in determining the fair market value.

Their report (Metz and Dixon, December 11, 1988) produced within the specified time and data constraints a range of probable values for mineral resulting in a final estimated value of \$1.5 billion. After preliminary review by DNR staff and the Institute of Social and Economic Research, DNR contracted with a methodology expert (Professor DeVerle Harris of the University of Arizona) to critique the report using "best practices" as the standard of criticism without allowance being made for cost, time or data limitations.

Harris fully stated the restricted nature of his charge at the outset. Although finding that it did not always follow "best practices", he noted "such analysis is very difficult and usually entails compromises of best practices.. and approximations" and that the less than best practices used by Metz/Dixon might be accepted "if a rough estimate of value is adequate". Harris goes on to say "In fairness to Metz and Dixon, the use of net smelter return methods is consistent with the simplistic treatment of mineral potential and exploration [by DGGs]." (Harris, May, 1989).

He further noted that "replacing [the Metz/Dixon] estimate by best practice will require a much greater effort" and still would result in an estimate based upon professional judgment (report dated May 30, 1989). Apparently this was too inconclusive for DNR and a second contract was entered into with Harris in which

he presented the design of a best practices undertaking and estimated the price at \$350,000 (report September 1989)<sup>1</sup>.

"Best practices", however, under Harris' proposal would require much more than money. "Much of the geologic analysis by ADGGS personnel will have to be redone for the estimation of mineral endowment". (Harris Sept., 1989). The product of the DGGS effort was a ranking of MHTL by their favorability for mineral deposits, not probabilities for number of deposits required by "best-practices". Metz/Dixon, having no alternative but to use this data, introduced an additional step converting the DGGS rankings into probabilities. They would have preferred to have had the best practices version advocated by Harris (Metz/Dixon, October 1989, pp. 6-7). Harris also noted shortcomings and gaps in the basic data collection and compilations requiring that "the geologic analysis for endowment estimation would have to repeat this initial data and information acquisition" (Harris, September 1989, pp. 3-4)<sup>2</sup>. However, at the November 7, 1989, Commission meeting, which Harris declined to attend, C. Dixon explained how they used generally accepted "rules of thumb" that would not be seriously in error and built in "safety factors" at each step to insure that the valuation would not be overstated.

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1. DGGS had previously advised DNR and the Commission that a \$53 million surveying and exploration program would be necessary before they could attempt a valuation.

2. This would not involve acquiring new geologic data, but reworking the same data that DGGS utilized.

In discussing the kinds of expertise required (geoscience of mineral resource formation, regional knowledge of geology, and estimation methodology), Harris rated some of DGGs personnel as "well qualified for the first expertise, at least as to certain deposit types", as "especially well qualified for the second expertise", and "not highly experienced in expertise three". (page 8). Beyond expertise, Harris noted the appearance of conflict of interest because of the litigation (page 9). He recommended contracting with the USGS for mineral endowment estimate and with an outside contractor (such as his Center for Mineral Resource Science) for other phases. (page 10).

#### Commission Decision

On the basis of the two Harris reports, the ISER study commissioned by DNR ("Review and Analysis of 'Mineral, Coal, and Aggregate Resource Appraisal of Alaska Mental Health Trust Lands," Tuck and Berman, March, 1989), and the Metz/Dixon Reply (October 12, 1989) important areas of broad agreement between all the mineral valuation experts emerged. There was consensus that:

- (1) a value can be estimated for undiscovered mineral deposits (Harris devoted an entire book to appraisal of undiscovered mineral resources, "Mineral Resources Appraisal", Clarendon Press, Oxford, 1984),
- (2) the comparable sales approach was not an appropriate method to value the mineral endowment of
- (3) the use of a discounted net income stream is the appropriate means of estimating the fair market value, and
- (4) the dominant mineral production from a district comes from a few very large

deposits (Harris, p. 17, Metz/Dixon, p. 12), . The areas of disagreement were related to degree of refinement of the analysis and estimates, on techniques used at each point of procedure (i.e. costly econometric modeling vs. accepted industry practices).

Given (1) the unanimity that the discounted cash flow approach utilized by Metz/Dixon was the appropriate methodology; (2) that compromises made from "best-practices" for other portions of the total valuation process were far more serious than for the minerals valuation (e.g. surface and oil & gas), and (3) the complete lack of any viable alternative, the Commission approved the Metz/Dixon approach and methodology for determining fair market value for the mineral endowment of MHTL.

While not approving the values per se, the Commission also notes that the estimate of \$1.5 Billion, as a "reality check" of the processes generating the figure, is a reasonable and conservative one. That the Greens Creek mine has a \$3.6 billion estimated reserve and Red Dog \$20 Billion, lends ample supports that the \$1.5 billion advanced by Metz/Dixon for all MHTL is reasonable. Other new projects in advanced stages of exploration are the Fort Knox near Fairbanks, the Kensington Mine project in the Juneau area, and the Golden Zone between Anchorage and Fairbanks.

**MINORITY RECOMMENDATION**  
**TO THE COMMISSIONER OF NATURAL RESOURCES**

Regarding Procedures to Determine the  
Fair Market Value of Alaska's Mental Health  
Trust and Replacement Lands

Submitted by: Rod Swope  
Commissioner's Designee to the  
Interim Mental Health Trust Commission  
February 1, 1990

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## EXECUTIVE SUMMARY

This minority report documents my dissent from the majority report of the Interim Mental Health Trust Commission (IMHTC) regarding procedures to be used by the Commissioner of the Department of Natural Resources (Commissioner) to determine the fair market value of both the original one million acre mental health trust land grant and the replacement lands in accord with Chapter 48, SLA 1987. In addition, I have set out the procedures which I believe should be used in order to comply with Chapter 48 and the land and resource values which those procedures produce.

I do not take this step lightly. Since joining the IMHTC as the Commissioner's designee in January, 1988, my goal has been to reach consensus with my fellow IMHTC members if and whenever possible.

While I believe my fellow IMHTC members also shared this goal, that approach was abandoned with respect to the valuation procedures finally adopted in the IMHTC majority report. By adopting, in large measure, valuation procedures urged by the attorneys for the plaintiffs and intervenors in the Weiss case, procedures designed to maximize value and not to produce fair market value as required by Chapter 48, the majority left me with no alternative but to dissent.

I dissent from the IMHTC majority report for the following reasons:

1. The IMHTC exceeded its statutory authority by proposing and adopting its own valuation procedures instead of reviewing and approving only those procedures proposed by the Commissioner.

Chapter 48 specifies that the IMHTC is to review and approve valuation procedures proposed by the Commissioner. As contemplated by the Legislature, the valuation procedures accordingly would be acceptable to both the plaintiffs' and intervenors' representatives on the IMHTC and to the Department of Natural Resources ("department"). Certain procedures contained in the majority report, however, were not proposed by the Commissioner, are unacceptable to the department, and therefore should not have been approved by the IMHTC majority. By proposing and adopting valuation procedures over the department's objections, the IMHTC has ignored the legislative requirement that, in effect, there be consensus as to the valuation procedures to be employed.

2. The procedures proposed and adopted by the IMHTC in the majority report do not produce fair market value, as required by Chapter 48; instead, they produce a value substantially greater than fair market value.

The importance of the value determinations used to determine fair market value cannot be overstated because of the dramatic effect they will have on the overall state budget. Under the valuation procedures adopted by the majority of the IMHTC, the total value of the original one million acre mental health trust land grant would exceed \$2.2 billion. Under AS 37.14.021(c), this would result in more than \$178 million in otherwise unrestricted state general funds being restricted in the Mental Health Trust Income Account. Under the valuation procedures I believe should be employed, the fair market value of the original one million acre grant equals just over \$564 million, resulting in more than \$45 million annually in the Mental Health Trust Income Account.

While the remainder of this minority report documents the fact that the procedures adopted by the IMHTC in the majority report do not produce fair market value, the point can be illustrated with three examples.

Example 1: Surface Estate. The IMHTC initially defined "fair market value," the value required by Chapter 48, as "the most probable selling price in a free and open market," a standard definition in the real estate business. Panels of independent expert appraisers were then given instructions (prepared jointly by the majority of the IMHTC, the lawyers for the plaintiffs and intervenors and the department) to determine fair market value as defined. The lawyers for the plaintiffs and intervenors retained consultants (at state expense and without formal approval of the IMHTC) who were not asked to determine fair market value as defined by the IMHTC and required by Chapter 48. Instead, they were directed to determine "the highest value that can be supported in the market." Following review by those consultants, the panels increased their initial values, on the average, by about 20 percent. The procedures adopted by the IMHTC majority require that those values be further increased by splitting the difference between the final fair market values as determined by the panels and "the highest values that can be supported in the market" as determined by the consultants for the plaintiffs and intervenors.

Example 2: Hardrock Minerals. The procedures adopted by the IMHTC majority to determine the fair market value of the hardrock mineral estate, among many other shortcomings, begin with the assumption that all mineral deposits on mental health lands were developed on the date of valuation. That, of course, is not the case. In fact, there is very little mineral production from mental health lands even today. The consultants hired by the lawyers for the plaintiffs and intervenors acknowledge that this assumption alone produces value many times higher than would be produced if it was assumed that mineral deposits on mental health lands are not developed until sometime in the future:

- A. Deposits are developed as of 2006 - the net present value (NPV) is \$225 million.
- B. Deposits are developed as of 1996 - the NPV is \$585 million.
- C. Deposits are developed as of 1987 - the NPV is \$1.5 billion.

The procedures adopted by the IMHTC majority value the mineral estate at the \$1.5 billion figure. It's also conceivable that major deposits will never be discovered in which case the NPV would be zero.

Example 3: Integration. The procedures adopted by the IMHTC combine the various value components -- surface estate, timber, oil and gas, hardrock minerals, coal, and sand and gravel--by simply adding them up. A prospective purchaser in the real world, of course, would not simply add up all the values. He or she would instead determine which uses, if any, are compatible. For example, residential subdivision development and strip mining for coal are not compatible.

3. The procedures proposed and adopted by the IMHTC in the majority report create substantial problems with respect to reconstituting the trust and periodically redetermining its value.

Chapter 48 contemplated an exchange of some original mental health lands for other state lands on the basis of equal value. The procedures adopted by the majority of the IMHTC have been used to value the original mental health lands, but they have not been used to value the pool of potential exchange lands. This precludes the exchange contemplated by the Legislature. In

addition, Chapter 48 contemplated periodic revaluation of the lands following the exchange. If the exchange cannot go forward, the legislatively contemplated revaluation also cannot go forward.

In my opinion, the failure of the IMHTC to reach consensus on valuation procedures makes it impossible for the Commissioner to comply with Chapter 48. The procedures approved by the IMHTC majority were not proposed by the Commissioner as required by law; the procedures I believe should be used have not been approved by the IMHTC as required by law. For this reason, I believe the Commissioner should transmit both the majority and minority IMHTC reports to the Legislature, explain that she is unable to comply with Chapter 48 at present, and list three options for legislative consideration: (1) change the law to accept the value determined under the procedures adopted by the IMHTC majority; or (2) change the law to accept the value under the procedures I believe should be used to comply with Chapter 48; or (3) appropriate additional funds to permit the IMHTC to continue seeking consensus. I believe the Commissioner should recommend that the Legislature choose option (2), accepting the value determined under the procedures I believe should be used to comply with Chapter 48.

## BACKGROUND

The IMHTC was created by the Legislature in Chapter 132, SLA 1986, to oversee state management of mental health trust lands. In Chapter 48, SLA 1987, the Legislature established a statutory framework for resolving the mental health trust land issue. The three main elements of that resolution are: (1) valuing the original one million acre land grant and all lands in legislatively designated areas (parks, wildlife refuge, etc.) under procedures proposed by the Commissioner and approved by the IMHTC; (2) "exchanging" those original mental health trust lands not in legislatively designated areas for "replacement" lands of equal value in such areas; and (3) "renting" the original mental health trust lands in such areas and the equal value "replacement" lands for 8 percent of their fair market value annually.

Following the passage of Chapter 48, SLA 1987, the Governor appointed Dr. George Rogers of Juneau and Dr. Lidia Selkregg of Anchorage to join the Commissioner to compose the membership of the IMHTC. Dr. Rogers was then selected chairman of the IMHTC. Originally, Deputy Commissioner Lennie Gorsuch represented the Commissioner on the IMHTC, followed later (after January, 1988) by Deputy Commissioner Rod Swope. Assistant Attorney General Tom Kcester of the Department of Law served as legal counsel to the IMHTC, while representatives of the Department of Natural Resources (department) provided staff support.

The IMHTC met on August 19 and 20, 1987, and continued to meet regularly through January, 1990. Since passage of Chapter 48, a total of thirty-five (35) IMHTC meetings have been held in either Anchorage or Juneau following at least fourteen (14) days prior public notice.

Although not part of the IMHTC, the attorneys for the plaintiffs and intervenors in the Weiss lawsuit, David Walker and Jim Gottstein, attended almost every IMHTC meeting and actively participated in all aspects of the discussions and valuation process, even to the point of proposing valuation procedures and resultant values. The IMHTC allowed the plaintiffs and intervenors to join in all discussions during IMHTC meetings.

At times, this degree of participation made it extremely difficult to differentiate between IMHTC conclusions and those of the lawyers for the plaintiffs and intervenors. The plaintiffs' and intervenors' lawyers also independently hired appraisal

consultants to review the work of contractual appraisers, retained by the department under procedures developed by the department, the IMHTC, and the lawyers for the plaintiffs and intervenors, and working under instructions developed in the same way, to compose the opinion of value panels for the surface estate valuation. In addition, the plaintiffs and intervenors, acting without formal IMHTC authorization, hired independent mineral consultants, Paul Metz and Colin Dixon, to compile a value for hardrock minerals, coal, and material sources (within the mental health trust land portfolio) using a procedure not previously recommended by the Commissioner or formally discussed or approved by the IMHTC. Mr. Metz and Mr. Dixon also attended several meetings of the IMHTC to present their information and viewpoints.

The most difficult aspect of the entire valuation process proved to be the development and approval of specific procedures under which the department would value mental health trust lands. On several occasions the IMHTC chose to adopt a new valuation methodology even after the department had already completed, at considerable time and expense, the valuation process using the original IMHTC approved methodology. Development of a new valuation methodology frequently seemed to be motivated more by the desire to produce a higher value than to correct the original methodology. As a result, procedures were adopted by the IMHTC that were not proposed by the Commissioner (as required under Chapter 48) and which do not produce fair market value (as Chapter 48 also requires).

Throughout my participation in this process, I strived toward achieving consensus and a common resolution of the various issues with my fellow IMHTC members. However, as it became apparent that the majority of the IMHTC was dissatisfied with the results of the initially approved procedures and began amending them to produce higher values, the consensus approach began to erode. This became particularly apparent in discussions regarding the results of the opinion of values for the surface estate and values for the mineral estate. Thus, as a dissenting member of the IMHTC, I felt it was necessary to submit a minority report.

## FINDINGS

1. **The IMHTC exceeded its statutory authority by proposing and adopting its own procedures instead of reviewing and approving only those procedures proposed by the Commissioner.**

The Legislature contemplated and specified that the Commissioner propose valuation procedures which then would be approved by the IMHTC. Section 90 of Chapter 48, SLA 1987 repealed and reenacted section 2(a) of Chapter 132, SLA 1986 to read: "The commission shall approve procedures proposed by the Commissioner of Natural Resources to determine the fair market value, as of the effective date of AS 38.05.800, of all lands selected by and patented to the state under sec. 202 of the Alaska Mental Health Enabling Act, and review the final determination of the fair market value determined under those procedures." (Emphasis added.)

Under AS 38.05.800(a), also enacted as part of Chapter 48, the Commissioner is to determine the fair market value of the original mental health land grant "under procedures approved by the Interim Mental Health Trust Commission."

Simply stated, the Commissioner is to propose valuation procedures to be reviewed and approved by the IMHTC. Once a set of procedures have been approved by the IMHTC, the application of those procedures to the valuation of the mental health land grant and replacement lands is the responsibility of the Commissioner, with the results then reviewed by the IMHTC. The Legislature thus contemplated a three-step process: (1) consensus would be reached as to the procedures to be followed; and (2) the Commissioner would unilaterally implement those procedures to determine fair market value; and (3) the IMHTC would review the final fair market value determined by the Commissioner.

Although the IMHTC initially approved certain valuation procedures proposed by the Commissioner, the IMHTC majority eventually proposed and adopted many of its own procedures not proposed by the Commissioner. Specifically, the procedures adopted by the IMHTC majority for the surface valuation and for the mineral valuation were not proposed by the Commissioner. These actions removed from the Commissioner all discretion and thereby effectively excluded the Commissioner from the valuation process, a result certainly not intended by the Legislature.

Furthermore, the IMHTC in its majority report adopted not only procedures, but also an actual set of resultant values. As mentioned above, only the Commissioner has the authority and responsibility to determine the fair market value of the land. Therefore, the IMHTC again clearly exceeded its statutory authority.

2. **The procedures proposed and adopted by the IMHTC in the majority report do not result in fair market value, as required by Chapter 48; initially they produce a value substantially greater than fair market value.**

AS 38.05.800(a) requires the Commissioner to "determine the fair market value, as of September 6, 1987 of all land selected by and patented to the state under the Alaska Mental Health Enabling Act." At its September 21-22, 1987 meeting, the IMHTC initiated the valuation process by adopting, as proposed by the department, the definition of fair market value found in American Institute of Real Estate Appraisers/Society of Real Estate Appraisers, Real Estate Appraisal Terminology (rev. ed. 1981). This definition specifies "The most probable price in terms of money which a property should bring in a competitive and open market under all conditions requisite to a fair sale." Employing that definition and procedures, the department determined the fair market values for the surface estate and resources associated with the mental health and replacement lands (timber, oil and gas, coal, material sources, and hard rock minerals). Those procedures and values are outlined in this section.

The surface estate of all mental health trust and replacement land was valued by the department using the opinion of value approach. This approach, as amended by the IMHTC to make adjustments for certain disputed values submitted by the lawyers for the plaintiffs and intervenors, was approved by the Commissioner and became the accepted procedure for valuing the surface estate. However, the IMHTC majority report reflects a surface estate valuation procedure and value different from that developed by the IMHTC, approved by the Commissioner, and employed by the department. As a result of this significant departure from accepted and approved procedures, the resulting value does not reflect fair market value and is inconsistent with the fair market value requirement. Once the opinion of value panels completed their work, the plaintiffs and intervenors hired their own appraisal consultants to examine the results. The review appraisers, however, did not employ the same valuation approach used by the department. Instead, the plaintiffs' and intervenors' appraisal consultants were given the following

written instruction: "For all parcels that appear to have been undervalued, provide your estimate of the highest value that can be supported in the market." [Walker letter to MacSwain, Olson, Sopp, dated July 19, 1988.] In State v. Alaska Continental Development Corp., 630 p.2d 977, 991 (Alaska, 1980), the Alaska Supreme Court specifically disapproved of a valuation process reflecting "the high end of the market spectrum," stating that such an approach "is contrary to the law in Alaska" that fair market value, "or the price a willing buyer would pay a willing seller for the property, is the appropriate measure of just compensation. There was no mention in the instructions to the appraisal consultants of fair market value or most probable selling price. The values determined by the review appraisers, therefore, have no relevance to the task with which the Legislature charged the Commissioner, that of determining the fair market value and not "the highest value that can be supported in the market" of the original one million acre mental health land grant.

The IMHTC also approved the department's recommendation that determination of resource values would employ a two step approach. The first step was to quantify the particular resource(s) in place. The second step was to determine the value to the landowner of that quantity of the particular resource(s) in place.

For the hardrock portion of the mineral valuation, the IMHTC majority report simply adopted the procedures and value contained in the Report by Paul Metz and Colin Dixon ("MDA Report"). The MDA approach employed procedures not recommended by the Commissioner or previously discussed or approved by the IMHTC. Furthermore, it produced a value which is substantially too high for the hardrock mineral component, and suggests a hardrock mineral endowment considerably greater than the facts support.

The resultant surface and resource values then were integrated by the department, recognizing that values could be added where use of the surface was compatible with other resource development, but not where surface use was incompatible with resource development. This was in accord with integration procedures already approved by the IMHTC. However, the majority report uses a different integration approach which involves simple addition of all values--a process totally inconsistent with standard valuation procedures. The issues of parcelization, integration,

replacement lands, redetermination of values, and the valuation process used to determine fair market value for the various resources, are described in more detail in the sections that follow.

### Parcelization

The department began the valuation process by proposing procedures for the parcelization of all land. After review by the lawyers for the plaintiffs and intervenors and their "expert appraisers" regarding the parcelization procedures, the department's proposed parcelization procedures were approved by the Commissioner and the IMHTC. Department personnel then parcelized approximately 7.5 million acres of land (mental health trust and replacement land) into over 10,000 parcels.

This parcelization process used the standard larger parcel criteria set out by the courts for determining fair market value in condemnation litigation. The criteria include: unity of ownership, unity of use, and contiguity. There was one exception to this rule. Where an approved survey was in existence identifying separate lots, tracts, or metes and bounds surveys, those surveyed tracts were segregated out from the larger into separate individual parcels.

## Surface Estate Valuation

In accordance with the intent of the Legislature, as reflected in the fiscal note accompanying the bill that became Chapter 48, an opinion of value process was to be used to determine the value of the surface estate.

During the legislative discussion concerning Ch. 48, SLA 1987, the department explained the opinion of value process to the Legislature and submitted two different fiscal notes, one to cover the cost of individual standard appraisals and one for the opinion of value process. The Legislature recognized the potential costs and lack of available money to fund individual appraisals for all mental health and replacement lands. Therefore, money was appropriated for the department to conduct the fair market valuation through an opinion of value process, consisting of three panels of appraisers. In other words, funds were appropriated to cover only the cost of an opinion of value process.

This opinion of value process involved three panels comprised of three very experienced and knowledgeable independent appraisers from each of three geographic areas of the state (Southeast, Southcentral, and Northern). These appraisers sat as a panel according to geographic area, examined plats, maps and legal descriptions of mental health land, and rendered an opinion of value for each parcel of property examined. They brought a variety of work experience and market knowledge with them to contribute to the opinion of value panel process. The use of a three member panel for each geographic area provided an optimum cross section of local market conditions, market demand, and varied sales data. The comprehensive appraisal files of the department were also made available to each panel.

The IMHTC and the lawyers for the plaintiffs and intervenors approved, word by word, the "Request for Proposal" (RFP) sent out by the department to all appraisers in the state in order to solicit interest in being a member of one of the opinion of value panels. Two department employees and the two IMHTC members representing the plaintiffs and intervenors, after consultation with their respective attorneys, evaluated all of the RFP's submitted. They scored each proposal and selected nine appraisers to compose the three separate panels of the most qualified appraisers in the respective regions (i.e., Southeast, Southcentral and Northern).

The process used by the panels was not an "appraisal" in the strictest accepted definition of the term. Appraisal reports were not required nor were field inspections conducted for every parcel. However, this was fully recognized by both the Legislature and IMHTC.

The theory of the opinion of value process is that some parcels may be valued high and some parcels may be valued low, but they average themselves out. This theory was given credibility when the IMHTC conducted a check of the results of an earlier opinion of value process (one panel of three appraisers for all three regions of the state with only one appraiser representing each region) on all original mental health land that had been selected by the state or conveyed to municipalities. The IMHTC selected parcels, in the Northern, Southcentral and Southeast regions, that it felt were most likely to be valued too low, and had them appraised under standard appraisal procedures. The result of this exercise was that, on total, the actual appraised values and the opinions of value for the parcels the IMHTC believed were the most undervalued were within 4 percent. While some differences were dramatic--the IMHTC majority report notes one 800 percent difference (interestingly, the high value was produced by the opinion of value process) they balanced out overall as expected. This is contrary to the IMHTC majority report which infers that the opinion of value process produces values which are uniformly too low.

As soon as contracts were awarded, the department convened the three opinion of value panels for each region to render their best collective professional opinions of fair market value for each parcel. The opinion of value panels were instructed to determine fair market value using the definition found in the American Institute of Real Estate Appraisers/Society of Real Estate Appraisers, Real Estate Appraisal Terminology, adopted by the IMHTC at its September, 1987 meeting. The opinion of value panels also were instructed to consider reparcelizing if, in their best professional judgement, reparcelization was necessary to enable them to determine the land's fair market value.

The panel's findings were recorded on forms provided by the department and approved by the IMHTC and attorneys for the plaintiffs and intervenors. The forms contained all available information relative to the parcels and were supplemented by land status plats and maps. At least two members of each three member panel signed signature blocks on each form indicating panel concurrence with the specific value for each parcel.

The IMHTC had, in the RFP, provided that the plaintiffs and intervenors could review and challenge any of the values established by the panels. The lawyers for the plaintiffs and intervenors independently hired their own "appraisal review consultants" to review the work of the opinion of value panels (paid for by the state as court-ordered costs in the Weiss case).

The appraisal consultants hired by the lawyers for the plaintiffs and intervenors were directed to determine "the highest value supported by market data." (Walker letter to Mac Swain, Olson, et.al., dated July 19, 1988). They were not instructed to determine what, in their best professional opinion, they considered to be fair market value (using the definition adopted by the IMHTC). Under their instructions, they valued the surface estate at \$833,280,096 compared to the opinion of value panels' initial value of \$392,000,000.

Their review took approximately nine months and resulted in approximately two-thirds of the values of original mental health trust parcels being questioned.

Due to the large number of questioned values by the appraisal consultants and limited funding, the department proposed a sampling strategy which was adopted by the IMHTC. Certain groups of disputed values along with a computer-generated random sample of the remaining disputed values, were identified and returned to the Southeast panel for review. A representative sampling of large (over 1,000 acres) parcels was submitted to the Southcentral panel for review. The review of these disputed values by the panels resulted in a small increase in the value of some of the parcels. This occurred only after the lawyers for the plaintiffs and intervenors and the chairman of the IMHTC instructed the panels on how to value certain classes of parcels.

The method of applying the sampling results to all three regions resulted in a 30 percent increase in the opinion of value panels' initial \$392 million value for the surface estate, thus increasing it to a final value of \$511,949,467. The value determined by the plaintiffs' and intervenors' review appraisers, however, was not similarly revised downward, but instead was held at \$833,280,096; no downward adjustment in their value was made.

The IMHTC, acting without a recommendation from the Commissioner, adopted the procedure to determine the value of the surface estate by simply splitting the difference between the revised value determined by the opinion of value panels (which was

increased by 30 percent over the initially determined value) and the unadjusted total determined by the appraisal consultants retained by the lawyers for the plaintiffs. This resulted in an arbitrary value of \$672,614,782., halfway between the panels' final recommended surface value of \$511,949,467. and the review appraisers' initial value of \$833,280,096.

The basic flaw in the procedures adopted by the IMHTC majority is that those procedures incorporate, in large measure, the values determined by the plaintiffs' and intervenors' review appraisers. The appraisal consultants were instructed to determine the "highest value that can be supported in the market," a value which is not the same as fair market value. Using the value those procedures produce is not consistent with fair market value specified in Chapter 48. Instead it is simply the average of the fair market value determined by the opinion of value panels as the Legislature contemplated and "the highest value supported by market data" as determined by the review appraiser. The fair market value of the surface estate should be the final value determined by the opinion of value panels, which was \$511,949,467.

## Hard Rock Mineral Evaluation

The procedures proposed and adopted by the IMHTC to assess and value hard rock mineral resources (MDA Report) produced a value which is substantially greater than the facts support.

The initial hardrock mineral assessment was completed, using available information, by the department's Division of Geological and Geophysical Survey (DGGS). However, DGGS did qualify their assessment with the observation that there are inadequate data to perform a comprehensive mineral assessment. In addition, the parcels being studied were too scattered and too varied in size to make any very specific quantitative determinations without a great deal of expense. The department also sought assistance from the U.S. Bureau of Mines, WGM (a private mineral consulting firm), and the department's Division of Mining to quantify these resources. These sources also indicated that there are insufficient data and the parcels are too scattered.

The DGGS did, however, identify the potential for mineral occurrences on mental health trust lands and the pool of potential replacement lands by ranking them from 1 (low potential) to 5 (high potential), with category 5 subsequently broken down by DGGS at the request of the IMHTC to identify the lands with the highest high potential ("Super 5s"). No consideration was given, however, to quantity of potential mineral resources or the economic feasibility of their development. The Super 5 category identified only the highest potential for occurrence of a mineral deposit, not the highest probability of a commercial discovery.

The IMHTC, at a March 17 - 18, 1988 meeting, determined that it was impracticable to determine mineral value in light of the information from DGGS, the U.S. Bureau of Mines, WGM, and the Division of Mining. The department was, therefore, originally instructed by the IMHTC to consider the potential of the land (according to the DGGS assessment) only for replacement purposes.

The department continued, however, to seek procedures to present to the IMHTC that would reflect, to the extent possible, the fair market value of the hardrock minerals on both the original mental health land and the potential replacement land. Eventually, a small number of comparable sales of patented and unpatented mining claims in the state were identified for that purpose.

When presented to the IMHTC, however, the comparable sales approach was rejected. The initial value determined --\$16 million--admittedly seemed quite low.

Unknown to the IMHTC minority, the lawyers for the plaintiffs and intervenors retained two consultants, Paul Metz and Colin Dixon, to estimate the value of the hardrock minerals on the original one million acre grant using a discounted cash flow methodology. Employing a variety of assumptions and probability analyses, Metz and Dixon concluded that the hardrock mineral value of the original grant was \$1.51 billion. The lawyers for the plaintiffs and intervenors presented this information to the IMHTC in the form of a report ("MDA Report").

The MDA Report was criticized by a variety of expert analysts.

The department's natural resource economist, Ed Phillips of the Division of Oil and Gas, reviewed the MDA Report from an economic standpoint and concluded that the methodology, assumptions and judgments were so manipulated that the values are excessively high.

The DGGs geologists responsible for developing the geological data reviewed the MDA report. Their review raised substantive questions relating to the assumed probabilities of discovery and the range of estimated deposit sizes.

The University of Alaska's Institute for Social and Economic Research (ISER) conducted a thorough review and analysis of the MDA Report. Their analysis concluded that if the geologic assumptions, probabilities and costs in the MDA Report are found to be valid, the economic considerations are not. The ISER economists (Dr. Bradford H. Tuck and Dr. Matthew Berman) who reviewed the MDA Report estimated that the net present value of the original one million acre grant would not exceed between 10 and 30 (\$177,000,000. and \$460,000,000. respectively) of the value contained in the MDA Report, and would be in the 10 to 30 percent range only if the geologic assumptions, probabilities and costs are valid. Thus, only under the optimum set of circumstances--i.e., all of the analysts' expectations are realized--would the values even approach one-third of the total estimate in the MDA Report?

The following is the "Summary" from the ISER report (dated March 22, 1989):

"In summary, our review has identified a number of points that question some of the assumptions underlying the Metz appraisal. The three that are critical relate to the assumed probabilities of discovery, the assumed net smelter return, and the timing of the income stream. The assumed values in the appraisal result in projected revenue and production estimates that do not currently exist and are highly improbable in the future.

"The test of an appraisal, as mentioned above, is whether it approximates fair market value. Fair market value is what the asset would bring in a competitive market disposal held today. The historic levels of mining industry activity in Alaska, coupled with long term trends in world mineral markets, simply do not support the notion that the mineral rights on the Mental Health Trust Lands would command 1.5 billion dollars today, or at any time in the foreseeable future."

Perhaps more telling, the MDA Report used a number of works by Dr. DeVerle P. Harris of the University of Arizona for its methodological basis and to justify the numbers that were produced. Dr. Harris was recognized by the IMHTC as one of the leading authorities in the nation in the area of discounted case flow valuation methodology. To determine if the MDA report properly interpreted his own works, the department entered into a contract with Dr. Harris to review and analyze the report. In his critique of the MDA Report, Dr. Harris found numerous problems with the report and its ultimate value estimate.

Because of Dr. Harris's preeminence in the field, I have included extensive excerpts from his summary as follows:

"The least equivocal judgment that can be made about the analysis performed by MDA is that there can be little confidence that the fair market value of the Alaska Mental Health lands is \$1.5 x 10<sup>9</sup> because of (1) great uncertainties that exist about critical factors, e.g., mineral endowment, probability for discovery, costs of development and production, and future markets, (2) subjective judgments made, and (3) rough approximations employed in computation of fair market value..."

"Those who use the number, particularly when uninformed about evaluation and estimation practices, ascribe to it much greater confidence than it deserves. Intelligent decision making requires a description of uncertainties about the estimate of a highly uncertain quantity. Clearly, the fair market value of Alaska Mental Health Lands is a highly uncertain quantity. Representing so uncertain a quantity as the fair market value of unseen mineral deposits by a single-point estimate ( $1.5 \times 10^9$ ) begs some explanation, for such analysis clearly is not best practice, nor even usual practice, in evaluation of a complex and uncertain quantity.

"There is another dimension to the neglect of uncertainty besides that of information to the user, namely, the implication of uncertainty to fair market value as perceived by those who would purchase the rights to explore for and exploit the mineral resources. In this case, these buyers are private corporations. Corporations behave generally as though they are risk averse, meaning that the investment value (fair market value) of a highly uncertain venture is less than its expected monetary value. The greater the uncertainty about the outcome, the greater the expected value is discounted by the investor. Thus, fair market value to a private corporation of a highly uncertain venture, such as exploration, development, and exploitation of unseen mineral deposits, is not independent of the magnitude of uncertainty; consequently, a comprehensive evaluation itself requires a probability distribution of the uncertain quantity, which in this case is the fair market value of MHL.

"One may agree with the foregoing but still press the question of whether or not  $\$1.5 \times 10^9$  is a "reasonable" single-point estimate of fair market value when risk is not explicitly accounted for. Responding to this question in an absolute sense is nearly impossible because of the great uncertainties mentioned above, the subjective judgments made, and the approximations employed.

"A more answerable question is whether within the context of the approach used by MDA there were judgments made or procedures employed which, everything

else being equal, tend to over or underestimate fair market value. Clearly, as indicated in the body of the report, such can be identified. The most obvious of these is the ignoring of lead times in the computation of net present value. This neglect leads to overestimation by a factor of 2 or 3. Similarly, neglect of market impacts leads to overestimation. Ascribing to every discovery the 90th percentile tonnage and grade also leads to overestimation, perhaps a large overestimation, unless compensating adjustments are made in discovery probabilities. There is no documentation of such adjustment, but the selection of discovery probabilities by MDA is heavily subjective and especially vague, making it difficult to draw firm conclusions. If, as suggested by the MDA report, the discovery probabilities selected were predicated in part upon the CRA analysis of regions in Alaska that were appraised by the U.S. Geological Survey, then the discovery probabilities probably are considerably too large, because these (CRA) numbers of deposits are expectations for occurrence (not discovery) of deposits of all sizes and grades (not just 90th percentile value).

"The treatment of exploration and mineral potential is particularly vague and unrationalized. This is a serious deficiency of the report, because analysis of value is so sensitive to the treatment of these factors. The effect of this neglect is to create low confidence in the specified probabilities for discovery and in the computed expectations for fair market value. The fact that discovery probabilities were estimated directly using exploration outcomes from other regions, and that these were subjectively adjusted to reflect mineral potential rankings, makes a careful description of the estimation even more important and necessary if the resulting estimate of fair market value is to be credible, because the very foundation upon which the process rests (exploration outcomes) is very difficult to interpret. This is especially the case when these outcomes are to serve as the basis for discovery probabilities for a host of different mineral commodities and different deposit types. The use of constant discovery probabilities for all deposit types and all metals for a given mineral potential ranking is at best a crude approximation and lacks credibility when the objective is fair market value.

"Finally, a fair market value as large as  $\$1.5 \times 10^9$  does not seem consistent with economic conditions and factors. As fair market value,  $\$1.5 \times 10^9$  represents an estimate of the net present value of profits (net of all costs, royalties, and taxes) that firms could earn by acquiring rights to exploration for and exploitation of minerals on the Alaska Mental Health Lands. Such a large value, if correct, would be a strong incentive for acquisition of tenure and exploration of these lands. While the author has little first-hand knowledge about recent metal resource development on the Mental Health Lands, or in Alaska in general, it is his understanding that such activity is and has been at a low level (Tuck and Berman, March 22, 1989; Paul Metz, May 20, 1989, personal communication). Such circumstances challenge a value as large as  $\$1.5 \times 10^9$  as a credible estimate of the fair market value of metal resources of the  $1 \times 10^6$  acres of Mental Health Lands. Moreover, rationalizing inactivity by institutional impediments or by stringent tenure requirements does not lend credence to such a high value. Unless such impediments and stringent tenure provisions are to be altered, fair market value appropriately reflects the impact of current conditions on profitability of resource development."

The foregoing expert critiques, questioning the credibility of the MDA Report's \$1.51 billion estimate for the value of the original one million acre grant, are supported by a number of objective considerations. WGM, a private mineral consulting firm, determined in March, 1988 that the market value of 2.2 million acres of Bering Straits Native Corporation land in Northwest Alaska was \$343 million, an average of \$156 per acre. That land is located in the vicinity of the Seward Peninsula, historically the most productive mineral province in the state. While some mental health land was specifically selected for its mineral potential (as was a considerable portion of the Bering Straits Native Corporation's selections), more was selected for other values (e.g., residential, timber, etc.). Given those facts, I cannot accept the MDA Report's average mineral estate value of \$1,510 per acre for mental health lands. This is particularly true as the Bering Straits Native Corporation lands are in large continuous tracts, which a prospective purchaser could evaluate through appropriate and efficient exploration

strategies. The mental health lands are generally in much smaller parcels scattered throughout the state and could not be explored in as cost-effective a manner.

Furthermore, the MDA Report's conclusions regarding total mineral production from mental health lands appears extremely optimistic in light of existing mineral production in Alaska. The MDA Report used the following formula to estimate the mineral estate value of the original one million acre grant: net present value (NPV) equals the gross value of annual production (GVAP) times the landowner's royalty, measured as a percentage of the net smelter return (NSR), times a uniform series present worth factor (PWF) to discount future income to present value:

$$NPV = GVAP \times NSR \times PWF \text{ (see MDA Report, p. C-1)}$$

Working backwards, the gross value of annual production necessary to produce a given net present value can be determined as follows:

$$GVAP = NPV \div (NSR \times PWF)$$

Under the assumptions in the MDA Report (4 percent NSR, 10 percent discount rate for 20 years for a PWF of 8.514), the gross value of annual production required to produce the MDA Report's \$1.51 billion net present value is more than \$4.43 billion:

$$GVAP = \$1.51 \text{ billion} \div (0.04 \times 8.514) = \$4.43 + \text{billion}$$

Total mineral production for the entire state in 1987 was \$202,389,898. A production increase of 14.7 percent was seen in 1988, and further development of projects such as Greens Creek and Red Dog (none of which, incidentally, are on state or mental health land; furthermore, a third "world-class" deposit, Quartz Hill, also not on state or mental health land, is not commercially viable at this time) undoubtedly will result in further annual increases. However, \$4.43 billion in gross value of annual production statewide is unrealistic given the current status and most optimistic projection by the mining industry in this state. I simply cannot accept that the gross annual value of production from mental health lands alone (one-third of one percent of the state's land mass) would exceed \$4.43 billion.

A survey of fifteen other states with trust lands (including Texas, where the Texas Railroad Commission administers a substantial quantity of oil-rich lands for the University of Texas' benefit) reveals that the subsurface income from those

lands averages \$4.57 per acre per year based on 1987 returns. Under the analysis in the MDA Report, the mental health lands would produce \$120.80 per acre per year based on the eight percent per year rental provision of AS 37.14.011(c) although differences certainly exist between Alaska and other states. I cannot accept that even the most aggressive trust management could produce results so dramatically different from those in other states, including even those states with substantial known subsurface resources (unlike the Alaska mental health land situation) and where transportation and infrastructure systems are much more developed and extensive than in Alaska.

In responding to the various expert critiques of the MDA Report, Metz and Dixon argue that the current lack of mineral production from mental health lands is not a consequence of a lack of interest on the part of industry but instead is the result of state mismanagement. Their report states that, "The failure of the State of Alaska to fully implement a mineral location/leasing system and the various types of land withdrawal and restrictions, have acted as a major disincentive to investment in prospecting and exploration on state land in general and the mental health land (MHL) in particular."

The fact, of course, is that most mental health lands have been available for claim-staking--i.e., the mineral rights were available for free from the time they were selected until they were closed to mineral entry by order of the Commissioner following the Weiss decision in 1985. While some claims were staked, industry interest in mental health lands was not great. It is hard to imagine that a vigorous state leasing program, where industry would have to pay for mineral rights, would result in increased industry interest, particularly where (as Dr. Harris noted) there is a world market in rights to mineral lands and substantial amounts of state and federal land would continue to be open to claim-staking for free.

At the request of the department, Dr. Harris also outlined the activities required to produce a credible estimation of the market value of the mineral resources using the discounted cash flow analysis and the costs of these activities. Dr. Harris estimated that the costs of estimating the market value of the original mental health land and replacement land would be about \$350,000, plus funding for additional DGGs work.

Given the amount of time and money expended to date in an effort to value mental health lands has taken to date. I cannot recommend that additional funds be requested from the Legislature to continue the process.

As an alternative, department staff have suggested employing a comparable sales approach to determine the value of the mineral estate of both the original one million acre mental health land grant and the pool of potential replacement land. The department has received information regarding sales of the mineral rights to certain lands in DGGs's classes 4, 5, and Super 5s for which the mineral endowment is unknown (although suspected), which is the case with the land to be valued. Those sales revealed the following per acre market values:

Super 5	\$2,000/acre
5	1,135/acre
4	108/acre

Using those figures, the value of the mineral estate of the original grant would equal \$73,403,459.

In my opinion, this is a more than reasonable value for the mineral estate. Under the MDA Report assumptions (four percent net smelter return, ten percent discount rate for 20 years), the gross value of annual production from mental health lands would have to exceed \$215 million to produce a net present value of \$73 + million. That is more than the total of statewide mineral production in 1987. In addition, the eight percent annual rent required under AS 37.14.011(c) would result in the subsurface income from mental health lands equalling \$5.87 per acre, substantially greater (more than 28 percent) than the \$4.57 per acre earned on average by trust lands in the 15 lower 48 states surveyed.

The IMHTC majority has made it clear they do not believe a comparable sales approach is a valid method for determining the value of the mineral estate. Even though I believe the foregoing comparisons to current statewide mineral production and subsurface income from trust lands in other states reveal that the result of this approach is eminently fair to the trust, it has been suggested that a panel of Alaska mineral consultants could quickly and inexpensively provide an additional review of both the MDA Report and this comparable sales approach. You may wish to consider that option.

In my opinion, however, the final value of the mineral estate should be that produced by the comparable sales approach which is \$73,403,459.

#### Timber Valuation

A timber resource valuation was prepared at the request of the IMHTC and the Commissioner. The valuation considered all original mental health trust lands, which total approximately one million acres, and all legislatively designated replacement pool lands, which encompass over six and one half million acres.

A detailed process to delineate and value lands suitable for commercial timber activities was developed in concert with the IMHTC and the consultants hired by the plaintiffs and intervenors. The results of this process are a series of 123 forestry potential maps, published as overlays to the USGS one inch-per-mile quadrangles, inventory estimates of commercial standing crop on these lands, and estimates of timber resource values reported on a parcel-by-parcel basis.

The conclusion of this process was that the one million acres of original mental health trust land contained \$36,243,253. in commercial timber. I agree with the timber valuation procedures employed and the value derived.

#### Oil and Gas Valuation

At the request of the IMHTC, a report was written to describe the geology and exploration activity pertinent to establishing a "best estimate" of the oil and gas potential of the legislatively designated replacement pool lands and the original mental health trust lands within Alaska.

For general evaluation, the state was divided into four regions: (1) Gulf of Alaska (including Southeast, Prince William Sound, and the Kodiak area), (2) Alaska Peninsula and Southwestern Alaska, (3) Central and East-Central Interior, and (4) Cook Inlet and Susitna Basins (including the Talkeetna and Chugach Mountains and a portion of the Copper River Basin). Each of these was assigned to a petroleum geologist or geophysicist. These four regions were further subdivided in order to produce a more precise and detailed evaluation. Information from surface geologic mapping and from nonconfidential drilling well logs was utilized. Confidential well log information and data from proprietary seismic surveys were not included in this study.

Of the four areas studied, only the Cook Inlet Basin contains known natural gas fields which underlie some of the mental health and legislatively designated parcels. Where sufficient data were available, an economic analysis was completed for those parcels.

There are no known oil fields beneath any of the parcels.

This process concluded that the oil and gas value of the one million acres of original mental health trust land was \$495,998. I concur with the oil and gas valuation procedures employed and the value derived.

### Coal Value

At the request of the IMHTC, a coal valuation was prepared by the department. The valuation considered all original mental health trust land and all legislatively designated replacement pool land.

The conclusion of this process was that, although coal is present in a number of areas, it is currently economic to produce in only two areas (Nenana and Wishbone Hill). The value of this coal on original mental health trust land was determined by the department to be \$432,866.

The IMHTC proposed and adopted the MDA Report as its procedures and resultant value. The MDA Report states that a current market does not exist for coal other than that identified in the DNR coal valuation. The authors then hypothesize that "several large scale open pit metal mines" in the railbelt and Kenai Peninsula areas could serve to diminish the "current excess electrical generating capacity" and provide additional coal marketing opportunities, with similar opportunities arising elsewhere. The MDA Report then makes a number of assumptions about the mines to produce figures for a cash flow analysis. One of these assumptions is that "The entire production would come from the subject land (i.e. mental health trust land)."

Using the hypothetical developments and related assumptions, the MDA Report concludes that "the net present value of the cash flow" from coal on mental health land would be \$3,200,000. The MDA Report then states: "With the large quantities of coal on adjacent state and federal land in Alaska, it is probably unrealistic to expect more than 10 percent of the model production to come from trust lands."

This statement from the MDA Report infers that under that analysis, the best estimate of net present value is \$320,000. I believe \$432,866. should be used as the value for coal on the original one million acres.

### Material Sources

The DGGs conducted a review of all mental health trust land and replacement pool land in order to assess potential mineral sources. Unfortunately, there is little detailed inventory information available. The DGGs estimated the cost of data gathering sufficient to enable them to determine material sources volumes and quality to be between \$65.4 and \$85.2 million. However, this would still be inadequate data upon which to base a value determination because material source values are heavily influenced upon their proximity to the market. Also, prices fluctuate upon demand. If there is no demand, then there is no value.

At a June, 1989 meeting of the IMHTC, Dick Rieger of DGGs presented three options available for material source valuation. At that meeting, the IMHTC determined that the valuation of material sources was simply not a fruitful exercise, given the uncertainty over material source location, quality and volume. As a result, the IMHTC approved a process whereby the value of the material sources on mental health land would be addressed through the designation of equal potential replacement lands.

However, the IMHTC reversed itself when it adopted the MDA Report. The MDA Report established a range of value between \$2.5 million and \$25.4 million for material sources, with a most likely value of \$13 million. This value was based upon an average of 14 million cubic yards consumption per year statewide, with the original mental health trust land producing 24 percent, or 3.5 million cubic yards. Unfortunately, these assumptions cannot be substantiated since, in reality, only 1.275 million cubic yards were produced in that timeframe (425,000 cubic yards/year) from mental health lands. In fact, if the average annual production level of 425,000 cubic yards were to be maintained into the future, the discounted cash flow for 20 years would be approximately \$420,000/year.

For the above reasons, I reject the MDA Report as a basis for material source value determination. However, I also conclude that we do not presently have sufficient data to produce a meaningful value for this resource. Because there are

insufficient funds available to produce these data, at least at this time, it is impossible to produce fair market value for this resource. Alternately, the trust should be protected if lands of equal material source potential are designated as replacement lands.

#### Integration Procedure and Valuation

On October 21, 1987, the full IMHTC approved the department's recommendation for integrating the various land values (e.g., surface estate value, timber value, mineral value, etc.). Under those approved procedures, values for compatible uses--e.g., a subdivision for residential or commercial use and oil and gas development (i.e. North Kenai area--would be simply added together. Where uses would be incompatible--e.g. subdivision for residential use and coal development (i.e. Beluga area)--the highest value (i.e., the value for the highest and best use) would be used. Generally, those initially approved procedures could result in one of three possible values being selected: (1) the sum of the surface value and the resource value, where extraction or removal of the resource would not affect the surface value; or (2) the resource value where it exceeds the surface value and extraction or removal would diminish the surface value; or (3) the surface value where it exceeds the resource value and extraction or removal of the resource would diminish the surface value.

The IMHTC majority, however, substituted an integration process which simply adds the various value elements, with no consideration given to whether the various uses are compatible or not.

I initially went along with this revised integration procedure, despite objections by department staff, in the spirit of compromise and my desire to achieve consensus. It is well-recognized, however, that a proper valuation procedure cannot simply add separate value elements where use of the property to exploit one element is incompatible with use of the property to exploit another. See, e.g., W. Mason, Jr., M. Azar, and G. Anderson, "Condemnation Value: The Taking of Mineral Bearing Lands," Mining Engineering 10986 (November 1989).

In my opinion, the integration procedures first determined by the IMHTC are the only ones which can produce a credible integrated value. I therefore believe that the following procedures should be used:

- (1) Add the surface value and the oil and gas value;
- (2) Add the mineral value, timber value, oil and gas value, coal value, and material source value; and
- (3) for each parcel, select the highest value developed under (1) and (2) as the fair market value for that parcel.

Using those integration procedures and the per parcel values for each value element as outlined above, the total integrated fair market value for the original one million acre grant equals \$564,700,728. Using the same integration procedures, the pool of potential replacement lands would have a fair market value of \$910,103,205.

#### Replacement Pool Lands

As stated earlier, the IMHTC majority report failed to address the replacement land valuation requirements altogether. Using the procedures included in the majority report, the trust simply cannot be reconstituted by the Commissioner as contemplated by the Legislature and required by AS 38.05.800(b) and (c).

The procedures that I recommend will allow the trust to be reconstituted with equal value land from the replacement pool of legislative designations. Each of the procedures that I recommend has been followed for the replacement pool land on a parcel by parcel basis (with exception of material sources).

#### Redetermination of Values

AS 37.14.011(c) provides for the redetermination of the fair market value of the land constituting the mental health corpus at least every five years. The statute does not provide any further guidance on how this revaluation shall be accomplished.

This requirement can be fulfilled in any number of ways. I feel that the least desirable is to repeat a valuation process modeled on the one that we have just finished. I feel that the time, effort, and continual disagreement with the results would not be productive for all concerned.

I therefore recommend the following revaluation process.

1. Valuation of mental health corpus land will be conducted on an 18 month basis by region. Each of three regions, Northern, Southcentral and Southeast will be valued during successive 19-month periods. The same criteria previously recommended will be used to integrate values and to determine the fair market value of the parcels and the trust corpus as a whole.
2. Surface valuation will consist of an indexing of value increases, or decreases, within each region and application of the appropriate increase or decrease in market value occurring in each area since the previous valuation. Municipal property assessment records (for lands within municipalities) and paired market sales data (for lands outside municipalities or where property taxes are not levied) will be used to determine land value increases or decreases in each area.
3. Mineral values will be indexed to the mineral production in Alaska with the appropriate increases or decreases made for each region on a parcel-by-parcel basis.
4. Coal and oil and gas values will be indexed to the world market with appropriate increases or decreases made statewide on a parcel-by-parcel basis.
5. Timber values will be indexed to the market and conditions for the region with appropriate increases or decreases made regionally on a parcel-by-parcel basis.
3. The procedures proposed and adopted by the IMBTC create substantial problems with respect to reconstituting the trust and periodically redetermining its value.

AS 38.05.800(b) specifically states:

"The Commissioner of natural resources, with the approval of the Interim Mental Health Trust Commission, shall identify land within legislative designations that is equal in value to all land selected by and patented to the state under Sec. 202 of the Alaska Mental Health Enabling Act that is not in legislative designation."

The value of the original mental health land trust is so high under the procedures specified in the majority report of the

IMHTC, that the trust cannot be reconstituted as contemplated by the Legislature. The value of the mental health trust, as established in the majority report, exceeds the value of all possible replacement lands.

Under AS 38.05.800(b) and (c), moreover, the trust is to be reconstituted with land in legislatively designated areas (e.g., parks, wildlife refuges, etc.) which is equal in value to the original mental health land grant. To do this, both the original grant and the pool of potential replacement land must be valued under the same procedures. The majority report of the IMHTC fails to address the replacement land valuation requirement altogether.

Because it is unnecessary to replace every parcel of original trust land (since some trust lands are already within legislative areas), and because the procedures proposed and adopted by the IMHTC make no attempt to value parcels individually, the trust simply cannot be reconstituted through the majority report approach.

Under AS 37.14.011(c), moreover, the trust as reconstituted under AS 38.05.800(b) and (c) must be periodically revalued at least once every five years. Therefore, because the pool of potential replacement land has not been valued under the same procedures used to value the original grant and therefore cannot be reconstituted, it also cannot be periodically revalued as contemplated by the Legislature.

## CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, I have concluded that the Commissioner simply cannot comply with the applicable provisions of law at this time. The valuation procedures set out in the IMHTC majority report were adopted over my objection on behalf of the department, and therefore are not the product of consensus as contemplated by the Legislature and specified by law. The procedures that I believe should be employed, on the other hand, have not been approved by the IMHTC as required by the Legislature and specified by law.

I therefore recommend that the Commissioner send letters to both the Speaker of the House of Representatives and the President of the Senate explaining that she is unable to comply with the law as currently written, enclose copies of both the IMHTC majority and minority reports, and list three options for legislative consideration: (1) change the law and accept the \$2.2 + billion value determined under the procedures adopted by the IMHTC majority; or (2) change the law and accept the \$564 + million value determined under the procedures I believe should be used to comply with Chapter 48; or (3) appropriate additional funds to permit the IMHTC to continue seeking consensus.

I believe that the Commissioner should recommend to the Legislature that they adopt option (2) and accept the 564 + million value for the original one million acre mental health trust land grant. The procedures used to determine that value have been subject to review by outside professional experts and developed, reviewed, and approved by department staff who have a wide variety of expertise in valuing the various resources found on mental health lands. Furthermore, the Attorney General's Office advises that such a procedure would be legally defensible since the United States Supreme Court ruled that it is permissible to use "procedures established by the Commissioner's rules, or any other procedures reasonably calculated to assure the integrity of the trust and to prevent misapplication of its lands and funds." Lassen V. Arizona Highway Department, 385 U.S. 758, 465 (1967).

It also would be eminently fair to both the trust and the state. It would establish the various elements of value as follows:

Surface Estate	* \$511,949,467.00	-- 833
Hardrock Minerals	73,403,459.00	-- 1.5 BILLIONS
Timber	36,243,253.00	-- SAME
Oil and Gas	495,998.00	-- SAME
Coal	432,866.00	-- 320,000
Material Sources	undetermined	-- 2.5 - 25 MILLION

Following the integration procedures outlined above, the total integrated fair market value of the original one million acre grant would equal \$564,700,782.82.

As an objective measure of the fairness of this value to the trust, the eight percent of this amount which the Commissioner of Revenue annually must allocate to the mental health trust income account under AS 37.14.011(c) until revaluation takes place equals \$45,176,058. or \$45.18 per acre per year; this compares very favorable to the national average of \$8.97 per acre per year returned for trust lands in other states.

At first blush, this figure might appear unfair to the state. After all, it is more than five times the national average, and exceeds even Washington which, at \$45.68 per acre (as a consequence of its prime and easily accessible timber resources), has the highest average in the nation. At the same time, it must be remembered that, following the exchange contemplated by Chapter 48, all of the newly reconstituted mental health trust will consist of land within legislatively designated areas which the state will continue to administer for legislatively designated purposes. In other words, unlike the case in most states, the state here will be using every acre of the newly constituted mental health trust for its own purposes. It therefore is only fair that the state compensate the trust for that use. One consequence of this is that, unlike the case in other states, every acre of the mental health trust will be productive in terms of generating revenue. That has the effect of raising the per acre earnings of the entire trust, a result which I believe is not inappropriate.

\* ADJUSTED VALUE TAKING INTO ACCOUNT PLAINTIFFS APPRAISER  
 \* PLAINTIFFS APPRAISAL

I recognize that many in the mental health community will find fault with the approach I have recommended and its result. I did my best, as a Commission member, to be cooperative and strive toward achieving consensus. Unfortunately, it was simply not possible to reach agreement on all of the difficult issues that required decisions. It should not go unnoticed that the IMHTC was able to reach agreement on many issues. I believe the facts and information presented in this report support my recommended approach and the resultant values. While further litigation may be inevitable as a consequence of my recommendation, I cannot

accede to the values determined under the procedures adopted by the IMHTC majority since they significantly overstate the value of the original one million acre mental health trust land grant as of September 7, 1987. Accordingly, for the reasons stated, I dissent from the report filed by the IMHTC majority.

February 1, 1990  
Date

Rod Swope  
Rod Swope, Designee  
Interim Mental Health Trust  
Commission

March 20, 1990

Mrs. Lennie Gorsuch  
Commissioner of Natural Resources  
State of Alaska  
Willoughby Center, 5th Floor  
Juneau, Alaska 99801

Dear Commissioner Gorsuch:

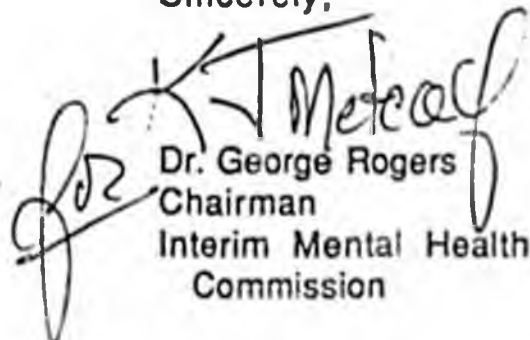
With this letter I am transmitting the Interim Mental Health Trust Commission's response to Rod Swope's Minority Report. I wanted to get this response to you earlier, but I was hospitalized resulting in the delay.

I suggest we meet, at the earliest possible time, to discuss where the Commission should go from this juncture. We have yet to finalize the reevaluation and the replacement lands.

If you agree with the minority report, and are unable to follow the Commission's procedures, then there may be reason for us not to proceed with the rest of our task. We do need to discuss these options.

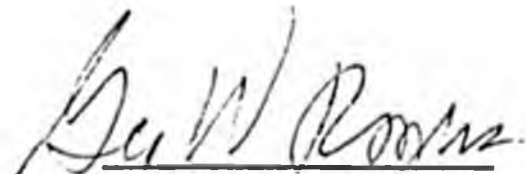
A process for reevaluation was suggested to the Commission by David Walker and Jim Gottstein. Tom Koester was to review this suggestion and give the Commission his recommendation. It would be helpful to have his response.

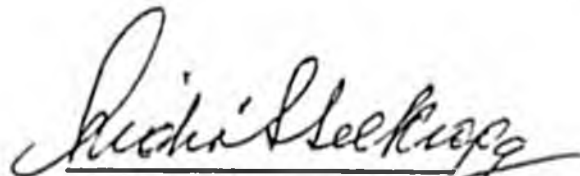
Sincerely,

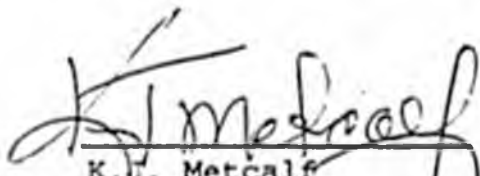
  
Dr. George Rogers  
Chairman  
Interim Mental Health  
Commission

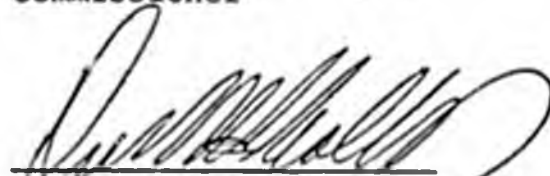
INTERIM MENTAL HEALTH TRUST COMMISSION (IMHTC)  
RESPONSE TO  
MINORITY RECOMMENDATION TO THE COMMISSIONER OF NATURAL  
RESOURCES

March 20, 1990

  
George Rogers, Ph.D.  
Chair

  
Lidia Selkregg, Ph.D.  
Commissioner

  
K.F. Metcalf  
Alternate

  
Dennis Scholl, Ph.D.  
Alternate

### Introduction:

The Commission members and alternates have reviewed the "Minority Recommendation to the Commissioner of Natural Resources" (Minority Report) submitted February 1, 1990 by Rod Swope, the Commission member serving as the Designee for the Commissioner, Department of Natural Resources (DNR). The review of the Minority Report by the Commission majority produced no basis for modification or revision of the "Interim Mental Health Trust Commission Draft Final Report" (Commission Report) of December 20, 1989. The Commission Report stands as the final report on the "Approved Procedures for Determining the Fair Market Value of Alaska's Mental Health Trust Lands." The public members of the Commission and their alternates re-affirm their recommendations.

### General Nature and Character of the Minority Report:

The nature of the Minority Report was a significant disappointment to the other members of the Commission. While failing to substantiate DNR's findings and conclusions, the Minority Report attempted to discredit the Commission's work by portraying the public members as unprofessional, not acting in the public interest and in fact acting illegally. These are serious personal allegations that require a personal response.

The Minority Report opens on the first page by asserting that the Commission exceeded its authority and adopted,

*"...valuation procedures urged by the attorneys for the plaintiffs and intervenors in the Weiss case, procedures designed to maximize value and not to produce fair market value as required by Chapter 48."*

The Minority Report is laced with similar implications of professional misconduct by the public members of the Commission. Designee Swope portrays himself as the lone champion of reason and legality, and by implication, and sometimes directly, portrays the public members as being the reverse. On page 6, for example, Swope claims

*"I strived toward achieving consensus and a common resolution...[On the other hand] it became apparent that the majority of the IMHTC was dissatisfied with the results of the initially approved procedures and began amending them to produce higher values."*

It is extremely unfortunate that the Minority Report personally attacked two professionally respected, long time Alaskans who have dedicated their lives to public service, by

implying they would put their professional and personal reputations on the line for the benefit of an interest group.

The public members of the Commission volunteered over three years of their time without compensation to develop a legitimate process for arriving at the "fair market value" of the original Mental Health Trust. The process is legitimate and the Commission Report accurately documents the effort.

Another tactic used at the outset of the Minority Report has nothing to do with the Commission recommendations as such, but is designed to create an attitude in the mind of the reader that would be antagonistic to the Commission and favorable to the Minority Report. At the top of the second page the Minority Report introduces a half truth to portray the dire consequences to the State budget of following the Commission's recommendations.

*"The importance of the value determination used to determine fair market value cannot be overstated because of the dramatic effect they will have on the overall state budget. Under the valuation procedures adopted by the majority of the IMHTC...this would result in more than \$178 million in otherwise unrestricted state general funds being restricted in the Mental Health Trust Income Account."*

The omitted half of the whole truth is that the restriction to the Mental Health Trust Income Account is only a temporary accounting transaction required by Chapter 48 in an attempt to comply with the 1956 Congressional Alaska Mental Health Enabling Act which created the Trust. After payment from the account of only the necessary expenses (not the unnecessary expenses) of the Mental Health Program, the balance of the income is transferred to the General Fund for other public purposes. The value of the land corpus (whether it be high or low) does not determine the Mental Health Program budget as Designee Swope states. The Program budget is determined by Legislative appropriation after consideration of the recommendations of the Alaska Mental Health Board. In short, the effect of the valuation procedure upon the overall State budget is neutral, not "dramatic" as alleged.

The public member majority of the Commission do not feel resolution of the issue is served by trying to alarm Alaskans, rightfully concerned with fiscal solvency of the State, by painting a fiscal horror story not supported by facts. They further believe that the tactic was used to justify D's own fanatical efforts throughout the process to drive down the estimated value of the original Trust Lands.

The personal attacks in the Minority Report are distressing and had to be addressed. But, to belabor this does not serve the purpose of resolving the complex Mental Health Lands Trust issue. The technical questions raised in the Minority Report are more appropriate to address.

Technical Questions Raised by the Minority Report:

The Minority Report fails to address directly the Commission Report. Instead, Designee Swope's dissent is based upon two charges, (1) that the Commission exceeded its statutory authority, and (2) that the Commission adopted "procedures designed to maximize value and not to produce fair market value."

Minority Report Finding 1: "The IMHTC exceeded its statutory authority by proposing and adopting its own valuation procedures instead of reviewing and approving procedures proposed by the Commissioner."

The long and arduous task of developing a procedure for identifying fair market value was undertaken by the Commission in an atmosphere of cooperation and trust. We, the public members, assumed all parties were working toward a solution. This enormous task was made difficult by shortages of data, time, and funds and by the limited expertise of DNR staff. The Commission Report adequately details the process. The Commission followed the advice and counsel of the Attorney General's office in developing the fair market value procedures. It therefore came as a shock to find DNR and/or the Attorney General's office, in the Minority Report, creating a new interpretation of the Commission task in an apparent attempt to invalidate our years of effort. It is all too apparent this new interpretation evolved because DNR disagreed with the Commission's approved procedures. This unfortunate "eleventh hour" tactic suggests the Commission's assumption of trust and good faith was ill-founded.

Chapter 48, SLA 1987 revised and replaced certain sections of Chapter 132, SLA 1986 which created the Commission to oversee interim management of the Trust lands and work with the Legislature in establishing a statutory basis for resolving the Trust land issues. The Commission membership was reduced from five (5) to three (3) -- the Commissioner of DNR and two public members -- and its mission redefined in terms of the negotiated settlement framework. The reduced Commission assumed sections of Chapter 132 not replaced or revised were still in effect and for more than two years continued operations much as it had in its original form without question or challenges.

Throughout this period the Commissioner of DNR participated continuously (through various designees) and the Attorney General was represented by Tom Koester. It came as a surprise, therefore, to be informed three months after the Commission submitted its final approved procedures and two months after forwarding its draft final report that the Commission had "exceeded its statutory authority."

The Minority Report further alleges,

*"By proposing and adopting valuation procedures over the department's objections, the IMHTC has ignored the legislative requirement that, in effect, there be consensus as to the valuation procedures to be employed. ... In my opinion, the failure of the IMHTC to reach consensus on valuation procedures makes it impossible for the Commissioner to comply with Chapter 48."*

Consensus was not a "legislative requirement". Chapter 132, SLA 1986 provided that motions could be adopted by majority vote and, in fact, many of the "action items" treated by the present Commission were resolved by a two yea vote (the other member voting nay or abstaining). The actions resulting in the final approved procedures and the Commission Report were carried out, at the suggestion of Designee Swope, as a means of bringing the whole issue of valuation to a close. He also stated, and it was agreed, there might also be a minority report.

In the Minority Report Designee Swope also charges the Commission improperly changed the originally approved procedures and he implies this was a frequent practice aimed at producing a value substantially greater than fair market value. In fact, the originally "accepted and approved" procedures were observed to the very end of the Commission deliberations adjusted only when required by lack of funds or data. This is more fully discussed in the final section of this reply (page 10, below).

Minority Report Finding 2: "The procedures proposed and adopted by the IMHTC in the majority report do not produce fair market value, as required by Chapter 48; instead they produce a value substantially greater than fair market value."

The bulk of the Minority Report attempts to discredit the Commission's fair market procedures. After careful review of the Minority Report, the Commission determined there is no reason to alter its conclusions. The Commission Report sets forth the final approved procedures in detail. Rather than

repeat that substantial information, a summary response is given to key challenges in the Minority Report.

Given the limitations of budget, time, data and staff the final approved procedures are appropriate, legal and lead to a mid-range value, not a high value. This is summarized in the text of the resolution adopted November 7, 1989 (see Appendix A in the Commission Report of December 20, 1989).

The largest differences between DNR's preferred values and the values arrived at by the Commission's final approved procedures are in the surface estate and the mineral resources. Further clarification on surface estate valuation and procedure for valuing mineral resources follows.

### Surface Estate Valuation Procedures

Because of time and financial constraints the Commission could not use "best practices" (i.e. appraisals). Instead, three geo-panels of appraisers were selected to give opinions of value for parcels in their regions. At best the process was highly judgmental and subjective, but in addition only an estimated seven to ten minutes was spent on each parcel and data was limited to that provided by DNR or brought to the meetings by the appraisers. Because of inevitable differences of opinion between appraisers and the probability of error due to time and data limitations, the approved procedures provided for a review and discussion of questioned values. In the event the review step did not resolve differences, the Commission could utilize a mediator to recommend resolution.

The review stage was never completed and the mediation stage never reached.

Although problems arose in connection with the operations of the geo-panels, it was with the initiation of the review stage of the approved procedures that the surface estate valuation process began to break down. Through various tactics the DNR staff attempted to thwart the proper implementation of this stage of the surface valuation with the justification that the approved procedure might result in increases in values. After several bitterly fought meetings, the process was allowed to continue with modifications. The Minority Report chose to ignore the review aspects of the approved procedures and wrongfully portrays the role of the review appraisers as something added later at the insistence of attorneys for the plaintiff and intervener.

The Southeast geo-panel was provided a random sampling of the questioned surface estate values. On the basis of the geo-panel's accepted adjustments the initial geo-panel value for

Southeast parcels was increased by 30%. However, of the 387 sample parcels reviewed more than half (207) were recommended for further mediation, a step of the originally approved procedures that never came to fruition.

The Southcentral geo-panel was called into review session, but DNR staff neglected to invite the review appraiser. Although an apology was made to the Commission, the end result was the reviewer could only be present for a few hours of one morning. At that time he did present comparable sales for large parcels which the geo-panel did not know existed. Once provided this useful large parcel information, the Southcentral geo-panel recommended five of six large parcels re-examined be increased in value by 68%. If the southcentral review had been possible, as provided by the approved procedures, there was a high probability other similar adjustments would have been made.

A review of the Northern geo-panel was never even initiated. At this point the Commission was informed by the DNR staff that funds had been exhausted.

In the course of carrying out the approved procedures it became apparent the opinion of value approach was seriously flawed. The State's appraiser provided the geo-panels during their deliberations with interpretation of the valuation instructions for application to actual cases. The review step disclosed the State's interpretations as not totally unbiased. During the geo-panels' deliberations the State appraiser reported to the Commission problems between members of the Southeast panel in coming to agreement. Additionally, the members of the Southcentral geo-panel submitted a memorandum to the Commission designed to protect their professional reputations. The memo stated the product of the abbreviated valuation process was "not even 'preliminary opinions of value' as commonly understood in the appraisal profession" and listed other limitations such as time and funding and the manner in which the State had parcelized the land for appraisal (see Commission Report, Appendix B, page E4).

The unfinished process of carrying out the approved procedures left the Commission with a wide range of surface estate values -- the adjusted values of the geo-panels advocated by DNR and the values presented by the review appraisers advocated by the plaintiffs. The Commission chose a procedure leading to a mid-level value between these extremes.

Procedures for Valuing Mineral Resources -- A Question of Most Appropriate Methodology

The National Appraisers Association Standards for determining fair market value recognized three general approaches: market (comparable sales), income (capitalization of income stream from the property) and replacement cost. From the beginning the public member majority of the Commission have insisted the methodology most appropriate to the type of estate being valued would be employed and the various Commissioners of DNR and designees understood this requirement. On September 29, 1987, for example, the then Commissioner of DNR directed the Division of Geological and Geophysical Surveys (DGGS) to "assess the quantity and quality of known and potential hard rock minerals...followed by a resource valuation." This value was to "be determined by an independent entity, likely retained under contract to the department."

In April 1988 DGGS maps reflecting mineral potentials and favorability of mineral occurrence on Trust Land were presented to the Commission. In preparing for the next phase, the Commission was informed

*"assuming it proves impossible to complete an in-house mineral valuation (for whatever reason), we will be prepared to proceed with contract solicitation to complete the work."*

The Commission assumed it had approved procedures that included mineral valuation by outside consultants using the income approach. This is the point at which DNR decided to depart from the previously approved procedures and to use instead the comparable sales approach. The comparable sales approach was considered totally inappropriate by the public members as well as the State's own professional consultant, (Dr. Harris). Using the wrong approach, DNR first set the mineral value at zero and later at \$16 million. In commenting on the Commission's rejection of this value, the Minority Report author agrees, "The initial value determined--\$16 million--admittedly seemed quite low." (see Minority Report, page 16).

To bring these mineral valuation procedures to a conclusion, therefore, the plaintiffs and interveners entered into a contract with independent consultants as provided in the originally approved procedures. The Minority Report asserts wrongfully that the consultants used "a procedure not previously recommended by the Commissioner or formally discussed or approved by the Commission." This statement is an outrageous distortion of the truth. From the very beginning the Commission has distinguished between procedures and the methodology selected to implement the procedures and also has always held the most appropriate methodology would

be used in implementing the procedures. This was formally reiterated by the Commission and agreed upon by all members at the July 12, 1989 meeting. "Fair market value for purposes of Chapter 48 means utilization of the best information and methodology available." (see Commission Report, page 5, emphasis added).

Designee Swope and the DNR staff, however, have overlooked this Commission direction. Instead, at the September 5, 1989 meeting the lead DNR staff member emotionally exclaimed

*"we have been faithful to the market approach because that is what the Legislature required."*

(Commission Report, page 5). We have searched the statute in vain for any such requirement! Stonewalled by DNR staff the Commission was left with two mineral values ranging from the unacceptable "comparable sales" value of \$16 million and the \$1.5 billion value arrived at by employing an appropriate "income" methodology.

DNR staff have consistently insisted on or returned inappropriately to reliance upon only one methodology -- comparable sales -- and have gone to the extreme of insisting this and nothing else results in fair market value. This entrenchment is clearly because their valuation experience has been primarily in "condemnation litigation" (the Minority Report at least twice, pages 10 and 27, admits these are the DNR standards). This is the methodology DNR has always used and they are most comfortable with. But, the present transaction is not a condemnation valuation and comparable sales are totally inappropriate to determining fair market value of a mineral endowment.

This view of limitations of DNR experience and capability was shared by DNR's own expert consultant, Professor Harris, who also provided possible explanation for DNR's very narrow interpretation. Dr. Harris diplomatically worded an evaluation of the technical expertise of the DNR staff (see Harris, September 1989, pages 8-9). Of the types of expertise required for the mineral estate valuation estimates attempted, he found the DNR staff qualified "as to certain types of deposits...especially well qualified as to regional knowledge...[but] not highly experienced in estimation methodology." He also noted the possibility of bias or at least the "appearance of conflict of interest," due to the State being defendant in litigation.

In his conclusion as to the requirements for a process following "best practices," Harris reiterated his evaluation of the in-house expertise by stating the DGGs work on mineral endowment would have to be redone. He recommended this work and the estimation of value not be done in-house. Instead,

the mineral endowment should be done by contract with the U.S. Geological Survey (he confirmed USGS could and were willing to do the work) and the valuation work should be done by independent economic consultants such as the Center for Mineral Resource Science in Arizona (Ibid. page 10). Ironically, these recommendations by DNR's mineral valuation expert consultant coincide with the recommendations of the Commission Chairman made in a memo over two years previously, June 19, 1987.

#### In Search of a Resolution:

The task of valuation was far more complex, controversial and time consuming than anyone had contemplated beforehand. The public Commission members entered the effort, more than three years ago, with the belief that fair resolution of the Trust valuation was in the best interests of Alaska. To not resolve the issue and continue the legal battle could be disastrous to the well-being of all Alaskans, not just the primary beneficiaries of the trust. The Commission believed at the outset that it had the latitude to craft a resolution that could be recommended to the Legislature. This goal was pursued until mid-1989 when it became apparent DNR and the public members of the Commission could not achieve accord on the methodology to be used in implementing the approved procedures.

Only at this point did the Commission contemplate amending the originally approved procedures. At its May 16, 1989 meeting the Commission discussed (but did not adopt) a draft report submitted by the three lawyers in the case which noted "Continuing with the Commission's currently approved valuation procedures no longer appears possible" and also recommending amended procedures. These would attempt to narrow the range of values calculated by use of the two sets of methodology and the Commissioner of DNR would determine a value within the narrowed ranges.

No progress was made toward narrowing the range and a team composed of the three lawyers in the Weiss case and a DNR staff member explored the possibility of using negotiation to arrive at an acceptable value for purposes of settlement. The defendants made a token increase (mineral value from \$16 to \$73 million) and the plaintiffs decreased their value by \$200 million. At the October 1989 Commission meeting the team announced an impasse leaving a difference of more than \$1.5 billion.

At this point Designee Swope agreed that a resolution setting forth procedures should be placed before the Commission for a vote. This was done on November 7th, 1989. The public members and their alternates stand firm on their final approved recommendations. We followed the law. We recognize a divergence of opinion exists. We see it as unfortunate complete consensus was not achieved. However, complete consensus may never be reached. We feel it is essential to complete the task of reconstituting the Trust and removing the threat of continued litigation and resulting disruption.

We urge the Commissioner of the Department of Natural Resources to use the Commission procedures in establishing a fair market value for the Mental Health Trust.

Original sponsor(s): REP. MILLER. Boyer, Koponen

1 IN THE HOUSE

BY THE HESS COMMITTEE

2 CS FOR HOUSE BILL NO. 548 (HESS)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the reconstitution and adminis-  
7 tration of the mental health trust."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 37.14.011(c) is repealed and reenacted to read:

10 (c) The fair market rental value of the land constituting the  
11 mental health trust corpus is equal to eight percent of the value of  
12 the land selected or patented to the state under sec. 202 of the  
13 Alaska Mental Health Enabling Act. At least every five years, com-  
14 mencing with 1992, the value of the land selected or patented to the  
15 state under sec. 202 of the Alaska Mental Health Enabling Act, shall  
16 be redetermined as follows:

17 (1) the number of acres of land selected or patented to the  
18 state under sec. 202 of the Alaska Mental Health Enabling Act in each  
19 municipality that assesses land for property tax purposes shall be  
20 divided by the total number of acres of land selected or patented to  
21 the state under sec. 202 of the Alaska Mental Health Enabling Act that  
22 is located in municipalities that assess land for property tax pur-  
23 poses; the result of this division is the "weighting factor";

24 (2) the weighting factor for each municipality that assess-  
25 es land is multiplied by the average percentage change in assessed  
26 values for that municipality since that municipality's assessed values  
27 were used to revalue land selected or patented to the state under  
28 sec. 202 of the Alaska Mental Health Enabling Act; the result is the  
29 "weighted value change" for that municipality;

1 (3) all of the weighted value changes must be added together  
2 to arrive at the "revaluation factor," expressed as a decimal;

3 (4) one plus the revaluation factor must be multiplied by  
4 the previous total value of land selected or patented to the state  
5 under sec. 202 of the Alaska Mental Health Enabling Act to arrive at  
6 the redetermined value of land selected or patented to the state under  
7 sec. 202 of the Alaska Mental Health Enabling Act.

8 \* Sec. 2. AS 37.14.011 is amended by adding a new subsection to read:

9 (d) The commissioner of natural resources shall calculate the  
10 redetermined value of the trust under (c) of this section and provide  
11 the redetermined value to the commissioner of revenue and the board  
12 established under AS 47.30.661.

13 \* Sec. 3. AS 38.05 is amended by adding a new section to read:

14 Sec. 38.05.801. RECONSTITUTION AND ADMINISTRATION OF MENTAL  
15 HEALTH LAND TRUST. (a) The value of all land selected by or patented  
16 to the state under the Alaska Mental Health Enabling Act, as of  
17 September 7, 1987, is \$2,243,000,000.

18 (b) All land within legislative designations on the effective  
19 date of this Act and all land made subject to legislative designations  
20 in the future constitute the corpus of the mental health land trust.

21 (c) On reconstitution of the trust under this section, land  
22 selected by or patented to the state under sec. 202 of the Alaska  
23 Mental Health Enabling Act that is not within legislative designations  
24 is removed from trust status.

25 (d) The land within legislative designations that constitutes  
26 the mental health land trust shall be administered for the legisla-  
27 tively designated purposes. The trust shall be compensated for the  
28 use of the mental health trust land for the legislatively designated  
29 purposes under AS 37.14.011.

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2 (e) Before the state may remove land that is part of the mental  
3 health trust corpus from trust status, replacement land, equal in  
4 value at the time of replacement, shall be designated mental health  
5 land and added to the trust corpus. Before replacement, the commis-  
6 sioner shall identify the land proposed as replacement land and recom-  
7 mend the proposed replacement to the board established under AS 47.-  
8 30.661. If the board approves the replacement, the commissioner will  
9 transfer the land to the trust. If the board does not approve the  
10 transfer, the land proposed for removal remains in the trust.  
11 \* Sec. 4. AS 38.05.800 is repealed.  
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