HB 548

ALASKA'S MENTAL HEALTH TRUST LANDS

A Summary of

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

March, 1990

OVERVIEW

The Interim Mental Health Trust Commission approved its *Procedures for Determining the Fair Market Value of Alaska's Mental Health Trust Lands* on Dec. 20, 1989. The Department of Natural Resources (DNR), in a dissenting report released Feb. 1, 1990, disputed the Commission's findings.

The Commission, DNR, and the Plaintiffs in the Mental Health Trust Lands lawsuit have now reached a standstill. At stake are services for developmentally disabled and seriously mentally ill individuals, including senior citizens with Alzheimer's and dementia and alcoholics with psychoses, as determined by Judge Greene in the 1988 **Weiss v. State** decision. These persons are the beneficiaries of the trust.

Using valuation procedures adopted by the Commission, the total value of the original one million acre trust is $2.2 billion. Under DNR's valuation procedures, this figure approximates only $564 million. This difference amounts to over $1.6 billion.

The Legislature must now reaffirm the process it established in 1986, when it created the Commission and in 1987, when it passed Chapter 48, SLA 1987, of effecting a resolution of the litigation. It must either confirm the work adopted by its mandated Commission or provide sufficient funds to allow for complete valuation.

Without legislative action, Plaintiffs to the lawsuit may 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.

RECOMMENDATIONS

Beneficiaries of the Mental Health Trust, through the Mental Health Trust Coalition, recommend that the Legislature:

1. recognize the dilemma over valuation procedures; and
2. intervene on behalf of disabled people to confirm the Commission's adopted valuation procedures; and
3. pass legislation that acknowledges the Commission's work under Chapter 48 and adopt its conclusions in the Final Report.

BACKGROUND

This brochure is based on the results of the Mental Health Trust Commission's report of Dec. 1989 and borrows heavily from other documents used to develop the procedures. It identifies the valuation procedures approved by the Commission, indicates points of agreement and disagreement, and recommends action to resolve the issue.

The Mental Health Trust Coalition, formed in Fall, 1989, represents the beneficiaries. Its express purpose is to be an active voice in administrative, legislative, judicial and other matters which may affect the provision of services for these disabled individuals.

The Coalition endorses the Commission's Final Report, *Approved Procedures for Determining the Fair Market Value of Alaska's Mental Health Trust Lands.* Its conclusions were the result of several years of intensive research, analysis, negotiation, scrutiny, and public review, which have combined to create procedures widely accepted as industry standard, within the necessary constraints of time and money.

The task given to the Commission was an exceedingly difficult one, one which was made even more difficult by the discord among the members over which procedures were acceptable to consider and the exact application of the term **fair market value** in consideration of those procedures. Of concern to observers of the process was the apparent lack of good faith and unwillingness of DNR to reach a compromise.

As the Commission noted in its report, "the actual task of arriving at satisfactory valuation procedures was much bigger, complicated and controversial than anyone initially envisioned. Indeed, for a brief period between April and July, 1989, the Commission considered publicly stating that "continued work on valuation procedures no longer appeared possible."

Part of the problem may lie in the composition of the Commission itself. During the entire process, the State of Alaska has had a built-in conflict of interest. Not only does the Commissioner of Natural Resources sit on the Commission, but the Commission must submit its report to the Commissioner, who then decides whether or not to agree with the Commission's majority viewpoint.

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The second conflict of interest lies in the assignment of a single Attorney General (AG) to act as counsel both to DNR and to the Commission. Again, if all three Commissioners were in agreement, any conflict of interest would be suppressed or minimized by agreement. However, as long as DNR is in the minority, the AG must answer to two masters. Throughout the entire process, it became clear that the AG has consistently taken the side of the State.

Between June 9, 1986 and November, 1989 the Commission held over 30 meetings, all open to the public, for discussion of the valuation procedures. Because the Coalition has a vested interest in the Commission's proceedings, representatives have attended almost every meeting. On our own initiative, we have independently hired consultants to review industry-accepted standard valuation procedures of the various categorical lands and requested the right to present their findings to the Commission. Due to the open nature of the meetings, the Commission granted this right.

ALASKA ALLIANCE FOR THE
MENTALLY ILL
P.O. Box 211247
AUKE BAY, AK 99821

VALUATION PROCEDURES

Valuation Procedures were obtained through extensive review of all methods of land valuation used by real estate and natural resources assessors. They were determined after adoption of standard and specific industry methodologies, modified for use within the severe constraints of available time and money. Above all, Commission actions reflected the necessity for deriving fair market value — instead, for example, of obtaining an inflated value — from the procedures in order to assure fairness to all residents of Alaska.

1. Surface Estate

Procedures: The difference between the results of the State appraisal and that of the Plaintiffs, split equally between the two values, was approved.

Methods Explored: The original procedure 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 re-evaluation of their original values when necessary, and mediation, including the possibility of site visits.

However, due to the large number of questioned values and the limited funds available, the Commission agreed to use a *sampling strategy* for the review. Results varied widely. The State assigned a value of $499.8 million. The Plaintiff's appraisers assigned a value of $833,280,096.

Decision of Commission: The Commission recognized that such differences are usually resolved through mediation. However, mediation was not an option due to limited funds. The Commission determined that the only reasonable procedure it could approve was to split the difference between the two figures.

2. Timber

Procedure: The methodology, data, assumptions and judgments 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 was approved.

Opinion of the Plaintiff: The Plaintiffs disputed the appropriateness of deducting the approximately $31 million in reforestation costs, because the timber should be valued as if "sold" to the State as "standing timber."

Decision of Commission: The Commission regarded these costs as essential to sustained yield forest management and because the original selections were made with the intention that they would become the core of a State forest system.

3. Oil and Gas

Procedure: 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 Ariey, Hansen, Kornbrath, Philips, Ryherd and Smith, July, 1988, with the fair market value being the midpoint between the low to the high range, was approved.

Opinion of the Plaintiff: The Plaintiffs assert the State's analysis did not follow the procedures approved by the Commission and that the value range appears grossly low, although no separate valuations submitted to support this assertion.

Decision of Commission: The Commission rejected the assertion, in light of the lack of any specific valuation from the Plaintiffs.

4. Minerals, Coal and Aggregate

Procedure: 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 was approved.

Methods Discussed: The industry standard for valuation of minerals, coal and aggregate is the *income or discounted cash flow approach.* This approach, adopted by the Commission, resulted in an estimated $1.5 billion value. DNR used the *comparable sales approach*, which produced an intial value of zero and later, after revision, a value of approximately $16 million.

Decision of Commission: The Commission rejected the use of the comparable sales approach because it was 1) not in accordance with accepted industry valuation practices, 2) considered unrealistic and unreasonable in light of the fact that 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, 3) not pursued with any sort of rigor by the State, and 4) not supported by its own independent study.

HOUSE COMMITTEE REPORT

(9)
Date Referred: April 11, 1990 FURTHER REFERRALS:

FINANCE

Date of Committee Action: 4/24/90

The RESOURCES 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 _____ [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[✓] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

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

[ ] fiscal impact _____ [ ] fiscal note(s) _____
[✓] zero fiscal note Health & Soc. Svcs. [ ] zero fiscal note(s) _____
[ ] zero with analysis _____ [ ] zero fn/analysis _____

SIGNING DO PASS:

MENARD
DAVIDSON

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
NAVARRE		X	
SHARP		✓	
HUDSON		✓	

Chairman's Signature

TELECOPY COVER SHEET

Fairbanks Legislative Information Office

Office - (907) 452-4448 Fax - (907) 456-3346

TO: Juneau Lio FAX: — PHONE: —

FROM: Fbks Lio PHONE: 452-4448

INSTRUCTIONS: Written Testimony for House Resources Teleconference 90-04-085 4-24-90

(I don't know if the Resource cmte still needs this they passed HB 548 to Finance cmte)

RECEIVED: Date 4-24-90 Time 3:15pm

SENT: Date 4-24-90 Time 4:22

DISPOSAL OF ORIGINAL: Discard ____ Hold for Pickup P

NUMBER OF PAGES: 1 (Not counting cover sheet)

SENT BY: Christ

Alaska State Legislature

Please enter into the record my testimony to the Hess Committee
committee name

committee on HB 546 , dated 4-24-90 .
bill/subject

I am the parent of a special needs child who will never be able to be the sole provider for his needs. I request that you support this bill to ensure we have a future for this special population in our state. Thank you.

Sincerely,

Leslie Yamamoto

Signed: Leslie Yamamoto
Testifier

Representing (Optional)

P.O. Box 83496, FBKS AK 99708
Address

479-0185
Phone No.

6/88 Legislative Information Office

Alaska State Legislature

Please enter into the record my testimony to the House Resource.
committee name

committee on HB 548, dated 4-24-90.
bill/subject

I would encourage legislators settle quickly on the value of the mental health trust, For the senior population in Kodiak will be effected by this decision. (500+)

The older Alaskan Commission is matching funds received fom the mental health trust so that adult day care centers can be maintained and new ones opened in communities where they are needed. One such community is Kodiak. ~~Seward~~ ~~Kodiak~~ have a desperate need to fill the gap between seniors who can live independently and those who are in the hospital nursing home. An adult day care facility is being planned Kodiak for that dangerous gap. The Senior Citizens of Kodiak urge ~~you~~ legislators to act on the mental health trust in a fair and immediate manner.

Signed: _____
Testifier

Pat Braun Senior Citizens of Kodiak Inc
Representing (Optional)

302 Elokono
Address

486-6181
Phone No.

Alaska State Legislature

Please enter into the record my testimony to the House Resources Committee
committee name

committee on HB 548 , dated April 24, 1990 .
bill/subject

Kodiak Island Mental Health Center

Pamela J. Delys-Baglien, Ph.D, Director

316 Mission Road • Suite 119 • Kodiak, Alaska 99615 • Telephone (907) 486-5742

April 23, 1990

Dear Committee Members:

Thank you for this opportunity to submit testimony in support of House Bill 548.

My name is Dr. Pamela Baglien and I have worked in the community mental health system in Alaska for nearly fifteen years.

The state mental health system has grown throughout those years, but continues to fall far short of meeting the mental health needs for our communities. The State Mental Health Board and the Interim Commission have worked diligently for several years to document the actual mental health need and to arrive at a fair value on the Mental Health Land Trust. House Bill 548 recognizes a responsible value on the trust and will enhance adequate development of the mental health system in a planned and cohesive manner. I strongly urge your support of House Bill 548.

Sincerely,

Pamela Baglien

Pamela Baglien, Ph.D.
Director

Alaska State Legislature

Please enter into the record my testimony to the House Education & Social Services committee name committee on HB 548 bill/subject, dated April 5, 1990.

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.

Older Alaskans Commission

Box C
Juneau, Alaska 99811-0209
907/465-3250

POSITION PAPER ON HOUSE BILL 548

The Older Alaskans Commission supports House Bill 548, which would finish the process started in 1987, of reconstituting the mental health lands trust.

The OAC was appointed by Governor Cowper to represent the interests of one of the mental health "beneficiary" groups as declared by Judge Greene's April 1988 decision in the second part of the Weiss v. State lawsuit, namely "senile seriously mentally ill" persons (known today as Alzheimers and related disorders).

Since mid-1988, the OAC has worked extensively with the Alaska Mental Health Board on issues related to the mental health trust. We have become acutely aware of the need to get the lands trust reconstituted and the valuation of the lands settled, so that the present "interim settlement" of the Weiss litigation can come to final resolution--and remove the overshadowing threat of more court battles.

The OAC would also urge legislators to remember that the 8% fair "rental value" which the State would pay each year into the Mental Health Trust Income Account is a compromise figure already adopted in Chapter 48 of the 1987 Session Laws. As we understand the situation, the 1987 Legislature wrote Chapter 48 to avoid continued litigation over all the various trust lands which had been disposed of by the state for less than full market value, or otherwise in contradiction of the state's trust duties.

The Older Alaskans Commission does not have expertise on these land valuation matters. However, the OAC feels that the 1987 Legislature set up the Interim Mental Health Lands Commission, in Chapter 48, and that the current Legislature should give great weight and deference to the majority report of that Commission, a report which would support the system and valuation contained in HB 548.

The Older Alaskans Commission urges your early and favorable action on this bill.

APPROVED:
Peggy A. Burgin
Peggy A. Burgin, Chair
Older Alaskans Commission
DATED: March 27, 1990

REVIEWED ~~AND~~ no comment:
Frank S. Baxter
Frank S. Baxter, Commissioner
Department of Administration
DATED: 3/27/90

USIBELLI COAL MINE, INC.
122 First Avenue - Suite 302
Fairbanks, Alaska 99701
Telephone (907) 452-2625
Facsimile (907) 451-6543

April 11, 1990

Representative Mike Miller
Alaska State Legislature
P.O. Box "V" (MS 3100)
Juneau, Alaska 99811

Dear Representative Miller:

I was advised by your staff that you were interested in receiving material and information regarding the impact of the current mental health situation as it relates to Usibelli Coal Mine (UCM). The following information is supplied for your consideration.

All of the state coal leases that UCM holds are situated on patented mental health (PMH) lands. Much of the unappropriated state land that lies adjacent or contiguous to these coal lease is also designated PMH. Also common to the Healy area are material sale sites for gravel and rock extraction that are located on PMH lands.

The problems have become visible by virtue of an ADNR administrative decision, in late January of this year, to suspend all lease or material sales that were in process. One of the in process material sales was for 50,000 cubic yards of gravel that UCM needs to complete the topping of a currently used haul road that links the Gold Run Pass mine to the rail head tipple facility. The attached paperwork indicates our application and request dated July 26, 1989 has yet to be acted upon. The latest letter, dated February 2, 1990 relays to UCM that we will be notified as soon as there is a resolution to this issue.

The administrative order that halted all transactions on PMH lands was executed so that an argument could not be made later, that present-day decisions relating to PMH lands diminished the corpus of the mental health fund. In my humble estimation, the inaction we are currently experiencing is doing just that, and additionally is frustrating efforts by companies like UCM who have major projects on hold pending the outcome of this problem.

Looming larger in the background is the need that UCM has to secure a surface lease on adjacent PMH property to continue development of the Poker Flats Mine, in particular an area east of the current operation. This area, named Runaway Ridge, contains minable reserves of approximately 2.9 million tons of sub-bituminous coal, and is due for initial development this summer. Overburden from this area is being designed to be disposed of in a permanent storage f[illegible]ty that will be located to the south of the current mining area. The site is once again on PMH land, so we are locked out from even applying for a lease on this area. It is fruitless to proceed with ancillary development plans, when the disposal site needed in conjunction with the mining can't be secured.

UCM supports the mental health community in it's attempt to make sure the money received from PMH lands is legislatively appropriated to provide for the proper care of those in need. However, during this interim period we need to proceed with normal functions in the consideration of material sales and leases that have been conducted in a workmanlike manner by the competent staff of the Division of Land and Water Management.

Your support in resolving this most important issue is appreciated. Please contact me if I can be of further assistance. With best regards, I remain,

Cordially yours,

Charles P.Boddy
Regulatory Compliance Manager

cc: JEUj, WAM, MDU, RCH, LPJ, file
attachments

me/CPB

al041190

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND AND WATER MANAGEMENT

NORTHERN REGION
3700 AIRPORT WAY
FAIRBANKS, ALASKA 99709-4613
PHONE: (907) 451-2700

February 2, 1990

Usibelli Coal Mines, Inc.
Attn: Charles P. Boddy
P.O. Box 1000
Healy, Alaska 99743

Enclosed is the latest announcement for all uses of Mental Health lands (both pending and existing). Our instructions are clear and your pending casefile is now being held in abeyance until such time that we receive further instructions.

We will notify you as soon as there is a resolution to this issue.

Sincerely,

FREDERICK L. SMITH
Acting Regional Manager

By: Joy Zuke
Natural Resource Officer

cc: Birch, Horton, Bittner, Cherot and Anderson Law Offices

JZ/kz

10-J18LH

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF LAND & WATER MANAGEMENT
3601 C Street
Anchorage, AK 99503

SS# _____

$50.00 Filing Fee MATERIAL APPLICATION ADL# 414143

1. Name and address (please include zip code) USIBELLI COAL MINE, INC. P.O. BOX 1000, HEALY, ALASKA 99743 ATTN: Charles P. Boddy REG/COI

2. Applicant is at least 19 years old YES Yes _____ No

3. Applicant is a citizen of the U.S. YES Yes _____ No

4. Quantity of material desired (cubic yards) 50,000 Fifty thousand

5. Length of time requested for removal 180 Days

6. When will removal operation begin? Upon Approval

7. Location of material site (please include section, township, range and meridian) Within ADL#68139 Referenced to the Fairbanks Meridan as follows: Section 3, Range 6 W, Township 12 S.

8. Approximate size of material site in acres 7.2

9. For what purpose will the material be used Road ConstructionOverlayment

10. Are there any existing permits or leases covering any part of the land applied for? YES Yes _____ No _____ Lease _____ Permit

11. If 10 is answered yes, state name and last known address of permittee or lessee Right-Of-Way ADL # 68139

12. Are there any improvements on the lands applied for? ___Yes NO___No

13. If 12 is answered yes, describe and state approximate value and name and address of last known owner _____

14. Describe the proposed method of excavation including the type of equipment to be used Front end loader or hydraulic shovel and Wabco haul trucks.

10-143 (155)
Rev 3/70

USIBELLI COAL MINE, INC.
P.O. Box 1000
Healy, Alaska 99743
(907) 683-2226
Telecopier (907) 683-2253

July 26, 1989

Mr. William F. Newman
Alaska Department of Natural Resources
Division of Land & Water Management
3700 Airport Way
Fairbanks, Alaska 99709-4613

Dear Mr. Newman:

Please find attached the completed material application for an additional 50,000 cubic yards of gravel from the site near the Gold Run Pass mine area.

Usibelli Coal Mine Incorporated request that the division conduct a public oral outcry auction for this competitive sale of material.

Your prompt attention to this matter is appreciated, and either myself or Mr. Larry Jackson may be used as your contact. My number locally is 452-2625, and Mr. Jackson may be reached at the Healy office number, 683-2226.

With best regards, I remain,

Sincerely,

Charles P. Boddy
Regulatory Compliance Manager

CC: JEUj, WAM, MDU, LPJ
mw: dl072689

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LAND AND WATER MANAGEMENT

NORTHERN REGION
3700 AIRPORT WAY
FAIRBANKS, ALASKA 99709-4613
PHONE: (907) 451-2700

December 19, 1989

Charles P. Boddy
Usibelli Coal Mine, Inc.
P.O. Box 1000
Healy, Alaska 99743

Re: Material Contract, ADL No. 414143

Dear Mr. Boddy,

Your request for gravel from Section 3, Township 12 South, Range 6 West, Fairbanks Meridian was scheduled to be reviewed by the Mental Health Board on December 1, 1989. It was decided that no action would be taken on any casefile at that meeting. It was rescheduled to be heard on December 18th. That meeting was cancelled.

Since the affected property is on mental health trust lands approval of the Commission is required. I cannot issue the contract without this approval. It is not known at this time when, or if, the Commission will meet again. I regret to inform you that I must hold your application in abeyance until such time as the Commission meets and takes affirmative action on your request.

Sincerely,

FREDERICK L. SMITH
Acting Regional Manager

William F. Newman

By: William F. Newman
Natural Resource Officer

WFN/kz

10-J16LH

What does HB548 do?

Sections 3 & 4 of the bill in effect replace parts of Chapter 48, SLA, 1987 and accomplish two things

First, on page 2, lines 14 through 17 the Legislature certifies the Trust value of $2,243,000,000 established under procedures approved by the IMHTC. This was item (1) in the Board's recommendations.

Second, page 2, lines 18 through 20, establishes a new Trust corpus from all land presently or in the future included within legislatively designated lands. This is one way to accomplish item (2) of the Board's recommendations.

The balance of section three of the bill makes no changes to the Chapter 48 SLA, 1987 settlement. Sub-section (c) releases the cloud over the title of original trust lands. Sub-section (d) is part of the mechanism making the new trust corpus productive through a contract rent of the corpus by the state.

Sub-section (e) permits removal of land provided equal value replacement land is offered by DNR and approved by the AMHB.

Sections 1 and 2 provide, in a formula, one method for accomplishing the third (3) recommendation of the Board.

11 AAC 58.910

(11) "fair market value" means the highest price, estimated in terms of money, which the property would bring if exposed for sale for a reasonable time in the open market, with a seller, willing but not forced to sell, and a buyer, willing but not forced to buy, both being fully informed of all the purposes for which the property is being adapted or could be used;

Table 1

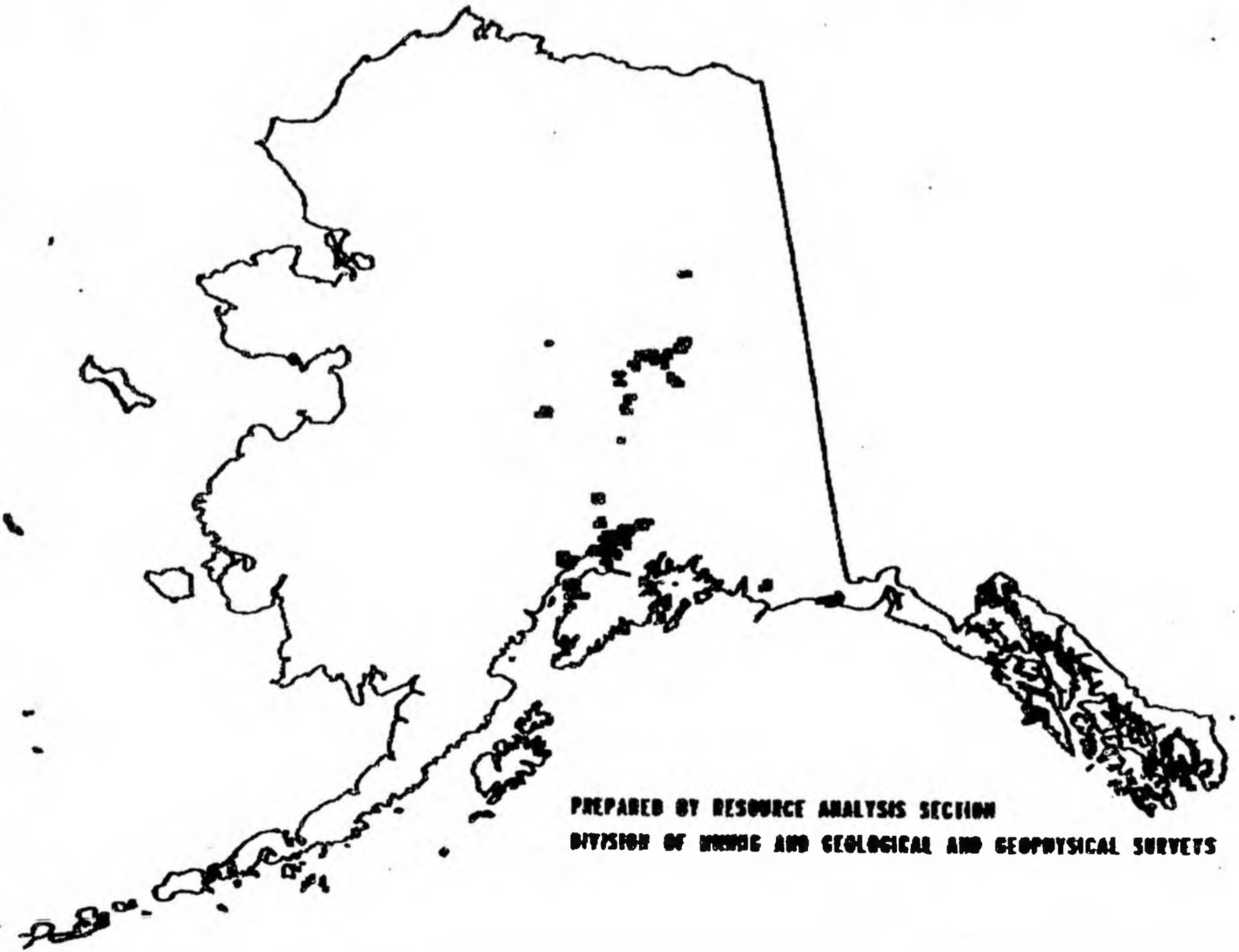
Mental Health Land Selections
by
Location and Anticipated Type of Income Generation

Area	Projected Source of Income
Anchorage Area (Proper)	Settlement*, commercial
Beluga River	Oil, gas, coal, and timber
Fairbanks	Settlement, timber
Haines	Timber, recreation**, minerals
Healy	Coal
Juneau	Settlement, recreation
Kenai Peninsula	Oil, gas, settlement, agriculture timber
Susitna Valley	Timber, agriculture, settlement, recreation
Yakutat-Icy Straits	Oil, gas, timber, recreation

* settlement probably means residential development
** recreation probably means commercial recreation development

Source: DNR records

TRUST LANDS: MENTAL HEALTH GRANT (1956)



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

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

Selling Your House Without a Broker

The Complete Guide to Saving Thousands of Dollars in Commissions by Selling Your Own Home

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- Marketing and advertising
- Qualifying prospective buyers
- Closing the deal

Dale Chaney and Mary Beth Libbey

11
The Appraisal

While some sellers may opt for hiring an appraiser before they set their asking price, most sellers will meet their first appraiser when their buyer's mortgage lender orders an appraisal.

The purpose of the appraisal is to get an expert opinion of your property's value. It assures the mortgage lender that in the rare event of a default, it would be able to get most if not all of its money back by selling the property.

As a seller, you may be a bit anxious at the prospect of an appraisal. What if the appraiser comes in with a price far below the price you've agreed to with your buyer? Even more dreadful, what if the appraiser comes in with a much higher value than the one on the sales contract? Will you find out you're giving your property away?

As interest rates fluctuate more dramatically than ever before, and as rehabilitation of many city neighborhoods changes the value of property (almost overnight in some cases), appraisals have become less predictable and appraisers have come under fire for not doing a thorough job of analyzing a property. As mentioned earlier, you will

probably have no say in who will perform the appraisal. In nearly all real estate transactions, the appraiser will be selected by the mortgage lender.

FINDING AN APPRAISER

In seller-financed deals, you and your lawyer will be responsible for finding an appraiser. If you are, look for members of the American Institute of Real Estate Appraisers. They are listed in a directory published by the American Institute of Real Estate Appraisers every January. The institute's directory is available by writing to:

American Institute of Real Estate Appraisers
430 N. Michigan Avenue
Chicago, Ill. 60611-4088
(312) 329-8559

Locally, institute members will publish MAI (Member, Appraisal Institute) or RM (Residential Member) after their names in the telephone directory. If you are financing the sale and are responsible for finding an appraiser, your lawyer may be the best source for referral, particularly if the lawyer does a great deal of real estate work.

In any event, a member of the appraisal institute is worth finding. Though membership is no guarantee, at least you know your appraiser has had specialized training in appraisal work, is aware of industry-enforced codes of ethics and standards of professional practice, and has received professional recognition for mastery of the institute's educational program.

HOW AN APPRAISER DOES THE JOB

Appraisers, it is important to understand, give an expert *opinion* of what a property is worth. They do not determine a property's value.

The appraiser uses one of these methods to value property:

1. The value indicated by recent sales of comparable properties in the market
2. The value that the property's net earning power will support
3. The current cost of reproducing or replacing a building, minus an estimate for depreciation, plus the value of the land

The first method, called a sales comparison, is always used for residential real estate appraisals. The second method is used on income-producing properties, and the final method is usually used for insurance purposes.

When an appraiser does a sales comparison, he or she researches the market within about one mile of your house. The appraiser gets information about transactions, listings, and other offerings of properties similar to yours. He or she verifies this information with a knowledgeable source to check that the data are accurate and that the transactions with which yours is compared reflect arm's-length market considerations.

Finally, the appraiser determines relevant units of comparison—square feet if your property is a single-family home or condominium, or acreage if your property is, say, a ranch—and develops a comparative analysis for each unit. He or she compares your property to comparable sales and adjusts the sale price of each comparable as appropriate or eliminates the property as a comparable. He or she reconciles the several value indications that result from the comparables into a single valuation.

Appraisal requires a great deal of judgment even after all the numbers have been crunched. It is an inexact science because so many variables can affect a house's price. In general, however, elements of comparison include the following:

- Financing
- Conditions of sale
- Market conditions
- Location

- Physical characteristics
- Income characteristics, if the property includes rental units

Other Appraisal Approaches

We have detailed the sales comparison appraisal because it is the approach most often used for single-family houses. If your home happens to be a two-flat or duplex, you may have an appraisal based on income capitalization. Briefly, capitalization begins with an estimate of net operating income, from which the appraiser develops a rate of capitalization and estimates the property's value.

The third method of appraisal, the cost approach, is used almost exclusively to determine insurable value.

The Appraisal Report

The form, length, and content of an appraisal report depend on the type of property covered. However, the American Institute of Real Estate Appraisers has set some standards for what should be included in an appraiser's report.

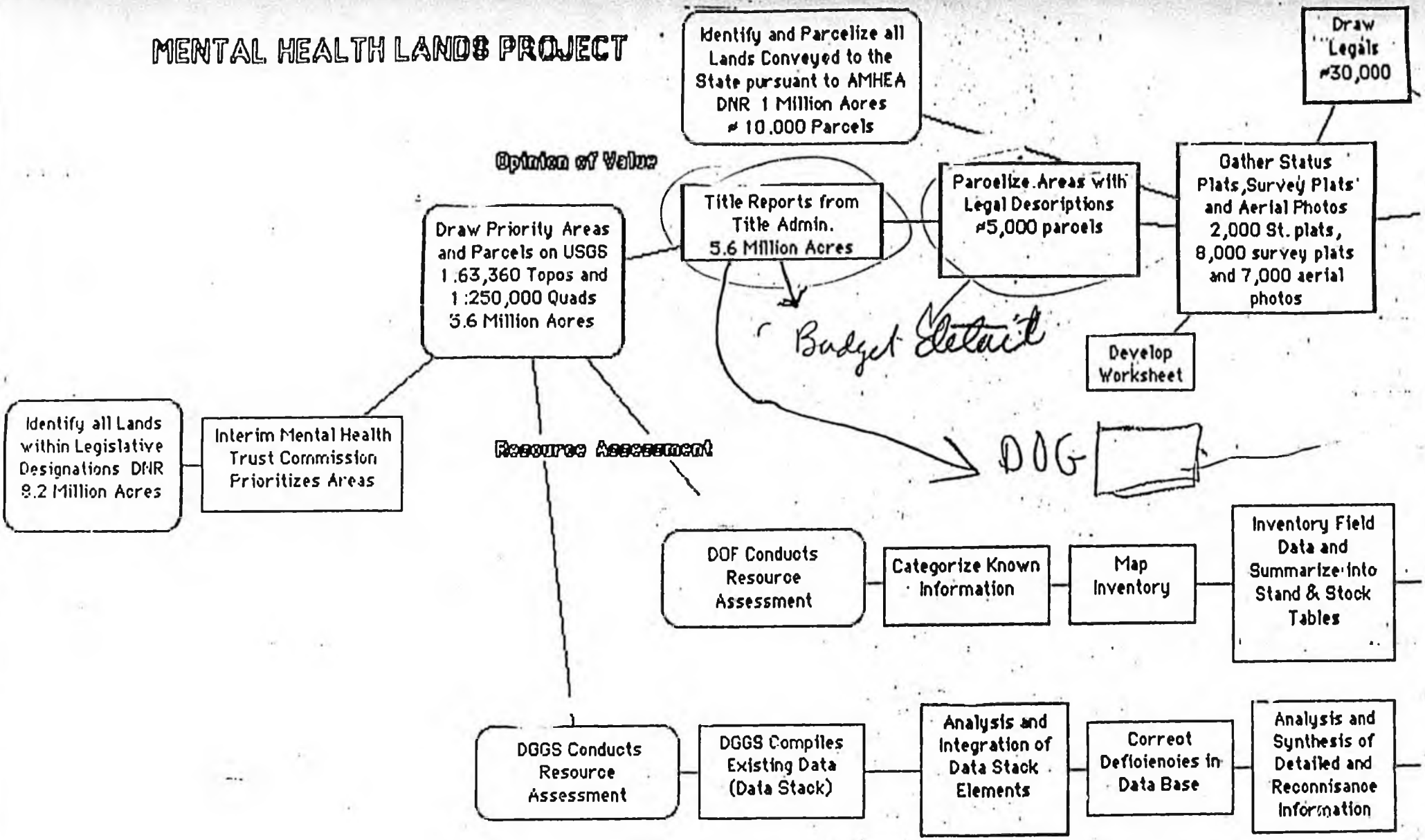
As a seller, you probably will not see the appraisal, as long as it satisfies the buyer and the mortgage lender. However, you may request through your lawyer a copy of the appraisal if it comes in below your contract price and buyer's remorse sets in on your once-enthusiastic buyer. An appraiser is required to defend every aspect of the report and justify all of the comparables.

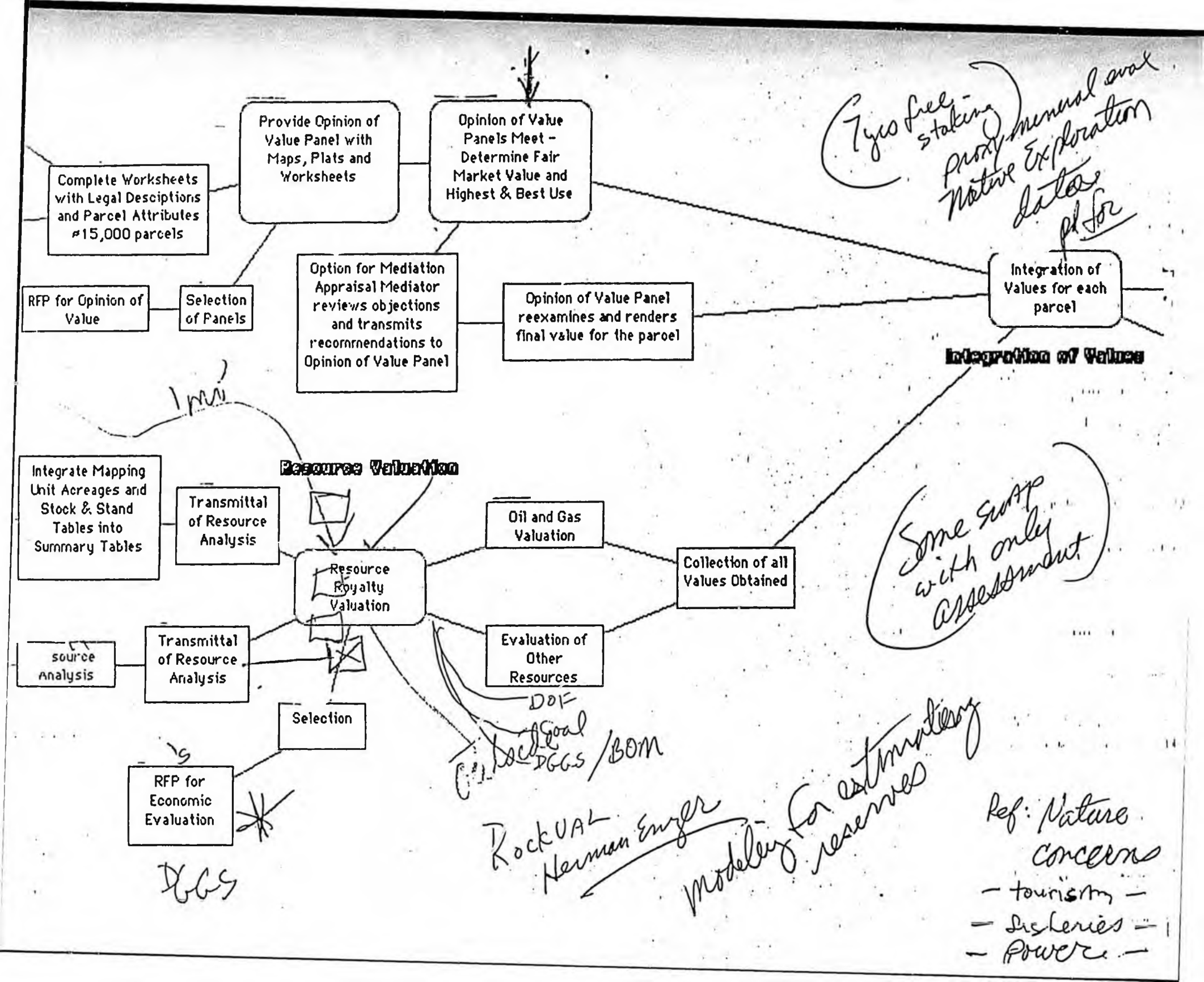
If the appraisal comes in lower than the sales price, you may consider yielding on your price, say meeting your buyer halfway on the difference, if it means keeping the deal alive.

THE APPRAISAL APPOINTMENT

If you were using a real estate broker, he or she would probably make a point of being present when the appraiser

MENTAL HEALTH LANDS PROJECT

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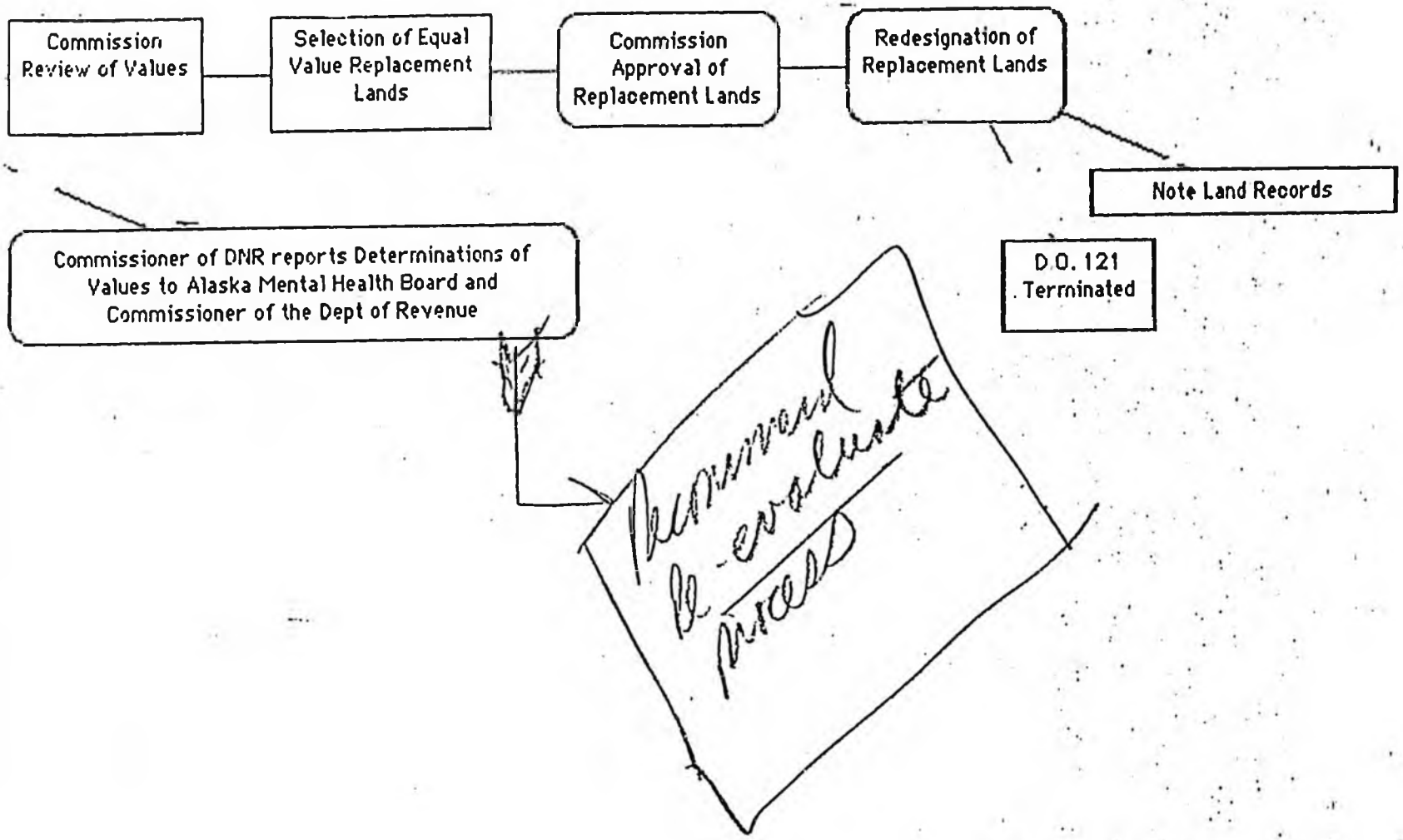
- fisheries -
- Power -


Commission Review of Values
Selection of Equal Value Replacement Lands
Commission Approval of Replacement Lands
Redesignation of Replacement Lands
Note Land Records
D.O. 121 Terminated
Commissioner of DNR reports Determinations of Values to Alaska Mental Health Board and Commissioner of the Dept of Revenue
Removed to re-evaluate process

ALI / Restatement of TRUST LAW

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QUESTIONS REGARDING SB 493 AND HB 548

1. What are the implications of making all land currently in legislative designations, and all land made subject to legislative designations in the future, subject to trust status?

a. If the Legislature wanted to remove land from legislative designations and no state land was available for an equal value exchange, would the Legislature have to purchase it from the trust before it could be removed from trust status?

b. Might development or other use of such land, even if consistent with the purpose of the legislative designations, be precluded by virtue of the trust?

c. Will making all land in future legislative designations subject to trust status make it politically more difficult to identify and include such land in future legislative designations?

d. If future unrestricted state general fund revenues are insufficient to pay the 8 percent "rent" for continued use of mental health trust land in legislative designations for the legislatively designated purposes, will the state be forced to use the land to generate revenue to make up any shortfall?

2. Is it reasonable to determine that the value of the original one million acre mental health land grant is $2.243 billion?

a. Is it reasonable to assume that all mental health lands were in full mineral production on September 7, 1987, the date of valuation? If full production would not be reached for ten years, the value of the mineral estate drops from $1.5 billion to $585 million; if full production is not reached for 20 years, the value drops to $225 million.

b. Is it reasonable to conclude that the gross annual value of mineral production from the one million acres of mental health land is equal to $4.43 billion (required to reach a $1.5 billion net present value under the discounted future income valuation approach approved by the majority of the interim mental health trust commission)? The total value of mineral production from all of Alaska's 350 million acres was $202 million in 1987 and, according to the Alaska Minerals Commission, will be less than $1.2 billion in 1990.

c. With respect to the value of the surface

estate, is it reasonable to split the difference between (1) values determined under the standard definition of fair market value (the most probable selling price) and then adjusted upward by 30 percent, and (2) values determined under instructions to determine the "highest value supported by market data" for only those parcels where the first value was believed to be too low?

3. Might the valuation methodology used to derive the $2.243 billion figure be employed against the state in other contexts (e.g., land exchanges, condemnation proceedings, etc.)? Chapter 48, SLA 1987, was predicated on the concept of fair market value, advocates of the $2.243 billion figure assert that the procedures employed to reach that figure determine fair market value, and those engaged in land transactions with the state are always looking for new ways to increase the amount the state must pay in land and/or money to acquire other land.

4. Is it reasonable to use an indexing method for revaluation purposes which is based on annual changes in land values only in organized municipalities? Much mental health land is in the unorganized borough.

ALASKA MENTAL HEALTH BOARD

STEVE COWPER, GOVERNOR
STATE OF ALASKA

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

April 23, 1990

Members, House Resources Committee
P.O. Box "V"
Juneau, Alaska 99811

Honorable Representatives,

In 1987, the Legislature created the Alaska Mental Health Board (AMHB) to assist the state in ensuring a comprehensive, integrated mental health program. The AMHB must review applicable statutes, regulations and policies and recommend appropriate changes. The AMHB must also 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. Because of these duties, the AMHB offers recommendations on Legislation before you, HB548.

The purpose of the one million acre land grant made by Congress in the 1956 Alaska Mental Health Enabling Act was to assist the Territory with meeting the necessary expenses of an integrated mental health program. To receive the grant the Territory had to submit program plans to the Surgeon General of the Public Health Service for approval. The land grant, its income and proceeds were to be administered as a public trust. Unfortunately, the Territory and later the State failed to administer the land grant as a public trust. In October, 1985, the Alaska Supreme Court, relying upon basic trust law principles, ruled the legislature had breached its duties as trustee. That ruling came about because of 1978 legislation taking trust property. Since the Supreme Court ruling, the legislature has tried to reach a settlement fulfilling the Court order to reconstitute the trust. Chapter 132, SLA, 1986 and Chapter 48, SLA, 1987 demonstrated the Legislature's desire for settlement. The legislation before you, HB548, addresses settlement issues.

The AMHB expresses support for 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.**

The AMHB has closely monitored the work of the Interim Mental Health Trust Commission (IMHTC) chaired by Dr. George Rogers. The AMHB reviewed and endorsed the IMHTC Resolution of November 7th, 1989, "**Final Approval of Procedures for Determining Fair Market Value.**" The AMHB has just received a letter/report from DNR Commissioner Gorsuch, dated April 17, 1990 indicating she will not apply the IMHTC approved procedures. The AMHB will try to complete review of DNR reports promptly.

Relevant to the entire settlement issue, the AMHB repeatedly has advised appointment of **an independent trustee for the mental health trust.** Such a body would help ensure proper reconstitution and administration of the Alaska Mental Health Land Trust and also proper use of proceeds of the mental health trust income account. If we can further assist you with your mental health trustee responsibilities please let us know.

Sincerely,

Dennis M. Scholl, Ph.D.
Executive Director

cc. AMHB
DMS/6.4.1

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB548
PUBLISH DATE: 02/12/90

FISCAL NOTE

REQUEST: HB548

Revision Date:
Title: An Act relating to the reconstitution and administration of the Mental Health Trust
Sponsor: Rep. Miller
Requestor: Rep. Miller

Agency Affected: Health & Social Services
BRU:
Components:

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 Remninger
Division: Administrative Services
Phone: 465-3331
Date: March 27, 1990

Approved by Commissioner: Myra 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)

DHSS FISCAL NOTE

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

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, 1987, 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.

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

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

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

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

is 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
110. Public school trust fund established
120. Public School Fund Advisory Board created
130. Powers and duties of board
140. Utilization of income
150. Contributions
160. Duties of the commissioner of revenue
170. Investments

ALASKA MENTAL HEALTH BOARD

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 MENTAL HEALTH BOARD INTERIM REPORT ON CHAPTER 48 REVISIONS (6.6.4)

January 1990

INTRODUCTION

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

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

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

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

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

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

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

BACKGROUND

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

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

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

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

---

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

> "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.[2]

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

---

2 *Id.* pg 8-9

> 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.[3]

The Interim Mental Health Trust Commission reached a similar conclusion, ultimately suggesting that a revenue-stream option be adopted by the Legislature.[4] 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.[5]

These recommendations were the genesis of the present Chapter 48.

---

3 *Id. at pg. 19-21*

4 *Report to the Legislature by the Interim Mental Health Trust Commission, February 1987, at pg 199*

5 *id at pg., 19-21.*

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

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

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6 *Letter from Milt Barker, Department of Revenue, December 1, 1989*

PROPOSED RESOLUTIONS

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

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

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

> The only change the Commission anticipates at this point is a proposal to alter the five-year reappraisal requirement. We have indicated support for an indexing system which would automatically adjust the value of the trust lands. As yet, however, there has been no uniform agreement concerning the adjustment methodology.[7]

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

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

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

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

> 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.
>
> The Governor's Council for the Handicapped and Gifted, the Older Alaskans' Commission, and the SOADA Board are already serving planning, advisory, evaluative 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.[8]

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

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

PROPOSAL B <u>Creation of a Separate Trustee Without Operating Authority</u>

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

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

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

1. Oversee and approve land management decisions of the Department of Natural Resources, as they affect the Mental Health Trust lands, and to negotiate with the State when it became necessary to revalue State land. Under the present Chapter 48, such re-valuation is to take place every five years;

2. Invest and oversee any designated funds, such as funds appropriated for capital improvements;

3. Determine annually the extent to which the needs of the beneficiaries of the Mental Health Trust have been met, based on the goals and objectives of the Alaska State Comprehensive Mental Health Plan, and to certify annually the extent to which the needs have been met or not met;

4. To review and approve expenditures from the Trust to ensure that the expenditures are properly charged to the Trust.

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

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

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

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

PROPOSAL C <u>Separate Trust with Operating Authority</u>

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

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

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

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 B anch, 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.

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

B. PREPARE COMPREHENSIVE PROPOSALS FOR THE 1991 LEGISLATIVE SESSION

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

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

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

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

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

CONCLUSION

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

Interim Report 6.6.4

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 7-10 take effect July 1, 1987; remainder of Act takes effect September 6, 1987.

Chapter 48

AN ACT

Relating to the Alaska Mental Health Trust;

and providing for an effective date.

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* 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. 202 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 202(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

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

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, 4FA-82-2208, was filed on November 26, 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

require additional costly and time-consuming litigation;

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

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

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

(17) continued costly and time-consuming litigation over mental health trust land management is not in the public interest because advocates or stringent mental health trust land management may seek the invalidation of legislative designations of mental health land as state

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

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

(19) the same problems that led to the 1978 redesignation of mental health land as general grant land, for example, the desirability of managing mental health land for its highest and best use, including the satisfaction of municipal entitlements, inclusion in parks and game refuges, will continue to pose difficulties in the state's efforts to accommodate the public's needs generally with the obligation to administer mental health land as a trust;

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

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

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

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;

(26) 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 is, those in legislatively designated areas, in that, prior to such disposal, equal value replacement land would have to be identified and redesignated as trust land;

(27) 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 [illegible] 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 as the special mental health trust income account, and creating a board to assist and advise the legislative and executive

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

(b) The purposes of this Act are

(1) to implement the intent of the Congress underlying sec. 202 of the Alaska Mental Health Enabling Act that mental health land be administered in a way that makes funds available for the support of Alaska's mental health program;

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

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

(4) to reconstitute a mental health land 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 sec. 202 of the Alaska Mental Health Enabling Act;

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

(6) to validate each deed, contract for sale, lease, easement, right-of-way, permit, mineral lease disposal, reservation of land for public use by statute, or land management actions, including use classifications under AS 38.05.300 and interagency land management assignments by the Department of Natural Resources, that may have been called into question by the Supreme Court's decision in State v. Weiss, 706 P.2d 681 (Alaska 1985), returning mental health land to trust status;

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

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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 legislatively 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 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 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 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.

* 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

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.

* Sec. 4. AS 38.05 is amended by adding a new section to article II to read:

Sec. 38.05.800. RECONSTITUTION AND ADMINISTRATION OF MENTAL HEALTH LAND TRUST. (a) The commissioner of natural resources, under procedures approved by the interim mental health trust commission, shall determine the fair market value, as of the effective date of this section, of all land selected by and patented to the state under the Alaska Mental Health Enabling Act. The commissioner shall report the determination of that value to the board established under AS 47.30.661.

(b) 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 designations.

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

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

selected by and patented to the state under sec. 202 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 39.25.120(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

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

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

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

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

Sec. 47.30.663. TERM OF OFFICE. (a) Board members serve staggered terms of three years.

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

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

Sec. 47.30.664. OFFICERS AND STAFF. (a) The board, by a majority of its membership, shall annually elect a chair and other officers it considers necessary from among its membership.

(b) The board will have a paid staff provided by the Department of Health and Social Services, including, but not limited to, an executive director who shall be selected by the board from candidates provided by the department. The executive director is in the partially exempt service and may hire additional employees in the classified service of the state. The executive director and the staff of the board shall be directly responsible to the board in the performance of 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

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

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

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

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

(10) serve as an advocate before the executive and legislative branches of government and the public on behalf of those served by the mental health program of the state;

(11) discourage duplication of services and promote efficient and coordinated use of federal, state, and private resources in the provision of mental health services; and

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

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

AS 47.30.661.

* 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 Weiss v. State, 4 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 Weiss v. State, 4 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-

Chapter 48

SOURCES AND THE COMMISSION. (a) The commission shall review 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 land 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.

(b) The commission shall review the identification by the commissioner of natural resources under AS 38.05.800 of 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 designations.

(c) In the exercise of the commission's responsibilities under this section, the commission and its staff may review the records of the Department of Natural Resources that are made confidential by law or regulation. An individual who acquires information made confidential by law or regulation in the performance of functions authorized by this Act and discloses it without proper authority violates AS 11.-56.860.

(d) The commissioner of natural resources is responsible for the management of the mental health land of the state as a public trust under P.L. 84-830, 70 Stat. 709. Except as provided in (e) of this section, the commissioner of natural resources may not sell, lease, or exchange mental health trust land of the state or an interest in the mental health trust land of the state without the prior approval of the commission. In reviewing a proposal for the sale, lease, or exchange of mental health trust land from the commissioner of natural resources, the commission may approve the proposal of the commissioner on its determination that the proposal is consistent with the terms of the trust established by the Alaska Mental Health 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 47.30.66[illegible];

(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

for three year terms.

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

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

SENATE SPECIAL COMMITTEE ON MENTAL HEALTH

SECOND SESSION

16TH ALASKA STATE LEGISLATURE

Senator Pat Pourchot, Chairman

Senator Jack Coghill
Senator Paul Fischer

Report to the Senate

January 1990

Alaska State Legislature

Sen. Pat Pourchot, Chairman

Sen. Jack Coghill
Sen. Paul Fischer

P.O. Box V
State Capitol
Juneau, Alaska 99811

907-465-3712

Senate Special Committee on Mental Health

January 8, 1990

The Honorable Tim Kelly
President, Alaska State Senate
Post Office Box V
Juneau, Alaska 99811

Dear Senator Kelly:

Passage of SR 10 by the 1989 Legislature established the Senate Special Committee on Mental Health and charged it with the following:

-- conducting oversight hearings on the implementation of the settlement of the mental health trust litigation and

-- facilitating resolution of the problems hindering settlement.

The Committee is authorized to meet during and between sessions of the Legislature, and terminates upon convening of the First Session of the Seventeenth Legislature. The Committee conducted two public hearings during the past interim and met individually with many of the participants in this issue. At this time, we are submitting an interim report that provides an overview and status of the mental health trust issue.

The work of the groups involved in resolving the litigation (primarily the Interim Mental Health Trust Commission, the Department of Natural Resources, and the Alaska Mental Health Board) is ongoing, so final recommendations are not contained in this report. The Senate Special Committee will continue to work with these groups during the upcoming session, and will bring before the Senate any items requiring legislative action or oversight.

The Committee would like to extend special thanks to Sandra Schubert, who was instrumental in the drafting of this report.

Sincerely,

Pat Pourchot

Senator Pat Pourchot, Chairman

Senator Jack Coghill

Paul Fischer

Senator Paul Fischer

MENTAL HEALTH TRUST LANDS SETTLEMENT

BACKGROUND

THE FEDERAL GRANT

In 1956 the U.S. Congress passed the Alaska Mental Health Enabling Act (PL 84-830). The Act authorized the Territory of Alaska to administer a mental health program and, to ensure that the territory had adequate financial resources to do so, granted Alaska 1 million acres of land. The Act required that the land be administered as a public trust and that the income from the land "first be applied to meet the necessary expenses of the mental health program of Alaska". The land was selected but no trust fund was established.

THE LEGISLATIVE REDESIGNATION

In 1978, public pressure to make state land available for use and development prompted the legislature to abolish the land trust and redesignate all mental health land as general grant land. A monetary trust fund, to be financed by 1.5% of revenues from all state lands, was established in its place. No revenues were ever appropriated to the fund.

THE WEISS LAWSUIT

In 1982 a suit was filed on behalf of Carl Weiss and Earl Hilliker, two Alaskans in need of mental health services not available in Alaska. The suit contended that the law which abolished the land trust was a breach of the federally-created trust.

THE COURT DECISION

In 1984 the Alaska Superior Court ruled in favor of the plaintiffs; the state appealed. The Alaska Supreme Court agreed with the Superior Court and held that the 1978 redesignation law was invalid. The Court directed the state to reconstitute the 1 million acre trust as nearly as possible, reimbursing the trust for land which had been sold, offset by mental health expenditures made by the state since 1978. At the time of the court decision 90,000 of the original 1 million acres had been patented to private parties, 43,000 acres had been conveyed to municipalities, 370,000 acres were in legislative designations (parks, refuges, forests, public use areas), and 290,000 acres were under special use (rights-of-way, timber sales, mining claims, oil and gas leases, etc.).

THE SETTLEMENT PROPOSAL

In 1986 the legislature appointed a special committee to develop a means of implementing the Court's decision. The committee's proposal, introduced as HB 92 and signed into law as Chapter 48, SLA 87:

1. Directed the Department of Natural Resources (DNR) to reconstitute the trust with land currently in state parks, refuges, forests, and public use areas that is equal in value to the original 1 million acres of land. "Value" was defined as the July 1987 fair market value as determined by DNR under procedures approved by an Interim Mental Health Trust Commission.

2. Required, in lieu of managing the replacement lands for maximum revenue generation as is required under general trust law, that the state annually allocate an amount equal to 8% of the fair market value of the land to the Mental Health Trust Income Account in the state's general fund. These "trust earnings" would be appropriated first to meet the necessary expenses of the state's mental health program, and then for other public purposes. Pending reconstitution of the land trust, 5% of the state's annual unrestricted revenue would constitute the trust earnings.

3. Established the Alaska Mental Health Board (9-12 members who represent consumers, providers, and the public at large). The Board was charged with determining the need for mental health services in Alaska, reviewing the state's mental health program, and reporting its findings to the Legislature and the Governor.

The settlement proposal was seen by the parties to the lawsuit and the Legislature to have the following advantages:

1. Satisfies state's legal obligation under federal law to create a permanent funding source for mental health while retaining the Legislature's discretion in appropriating funds.
2. Allows the original 1 million acres to continue to be used for general public purposes, removing the "cloud" on title and/or use of trust lands selected by municipalities and purchased by third parties.
3. Provides immediate financial support for the mental health program but doesn't require a major cash outlay.
4. Avoids further costly and time consuming litigation.
5. Is relatively easy to administer.

MENTAL HEALTH TRUST LANDS SETTLEMENT

STATUS

DETERMINATION OF LAND VALUE

DNR hired appraisers who, using an opinion-of-value methodology and procedures approved by the Interim Mental Health Trust Commission, calculated the surface value of the original 1 million acres to be $499.8 million. This figure was disputed by appraisers hired by the plaintiffs' attorneys who, asserting that DNR's appraisers had not properly interpreted the Commission's procedures, calculated a value of $833.3 million.

DNR calculated the value of the timber resource on the original 1 million acres to be $41.0 million. This figure was disputed by the plaintiffs' attorneys who objected to the deduction of reforestation costs.

The federal land grant included the subsurface estate. DNR calculated the value of the minerals/coal/aggregate on the original 1 million acres to be $16 million. The minerals/coal/aggregate figure was disputed by geologists hired by the plaintiffs' attorneys who calculated the value at $1.5 billion. DNR calculated the mineral value based on "comparable sales" -- the plaintiffs argue this does not accurately reflect the development potential of the resources; DNR argues that comparable sales is the established procedure for determining fair market value.

DNR calculated the value of the oil/gas to be somewhere between $135,953 and $856,040. The plaintiff's attorneys did not submit an oil/gas valuation, but asserted that DNR's range was grossly low.

THE NEGOTIATIONS

Because of the large discrepancy between the values determined by DNR's procedures and the plaintiffs'procedures, the Commission requested that the state and the plaintiffs attempt to negotiate a value that would be acceptable to both parties. On October 27, 1989 the negotiators reported to the Commission that they were at impasse. The plaintiffs' final offer was $2.325 billion; the state's final offer was undisclosed, but at least $1.5 billion less than the plaintiffs' offer.

THE COMMISSION'S FINAL DECISION

Unable to reach consensus, on November 7, 1989 the Commission adopted by a 2-1 vote a resolution approving final procedures for determining the value of the land. The DNR representative voted no, the plaintiffs' and intervenors' representatives voted yes. The procedures lead to the following values:

Surface		$ 666.5 million
Minerals/Coal/Aggregate		1,534.7 million
Oil/Gas		.5 million
Timber		41.0 million
	TOTAL	$2,242.7 million

(The Alaska Mental Health Board has endorsed these values.)

THE DNR COMMISSIONER'S FINAL DETERMINATION

The settlement proposal requires that the Commissioner of DNR determine the fair market value of the land based on the Commission's procedures. The Commission submitted its final procedures to Commissioner Gorsuch on November 7, 1989. Before responding, Gorsuch requested a written justification of the procedures from the Commission, which was submitted on December 20, 1989.

If the Commissioner does not endorse the Commission's procedures (which the Department of Law has advised she can do if she finds the procedures to be arbitrary or capricious), it is unclear what the next step would be. The parties could request legislative clarification of "fair market value", legislative confirmation of a particular value, judicial intervention, or possibly some other action.

RECONSTITUTION OF THE TRUST

Once the value of the original 1 million acres is determined, lands of equal value from legislatively designated areas (parks, refuges, forests, and public use areas) are to be identified by DNR and approved by the Commission; these replacement lands would constitute the trust corpus. There has not been a formalized appraisal process for the replacement land as there was for the original 1 million acres. As of this writing, the Commission has not finalized its recommendation on valuation of replacement lands.

Once the trust is reconstituted, the DNR Commissioner must certify the reconstitution to the Revenue Commissioner, the Alaska Mental Health Board, and the Lieutenant Governor. Upon certification, an amount equal to 8% of the land value will be segregated in the state's general fund as the Mental Health Trust Income Account.

Every five years, the fair market value of the replacement land is to be reappraised and the 8% adjusted accordingly. As of this writing, the Commission is considering recommending that the reevaluation be of the original 1 million acres, not the replacement land, and that it be tied to a cost-of-living index, rather than an actual reappraisal.

MENTAL HEALTH TRUST INCOME ACCOUNT

Until the trust is reconstituted, an amount equal to 5% of the state's annual unrestricted revenue constitutes the Mental Health Trust Income Account. In FY 89, 5% was $97.7 million. The Department of Revenue's November 1989 mid-case revenue forecast projects 5% to be $114.8 million in FY 90 and $113 million in FY 91.

The Legislature has appropriated from the Mental Health Trust Income Account what, in its collective judgment, has been necessary to fund the mental health program. The appropriations have been less than the Alaska Mental Health Board's recommendations and significantly less than the funds in the Account.

	5%	Board Recommendation	Appropriation
FY 89	$ 97,724,965	$ 54,992,300	$ 39,596,800
FY 90	$114,800,000(est.)	$ 54,260,800	$ 43,426,100

(NOTE: Not all state mental health services are included in the "appropriation" figure. Only services for the "traditional" mentally ill and FY 90 budget increments for the developmentally disabled, senile, and chronic alcoholics are currently being funded from the trust account. See program discussion following.)

Each year the unappropriated balance of the Mental Health Trust Income Account has been transferred in accordance with Chapter 48 to the state's general fund for general expenditure.

THE MENTAL HEALTH PROGRAM

Although not a part of the Supreme Court's ruling or the settlement proposal embodied in Chapter 48, the plaintiffs and intervenors have made it clear that the determination of "the necessary expenses of the mental health program of Alaska" is integral to settlement. Clearly, the goal of the 1956 enabling act, the Weiss lawsuit, and the settlement proposal is to provide a funding source for mental health services. However, none provide a definition of "necessary expenses" or "mental health program". Some guidance has come from the court, but many questions remain unresolved.

THE GREENE DECISION

The Weiss lawsuit was filed on behalf of chronically mentally ill individuals. After the Supreme Court ruled in the plaintiffs' favor, additional groups intervened in the lawsuit, wanting to be recognized as beneficiaries of the mental health trust. In 1988 Superior Court Judge Greene ruled that Congress intended that the trust benefit the recipients of the services of a "comprehensive mental health program".

Prior to passage of the Alaska Mental Health Enabling Act and the concomitant assumption of mental health responsibilities by the Territory, Alaskans in need of mental health services were sent to Morningside Hospital in Oregon. Judge Green ruled that Alaska's program must serve, at a minimum, those populations that were treated at Morningside -- the mentally ill who may require hospitalization, the mentally retarded (developmentally disabled), chronic alcoholics suffering from psychoses, and persons who suffer mental illness as a result of senility. Judge Greene's decision did not preclude the addition of other populations.

THE GREENE GROUP

The ad hoc "Greene Group", consisting of state officials and representatives of each of the four beneficiary groups named by the court, was formed to make recommendations to the Alaska Mental Health Board on which specific programs should benefit from the trust. Their final report, issued in April 1989, provides a definition of each of the four beneficiary groups. The definitions are based on clinical diagnoses and functional limitations that effectively limit the beneficiaries to the most severely ill in each group. The position of the Greene Group is that these "core beneficiaries" must have their needs met before additional beneficiaries may be served.

The Greene Group did not reach a consensus on what specific services should be provided or whether additional beneficiaries should be included.

THE ALASKA MENTAL HEALTH BOARD

The Alaska Mental Health Board issued a policy paper in July 1989 supporting funding of a "comprehensive mental health program", which would serve a broader group of beneficiaries than that identified by the Greene Group. For example, under the Board's definition, services provided by the state's Community Mental Health Centers to persons who are not severely ill would be funded from the trust.

At its December 1989 meeting the Board recommended that the following guidelines be used to determine what specific services should be funded from the trust:

1. The service must be included in the most current approved State Mental Health Plan or the Governor's Council Plan for Services to People Who Experience Developmental Disabilities;
2. The service is not one for which eligibility is determined on a basis other than trust beneficiary status (e.g. age, income);
3. The service is not one to which beneficiaries are otherwise entitled under state law; and
4. The service has been determined by the Alaska Mental Health Board or in statute to be a necessary expense of the state's mental health program.

THE ADMINISTRATION

As of this writing, the administration has not taken a position on who the trust beneficiaries should be and has not responded to the Board's recommended guidelines for identifying services. The state's current operating budget appropriates from the trust only for "traditional" mental health services and for FY 90 budget increments for the developmentally disabled, senile persons, and chronic alcoholics.

Appropriations from the trust are done simply by identifying the trust as the funding source in the state's operating budget. Identification of the traditional mental health program was done in FY 89 prior to the Greene decision. Since the decision, additional programs in the base budget have not been identified because of a lack of consensus over what services are "necessary". Once these issues are resolved, the budget will be revised to show the trust as the funding source for all eligible programs.

TRUST APPROPRIATIONS IN FY 89 AND FY 90

	FY 89	FY 90
Chronically Mentally Ill	8,003.0	9,758.0
Community Mental Health Centers	11,263.9	10,542.1
API/AYI/Designated BRUs/Administration	17,479.9	18,557.5
Developmentally Disabled	0	1,653.5
Alcohol Abuse	0	1,064.0
Alzheimers	0	325.0
Capital projects	2,850.0	1,526.0
TOTAL	39,596.8	43,426.1

TOTAL PROGRAM FUNDING IN FY 89 AND FY 90

	FY 89	FY 90
Chronically Mentally Ill	9,058.0	9,758.0
Community Mental Health Centers	11,248.3	11,967.3
API/AYI/Designated BRUs/Administration	18,527.2	19,965.1
Developmentally Disabled	17,248.7	18,998.9
Alcohol Abuse	14,479.3	15,905.7
Alzheimers	0	325.0
Capital projects	2,850.0	1,526.0
TOTAL	73,411.5	78,446.0

MENTAL HEALTH TRUST LANDS SETTLEMENT

DISCUSSION

THE GOAL

The common goal of the federal enabling act, the Weiss lawsuit, and the settlement agreement is to provide a funding source for mental health services. Under the settlement proposal, the amount of funds available is tied directly to the value of the original 1 million acres of land. Under both the federal enabling act and the settlement proposal, the amount of funds actually appropriated is tied directly to the "necessary expenses of the mental health program". This has led to there being two major unresolved issues:

1. The value of the land trust.
2. The determination of "necessary expenses", which involves both a determination of who the trust beneficiaries are and the services to be provided to each beneficiary group.

THE LAND VALUE

A basic conclusion at the time the settlement statute was enacted was that returning the original 1 million acres to trust status would create too many conflicts with current land uses. Hence, the concept of selecting replacement lands of equal value was endorsed. As is standard procedure in any equal value land exchange conducted by the state, both the original and replacement lands need to be appraised. As is also fairly standard, the land valuation process has become very controversial.

Because the amount of money in the Mental Health Trust Income Account will be a direct result of the land value (through the 8% payment mechanism), there is a tremendous interest on the part of the plaintiffs in a "high" land value. The administration asserts that its interest is in the "correct" value. It has voiced concern that "fair market value" has a specific meaing in its determination on a wide variety of land management actions, and that a different approach for mental health lands could set a detrimental precedent. However, because there are many approaches to land appraisal and because appraising involves some subjectivity, it is hard to say what is "correct". What can be said is that the value supported by the administration is much lower than that supported by the plaintiffs.

One might argue that the land value itself is irrelevant, because it simply generates a revenue stream that is available for appropriation by the Legislature; it is not a dedicated fund and hence there is no mandate to spend the full stream on mental health. The administration has asserted throughout the settlement negotiations that Congress, by allowing trust revenues not needed for the mental health program to be spent on other public purposes, intended that the determination of "necessary expenses" be the prerogative of the Legislature.

However, when the Legislature appropriated for other public purposes $60 million from the trust account in FY 89, the Governor received over 100 letters from the mental health community requesting that he veto the transfer on the grounds that the necessary expenses of the mental health program had not been met.

The Governor did not veto the transfer. The Alaska Mental Health Board's response has been to conduct public hearings on the concept of an independent board of trustees that would oversee the Legislature's distribution of trust revenue. In addition, David Walker, attorney in the Weiss suit, testified to the Board at its November 17, 1989 meeting that "that situation that happened last year [expenditure of trust funds on other public purposes] we don't see happening again frankly.... The way you would enforce against that is you would say this Board has determined the need and the Legislature has not appropriated to meet that need and therefore the fund ... cannot be used for any other purpose. We do not see a way that the Legislature can be forced [by the court] to appropriate ... but we do see a way that says they can't spend it on other things if they don't appropriate."

The Board's hearings and Walker's comments tightly tie the question of necessary expenses to the land valuation process.

In addition to possible action attempting to block return of unused trust monies to the general fund, failure to resolve the land valuation question could block future management actions on mental health lands. The Interim Mental Health Trust Commission currently approves on-going DNR management activities on all mental health lands. The Commission, by a 2-1 vote, could refuse to approve DNR's proposed actions. Additionally, the plaintiffs could file a lis pendens, which would notify all involved that action is pending against the mental health lands and calls title to the property into question.

NECESSARY EXPENSES

The more people served by the trust, the fewer funds there are for each; and the more services provided to any beneficiary group, the fewer funds there are for other beneficiary groups. To ensure that the trust is not "diluted" to the point that it is unable to meet the needs of the most severely ill, the Greene Group and others advocate using the trust to increase services to a narrow band of beneficiaries, and not increasing the potential number of beneficiaries. The Greene Group supports serving first the most severely ill (the "core beneficiaries" named by the court), and serving other persons in need of mental health services only after all the needs of the core beneficiaries have been met. Others support serving all Alaskans in need of mental health services, regardless of the severity of their illness.

The Greene Group's position results from the court's ruling that the trust must serve those persons who, prior to passage of the Alaska Mental Health Enabling Act, were sent to Morningside Hospital. However, the Greene decision also concluded that Congress intended that the Territory establish a "comprehensive mental health program", and that those illnesses treated at Morningside represented the minimum of services which should be provided. In addition, Judge Greene ruled that in the administration of the trust the state must treat all beneficiaries impartially. This is the basis for arguing for the provision of a full range of services.

The different approaches raise both policy questions and administrative concerns. For example, the core beneficiary approach, although not without merit, would be difficult budgetarily. In the provision of services by Community Mental Health Centers, it would require distinguishing between services provided to the severely ill and services provided to other Alaskans, with trust funds being spent only on the severely ill. Currently, all funds for the centers, which are established in statute to comply with federal law, are appropriated from the Mental Health Trust Income Account. Similarly, services provided by the state's alcohol program to chronic alcoholics who suffer psychoses would need to be distinguished from services provided to other alcoholics.

The question of who the trust should serve is important, but equally important is the question of who makes the determination. If the Legislature makes the determination of necessary expenses, should it do so in a "mental health vacuum" or in comparison to how it addresses other state needs? In other words, should the Legislature use different criteria in determining mental health needs than it does in determining education needs or the need for police services? How much weight should the needs assessments conducted by the Alaska Mental Health Board have? Should it dictate the budget recommendations of the administration, and effectively bind the Legislature? Are the Legislature and Board both too political in nature to adequately defend the trust so that an independent trustee should be given trust management responsibility?

While these questions are unresolved, the Alaska Mental Health Board adopted a policy paper at its December 1989 meeting endorsing the creation of an independent board of trustees to oversee the actions of the state in funding and administering the mental health program. The paper stresses that the Weiss lawsuit is still pending, and until the litigants are satisfied with the management of the program there is always the option of returning to court to seek restoration of the original land trust.

MENTAL HEALTH LANDS TRUST

OPTIONS

LAND VALUE

As of this writing, the Interim Mental Health Trust Commission has recommended the value of the original 1 million acres be set at $2.24 billion. The DNR Commissioner has not yet accepted the procedures resulting in this value.

A. If the Commissioner endorses the Commission's procedures, the trust will be reconstituted with replacement lands and 8% of the value will be segregated in the state's general fund as the Mental Health Trust Income Account.

B. If the Commissioner does not endorse the Commission's value:
   1. The Legislature could statutorially establish the value based on recommendations of DNR and the Commission.
   2. The Legislature could clarify the valuation procedures in Chapter 48, for example, the term "fair market value" could be further defined for the specific purpose of mental health land appraisal.
   3. The parties could return to court for guidance on the valuation.

C. The designation of replacement lands and a reappraisal methodology would also require Commission agreement or legislation or court direction.

NECESSARY EXPENSES

As of this writing, the Alaska Mental Health Board and the Greene Group have made conflicting recommendations on who should be beneficiaries of the trust; the Board has recommended guidelines for determining what services should be funded from the trust. The administration has not taken a position on beneficiaries or services, but, at the request of the Senate Special Committee, is beginning to identify costs of a wide range of services so they may be considered for funding from the trust.

A. The determination of necessary expenses could be made by:
   1. The Legislature, through statutory designation of groups and services or the annual budget process.
   2. The Alaska Mental Health Board, based on needs assessments that, through a settlement agreement, the Legislature would be bound to address.
   3. An independent board of trustees, with responsibility for approving expenditures from the trust.
   4. The state administration, through regulatory designation of groups and services.
   5. The court, through the parties' request for guidance on this issue.

B. Beneficiaries could include:
   1. Only the "core" groups named in the Greene decision (mentally ill who may require hospitalization, developmentally disabled, chronic alcoholics suffering from psychoses, and persons who suffer mental illness as a result of senility).

2. Any additional group receiving mental health services and currently recognized by statute or appropriation, such as clients of Community Mental Health Centers.
3. Additional groups, such as other alcoholics.

C. Services could include:
1. Those services currently identified in statute (AS 47.30: outpatient and inpatient treatment, consultation, prevention and education, crisis stabilization, patient treatment, case management, daily structure and support, vocational services).
2. Those services identified in the state's 5-year comprehensive plan.
3. Services identified through needs assessments conducted by the Alaska Mental Health Board.
4. Any services identified by the Legislature either by statute or appropriation.

RECOMMENDATIONS

Because the work of the administration, the Alaska Mental Health Board, and the Interim Mental Health Trust Commission is ongoing, no specific recommendations are contained in this report. The Senate Special Committee on Mental Health will continue to work with these groups during the Second Session of the Sixteenth Legislature, and will bring to the full body any items that require legislative action. The Special Committee terminates upon convening of the First Session of the Seventeenth Legislature.

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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

Law offices of
JAMES B. GOTTSTEIN
406 G STREET, SUITE 206
ANCHORAGE, ALASKA 99501
(907) 274-7686
TELECOPIER (907) 274-9493

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[1];
45,000	acres to individuals;
3,000	acres to the University of Alaska; and
280,000	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).[2] In 1978[3] the legislature purported to abolish the trust by "redesignating" Mental Health Trust Lands as General Grant Lands.[4] 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[5], 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 "undesignated" 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[6]:

> 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[7] in the administration of the trust[8] 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 1978 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[9]., 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:

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 situation 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 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.
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> * * *
>
> 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'Cormick, 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[10] 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[11]:

> 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.
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> * * *
>
> [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[12] 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.
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> * * *
>
> 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.
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> * * *
>
> [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.[13] 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.[14]

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.[15] 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.

---

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[16] 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[17] 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.[18] 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.[19]

(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.

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400

April 17, 1990

RECEIVED APR 17 1990

Ms. Thelma Langdon
Chair
Alaska Mental Health Board
2363 Captain Cook Drive
Anchorage, AK 99517

Dear Ms. Langdon:

In accord with AS 38.05.800(a), the commissioner of natural resources is charged with determining the fair market value of the original one million acre mental health land grant under procedures approved by the Interim Mental Health Trust Commission (commission). In addition, the commissioner, with the approval of the commission, is to identify land within legislative designations that is equal in value to the original mental health trust lands.

On February 1, 1990, my designee to the commission submitted a minority report regarding procedures to determine the fair market value of the mental health trust and replacement lands. The report detailed the reasons for his dissent from the majority report, and outlined procedures used by the Department of Natural Resources (department) to produce a fair market value of $564,700,782.82 for the total original mental health trust lands.

On March 20, 1990, I received the final majority report of the commission. The report critiqued the minority report and confirmed a December 20, 1989 draft as the commission's final report. The December 20, 1989 report of the commission specifically approved procedures for determining the fair market value of the original mental health trust lands. The procedures produced a value of $2,243,000,000 for all land selected by or patented to the state under the Alaska Mental Health Enabling Act.

After reviewing the two reports and their respective valuation procedures, I have concluded that I cannot use either set of procedures and still act consistently with the law. Therefore, I have no choice but to declare an impasse as I am prevented from

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fulfilling my statutory mandate of determining the fair market value of the mental health land grant, as well as to identify equal value replacement land.

In retrospect, I believe Chapter 48, SLA 1987 set an unrealistic goal when it contemplated that all parties could work together on a consensus basis to implement the law. Initially, it appeared as though the consensus approach would be successful. Later in the process, particularly after initial land values began to emerge, the consensus process began to deteriorate as the parties began to disagree over valuation approaches. Since the legislation provided no specific mechanism to resolve such disagreements other than through the commission, the process soon became unworkable as the parties gravitated to their respective positions.

The Commission's Report

Chapter 48, SLA 1987 specifically required a determination of "fair market value." However, my reading of the commission's December 20, 1989 report causes me to conclude that fair market value is not what is produced by the procedures the commission majority approved.

For example, the review appraisers (who examined the work of the three opinion of value geo-panels valuing the surface estate) were instructed in writing by the lawyers for the plaintiffs and intervenors to determine "the highest value that can be supported in the market." Under the procedures approved by the commission majority, the resultant value was later averaged with the final adjusted fair market value determined by the geo-panels. These same review appraisers were also instructed by the same lawyers to look only at those individual mental health parcels which might have been "undervalued" by the geo-panels. As there was no corresponding search or review of any "overvalued" parcels, I believe this approach was disproportionately weighted to the high value end of the spectrum. I also conclude the commission acted arbitrarily when it decided to establish a final value of the surface estate by simply splitting the difference between the revised parcel values determined by the geo-panels and the unadjusted values determined by the review appraisers. In my opinion, the resultant compromise value bears no relationship to fair market value.

The most significant problem in the procedures approved by the commission majority in the December 20, 1989 report, however, lies with the hard rock mineral valuation. The commission

majority based its hard rock mineral value on the work and recommendations of two consultants hired independently by the lawyers for the plaintiffs and intervenors. The consultants used a discounted cash flow approach, producing a hard rock mineral value of $1.51 billion for the original mental health land grant. The minority member used a comparable sales approach, the standard for determining fair market value, producing a value of $73.5 million.

While I do not necessarily disagree with the income value approach, several assumptions used in that approach were incorrect. Dr. DeVerle Harris, a nationally recognized expert on valuation procedures and the discounted cash flow approach, noted several incorrect assumptions used by the consultants which resulted in a gross overestimation of the hardrock mineral value, as did the University of Alaska's Institute for Social and Economic Research. One such assumption was that there was full mineral production from all one million acres of the original grant on the date of valuation. The reality is that there is little if any production even today. The unreasonableness of the $1.5 billion value is clear when it is recognized that more than $4 billion in annual mineral production would be required to support that figure. Annual statewide production in 1987 was only $200 million.

Finally, in my view, the majority report also fails to adhere to the statutory requirement that there be consensus on the valuation procedures used. Section 2 of chapter 132, SLA 1986, as amended by section 9 of chapter 48, requires the commission to review valuation procedures proposed by the commissioner. AS 38.05.800(a), also enacted as part of chapter 48, requires the commissioner to use valuation procedures approved by the commission. Section 2 of chapter 132, as amended, requires the commission to then review the value thus determined. Particularly when it is remembered that chapter 48 was viewed by all parties as a framework for settlement, the only reasonable construction of these provisions is that neither the plaintiffs and intervenors nor the department can adopt valuation procedures over the other's objection. Yet that is what the commission majority has done. The December 20, 1989 majority report reflects the use of numerous procedures which were not proposed by the commissioner and are unacceptable to the department.

The Minority Report

AS 38.05.800(a) requires the commissioner to determine "fair market value" based on procedures approved by the commission. Several of the procedures included in the minority report were not approved by the commission.

I do believe, however, that the department took very seriously its charge to determine the fair market value of the mental health lands. Under the statutes the department normally operates under, there are numerous references to "fair market value" (i.e. AS 38.05.055, 38.05.057, 38.05.067, 38.05.068, 38.05.075, 38.05.087, 38.05.102, 38.05.105, etc.). The department has operated most of its disposal and lease programs using this appraisal standard. The interpretation of fair market value has been consistently interpreted and applied by the department over the years. I also believe that the values provided in the minority report accurately reflect fair market value.

Among the first procedural decisions made by the commission in September, 1987 was its adoption of the definition of "fair market value" proposed by the department. This definition was the same as that used by the American Institute of Real Estate Appraisers/Society of Real Estate Appraisers, and the same one used over the years by the department. Based upon this action, the department consistently used this definition while the commission later departed from its use.

Summary

Although I have no recourse but to declare an impasse, I believe there are ways to break this procedural logjam so as to achieve the primary goal of all affected parties--namely **to ensure that there is a guaranteed source of state funds from which the legislature would first appropriate to cover the needs of the state's mental health programs:**

1. Request that the court issue instructions prior to any further legislative action. There are several legal questions which could be answered before policy options are pursued. The Department of Law has advised that the court will issue advisory opinions which involve a trust, and trustees can obtain such instructions as they relate to their trust administration powers and responsibilities. I believe these instructions could be timely obtained and pledge to assist in their

development. The interim provision in Chapter 48, SLA 1987 that pays the trust five percent of the state's unrestricted general fund per annum could remain in effect until an advisory opinion is rendered.

2. Replace "fair market value" with "value" as it appears in AS 38.05.800(a).

3. Remove the requirement in AS 38.05.800(a) that the commission approve the procedures to be used to value the original grant and the replacement lands.

4. Again, consistent with #1 above, another possibility (although one which would not provide a guaranteed source of funds for the state's mental health program in perpetuity) would be to purchase the lands from the trust at fair market value over time and appropriate the proceeds for the state's mental health program. Over time, this would result in all the mental health lands being purchased from the trust and removed from trust status, with the proceeds of the sales going to the state's mental health income trust account. The Alaska Supreme Court seemed to authorize this approach in the Weiss decision when it stated that the remedy for lands which the state has sold is to pay the trust the fair market value of the lands at the time of sale, but that the state should receive a set-off against that liability for money it has spent for the state's mental health program, and that this could result in the state having no monetary liability to the trust (In pointing out this alternative, I am not suggesting that this is an appropriate policy for funding the state's mental health program. As the state's land manager, however, I feel compelled to point it out as a possible option for removing mental health lands from trust status so they can be managed for their highest and best use and not merely to raise revenue).

5. Replace the five year reappraisal requirement in Chapter 48, SLA 1987 with a simple index formula which accounts for inflation and appreciation. This index could then be implemented automatically, with the mental health income trust account adjusted on an annual basis.

I appreciate the immense importance and timely resolution of this very complex and sensitive matter. Accordingly, the department is prepared to offer any assistance that may be required to resolve this dilemma consistent with the Alaska Mental Health Enabling Act.

Sincerely,

Lennie Gorsuch

Lennie Gorsuch
Commissioner

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 20, 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[1] 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[2].

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-

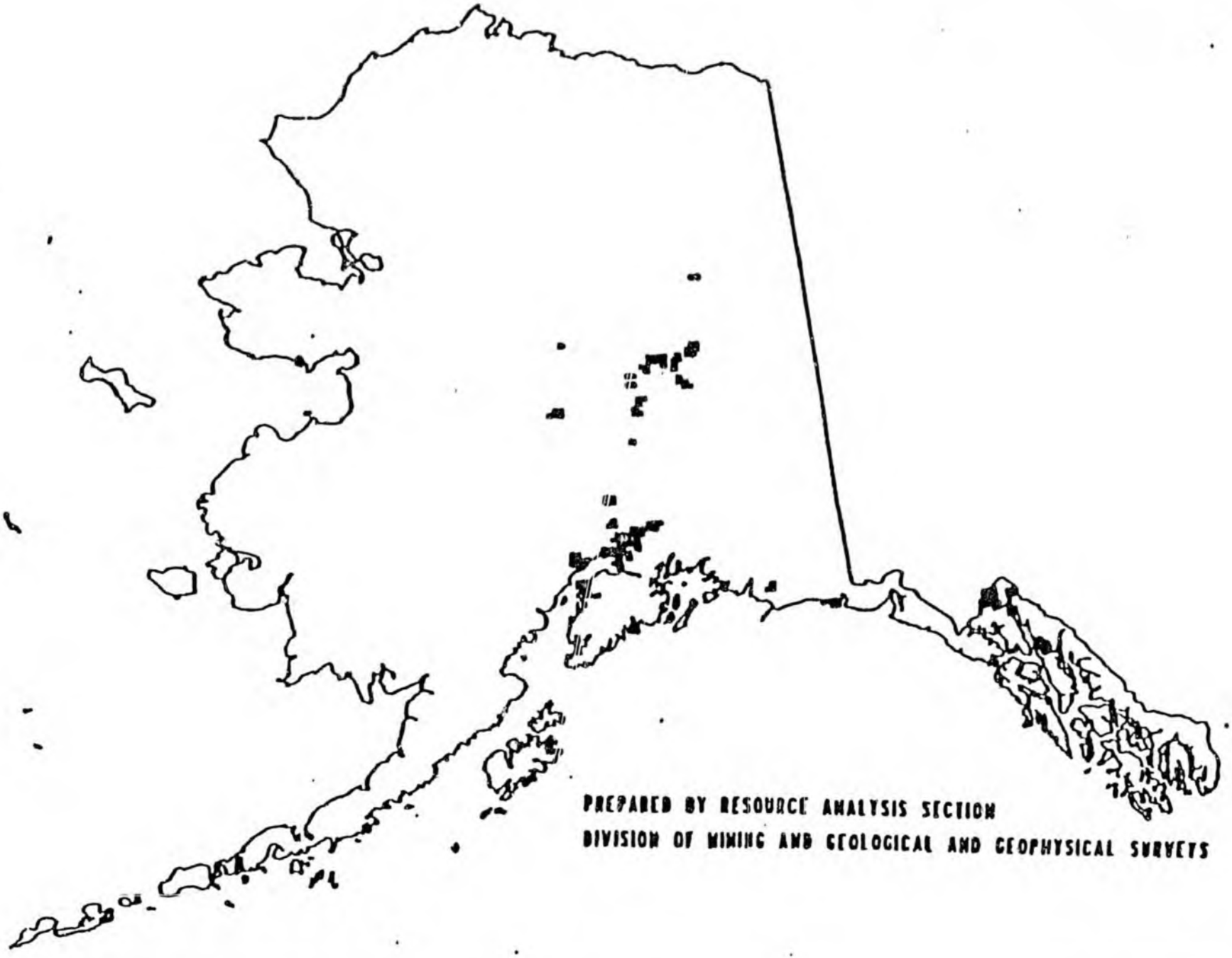
tent, the land selections made by the Territory and State of Alaska between 1956 and 1965 were based upon income analysis. Selections were anticipated to be suitable for development and targeted lands surrounding the principal urban centers and known commercially valuable natural resource lands along 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 hydrocarbon 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[3].

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.

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 24,1 987). 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.[4] 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 <u>for settlement purposes only</u>. 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[5] 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

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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[6]. 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[7], 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.[8] (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 DGGS'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 Ariey, 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	Disapproving	Abstaining
Commissioner Rogers Commissioner Selkregg	Commissioner Swope	

Date: November 7, 1989

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 796% 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 $407,668,683, 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[1].

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

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 case, 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 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)[1].

"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)[2]. 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 MHTLs, (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

CONTENTS

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 Koester 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 8, 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 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 <u>if</u> 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 <u>only</u> 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 "<u>Summary</u>" 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 $\$1.5 \times 10^9$ 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 (1.5×10^9) 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, <u>fair market value</u> 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 1.5×10^9 does not seem consistent with economic conditions and factors. As fair market value, 1.5×10^9 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 1.5×10^9 as a credible estimate of the fair market value of metal resources of the 1×10^6 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 x NSR x PWF (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 ÷ (NSR X 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 billion ÷ (0.04 x 8.514) = $4.43 + 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 <u>for free</u> from the time they were selected until they were closed to mineral entry by order of the Commissioner following the <u>Weiss</u> 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 <u>pay</u> 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 expanded 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/acr
5	1,135/ac
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 $0,000/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 desireable 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 IMHTC 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
Hardrock Minerals	73,403,459.00
Timber	36,243,253.00
Oil and Gas	495,998.00
Coal	432,866.00
Material Sources	undetermined

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.

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, 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.J. 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 DNR'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 B4).

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.