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SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 4/29/92

FURTHER: Judiciary
Finance

Date of 5-Day Notice: Received
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: May 1, 1992

Resources Committee considered SB 475

"An Act amending and reenacting provisions of ch. 66, SLA 1991, relating to the trust established by the Alaska Mental Health Enabling Act of 1956; and providing for an effective date."

and recommends:

[] replace with CS SB 475 (Res)

[] attaches amendment(s)

[] adopts _____ Letter of Intent

[] further referral to the _____

same title
 new title
 technical
title change
(HB only)

do pass

[] do not pass

[] no recommendation

[] individual recommendations

NEW FISCAL NOTES: Dept/Date

[] zero fiscal notes _____

[] fiscal notes _____

[] appropriation--no fiscal note

PREVIOUS FISCAL NOTES: Dept/Date

[] Governor's bill with fiscal notes:
zero fiscal notes Sen Rescumes 4/30/92

fiscal notes _____

DO PASS

[Handwritten signatures]

OTHER RECOMMENDATIONS:

[Handwritten signature]
Chair, Signature and Recommendation

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

April 27, 1992

Hon. Lloyd Jones, Chairman
Senate Resources Committee
Seventeenth Alaska State Legislature
Room 30
State Capitol
Juneau, Alaska 99801-1182

Re: SB 469 (mental health lands trust)

Dear Senator Jones:

During Attorney General Charles E. Cole's testimony on Senate Bill 469 at the Senate Resources Committee on April 24, 1992, he expressed his fundamental objections to the bill as a settlement of Weiss v. State, 4FA-82-2208 Civ., the mental health lands litigation. He also mentioned that we had identified a number of legal problems with the bill in the short time we have had to review it. Those legal problems are outlined below.

It is our understanding that the intent of the bill is to shorten the time it will take to gain judicial approval of the settlement of the Weiss litigation embodied in Chapter 66, SLA 1991. To that end, and as an alternative to the provisions of SB 469 as currently drafted, we suggest that the legislature consider three amendments to Chapter 66 which would eliminate any legal argument as to the validity of Chapter 66 (1) under section 6(i) of the Alaska Statehood Act, (2) with respect to the hypothecated lands, and (3) regarding the application of AS 38.04 and 38.05 to the process of reconstituting the trust. The proposed amendments, along with a brief explanation of each one, also are set out below.

I. SB 469 would violate the Alaska Mental Health Enabling Act.

Section 3 of SB 469 would require that all revenues from the reconstituted mental health trust lands -- i.e., both principal from the sale of trust land or extraction of nonrenewable resources and income from leasing the land or the sale of renewable resources -- be deposited in the mental health trust fund, a permanent fund from which only the earnings may be spent. Subsection 202(e) of the Alaska Mental Health Enabling Act (the federal act that created the trust), however, provides in part that "such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska."

WALTER J. HICKEL, GOVERNOR

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We believe we can defend the deposit of principal from the lands in the mental health trust fund under general private trust law principles. But income from trust lands is normally spent for trust purposes, and Congress clearly intended that income from mental health lands be spent first for programs before being used in any other way. Depositing the income directly in the fund, therefore, is prohibited by the Act.

II. SB 469 would create an unconstitutional dedicated fund.

Article IX, section 7 of the Alaska Constitution prohibits the dedication of state revenues to specific purposes "unless required by the federal government for state participation in federal programs" or if the dedication pre-dated the constitution. As noted in the preceding section, section 3 of SB 469 would dedicate trust land income to the mental health trust fund, and such income could not be spent on mental health programs as Congress required when it created the trust originally.

Because the dedication of income to the permanent mental health trust fund is not required by federal law (and, indeed, automatic dedication is prohibited by the Enabling Act), it would violate article IX, section 7.

III. SB 469 would violate the single appropriation bill requirement.

Chapter 66 imposes several restrictions on appropriations of income from the reconstituted mental health land trust, including a requirement that the governor introduce a separate appropriation bill limited to appropriations from the mental health trust income account. SB 469 would apply the separate bill requirement to a percentage of the unrestricted general fund. Article IX, section 12 of the Alaska Constitution, however, requires that the governor "submit a general appropriation bill to authorize the proposed expenditures [of all departments, offices, and agencies of the State]." The important objective of the provision is to ensure that the legislature considers the expenditure of the state's general revenues comprehensively and not in a piecemeal fashion.

As long as it applies only to revenues from the trust lands that will be reconstituted under Chapter 66, we can defend the separate bill requirement on the ground that the Enabling Act requires that income from mental health lands "shall first be applied to meet the necessary expenses of the mental health program of Alaska." Applying it to a percentage of general fund revenues instead of just those from mental health lands, however, would violate article IX, section 12.

IV. Land management would remain a question under SB 469.

The proponents of SB 469 suggest that, because SB 469 requires the Alaska Mental Health Trust Authority to contract with the Department of Natural Resources to manage the land unless the Authority determines that it is in the best interest of the trust to do otherwise, SB 469 allows continuity of management and gives affected industries some comfort with respect to trust ownership of the land.

What they fail to recognize, however, is that the courts will require that trust lands be managed in a fiduciary manner and in the best interest of the trust. Whether DNR or the Trust Authority exercises management duties, therefore, the current state pricing structure and policies for land use could not be applied to trust lands unless they meet fiduciary standards and are in the best interests of the beneficiaries and not just the best interests of the state standard employed by DNR for non-trust lands. The "comfort" to affected industries therefore is illusory.

V. SB 469 provides no protection to third party interests and would create potential liability for the state.

As under Chapter 66, SB 469 would reconstitute the trust with some "encumbered land" -- i.e., land subject to an oil or gas lease, coal lease, or other lease, timber contract, mining claim, sale of materials, land use permit or right-of-way. Under the Settlement Agreement implementing Chapter 66, the plaintiffs agreed that the trust would be bound by the terms of such encumbrances because the trust will be compensated to the extent those encumbrances reduce the value of the lands returned to the trust.

Nothing in SB 469, however, provides that the trust will be bound by the terms of the encumbrances, nor does it provide compensation for those encumbrances. Instead, the trust would be given an "all or nothing choice" to either accept the encumbrance and receive no compensation in return for the devaluation or contest the validity of the encumbrance and, if successful, receive the parcel with no devaluation. Faced with this choice, the trust would vigorously contest the validity of third party interests.

If the trust were to successfully challenge an encumbrance or some of its terms, an affected third party might then try to hold the state liable for the termination of the encumbrance or an increase in rents or royalties. The state would then have settled the Weiss case only to expose itself to numerous other lawsuits.

VI. SB 469 would preclude development of some land currently available for development.

Section 5 of SB 469 would pledge all original mental health lands in state parks, state forests, state wildlife refuges, etc., as security for the state's performance under the bill. Under the Settlement Agreement implementing Chapter 66, and to the extent permitted by the statutes governing the areas, those lands will be available for development prior to court approval of the settlement if plaintiffs agree and after court approval whether plaintiffs agree or not. If they become security for the state's performance as SB 469 would provide, however, the state would be obligated not to diminish their value. In other words, even if otherwise allowed by law, development would be prohibited.

VII. SB 469 does not protect Native allotments.

Under Chapter 66 and the Settlement Agreement, original trust land encumbered by valid Native allotment claims will not be returned to the trust; instead, the trust will receive other state land to compensate for any value lost to the trust as a result of those claims. As a result, the state will decide whether to challenge the validity of Native allotment claims and will review Native allotments on original trust land under the same standards applied to general state land instead of under a higher trust standard of review which would result in more challenges. Under SB 469, land with allotment claims would go back to the trust, and the trust would be almost compelled to challenge each claim because, if the claim were found valid, the trust would receive less valuable over-selection land.

VIII. The provisions of the April 6, 1992 Settlement Agreement cannot be simply cut and pasted into a new agreement.

Supporters of SB 469 have argued that, as a time saving measure, all that will be necessary for a new Settlement Agreement is to cut and paste pertinent parts of the Chapter 66 Settlement Agreement. This will not be possible because each provision of the April 6 Settlement Agreement was negotiated in the context of Chapter 66.

For example, the Settlement Agreement defines an encumbrance to mean every kind of lease, permit, contract, right-of-way, interagency land management agreement, etc. If that very expansive definition is used in a new settlement agreement, very little original trust land would be returned to the trust because SB 469 provides that only certain encumbered land is returned to the trust. As another example, Chapter 66 provides for conveyance of the reconstituted trust lands to the Trust Authority, and the Settlement Agreement includes detailed provisions for such conveyances and for proper accounting following such conveyance.

Under SB 469, trust lands will not be conveyed. Instead, they will simply be redesignated, and an entirely different approach would have to be taken in any implementing settlement agreement.

For all of the foregoing reasons, as well as those Attorney General Cole expressed during his testimony before the Committee, he has asked us to make clear that he will have to recommend that Governor Hickel veto SB 469 should it pass the legislature in its current form. In his view, it is not appropriate to pass such legislation as a settlement of litigation, especially since Chapter 66 will settle the case on terms which are fair to both the trust and the state.

At the same time, Attorney General Cole understands the legislature's and affected third parties' desire to reduce the amount of time it will take to get court approval of Chapter 66, however. To accomplish that result, we have identified three amendments to Chapter 66 that would significantly advance that goal. It is our understanding that all of the attorneys who have signed the Settlement Agreement support these amendments.

The first proposal would make clear that section 6(i) of the Alaska Statehood Act applies to the Trust Authority's management of the reconstituted mental health trust:

AS 37.14.009, added by sec. 10, ch. 66, SLA 1991, is amended by adding a new subsection to read:

(c) In exercising its authority under (a)(2) or (3) of this section, the authority shall comply with the restrictions imposed by section 6(i) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958).

This result is already provided for in the Settlement Agreement as a term of the patent documents which will be used for conveyance of land to the Trust Authority. The amendment would simply incorporate the parties' agreement in statute, and eliminate any argument that Chapter 66 violates section 6(i).

The second proposal is not really an amendment to Chapter 66. Instead, it would simply ratify the hypothecated lands provision:

Section 56, ch. 66, SLA 1991, is confirmed and re-enacted in its entirety to read:

Sec. 56. SECURITY FOR COMPENSATION TO TRUST. (a) To secure the reconstitution ... [etc.].

This would eliminate any legal argument that the hypothecated lands provision of Chapter 66 was not passed by the legislature in

accordance with constitutional requirements.

The third proposal would amend two subsections of section 55 of Chapter 66 to make clear that the criteria in section 55(e) are substitute safeguards of the public interest for those contained in AS 38.04 and 38.05, and those statutes do not apply to the reconstitution process:

Subsection (e), sec. 55, ch. 66, SLA 1991, is amended to read:

(e) Additional factors prescribed as safeguards of the public interest that shall be considered in determining whether land proposed for exchange under this section should be conveyed by the commissioner of natural resources in trust to the authority are:

(1) ensuring ... [etc.]

Subsection (g), sec. 55, ch. 66, SLA 1991, is amended to read:

(g) The provisions of AS 38.04, 38.05, and 38.50 do not apply to exchanges under this section.

These amendments would make clear that there are significant legal safeguards of the public interest as the reconstitution process moves forward.

We must stress that these amendments are not necessary for the state to prevail against the legal challenges to Chapter 66. If passed, however, they will effectively eliminate the challenges on the specified grounds and significantly hasten judicial approval of Chapter 66.

We urge you to give the proposed amendments serious consideration. If we can answer any questions, please contact us at your convenience.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By:

G. Thomas Koester

for Brian Bjorkquist
Wendy S. Feuer
Assistant Attorneys General

G. Thomas Koester
G. Thomas Koester
Special Assistant Attorney
General

Page 2, line 11:

Insert a new section, and renumber subsequent sections accordingly:

"*Sec. 4. Section 55(h), ch. 66, SLA 1991, is amended to read:

(h) If agreement cannot be reached between the plaintiffs in *Weiss v. State of Alaska*, 4FA-82-2208 Civil, and the commissioner of natural resources under (f) of this section as to appropriate lands to be conveyed to the trust as compensation or as to the value of the original lands taken or of replacement lands, the superior court [ALASKA SUPREME COURT] shall resolve the disagreements using the criteria set out in this section. The superior court [ALASKA SUPREME COURT] may order the commissioner of natural resources to appropriate state land to the trust without further legislative authorization."

Page 2, line 28:

Insert a new section, and renumber subsequent sections accordingly:

"*Sec. 5. Section 57, ch. 66, SLA 1991, is repealed and reenacted to read:

*Sec. 57. JURISDICTION ASSIGNED TO THE SUPERIOR COURT. (a) The superior court is the court of original jurisdiction to hear and determine any dispute arising under secs. 54 - 56 of this Act.

(b) The superior court may refer the proceedings under this section to a special master."