SB 118

February 1, 1990

Dear Senators and Representatives

Attached is a position paper recently adopted by the Alaska Alliance for the Mentally Ill regarding the issues surrounding the Mental Health Land Trust.

This is one of the many issue papers we have prepared on the topic and because it is well-reasoned and may present some new information, we would urge you to consider it.

I will be available to answer any questions you might have on Mental Health Issues as the lobbyist for the Alaska Alliance for the Mentally ill. Our membership represents over 300 families and consumers with mental illness in 13 separate affiliated groups in our state. The President of the organization is Francis Cater of Kodiak, Alaska.

Sincerly,

Sharron Lobaugh

Sharron Lobaugh
3340 Fritz Cove
Juneau, Ak 99801

cc: Francis Cater, Pres.
AKAMI

ALASKA ALLIANCE FOR THE MENTALLY ILL

4050 Lake Otis Suite 103
Anchorage, Alaska 99508
(907) 561-3127

413 7th Street # 12
Juneau, Alaska 99801
(907) 463-4822

THE ALASKA ALLIANCE FOR THE MENTALLY ILL

POSITION PAPER ON

THE MENTAL HEALTH LANDS TRUST

AND

CHAPTER 48

Adopted January 1990

ALASKA ALLIANCE FOR THE MENTALLY ILL

4050 Lake Otis Suite 103
Anchorage, Alaska 99508
(907) 561-3127

413 7th Street # 12
Juneau, Alaska 99801
(907) 463-4822

NISSEL A. ROSE
927 Clay Court
Anchorage, Alaska 99503
Tel: (907)277-6361

Senator Pat Pourchot, Chairman
Senate Special Committee on Mental Health

Re: Mental Health Trust Lands Settlement

Dear Senator Pourchot,

These are supplemental remarks to my oral testimony before your committee at the November 17 hearing. My interest in this subject is multiple: as the father of a mentally ill son; as a member of the Alliance for the Mentally Ill, and former president of the Anchorage Chapter; as counsel for the Alliance for the Mentally Ill on the intervenor's brief in Weiss et al v. State; as former legislator; and as a very concerned citizen.

The 3 page summary you provided at the hearing gives a very good thumbnail background, but suffers some shortcomings due to (1) its compactness, and (2) the fact that it looks at the "advantages of the settlement proposal", but fails to raise questions of disadvantages, or whether Chapter 48 really amounts to a settlement.

One of the witnesses at the November 17 hearing compared the handling of the Alaska Mental Health Trust with what would occur if one were to create a trust for the education of his son and provided that whatever trust proceeds might be surplus to the needs of the beneficiary could be expended by the trustee for his own purposes as he sees fit. I believe the speaker concluded that instead of a Harvard education, the son would probably wind up in a community college. I submit that the example did not go nearly far enough.

Suppose that, in the same scenario, the trustee had accepted the corpus, but never managed or invested any part of the trust corpus, never created a trust account, never kept or rendered any accounting. Instead, each year the trustee gave the beneficiary some funds out of his own pocket, as he deemed he could spare. Suppose further that after over 20 years of such practice, the trustee decided to appropriate the entire corpus and assign 1.5% of his own revenues in lieu of trust proceeds, but never made a deposit to that account, and simply continued to give the beneficiary whatever annual handout the trustee felt he could afford. From then on, the trustee sold some of the former trust assets, gave some away, created monuments out of other such assets, until another 4 years went by, and the beneficiary finally sued.

Instead of recognizing the error of his ways, the trustee used

his well staffed salaried lawyers to fight the litigation at every turn. Then, having lost in the Supreme Court, and having been ordered to reconstruct the trust, and manage it as originally intended, the trustee makes an offer of settlement whereby the trust assets are to be replaced by other assets owned by the trustee, chosen by the trustee, to be leased by the trustee from the trust, and the rental proceeds according to a stated percentage of value would be considered the trust revenues from which the needs of the beneficiary would be met. The beneficiary's needs would be established by another body appointed by the trustee, and whatever revenues might be surplus to those needs could be used by the trustee as he might see fit, and the trustee was not bound by the described needs or their designated budgetary values.

In order to work out this new arrangement, the parties agree to hold the litigation in abeyance. Another three years go by, during which the trustee fails, each year to abide by the determination of needs presented to him, and makes yearly appropriations short of the budget presented to meet those needs. In the meantime, the litigation remains pending in court.

I submit that the trustor, the beneficiary and the court would all have good reason to resent and distrust such a trustee-owner-landlord-tenant and, in effect, co-beneficiary to the extent that he determines the amount of surplus he is entitled to keep for himself.

The actual picture is even worse, as the trustee has not provided for any payment to the trust from the extraction of subsurface materials from the real estate assets, so that while the trustee gets richer from such subsurface assets, the value of the corpus diminishes as the years go by, and the needs of the beneficiary increase.

If your son were the beneficiary of such a trust, Mr. Chairman, would you, could you advise him to ratify such a settlement?

WHERE ARE WE?

Are we dealing with a misguided but well intended trustee who did not cross the "t"s or dot the "i"s, but has met the needs of the beneficiary nonetheless? Unfortunately, NO. The mentally ill (including the "Green Group" members) of Alaska do not fare well, and do not compare favorably with those of most other states. Because of inadequate facilities in Alaska's institutions, we have resorted to treatment of mental patients in correctional facilities. It is not uncommon to hear recipients of services for the mentally ill say that they are treated better at the Cook Inlet jail than at API.

Certification of API has been touch and go, and staffing has been a continuous problem. We have no forensic halfway house. Members of the mentally ill population too often fall unnecessarily into the criminal justice system. Only a minority of the mentally ill receive treatment or services, with the remainder experiencing a living hell, often winding up as part of the homeless, the street people, or as part of homes they involuntarily abuse emotionally and otherwise. Others are residents of our correctional system, some with medical care for their mental illness, and others without.

WHAT HAS THE EXECUTIVE BRANCH DONE?

This is one instance where it is easy to be non-partisan. Every governor, Democrat and Republican, has participated in the self-serving-trustee scenario described above, every year since 1956. Each has included yearly mental health appropriations in the budget without regard to the trust, and without effort to create an appropriate trust management. At no time has any governor of Alaska presented a program to achieve an acceptable level of care and services for the mentally ill.

If anybody should be aware of the extent of needs, of the long practiced failure to carry out the fiduciary duties of a trustee, it is our present governor, Steve Cowper. As attorney in private practice, he was the attorney of record who filed and prosecuted the Weiss v. State case until he became a candidate for the office he now holds.

In his present position, Governor Cowper has maintained a hands off policy, letting his Attorney General fight his former clients, with the assistance of various departments of his cabinet. There is good reason to believe that as one who is ve familiar with the bona fides of the the plaintiff's - ction, the governor could and should have used his office to mpt to rectify the wrongs of more than 30 years. Apparently, it goes with the position to look out for the interest of the trustee as opposed to the interest of the beneficiaries.

Unfortunately, the continued opposition to the mentally ill, plaintiff in the litigation, is the administration, and that includes the Department of Health and Social Services with which and through which care and services are dispensed to the mentally ill. Of course, the same department competes for dollars to be appropriated for its many other concerns, and suffers from a conflict of interests as a member of the trustee team because of those budgetary concerns.

WHAT ABOUT THE LEGISLATURE?

Just as with the various governors, the same bi-partisanship has touched both houses of every legislature since 1956 in failing to carry out the fiduciary responsibilities and duties of trustee.

It was up to the legislature to create the necessary managerial system for the trust, proper handling and investment of the corpus, adequate formulation of the Alaska Mental Health Plan, and funding to carry out the Plan. Not only did that not happen, but it was the legislature that enacted the wrongful appropriation of the corpus in 1978. Subsequent legislatures continued along the same path until the attempt to resolve the legal dispute by way of HB 92 which became Chapter 48, SLA 87. Even from that point on, yearly appropriations have fallen short of funding the Alaska Mental Health Plan, even though the Mental Health Trust Income Account exceeded considerably the very reasonable Mental Health Board's budget requests.

What both the legislature and the governor have demonstrated clearly and emphatically since 1987 is that the "settlement" formula settles nothing. The same conflicts of interests continue to exist in both the legislative and the executive branches that constitute the trustee. Both look at their total budgetary needs, and at the fact that, as far as they are concerned, whatever is not appropriated for mental health out of the Mental Health Trust Income Account is available "for other public purposes".

As state income continues to decline in the future with the expected drop in oil and gas revenues, the temptation to create available surplus in the Trust Account can only increase at the expense of the Mental Health Plan, and thus at the expense of the beneficiaries.

DISADVANTAGES OF CHAPTER 48.

The following is a seriatim review of disadvantages of Chapter 48:

1. Sec.1 (a) (15) -(17) and (19) negatively portray "advocates of stringent mental health trust land management" vis a vis advocates of "highest and best use". The first group is intended to describe the plaintiffs, intervenors and their supporters as the black hats, while the second group, the wrong-doing trustee-state, is the white hatted hero.

2. Sec.1 (a) (22) assumes that the assertion of a "substantial legal question" about an alleged conflict with the prohibition

against dedicated funds in Art. IX, Sec. 7, is sufficient to abandon the concept of preservation of the corpus in perpetuity if it consisted, in part, of money. The section raises at least two erroneous conclusions:

(a) The possibility of a substantial legal question does not, normally, keep the legislature or the governor from enacting a bill into law. How well I recall presenting the legislature with subtantial legal question about the validity or constitutionality of a bill on the floor of the House, only to have supporters of the bill retort that if someone wished to challenge it, the courts would have the opportunity to pass on the question. Examples that readily come to mind include a number of state preference laws for employment, contracting, right of access to courts, and, of course, the 1978 wrongful appropriation of mental health trust lands, all of which were judicially defeated.

(b) There are "subtantial legal questions" about the validity of the Chapter 48 approach, such as failure of the trustee to manage the trust, failure of the trustee to invest and ADMINISTER THE LAND, AS WELL AS ANY INCOME FROM THE LAND AND PROCEEDS FROM DISPOSITIONS OF THE LAND AS A PUBLIC TRUST. (See Sec. 202 (e), Alaska Mental Health Enabling Act, and Ch.48 Sec.1 (a) (3)). There is also the question of failure of the state to comply with the Procurement Act in the leasing of these lands. In fact, if substantial legal questions as to a bill were to stop the legislature, we would see a great deal less legislation. The argument only seems to have merit when it stems from a majority of the legislators.

(c) The obvious intent of Congress, as stated in Sec. 202(e), was that the trust consisted not only of the land, but also of its income, and proceeds from sales. It was intended that the land produce money and/or other property, that it be "sold, leased, mortgaged, exchanged or otherwise disposed of . . . in order to obtain funds or other property to be <u>invested, expended or used</u> by the Territory (now State)." Note particularly that Alaska is not free to do all these things in any manner it sees fit, but that the legislature must exercise this broad authority "in a manner compatible with the conditions and requirements imposed by this Act."

Thus, if one reads these instructions and guidelines as a road map for the trustee, it should lead to the inescapable conclusion that none of the monies generated lose their "trust" character until after the needs of the Mental Health Plan have been met, and nothing requires that surplus, if any, be determined annually. Obviously, mortgages and investments are not normally for a life of one year or less, but that is the convoluted conclusion reached by the State-trustee in order to

keep its hand in cooky jar.

Recognizing that the income and proceeds are part of the trust until surplus to the needs of the Mental Health Plan are met, it follows that there can be no conflict with the prohibition against dedicated funds. Only in this manner can the trustee's functions, responsibilities and duties be carried out and discharged, and only when a surplus is declared on a fair basis within the intent of the trustor can such surplus become a part of the general funds, subject to appropriations for other public purposes, and, as such, subject to the prohibition against dedicated funds.

The fact is that there has never been any investment or management of the corpus as intended, and as instructed, at any time past, and Chapter 48 does not contemplate any at any time in the future. As it has always done, the legislature skips over the mandate that the land AS WELL AS income and proceeds be administered as a trust.

(d) Sec. 1 (a) (20)-(21) aver that the state has the authority to remove land from the trust IF THE TRUST IS COMPENSATED for the fair market value of the land, but that the state is not financially able to provide such cash compensation and will not be so able in the foreseeable future. So what? There are other ways to take care of that kind of problem. There could be exchanges, and it or they would not necessarily have to be of the same kind, i.e. land for land. Such is provided for in the Enabling Act. Or, the state as "buyer" could do that which most purchasers of real property do, namely become a mortgagor to the trust to the extent of the value of part of the trust lands. That, too, is specifically provided for by the Enabling Act. And since the mortgage payments are part of the corpus and are administered as a trust together with the land, there can be no constitutional conflict. State revenues contain many Federal source funds that, because they are dedicated federal funds, remain dedicated as an exception to the prohibition. There is nothing novel about the concept, and it well established and accepted.

(e) Sec. 1 (a) (25) commits the same error that has been committed through the years and discussed above, by providing that the rental value of the trust lands be identified as an account in the general fund. In order to have the income and proceeds managed together with the land as a trust, and in ordr to permit investment, mortgage, exchanges and other trust management tools, these funds should not be fungibble and co-mingled with general funds any more than a lawyer's trust account or any fiduciary's accounts should be co-mingled with his own.

This subsection suffers from another infirmity. Rent is to be a stated percentage of the appraised value of the land, but nothing is said about compensating the trust for any depletion in value due to removal of oil gas, minerals, other assets such as standing timber, or changes in topography by acts of the state-lessee, or with its consent. Thus, the state-trustee-owner-landlord-tenant-manager could excavate, deplete the land of value, keep all benefits and royalties, and then pay less rent for the devalued land. That would obviously not be management by the trustee in the best interest of the beneficiary. But Chapter 48 fails to address the problem.

(f) Most of the problems with Sec. 1 (a) (27) have been covered above, except for the fact that the Mental Health Board's function is described as to assist and advise the legislative and executive branches. In other words, the Board is not shown as having any real jurisdiction or authority. The extent to which the legislative and executive branches are guided by the Board's recommendations is painfully evident from the appropriations made since 1987.

(g) reference to portions of Chapter 48 beginning with Sec.2 are by AS numbers.

AS 37.14.011 (a) - (c) these issues have been discussed in detail hereinabove, except for the valuation to be by DNR, without active participation by the Board or anyone on behalf of the trust or the beneficiaries. The conflict is self evident.

AS 37.14.021. This section fails to give the legislature any guideline, control or restriction as to appppropriations "to meet the necessary expenses of the mental health program of the state." The lessons of the past teach us that this approach amounts to putting B'rer Rabbit in the briar patch. The temptation to create surpluses "for other public purposes" has been covered above. Furthermore, the format is contrary to the management and investment as a trust together with the land, and promotes dissipation of trust assets consisting of income and proceeds. The only recourse apparently left to frustrated beneficiaries is to return to the courts, assuming that beneficiaries can keep on marshalling their forces against the strength, wealth, and litigiousness of the state.

AS 47.30.661 et seq. It should be obvious that the Board has very limited powers and jurisdiction. Although designated as the advocate of the beneficiaries before the executive and legislative branches, it has no power to sue or be sued, its recommendations are just that, recommendations that need not be followed and that can be deviated from with or without stated basis in facts, and without any ability to carry

out its program or see to it that it is carried out as intended.

RECOMMENDATIONS:

1. The conflicts of interests of the state-trustee-owner-landlord-tenant-manger-and alleged beneficiary of self-serving declared surpluses, coupled with the political process, the expected reduction in state revenues coupled with inflation-fanned future state budgets, together with competing interests of DHSS, Revenue, DNR et al, and past interpretations of the Enabling Act and other breaches of the trustee's fiduciary duties by both the legislative and executive branches give more than ample evidence of the fact that just as a bank establishes a separate Trust Department, the State of Alaska needs to take the trustee's functions out of the political process.

2. Just as the Permanent Fund has been effectively removed from the reach of both the legislative and executive branches, and other activities have been entrusted to public corporations such as AHFC, ASHA, the Alaska Railroad and others, it seems that the best way to have the trust managed in the interest of the beneficiaries is to create an independent trustee, preferably by way of a public corporation, with the power and duty to administer the trust, its corpus, income and proceeds, subject to proper oversight and reporting. There is adequate precedent for the creation of such a Mental Health Trust Corporation or Authority (hereinafter referred to as MHTC).

3. The MHTC should have its own counsel, not connected with the AG's office.

4. MHTC should be empowered to manage, invest, re-invest, lease, mortgage, exchange assets other than designated lands leased by the state, and do and perform all things that a prudent trustee may do and perform.

5. MHTC should participate with DNR in periodic re-appraisals of land values for purposes of establishing fair market values as the basis of rental. In the event of disagreement between these agencies, a method of resolving conflicts should be provided.

6. The Mental Health Board, within MHTC, should prepare the Mental Health Plan, with its budget, on a 5 year plan with annual increments, including capital improvements, facilities, and services, and, where necessary, in conjunction with other agencies such as DHSS, Corrections, and possibly others.

7. The Board should be given the power and duty to carry out the Plan, and to this end, the Divison of Mental Health in DHSS should be shifted to the jurisdiction of the Baord.

8. The statute should spell out the interpretation of the Mental Health Enabling Act as including land, other assets, including income and proceeds as part of the trust to be administered, with declared surplusses, if any, to be accessible to the state for incorporation into the general fund and use for other public purposes at stated interval of 3 or 5 years.

9. The Alaska Mental Health Plan and proposed budget therefor, prepared by the Board, reviewed by MHTC, DHSS, and possible other distributees, should be submitted to the legislature. The legislature, in turn, could (a) approve it as submitted, or (b) amend it in whole or in part, together with specific findings supporting substantive and/or budgetary changes, thus preserving the legislative prerogative of final oversight and disposition.

10. The statute should specifically provide that it is intended as a settlement and final resolution of the litigation, to be concurred in by the litigants, and to be approved by the court and incorporated into the final judgment, with leave for future amendment by the legislature with concurrence of MHTC as representative of the beneficiaries, and that failing such concurrence by the parties and approval by the court, within a given time frame with possible agreed continuance, the said statute shall be null and void and deemed repealed, and the litigating parties returned to their prior status in court.

The previous proviso is for the reason that it is not possible for the state to end the litigation unilaterally. I am well aware of the fact that you, Mr. Chairman, have stated that it was the specific intent of the legislature that the statute be a settlement, but the mechanics of cocncurrence by the parties, approval by the court and incorporation of the settlement into a final judgment were not made part of Chapter 48, as I believe is necessary to achieve a settlement that would have some binding efect on future legislatures and administrations.

Surely, other minds than mine will come up with other wrinkles, criticism, and refinements, but I believe that the foregoing represents a fair analysis of the past and present, as well as a feasible and sound approach for the future.

Respectfully submitted,

Nissel A. Rose

cc: Alaska Mental Health Board
Alliance for the Mentally Ill
Alaska Mental Health Association

Mental Health Consumers of Alaska
Advocacy Services of Alaska
James Gottstein, Esq.
David Walker, Esq.

AKAMI

FEB 0 4 1990

February 1, 1990

Senator Paul Fischer
Chairman of Senate
Health and Social Services
Committee
Alaska State Senate

Dear Senator:

The Alaska Alliance for the Mentally Ill is interested in presenting testimony or information to your committee on SB 118 by Senator Uehling regarding medical assistance coverage for adult day health care and respite care.

There are a number of issues related to medicaid options which have been concerning our organizations for a number of years and we would like to urge any studies be expanded to include the mentally ill as well.

There is strong evidence that increasing the options to provide adult day care and respite care for the mentally ill will be a benefit to the State by increasing medicaid reimbursements for such services.

We believe a re-examination of the options has been in order for a long time and are hopeful that the mentally ill will be considered among those who will benefit from this re-examination.

I will be lobbying for the Alaska Alliance for the Mentally Ill this session and can be reached at 789-5028 or 463-4822. I would appreciate being notified of any hearings on this issue.

Sincerely,

Sharron Lobaugh

cc: Senator Uehling
Representatives: Boyer, Ellis, Ulmer, a

ALASKA ALLIANCE FOR THE MENTALLY ILL

4050 Lake Otis Suite 103
Anchorage Alaska 99508
(907) 561-3127

313 7th Street # 12
Juneau Alaska 99801
(907) 463-4822

THE SALVATION ARMY
OLDER ALASKANS PROGRAMS
1709 South Bragaw
Anchorage, AK 99508-3400
(907) 279-7658

March 29, 1990

Senator Paul A. Fischer
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, AK 99811

Re: Senate Bill 118

Dear Senator Fischer:

We are requesting your support and approval for Senate Bill 118.

Any consideration given the senior constituency eventually aids the entire population of Alaska.

Your concern and assistance is greatly appreciated.

Sincerely,

Lillian D. Wilder

Lillian Wilder
Executive Director

Funded by The Salvation Army,
and Federal, State, and Local Funds