

SB

382

SFIN

FILE

SENATE FINANCE COMMITTEE REPORT

DATE: 9/26/94

FURTHER:

Date of 5-Day Notice: 9/20/94
(in accordance with Uniform Rule 23)

DATE TURNED
INTO OFFICE: 9-26-94

Finance Committee considered SENATE BILL NO. 382

"An Act relating to the mental health land trust, the mental health trust income account, and the mental health land trust litigation, Weiss v. State, 4FA-82-2208 Civil, and amending ch. 66, SLA 1991, and ch. 5, FSSLA 1994 relating to the trust, the account, and the litigation; and providing for an effective date."
and recommends:

- replace with _____ CS _____ (FINANCE)
- or adopt previous _____ CS _____ (_____)
- attaches amendment(s)

- same title
- new title
- technical title change (HB only)

adopts _____ Letter of Intent

further referral to the _____

do pass

do not pass

no recommendation

individual recommendations

NEW FISCAL NOTES

Department	Date	Zero	Fiscal

PREVIOUS FISCAL NOTES

Department	Date	Zero	Fiscal
OMB/All agencies	9/22	0	

Appropriation No Fiscal Note

DO PASS:

[Signature]
[Signature]
[Signature]
[Signature]

OTHER RECOMMENDATIONS:

1. [Signature] no pass
 Co-Chair: Signature/Recommendation

2. [Signature]
 Co-Chair: Signature/Recommendation

FISCAL NOTE

No. 1

Bill Version: SB 382

(S) Publish Date: 9-26-94

**STATE OF ALASKA
1994 LEGISLATIVE SESSION**

Revision Date: 9/22/94 Dept. Affected: All Agencies
 Title: An Act relating to the mental health trust, trust income account and litigation BRU: _____
 Component: _____
 Sponsor: Rules Committee
 Requestor: Office of the Governor COMPONENT SERIAL NO. _____

Expenditures/Revenues	(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
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 EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY94) cost: \$ _____

POSITIONS						
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nancy Slagle *Nancy Slagle*
 Division: Division of Budget Review
 Approved by Commissioner: Nancy Bear Usera
 Agency: Office of the Governor

Phone: 465-4681
 Date: 9/22/94
 Date: _____

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ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Finance

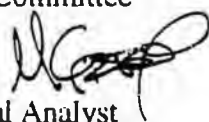


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September 26, 1994

TO: Representative Larson
Representative MacLean
Co-Chairs
House Finance Committee

Senator Frank
Senator Pearce
Co-Chairs
Senate Finance Committee

FROM: Michael Greany 
Legislative Fiscal Analyst

RE: Analysis of Mental Health Special Session Draft Legislation

The Division of Legislative Finance has prepared the attached analysis to assist you in your understanding of the September 21, 1994 draft legislation.

The principal fiscal analysts assigned to the mental health issue are Susan (Sorenson) Taylor, 465-5410 and Fred Fisher, 465-5411. Please refer any questions you may have to them or for further assistance you may require.

cc: Senator Randy Phillips, Chairman
Legislative Budget and Audit Committee

Analysis of the Effects of the 9/21/94 Draft Amendments to the Mental Health Trust Settlement

Sources:	Ch 6, FSSLA 1994	
	as enacted	per 9/21/94 draft amds (estimated)
Mental health trust income account (AS 37.14.011) (1)	33,000.0	40,700.0
Department of Natural Resources - mental health trust income in the general fund (2)	11,700.0	13,000.0
Proceeds from sale of Department of Natural Resources land sale contract portfolio (3)	25,000.0	16,000.0
Constitutional Budget Reserve Fund	130,300.0	130,300.0
Total	200,000.0	200,000.0

(1) Chapter 5, FSSLA 1994 repealed the Mental Health Trust Income Account (MHTIA) on its effective date, June 24, 1994. Section 3 of the draft amendments to Ch 5, FSSLA 1994 and Ch 66, SLA 1991 would reinstate the MHTIA in order to provide a valid funding source for appropriations made from that source. AS 37.14.011 (b) & (c) which provided the income source (6% of unrestricted general fund revenues) of the MHTIA were also repealed by Ch 5, FSSLA 1994. The repealed income provision is not reinstated but replaced by section 5 of the draft amendments to Ch 6, FSSLA 1994, which appropriates the amount necessary to fund MHTIA appropriations including FY95 operating and capital from the general fund. Section 4 of the draft amendments to Ch 6, FSSLA 1994 identifies the MHTIA as one of the sources for covering shortfalls in other funding sources, such as the land sale contract portfolio. As stated previously, the amount needed to fund MHTIA appropriations will be forthcoming from the general fund.

(2) Department of Natural Resources - mental health trust income in the general fund. Section 4 of the draft amendments identifies these funds as a source for covering shortfalls in other funding sources. As of September 20, 1994, an additional \$1.3 million would be available from this source, due to the receipt of additional coal royalties and other income.

(3) The actual value of the portfolio is unknown at this time. For the purposes of this analysis, the value is conservatively estimated at \$16 million. It is assumed that the value will be less than the \$25 million originally estimated due to withdrawal of certain types of contracts from the portfolio, the increase in interest rates, and the receipt of additional payments on principal since the initial estimates were made. DNR is in the process of soliciting bids for the land sale contract portfolio. The actual value of the portfolio will be known after the bids have been opened, which is expected to occur on October 14, 1994.

**Comparative Analysis of FY95 Mental Health Spending
Based on DOR Spring Revenue Forecast, Mid-case**

	8/15 spend plan	9/21/94 draft amds
FY 94 MHTIA Balance	48.0	47.7
FY95 Revenues, @ Spring mid-case \$13.97/bbl.	101.8	
Estimated FY95 general fund transfer, per section 5 of draft amendments to Ch 6/94		109.6
FY95 AVAILABLE	149.8	157.3
FY95 Expenditures		
Operating-Mental Health	106.4	106.4
Education	8.1	8.1
Capital	0.4	0.4
Special Appropriations/Fund Transfers	1.1	1.1
New Legislation	0.6	0.6
From MHTIA to MHTF, estimated	33.2	40.7
FY95 EXPENDITURES	149.8	157.3
FY95 MHTIA Balance	0.0	0.0

Ch 5, FSSLA 1994 repealed AS 37.14.011(b) & (c) as of 6/24/94 which ended the automatic transfer of 6% of unrestricted general fund revenues to the mental health trust income account (MHTIA). Section 5 of the draft amendments to Ch 6, FSSLA 1994 appropriates general funds to the MHTIA as needed to cover existing appropriations including any shortfalls in other funding sources for the capitalization of the mental health trust fund. The net shortfall in other funding sources, primarily the DNR land sale contract portfolio, is estimated at \$7.8 million. Assuming the DOR spring mid-case revenue forecast, the \$7.8 million in additional funding needed for the capitalization of the mental health trust fund would be withdrawn from the Constitutional Budget Reserve Fund (CBRF) under section 39(c) of Ch 3, FSSLA 1994, increasing the estimated withdrawal from \$350.2 million to \$358.0 million. However, if FY95 unrestricted general fund revenues exceed the spring mid-case forecast of \$13.97/bbl., which is likely, there would be sufficient general funds to cover the \$7.8 million and to further reduce the estimated withdrawal from the CBRF by an estimated \$160 million at \$15.50/bbl. (latest Executive Update) and by \$270 million at \$16.60/bbl. (year-to-date average).

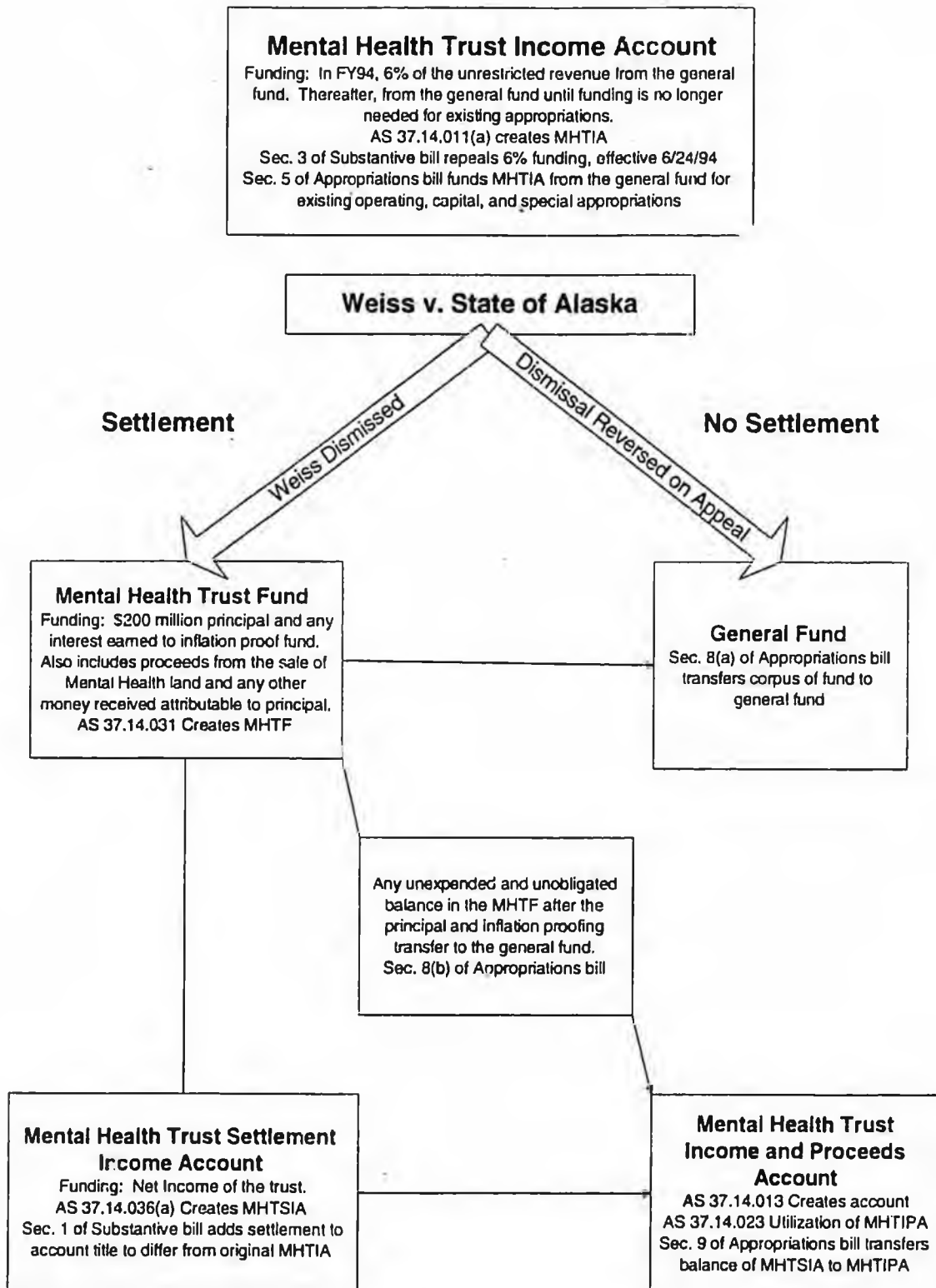
**Comparative Analysis of FY95 General Fund and Mental Health Trust Spending
Based on DOR Spring Revenue Forecast, Mid-case**

	per 8/15 Legislative Spendplan	per 9/21/94 Draft Legislation	
FY95 REVENUES			
Unrestricted General Fund	1,696.9	1,696.9	Spring Forecast, Mid-case
Revenue Adjustments	32.7	32.7	
FY95 AHFC Dividend	200.0	200.0	Section 17(d), Ch 3/94
Executive Life/ILTF Recovery	37.6	37.6	Section 39(a), Ch 3/94
AIDEA	60.0	60.0	Section 39(b), Ch 3/94
From Constitutional Budget Reserve	350.2	358.0	Sec 39(c), Ch 3/94,
From Constitutional Budget Reserve	68.7	68.7	Section 40, Ch 3/94
From Sale of DNR Land Sale Contract Portfolio	25.0	16.0	Ch 6, FSSLA 94
From Mental Health Trust Income Account	48.0	47.7	Updated per sec 24, CH2/94
FY95 AVAILABLE	2,519.1	2,517.6	
FY95 Expenditures			
Operating	2,196.3	2,196.3	
Debt Service	133.1	133.1	
Capital	100.4	100.4	
Special Appropriations/Fund Transfers	89.3	87.8	See note below
FY95 EXPENDITURES	2,519.1	2,517.6	
Constitutional Budget Reserve Balance	109.2	101.4	Estimated as of 6/30/95
Mental Health Trust Income Account Balance	0.0	0.0	Estimated as of 6/30/95

Note: FY95 specials and fund transfers have been adjusted as follows:

Ch 3, FSSLA 1994 Fund Transfers Sections 19(b), 20(a), 26, & 27	31.1	31.1
Ch 6, FSSLA 1994 GF to MHTF based on value of DNR land contract portfolio	25.0	16.0
Ch 6, FSSLA 1994 MHTIA to MHTF	33.2	40.7
Total	89.3	87.8

**Flowchart of Mental Health funds and accounts if settlement occurs
(Weiss is dismissed) or does not (dismissal is reversed on appeal).**



MEMORANDUM

DEPARTMENT OF NATURAL RESOURCES

STATE OF ALASKA

OFFICE OF THE COMMISSIONER

TO: Finance Committee Members

DATE: September 26, 1994

FILE NO.:

PHONE: 465-2400

FROM: 
Harry A. Noah
Commissioner

SUBJECT: Mental Health Legislation

Attached is the article referenced on page 19 by Judge Green in her preliminary approval of the proposed settlement of the Mental Health Trust Lands litigation.

As some of you may recall, the management standards found in HB 201 are taken directly from this article. (see pages 79-85)

*The School Trust Lands:
A Fresh Look at Conventional Wisdom*

Sally K. Fairfax
Jon A. Souder
Gretta Goldenman

WORKING PAPER 90 - 5

State Lands Project
Department of Forestry & Resource Management
University of California
Berkeley, CA 94705



These acceptance provisions of the Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the *benefit of the common schools*, which cannot be altered or abrogated. No disposition of such lands or funds can be made that conflict either with the terms and purposes of the grant in the Enabling Act or the provisions of the Constitution relating to such land and funds. The State has an irrevocable duty, as Trustee, to manage the trust estate for the *exclusive benefit* of the beneficiaries, and to return *full value* from the use and disposition of the trust property.

Oklahoma Education Association v. Nigh, 642 P.2d 230 (Okla. 1982), at 235.

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I. INTRODUCTION

State lands are less studied than federal lands and management agencies. They are so obscure that the idea that a small subset of them, the state school lands, are the subject of a conventional wisdom which merits a fresh look may surprise even attentive observers of public resource debates. The basics are not unfamiliar: at or near the time of statehood, Congress granted sections of land to new states to support common schools. In 1803 Ohio became the first beneficiary of such a Congressional grant.¹ Details about the rest of the story are omitted from most texts.² However, the program evolved for over a century and played an integral role in the westward movement and state making process until it ended, for the purposes of this analysis, in 1912 when Arizona and New Mexico joined the union. Hence the lands have a complex and very interesting history.

More important, both the lands and the peculiar mandate under which they are managed are of great contemporary significance. Of the almost 322 million acres originally granted to the states for school and related purposes, approximately 135 million acres of surface and 152 million acres of mineral rights continue to be held in state ownership.³ Twenty-two different states manage these lands; they contribute important financial support for education, though many have argued, less than they ought.⁴ They also provide an enormous reservoir of experience for comparative analysis, and thereby, a unique window through which to explore alternative definitions of public resource management and management programs. This opportunity for illumination is enhanced by the fact that the state school lands are not managed subject to the same multiple use standard that currently directs federal resource management.⁵ The school land and related grants are held "in trust" by the states. This fact makes the state's management programs especially interesting and comparisons with federal management particularly enlightening. Unfortunately, the mandate is insufficiently discussed and, we

¹ For a full story on the original grant to Ohio see Mansfield, "Educational Land Policy of the United States: Land Grants for Educational Purposes Within the State of Ohio." XXVIII Barnard American Journal of Education 59 (1878). Because it marks the beginning, Ohio is also discussed, occasionally in considerable detail, in all of the references below, n. 16.

² Dana and Fairfax, Forest and Range Policy (1980) writes them off in less than a page, at 17.

³ Regarding original grants, see Gates, History of Public Land Law Development (1968), at 805-6. Current acreage data are based on the twenty-two states that contain the vast majority of the remaining school and institutional trust lands. See, Western States Land Commissioners Association, Directory 1988-89.

⁴ Discussed below at n. 23-25 and text accompanying.

⁵ Multiple Use and Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (MUSY); National Forest Management Act, 16 U.S.C. §§ 1600-1647 (RPA-NFMA); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (FLPMA).

argue, generally misunderstood.

The purpose of this paper is to suggest that the conventional wisdom about state trust lands is misleading. The basic notions are easily summarized: "any derived benefit from the school trust lands must be used in support of schools and may not be used to support or subsidize other public purposes. Any arrangement not ensuring full fair market value for the use and/or sale of the school trust lands violates the trust obligation mandated by Congress."⁶ The purpose of the grants was to "enable states to produce a fund with which the states could support the public school system."⁷ Therefore, "...without exception, the principal goal—the overriding purpose—of the trust administrative agencies is to secure the highest monetary return."⁸ This view is held by most state trust land managers,⁹ and virtually all contemporary commentators.¹⁰

It is not difficult to imagine that this approach to the management of public lands could be an anathema to many. Maximum economic returns is barely tolerated as the controlling notion, and indeed, is rarely practiced, on lands privately held by corporations.¹¹ Many feel or believe that it has no place at all in the discussion of publicly owned lands. It is probably true, however, that this situation distresses fewer than it might: most citizens and school children, and indeed, many specialists in public land management, are not even aware that school lands

⁶ Bassett, "Utah's School Trust Lands: Dilemma in Land Use Management and the Possible Effect of Utah's Trust Land Management Act," 1989 *Utah J. Energy Law and Policy* 202 (1989), at 202.

⁷ *Id.*, at 211.

⁸ Patric, *Trust Land Administration in the Western States*, (January, 1981), at 7.

⁹ Souder and Fairfax, *Western States Survey Responses* (1990). Hereinafter cited as *Western States Survey Responses*.

¹⁰ See Bassett, *supra*, n. 6 and Patric, *supra*, n. 8. For an arguable exception, see McCormack, "Land Use Planning and Management of State School Lands," 1982 *Utah Law Rev.* 525 (1982). A recent Oklahoma case restates what is considered obvious: "These acceptance provisions of the Oklahoma Constitution and the Enabling Act constitute an irrevocable compact between the United States and Oklahoma, for the benefit of the common schools, which cannot be altered or abrogated. No disposition of such lands or funds can be made that conflict either with the terms and purposes of the grant in the Enabling Act or the provisions of the Constitution relating to such land and funds. The State has an irrevocable duty, as Trustee, to manage the trust estate for the exclusive benefit of the beneficiaries, and to return full value from the use and disposition of the trust property." *Oklahoma Education Association v. Nigh*, 642 P.2d 230, 235 (Okla. 1982). But see Beaver, "Management of Wyoming's State Trust Lands from 1890-1990: A Running Battle Between Good Politics and the Law," *Land and Water Law Review*, forthcoming, in which the state's senior assistant attorney general argues that the conventional wisdom as we describe it has not yet come to Wyoming: "When the trusts are viewed in the proper light, the public and state officials, *should* staunchly support management of state trust lands for the exclusive benefit of the named beneficiaries." (at 36, my italics). Beaver describes the operative conventional wisdom about the trust in Wyoming as "something the Attorney General's office dreamed up to prevent the public from fully enjoying (exploiting) their land." Pers. Comm., March 7, 1991, at 1.

¹¹ See Sax, "The Claim for Retention of Public Lands" in Brubaker, ed., *Rethinking the Federal Lands*

exist. Yet, even given the general anonymity of state school lands, there has been surprisingly little public discussion of the trust notion. Nevertheless, under limited direct pressure from environmentalists,¹² and perhaps more pressure from evolving notions of what constitutes ecologically sound and politically acceptable land management, some states have sought flexibility within the trust notion.¹³

This article puts these developments into a comprehensive context. It is aimed at starting a conversation rather than ending or even defining it. We will argue that notions of trust law have been applied selectively, rather simplistically, and frequently inappropriately. Further exploration of basic trust concepts and management practice would, we suggest, reveal more flexibility than the standard discussion thus far. Our basic point is that trust land management is less confined—both *to* economic maximization goals and *by* economic maximization notions—than the received wisdom suggests.

The paper proceeds in four parts. The first part will describe, excessively no doubt, the lands and their history. It should leave the reader with a general appreciation of how the grant program evolved: how much land was granted; to whom; for what purposes; how the lands and the associated funds are managed. It will also give a brief description of the granted lands, how much of the grants have been retained, who owns them, how much revenue they produce from which resources, and how much the permanent funds produce. The discussion of the evolving program will emphasize three themes: first, that accession was a bargain between the joining state and Congress; second, that the particulars of the bargain, and the details of the school land grants, varied considerably over time. Finally, we take issue with the prevailing wisdom by arguing that the bargains do not evince a pattern of increasing Congressional restrictions on use and disposition of the granted lands.

The second section looks primarily at 150 years of case law, to frame and discuss several questions which are central to our quest for flexibility: what is the trust instrument, and do we have a trust; what is the purpose of the grant and who or what is to benefit; what is the trust property; who or what is the trustee; and how can the trust be changed?

There is too much law and policy surrounding the assertion that the school land grants

(1984) for general discussion on this and related points.

¹² See, Patric, *supra*, n. 8; see also, *North Fork Preservation Association v. Dept of St. Lands*, 788 P.2d 862 (Mont. 1989) and *Conda v. Colorado State Board of Land Commissioners, et al.* Nos. 88 CA 0373 and 88CA 0375; Appeal No. 86 CV 2182, filed Sept. 7, 1989.

¹³ McCormack, *supra*, n. 10 and Bassett, *supra*, n. 1, analyze laws which try to get amenity and non-economic values into the operation.

constitute a "trust" for us to seriously argue the contrary. However, raising the question—and asking why, how, and at what point does a trust interpretation of these grants become reasonable, who is bound by the notion, and to do what—does underscore that the nuances are less clear than the dominant much cited phrases. There is more room for flexibility than the conventional wisdom suggests.

Part three adds some ground truth to the theoretical flexibility derived from case analysis by looking at trust land management in practice. The discussion will take the oft-repeated trust terms of maximized return and put them in the context of economic theory and reality. A brief review of timber management on trust lands in four western states will both specify and expand upon that theoretical diversity. Anything more than the most casual perusal makes clear that different states are doing different things. They are pursuing different economic strategies, using different definitions of sustained yield, of fair market value, and of multiple use of forested lands. They use different funding mechanisms and different revenue distribution procedures, all within different institutional structures. All this variability in management programs suggests that there is more flexibility than supposed in the trust doctrine. The simple truth of the matter is that maximum economic benefit turns out to be a very flexible mandate after all. More important, the trust mandate to preserve the corpus of the trust while making the trust productive permits more conservative management, and a broader range of social benefits, than the maximum benefits perspective at first implies.

We think it is important to be systematic in analyzing this flexibility for several reasons. The first has already been suggested. Since the first "environmental decade" several states have evolved planning and management programs for the school lands that chip away at the received wisdom. Our impression from talking to land managers in these states is that each perceives his or her situation to be unique or nearly so. Moreover, there is sometimes a large difference between the school land management regime as defined by state statute and as described by the managers themselves. Among other things, this perspective, and lack thereof, renders each of the state innovations difficult to imitate or to understand as part of a general pattern; it also makes them potentially quite vulnerable. As we move into a second environmental decade, providing even a partial glimpse at the "big picture" may be beneficial to continuing evolution of state school land management.

Without adding unduly to an already lengthy introduction, we want to be careful in stating our purpose. Our goal is not to erode either the trust obligation, or its emphasis on economic returns. We are not opposed in principle to achieving economic returns from publicly held lands, even if the result is the occasional or well-planned loss of amenity and environmental

values. Nor are we opposed, on the other hand, to environmentally responsible, even amenity oriented management of the trust lands.

Rather, we argue that the trust obligation provides an extremely useful, albeit misrepresented and underappreciated, context for public resource management. Indeed, just those environmental and amenity values which appear diametrically opposed to the trust obligation conventionally understood may, in fact, be well served by a more flexible and accurate definition of it. Critics of multiple use land management as historically practiced by the federal land management agencies may find much that is salubrious in consideration of the school lands. They will not, however, find it in the conventional wisdom currently surrounding school land management. Nor will lessees or beneficiaries find continuing succor in the traditional oversimplifications.

The school lands and state management programs merit the attention. In the more complex and comprehensive picture we propose, there are models and approaches to enrich discussions of public resource management now dominated by desiccated and polarized issues arising at the federal level. We aim, therefore, to complicate things.

II. EVOLUTION OF THE GRANT PROGRAM AND OVERVIEW OF THE LANDS, REVENUES AND RESOURCES

This overview will introduce first, the evolution of the grant program, and then, the retained lands in ten western states.

Evolution of the Grant Program

1. The Context

Although we must point to the humility¹⁴ appropriate to studying a policy which has thirty-five distinctive variants and which began just after the nation was founded, it is important that the notion of granting land to support common schools is actually much older. One enthusiastic scholar discounts the importance of the program's colonial heritage but mused that the beginnings of land grants for schools perhaps began in ancient times; he was, however, able to penetrate no deeper than Henry V.¹⁵ For present purposes it is sufficient to note that the idea

¹⁴ This section draws heavily upon but recasts and corrects material found in Souder and Fairfax, "The State School Trust Lands." A Paper presented at the Annual Meeting of the Western Political Science Association, Newport Beach, California, March, 1990.

¹⁵ See Taylor, The Educational Significance of the Early Federal Land Ordinances. Teachers College, Columbia University Contributions to Education No. 118, (1922). Another notes that after the monasteries were destroyed by Henry VII, many grammar schools were lost in England and it became common for

of granting, donating, or bequeathing land in support of schools was common throughout the colonial period. It was, however, most characteristic of the northeastern states, especially Massachusetts, New York, Connecticut, and New Hampshire, "where it developed steadily in the direction of a public land grant system."¹⁶

The idea of land grants for schools was just one of a number of concerns, both profound and less so, which swirled about the western lands before, during, and after the Revolution. The need to resolve some of those issues was given urgency in the early 1780s by several major events, the most pertinent in the present instance being the acceptance of the Virginia land cession¹⁷ by Congress in 1783.¹⁸ Congress was obliged to announce some policies about what would be done with the lands which had been ceded. In two statutes remarkable for their brevity, durability, and dignity, Congress did so. The General Land Ordinance of 1785

individuals to endow schools with land. Schafer, *The Origin of the System of Land Grants for Education*. Bulletin of the University of Wisconsin [Madison], No. 63. History Series, Vol 1, No. 1, (1902), at 8-10.

¹⁶ Schafer, *id.*, at 11. For a fulsome listing, much of it overlapping, of colonial programs; see, in addition, Commissioner of Education, *Report of the Commissioner of Education for the Year 1895-96: The American Common School in the Southern States During the First Half Century of the Republic, 1790-1840* (1897); Dienst, *The Administration of Endowments with Special Reference to the Public Schools and Institutional Trusts of Idaho*, Columbia University Contributions to Education, No. 560, (1933); Dixon, *The Administration of State Permanent School Funds: As Illustrated by a Study of the Management of the Utah Endowment*, Southern California Education Monographs, No. 9, (1936); see also, Green, *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy*, 1930, 1966; Hibbard, *A History of the Public Land Policies* (1924); Knight, *History and Management of Land Grants for Education in the Northwest Territory (Ohio, Indiana, Illinois, Michigan, Wisconsin)*, 1885; Swift, *History of Public Permanent Common School Funds in the United States 1795-1905* (1911); Swift, *Studies in Public School Finance: The West--California and Colorado*, Research Publications of the University of Minnesota--Education Series No. 1, (1922); Swift, *Federal and State Policies in Public School Finance in the United States*, (1931). And, for a series of charts tracking different provisions in state constitutions circa 1930 see Koch, *Constitutional Provisions for Common School Funds in the Several States*, Masters Thesis, The Ohio State University, (1930). Unfortunately, for present purposes, the thesis does not contain original constitutions and therefore is not a consistently reliable guide to what states originally agreed to. The best general source on grants to the states is Orfield, *Federal Land Grants to the States with Special Reference to Minnesota*, University of Minnesota Studies in the Social Sciences, No. 2 (1915). See also Waggener, "The Federal Land Grant Endowments: A Problem in Forest Resource Management." PhD Diss., University of Washington, 1966, and the references cited therein.

¹⁷ The Virginia land cession obviously resolved many issues, but it created a number as well. The original thirteen colonies vigorously pursued enormous, overlapping claims to all the land between the Appalachians and the Mississippi. Following the Revolution, they ceded their claims gradually to the central government. Virginia's claim was the most extensive and the cession most central in the process under discussion here. There is an enormous literature. See Hibbard, *supra*, n. 16; Robbins, *Our Landed Heritage: The Public Domain 1776-1936* (1942); and Gates, *supra*, n. 3, and the references cited, particularly in the latter.

¹⁸ Not unexpectedly, the Virginia cession and kindred phenomena are also the subject of much analysis. For good reason: the terms of the Virginia cession are key to almost literally everything that follows in American political and social history: *inter alia*, the ceded land was to be laid out in states; the states formed were to have a republican form of government and were to be admitted to the Union; all land not taken up by military bounty claims was to be a "common fund for all the states." A good place to start is, as always, Gates, *supra*, n.3.

provided for the rectangular survey¹⁹ and sale of western lands. It also initiated the program of land grants for schools, providing that lot number 16 in every township would be reserved "for the maintenance of public schools within the said township."²⁰ The Northwest Ordinance, passed two years later, provided for establishing a system of territorial governance and transition to statehood which technically applied only to the states formed out of the ceded lands (Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota east of the Mississippi). However, the principles of that document and many of its key phrases became, during the experience of implementing them, the template of all western expansion and a pervasive architectonic of American political and social life.²¹ In a series of fits and starts, the simple commitment to granting lands for schools was elaborated and expanded. It too became so woven into the warp and woof of both education and lands policy that it is, as noted above, scarcely seen today.²²

¹⁹ The survey "organizes land into six-by-six mile townships divided into thirty-six sections of one square mile each." Again, there is an enormous literature. See, for example Johnson, Order Upon the Land: The U.S. Rectangular Survey and the Upper Mississippi Country (1976); Treat, The National Land System: 1785-1920 (1910). Many recent authors discuss the survey in terms of straight lines, which nature abhors as much as vacuums. Property lines and fence lines followed the survey lines, and farmers plowed along the fence line, hence some have asserted, the dust bowl. Reality and the literature are more complex, but you get the picture. More relevant here, Treat discusses the decision in terms of a regional sociological conflict: the South versus the New England states and styles the survey and sale notion as a victory for the New England approach to ordering both land and community life. See especially Chapter 2. See also Treat, "The Origin of the National Land System Under the Confederation," Annual Report of the American Historical Association for the Year 1905 (1906). There are also whiffs throughout the literature that the south east was not really wholly enthusiastic about common or free schools, preferring to concentrate resources on educating the sons of the aristocracy. Daughters everywhere are more ambiguous, and whether education for all includes them depends considerably on where and when.

²⁰ Most of the writers cited above, see n. 16, are at great pains to correct a misconception, which apparently gained currency at the time of the centennial of the Northwest Ordinance, that the 1787 statute rather than the 1785 one provided for public schools. They are quite correct. The Northwest Ordinance lauds education but does nothing for it "except that it established a form of territorial government which led to the rapid settlement of the unoccupied lands and therefore made effective and useful the land grants for public education." See Swift, 1911, supra note 16. There is also much in the early discussion to suggest that Thomas Jefferson wrongly claimed or was incorrectly given credit for having advocated or imposed the notion of land grants for schools. Indeed, Jefferson did pen a pivotal 1784 report on what to do with the territories but that document did not mention school land grants. Duly noted.

²¹ The most important strand of which is the "equal footing" doctrine which has become so ingrained that many people look for it, erroneously, in the Constitution. Again, there is an enormous literature. However, the fact remains, it was the 1785 not the 1787 ordinance that provided for land grants for common schools.

²² Because of the school land grant programs' current invisibility, and because the terms and contours of current social science analysis were not live when it was visible, it is worth noting, if only in passing, the enormity of what transpired in a single sentence in a statute now considered interesting primarily to a small bunch of geographers and public land scholars. Under the Articles of Confederation, known and unloved for its allegedly sapless central government and powerful states, Congress assembled and imposed a uniform education policy—and a means for funding it—on the states. Common schools meaning schools paid for by the government rather than the students, would be made available in all the new states. Originally the term meant grammar or pre-university schools. The evolving concept of "school" can be read in the progression of detail in

It is clear, however, both from its antecedents and from its early implementation, that although the idea of granting land for education was broadly familiar, what the grantee was supposed to do with the lands in order to support the schools was not well defined.

It will shock no one to learn that much of the land and its potential benefit were lost due to incompetence, indirection, and corruption. Much of the loss was connected to a fairly consistent decision made by the states to sell the lands rapidly, to spur settlement and support early schools.²³ School land grants are little different from other 19th century land policies in one regard: corruption and ineffective administration were rampant. This is, however, easily and frequently overplayed.²⁴ Viewed from the perspective of the current value of the land and resources, it is reasonable to feel that it would have been preferable to rent a given section rather than to give it in salary to the school teacher. However it is worth wondering whether many of the policies which would have been more beneficial to current students would have deprived the earliest generations of school children of much of the benefit of the grants.²⁵

19th century constitutions. Compare the 1792 New Hampshire constitution (Thorpe, IV, 2487) with Utah's from 1896 (Thorpe, VI, 3720), for example. See also School District No. 20, Spokane County v. Byrum 99 P.28 (1909) for an interesting dispute in this arena. Consensus is that this step was taken, and continued to be taken, because it was everywhere acknowledged that if common schools were obliged to rely on locally instituted property taxes, education would not be generally provided in the new territories. See, for example, Swift, 1911, supra, n. 16, at 160 ff, who argues that the idea of free schools was controversial even in Connecticut where the support for a permanent school fund was greatest. The idea motivating the grants was to avoid the need for taxes to support schools. For those who would argue that federal tentacles did not start to encroach upon the states until the Commerce Clause developed its many sets of wings, or that federal subsidies did not become significant until the Depression or the Civil War, it is interesting to note that this tentacle/subsidy antedates the Commerce clause by half a decade, its wings by a hundred and fifty years, more or less, and the Civil War by almost a century.

²³ Sale of the lands was originally not authorized. However, with so much free land for the taking, leasing the lands was not feasible. But see Taylor, supra., n. 15, at 123: "It was never intended that the land should be held for the benefit of future generations more able to maintain schools than the pioneers. If the early settler could derive the greatest aid from the land grants by selling school lands, such sales were wise." Early states provided explicitly for quick sale of the lands. See, for example, Minnesota's original Constitution, "the best one-third [of the land] was to be sold in the first two years of sale... ." Discussed in Segner v. State Investment Board, No. C-587-489319 (Ramsey County District Court, August 11, 1988), at 6.

²⁴ See, for example Bruce, "State Socialism and the School Land Grants," 33 Harvard Law Review 401 (1920). For a better discussion, see Jon A. Souder, "Economic strategies for the management of state and institutional trust lands: a comparative study of ten western states." Ph.D. Dissertation, University of California, Berkeley, 1990.

²⁵ The sell-lease-hold option will be discussed in terms of evolution of authorities, below at n. 61 and text accompanying, and in the context of economic development and management options in Section 4.. This is not the place to evaluate the land grants/permanent school fund's contributions to education. It is of course true that if the resources had been handled differently at the outset, the funds might possibly be larger and more important now. However, the cost of imposing order would have been enormous. The general theme of the discussion seems to be that the grants were pivotal in getting things started. See Dixon, supra, n. 16, at 12, ff. and references cited. Note also that Dixon, supra, n. 16, muses that in Utah the dependency on statehood and the promise of grants for schools may have had the opposite effect, that is, the Utah settlers waited for the grants to start schools (at 106). Although credible in the case of Utah, which was characterized by an unusually high

2. The Basic Grant Program²⁶

With that background regarding state school lands, it is possible to discuss the evolution of the grant program. In order to give an idea of the actual content of the diverse documents and the state and federal components thereof, the section will begin and end with a discussion of specific states: Indiana is taken as representative of an early grant program, and New Mexico will be presented as the final one. The section will describe the evolution of four central aspects of the grant program: (1) how much land was granted; (2) to whom; (3) for what purpose; (4) how were the lands to be administered? The last category will discuss the growth and limits on state authority to dispose of land, the rise of the permanent fund as a concomitant of the land grants, and the evolution of the State Land Commission as manager, arguably trustee.

From this evolution three important observations emerge. The first is that for new states, joining the union involved a process of bargaining with Congress.²⁷ States typically submitted offers and countered Congress' counter offers, literally negotiating their way into the Union. During the 19th century, predictably, the process became more and more generous to new states.²⁸ Although the process dragged on sometimes for several decades or more, in every instance, statehood was a literal contract. States were required to accept the terms and conditions specifically.²⁹

The second theme, not unexpectedly, is variation. Over time, the grant process changed significantly. Thus, different states now operate under quite different mandates. Finally, it is crucial to note, most of the variation arises from changes in state not federal policy. Although

degree of social cohesion, that point may be less applicable in other areas where, Swift has argued the lack of a strong sense of community was a barrier to the establishment of schools. See Swift, *supra*, n. 16, at 115, ff.

²⁶ The major sources for this section are Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States and Colonies Now or Herebefore Forming the United States of America [7 vols.] (1909) printed pursuant to an Act of Congress as House Doc. 357, 59th Cong., 2d Sess. and Shepards Citations, Inc., Digest of Public Land Laws (1968). Reading the progression of documents was aided by Gates, *supra*, n. 3, Hibbard, and Koch, both *supra*, n. 16. Citations will be to Thorpe, followed by the appropriate volume and page number.

²⁷ See Fairfax, "Interstate Bargaining over Revenue Sharing and Payments in Lieu of Taxes: Federalism as If States Mattered" in Foss, (ed.) Federal Lands Policy (1987), and the references cited therein.

²⁸ In addition, the "old" states, and the early "new" ones insisted on partaking of Congress' increasing generosity through retroactive land and cash grants and grants of "scrip" which entitled states where no public domain remained to select lands further west. The classic reference here is Gates, The Wisconsin Pine Lands of Cornell University (1943). Orfield, *supra*, n. 16 does an interesting job of early Congressional roll call voting analysis to chronicle the emergence and growing power of older new (perhaps we could call them middle-aged) states.

²⁹ See Treat, (1910), *supra*, n. 19 for a discussion of the "quid pro quo" in Chapter XI.

the grant program over time became incontrovertibly more specific about state responsibilities, there is no pattern, much discussed in the cases and some recent literature, of the federal government evincing increasing concern for the dissipation of the granted lands. Nor, contrary to the assertions of many court and scholarly discussions,³⁰ is there a pattern of the federal Congress imposing a trust agreement on the states: prior to 1910, such trust obligations as exist arise entirely from state commitments made in state constitutions. In order to illustrate these important points, we begin almost at the beginning, with the grants to Indiana, a typical set of early documents and circumstances.

3. Indiana—a typical beginning

The Enabling Act and Acceptance. In 1814 Congress authorized the "laying off" of the Territory of Indiana into districts for the election of a legislative council. Two years later an Congress passed "Act to enable the people of the Indiana Territory to form a constitution and State Government, and for the admission of such State into the Union on an equal footing with the original states."³¹ Section 6 of this enabling act contains the provisions that most interest us. In language and format that soon became standard, it begins:

And be it further enacted, That the following propositions be, and the same are hereby, offered to the convention of the said Territory of Indiana, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States: First, That the section numbered sixteen, in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.³²

This language or something similar was contained in every accession package until the accession era ended in 1912. This is all that the Indiana Enabling Act says about school lands. There is no supplementary discussion of trusts, fiduciary obligations, restrictions on use to protect any trust, or any instructions regarding what constitutes "use of schools." The rest of Section 6 of the Indiana Enabling Act makes additional grants: saline land grants,³³ five per

³⁰ See, for example, *Gladden Farms, Inc. v. State*, 633 P. 2d 325, 327 (Ariz. 1981). Usually cited in this connection is S. Rept. 454, 61st Cong, 2d Sess, 3-28-1910, To Accompany HR 18166, at 18-21.

³¹ Thorpe, II, 1053.

³² Thorpe, II, 1055.

³³ The saline grants are most fully discussed in Orfield, *supra*, n. 16, Ch. IV. The second provision, granting salt springs to the people of the state also became a standard feature of accession statutes. It provides an important comparison with the school land grants:

"Second, That all salt-springs within the said Territory, and the land reserved for the use of the same, together with such other lands as may, by the President of the United States, be deemed necessary and proper for working the said salt-springs, not exceeding, in the whole, the quantity contained in thirty-six entire sections, shall be granted to the said State, for the use of the people of the said State, the same to be used under such terms, conditions, and regulations as the legislature of the said State shall direct: Provided, The said legislature shall never sell nor lease the same for a longer period than ten years at any

cent of the net proceeds of land sales shall be reserved for making public roads and canals, three-fifths of which shall be applied within the state under the direction of the state legislature and two fifths for roads leading to the state under the direction of Congress;³⁴ one entire township to be designated by the president of the United States to be reserved for the use of a seminary of learning, and vested in the legislature of the said State, to be appropriated solely to the use of such seminary by the said legislature;³⁵ four sections of land for the purpose of fixing their seat of government thereon.

The Section concludes:

And provided always, That the five foregoing provisions, herein offered, are on the conditions that the convention of the said State shall provide by an ordinance, irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the first day of December next, shall be and remain exempt from any tax, laid by order or under any authority of the State, whether for State county, or township, or any other purpose whatever, for the term of five years from and after the day of sale.³⁶

Every state was required to formally accept the terms and conditions offered in the enabling act documents. Two months later, in June, 1816, the Convention of the Territory of Indiana met and did so.³⁷ In December of the same year a Congressional resolution took note of the

one time." Thorpe, II, 1055.

Variants in this provision are also seen repeated throughout the accession process, although the particular language here is important for two reasons. The Congress made numerous specific provisions to protect the saline grants, and although the some of the galaxy of trust paraphernalia is implicit, the salt-lands were not and are not consistently viewed as trusts. The fact that land was granted for a specific purpose should not therefore automatically be interpreted as a trust, implicit or otherwise. Second, it suggests the kind of language that Congress used when it was concerned about the integrity and utilization of granted lands. From the beginning of the 19th century, Congress labored to protect the salt-land grants from abuse and dissipation. A hundred years later, the U.S. Supreme Court was inclined, while interpreting the language of 20th century enabling acts, to read a similar concern for school lands into early 19th century grants. See, *Lassen v. Arizona Highway Department* 385 US 458 (1967) and *U.S. v. 111.2 Acres of Land*, supra, n. 2 at 1047. It is therefore interesting to note that language and provisions doing anything more than granting the lands did not appear in Congressional acts until the statehood process was nearly over, beginning with Colorado in 1876.

³⁴ This is another standard grant never identified as a trust and containing more careful restrictions than either the school or salt land grants. Subsequent states took this grant with more or less restrictions on what the proceeds could be spent on, and by whom. Many states that received the grant subject to no restrictions subsequently allocated the receipts to school or other specific purposes. Discussed in Orfield, supra, n. 16, at Chapter 6.

³⁵ This provision led to the earliest of the school trust land cases, *Trustees for Vincennes v. State of Indiana*, 55 U.S. 268 (1852). The Enabling Act provisions applied to the seminary grant in 1816 are similar to those which were attached to the school grants in the 1800s.

³⁶ Thorpe, II, 1055-56. The latter provision was designed to assist settlers purchasing land on credit. When the credit sales program was abolished in the 1840s, the provision dropped out of state constitutions, beginning with Arkansas and Michigan.

³⁷ The document states that the convention does "for ourselves, and our posterity, agree, determine, declare and ordain, that we will, and do hereby accept the propositions of the Congress of the United States, as made and contained in their act..." Thorpe, II, 1056.

Convention's June ordinance accepting the terms and conditions and its July constitution "republican, and in conformity with the principles of the articles of compact between the original states, and the people and States in the territory northwest of the river Ohio" and declared that the State of Indiana was "admitted to the Union on an equal footing with the original States, in all respects whatever."³⁸

The State Constitution The Indiana Constitution contains two sections in Article IX which refer to the school land grants. One part declares that

it shall be the duty of the General Assembly to provide, by law, for the improvement of such lands as are or hereafter may be granted by the United States to this State for the use of schools, and to apply any funds which may be raised from such lands or from any other quarter to the accomplishment of the grand object for which they are or may be intended. But no lands granted for the use of schools or seminaries of learning shall be sold by authority of this State prior to the year 1820; and the moneys which may be raised out of the sale of any such lands, or otherwise obtained for the purposes aforesaid, shall be and remain a fund for the exclusive purpose of seminaries and public schools.³⁹

Although the "be and remain a fund for ... schools" may appear to be a nascent permanent school fund, it merely reiterates that the proceeds from the grant will be spent for the purpose intended.⁴⁰

38 Id.

39 Thorpe, II, 1067-68.

40 An actual permanent school fund was added when Indiana revised its Constitution in 1851. Article VII of the 1851 Constitution describes diverse sources of income for the fund, including the township fund and the lands belonging thereto, the saline fund and lands, all lands and other estate which shall escheat to the state, and taxes which may be assessed. The principal of the Common School Fund "may be increased but never diminished," and "the income thereof may be appropriated for the support of Common Schools, and to no other purpose whatever." Section 7 provides that "All trust funds held by the State shall remain inviolate and be faithfully and exclusively applied to the purposes for which the trust was created." [Thorpe, II, 1086]. This language, or variations on it, was typical of the Constitutions of the 1850s. Indiana unambiguously added the lands to a trust in its amended constitution. Many, but not all states did so as well, most typically beginning in the 1870s. See Fairfax and Souder, "State Accession Documents Provisions Relating to the Grant of School and Related Lands, Working Paper 90-4, n.d. Cited hereafter as Working Paper 90-4. Beginning in the 1850s and more dramatically after the Civil War, the old new states "lapped" the new ones—that is, before the process of writing new Constitutions was completed, the old states substantially revised theirs. Hence, the process of writing Constitutions for new states begins to draw not only on previous new Constitutions but, in addition, on document revisions undertaken in the older states. The current analysis focuses almost exclusively on the original Constitutions. It also ignores statutory changes. The Indiana legislature, had, however, paid considerable attention to the school lands well in advance of the 1851 Constitution. Beginning in 1821, with a report from a special Senate Committee appointed to "investigate the condition of the school lands," the legislature pondered how to make money off the lands. An 1824 statute incorporated the Congressional townships for the purpose of "creating a controlling power over section sixteen." Commissioners elected in each township were to control the lands therein and to "dispose of them in such manner as for the best interest of the schools." There were no limits on the disposition; due to the dissipation of the grant, the law was repealed but one year later so that leases could not be given for more than ten years. Numerous legislative enactments over the next several decades sought to protect the lands from dissipation by the commissioners, to little avail. A legislative effort to abolish the congressional townships and centralize management of the grants at the state level was challenged by Springfield Township and was held by the state court to be a violation of the original grant. See, Knight, 71-72, discussing *State et al v. Springfield Township*, 6 Indiana Reports, 83,

Indiana provides a template against which we can now project four key points of programmatic evolution.

4. Key Points in the Evolution of the Grant Program

How Much Land Was Granted? Because the courts and others at the close of the 20th century have tended to see in the evolution of the grants an increasingly concerned Congress guarding against state mis- and malfeasance with ever more stringent Enabling Act provisions,⁴¹ it is well to begin with the most obvious pattern: increasing Congressional generosity to the states. Over the 19th century, school land grants to the states became larger and larger. Ohio and states thereafter until 1850 received one section per township.⁴² Starting with California and Oregon, all states received two sections per township. Then, at the Utah accession in 1896, four sections per township were granted. That continued through 1910 grants to Arizona and New Mexico.⁴³

This increasing generosity was manifest in related areas as well. Many of the accompanying land grants and donations are relevant because the proceeds were added, at accession or by Constitutional revisions, to the permanent school fund.⁴⁴ In 1841, 500,000 acres of land was

which eventually gave rise to the more familiar Springfield Township v. Quick, et al. 63 US 56 (1859).

⁴¹ See, for example, *Deer Valley Unified School District v. Superior Court* 760 P.2d 537 (Az, 1988), *Lassen v. Arizona*, supra, n 33, at 463-64, and the references cited therein, particularly S. Rep. 454, 61st Cong., 2d Sess., at 18.

⁴² Although this discussion emphasizes, among other things, variation, there are several points on which there was none. Most notably, from first to last, Congress provided for "in lieu" selections when the granted lands were occupied by settlers, or squatters, in advance of the land surveys that identified the granted areas.

⁴³ Oklahoma, which joined in 1907 was, as Gates notes, "treated differently." Oklahoma received sections 16 and 36 "for schools." Section 13 of Indian lands, when opened, were to be "one-third for the University of Oklahoma and its associated preparatory school, one-third for normal schools, and one-third for a colored A & M school. Section 33 of the Indian lands was assigned to charitable and penal institutions." Arizona and Oklahoma also received \$5 million in lieu of the school sections which they would not have in the Indian Territory. Oklahoma wound up with only 4.6% of its total acreage, which compares unfavorably with the 11% it would have received if it had gotten four sections like the others. "On the other hand the Oklahoma lands were likely to produce revenue much earlier than those of Arizona, partly because of their minerals and because they had greater value as farms." See Gates, supra, n 3, at 314-15. Alaska was treated differently still, of course. However, Alaska has a perhaps surprising analogue in Nevada; both states ultimately received land selection rights rather than grants of specific sections. Counsel for the Utah State Lands Commission dissents: "...the reason four sections were granted was due to the relatively poor quality of the lands rather than to increasing generosity." See Basset, supra, n. 6, at 197 citing 26 Cong. Record 182 (1893). This is also true today: grazing rates per A.U.M. for Kansas and Nebraska are four times those of Utah, Arizona, and New Mexico, and returns are further reduced by the limited number of A.U.M.s per acre in the latter three states. Only minerals in the form of oil and gas have saved these states—and that was unintentional since mineral lands were excluded from the grants." Steven F. Alder, Assistant Attorney General, Utah, pers. comm. March 1, 1991. But see below, n. 49.

⁴⁴ For example, Oregon 1859; Kansas, 1861; Nevada 1864; Mississippi, rev. 1868.

granted to each public land state which had not already received such aid.⁴⁵ In 1862 land or scrip was granted to all old and new states "not in rebellion" for the purpose of endowing agricultural and mechanical colleges. This program was extended, after the war, to the southern states.⁴⁶ It is difficult to describe succinctly this pattern of increasing Congressional openhandedness because grants to states were so munificent, so frequent, and so frequently made retroactive. Further, many grants were made to the states to be re-granted to developers of internal improvements, such as railroads. Hence it would be difficult to identify an appropriate set of programs for analysis. Though drawing lines is difficult,⁴⁷ and for present purposes unnecessary, there is no confusion about the pattern: over time the federal government gave more and more land to new and middle aged states, at accession, as well as before and after. The states were effective bargainers in their own behalf.

Another component of the grant program, Congress' inconsistent efforts to protect its own growing interest in public domain lands, had the effect of increasing the extent of the grants. As national public domain policy shifted from disposition to retention, Congress tried sporadically to exempt federal land reservations for forests, parks, and Indians, from the school land grant process. In the 1889 "Omnibus" enabling act for North and South Dakota, Montana and Washington,⁴⁸ as well as in the 1896 Utah enabling act, it is clearly stated that the provisions granting sections in every township do not apply to federal land reservations.⁴⁹ Arizona and New Mexico were successful, in 1910, in having that provision specifically disavowed. Hence, Arizona and New Mexico were able to select land in lieu of sections contained in national forests.

Congress had the same difficulty achieving a consistent policy with regard to minerals: it did not specifically exempt mineral lands from the grant process until 1889. The four-state enabling act provided for land selections in lieu of mineral lands. In 1896, minerals were not

⁴⁵ See Gates, *supra*, n. 3, discussing the 1841 Preemption Act, at 238. See also, Orfield, *supra*, n. 16, at 98-102.

⁴⁶ See Gates, *supra*, n. 3, at 335-36.

⁴⁷ The best general source is Orfield, *supra*, n. 16. Hibbard, *supra*, n. 16, and Waggener, *supra*, n. 16 do more than adequate jobs generically. For the composition of the institutional trust grants in just one state as an illustration, see Dienst, *supra*, n. 16, at 4-10.

⁴⁸ Sections 16 and 36 which were located in permanent reservations for national purposes were not subject to grants or in lieu selections. Thorpe, IV, at 2293. These restrictions were not included in the Idaho Enabling Act one year later. See Thorpe, II, 914.

⁴⁹ And, as noted above, although differently stated, the same principle was applied to Oklahoma, see n. 43. However, note that the potential for "damage" as perceived by the Omnibus Four and Utah was nowhere what it would have been for Arizona and New Mexico, wherein Congress backed off: the Forest Reserve Act did not pass until 1891, and was not extensively implemented for almost a decade, much past statehood for those five.

mentioned in the Utah enabling act; this omission led to litigation which gave the Supreme Court the opportunity to opine that whatever Congress had said, it *intended* to reserve minerals, not only in the Utah enabling act, but in *all* such grants.⁵⁰ In 1927 Congress enacted legislation to reverse the Supreme Court decision, its last flourish of generosity, perhaps, of the accession period.

To Whom Were the Lands Granted? Although it is now common to list school lands under the heading "grants to the states," the issue of who should receive the grants was not easily answered at the outset. Congress resolved this issue in a number of different ways during the first half of the 19th century before settling into the now familiar standard pattern. When Ohio made application for statehood, it proposed an arrangement similar to the 1780s land sale contracts with the Ohio Company, that *the townships* receive section 16 or equivalent for the use of schools. Congress rejected that and after a series of concessions and counter proposals provided that all sections for the use of schools be vested in the legislature of that state.⁵¹ Thereafter, the pattern evolved as follows: after Ohio, grants of land were made to the township for use of schools in the township. Then the lands were granted to benefit schools in the township but were to be managed by the county. Then the lands were granted to benefit schools in the township but to be administered by the state. Finally, Congress granted to lands for the benefit of schools in the state to be administered by the state.⁵²

This shift from township to state ownership made sense for several reasons. First, the township was frequently a name for lines on a map and did not always exist as a government. In any event, the local level was not generally adequate to administer the resources.⁵³ Second, the townships were not equally endowed by the grants. In some townships the section was valuable or marketable land and provided support for schools in the township. In other areas, the resource was not marketable, but the township still needed support for schools. The gradual evolution ended in a Congressional policy for granting land to the states for supporting

⁵⁰ See, *Sweet v. U.S.* 228 P. 421 (1915); rev'd *U. S. v. Sweet*, 245 U.S. 565 (1918); rev'd by legislation; but see, *Andrus v. Utah*, 446 U.S. 500 (1980). See also, Robinson, *Land In California* (1948), pp. 190-91. For more detail regarding minerals lands see Shearer, "Federal Land Grants to the States: An Advocate's Dream, A Title Examiner's Nightmare." 14 *Rocky Mt. Mineral Law Inst.* 185 (1968). See also Colby, *U.S. Mining Law in Recent Years*, 36 *C.L.R.* 371 (1948).

⁵¹ See Hibbard, *supra*, n. 16, p. 309-10.

⁵² Swift, 1911, *supra*, n. 16, at 107 ff has the most detailed discussion of this progression. See Also, Hibbard, 310, ff, and Taylor, *supra*, n. 15, at 115 ff.

⁵³ The problems encountered by townships are detailed in numerous sources. See particularly, Swift, 1911, *supra* n. 16, at 115 ff; Taylor, *supra*, n. 15, at 85 ff; Taylor notes that the earlier settlers' educational work was hampered by physical hardship; Indian hostility; general poverty; scarcity of money; scattered population; difficulty in getting teachers; lack of social coherence.

the schools statewide.

What is the Purpose of the Grants? The conventional wisdom suggests that if nothing else, the purpose of the grants ought to be obvious. Unfortunately it is not. From state to state, and, more interesting, in diverse documents affecting any one state, there appears slight but significant variation in the language describing the purpose of the grants. All of the variations imply something just a little different concerning use of the resources. For example, typical enabling act language from Ohio forward grants the lands "for the use of schools." That normal phrase changed during the 1860s to read "for the support of common schools"⁵⁴ and shifted again in 1907 when Oklahoma was granted land "for the use and benefit of common schools." California, being its typical peculiar self,⁵⁵ received land in 1853 for "the purposes of public schools." Even more confusing, perhaps, is the Omnibus Enabling Act which grants the school lands, again, "for the support of common schools,"⁵⁶ but authorizes in lieu selections of excluded mineral lands for the "use and benefit" of the schools.⁵⁷

Variation in the enabling act languages are compounded by equally subtle shifts in language in other key documents. For example, Wyoming was among those states granted lands "for the support of common schools." However, its Constitution formally accepts the grants, as was required by Congress, "for educational purposes."⁵⁸

⁵⁴ This phrase first appeared in West Virginia's 1863 Enabling Act.

⁵⁵ This is not the place to discuss in detail the peculiarities of the California situation. However, the lands were granted three years after statehood and therefore came apart from the normal context of provisos and quid pro quos which characterize other grants. There is, accordingly, no compact, hence no basis for arguing that there is a trust agreement with the federal government attaching to the California school grants. The state has taken the position that its grant is "honorary," rather than binding. At least one court seems to have been confused by this. See 111.2 Acres, *supra*, n. 33, discussed below at 161 and text accompanying. For a fuller but still preliminary discussion of California's peculiarities, see Gates, *supra*, n. 3, at 301-04, and Philips, "The Intermixed School Trust Lands: A Legal Perspective on Their Management," a Professional Report submitted in partial satisfaction of the requirements for the degree of Master in City Planning, University of California, Berkeley, (1984), at 2-9.

⁵⁶ Thorpe, IV, 2293.

⁵⁷ *Id.*, at 2296.

⁵⁸ Wyoming's Act of Admission provided that proceeds of lands should be a fund "expended in the support of said schools... ." But the lands were "reserved for school purposes only..." which seems broader. And the Constitution accepted "the grant of lands ... for educational purposes..." which seems broader still. Cited and discussed briefly in Beaver, "Comment: Wyoming School Trust Lands Trapped Inside Grand Teton National Park - Alternative Solutions for the Commissioner of Public Lands." *XX Land and Water Law Review* 207 (1985), at 208-09. See also, Beaver, *supra*, n. 10, at 9-10 for apparent errors in interpreting Wyoming's constitution in the Legislature and the courts. Nebraska, a state from the middle of the process (1867) provides useful illustration of the significant questions this verbal variation presents. An 1854 act authorizing the organization of a territorial government for Nebraska and Kansas reserved sections numbered sixteen and thirty six in each township "for the purpose of being applied to schools in said Territory" (Thorpe, II, 1168). Nebraska's enabling act, ten years later, granted the same sections to the state "for the support of common

The variety in language presents interesting questions for use and management of the grants. For example, can land management or permanent fund investment policies be designed to support schools by enhancing local property tax base from which the schools derive much of their funding? The answer would depend, in part, on whether the grant was made "for educational purposes," to be "applied to schools," "for the support of schools," or some combination thereof. Similarly, one recent commentator argued that "particular sections [of granted land] may have historical values that should be preserved to give future generations of school children the opportunity to observe land and the life it supports in a natural setting."⁵⁹

This issue will be revisited below when we attempt to identify the "trust document" and the "trust purpose." For the present it is sufficient to note that although the goal of fostering education is everywhere apparent, the precise definition of that commitment is not. The language stating the purpose of the grant varies considerably.

Evolution of Administrative Provisions. Questions concerning who receives the lands and for what purpose are closely related to practical questions of how they should be managed and by whom. One of the problematic aspects of interpreting the grants, is that there was very little discussion of how they ought to be administered by the recipients. This gives rise to numerous questions: who is the owner, the manager, the trustee (if such there be); how shall management expenses be paid and what costs are legitimately charged against income? Herein we shall discuss the evolution of three key aspects of school land administration: the recipient's authority to lease or sell; the evolution of a permanent fund, and the rise of State Land Boards or Commissions.⁶⁰

Lease, Sell, or Hold It was not always clear that any of the granted lands would be retained and/or managed. Although nothing is said in early Enabling Acts on this subject, the original assumption appears to have been that the townships would lease the lands and use the profits to support schools. Indiana's Constitution, as quoted above, clearly contemplates "improving" the lands for leasing.⁶¹ However, various leasing systems were tried in each of

schools." (Thorpe, IV, 2345). And the state Constitution, adopted in 1866, contained refers primarily to funds arising from lands granted for "educational and religious purposes." (Thorpe, IV, 2358).

⁵⁹ McCormick, *supra*, n. 10, at 537.

⁶⁰ Terminology varies. Hereafter we shall use the term Commission for generic references.

⁶¹ See *supra*, n. 39 and text accompanying. Congress reserved school lands for for Indiana in 1804. In 1808 the Indiana Court of Common Pleas in various counties were "authorized to lease school sections during the ensuing year, on improvement leases, for not more than five years... Two years later, the same courts were empowered to lease the lands under such restrictions as seemed best to them.... The proceeds were to be applied by the courts 'to the support of common schools according to the true intent of the Act of Congress.' Here, then, six years before the lands had actually been granted and Indiana had become a State, was a law looking to

the five states of the old Northwest, and "in every case it was discarded as a failure."⁶² In 1827 Ohio petitioned Congress for authority to sell rather than lease the lands,⁶³ and thereafter, school lands were generally sold.⁶⁴ The shift from lease-dominated to sales-dominated thinking about the school land grants occurred with little ado after early painful experience with leasing.

For present purposes, the more interesting issues concern the evolution of restrictions on sales, and the gradual emergence of a policy of retaining the granted lands. The federal government did not impose sales restrictions as grant conditions until 1875 when the Colorado Enabling Act provided merely that school property had to be sold "at a public sale for not less than \$2.50 per acre." All states entering the union after Colorado with the exception of Utah have done so with enabling act restrictions on the sale of the school allotments specified in their enabling acts.⁶⁵

Over time, the provisions became more detailed.⁶⁶ This fact is apparently the origin of the argument that Congress, concerned about the lands, became increasingly more cautious in the granting process. The states, however, began imposing sales restrictions on themselves in their own constitutions much earlier. And, the state restrictions from mid-century were much more restrictive than the Enabling Acts *ever* became.⁶⁷ For example, the original Kansas constitution, and several versions adopted thereafter between 1861 and 1868, provide for minimum sales prices. The education article of the 1859 version provides that "the school-lands shall not be sold unless such sale is authorized by a vote of the people at a general election."⁶⁸ This is still sixteen years before Congress enacted its first sales restriction in Colorado's Enabling Act.

A bouncing ball pattern is apparent in the evolution of sales restrictions provisions: a state

the establishment of a revenue for the schools. Without discussion, the plan of leasing had been adopted." See Knight, *supra*, n. 16, at 135.

⁶² See, for example, Taylor, *supra*, n. 16, at 93.

⁶³ Discussed in Knight, *supra*, n. 16, at 139.

⁶⁴ It is enlightening to note that the Indiana Constitution (discussed *supra*, n. 31, *ff.*, and text accompanying), disallowed sales until 1820; Congress did not formally grant authority to sell land until 1828. See Knight, *supra*, n. 16, at 139.

⁶⁵ Hibbard, *supra*, n. 16 at 317. See also Koch, *supra*, n. 16, at 43-56.

⁶⁶ Compare this provision in the Colorado Enabling act to the language of the New Mexico Enabling Act, discussed below below at n. 87-88 and text accompanying.

⁶⁷ See Fairfax and Souder, Working Paper 90-4, *supra*, n. 40.

⁶⁸ Thorpe, II, 1252.

adopts a restriction in its constitution; variations show up in subsequent state constitutions and occasionally in Enabling Acts; a subsequent state adopts variations on those conditions with further elaborations. This was all played out as a part of individual bargains with states at accession. The courts have tended to style this process of evolving restrictions as federal punishment for bad state behavior.⁶⁹ Our data suggest that the courts have failed to understand the origin of the restrictions, and their rationale.

The matter of who authored or agreed to the provisions is more significant than may first appear. As shall be discussed in more detail below, if the restrictions were part of the Enabling Act, then they bind the state and probably cannot be altered absent the consent of Congress. Moreover, if they were a part of the Enabling Act they are also arguably binding on the Federal government and some would assert cannot be abrogated without the consent of the state. If, however, the restrictions are self imposed, the state itself can alter them and the federal government is less likely to feel bound or be held to be bound by them.⁷⁰

By the mid-1830s, the lease-only policy had given way in favor of sales and the sales program gradually became more restrictive. The shift to land retention is less explicit: there is no apparent shift in Enabling Act or Constitutional language, and no plethora of states applying to the federal government for changes that would authorize the states to retain and manage the lands.⁷¹

How then, did the western states initiate the now dominant program of retaining and managing the granted lands? The shift to retention appears to have occurred gradually at the state level in much the same way it evolved at the federal level. Over time the assumption that the federal government would dispose of all of the public domain lands eroded under a number of pressures.⁷² The states were carried along in this same national reorientation. Indeed, many

⁶⁹ See *Ervien v. United States*, 251 U.S. 41, 47-48 (1919), and *Lassen*, supra, n. 30, at 463-64..

⁷⁰ Discussed below, n. 150 and text accompanying.

⁷¹ We have located one case on the subject, one which holds that the authority to sell clearly includes the authority not to sell. This is in accordance with normal trust management principles but the Court ties the conclusion instead to the conditions prevailing at the time of the grant, and the reasonable contemplation that they would change. See *State ex rel. Koch v. Barrett* 68 P.2d 504, 507-08 (Mont. 1901).

⁷² This evolution was not explicit or final until 1976. Everything from the rise of science and scientific bureaucracies in government, the beginning of the Progressive era, and the closing of the frontier to the death of the last passenger pigeon is involved. See *Gates*, supra, n.3, and *Peffer*, *The Closing of the Public Domain* (1950) for starters. See also Fairfax, "Coming of Age in the Bureau of Land Management: Range Management in Search of a Gospel," in National Research Council, *Developing Strategies for Rangeland Management*, National Academy of Sciences, (A Report Prepared by the Committee on Developing Strategies for Rangeland Management.) (1984), at 1689. A key indicator, without so stating, that the federal government was going to retain far more extensive land holdings than the park and forest reservations previously authorized was the passage of the Mineral Lands Leasing Act of 1920. Because the lands had been withdrawn from entry

states did not formally recognize retention as their official policy until the mid-1970s, the same as at the federal level.⁷³ States that joined the union toward the end of the granting process did so as the sales program ebbed into retention—they retain and manage most of their lands. Older new states vary in the degree to which they held onto their grants.⁷⁴

One consequence of this gradual and unexplicit evolution toward land retention is that the states continue to have a choice regarding whether to sell or retain the lands. And the shift is not absolute. Like the federal government, the states continue to engage in land sales and exchanges.⁷⁵ Hence, the shift to retention does not imply that no state trust lands will ever be sold, but rather that the presumption is in favor of retaining rather than disposing of the lands.⁷⁶

*Permanent School Fund*⁷⁷ The concept of a state wide fund and a process for disbursing receipts to local school districts was a logical concomitant of the shift from townships to states as grant recipients: there had to be a kin, from which the state could disburse money to the school districts. This is true even though the permanent fund has a separate history quite apart from the land grants program. At the urging of numerous public and professional groups established to foster public education, even states that did not receive school sections soon established permanent funds for supporting schools. When states rather

and therefore from patent, leasing was necessary to access the resources, primarily coal. But the subtext, now frequently overlooked, is that the lands would be retained in federal ownership. See Fairfax and Yale, The Federal Lands: A Guide to Planning Management and State Revenues (1987), at 59-62. There are a number of issues concerning which much of the discussion of the shift from a disposition policy to a retention policy at the federal level is not applicable to state policy. Most states began with leasing as part of their mandate. Although leasing was justified primarily as a stopgap until the market stabilizes so it can be sold at a profit, it is different from the federal mandate. The federal government began with a mandate to dispose. These differences are not trivial. However, for the purposes of explaining why there are no clear road signs in this shift in policy from disposition to retention, the same facts are relevant.

⁷³ See FLPMA, supra, n. 5.

⁷⁴ See below, Figure 2 and text accompanying.

⁷⁵ Literally every state is still selling land as part of its management activities. See below, n. 278, ff.

⁷⁶ It is interesting to compare the state trust land managers' notion of retention with that of most federal land managers. At the state level, retention typically implies the idea of maintaining a portfolio of lands for investment and management purposes. The federal land managers seem much more concerned with holding onto the specific acres which are "theirs" to administer. California, Arizona, and Washington have recently established "land banks" to facilitate real estate transactions in their portfolio. All states engage in land exchanges to block in their scattered sections except California which does not. Oregon and Arizona have moved particularly effectively in this direction. See generally, Dragoo, "The Impact of the Federal Land Policy Management Act Upon Statehood Grants and Indemnity Land Selections." 21 Az. Law. Rev. 395 (1979).

⁷⁷ Not all states use the term permanent school fund. Equivalent phrases include perpetual fund for schools, common school fund, public school fund, and state school fund. The nomenclature varies largely according to what the states first constitution called it. See Dixon, supra, n. 16, p. 3, for a list of which states use which terms. See also Koch, supra, n. 16, pp. 7-22.

than townships began to receive the lands, the idea became ubiquitous and closely tied to school land management.⁷⁸ Increasingly elaborate state constitutional provisions detailed the content and management of the permanent school funds. The pattern of evolving permanent fund provisions is confused by the fact that old new states "lapped" the new new ones: that is, long before the accession process was complete, early joiners rewrote their constitutions and included provisions that were then current in the accession process. For example, Louisiana, which had been admitted in 1812 without any school lands, revised its constitution in 1845 to provide for dealing with the proceeds of retroactive grants made by Congress at the insistence of older new states.⁷⁹

Clearly, the whole operation was highly refined before Congress made its first reference to a permanent school fund in school land grant provisions of the 1876 Colorado enabling act. As in the case of restrictions on sales, Congress' direction was far less consequential than those then current in state documents: Congress merely required Colorado to set up a permanent fund, the interest only of which should be expended in the support of schools.⁸⁰

One of the most interesting aspects of the permanent funds is that it confuses a central question which arose toward the close of the century: if there is a trust, what is the trust property or corpus? About the permanent funds, there is little question. As soon as there is a trust, it includes the funds. Many state constitutions specifically declare that their permanent funds are to be treated as a "trust." Although the term is not always employed, the implication is quite clear beginning with Michigan's 1837 constitution.⁸¹ Far fewer states have specifically included the lands in the trust. Since most of the specific requirements concerned investment of the funds, the management of retained lands is sometimes confused by provisions which never contemplated lands. To these important issues we will return in section three.

⁷⁸ States were soon making detailed provisions regarding how localities could qualify to receive what were then state funds. One of the first was that no school district which offered less than three months of schooling would qualify for what were by then state funds. Perhaps at some future moment in the evolution of K-12 education, some might wish that the federal government had not established a system that was centralized within each state. With the school land grant program, they clearly did so.

⁷⁹ Specifically, the new constitution provided that the proceeds of all lands heretofore granted by the United States to this State for the use or support of schools, and of all lands which may hereafter be granted or bequeathed to the State "shall be and remain a perpetual fund on which the State shall pay an annual interest of six per cent; which interest, together with all the rents of the unsold lands, shall be appropriated to the support of such schools, and this appropriation shall remain inviolable." Thorpe, III, 1047.

⁸⁰ Thorpe, , 472-473. Compare with Michigan's Constitution of 1837, *infra*, n. 81.

⁸¹ Thorpe, IV, 1939. Article X of Michigan's original Constitution is typical: "a perpetual fund, the interest of which, together with the rents of all such unsold lands, shall be inviolably appropriated to the support of schools throughout the state."

State Land Commissions and Commissioners The pattern regarding grant administration is, as noted above, that very little arrangement was made at the time of the grant for administration thereof. Considering that every state still holding school lands, and some that do not, has a variation on a State Land Commission or Board and Commissioner or Commissioners, it is perhaps surprising that the Congress never mandated same in an enabling act. And, early state constitutions are mixed as to whether responsibility for the lands, and/or the permanent school funds, was vested in the Legislature or in some Commission.

Oregon appears to be the first to provide for a land commission in its original Constitution. Section 5 of the education article in the 1857 Oregon Constitution, two years prior to statehood, establishes a Board of Commissioners. Consisting of the Governor, the Secretary of State, and the State Treasurer, the Board was charged with selling the school lands and investing the fund arising therefrom.⁸² This pattern was adopted in other states which established such boards in their constitution. The New Mexico constitution (1910) merely establishes a Commissioner, without a board. Colorado (1876), South Dakota (1889), Montana (1889), Idaho (1890), Wyoming (1890) and Oklahoma (1907) all established boards consisting of a collection of similar ex-officio state officers. South Dakota included on its board the School Superintendents of all its counties. Although this pattern for boards became familiar, they were not uniformly adopted. Kansas (1857), Nevada (1864), Nebraska (1866-67), North Dakota (1889), Washington (1889), Utah (1895), and Arizona (1910) all specifically directed in their constitutions that the Legislature was responsible for providing for the school lands. Interestingly the four states that came in under the 1889 enabling act (North and South Dakota, Washington, and Montana) split on this key aspect of school land management, two setting up commissions and two not, as did Arizona and New Mexico, which both joined under the same 1910 enabling act.

5. What Did this All Look Like at the End?

In the preceding discussion of Indiana's early accession and patterns of grant program evolution in subsequent ones, we emphasized numerous points at which Congressional language protecting granted lands was far less detailed than state language. The same observations are accurate concerning Arizona and New Mexico—the states imposed more rigorous requirements on themselves than Congress did. Indeed, it is also true that most of the later joining states restricted themselves more stringently than the Congress restricted New

⁸² Thorpe, V, 3011. Ex Officio boards were widespread and much complained of as a source of school land mismanagement. See Knight, supra, n. 16.

Mexico and Arizona. However, twentieth century accessions are so different from Indiana's that we shall conclude this programmatic overview with a brief look at one of them. Taking New Mexico as an example, the conventional wisdom begins to make sense.

The Enabling Act. Section 15 of the 1850 Congressional act establishing the Territory of New Mexico⁸³ reserves sections 16 and 36 "for the purpose of being applied to schools..." Approximately 60 years later a second Enabling Act was passed. In distinction to the brief provisions concerning school land grants to Indiana, New Mexico's grants are the subject of six lengthy sections of the Enabling Act⁸⁴ The school lands figure most prominently in Sections 6, 9, and 10.

Section 6 grants, in addition to the previously reserved sixteenth and thirty sixth sections, sections two and thirty two. Mineral lands are excluded and sections included in national forests are to be administered as part of the forest, with the appropriate portion of forest receipts going to the common school fund, until indemnity lands are selected.

Section 9 makes the ancient grant of 5 per cent of the proceeds of sales of public lands lying within the state. The money is to be paid to a "permanent inviolable fund, the interest of which only shall be expended for the support of the common schools within the said state."

Section 10 specifically provides that lands granted to the state are held "in trust, to be disposed of in whole or in part only in manner as herein provided for and for the several objects specified in the respective granting and confirmatory provisions, and the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

It further provides that disposing of any of the lands or money or other thing of value directly or indirectly for any object other than that for which the lands were granted or in any manner not in conformity with the act will be deemed a "breach of trust." It makes numerous provisions regarding the manner of sale or lease ("only to the highest and best bidder at a public auction") and about the manner of advertising the mandatory auction; about appraisal and minimum prices (lands to the east of certain ridges are not to be sold for less than \$5 per acre; to the west, not less than \$3 per acre; irrigable lands, not less than \$25 per acre). Section 10 also provides that a separate fund shall be established for each of the several objects for which grants are made. It directs the state treasurer on which securities are approved for

⁸³ Act of September 9, 1850, 9 Statutes at Large 446, Chapter 49.

⁸⁴ 36 Stat. 557 (1910).

investment of the fund, and it declares that any lease, sale, conveyance or contract not in conformity with the provisions of the Enabling Act shall be null and void. Finally, Section 10 declares that it is the duty of the Attorney-General of the United States to prosecute to enforce the provisions relative to the application and disposition of the lands, the products thereof and the funds derived therefrom.⁸⁵

Section 11 provides for surveys of the granted lands by a commission consisting of the governor, the surveyor-general and the attorney-general of the state and Section 12 confirms all grants of lands previously made by Congress. Section 18 reserves all saline lands in the state from entry until Congress shall provide for their disposition.⁸⁶

The State Constitution To these lengthy provisions, the New Mexico state constitution adds little.⁸⁷ It describes the management of the school fund in less detail than the Enabling Act.⁸⁸ It establishes a formula for distribution of the school fund. Article XIII, which treats public lands is but two paragraphs long. Section 1 establishes a minimum price of \$10 per acre for school lands not contiguous to other state lands, and prohibits their sale for ten years after statehood. Section 2 provides for a Commissioner of Public Lands to have "direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law." Article 21 contains a lengthy "compact" with the United States which adds nothing pertinent here.

The brevity of New Mexico's Constitution in comparison to the Enabling Act is striking. In the New Mexico bargain, virtually all the restrictions and conditions are in the congressional statute.

6. Summary

The New Mexico enabling act and constitution represents the end of the accession period. The early enabling acts merely granted the land, and the early state constitutions left major issues to the legislature to sort out. Half way through the 19th century, the states were concerned

⁸⁵ This provision is unique to Arizona and New Mexico. It may partially explain why key U.S. Supreme Court decisions are therefore unusually likely to involve cases about those two states. The general trust rule is that once a trust is established the settlor has a very limited role in the administration of the trust. However, the U.S. Government is not a typical settlor.

⁸⁶ Congress never did loose its grip on the saline lands. See Orfield, *supra*, n. 16 for the fullest discussion.

⁸⁷ Thorpe, published in 1909 does not contain the pertinent original Arizona and New Mexico documents. Here we rely on Secretary of State, The Constitution of the State of New Mexico Adopted by the Constitutional Convention Held at Santa Fe, N.M., from October 3 to November 21, 1910, and as Amended, November 6th, 1911 (1912).

merely to provide for the establishment and preservation of a permanent fund whose income was to be devoted to the support of common schools. Later state constitutions make provisions regarding the sale price of school lands, the securities in which the proceeds of the sales can be invested,⁸⁹ the management of the fund, and the like.⁹⁰

The pattern observed in the proliferation of both sales restrictions and the spread of permanent school fund and fund management requirements does not support the conventional picture of a concerned Congress acting ever more stringently to bring profligate states to heel. The restrictive provisions are literally all initiated in state constitutions, and are initially elaborated at that level.

Only at the very end of the process, specifically in the 1910 Arizona and New Mexico's accessions, is something which might be called Congressional vigilance apparent. That Enabling Act is peculiar because it is considerably longer than the state constitution. It shows us from whence the conventional wisdom emanates, and further supports the assertion that the grants vary considerably from state to state and over time. Although there is a clear core to the grant program, it evolved differently in the different bargains struck by different states.

The Land and Resources

This same variability is seen in decisions—both historic and contemporary—that different states have made regarding the management of the granted lands and the permanent funds arising therefrom. This section will briefly introduce the current status of those resources by discussing two topics: first, land holdings and holding patterns; and then, resources and the revenues they produce.

1. Land Holdings and Patterns

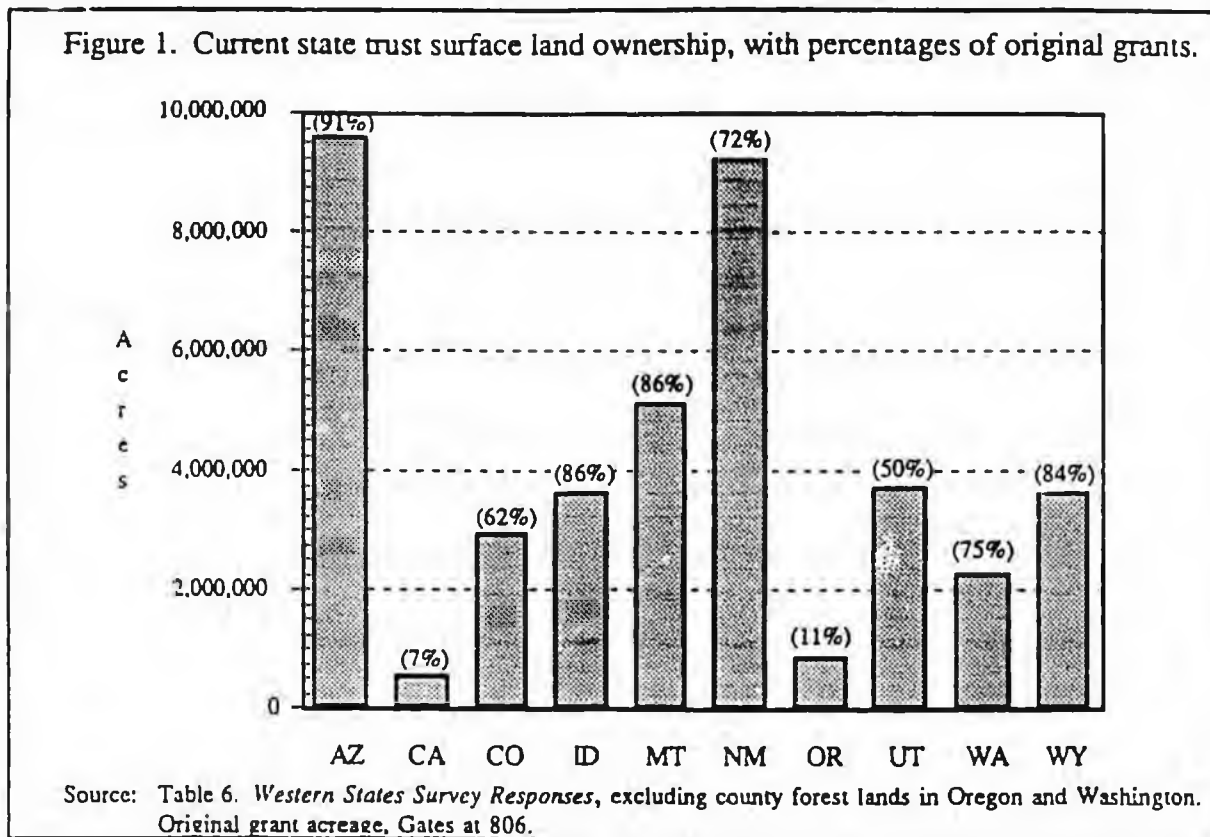
In the ten western states where we are concentrating, approximately 41 million acres are

⁸⁸ *Id.*, Article XII, §§ 2 and 7.

⁸⁹ Investment policy in the states was, to use Dixon's word, "confused:" "On the one hand existed the notion that the money was intended to be used to build up the state and develop her resources, while it was contended, on the other hand, that the purpose of the trust was to aid the institutions endowed." *Supra*, n. 16, at 92-9?

⁹⁰ See Swift, 1911, *supra*, n. 16, at 124. Some of the impetus for protecting the permanent fund and its purpose may have come from the fact that many of the funds were diverted to other purposes during the Civil War, for the conduct of the war. In addition, many of the railroads and other internal improvements in which the funds were invested, especially in the south, were destroyed during the war. See Swift, *id.*, at 150. Railroad investments lost in the Civil War and never replaced were the subject of recent litigation in Mississippi. See *Papasan v. Alan*, 106 S. Cl. 2932 (1986).

currently managed by states as part of the school land grants. Three fairly distinct classes can be differentiated based on the extent of land ownership, as can be seen in Figure 1 below.



Clearly the last two states to receive their trust lands, Arizona and New Mexico, still have the largest amounts - due largely to the fact that they received four sections per township, and that their lands were difficult to sell because of both constitutional limitations and the quality of the land. Those two states, plus Montana, each retain title to over five million acres. Those three states also continue to hold the vast majority of their original grants. Other states (Washington, Idaho, Wyoming), have also held onto most of the lands they were granted, but they do not appear as large holders because they were granted less land to begin with. States which sold most of their lands have the least: California and Oregon. Both states began with enormous granted acreage and neither holds more than a million acres now.⁹¹ The middle group of six

⁹¹ Robinson describes the process whereby granted lands passed speedily into private hands in California. See *supra*, n. 50, at 189-92. Nevada is a special case. For reasons that aren't too hard to figure, there was not a huge demand for school sections scattered in the desert. Twenty years after statehood Nevada petitioned Congress asking to trade the 4 million acres of scattered sections for approximately 2 million acres of selection rights so that the resources could be concentrated where the demand was. Congress acceded to this request. Most of Nevada's land was taken up as a result of this opportunity to select desirable land, leaving only about 2,000 acres of state trust lands remaining. See Townley, *Alfalfa Country: Nevada Land, Water and Politics in the 19th Century*, (1976), pp 1-18.

states includes three which have sold some or much of their lands (Utah, Montana, Colorado), and the three who began with less land. Note that both Oregon (652,000 acres) and Washington (622,500 acres) have large amounts of forest board lands which came to the counties through tax reversions and purchases⁹² and are managed in trust for them by the state.

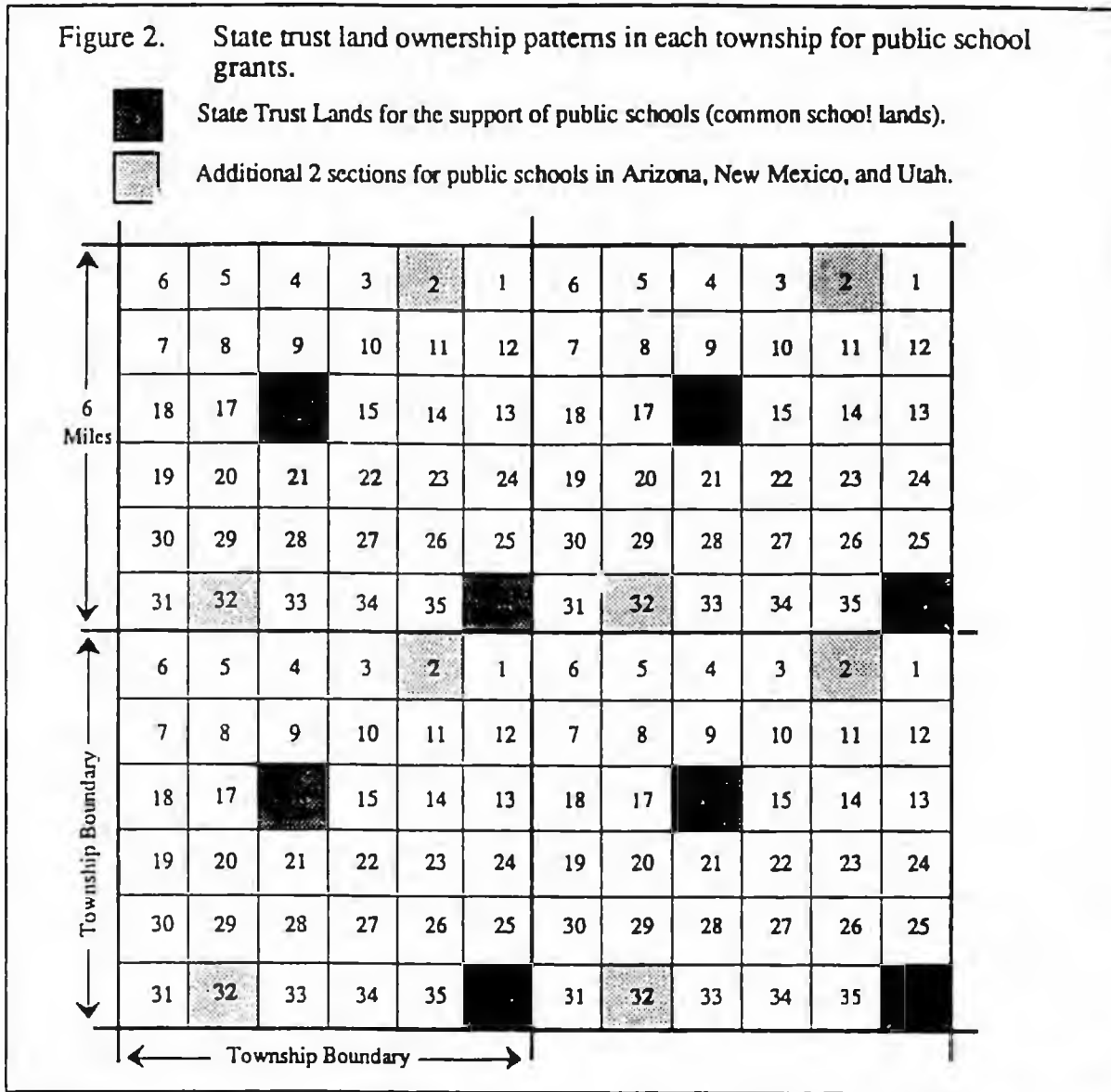
Although total acreage held is an important data point, the pattern of land holdings is more significant. The shift from disposition to retention left the states holding many parcels which resemble many of the federal lands now managed by the Bureau of Land Management; that is, they are still in public ownership not because anybody had intended to retain them but because they could not be marketed during the era when "disposition" was the goal. For example, 85% of the remaining school lands in California are located in the California desert.⁹³ Moreover, many of the states continue to hold the majority of their lands in the dispersed pattern of two to four sections per township in which they were granted. This pattern is typical of the state school lands west wide and has significant consequences for management of those *and other* lands. Most obviously it is difficult to plan for and administer scattered parcels of land.

This can be seen in detail in Figure 2. Even in Arizona, New Mexico and Utah where four sections per township were granted for the public schools, no sections have common property lines. This scattering of state owned parcels means that state granted lands are uncommonly likely to be surrounded by neighbors—especially the U.S. Forest Service and Bureau of Land Management—who operate under a significantly different management mandate than the state, and who frequently do not share the state's priorities. This has been particularly difficult when state mineral lands are completely surrounded by federal holdings such as wilderness study areas. Getting access to the parcel and pursuing conflicting goals has been an increasingly difficult problem for state school land managers.⁹⁴ Not surprisingly, many states

⁹² Washington State has purchased about 80,000 acres of Forest Board Purchase Lands with bond money. Nick Handy, Chief Counsel, Washington State Department of Natural Resources, Pers. Comm. March, 6, 1991.

⁹³ But, although it is standard to say of the Federal unreserved, unentered public domain that it was the dreck and nobody wanted it, sometimes that is not the case. Regarding many parcels the truth is that somebody was able to enjoy the benefit of the land without purchasing it and paying taxes on it. By fair means (the state parcel happened to be completely surrounded by Pappy's farm) or foul (e.g., Pappy illegally fenced the state lands and took pot shots at all comers) many settlers successfully trespassed on state school lands for decades. Hence the lands remained in state ownership not because they were worthless but because they had been effectively stolen and title transfer would have been an expensive formality. Discussed in Fairfax, *Developing Strategies*, supra, n. 72.

⁹⁴ See for example, *Utah v. Andrus [Coutter]* 486 F. Supp. 995 (1979).



pursue land sales and exchanges to "block in" their holdings, that is trade sections with federal and private land holders to aggregate the sections into compact, efficient management units.⁹⁵ The original scattering also means that many of the state parcels, once regarded as grazing or agricultural lands, are now surrounded by cities and/or otherwise quite valuable for commercial development. Several states have evolved programs to exploit the commercial development

⁹⁵ Utah's selection efforts were frustrated in *Andrus v. Utah* 446 U.S. 500 (1980), which held that the Taylor Grazing Act gave the Secretary of the Interior authority to reject state land selections. See Tomsic, "The Loss of the States' Right to Indemnify Preempted School Land Grants on the Basis of Equal Acreage." 1981 *Utah Law Rev.* 409 (1981). This led the Governor to propose a massive federal-state land exchange, known as Project Bold, which also failed. See Matheson and Becker, "Improving Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience." 33 *Rocky Mt. Mineral Law Inst.* 4-1 (1987) and references cited.

potential of these lands. Arizona, California, and Utah are also still in the process of selecting lieu lands.⁹⁶

2. Resources and Revenues

Revenues are received by the state land office from three basic sources: (1) royalties from the sale of non-renewable resources, again usually oil, gas, coal, and minerals; (2) revenues from the sale of granted trust lands; and (3) revenues from the use of renewable resources, usually agriculture and grazing fees, timber sales, commercial or special purpose leases, and the surface rentals and bonus bids received for oil, gas, coal, and mineral leases.

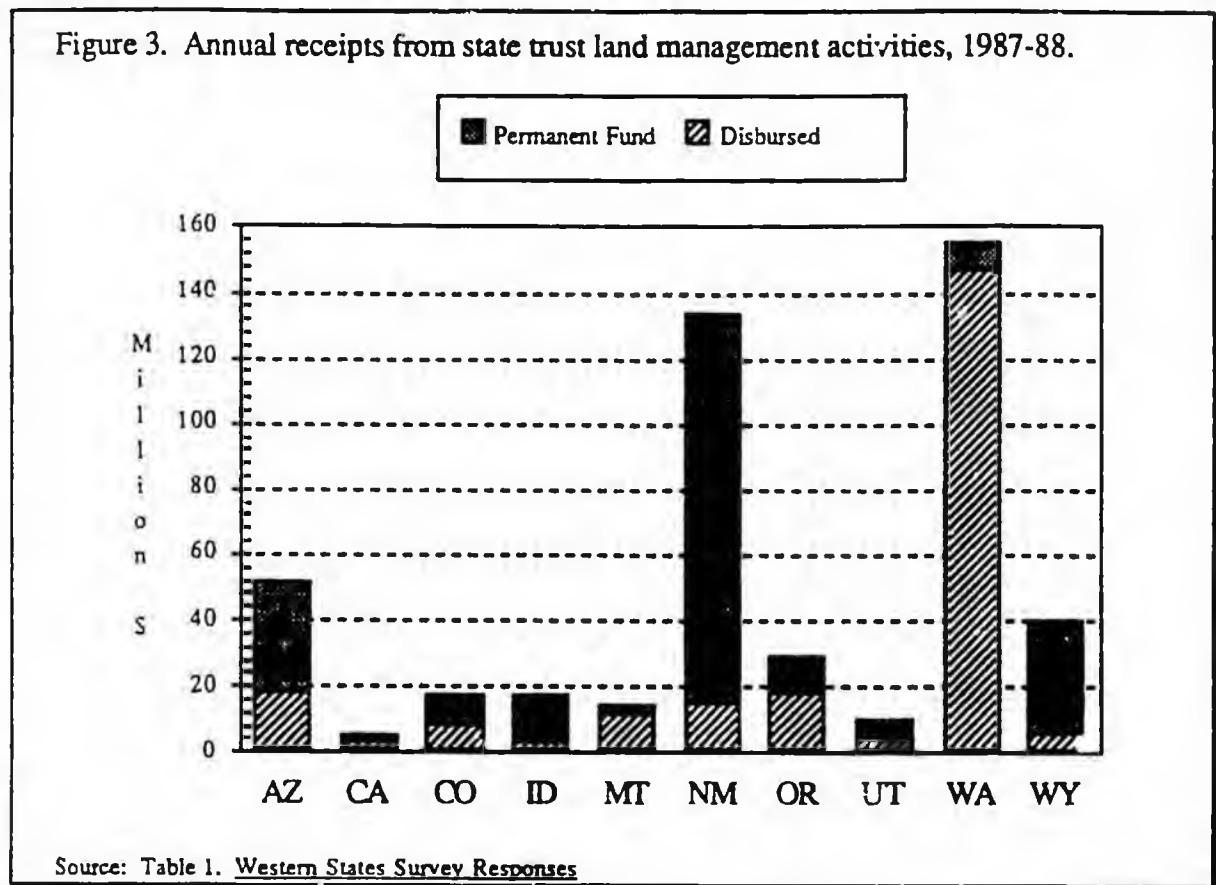


Figure 3 shows annual receipts from state trust land management activities in ten western states. There is considerable variation in the annual revenues received by the states from trust lands. States can be divided easily into two or three categories: those that receive less than \$20 million per year in revenues (CA⁹⁷, CO, ID, MT, and UT); those that receive greater than \$20

⁹⁶ See supra, n. 27, that when the granted section had been sold, granted or otherwise disposed of the state was authorized to select alternative land "in lieu" of the original parcel.

⁹⁷ Sovereign lands managed by the State Land Office are not included as trust lands. California is somewhat

million per year but less than \$60 - \$80 million per year (AZ, OR, and WY); and those that have very high levels of trust revenues (NM and WA). If breaking down into only two categories, clearly New Mexico and Washington are still in a category by themselves and every other state is lumped.

Permanent Funds

State permanent funds are the repository of, among other things, revenues received from the sale of trust lands and from royalties on non-renewable resources, usually from oil, gas and coal, leases. The annual interest from these funds is disbursed to beneficiaries based on the contributions of their lands. State constitutions vary considerably regarding what is included in the fund in addition to the revenues. Indiana's original constitution simply stated that money raised from the sale of the lands would "be and remain a fund for the exclusive purpose of promoting the interest of literature and science." Louisiana's 1845 revised constitution was the first to provide that the permanent fund would include all escheat land and property.

Wisconsin's fund added fines, payments made in lieu of military service, all unspecified federal grants and the 5% of receipts on sale of federal lands in the state which it was customary to grant to the states.⁹⁸

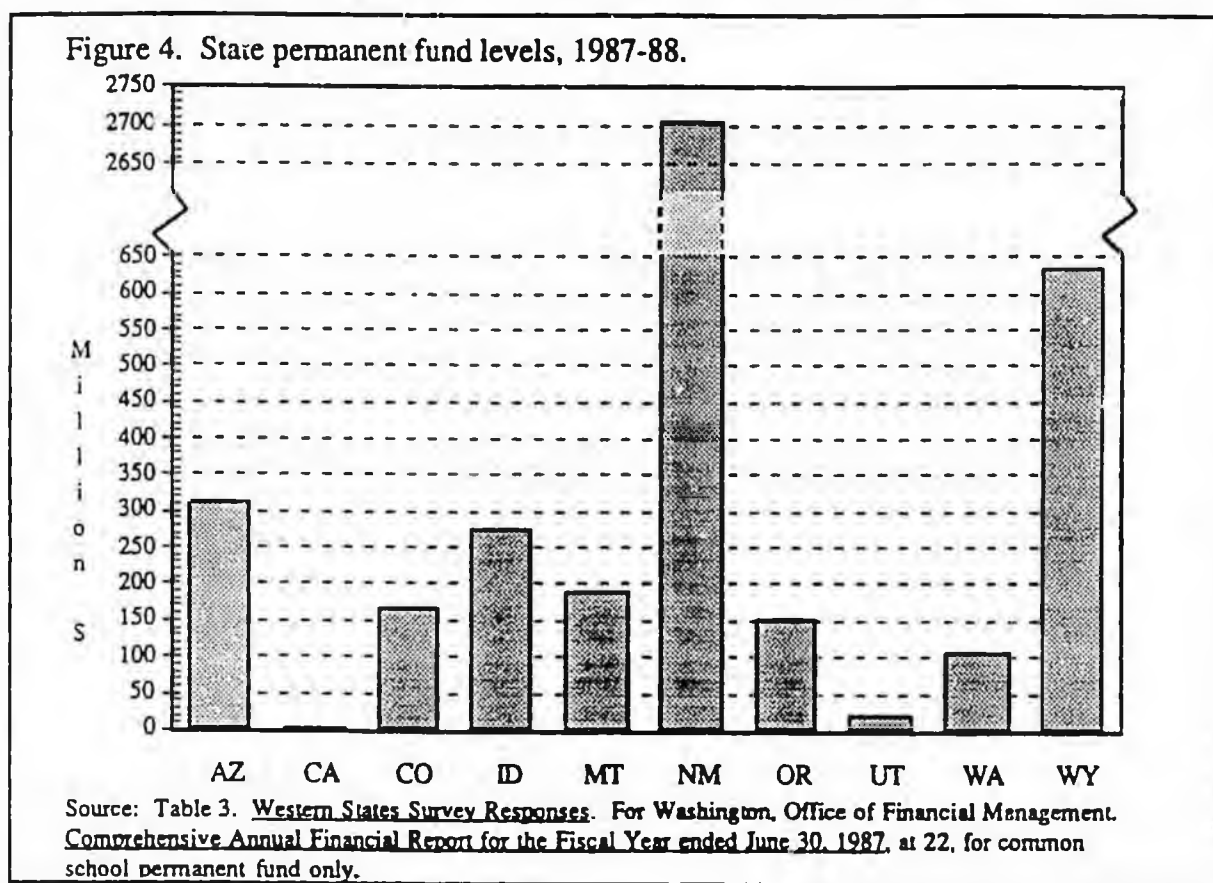
Inspection of Figure 4 shows the extent of the permanent funds in ten western states. The states cannot necessarily be easily divided into groups according to how much money is in the fund. California has the least amount of permanent funds since its fund was liquidated.⁹⁹ Utah has the next lowest amount of permanent funds due to the fact that in the early 1980s, faced with a large budget cut of one-third, the beneficiaries were allowed to liquidate a portion of their permanent funds to maintain their budgets. New Mexico and Wyoming have high levels of permanent funds due to oil and gas and coal royalties. The high level in Arizona is

peculiar, since if you look at its total state land office revenues they lead all other states with about \$230 million in annually. However, about \$220 million of this is from oil and gas royalties and rentals on their sovereign lands in the Santa Barbara Channel.

⁹⁸ Fairfax and Souder, Working Paper 90-4, *supra*, n. 40.

⁹⁹ All net income (both rentals and royalties) from school and in-lieu lands is now placed in the state Teachers' Retirement Fund (A.C.C.-P.R.C. §6217.5 and A.C.C.-E.C. §24702(a)), while net receipts from land sales go into the State Land Bank to purchase replacement lands (A.C.C.-P.R.C. §6217.7). There are two exceptions to this division: (1) the two state sections within the Elk Hills Naval Petroleum Reserve that the state claims; royalties from these lands, or their in-lieu replacement, go into the State Land Bank (A.C.C.-E.C. §24702(a) with the interest only going into the Teachers' Retirement Fund. (2) Geothermal indemnity lands (A.C.C.-P.R.C. §3826) income is divided fifty percent to the Geothermal Resources Development Account (30% to the Renewable Resources Investment Fund; 30% as grants to local jurisdictions, and 40% to the county where the revenues were generated; while the other fifty percent goes to the Teachers' Retirement Fund (A.C.C.-P.R.C. §3826 and A.C.C.-E.C. §24702).

less easily explained: it has no significant oil, gas or coal royalties, its mining royalties were set below fair market value until recently, and it still retains almost all its originally granted lands (92%). However, in 1987-88 the land office received almost \$24 million in land sales, mostly for lands surrounding urbanizing areas. Washington's case is similar; however, its permanent fund came primarily from early land sales. Its current policy of not decreasing its trust land base means that land sales receipts no longer are deposited in the permanent fund, but are used instead to purchase replacement property. The other states with smaller amounts of permanent funds have either sold many of their lands (Oregon), or have more limited amounts of royalty income than the top producers (Colorado, Idaho and Montana).



Differences among the states in the division of revenues are primarily a result of their original constitutions.¹⁰⁰ The original reason for their creation is that permanent funds were considered just that—permanent—while the lands were expected to pass into private hands. Basically, the differences today in the amounts of permanent funds is due to two factors: (1) the amount of lands sold for low prices in the early days of statehood; and (2) the amounts of mineral royalty income accruing to the permanent funds. Lands sold before the 1927 passage of the Jones Act

¹⁰⁰ See Fairfax and Souder, Working Paper 90-4 (1990), *supra*, n. 40 for a complete enumeration.

gave the states legal title to their school sections classified as mineral in character also prevented the states from selling the mineral rights along with the surface lands.¹⁰¹

Thus California, Colorado, Nevada, and Oregon sold whatever unknown minerals were on their lands, often only retaining a one-sixteenth royalty right, if any. This problem was especially prevalent in states that had lands valued for surface uses, while the value of the subsurface resources was unknown, or masked for fraudulent purposes.¹⁰² In the other states where surface rights were not in demand, settlement and land claims did not occur on a large scale until either the restrictions on purchase of lands were stricter (New Mexico), or after passage of the Jones Act (Utah and Wyoming). The Jones Act allowed states "lucky" enough to have lands that nobody wanted to capture the mineral values of these lands for the trust.¹⁰³ This occurred in most states after the OPEC oil embargoes in 1973 pushed the prices for petroleum products up and spurred demand for state leases.¹⁰⁴

The tendency to treat the granted lands as if they were all the same is clearly inaccurate. As the program evolved, different states assumed different responsibilities for the care and management of the land and the funds it produced. The resources granted vary even more strikingly--some states received apparently worthless desert which they could not sell and are now possessed of valuable minerals deposits. Apparently better endowed states, such as California, now hold neither extensive lands nor significant permanent funds.

III. QUESTING AFTER MANAGEMENT FLEXIBILITY

We have seen that the grants do, or ought to, mean different things in different states. It is now possible to proceed with the main business of the paper: confronting and unwinding the idea that the management of the granted lands is narrowly constrained by economic maximization principles. This single mindedness arises, as noted at the outset, from the deeply ingrained idea that the school lands management is bound to simple pursuit of economic returns because it is defined by basic trust notions.

This leaves us with two questions: First, are the school land grants appropriately viewed as a

¹⁰¹ See *supra*, n. 50.

¹⁰² See Puter, *Looters of the Public Domain* (1908) for the classic, first hand account of fraud associated with state land selections. See also Uzes, *Chaining the Land: A History of Surveying in California* (1977).

¹⁰³ Basically, if there wasn't water, nobody wanted the lands. See Townley, *supra*, n. 89, for a description of the problems in Nevada's early days with selling its trust lands.

¹⁰⁴ See Souder, *supra*, n. 24, particularly Chapter 5 for a further discussion of price trends in crude oil and coal and their effects on trust revenues going into permanent funds.

trust? Our "yes" on that issue has more qualifications and textures than the conventional wisdom, but leads nevertheless to the second query: does the trust bind school land managers to pursue economic maximization? The "no" response here includes two arguments: first, economic maximization is not the only component of trust management; second, economic maximization is not an inflexible mandate in any event. In the main, these points are not startling discoveries. However, they have not been adequately raised and discussed in the context of the school lands management, and there is profit, in terms of perspective and flexibility, in doing so now.

Before we begin that discussion, a few words about the general contours of the case law are in order. The present section makes two kinds of observations about nearly five hundred cases which were reviewed in the process of preparing to write it.¹⁰⁵ First, it discusses why, if a review of the historic documents reveals so much diversity among states, is the conventional wisdom appear so monochromatic?¹⁰⁶ Second, it characterizes the disputes and makes some preliminary comments about the cases as a group.

Origins of Unanimity

One of the interesting things about reading the case law as opposed to the constitutions is that it rapidly begins to appear that the school land grants are all essentially the same. After such excruciating efforts to understand and describe diversity and change in the grant program, we have asked why this is so. Our answer begins with the routine observation that when any aspect of the confusion we have so carefully exhumed results in a dispute, the issue is defined and interpreted by courts. Lawyers and judges have, not unpredictably, looked to familiar trust principles¹⁰⁷ and previous decisions to unravel claims and counterclaims about the school

¹⁰⁵ Fairfax and Phillips, State Trust Lands Case Law and Attorney General's Opinions. A Joint Program of the State Lands Project and the Western States Land Commissioners Association Legal Committee. Draft (1991).

¹⁰⁶ It would be easy to overstate the consistency. As everyone who has read a group of cases in any area knows, eventually somebody mentions almost everything conceivable. We are describing, of course, the overriding and much cited themes rather than all the wild hares that ever ran through a single or a few decisions. Nevertheless colleague Nick Handy, Chief Counsel, Washington Department of Natural Resources answers this rhetorical question differently. He asserts that similar terminology in different documents [see e.g., supra, notes 54-59 and text accompanying] means essentially the same thing from one state to another, and that the courts have been "remarkably consistent" in interpreting those documents. Hence, there is less diversity than we have alleged. Pers. comm., March 6, 1991.

¹⁰⁷ It will be argued below that the trust theme did not appear until relatively recently in land grant interpretation. One reason is the late arrival on the scene of the Arizona-New Mexico Enabling Act. See supra, n. 93. The other reason may be that the trust notion itself did not emerge until the turn of the 19th century as a stable component of American law. A course in trusts was not taught in American law schools until a Professor Ames initiated the first course at Harvard in 1882. His casebook on the subject, first published in that same year, contained 200 cases, one hundred and seventy five of which were English cases. See Scott,

lands.

Two familiar judicial procedures have inclined the decisions, on balance, to simplify around a few tractable themes. These procedures are not peculiar to school lands cases. First, it is difficult to gather data on one state's situation, let alone gather enough to see patterns over time. The effect has been for the distinctions to be blurred and for what is familiar, the trust principles, to dominate what is not familiar, the peculiarities of public lands history and policy.

Second, normal deference to U.S. Supreme Court decisions has given this blurring a particular flavor in the school lands setting. Unique provisions in the Arizona and New Mexico Enabling Act authorize the U. S. Attorney General to enforce the provisions of the act.¹⁰⁸ Cases from Arizona and New Mexico have dominated Supreme Court discussion of the school lands. But those states are not an accurate guide to grants in other states. Nevertheless, precedents from Arizona and New Mexico have become central in interpreting the grants in other jurisdictions.¹⁰⁹

This suggests, correctly, that the conventional wisdom, and the unanimity are of relatively recent origin. Although a trust has been mentioned in connection with the lands since the 1850s, the frequency of the references and the dominance of the doctrine is most apparent as the 20th century advances.¹¹⁰

To suggest the validity of these observations without becoming mired in 150 years of cases, we will discuss but one. A brief review of *County of Skamania v. State*¹¹¹ will demonstrate

"Fifty Years of Trusts." 50 *Harvard L.R.* 60 (1936).

¹⁰⁸ It is not clear how much of the domination of Arizona and New Mexico cases to attach to this provision. The first federal prosecution, *Ervin v. United States*, 251 U.S. 41 (1919) was not long in coming. The Supreme Court was explicitly reluctant to hold that a state law allowing use of trust receipts to advertise New Mexico lands generally was a "breach of the trust" (at 48) but affirmed a Eighth Circuit opinion so stating. The key case in the contemporary interpretation of the school grants, *Lassen v. Arizona Highway Department*, 385 U.S. 458 (1967) contains a more explicit discussion of trust obligations but did not directly involve the U.S. Attorney General. The U.S. was granted special leave to argue the case as an amicus curiae however.

¹⁰⁹ This is in spite of the fact that the Supreme Court has been uncommonly careful to avoid sweeping generalizations and is uncharacteristically well informed about the grant process. It is interesting to note, however, that the Supreme Court noted in its *Lassen* decision that it took the case "because of the importance of the issues to other states which received the grants." At 461.

¹¹⁰ Discussed below at n. 144-151 and text accompanying.

¹¹¹ 685 P.2d 576 (Wash. 1984). The facts concern timber purchase contracts entered into by the State Department of Natural Resources, which manages the school lands in part by selling harvest rights to timber on state lands. The contracts were entered into during the period January, 1978 and July, 1980. At that time, purchasers expected the value of timber to rise, and bid quite high for timber which, in the natural course of events they would harvest several years hence. When the opposite occurred, and timber prices plummeted, the state legislature in Washington passed a statute which, among other things, allowed the purchasers to terminate their contracts if they forfeited their original small deposit. *Skamania* at 578-79. The Legislature justified its

that the process of simplification is operational. Two things interest us in this context: the admixture of citations from diverse jurisdictions without adequate response to differences in state obligations, and the centrality of Supreme Court decisions without apparent awareness that imports from Arizona and New Mexico are occurring and/or are particularly inappropriate.

The *Skamania* Court began by asserting the relevance of trust principles: "Every court," it asserts, "that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees."¹¹² The *Skamania* court draws our attention, "for cases in which courts have applied private trust principles to federal land grant trusts," to cases from Oklahoma, Alaska, and Nebraska. Further on, the Court concludes that "divided loyalty constitutes a breach of trust," and argues that its holding "is consistent with a host of cases from other jurisdictions. To our knowledge, every case that has considered similar issues has held that the state as trustee may not use trust assets to pursue other state goals."¹¹³

Trust principles in state A do generally resemble trust principles in state B, but the Court draws an over simplified picture of case law from other jurisdictions. What is problematic is that the similarities in trust law from state to state have been substituted for a clear understanding of the differences in the school land grant programs from state to state, and even for an awareness that differences in case law exist. The Court's reliance on simplified versions of precedent from other states may be peculiarly inappropriate in this instance, but it is characteristic of the school lands cases in general.

This process has been exacerbated by reliance on decisions of the Supreme Court. In the case of land grants this normal deference is likely to be misleading because the special role of the U.S. Attorney General defined in the Enabling Act gives rise to a disproportionate number of Supreme Court decisions interpreting the Arizona and New Mexico Enabling Acts. This is not, as has been repeatedly noted, a good guide to what was agreed to in other states. The problem is well illustrated by the *Skamania* court. For the notion that the trusts are real and enforceable and "impose upon the state the same fiduciary duties applicable to private trustees"

action, vis-a-vis the trust, on the grounds that acted in both the long and short term benefit of the trust—it protected the trust by preventing bankruptcies and disruption within the market for its assets. *Skamania* at 581. *Skamania* County sued the state alleging that the Act was "a breach of the state's fiduciary duties to the trust and a violation of several state and federal constitutional provisions." *Skamania* at 579.

¹¹² The matter is slightly more complex than that: according to its Constitution, Washington's granted land may be "held in trust for all the people." Hence the meaning of the provision vis-a-vis undivided loyalty to a particular beneficiary is less unambiguous than the courts discussion would suggest. We will return to this in the next section.

¹¹³ *Skamania*, at 582.

the court relies on *Lassen v. Arizona*.¹¹⁴

In *Lassen* the Supreme Court overturned a state court decision allowing an uncompensated taking of school lands for use by the state highway department. The *Skamania* Court embraced *Lassen* fully, noting that "[a]lthough *Lassen* involved a different enabling act, the principle of *Lassen* applies to Washington's Enabling Act." This assertion is supported by reference to a Washington case, which presumably ought to be interpreting Washington law. However, that case, *United States v. 111.2 Acres of Land*,¹¹⁵ merely cites *Lassen* again:

There have been intimations that school land trusts are merely honorary, that there is a "sacred obligation imposed on (the state's) public faith," but no legal obligation. These intimations have been dispelled by *Lassen v. Arizona* ... This trust is real, not illusory.¹¹⁶

In Washington the trust is unquestionably "real." Washington entered the Union under the Omnibus Enabling Act which did not establish a trust. Washington's state constitution clearly did so. Its specific provision is especially relevant to the issue of "undivided loyalty" about which the *Skamania* court was so emphatic: it states unambiguously that "all lands granted are held in trust for all the people."¹¹⁷ That language does not obviously justify use of trust resources to support stability among timber purchasers or in local economies. However, if the trust is to benefit all the people, it is not clear how undivided loyalty ought to be defined. The *Skamania* court never addressed the issue.

¹¹⁴ *Skamania*, at 580: "the Supreme Court, interpreting the Arizona Enabling Act, held that Arizona could not transfer easements across trust lands without compensation to the trust. The Court stated that the Arizona Enabling Act "contains 'a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose.'" *Lassen*, as the *Skamania* court notes, was actually citing *Ervien v. United States*, 251 U.S. 41, 47 (1919). Whether *Ervien* supports the *Skamania* court's point is unclear following a reading of the subsequent paragraphs in the 1919 decision. Discussed supra, n. 106.

¹¹⁵ 293 F. Supp. 1042 (E.D. Wash. 1968), aff'd F.2d 561 (9th Cir. 1970).

¹¹⁶ *Id.*, at 580. It is worth noting that both *111.2 Acres* and the *Skamania* court do cite in addition *State ex rel. Hellar v. Young*, 21 Wash. 391, 58 P. 220 (1899) as a case "in which courts have applied private trust principles to federal land grant trusts" (*Skamania*, at 580) or for the notion that "Section 10 of the Enabling Act and Article XVI, section 1 of the Washington Constitution constitute a declaration of trust." [*111.2 Acres*, at 1049]. *Hellar* in fact does neither of those things. It does not mention the Enabling Act or Section 10 of the Constitution, although it does discuss part of Section 5 on one page. Nor does it discuss trust principles or even mention the word trust beyond one simple sentence ("But the permanent school fund of this state must be regarded as a trust fund." at 221), in a decision which holds that warrants drawn by the auditor of the state upon the state's general fund cannot be paid out of the permanent fund when there is no money in the general fund "legally available to pay the warrant." *Id.*, at 220-21.

¹¹⁷ Thorpe, VII, 4000. Clearly "all the people" must remain within the context of the purpose of the grant as expressed in the enabling act. Don Lee Fraser, former Supervisor of the Washington Department of Natural Resources comments as follows: "It was our impression that in earlier grants to other states ... the 16's and 36's were to support school within the township. Washington's constitution made it clear that this was not the case." Pers. Comm., March 13, 1991. This issue is not peculiar to Washington. See *Jerke v. State Department of Lands*, 597 P.2d 49 (Mont, 1979), at 50, and cases cited therein. See also *Beaver*, supra, n. 10, discussed n. 58 supra, n. 10 for another view of this issue.

The point here is a simple one. Trust principles, especially those enshrined ambiguously¹¹⁸ in a relatively few Supreme Court cases, have come to dominate judicial understanding of school grants. The difficulty of obtaining alternative information has combined with the standard reliance on precedent and higher courts to erode appreciation of differences in state accession bargains. Citing a Washington state court decision that relies, at bottom, on *Lassen* invisibly incorporates Arizona's statehood bargain into Washington state's. This gradual process of accreting judicial decisions has rounded the angles and left us with the operating assumption that the grants are trusts and they are basically the same.

A Note about the Cases More Generally

All of the cases that involve school lands are not of equal interest, either because some issues of great moment in a previous era are now considered resolved, or because they are beyond the scope of the present inquiry. For example, numerous early disputes between rival title holders center on determining at what point in the granting process the state, as opposed to the federal government, became qualified to sell or otherwise dispose of the lands.¹¹⁹ That issue is now resolved, and although the discussion in some of the cases is interesting, occasionally still relevant to live issues, the specific issues are not. Similarly, much of the case law in Utah involves the issue of indemnity land selections, particularly as they are or are not applied to mineral lands.¹²⁰ That is still an interesting and important conflict, but it is the subject for another paper.

In spite of such diverticulae, it is fair to say that the bulk of the cases concern the relationship between the State Land Commissioner and lessees who work the land.¹²¹ Frequent issues

¹¹⁸ *Ervien* appears to put little reliance on trust principles and draws instead on the authority of the federal government to make specific grants for specific purposes (at 48). The application of trust principles is also selective, emphasizing undivided loyalty and maximum returns, and rarely, if ever protection of the trust property. See *Beaver*, supra, n. 10, at 1.

¹¹⁹ See, for example, *Doll v. Meador* 16 Cal. 295 (1860); *Middleton v. Low* 30 Cal. Sp. Ct 59 (1886); *Jacobs v. Walker* 90 Cal. 43 (1891). See also *Trustees for Vincennes University v. State of Indiana*, 55 U.S. 268 (1852) in which the township successfully defended its status as trustee against a state attempt to usurp the role. Note however, that this is a university grant not a school grant case.

¹²⁰ Utah's enabling act is neutral about whether or not mineral lands are included in the sections designated as school lands. An early case *United States v. Sweet*, 245 U.S. 562 (1917) upheld the Department of the Interior's view that "known mineral lands" were excluded "by implication" in Utah's enabling act. Congress changed this by statute in 1927 and explicitly included mineral lands in the grants for schools See Act of Jan. 25, 1927, 44 Stat. 1026027, as amended 43 U.S.C. Sec. 870-71.

¹²¹ Like the federal government, the school land managers have generally relied on private entrepreneurs to cut the timber, explore for and extract the minerals, and manage the cattle on their lands. Recent efforts by some states to develop urban, waterfront and other commercially valuable real estate holdings constitute a notable exception to this generalization.

include the legality and implementation of a preference right to renew a lease; the Commissioner's discretion to reject or accept a specific bid; and the right of the lessee to compensation for improvements made on leased land. Over time, the trust doctrine has increasingly come into play in answering these questions. For example, if the lessee has a preference right to renew a lease, but another party offers a higher return to the trust, must the statutory preference right fail?¹²² Or, is the Commissioner authorized to reject the high bid if s/he concludes that a lower bidder will be a better steward of trust resources?¹²³

Nevertheless, the cases are not always resolved by unalloyed reference to trust principles. Unlike a normal trustee, such as a bank, the State Land Commissioner is both a trustee and a government administrator. Hence two threads of standard judicial doctrine get intertwined.¹²⁴ The Courts frequently appear to lay aside trust obligations to rely on deference which the courts traditionally pay to administrators exercising discretion in their area of expertise.

It would be too tidy to assert that when a Commissioner's decision is challenged by a beneficiary, trust obligations are the primary decision rule and if challenged by a lessee, the decision goes off on discretion. However, the pattern is clearly that beneficiary suits are resolved with the trust the dominant theme, and in the much more frequent lessee challenges, administrative law principles are far more visible.

It is also true that disposal as sale is more likely to get scrutinized under strict application of trust principles than disposal as lease.¹²⁵ When leasing is involved, and the dispute is among lessees, discretion is likely to be an issue, if not the central issue. Indeed, the interplay between administrative discretion and trust obligations is one of the aspects of trust land case law which intrigues one further and further into the morass.¹²⁶

The most interesting disposal cases are those which involve a taking of school lands for a

¹²² *Jerke v. St. Dept of Lands* 597 P.2d 49 (1979) is interesting on this point.

¹²³ *Caffall Bros Forest Products v. State*, 79 Wash. 223, 484 P.2d 912 (1971) is typical of the genre.

¹²⁴ The two strands are especially clear in *Jeppeson v. St Department of Lands* 667 P.2d 428 (1983).

¹²⁵ Although what real estate transactions constitute disposal is itself frequently the issue. See *U.S. v. Fuller*, 20 F. Supp. 839 (D. Idaho, 1937).

¹²⁶ This trust/discretion issue frequently gets expressed in questions as "who is the trustee?" Administrator's decisions appear to have least weight when they are undertaken in response to acts of the Legislature which is frequently viewed by courts as an outsider trying to protect an established industry. This was the scenario, as the court perceived it, in *Skamania*. See also the tension in the following passage from *Nigh*: "While the Legislature does have the power to, and may, regulate the activities of the Commissioners [the Trustees] it can neither abridge nor impair their freedom to function in utmost good faith in the day-to-day discharge of their public obligation as managers of the trust estate and while acting on behalf of the State as Trustee." *Supra*, n. 10, at 238.

public purpose. There are three potential protagonists: a private corporation such as a ditch company which has been granted a way of necessity; the state, for highways or other purposes; the federal government, for park, road, or irrigation purposes. As shall be discussed in more detail below, early state cases permitted use of school lands in diverse contexts, and typically found no need to compensate the permanent fund for the use.¹²⁷ One sign that the trust concept was taking hold in connection with school land's management is to be found in the growing number of cases over time that prohibit takings and require compensation.¹²⁸

Another important pattern is that historically the beneficiaries have rarely been plaintiffs in trust land litigation. Beneficiaries have had a difficult time bringing complaints to the federal courts. The Supreme Court has long held that "Congress alone has the power to enforce the conditions of" grants it has made.¹²⁹ Until the state courts began to embrace trust principles, state litigation was not likely to be fruitful. The beneficiary's cause was not unlikely, however, to be defended by the trustee. When State Land Commissioners believe their authority is threatened, they will under the right political circumstances, defend trust principles.¹³⁰ Conversely, the beneficiaries have apparently "lost" in many cases in which they were not a party—for example those which tend to put local economic development over the trust.¹³¹ Beneficiary initiated litigation is recent and successful.¹³²

I. Question One--Is This A Trust

Earlier, we raised the point that it is not clear that the trust notion is appropriately applied to school land grants until fairly late in the accession process, perhaps not until the very end.

¹²⁷ See, for example *Ross v. Trustees of the University of Wyoming*, 30 Wyo. 433, 222 P. 3 (1924); *Grosetta v. Choate* 75 P. 2d 1031 (Ariz. 1938).

¹²⁸ See for example *State v. Walker*, 301 P.2d 317 (1956); *Ebke v. Board of Educational Lands and Funds* 47 N.W. 2d 520 (Neb. 1951).

¹²⁹ *Emigrant Co. v. County of Adams*, 190 U.S. 61, 69 (1879); see also *Mills County, Iowa v. Burlington and Missouri River Railroad Co.*, 107 U.S. 557 (1881); *Stems v. Minnesota* 179 U.S. 223 (1900). In *Essling v. Brubaker* 55 F.R.D. 360 (D. Minn 1971) the attempt of two minor school children to challenge acts of the Commissioner as a breach of trust was denied because the court did not have jurisdiction over the subject matter. In *Segner v. State Investment Board*, supra, n. 23, Minnesota argued that the schools not the school children were the beneficiary. Gail Lewellan and Andrew Tourville, Assistant Attorneys General, Minnesota, pers. comm., March 11, 1991.

¹³⁰ *Skamania* is apparently an example of the wrong political circumstances. Although the DNR was clearly on record opposing the legislation at issue and supported the county in court, it did not bring the case. See also *Papisaq*, supra, n. 88.

¹³¹ See, for example, *Manning v. Perry*, 62 P.2d 693 (1936). But see also *Ervien and Lassen* where they "won" without being a party.

¹³² See *Nigh*, supra, n. 10 and *Skamania*, supra, n. 111, for example.

Clearly both Congress and the states viewed the New Mexico and Arizona grants as trusts from the outset. Also clearly, somewhere in the Indiana process, the state created a trust. But for the intervening states, we have seen, the questions of who made the trust, hence, who is bound by it are live and important issues.

We begin with definitions of fundamental terms:

A *trust* is a fiduciary relationship with respect to property in which person by whom the title to the property is held is subject to equitable duties to keep or use the property for the benefit of another.

A *fiduciary relationship* places on the trustee the duty to act with strict honesty and candor and solely in the interest of the beneficiary.

The *settlor* of a trust is the person creates a trust.

The *trustee* is the person holding property in trust is the trustee.

The property held in trust is the *trust property*.

The *beneficiary* is the person for whose benefit the trust property is held in trust.

The *trust instrument* is the "manifestation of the intention of the settlor" by which property interests are vested in the trustee and beneficiary and the rights and duties of the parties (called the trust terms) are set forth in a manner which admits of its proof in judicial proceedings.¹³³

When a trust is established it invokes an enormous range of rules, defined over centuries in British common law and more recently in American common law,¹³⁴ codified with some state-by-state variations, and which are enforceable in the courts. Most of the rules, and certainly the ones most pertinent here, define the obligations of the trustee. Without the deep veneer of case interpretation, the obligations sound not unlike the Girl Scout Oath: to exercise prudence, skill and diligence in caring for the trust; to proceed with undivided loyalty to the beneficiary; to deal with the beneficiary with fairness, openness, honesty, and disclose fully to the beneficiary; to make the trust productive; to preserve and protect the trust property; to defend the trust against the settlor and all others; to separate the trust property from all other properties. Where the duty to make the trust productive might conflict with the duty to preserve and care for the trust, the rule is that the trustee must act as a prudent investor.¹³⁵

Although it is not necessary to have a formal document or agreement which explicitly states that there is a trust¹³⁶, neither will the court presume that there is a trust implied,¹³⁷ For example,

¹³³ Herein we weave together Restatement, Second, Trusts §§ 2, 3, and 4, and the less turgid prose of George T. Bogert *Trusts* (1987), at 1-2.

¹³⁴ See *supra*, n. 105.

¹³⁵ See Restatement, Trusts, Second, §§ 170-183.

¹³⁶ Restatement, Second, Trusts, § 24 (1).

neither the absence nor the presence of the word "trust" in whatever language is alleged to have established the trust is dispositive of the issue.¹³⁸ Nor will courts find an intention to establish a trust in mere "precatory words," that is words that express "a suggestion or wish that the transferee should use or dispose of the property in a certain manner" or "impose merely a moral obligation."¹³⁹

In order to have a trust, three elements must be present. First, there must be an expression of intent. No trust is created unless the settlor "manifests an intention to impose duties which are enforceable in the courts."¹⁴⁰ Second, there must be at least a beneficiary. "If the beneficiary cannot be ascertained, no trust is created."¹⁴¹ Finally, there must be a property interest which is in existence or ascertainable and is to be held for the benefit of the beneficiary.¹⁴²

There is no question about the last—the Congress clearly had title to lands which it could and did convey. And, although discussions below will elaborate somewhat on confusion already introduced about beneficiaries, we are not arguing that the beneficiary has been inadequately identified. The issue is with the first, the *intent* to establish a trust. Although the Courts will not require a settlor to make explicit identification of the trustee, the beneficiary, clarity about those things is an important indicator of intent, and "ambiguity in the description of the trust elements may tend to show that no trust was intended."¹⁴³

Once it is found to be established, the description of the trust elements are central in deciding how it should be administered. Therefore, this discussion will focus on very basic questions: what is the trust document, who can alter it and how; what is the trust property; what is the stated purpose of the trust and who or what is the beneficiary; and who is the trustee? We will not explore every nook and cranny of these issues; rather we will point to general trends and issues that are either ripe for further exploration or which point, as this section intends, toward greater management flexibility.

¹³⁷ *Id.*, § 24 (2). We are not particularly interested in the notion of an implied trust here. With inconsequential exceptions, the idea is that the accession documents are the trust instrument, and that no implication of trust is required.

¹³⁸ *Id.*, at § 24 (2).

¹³⁹ *Id.*, at § 25 (b).

¹⁴⁰ *Id.*, at § 25 (a).

¹⁴¹ *Id.*, at § 25, 112.

¹⁴² Bogert, *supra*, n. 131, at 5.

¹⁴³ *Id.*, at 25 paraphrasing Restatement, Torts, Second, § 25.

2. What Is the Trust Instrument

"A state's obligations concerning school trust lands," intones one recent commentator discussing Utah, "stems from the state's enabling act and the state's constitution."¹⁴⁴ But the matter is far more complex. It is not atypical to find an enabling act that does not say the same thing as the state constitution, or a state constitution that says conflicting things at different places. So, while obligations may indeed "stem from" those documents, they are not defined by them. Moreover, the state's obligations are not the only ones that concern us. We are also interested to know what, if anything, obliges the federal government.

To be logically complete, this quest for a full definition of trust documents and trust obligations would have to deal with the full hierarchy of federal and state constitutions, amended state constitutions, and federal and state statutes, their relationship to each other and to trust principles.¹⁴⁵ Although we have discovered that questing after such completeness has some entertainment value, it is beyond the scope of the present undertaking. Fragments of the full hierarchy of questions will appear in subsequent sections concerning trust purposes and the trustee. Herein we will focus on the most obvious "trust instrument" issues: what accession language binds either the federal government and/or the state?

Even this small subset of the question has enormous practical significance. If the lands were granted by a trust agreement that binds both state and Congress, it would be arguable that there would be some limits on subsequent federal programs which impede the state's ability to pursue trust objectives. Similarly, it would seem that having bound itself to a trust in its Constitution, the state would be restricted in its ability to enact subsequent statute which violate the trust or limit its own ability to pursue trust objectives. Finally, if state and federal government are mutually bound by a contract entered into at statehood, it would seem that neither can change the trust without the consent of the other.¹⁴⁶ Obviously, identifying the trust document is a central task.

The Trust Document

There would seem to be three points of departure for doing so. First, one could ignore the

¹⁴⁴ Basset *supra*, n. 6, at 198.

¹⁴⁵ We will ignore the issue of preemption here, having just recently pawed through it in a different but relevant context elsewhere. See Cowart and Fairfax, "Public Lands Federalism: Judicial Theory and Administrative Reality," 15 *ELQ* 375 (1988).

¹⁴⁶ It is also possible that neither party can change the contract at all. Because they have been changed frequently, see below, n. 302, ff, we will ignore that logical possibility.

state constitution and argue that trust obligations are defined in the enabling act. Second, one could find the trust document in the combination of the enabling act and the state's acceptance of its provisions.¹⁴⁷ Finally one could argue that the "compact irrevocable" includes both the enabling act provisions and the initial state constitution provisions regarding management of lands and funds.¹⁴⁸

The first option is most damaging to the conventional wisdom. If we are confined to interpreting enabling act language, it is difficult to describe anything other than Arizona and New Mexico school grants as a trusts. Not surprisingly, this position has considerable support in federal case law. When the Supreme Court reviews the grants, it interprets the enabling act requirements. *Lassen* speaks explicitly and exclusively of the enabling act requirements and the intent of Congress.¹⁴⁹ When the states interpret the school land grants they typically do not discuss the issue of whether an obligation was mutually agreed to, or subsequently and unilaterally assumed. States are, obviously, bound by their own constitutions.¹⁵⁰

We will discuss the second option, the enabling act and acceptance provision combination, under the heading of "who is the beneficiary." As already has been indicated, most state's acceptance language adds little that is on point to the enabling act except to the beneficiary question.

The third option seems to be what the conventional wisdom implies. Including the full text of pertinent sections of each state's original constitution in a mutually binding contract would have the effect of imposing trust obligations earlier in time, that is, in more states. It would also be more restrictive on those states because it would involve the federal government in any changes in state constitutions affecting their mutual agreement. The argument in favor of the third position is that in the process of accession, states presented their Constitutions for Congressional approval; in theory at least, and sometimes explicitly in the documents, it is stated that the Constitution having been read and seen to be in conformity with republican

¹⁴⁷ This is the position expressed in *Oklahoma Education Association v. Nigh*. See *supra*, n. 10.

¹⁴⁸ But see *Regents of University of New Mexico v. Graham* 264 P. 953 (1928) for judicial acknowledgment that the "intent of Congress is not to be discovered from the Enabling Act alone. Behind it lay the Ferguson Act. The two are in *pari materia*." at 954. This is a university lands case not a school lands case. However, it gives support for what was suggested above, that the accession packages are far more comprehensive, hence sloppier, than the two parts focused upon herein.

¹⁴⁹ See for example, n. 6, at 462. Note also that the Court appended to its decision Sec. 28 of the enabling act and nothing from the Arizona constitution. *Ervin*, the other major Supreme court case in this area, ignores both trust principles and the state constitution, concluding merely that the grantor of the lands can make conditions on the use of the grant and see that they are enforced.

¹⁵⁰ See *Deer Valley Unified School District v. Superior Court*, 760 P.2d 537 (Ariz., 1988).

principles, State X is admitted.¹⁵¹ This could imply that there is some kind of elixir over the state Constitution, or at least the lands provisions specifically offered and accepted, which binds the Congress.

Are the Feds Bound — and To and By What?

If Congress were bound by the trust, one might argue that it was barred from enacting legislation or undertaking programs that would undercut the trust land's economic value. That point is likely to appeal to trust land managers currently confounded by the presence of endangered species on trust lands.¹⁵² Although it unlikely to carry, it is worth exploring in order to plumb the degree to which the federal agencies are or are not respectful of the trust notion. Obviously, the best place to look for such an elixir, or less onerously, for evidence of federal deference to a trust agreement, would be in efforts by New Mexico or Arizona to thwart some apparent Congressional violation of the trust. We have not found any such disputes at present writing. In many other contexts courts do not have a well established tradition of finding the federal government bound by the contents of state constitutions.¹⁵³ Part of the weight of that argument could perhaps be shifted by noting that the school lands are, in fact, part of an explicit set of terms and conditions negotiated between the Congress and the State, and that the state constitution's provisions on those matters are therefore included in the specific compact irrevocable required by Congress. Thus, even if Congress is not bound by the entire programme of a state constitution, on this particular point, where the bargaining was specific and the Congressional insistence on state acceptance of a contract binding both parties was explicit, the mutuality is arguably weightier.

Although this argument is not without some logic, little in reality supports it. States have frequently made fundamental changes in constitutional provisions dealing with school lands, and these have only occasionally been of any interest to Congress.¹⁵⁴ Hence, there is no

¹⁵¹ See discussion of Indiana's accession, for example, *supra*, n. 37 and 38.

¹⁵² We need not speculate. The Endangered Species Act, most particularly the desert tortoise and the spotted owl were the subject of a panel at the winter meeting of the Western States Lands Commissioners' Association, St. George, Utah, January 1991. It has also motivated the State of Washington to sue the U.S. Secretary of Commerce on grounds that the Forest Reserves Conservation and Shortage Relief Act of 1990 (104 Stat. 629) singles out logs harvested from state lands in banning timber exports, and that the export ban is a breach of the federal government's fiduciary obligation as trustor. The state alleges that the export ban provisions "unilaterally impair and amend the Trust Compact in a manner that is harmful to the trust beneficiaries." *Board of Natural Resources v. Mosbacher*, No. C90-5495, November 16, 1990, at 5.

¹⁵³ The most interesting cases in this area are probably the reapportionment cases, especially *Baker v. Carr*, 396 U.S. 186 (1962) and *Reynolds v. Simms*, 377 U.S. 533 (1964), discussed in *Tribe, American Constitutional Law* (1978, at 746-7, and *Coyle v. Smith* 221 U.S. 559 (1911) discussed in *Tribe*, at 300-06.

¹⁵⁴ See the discussion of the forestry programs Section IV, B, 4.

established practice which would support the idea that either states or the federal government have considered the state's constitutional provisions regarding state lands as part of a mutually binding pact.

Stepping back from the notion of obligations binding on the federal government, we find two categories of cases which are of some relevance, to the broader question of federal respect for the school grants: the right-of-way-cases and the access cases. Neither are directly on point, but they give some indication of the terms of discussion.

The right-of-way cases involve agencies seeking uncompensated access across school lands. Over time the basic theme has altered dramatically from fairly unfettered rights-of-way without compensation or any reference at all to a trust to strict invocation of trust principles. In early state cases, such as *Grosetta*¹⁵⁵ and *Ross*,¹⁵⁶ state courts did not find either state constitutional or enabling act provisions regarding appraisals, public auction, et cetera, requisite to disposition of school lands to be a barrier to state agencies using school lands for state purposes. The Arizona Supreme Court's decision in *State v. Lassen* is crystal clear about early state interpretation of the Enabling Act: "For over fifty years the state and county highway departments of Arizona have obtained rights of way and material sites without compensation over and on lands granted to the State of Arizona by the federal government ..."¹⁵⁷

Early cases involving federal agencies seeking rights of way across school lands produced the same result. Two federal courts found the school land grants no barrier to an uncompensated state grant of right-of-way across school lands for federal irrigation projects. In *Ide v. United States*, the Supreme Court found that a Wyoming statute granting rights of way over "all lands of the state for ditches 'constructed by and under the authority of the United States'" to be lawful without ever referencing or discussing the trust notion.¹⁵⁸ Some years later, the District Court in Idaho reached the same result, noting an 1866 federal statute and a 1905 state statute which permit the granting of rights-of-ways across school lands without regard to any restrictions on alienation of granted lands. The court argued further that the right-of-way is an easement which does not convey fee title. Again, the trust notion was not mentioned in

¹⁵⁵ *Grosetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938).

¹⁵⁶ *Ross v. Trustees of the University of Wyoming*, 222 P. 3 (1924). Note that *Ross* is a university not a school lands case.

¹⁵⁷ *State v. Lassen*, 407 P.2d 747; rev'd *Lassen v. Arizona*, 385 U.S. 4358 (1967).

¹⁵⁸ *Ide v. United States*, 263 U.S. 497 (1923), at 502.

resolving the issue.¹⁵⁹

More recent cases reach the opposite conclusion. In *United States v. 78.61 Acres of Land in Dawes and Sioux Counties*, the Supreme Court was presented with exactly the same question: "whether the Nebraska Legislature had the power to grant to the United States a right-of-way over school lands without compensation."¹⁶⁰ Citing *Lassen* and invoking the trustee's duty of undivided loyalty to the beneficiary, the court concluded that "a sharing by the trust property in the general benefits to the state of an irrigation project is not sufficient compensation to the trust."¹⁶¹ Further, the Court concluded that the fact that the United States is the grantee does not "alter the principle that the *res* of the trust may not be depleted."¹⁶² Similarly, in *111.2 Acres of Land in Ferry County*, the court held that the state could not donate school land to the federal government.¹⁶³

This increased respect for school lands purposes, does not provide a strong basis for arguing that the federal government must respect the trust. Although *111.2 Acres* clearly states that the federal government is bound by what it agreed to in the enabling act, the decision turns on the state's inability to donate trust lands to the federal government. Similarly, although both the *78.61 Acres* court and the *111.2 Acres* court conclude that there is a trust, the trust in the analysis binds the state not the federal government.

Perhaps a more productive path for those seeking restrictions on the federal government is the access issue as discussed in a 1979 access dispute in Utah known as the Cotter case.¹⁶⁴ A federal court held that the Bureau of Land Management must grant to a holder of a state oil and

¹⁵⁹ U.S. v. Fuller, 20 F. Supp. 839 (D. Idaho, 1937).

¹⁶⁰ *United States v. 78.61 Acres of Land in Dawes & Sioux Cos.*, Neb 265 F. Supp 564 (1967) at 566. The court notes that the Nebraska enabling act "did not contain the express restrictions which were incorporated in later, similar acts" and cites *Lassen*. "Nevertheless," the Court continues, "the grant was undoubtedly in trust for a specific purpose as was recognized by the Supreme Court of Nebraska." But look at the language which the court cites for that conclusion. It contains nothing about trusts: "The provision of the enabling act making the grant, and of the Constitution of 1866 setting apart and pledging the principal and income from such grant ... and the subsequent act admitting the state into the Union under such Constitution constituted a contract between the state and the national government relating to such grants. [T]he state was and still is under a contractual as well as constitutional obligation to refrain from disposition or alienation of the use of this property except as allowed by the enabling act and the Constitution." *State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist.*, 143 Neb. 153, 8 N.W. 2d 841, 847-48 (1943). Ellipses as cited in *78.61 Acres*. A contract regarding means of disposal is not, obviously, a trust. The Court goes on to discuss *Lassen*.

¹⁶¹ *78.61 Acres*, *id.*, at 567.

¹⁶² *Id.*

¹⁶³ *United States v. 111.2 Acres of Land in Ferry County*, 293 F. Supp. 1042 (1968), *aff'd* 435 F. 2d 561 (1970).

¹⁶⁴ *State of Utah v. Andrus* 486 F. Supp. 995 (1979). See also *Sierra Club v. Hodel*, 675 F. Supp 594

gas lease access to a school land parcel wholly surrounded by a federal land in a wilderness study area. At first blush, the result of the case appears to suggest that having granted the lands as a profit maker to the state, the federal government cannot thereafter take or regulate away that profit making potential. Although the result is subject to that interpretation, the text suggests that, to the contrary, the decision turns on general notions of property rather than on the land's trust status. The Court discusses the land's trust status but also notes that "traditional property law concepts support Utah's claimed right of access."¹⁶⁵ It employs standard takings analysis to conclude that the state's access rights "cannot be so restricted as to destroy the lands' economic value."¹⁶⁶ A further embellishment of that standard point, that "the state must be allowed access which is not so narrowly restrictive as to render the lands incapable of their *full* economic development,"¹⁶⁷ arguably gives the trust more than it would have received as a private land owner. However, that is clearly tied in the decision to Congressional intent expressed in the grant as a limit on BLM discretion rather than to a trust notion restricting subsequent Congressional action.

The *Cotter* Court does specifically address the "special" status of the granted lands in two ways. First, in arriving at its conclusions about Congressional intent of the grant, the Court noted that legislation dealing with school lands has "always been liberally construed." That is, whereas a federal grant to a private person or railroad would be construed strictly, with nothing "held to pass to the grantee except that which is specifically delineated in the instrument of conveyance," school grants are liberally construed following *Wyoming v. United States*.¹⁶⁸ Nothing in the string of cites underlying the reference suggests any tie to trust principles.

The second and more interesting and pertinent material on the lands' special status comes in the *Cotter* Court's discussion of "special legislation."¹⁶⁹ Under rules of statutory construction,

(1987); *aff'd* in part and *rev'd* in part 848 F.2d 1068 (1988).

¹⁶⁵ *Cotter*, at 1002.

¹⁶⁶ *Id.*, at 1009.

¹⁶⁷ *Id.*, my italics.

¹⁶⁸ *Wyoming v. United States* 255 U.S. 489 1921; which actually relies on *Johanson v. Washington*, 190 U.S. 179 (1902), which cites, at 183, *Mr. Justice Field in Winona & St. P R.R. Co v. Barney*, 113 U.S. 618, 625 (1884): "To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

¹⁶⁹ *Utah v. Andrus*, at 1009. The preliminary discussion and fuller cites are found in an early round on the indemnity lands selection case *Utah v. Kleppe*, 586 F.2d 756, 768-69 (1978). The *Kleppe* court discussed the established rules of statutory construction regarding "special legislation" and likened the school lands to the "special treatment of Indians recognized in *Morton v. Mancari*, 417 U.S. 535 (1974). An analogy to Indian lands would not seem to give the states much leverage in binding federal actions to strict trust principles however. Nor would the *Kleppe's* court's assertion that the "strict, continuing 'trust' obligations imposed by Congress on the 'public land' states ... in the school land grant statutes" appear to give much support for the

the Court argued in *Cotter* that special acts prevail over other, even subsequent acts, unless there is some indication that Congress intended to modify the special act.¹⁷⁰ The *Cotter* Court relied for this argument on a fuller discussion of the same subject in a previous District Court opinion in an indemnity land selection case then on appeal. *Cotter's* application of the notion appears to be as far as any court has been willing to go in finding the state land trust obligatory on the federal government: Congress must indicate that it is modifying a special statute when violating the trust. Whether this argument would be useful in forestalling administrative actions not already vulnerable to the fifth amendment or Congressional statutes is not clear. However, subsequent activities in the indemnity case do not add luster to the thought: the Supreme Court rejected the lower Court's conclusion and did not address its reasoning when *Utah v. Kleppe* was appealed as *Andrus v. Utah*.¹⁷¹ Even if it were firmly rooted in Supreme Court prose, however, the notion of "special legislation" puts the finish line fairly close to the starting gate on trust obligations affecting the federal government.

Are the States Bound — To and By What

Discussion of state obligations is less speculative. States are obviously bound by both their enabling acts and their own constitutions. If the state binds itself to manage the funds and/or the lands as a trust, some management issues are clarified by trust principles. It is important to underscore that the topic here is state interpretation of state obligations. The federal government is obviously authorized, and in Arizona and New Mexico it is actively encouraged, to enforce the terms of the grant. However, prior to Arizona and New Mexico's 1910 accession, there are relatively few federally defined grant terms, and state requirements are far more numerous and restrictive. Neither Congress nor the federal courts have evinced much interest in state changes in state requirements.¹⁷²

assertion that the federal government is also bound. Most damaging of all, the fulsome treatment given the special status of the state lands in *Utah v. Kleppe*, although picked up soon thereafter in the *Cotter* case, was totally ignored by the Supreme Court in the appeal of *Utah v. Kleppe*, that is, *Andrus v. Utah*, 446 U.S. 500 (1980).

¹⁷⁰ *Utah v. Andrus* at 1009-1010.

¹⁷¹ 446 U.S. 500 (1980). Interestingly, the line of argument was also ignored by state amicus briefs in support of Utah. See Brief for Amicus Curiae, State of California, Arizona, Colorado, Montana, Nevada, New Mexico, Oregon and Washington, *Andrus v Utah* 78-1522, October term, 1978. Although *Cotter* was not specifically overturned by the subsequent indemnity land selection case, it is relevant to it. See also, *Sierra Club v. Hodel*, supra n. 164.

¹⁷² Although the courts have repeatedly held that enforcement of the grant conditions is an issue between federal and state governments, and that only Congress can enforce the conditions of the grant (see supra, n. 127) the feds have not been aggressive. See *Dienst*, supra, n. 16, at 105-06; *Orfield*, supra, n. 16, at 81 ff, 119.

The issue of what document[s] define state responsibilities is still important for at least two reasons. First, it is necessary to sort out what management direction arises from statute, hence can be changed by statute, what arises in the Constitution, and requires a change in the state constitution, and what can only be altered with permission of Congress. Given the inattention of the Congress to administration of school lands and the focus of most state constitutions on the management of the permanent funds rather than the granted land, it is also important to distinguish statutory direction regarding the lands from Constitutional direction regarding the funds. We have already said "uncle" to the challenge of sorting out the full hierarchy of trust principles as they entwine with federal and state enactments in the present report. We will take up two issues.

First, two recent Arizona cases underscore the importance of fully exploring differences and continuities between the Enabling Act, the Constitution and subsequent amendments, and subsequent statutes. Second, it is important to inquire whether the state's ability to make subsequent regulation affecting the trust is limited by its initial agreement, either in its constitution or with the federal government. The case of *Deer Valley Unified School District v. Superior Court*,¹⁷³ ironically involves the effort by a school district to obtain trust lands for school construction purposes. When the State Land Department refused to hold a public auction at which the School District would have an opportunity to obtain the land, Deer Valley filed an action to condemn the proposed school site.¹⁷⁴ The District Court and then the Arizona Supreme Court held that "neither the state nor its subdivisions could condemn land held in the school trust."¹⁷⁵ In so doing, the Arizona Courts rejected the United State Supreme Court's decision in *Lassen* as a guide to the State Land Commission's authority. *Lassen* had concluded that the form of the trust rather than the specific requirements of the enabling act must be respected, and that it was acceptable to sell lands to the state for highway purposes without the appraisals and auctions required by both the enabling act and the state Constitution. The state court in *Deer Valley* concluded the opposite. "The Enabling Act, as interpreted in *Lassen*," argued the Court, "merely sets out the minimum protection for our state trust land. We independently conclude that our state constitution does much more."¹⁷⁶

The Arizona Court noted that although the Supreme Court took a "strict view of the full

¹⁷³ 760 P.2d 537 (Ariz., 1988)

¹⁷⁴ *Id.*, at 537-38.

¹⁷⁵ *Id.*, at 538. But see *Independent School District of Virginia v. State of Minnesota*, 124 Minn. 271, 144 N.W. 960 (1914) for an instance where a school district condemned school lands for school purposes.

¹⁷⁶ *Id.*, at 541.

compensation provision of the Enabling Act," it did not "literally construe the public notice, public auction, and high bid provisions of the same act." This was based on the Supreme Court's "belief that the public notice/public sale provisions of the Enabling Act were useless in an acquisition by a state agency because the state eventually could condemn the land in any event."¹⁷⁷ In *Deer Valley* the state court rejected that conclusion. While noting that their view created "some divergence" between federal and state interpretations of "substantially identical provisions," nevertheless, the Arizona court concluded that "the state may not dispose of its school trust lands other than by compliance with the specific terms and conditions of the Arizona Constitution."¹⁷⁸ Although the Supreme Court interpreted the Enabling Act in *Lassen* and held "that condemnation is a permissible method of disposal" of state school lands, the Arizona Supreme Court declined to "follow that case in interpreting the identical language in the Arizona Constitution."¹⁷⁹

The logic of *Deer Valley* led to a sharp curtailment of the Commission's land exchange authorities in a subsequent case. The issue of whether the State Land Commissioner has authority to exchange lands begins with the 1934 Taylor Grazing Act, which, among other things allowed states to exchange trust and located within a federal grazing district for other land. In 1936, Congress amended section 28 of the state enabling act to "permit extended leases and exchanges of school trust land."¹⁸⁰ The Arizona state legislature adopted the terms of the 1934 and 1936 Congressional acts in statute without ever amending the state constitution. In the wake of *Deer Valley*, the State Land Commission doubted its authority to make such exchanges. The issue was litigated in *Fain Land and Cattle Co. v. Hassel*. Reiterating its "two levels of protection" theme, and rejecting the assertion that an exchange is not a sale and that therefore sales restrictions do not apply, the court disallowed the exchange.¹⁸¹

Turning to the second issue, although we have looked in vain for promising paths which would impose limits on post-grant federal actions which would undercut the trusts, the same question is more fruitful and interesting when pressed at the state level.

¹⁷⁷ *Id.*, at 540 citing *Lassen* at 464.

¹⁷⁸ *Id.*, at 541.

¹⁷⁹ *Id.*, 541.

¹⁸⁰ Act of June 5, 1936, ch. 517, 49 Stat. 1477 cited in *Fain Land and Cattle Co. v. Hassel*, No. CV-89-01 86 SA, March 30, 1990, at 6.

¹⁸¹ *Fain*, *id.*, at 8, ff. A New Mexico state effort to have its land exchange authority amended in Congress succeeded. However, P.L. 101-386 was rejected in a statewide referendum in the November, 1990 election. See 15 Public Lands News 1 (September 27, 1990.).

There are numerous cases in which the school lands are found to enjoy exemptions from burdens or principles which would affect private land. Diverse jurisdictions have held, for example, that the school lands are exempt from local taxation,¹⁸² adverse possession,¹⁸³ assessments for irrigation,¹⁸⁴ and which allow taxation of lessees operating on state trust lands¹⁸⁵ These cases occasionally produce some interesting language about the sanctity of trust lands, but they nevertheless have a familiar ring to them: it is difficult to discern a theory under which the trust status of the land alters the reasoning or the outcome any more than would simple state ownership.

There is, however, another line of cases which merits attention. In discussions in several contexts and jurisdictions we find the assertion that legislative regulations which may impede maximum profit to the trust are impermissible. For example, in *Oklahoma Education Association v. Nigh*, the Oklahoma Supreme Court sharply rejected what it characterized as respondent's contention that the Enabling Act authorized the legislature to "enact practically any rule or regulation it chooses with regard to selling or leasing the federally granted land."

For if respondents are correct, then a potentially self-defeating incompatibility exists between the stated purpose and objective of the trust on the one hand, and the alleged unbridled authority granted the State Legislature to defeat that strategy by means of creative rules and regulations on the other hand.¹⁸⁶

Instead, the court argued as follows:

No Act of the Legislature can validly alter, modify or diminish the State's duty as Trustee of the school land trust to administer it in a manner most beneficial to the trust estate and in a manner which obtains the maximum benefit in return from the use of trust property or loan of trust funds.¹⁸⁷

At issue in *Nigh* were statutes which the majority alleged provided for low-interest mortgage loans of trust funds to farmers and ranchers and low-rental leases of trust lands.¹⁸⁸ Although these provisions were arguably justified in the Constitution, an issue to which we shall return shortly, the pattern is nevertheless clear. The courts tend to disallow legislation, even when it

¹⁸² *People ex rel. Dunbar v. City of Littleton* 515 P.2d 1121 (1973); *Little v. Trustees of School of Township* 197 N.E. 262 (1886); *Erickson, et al. v. Cass County* 92 N.W. 841 (S.D. 1902); but see *Toule City Ligation District v. State* 67 P.2d 989 (1937). See also *Kelley v. Allen*, 49 F.2d 876 (1931).

¹⁸³ See, for example, *Hellerud v. Hauck*, 13 P.2d 1099 (1932); *Newton v. Weiler*, 87 Mont 164 (1930); *Van Wagoner v. Whitmore*, 58 Utah 418, 199 P. 670 (1921). For a slightly different flavor see *Duchesne County v. State Tax Commission* 140 P.2d 335 (1943).

¹⁸⁴ See for example *Southern Drainage District v. State* 112 So. 561 (Fla 1927); *Toule Irrigation District*, supra, n. 182.

¹⁸⁵ *Idaho Gold Dredging Co. v. Balderston* 78 P.2d 105 (1938)

¹⁸⁶ *Oklahoma Edcn. Assoc. Inc. v. Nigh*, 642 P.2d 230 (1982), at 237.

¹⁸⁷ *Id.*, at 236.

¹⁸⁸ *Id.*, at 230.

reflects Constitutional priorities, when the provisions appear to violate the standard trust notions of undivided loyalty.

The more interesting question is joined, however, when the court is reviewing the ability of the state to enact regulations which *indirectly* cut into the potential profitability of the trust lands. In *Department of State Lands v. Pettibone*,¹⁸⁹ a Montana case considering who owns water diverted or developed on school land, the state Supreme Court noted that the trusts created in the enabling act preempt state laws or constitutions. The court cited *Utah v Andrus*¹⁹⁰ for the conclusion that "any restriction on the use ... of school trust land that effectively devalues it cannot be sustained."¹⁹¹

A more recent Montana case could be interpreted as applying the *Pettibone* logic to a review of a Department of State Lands decision to approve an oil and gas lessee's operating plan without an environmental impact statement. The result is that the EIS is not required. It is not entirely clear whether the court's conclusion might arise from the special trust status of the school lands as opposed to discretion due to an administrative agency. The issue was whether the lower court had applied the correct standard of review. The Supreme Court concluded that it had, thereby allowing the Commission's decision not to do an EIS stand. The pertinent paragraph reads as follows:

The Department in this case was carrying out its statutorily imposed fiduciary duty to "secure the largest measure of legitimate and reasonable advantage to the state" in managing school trust lands. The Department also had to carry out duties imposed by MEPA. This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to the Department, not the courts.^{1,2}

Although the Court is clear that the Department's status as trustee does not exempt it from compliance with MEPA, still the special status of the responsibilities, even though they are attributed to statute rather than to the constitution, appear to effect the calculus regarding the appropriate standard of review.

The most explicit argument in this context is a Colorado case involving a county challenge under state law to a State Land Board lease.¹⁹³ State mine reclamation law allows counties to

¹⁸⁹ 702 P. 2d 948 (Mont. 1985).

¹⁹⁰ *Supra*, n 92.

¹⁹¹ *Department of State Lands v. Pettibone* 702 P.2d 948, 952-53 (Mont. 1985). *Italics mine.*

¹⁹² *North Fork Pres. v Dept of State Lands* 778 P.2d 862, at 867 (Mont. 1989). But see *MPIRG v. MEOC*, 237 N.W. 2d 375 (1975).

¹⁹³ Cases directly on point are rare, apparently for political reasons. A recent Western State Land Commissioners' Association meeting panel discussed the question "Should State and Trust Lands be Subject to Local Land Use Regulations?" Consensus was achieved: state trust lands are exempt from local regulation. However, rather than fight a locality, trust land officials will delay or alter their proposed action. January, 1991.

declare mining an "inappropriate use" of land. Boulder County denied a permit to a school land lessee. The leased parcel is in the county's designated open space and therefore the county classified it as unsuitable for mining. Both the lessee and the state argue that the county's denial of the permit is impermissible for numerous reasons. The interesting arguments here are those which assert the impermissibility of county regulation due to the special status of state trust lands. The state argued that "any statutory delegation of land use authority over state school lands would be unconstitutional" because the State Land Board is supposed to manage the lands for the exclusive benefit of the beneficiaries. The State also asserts that although the legislature has authority to make rules and regulations regarding trust lands management, that authority does not extend to determine the use to be made of state school lands. That right is the Board's exclusively, and reasonable legislative rules must be "limited to rules that regulate the manner in which the [Board's] land use decision is carried out."¹⁹⁴

Discussion of constraints on the state's ability to enact regulations that limit the value of the trust lands are certainly more robust and varied than the equivalent question at the federal level. And, the state level question seems less fully resolved by principles such as the supremacy clause. If this line of argument were pursued by either a regulation-averse lessee or a grasping beneficiary, it could have interesting consequences.

Before leaving the issue of by what and to what the state is bound, let us revisit the Oklahoma case briefly. Although the enabling act's reference to preference right sales is unusual, the broader question is not. Long standing use of school land grants to support the agricultural community are increasingly under attack in the courts as violations of the undivided loyalty principle. In *Nigh*, one might argue, they were laid to rest. However, given the specific language in many state constitutions, it is not clear that the conclusions in *Nigh* are appropriate.

At issue in *Nigh* were statutory provisions which appeared to the Court to violate a trust principle of undivided loyalty to the beneficiary. However, it is a question which deserves fuller explication and deeper thought than the decision provides. The Court simply asserted that the express "designation of the school lands and funds as a sacred trust" had the effect of "irrevocably incorporating into the Enabling Act, Oklahoma Constitution and conditions of the

St. George, Utah.

¹⁹⁴ Brief of Appellant Colorado State Board of Land Commissioners Court of Appeals Case Nos. 88 CA and 88 CA 0375. 23-25. Having lost at the District and Appeals court, the state is appealing the case to the state supreme court. Case No. 89 SE 612.

grant, all of the rules of law and duties governing the administration of trusts."¹⁹⁵ Second, the court defines, without reference to the documents, the "manifest objective of the Enabling Act provisions, viz., to assure the realization of maximal rents, profits, and returns for the trust estate for the benefit of the school children of this State."¹⁹⁶ The Court failed to note that it was the state Constitution and specifically not the Enabling Act that characterized the grant as a trust. The Court simply turned the whole set of documents into a single mush. Thus it misrepresents the state's own choices as "conditions of the grant."

Thus positioned, the Court arguably made two serious misinterpretations. First, it dismissed out of hand the notion that there could be any justification for state school lands policies that appear to benefit the state's agricultural economy: "Just as a State may not use school land trust funds assets to subsidize its highway construction program, a State may not use school land trust assets to subsidize farming and ranching," the court asserted, citing *Lassen*.¹⁹⁷ The question is not so simply resolved, or at least it ought not to be.¹⁹⁸ Proper attention to the specific content of the documents at issue would yield a different discussion entirely, and likely a different result in this instance.

There is, in fact, nothing in any of the pertinent Oklahoma documents which would suggest any thought at all by the state or the federal government to regarding highway construction.

¹⁹⁵ *Id.*, at 236.

¹⁹⁶ *Id.*, at 237. Note that the Oklahoma court has muddied an issue that the Minnesota court has been careful to sort out, that it is, it has brought in school children as beneficiaries in spite of the clear language of the constitution that it is the common schools which are to benefit. See also *Beaver*, *supra*, n.10, at 9-10 for a discussion of the Wyoming legislature and court confusing the issue on beneficiaries.

¹⁹⁷ *Oklahoma Edu. Assoc. Inc. v. Nigh*, *supra*, n. 10, at 236.

¹⁹⁸ One of the more intriguing issues to arise in work related to the present study is whether the trust purpose of benefitting the schools is better served by managing the trust lands for profit from the lands, or by managing trust assets to support the local tax base which provides the overwhelming proportion of the school budget in most jurisdictions. In the present discussion we put aside that question and ask merely whether the terms of the trust document have or ought to have any bearing on this matter. Cases like *Nigh*, *Lassen* and *Skamania* clearly reject the notion of "enhancement," that is making trust assets more productive by allowing highways to be built or by supporting the local economy. We are here making a significantly different argument, that if the land is to be used in support of schools, perhaps the best way to do that is to use the trust assets, in part, to enhance the local tax base on which the local schools depend. This was discussed in a recent Minnesota case, wherein school children's challenge to a sale of trust assets was rejected because, among other things, their claims "assume that the permanent school fund is an end unto itself. The permanent school fund is only one facet, a relatively small one, of Minnesota school finance system. The legislature has concluded that sale of lakeshore lots in this instance provides more overall benefits to school finance in Minnesota than indefinite leasing because, beside providing immediate investment cash for the permanent school fund, sale also immediately places title to the lots in the hands of private owners who are more likely to make significant new capital investments as owners rather than lessees. The consequence of sale will expand the local tax base, which experience demonstrates has provided the most economically healthy school districts ... with a sound financial base." *Segner v. State Investment Board*, No. C5-87-489319 (Ramsey County District Court, August 11, 1988), at 11.

The court's conclusions about using trust assets to subsidize highway construction are not likely to be debated. However regarding "maximal" returns, the Constitution is clear. There is also nothing express or implied in any of the documents which favors maximized economic returns as the guiding theme of resource management. Indeed, the Oklahoma Constitution is explicit that "safety and permanency of investment"¹⁹⁹ rather than maximized returns is the guiding principle. There is, moreover, language in the Enabling Act easily interpreted as support for stability in the agricultural community. And the Oklahoma constitution is explicit that investment in farming is the first priority of the trust portfolio.

The Oklahoma Enabling Act says nothing about trusts. The only pertinent language in the Enabling Act gives lessees a preference right to purchase their leasehold at time of sale for the highest bid.²⁰⁰ This was cited by defendants as evidence of the trust purpose of supporting stability and preventing waste in the agricultural community.²⁰¹ That would seem a permissible but not mandatory reading of the phrase. Those provisions were interpreted in what the Court characterizes as the "context of the overall text." as part of analyzing rule making authority granted to the legislature by the Enabling Act. The Court concluded that the rule making authority was intended "to promote rather than impede attainment of the manifest objective of the Enabling Act provisions, viz., to assure realization of maximal rents, profits, and returns from the trust estate for the benefit of the school children of this State."

Yet, the Enabling Act says nothing about either a trust or about economic returns. All of the language about trusts is, as was true of every state accession package prior to Oklahoma's accession, in the state's Constitution. The state Constitution is quite clear that it will establish a trust fund, and about the management priorities of the of permanent school funds. The constitution, as originally written and as amended, expresses a priority on safe and permanent investment of the funds. The Court ignores the plain language and overrides that clearly expressed intent with an emphasis on "maximum return from the trust property." ostensibly derived from trust principles.²⁰² There the Court appears to prefer an extreme statement of the trust principle to make the trust productive to both the plain language of the trust document and the explicit trust principle to preserve the trust.

199 Thorpe, VII, 4320.

200 Thorpe, V, 2968.

201 Nigh, supra, n. 10, at 236.

202 The dissenters pointed to the conflict between safety of investment and maximizing economic returns. "The people could have adopted a provision requiring the state to obtain the maximum possible return, but they did not. It is obvious that they intended to forego some return in favor of more secure investments, such as

It also dismisses Constitutional provisions regarding investment priorities which have direct bearing on the question of "subsidiz[ing] farming and ranching."²⁰³ The original Oklahoma Constitution directed that the school funds should be invested in "first mortgages upon good and improved farm lands within the state," or in state, city or county bonds, in school district bonds, or in U.S. bonds, preference in the order stated.²⁰⁴ The Constitution at the time of the litigation also included "promissory notes evidencing federal and state insured loans made to students under any federal or State of Oklahoma insured student loan program" as permitted investments.²⁰⁵ It is not clear why the provisions of the document establishing the trust are not read as dispositive regarding the purposes of the trust. The framer's intention that trust assets be used to secure stability and economic development of farms is unambiguous. One could take issue with the implicit assumption that first farm mortgages and, more recently, student loans, are appropriate securities if the stated goal is safety and permanency of the investment. Nevertheless, it is difficult to justify brushing aside the stated intent of the trust document regarding support for the agricultural community in favor of imposing a conflicting and dubious duty to "maintain the maximum return to the trust estate from the trust properties under their control"²⁰⁶

The Court is quite obviously correct that the state constitution and state statutes are constrained by the requirements of the Enabling Act. Even this cursory impression suggests several significant conclusions. First, carefully identifying and parsing the trust documents is not a fruitful way to find limits on federal activity. The broadest possible reading of the only thread obliging federal deference to the trust gets us very little (if any) beyond the respect owed in our system to any private property, or to non-trust state owned lands. The thread is not anything

mortgages and school bonds, etc." Nigh, dissent, at 243.

²⁰³ Nigh, supra, n. 10, at 236.

²⁰⁴ Thorpe, VII, 4320.

²⁰⁵ Article XI, § 6, cited in Nigh, at 238, n. 13.

²⁰⁶ Nigh, supra, n. 10, at 239. Compare *Nigh* with *State v. Babcock* 409 P.2d 1966 wherein the Board's discretion to reject the high bid in favor of the low bid was sustained on trust principle grounds: The Board noted that the high bid was "considerably over the landlord's share prevailing in the area, and that good husbandry and sustained income required that they have a lessee who could complete the term of the lease while making enough profit to protect the leasehold and not cut corners on good husbandry practice. If the competing bid is considerably higher, there is danger that the lessee will not fulfill his term because of inability to make money or that he will cut corners on good husbandry practice. In the meantime, the qualified proven farmer may have gone out of business or left the area. As trustees charged with managing this land in a prudent careful manner, I do not believe we can take these risks." At 810. The Court said that the Board's mandate to receive a sustained income coupled with full market value put them in an "awkward position" in circumstances such as this. However, it concluded that the Board had to have discretion to determine "what will most benefit the public." At 813.

resembling a bright or fixed line, and the notion of "special legislation" does not provide much protection for the trust in any event. Second, regarding state obligations, careful identification and interpretation of the trust documents is more likely to identify standards regarding state authorities and obligations.

Changing the Trust

Questions about what the trust binds the states and federal government to do lead reasonably to questions about how one might alter the obligations. After all, this is a programme that has been in operation for almost two hundred years; surely altered circumstances might give rise to pressures to alter its basic dimensions.

The answers to these questions are surprisingly unenlightening. Very little issue seems to have been generated around changing the trust and, when the issue has been raised, it has been resolved without apparent reference to trust principles.

The dominant theme in case law surrounding changing the trust is the unsurprising notion that both state constitutions and state statutes must comply with Congressional statute, that is, the enabling acts. Further, and also unexceptional, state statutes must comport with state constitutions. One implication of these unstartling facts is that states cannot make changes in school lands programs as they are described in the state's enabling act without the permission of Congress. As stated in a very standard Arizona case:

... any limitation upon the disposition of public land provided in the Enabling Act is absolutely binding on the state of Arizona, unless the Congress of the United States may consent to a change, and any statute or amendment to the state Constitution in conflict therewith is null and void.²⁰⁷

It is also true that since Arizona and New Mexico have the most specific enabling acts, they are the most likely to seek acquiescence from Congress in the redefinition of their management authorities. Congressional approval is routine.²⁰⁸

Moreover, states with few enabling act restrictions alter their programs considerably by constitutional amendment without participation of the federal Congress. In the late 1960s, modification of the Oregon state constitution broadened the concept of trust from a narrow interpretation as solely for the benefit of the trust institution and solely for maximum revenue generation. The amended document states that:

²⁰⁷ *Boice v. Campbell* 248 P. 34 (Az.1926).

²⁰⁸ *Deer Valley*, *supra*, n. 41, notes numerous instances in which "Congress has periodically amended the Enabling Act to allow Arizona more flexible use of its school trust land." at 539, cites omitted.

The board shall manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management."²⁰⁹

This provision is codified to provide for the management of those lands administered by the Oregon State Forester:

... so as to secure the greatest permanent value of the lands to the whole people of the State of Oregon, particularly for the dedicated purposes of the lands and the common schools which the resources of the lands are devoted."²¹⁰

It would seem that the effect of this change is to broaden the definition of the trust to include the entire populous of the state, not just the interest of the beneficiaries, while giving preferential treatment to the original purposes of the grants.²¹¹ The criteria for securing the greatest permanent value of the lands is different from securing maximum benefit, especially if maximum benefit is thought of in present value terms.²¹²

This is not to suggest, of course, that there are never controversies. The State Supreme Court in both Utah and Oklahoma have, for example, voided amendments to their state Constitutions regarding expenditure of trust land mineral royalties because they were incompatible with the states' Enabling Acts.²¹³

What is perhaps surprising about all of this is that trust principles providing for flexibility in the administration of trusts appear not to have been invoked in support of reasonable flexibility. Notably, the cy pres²¹⁴ power appears never to have been relied upon in resolving school lands cases. The rule may be applied when the court holds that it is impractical, impossible or

²⁰⁹ Oregon Constitution, Article VIII, §5(2). Amended by HJR No. 7, 1967 and adopted by the people May 28, 1968. See *Johnson v. Department of Revenue*, 639 P.2d 128 (1982).

²¹⁰ Oregon Revised Statutes (O.R.S.) §530.490.

²¹¹ This read William R. Cook, Assistant Attorney General, Oregon, pers. comm., April 5, 1991. Cook suggests that the referendum of May, 1968 constitutes approval by the beneficiaries of the change in the trust. See for consent of beneficiaries to change a trust, *Restatement, Trusts, Second*, §338.

²¹² *Waggener supra*, n. 16, at 8. We shall return to this in detail in the next section.

²¹³ *State ex re. Williamson v. Commissioners of the Land Office* 301 P. 2d 655 (Okla., 1956); *Jensen v. Dinehart*, 645 P.2d 32 (Utah, 1982). In *Williamson*, the Oklahoma Education Association, as an amicus, argued that the Congress was without authority to "prescribe any such conditions operating to limit in the future the legislative powers of a new state over matters in their nature confined exclusively to the state as a part of their sovereign powers; that the establishment, maintenance and promotion of schools throughout the State is a matter of state concern and power and an exercise of sovereignty in a field reserved to the States, and that the Federal Government has no delegated powers in such field." (at 658).

²¹⁴ See *Restatement, Second, Trusts*, §399. See also, Fisch, *The Cy Pres Doctrine in the United States* (1950), Ch 5. It is clear that cy pres applies only to charitable trusts. See *Restatement, Trusts, Second*, §349. We leave most of this to the trust attorneys. However, this looks like a charitable trust to us. Occasionally the courts use the term.

inexpedient to pursue purposes of the trust specifically as described by the settlor.²¹⁵ A similar principle allows the courts to approve a trustee's "deviation"²¹⁶ from the mechanics of a trust in order to protect or achieve its goals. It seems not to have been mentioned. Finally, putting aside the exotica, the simple trust duty to preserve the trust property²¹⁷ is everywhere apparent in the discussions; however it does not seem to be given much sway when juxtaposed with maximized economic returns.

Regarding the preservation of the trust or corpus principle, part of its absence from the discussion may be explicable by the fact that when the courts reject lessee's complaints and sustain Commissioner's efforts which might be characterized as "trust preservation" it gets packaged as respect for the administrator's discretion.²¹⁸ Therefore, one might argue, the idea is operative even if the nomenclature is missing. However, in the more difficult context, protecting the trust from beneficiaries demands, the principle is occasionally mentioned but never relied upon in preference to maximum returns.²¹⁹

Approximately the same is true regarding deviation. One could argue that the deviation principle was relied upon if not endorsed by name in *Lassen* and numerous cases which cite it.²²⁰ There it was held that although the trust must be compensated for land allocated by the state to highway use, it was not necessary to go through the specific procedures of appraisal and auction in order to achieve that purpose. The Supreme Court's conclusion is unevenly adhered to²²¹ but apparently the trust principle has never been explicitly invoked.

The classic cy pres case suggests why it might be useful in protecting trust lands from over-exploitation by economic maximizers. It involves an 1861 bequest designed to support efforts to create "public sentiment that would put an end to Negro slavery" and to benefit fugitive slaves. The settlor's heirs requested that the trust be dismantled when Negroes were freed as a result of the Civil War. The court instead invoked the cy pres doctrine to direct use of the fund to support the broader purposes of the grant, that is, the aiding persons of the Negro race, with

²¹⁵ Bogert, *supra*, n. 131, at 524-26.

²¹⁶ Restatement, Second, Trusts, §381. Sometimes called equitable deviation. See Bogert, *supra*, n. 131, 518; Chester, "Cy Pres: A Promise Unfulfilled," 54 *Indiana L.J.* 406 (1979).

²¹⁷ Restatement, Second, Trusts, §176.

²¹⁸ See discussion below, n. 243 ff. regarding who is trustee,

²¹⁹ For recent cases, see, most explicitly, Nigh, *supra*, n. 10, and less emphatically, *Skamania*, *supra*, n. 109.

²²⁰ *Supra*, n. 33.

²²¹ See *Deer Valley*, *supra*, n. 41.

education and welfare programs.²²² More relevant, perhaps, a New York court applied *cy pres* to a bequest of land to a town to enable it to build a hospital. The hospital was not needed and the court held that the testator's intent was actually to create a memorial to her husband; accordingly the court allowed the land to be used for a memorial town administration building.²²³

Apparently the only case that appears to mention the doctrine did not rely on it. A New Mexico case involving lands granted to establish and maintain a hospital for miners provides an example of how the doctrine might be applied. As part of a reorganization of state hospitals, New Mexico downgraded its miners' hospital to an intermediate care facility and planned to provide surgical and other services at trust expense to miners at a central facility. This was disallowed, and the District Court refused to apply the doctrine of *cy pres*.²²⁴ The Appeals Court noted that fact but did not discuss it while affirming and amending the decision.

Changing the trust appears less complex than one might have predicted. The idea of a "compact" seems not to have much meaning in this context. The federal government is bound by little, and the states are free to alter their management of the granted lands so long as they do not violate their enabling act. Moreover, trust principles regarding changing the trust seem not to have been applied. The trust notions that have emerged in connection with the land grants seem fairly restricted to economic returns and undivided loyalty. "Preserving the trust property," *cy pres*, and equitable deviation are rarely to never mentioned by the courts.

3. What is the Trust Property?

It is not initially obvious that this question is more than a formality. It arises from the fact that when state constitutions declare that there is a trust they are likely to mention only the permanent school fund and not mention the granted lands. This is because, as noted above, it was widely presumed during the accession period that public land ownership was temporary—that both the state and federal government would transfer their lands into private ownership. The concentration on the funds in most constitutional discussions of trusts could lead one to ask whether the granted lands are included in the trust. Certainly the answer is not obscure: the corpus of the trust includes both the lands and the funds arising therefrom.²²⁵ Courts and

²²² Bogert, *supra*, n. 131, at 526-27 and Chester, *supra*, n. 216; see also Scott, "Deviation from the Terms of a Trust," XLIV *Harvard L. Rev.* 1025 (1931) on general flexibility in trusts;

²²³ Chester, *supra*, n. 220, discussing *In re Will of Neher* 279 N.Y. 370 (1939), at 415.

²²⁴ *United States v. New Mexico* 536 F.2d 1324, 1326 (1976).

²²⁵ Not all lands which produce income paid into the trust are automatically part of the trust. For example, in Minnesota, "proceeds from minerals underlying navigable lakes are paid into the permanent school fund

statutes have made this absolutely clear. Why then do we bother with the topic at all, apart from emphasizing the by now familiar point that it is helpful to read the specific documents in specific states? Because raising the issue allows us to dwell, albeit briefly, a number of pesky little peculiarities that do, in fact occasion a significant portion of both recent case law and pressing contemporary policy issues. First, and most significant, the constitutional detail regarding the trust funds varies, as does everything else, from state to state. Any attempt to analyze school land or fund management must begin by sorting out in each jurisdiction what funds arising from what real estate transactions wind up in the permanent fund and elsewhere. We will do so here in a preliminary way. That will occupy the bulk of this section.

Two other points deserve mention. First, we simply observe that the predominance of fund management in constitutional discussion of trustees duties appears to us to have potentiated the emphasis on economic returns in discussion of trust obligations. This is after all the component of the conventional wisdom that most irks us. So, while we cannot prove the point, we cannot resist making it.

Second, the constitutions discussed primarily the funds. When the lands are mentioned it usually is in the context of disposition. Thus, when the trust documents discuss the trustee, it rarely reaches the subject of trustee as manager of the lands. This will be treated more fully under the heading of "who is the trustee." In this context we simply note that some of the confusion arises in connection with the nature of the trust property: only in Oregon and Oklahoma are the lands and the funds managed by the same administrator.

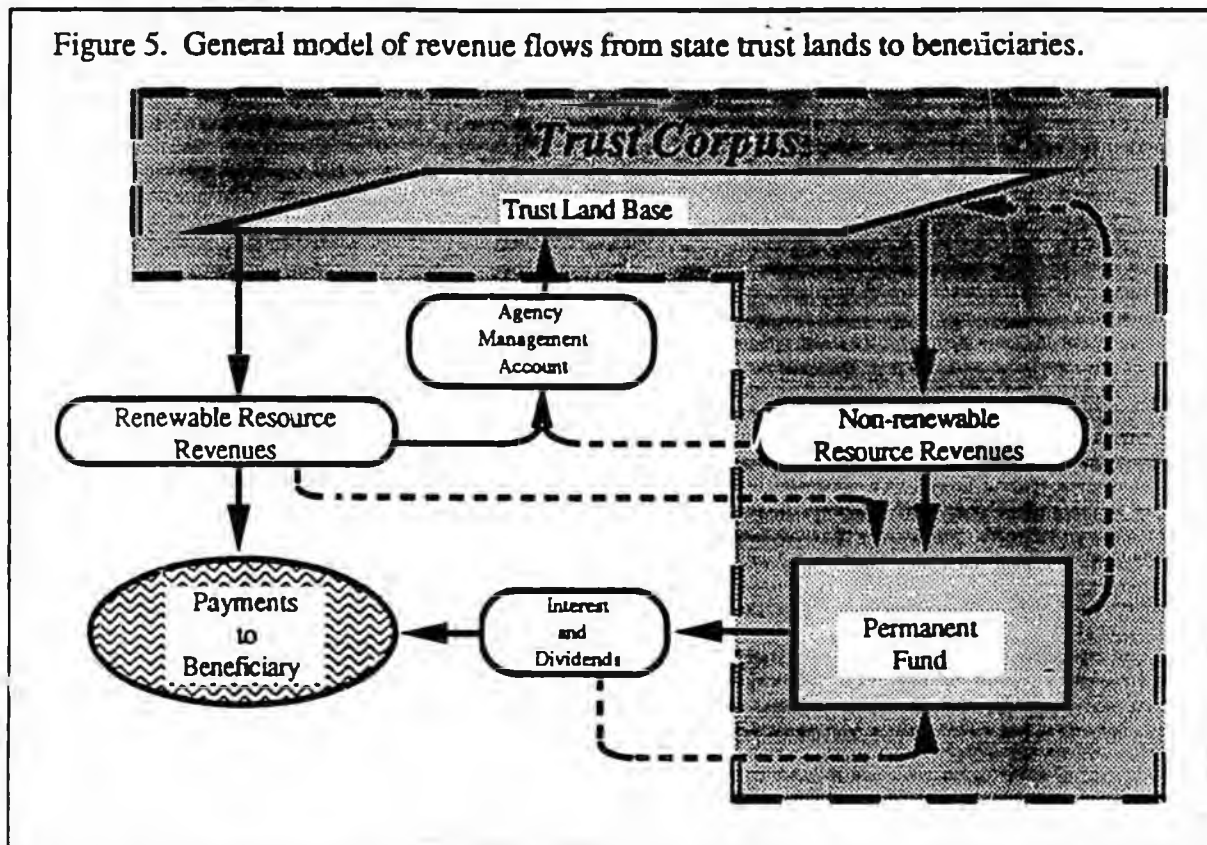
Returning to the overriding question of the funds, we have already noted that the trust that generates revenues for the beneficiaries from the trust corpus is made up of lands, resource revenues, and permanent funds. Revenues are generated from three basic sources: (1) royalties from the sale of non-renewable resources, usually oil, gas, coal, and minerals; (2) revenues from the sale of trust lands; and (3) revenues from the lease or sale of renewable resources, usually grazing fees, timber sales, commercial or special purpose leases, and the surface rentals received for oil, gas, coal, and mineral leases.

It is important to note that exact paths through which moneys travel before reaching the beneficiaries varies in different states according to three factors: (1) the source of the revenues, (2) the beneficiary of the lands which produced the revenues, and (3) the deduction for managerial expenses which varies among land type and beneficiary. In Figure 5 solid lines

pursuant to Minn. Stat SS 93.06--93.07." Personal communication, Gail Lewellan and Andrew Tourville, Assistant Attorneys General, Minnesota, pers. comm., March 11, 1991, at 4.

with arrows denote the normal revenue flows which are common to all states; dashed lines with arrows represent flows in which variations are found in one or more states. The double-dashed line encloses what can be thought of as the overall corpus, or body, of the trust. Contemporary policy analysts are enjoined to "follow the money." It is not easy in the case of school lands, but it can be done.

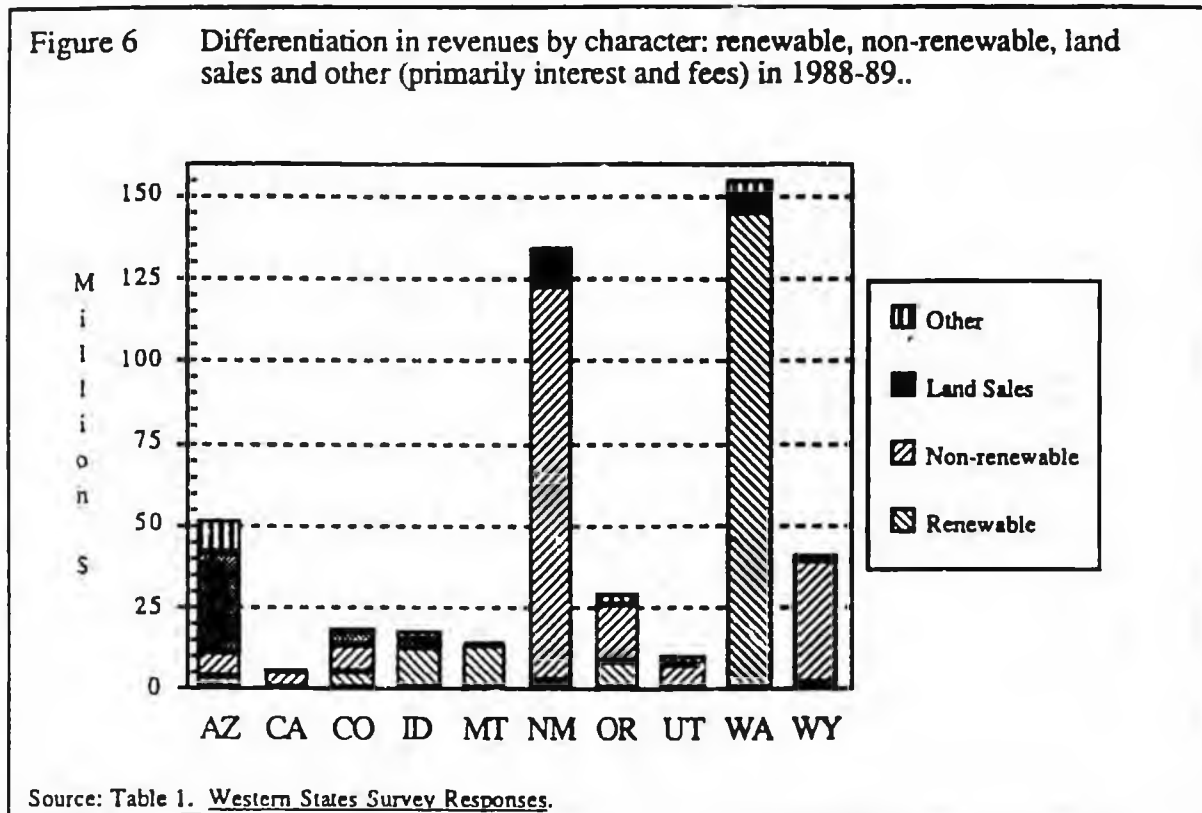
Figure 5. General model of revenue flows from state trust lands to beneficiaries.



Revenues from the first two categories, royalties and land sales, usually go into an "inviolable" permanent fund, with only the interest disbursed to the beneficiaries.²²⁶ Receipts from surface and renewable resource leases are generally channeled directly to the beneficiaries, in some cases after the state land office deducts its operating expenses. Generally, these monies do not go into the permanent fund. They are generally classed as "rental" income in land office financial statements. This is the flow on the left-hand side of Figure 5. Receipts from non-renewable resources, including land sales, are placed in permanent funds with only the

²²⁶ There are two exceptions to this generalization: (1) Utah in 1981 allowed its beneficiaries to withdrawal principal from their permanent funds in the face of a one-third cut in their appropriations from the legislature. See *Jensen v. Dinehart*, 645 P.2d 32 (Utah, 1982) for a discussion of the Jones Act and minerals revenues with respect to state trust lands. (2) States which have a land banking process, Arizona, California and Washington, allow proceeds from the sale of trust lands to be retained in a special account which is then used to purchase other lands for the beneficiaries.

dividends and interest from these funds distributed annually. This is the flow on the right-hand side of Figure 5.



The levels of revenues, and their type, are significant since they may contribute to different emphases in resource management in different states. Figure 6 shows these differences in broad categories. Frequently the states emphasize management of their major revenue source (such oil and gas in the case of New Mexico and California, and timber in the case of Washington and Oregon). Further, if some resources return revenues to the operating expenses of the state land office, they may gain a priority in use compared to other uses.²²⁷ For example, the land office may emphasize, or over invest in a use that returns operating funds to them (such as grazing) instead of a use that would return more to the trust even though it would involve selling the lands (such as commercial development). For this reason, the differentiation in Figure 6 between revenues going into permanent funds and those disbursed to beneficiaries may be significant.²²⁸ Distribution of revenues varies on a state-to-state basis,

²²⁷ This possibility was pointed out by Rick Lopez, Assistant Commissioner of Commercial Resources and Exchanges, New Mexico State Land Office during interview August 2, 1988. This is also the case in Utah. Steven F. Alder, Assistant Attorney General, Utah, pers. comm., February 25, 1991.

²²⁸ This differentiation will be elaborated upon in the discussion of land office funding mechanisms, *infra*, this section.

and by whether the trust beneficiary is the county or the public schools and institutions. Table 1 shows this variation among the ten western states. All the states' public school and institutions' non-renewable revenues are placed in permanent trust funds.

Both renewable resource receipts and the interest on the permanent funds from the public school trust lands go into the common school construction fund in Washington. This, until recently, was the only state source of funds for school building construction in Washington.²²⁹ Receipts from public school trust lands in the other states are undesignated for purpose, and comprise only a portion of the states' contribution to education, usually apportioned to the school districts according to student numbers. Idaho is different from the other states in placing receipts from the sale of timber, along with land sales, easements, and mineral royalties into a permanent endowment fund, with the interest distributed to the beneficiaries.²³⁰ Montana differs from the other states in disbursing only 95% of the renewable resource revenues, and only 95% of the interest on the permanent funds to the public schools; the remaining 5% of each of these funds is placed in the permanent fund.²³¹ This variation is shown in Figure 5 by dashed lines from the renewable resource revenues to the permanent fund, and from the interest and dividends to the permanent fund.

4. Trust Purpose — What Were the Grants For and Who is the Beneficiary?

It has already been noted that variation in language in pertinent documents gives rise to a broad range of potential purposes for the granted lands.²³² Nevertheless, trust purposes have been derived from generic statements rather than specific ones, and presents greater clarity and uniformity than can be found in the documents and their definition of the beneficiary. Simplification in discussion of the beneficiaries derives from three basic themes which by now must be familiar: the trusts are for the schools; the trust principle of undivided loyalty prohibits any consideration being given to general benefits; and the benefit will be accrued by raising money for the schools.

Herein, we will suggest three alternative notions of beneficiary: (1) the direct use by the schools of the lands, in the form of (a) lands for the construction of schools or (b) for

²²⁹ Washington DNR. Proposed Forest Land Management Plan. at 29. In recent years, the Legislature has given additional funds for school construction. Nick Handy, Chief Counsel, Washington Department of Natural Resources, personal communication, March 6, 1991.

²³⁰ Idaho Department of Lands. Idaho Forestry Opportunities 1980 - 1990. (March, 1988), at 3.

²³¹ Montana Constitution Article X, §5.

²³² See above, n. 50 and text accompanying.

Table 1. Division of revenues between direct disbursement to beneficiaries (net of land office expenses, if applicable) or placement in beneficiaries' permanent fund. (B=Disbursable to Beneficiary; PF=Permanent Fund; OT=Other; LB=Land Bank; ?=Unknown). <u>Western States Survey Responses and state statutes.</u>										
Revenue Source	AZ ^a	CA ^b	CO ^c	ID ^d	MT ^e	NM ^f	OR	UT	WA	WY
Renewable										
Agriculture	B	B	B	B	B	B	PF	B	B	B
Grazing	B	B	B	B	B	B	PF	B	B	B
Timber	PF	B	B	B,OT	PF	B	PF	B	B	B
Water	PF	B	?	?	?	?	PF	?	?	B,PF
Commercial	?	B	B	?	B	B	PF	B	B	B
Other Noncommodity	?	B	B	?	?	B	PF	B	B	B
Non-renewable										
<u>Minerals</u>										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	?	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
<u>Oil and Gas</u>										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	PF	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
<u>Coal</u>										
Surface Rental	B	B	B	?	B	B	PF	PF	?	B
Bonus Bids	?	B	PF	?	B	?	PF	PF	?	B
Royalties	PF	B	PF	?	PF	PF	PF	PF	PF	PF
<u>Geothermal</u>										
Surface Rental	?	B,OT	?	?	B	B	PF	PF	?	B
Royalties	?	B,OT	?	?	PF	PF	PF	PF	PF	PF
<u>Other Commodities</u>										
Surface Rentals	?	B	B	PF	B	B	PF	PF	?	B
Royalties	?	B	PF	PF	PF	PF	PF	PF	PF	PF
Lands & Misc.										
Right-of-Way	B, PF	B	PF	PF	?	?	PF	PF	PF	PF
<u>Land Sales</u>										
Interest	B	LB	PF	?	?	?	PF	PF	LB	B
Income	PF	LB	PF	PF	PF	PF	PF	PF	LB	PF
Fees and Permits	B	B	?	B, PF	?	?	PF	B	B	OT

a. A.R.S.A. §37-521 for receipt placement into permanent fund.

b. California no longer has a permanent fund. California P.R.C. §6417.5 for the use of school and in-lieu lands, §6417.7 for the sale of school and in-lieu lands. Geothermal revenues are divided differently with 50% net going to income fund and 50% into the Renewable Resources Development Account which is divided into three categories: 30% to the Renewable Resources Investment Fund; 30% as grants to local jurisdictions; and 40% to the county where the revenues were generated.

c. Based on C.R.S. §36-1-116. C.R.S. §36-7-202 says that 75% of timber revenues go to the income fund and 25% go to the county school fund for lands within designated state forests.

d. L.C.A. §58-503 for distribution of timber receipts on acquired lands: 50% net to general fund and 50% to county school fund.

e. M.C.A. §77-3-106 for metallic minerals receipts distribution; §77-3-318 for coal receipts; §77-3-436 for oil and gas receipts; §77-4-127 for geothermal receipts distribution. Note that only 95% of disbursable and 95% of permanent fund interest is distributed, the remaining 5% in each category goes back into the permanent fund by Article X§5 of the Montana Constitution.

f. N.M.S.A. §19-1-18.

environmental preservation and education for the edification of school children or others; (2) the possibility that the school grants contemplated other benefits or beneficiaries than schools; and, if that is too far from what is now considered normal, a third category (3) indirect

benefits, a redefinition of the raise money theme. We do not question the idea that the trustee owes a duty of "undivided loyalty" to the beneficiary. We simply believe that the plain language of the trust documents permits a broader conceptualization of both who the beneficiaries are and what benefits them than is presently acknowledged.²³³

What appears to be the easiest inroad into the traditional definition of trust land uses involves direct use of the lands by the currently recognized beneficiary, the schools. Reference to *Lassen*, the basic case in the most restrictive state, is sufficient to establish the point that the conditions of the grant do not preclude it. *Lassen*, in fact, appears to presume that schools will make direct use of appropriately situated parcels. The *Lassen* court states that in granting the lands, Congress never "supposed that Arizona would retain *all* the lands given it for *actual use by the beneficiaries*; the lands were obviously too extensive and too often inappropriate for the selected purposes." Congress could scarcely have expected, the Court argued, that *many* of the 8,000,000 acres of its grant "for the support of the common schools," all chosen without regard to topography or school needs, would be employed as building sites."²³⁴ In the mind of Congress, we may conclude that building sites for schools would seem a wholly appropriate use of the granted lands.

This does not entirely resolve the issue, however. There may be, in some particular state, constitutional or statutory provisions which preclude this use of trust lands. Whereas the Washington²³⁵ and Oregon constitutions would appear to raise no barrier, the Idaho one arguably does. Section 8 Article 9 of the state constitution clearly directs the State Board of Land Commissioners to treat with the land "in such manner as will secure the maximum long term financial return therefore." A hypothetically thwarted school board might argue, depending on the cost of an alternative school site and the return that the particular parcel it coveted for building was generating, that direct use as a building site was still the preferred use.

Much of the same logic would apply to what appears to be a harder case—dedicating land of

²³³ See *Johnson v. Dept of Revenue*, 639 P.2d 128, 292 Or. 373 (1982).

²³⁴ *Lassen*, at 463. There are two issues here. The first is whether the school district has a right to make use of the school lands. The second is, if yes to the first, must the school district compensate the trust. If there is no compensation to the trust, one could argue that state programs for spreading the benefit of the trust and permanent fund are trumped.

²³⁵ Washington does currently "use trust property as educational interpretive areas if [they will be] accessible equally to appropriate trust beneficiaries. On charitable, educational, penal and reformatory institutional trusts, [the state] allows the trust property to be used for construction of facilities usable by the beneficiary pursuant to advice of legal counsel." Nick Handy, Chief Counsel, Washington Department of Natural Resources, pers. comm., March 6, 1991.

historic or ecological interest, as discussed in the opening section of this paper, for educational purposes. Again, state constitutions vary. Even if an Idaho school district could have prevailed with the economic return argument in the building site hypothetical, it is not clear that the same logic would apply to the biological preserve case.²³⁶ However, if the precise wording in another jurisdiction was "maximum possible benefit" rather than amount, the opportunities would seem far less constrained.

Part of this argument would depend on whether the enabling act and or the state documents permit a broader definition of the beneficiary than merely schools. If trust principles becomes operational only as a result of state commitments, then the content of the state document ought to have more weight than has been apparent in post-*Lassen* interpretations. Wyoming provides, as noted above, a clear case. Although the lands were granted "for the support of schools" they were accepted "for educational purposes." Arguably this would authorize use of land as an ecological or historical site. In Idaho the educational use might prevail as opposed to a grazing lease, but perhaps not as opposed to an oil well. The possibilities are not limitless, but they are far more varied than they appear at first blush.²³⁷

Outside of Arizona and New Mexico, the narrow passage on the second question, broader beneficiaries, is not the enabling act's basic notion that the grants were to support (or for the use and benefit of) common schools, but the trust principle of undivided loyalty. The Wyoming acceptance language, "for educational purposes,"²³⁸ would not appear to provide much assistance for those arguing that land management programs and farming interests seeking to defend a preferred position such as is granted in the Oklahoma constitution to agriculture. However, language accepting the lands in trust "for all the people" as in Washington, and the more recent language in Oregon,²³⁹ might arguably do more, or at least do different things. At a minimum it would require that a court evaluate whether a specific use violated the enabling act rather than simply enveloping the entire turf in a selective recitation of trust principles.

²³⁶ However, it is worth noting that the basic Idaho case interpreting its trust land, *Barber Lumber Co. v. Gifford*, 139 P. 557 (1914) endorses wide discretion by the board in defining and securing "maximum benefit." This included rejecting the high bid both because a lower bidder promised more general benefits and because it was not, in the eyes of the court, imprudent to refuse to sell timber to someone that they did not know. at 562.

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The goal here is to challenge the knot between school lands and fund raising, not to erode hard won protections for the school lands in order to open them to industry predation. This leads us to press to a third possibility. What happens when as empirical matter the greatest benefit to the schools would come from managing them in such a way as to provide a long term stable base for real estate and other school supporting taxes in a jurisdiction? It is not clear that this notion violates trust principles: Is so doing obviously divided loyalty, or the essence of prudent protection of trust resources?

The Courts have been, as required by trust principles, quite unwilling to accept diversion of the trust resources to other purposes, such as highways. They may, however, have been excessively restrictive regarding the use of trust resources that arguably enhance the trust, but which also create a general benefit not exclusively enjoyed by the beneficiary.²⁴³ In the *Nigh* case we have suggested that the Court appears to have misread both the trust documents and trust principles to prevent a school land management regime that arguably benefits the agricultural community. But this is not the only result. Other courts, with a less emphatic

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²⁴¹ Thorpe, VII, Article XVIII, at 4147.

²⁴² Discussed below, at n. 293, ff.

²⁴³ The divided loyalty issue is not simply resolved. Compare *Ervien and Skamania* with *Toomey v. State Board of Land Commissioners*, 106 Mont. 547 (1935) which holds that the lands are held in trust for "the people," and *State ex rel. Thompson v. Babcock* 409 P.2d 808 (Mont. 1966) which holds that the steward can turn away the highest bid to protect the trust.

maximum economic returns, been willing to to entertain the notion.²⁴⁴

5. What is a Trustee

All this potential variability in uses of the land ought to make us wonder about who is managing them: who is the trustee? Is the manager or managing agency the same as the trustee? Or is the legislature, or the governor, or the state treasurer the trustee and the land commissioner merely the manager. Conventional wisdom would suggest, with considerably authority, that the State Lands Commission or Commissioner is the trustee. For example, in a 1983 Montana case, the state Supreme Court asserted that the "lands granted by the federal government to the states for the support of public schools constitute a trust, and the state is trustee of those lands. ... Thus, a fiduciary duty is placed upon the Board of Land Commissioners and the Department of State Lands to manage the trust according to the highest standard. The department, under the direction of the board, has responsibility for leasing, managing, and otherwise disposing of these lands, ... subject to the trust guidelines."²⁴⁵ This may be taken as the conventional wisdom on the subject, certainly as expressed by the land commissioners.²⁴⁶

When the courts deal with this issue, the response becomes slightly more complex and interesting. This question is typically a simple question of whether a Board's exercise of discretion can be justified. Many times, in these cases, it does not matter that the manager may also be a trustee. Frequently the trust plays little or no role in the court's evaluation of the administrator's decision. A Colorado court upheld the Board's authority to cancel a grazing lease to accommodate a more recent coal lease even though doing so clearly exceeded the statutory criteria for when lease cancellation was authorized.²⁴⁷ Without ever mentioning the notion of trusts or trustees, the Court upheld the cancellation concluding "[i]n our view, the constitution mandates that, unless limited by express statutory regulations, the Board shall enter into whatever leases it deems to be most beneficial to the state. It may therefore utilize

²⁴⁴ Although the *Skamania* court appears to line up with *Nigh* on the issue of undivided loyalty, parts of the decision suggest that if they state had presented even a credible hint of data which suggested that enhancement or stability were important, they might have at least considered the argument. As an empirical matter, subsequent events suggest that the court was correct. The Washington State situation would make an informative comparison with national forest timber purchasers who, in the absence of a trust notion, persuaded Congress to allow them out of their contracts. As a result of the decision, the state did not let timber contractors out of their purchase contracts. Predicted bankruptcies and economic collapse in the industry did not occur. Pat McElroy pers comm., April 6, 1991. This is a comparison which deserves further analysis.

²⁴⁵ *Jeppeson v. Dept. of State Lands*, 667 P.2d. 428 (Mont 1983) at 431.

²⁴⁶ Souder and Fairfax, *Western States Survey Response*, supra, n. 40

²⁴⁷ C.R.S. §36-1-131 (1973) for violating lease provisions or making false statements in lease application.

any lease terms not prohibited by law"

It is also common to find trust notions providing a minimum, verbal flourish in what would otherwise be a standard deference decision.²⁴⁸ Because the courts give themselves enormous latitude to take hard looks, or not, at administrative discretion, and use a wide range of more or less demanding criteria to determine the appropriateness of agency action, it is not possible to identify cases where trust principles have clearly tipped the scales in favor of an agency action that would otherwise have been disallowed. The Montana Supreme Court, after referencing all the trust trappings cited above, appeared in *Jeppson* to conclude without regard to them:

... this Court will not compel a state agency to make a particular decision with respect to a matter when that agency exercises its own judgment and discretion and has not violated any statutory provisions or engaged in fraudulent action. In sum, we find no evidence of arbitrary and capricious action on the part of the department so as to justify the extraordinary relief requested by the appellant.²⁴⁹

However, it is also clear that throughout, the notion of the trust played a role in defining the scope of the discretion. For example, the Court notes that the fact that "the statute and regulations did not include provisions respecting the evaluation of a party's willingness and ability to make timely payments does not remove them from the list of criteria that a *fiduciary* could consider when acting upon a proposed assignment."²⁵⁰

The question of how important is the trust notion to the definition of the manager/trustee's discretion is complicated by the fact that in cases which do not uphold the Board's exercise of discretion the Court is likely to simply redefine the trustee, hence the locus of discretion. When binding the Board to the specific detail of the disputed statute, the Court will frequently not decide that trust principles have been exceeded or distorted or ignored. It will simply find that the legislature rather than the Board is the trustee. Upholding a Montana legislature's decision regarding oil and gas lease terms, the Court found that the legislature was in an awkward position because it "had the duty of discharging two trusts in disposing of state lands." Yet, the two trusts conflicted: "There can be no sacrifice of the rental for additional royalty without, at the same time, violating § 1, Article XVII, as to the interest disposed of by renting."²⁵¹ Hence, the Board is bound by the decision of the trustee, the Legislature.

Discussed in *Evans v. Simpson*, 547 P.2d. 931, at 933.

²⁴⁸ See *State v. Babcock*, *supra*. for a case where trust principles provide a veneer rather than a central part of the analysis. Compare with *Jeppson*, *supra*, n. 242 less than 20 years later.

²⁴⁹ *Jeppson*, *supra*, n. 242, at 433-34.

²⁵⁰ *Id.*, 433. My italics. Compare *North Fork Pres. v. Dept of State Lands*, *supra*, n. 192.

²⁵¹ *Montana ex rel. Strandberg v. Board of Land Commissioners*, 307 P. 2d 234, 236-7 (1957).

Other contenders for the role of trustee emerge from the fact that different parts of the trust are typically administered by different agencies: the State Treasurer or Auditor is frequently considered to be, or styles him/herself as, the permanent school fund trustee. Who decides when a warrant against the permanent fund is a legitimate use of trust assets and ought to be paid? In an early Colorado case, the State Board of Land Commissioner's efforts to comply with statutory direction regarding investment of public school funds in loans on "unencumbered cultivated farm lands within the State of Colorado" were thwarted by the refusal of the state treasurer to pay the amount of the loan as directed. The Treasurer asserted that he was authorized by the constitution to securely and profitably invest the school fund, and that the statute which the Land Commissioners were attempting to carry out was unconstitutional because it grants to farmers special privileges. The Legislature was again identified as the appropriate Constitutionally designated body to be making the final decisions, again without reference to any trust or trustees. The Trustee was required to pay the warrant.²⁵²

More recently, Idaho's long-time state treasurer has waged a similar, and similarly unsuccessful battle, to assert authority over trust funds as against what she considered to be legislative/statutory frittering away of the assets.²⁵³ Other jurisdictions have reached other conclusions on the same points.²⁵⁴

It is not, of course, unusual for different branches and bodies of government to dispute among themselves about who has the authority to make a decision; even more frequently, perhaps, an affected interest group or individual will prefer one agency's position and will argue in court, or elsewhere, that other agencies lack authority to decide. Discussion of which administrator or entity has the authority, or how much discretion does an administrator have, is familiar and not tied to trusteeship even though the language may be used upon occasion. The trustee issue becomes relevant when an agency asserts that its actions are based on trust principles, and those principles trump what might be characterized as the normal order of things.

²⁵² *People ex rel. Miller v. Higgins*, 168 Pac. 740 (Colo. 1917).

²⁵³ In a number of cases involving legislation allowing the Land Board to use up to ten per cent of receipts for expenses, statutes defining how to calculate permanent fund losses, which under the Idaho Constitution must be repaid, and similar, the legislature and not the state treasurer has been found to have authority. See *Moon v. Investment Board*, 525 P.2d 335 (Id. 1874); *Moon v. Investment Board*, 548 P.2d 861 (Id. 1976); *Moon v. Investment Board*, 560 P.2d 871 (1977); *Moon v. State Bd. of Examiners*, 567 F.2d 858 (1978); *State ex rel. Moon v. State Bd. of Examiners*, 662 P.2d 221, cert. denied, 464 U.S. 992 (1983).

²⁵⁴ See on administrative expenses: *In re. Salaries of Commissioners and Employees of State Land Board* 133 P. 140 (Colo 1913); *U.S. v. Swope*, 10F.2d 215 (1926); and on determination of losses, see *State ex rel. Boucher v. Bartling*, 31 N.W.2d 422 (Neb 1948).

The cases simply do not support the profits only, or even the profits primarily, notion of school lands. So, while we believe that the courts have oversimplified, we do not find in the cases the straight jacket that others extract from the Golden Oldie key quotes from key cases. Further, we find in our preliminary plunge into trust law a number of notions which encourage and invite creativity and responsiveness to changed circumstances. Hence we are not discouraged in our quest to support emerging flexibility by moving from the historical background to the horse's mouth on conventional wisdom. Even the worst case analysis—that we are wrong about the history, it is all a trust and all the states are bound by it—does not leave school land management tied in economic maximizing knots.

Turning to the second issue, we argue that states are not immutably bound to inflexible or uniform standards. First, the trust is basically defined by the states and the states can change it; not easily, but not impossibly either. Second, all states are clearly not bound, and arguably no states are bound, to merely use the land to raise money. Even where the trust doctrine is applicable, it is less constricting than the conventional wisdom suggests. The obligation to make the trust productive is balanced, in constitutions, statutes and trust principles, by the duty to protect the corpus of the trust.

The next section will take this discussion out of the realm of case law and onto the ground, combining economic theory and management reality to underscore imprecisions in the concept of economic maximization. While not wanting to assert that everything currently being done as putative trust land management is actually acceptable under the doctrine, the diversity of programs demonstrates that there is more dispersion than might be assumed.

IV. MANAGEMENT ON THE GROUND

The forestry programs provide a clear range of alternative roles that a state can play in management of its trust resources. Even if we accede to conventional wisdom and accept managing the lands for maximum economic returns as the only possibility, there is still—this section will demonstrate with regard to just one program—enormous flexibility. The state has a choice in managing these lands solely for the production of revenues, either in the short- or long-term, or the state can manage the lands so that other beneficiary concerns are incorporated into management strategies. For example, in those states and counties that have a high dependency on timber for jobs and public finance, the state managing agency may modify the revenue maximizing strategy to provide for long-term sustained yield, or to even out expected revenues fluctuations based on changing harvest levels, or to provide for the development of infrastructure such as roads as a part of the state forestry program. In each of these cases, the beneficiaries' concerns affects management of their lands and provides a feedback mechanism

back to the trustee agency. This process is in contrast to other resources managed in trust by the state, such as grazing and non-renewable energy resources, where beneficiary input in the states' managing decisions is not

This section is organized as follows. The first part describes the context for state trust lands forest management. The origins of the timberlands and their extent are described for the ten western states with trust lands, with a subset of four major state trust timber producers selected for detailed examination. The organization of the state agencies responsible for management of trust lands is compared among these four states. Timber receipt flows from both school and "county trust lands" are described.²⁵⁵ The second section shows variations in how the states' trust responsibilities affect their timber management strategies.

Management Context

In many cases, especially in the northwest, the lands attractive for timber were sold, or the rights to those sections previously claimed or within the forest reserves were bought by speculators to use for selections of federal lands elsewhere in lieu of the state lands.²⁵⁶ The state trust lands that passed into private ownership were frequently consolidated into large holdings by timber companies. The timber on these lands, and the federal lands privately obtained under the various land disposal acts, was then harvested as demand justified, and they were then either retained by the companies, sold to individuals to be converted to pasture lands, or allowed to revert to the counties for back taxes. This last option was frequently exercised during the depression and after forest fires wiped out any value that the lands might have had for timber production in the near future.²⁵⁷

In two states, Oregon and Washington, county forest lands managed in trust by the state are significant: 652,000 acres in Oregon and 622,500 acres in Washington.²⁵⁸ These lands are of two types: (1) tax forfeited lands deeded by the county to the state and managed in trust for the county; and (2) lands purchased with bond revenues by the state. The latter are managed by the state and net revenues are returned to the county but they are not considered trust lands. The difference in the trust mandates between these county forest lands and the forested state trust lands will be discussed at greater length below; suffice it to say here that these tax-reverted

²⁵⁵ These are tax forfeited lands not granted lands. See below, .

²⁵⁶ The best description of the processes used to fraudulently obtain timbered public lands (federal as well as state) in the northwestern United States is found in Puter Looters of the Public Domain (1908).

²⁵⁷ See Levesque, A Chronicle of the Tillamook County Forest Trust Lands (1985).

²⁵⁸ Souder and Fairfax, Western States Survey Responses, *supra*, n. 40.

lands have a different trust mandate, different beneficiaries—and in Oregon even a different trustee—from those trust lands originally obtained by the state through federal grants. In our subsequent references to these lands, the county tax-reverted and purchased lands with the county as beneficiary will be called the "county forest lands", while the forested school and institutional trust lands will continue be called the "state trust lands" to differentiate between these two types of trust mandates.

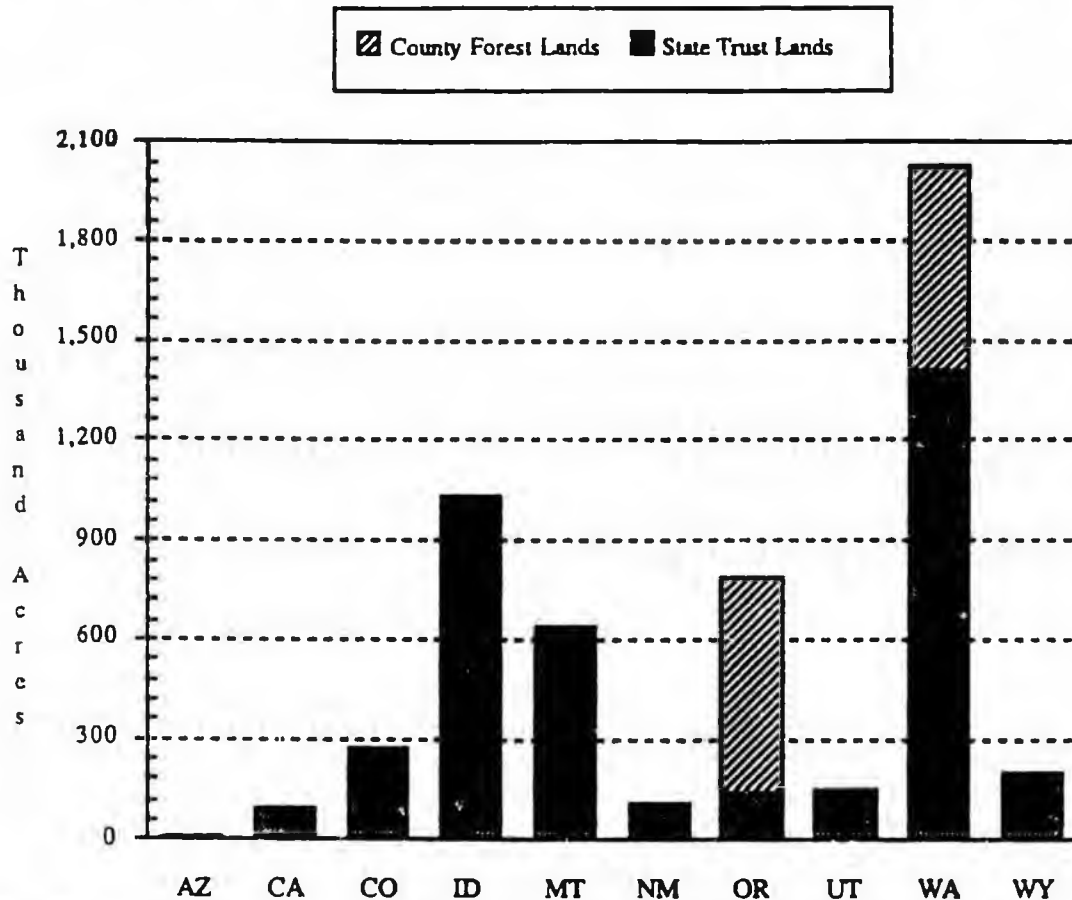
1. Forest Land Base

Forested lands and timber revenues form a significant part of state trust lands management in some states. Timberlands are defined as those lands that are producing, or are capable of producing twenty cubic feet per year per acre of industrial wood, and that are not withdrawn from timber production by statute or administrative action.²⁵⁹ Figure 7 shows these areas for the ten western states. Three major clusters of states categories break out based on timberland ownership. The largest holder is the State of Washington, with an ownership of slightly over 2 million acres. Medium sized owners include Idaho with over 1 million acres, Montana with 638 thousand acres, and Oregon with 827 thousand acres. Small timberland holding states are Arizona with 12 thousand acres, California with 95 thousand acres, Colorado with 274 thousand acres, New Mexico with 112 thousand acres, Utah with 150 thousand acres, and Wyoming with 203 thousand acres.

The four states selected for detailed examination are those with the largest amounts of commercial forest trust lands: Washington, Oregon, Idaho, and Montana. In terms of production and revenues, the classes are somewhat different. Figure 8 shows the production from the four largest state trust land managers. The rank order of the four states is still the same, however the differences in production, based on volume harvested per acre, are quite distinct. Over the ten year period from 1978 to 1987, Montana harvested 47 thousand board feet (MBF) per acre, Idaho 148 MBF/acre, Oregon 285 MBF/acre, and Washington lead with 359 MBF/acre of state trust forest lands. The reasons for these differences in harvest intensity from state trust lands can be attributed to differences in site quality, stocking levels, and markets.

²⁵⁹ Waddell, Oswald, and Powell. Forest Statistics of the United States, 1987. Resource Bulletin PNW-RB-168. Pacific Northwest Research Station, (1989).

Figure 7. State-owned or managed timberlands in the western United States.



Sources: Table 2, 1987 data in Waddell, K., D. Oswald, and D.S. Powell. Forest Statistics of the United States, 1987 (Resource Bulletin PNW-RB-168. Pacific Northwest Research Station, U.S.D.A. Forest Service. Portland, OR. 106pp. 1989) and Souder, J.A. and S.K. Fairfax Western States Survey Responses. (State Lands Project. Department of Forestry and Resource Management. University of California, Berkeley, CA. 143pp. December, 1989).

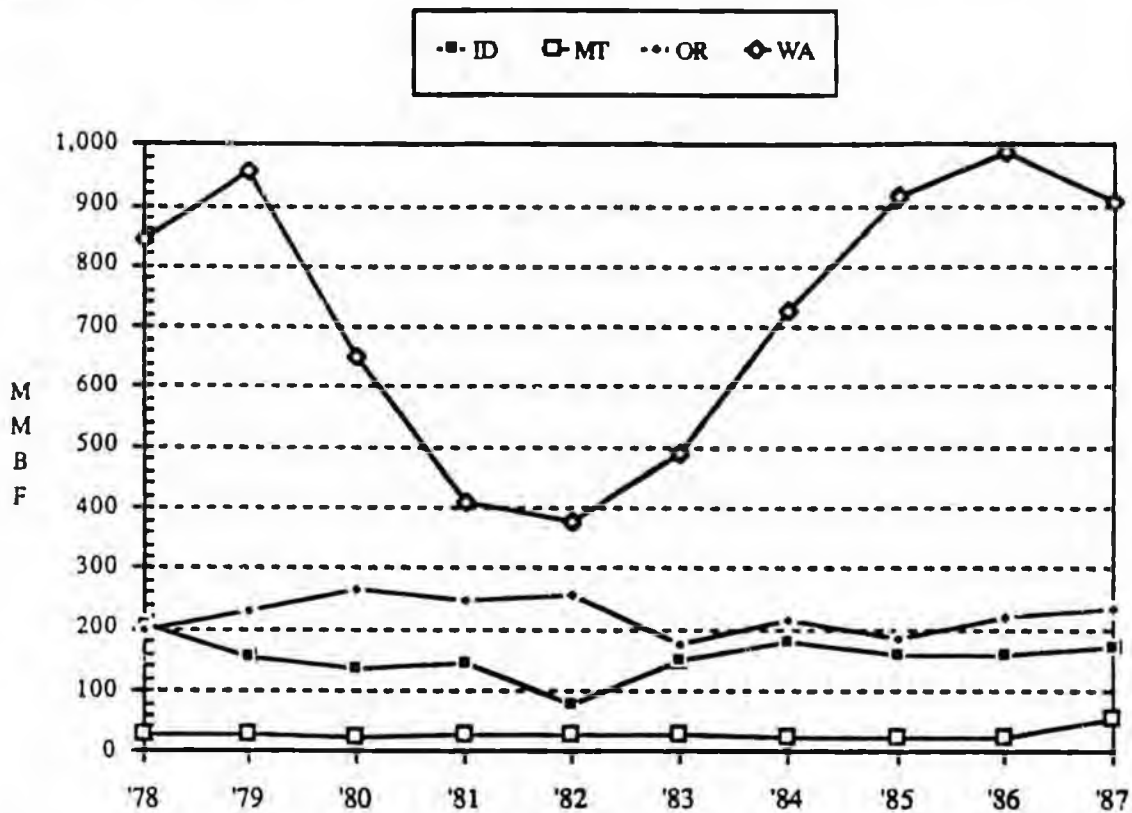
The land base for both the state trust lands and the county forest lands, while not fixed in place, is not expected to be reduced. Washington has specific legislation allowing the state to sell lands, place the proceeds in a land bank, and use these bank funds to purchase other lands with natural resource or income-producing potential.²⁶⁰ Oregon also has a policy of maintaining its county forest lands.²⁶¹ In 1969 the Oregon Land Board decided to stop selling state trust lands and instead to manage them for long-term income production, with the exception of scattered

²⁶⁰ Washington Department of Natural Resources. Transition Lands Policy Plan. Final. (1988). Land sales and land bank legislation is found in the Revised Code of Washington (R.C.W.) §79.66.

²⁶¹ Levesque, supra, n. 252. The Oregon Department of Forestry operates under the provisions of Oregon Revised Statutes (O.R.S.) Chapter 526. Public Lands are regulated under O.R.S. Chapter 274.

and isolated parcels.²⁶² No equivalent policies have been found for Idaho and Montana. However, Idaho will not sell more than 100 sections (64,000 acres) per year of all types of lands, and sells only to eliminate management and administrative problem areas.²⁶³ On the other hand, Idaho exchanged approximately fifty thousand acres of trust lands during 1985 - 87.²⁶⁴ The Montana State Land Board has a policy of not selling state lands at the present time, while exchanges are made to acquire land of equal or greater value, with high revenue generating potential and having good access and site productivity, while getting out of isolated parcels and federal special management areas.²⁶⁵

Figure 8. Timber Harvested from the largest state trust timberland owners, 1978-87.



Source: Souder, J.A. and S.K. Fairfax. *State Trust Lands Management Project: Western States Survey Responses*. Department of Forestry and Resource Management. University of California, Berkeley, CA. 143pp. 1990.

²⁶² *Western States Survey Responses*, supra, n. 40, at 49, 50.

²⁶³ *Id.*, at 48, 51, 55 and 59. As mandated by Article 9, § 8 of the Idaho Constitution.

²⁶⁴ During that period Idaho deeded 51,231.36 acres and acquired 45,145.40 in exchange. This acreage was not predominantly forest land. Most current and anticipated exchanges involve non-forested BLM land. Stephanie Balzarini, Office of the Attorney General, Idaho, pers. comm., March, 1991.

²⁶⁵ *Id.*, at 50, 58, and 59.

2. Institutional Structures for Forest Management

Three institutional structures for the management of state forested trust lands are found in the four states. In Oregon, the Department of Forestry manages all the county forest lands, and manages the forested state common school and institutional trust lands under contract with the Division of State Lands.²⁶⁶ The Oregon Board of Forestry is composed of seven public members, with the State Forester serving as secretary of the board. In contrast, the Oregon State Land Board is composed of three elected officials: the governor, secretary of state, and state treasurer. Even though about 20% of the lands managed by the Department of Forestry are entrusted to the Oregon State Land Board, it does not have representation on the Board of Forestry; however the State Land Board has sole authority over policy issues on state trust lands, even when the lands are managed by the Department of Forestry.²⁶⁷

The separation of management responsibilities is not found in the other three states. In Washington, the Department of Natural Resources manages both the county forest lands and the state school and institutional trust lands.²⁶⁸ A similar situation is found in Idaho and Montana. Although these states do not have county forest lands, the Department of State Lands in each of these states manages both the forested and non-forested trust lands.

Along with the management of trust forest resources, each of the four state agencies administrates other programs. All of the states have forest fire protection responsibilities.²⁶⁹ Forest practices are regulated in all four states by the same agency managing the trust forest lands. Extension forestry is also an administrative function of these offices. In addition, the states that manage the entire compliment of trust lands have grazing, commercial leasing and development, and sovereign lands programs within their jurisdiction.

3. Revenues Distribution and Management Funding Mechanisms

Revenue from timber sales goes either to the beneficiary or to the permanent fund after management expenses have been deducted. In Montana and Oregon net receipts from state trust land timber sales go into the permanent fund. Net receipts from all other timber sales—

²⁶⁶ Jones "State Forest Lands," in Lettman, ed. Assessment of Oregon's Forests. Oregon State Department of Forestry.(July, 1988), at 50.

²⁶⁷ William R. Cook, Assistant Attorney General, Oregon, pers. comm., _____, 1990.

²⁶⁸ Washington Department of Natural Resources. Proposed Forest Land Management Program 1984 - 1993. (November, 1983).at v. The Department of Natural Resources manages the University of Washington trust lands but cannot sell them without the Regent's permission. (RCW 79.01.184) Nick Handy, Chief Counsel, Washington Department of Natural Resources, pers. comm., March 6, 1991.

²⁶⁹ Western States Survey Responses at 5. Oregon reference in Levesque, supra, n. 254, at 75, ff.

from state trust lands in Idaho and Washington,²⁷⁰ and from county forest trust lands in Washington and Oregon²⁷¹—go directly to the beneficiary. The counties will not receive any revenues from the purchased county lands until the bonds are repaid.²⁷² Revenues from land sales and rights-of-way are also generated by county forest lands; these revenues are used to purchase replacement lands in Washington,²⁷³ but are distributed directly back to the county of origin in Oregon.²⁷⁴

The states' timber management expenses are funded by a number of different processes. The most common is that a percentage of revenues from renewable resource receipts is deducted prior to distribution. In Oregon, only renewable resource revenues are used to fund the operations of the Department of Forestry for both state trust and county forest lands. There is a difference in the split in revenue between county trust lands and state trust lands in Oregon. The Oregon Department of Forestry receives 36-1/4 percent of the revenues from the county forest lands, but recovers only administrative costs for forestry management on the common school lands.²⁷⁵ In the case of county forest lands, receipts from land sales and rights-of-way are used to purchase other lands, or returned to the county of origin.²⁷⁶

In Washington, timber management expenses may also be funded through a percentage of non-renewable resource receipts. The Washington Department of Natural Resources receives up to twenty-five percent of the revenues from both renewable and non-renewable resources, including land sales, for its operational cost accounts for the state school and institutional trust lands.²⁷⁷ In contrast, up to twenty-five percent of revenues from tax-reverted county forest lands, and up to fifty percent of revenues from those county forest lands obtained by gift or purchase by the board can be used for management expenses in Washington.²⁷⁸ Proceeds

270 Until 1966 net receipts from timber sales on state trust lands in Washington went into the permanent fund. Don Lee Fraser, former Supervisor, Washington DNR, pers. comm. March 13, 1991.

271 O. R. S. §530.110.

272 O. R. S. §530.210 et seq.

273 R. C. W. §76.12.

274 Levesque, *supra*, n. 354, at 751, ff.

275 Oregon Department of Forestry. 59 Forest Log 6 (August - September, 1989). Comparative percentages of sales are not discussed. Whether the cost recovery is on a sale-by-sale basis, by management area (75% of the forested state trust lands are in the Elliot State Forest in Clatsop County), or on a program-wide basis is not stated. Generally the deduction for management expenses has been 25%. Pam Wiley, Assistant Director, Oregon Department of Lands, pers. comm. _____

276 Levesque, *supra*, n. 254, at 751, ff.

277 WDNR, Proposed Forest Land Management Plan, *supra*, n 263, at 29.

278 *Id.*, at 28.

from sales of Washington county forest lands are used to buy replacement lands.²⁷⁹

In Idaho and Montana the majority of timber management expenses are funded directly from the state general fund, with small exceptions. Management cost recovery in Idaho includes a Forest Improvement Program to maximize the revenue production from state-owned forestlands by levying a ten percent fee on gross revenues from timber sales on these lands to fund the program.²⁸⁰ The remainder of the funds are deposited into the permanent fund; timber management operations of the Idaho Department of Lands are funded from direct legislative appropriation.²⁸¹ Montana has a resource development program funded by an amount not to exceed 2-1/2 percent of the income received from trust lands, although it is primarily used in range and agricultural development projects.²⁸² An additional eleven dollars per thousand board feet of timber sold is retained from receipts for brush control and another eleven dollars per thousand board feet is retained for timber stand improvement activities.²⁸³ The remainder of Montana's forestry management activities are funded through direct legislative appropriations of general funds.²⁸⁴

Trust Responsibilities

Four areas of forestry and land management on the state trust lands are significant in light of the specific trust responsibilities of the states towards the beneficiaries. These are: (1) maintenance of the trust land base; (2) management for the benefit of the trust; (3) management for long-term sustained yield of products from the lands; and (4) management for multiple-use on trust lands. Each of these areas will be discussed in light of trust responsibilities.

1. Maintenance of Trust Land Base

Perhaps the most elementary question of trust land management is whether the trust lands will

²⁷⁹ R. C. W. §76.12.

²⁸⁰ Idaho Forestry Opportunities 1980 - 1990, at 9.. I.C.A. §58-140 requires that funds derived from specific activities, such as timber, be used only to improve the productivity and revenue generation of that activity. For timber, allowable activities are timber management, protection, and reforestation.

²⁸¹ Idaho Department of Lands. Fourteenth Annual Report 1987 - 1988. (June 30, 1989), at 7.

²⁸² Office of the Legislative Auditor. Department of State Lands: Report on Examination of Financial Statements, Two Fiscal Years Ended June 30, 1983. Report 83-20. (1983), at 3-10. Program established in 1967 by the Legislature (M.C.A. §77-1-604). §§ 77-1-605 allows funds to be used to improve productivity of timberlands.

²⁸³ M.C.A. §77-5-100 et seq.

²⁸⁴ *Id.*, at 10. the "infusion of non-trust funds to support management and administration" adds weight to the argument that school lands are not quite a trust or a trust with a twist.... Generally, a trust would use its own assets to pay its expenses." Gail Lewellan and Andrew Tourville, Assistant Attorneys General, Minnesota, pers. communication, March 11, 1991, at 4. See also, Restatement, Trusts, Second, § 188.

be retained or sold. Early state policies throughout the west encouraged the sale of trust lands, both for their revenues and as an inducement to settlement.²⁸⁵ Present state policies in Washington, Oregon, Idaho, and Montana mandate the maintenance of the forest land base on the state school and institutional trust lands, while allowing for sales and exchanges to rationalize the pattern of ownership. In Washington, exchanges may be facilitated by a Land Bank, where the WDNR temporarily places proceeds from the sale of lands while waiting to purchase other lands identified as having potential benefits to the trusts.²⁸⁶ Isolated and fragments of sections of state trust lands that are not suitable for management in Oregon may be sold with the proceeds designated for purchase of replacement lands.²⁸⁷ The policy with respect to Oregon county forest trust lands is to replace them within the same county, otherwise return the proceeds from the original sale to the county of origin.²⁸⁸ In Idaho, "...all state-owned lands classified as chiefly valuable for forestry, reforestation, recreation, and watershed protection are hereby reserved from sale and set aside as state forests."²⁸⁹ Proceeds from land sales in Idaho go into the permanent fund; however, forest lands may be acquired by the Department, with the acquisition cost being repaid by timber sales revenues.²⁹⁰ Lands classified as timberlands in Montana are restricted from sale.²⁹¹ Land exchanges may be conducted with the approval of the county commissioners.²⁹²

2. Management for Benefit of Trust

Management for the benefit of the trust has three component parts. First, there is the granting of the lands by the federal government to the states, with the states acting as trustees for the beneficiaries. Second, there is a requirement that the states attain fair market value for those lands and resources sold. And third, there is the concept of maximizing revenues from the sale

²⁸⁵ See supra n. 23.

²⁸⁶ "The legislature finds that from time to time it may be desirable for the Department of Natural Resources to sell state lands which have low potential for natural resources management or low income-generating potential or which, because of geographic location, or other factors, are inefficient for the department to manage. However, it is also important to acquire lands for long-term management to replace those sold so that the publicly owned land base will not be depleted and the publicly owned forest land base will not be reduced." R.C.W. §79.66.010. The Land Bank is allowed to accumulate a maximum of 1,500 acres before transfer to a specific trust beneficiary. R.C.W. §79.66.020.

²⁸⁷ O. R. S. §273.413 (1) and (2). This applies to state trust land managed by the State Land Board only.

²⁸⁸ Levesque, supra, n. 250, at 580, ff.

²⁸⁹ I. C. A. §58.133.

²⁹⁰ I. C. A. §58.504. This is not an active program. the "Idaho Department of Lands does not sell its timber land, nor has it sought to purchase any in the past 20 years." Stephanie Balzarini, Assistant Attorney General, Idaho, pers comm., March, 1991.

²⁹¹ M. C. A. §77-2-203.

²⁹² M. C. A. §77-2-201.

and lease of the trust lands. The exact language in these documents varied depending upon when the state was admitted to the Union.²⁹³ Some states have also petitioned Congress to modify their Enabling Acts and have amended their Constitutions to change the trust language. Because of this, the concept of the states' trust role has evolved over the years.

The language in the Article X of the Montana Constitution of 1972 regarding state trust lands is explicit regarding the trust duties, and requiring the attainment of fair market value:

- (1) All lands of the state that have been ... granted by congress ... shall be public lands of the state. They shall be held in trust for the people ... for the respective purposes for which they have been or may be granted.
- (2) No such land ... shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state....²⁹⁴

The language in the Washington Constitution is practically identical.²⁹⁵

In contrast, Article 9, § 8 of the Idaho Constitution requires securing the maximum possible gain for the beneficiary, stating:

It shall be the duty of state board of land commissions to provide for the location, protection, sale or rental of all lands heretofore ... granted to the state by ... the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return ... provided that no state land shall be sold for less than appraised value.

These grants of lands by the federal government to Idaho were found in *Barber Lumber Co. v. Gifford*²⁹⁶ to constitute a trust fund with the board of land commissioners as the instrument to administer this trust. The principle that the board must act to secure the greatest measure of advantage to the beneficiary was also found to hold in *Barber*.

Managing to attain fair market value for those products sold from the trust lands is operationally different from managing those lands to produce the maximum revenues from the lands. The former requirement is reactive, i.e., if products such as timber are sold, they may not be sold for less than the fair market value. In contrast, revenue maximization may require managing lands in a specific manner before the resources are sold.²⁹⁷ In forestry, this type of management may cause impacts to local communities, and may result in revenue fluctuations due to fluctuations in the amounts of timber being harvested from state trust lands, or in the

²⁹³ See Souder and Fairfax, Working Draft No. 90-4, at 18 ff.

²⁹⁴ Montana Constitution, Article X, §11.

²⁹⁵ Washington Constitution, Article XVI, §1.

²⁹⁶ 25 Idaho 654, 139 P. 557 (1914).

²⁹⁷ Waggener, Some Economic Implications of Sustained Yield as a Forest Regulation Model. [Report No.

type of product being grown, or because of the environmental consequences of timber harvesting.

Recent modification of the Oregon state constitution noted above²⁹⁸ directs management of the forest resource under sound techniques of multiple use land management for the whole population of the state.²⁹⁹ This has led to some differentiation in the trusteeship terms between the lands granted to the state in their Enabling Acts and those lands which reverted to the counties through tax forfeiture. In the case of the federal grants, the trust responsibility is defined in the state's Constitution and perhaps in its Enabling Act. In contrast, Oregon's county forest land trust responsibility results from state legislation. However, once the county land is accepted by the state, general trust principles apply.

3. Long-term Sustained Yield

Both state and local communities are concerned with sustainability and fluctuations in log supplies from trust lands forestry.³⁰⁰ The sustained yield issue reflects concern for continuing revenues for the trust beneficiaries (and incidentally the state land office management accounts). The even flow of logs effects timber-dependent sawmills and local employment.³⁰¹

The Multiple Use Act of 1974 (R.C.W. §79.68) in Washington directs the Department to manage its lands capable of growing forest crops on a sustained yield basis which is defined as "management of the forest to provide harvesting on a continuing basis without prolonged curtailment or cessation of harvest, insofar as this is compatible with other statutory directives."³⁰² However, the implication is that this is only on a volume basis, without specifying grade, size, or species of timber.

6. Institute of Forest Products. College of Forest Resources. University of Washington.] (1969), at 8.

²⁹⁸ Oregon Constitution, Article VIII, §5(2). Amended by HJR No. 7, 1967 and adopted by the people May 28, 1968.

²⁹⁹ Oregon Revised Statutes (O.R.S.) §530.490. Both the Department of Forestry and the State Land Board manage their lands under this policy. However, the application of this principal to state trust lands has never been tested in court, thus its validity remains in doubt. These provisions do not apply to the county forest lands, which are managed solely for the benefit of the county where the land is located, subject to the police power provisions of the Oregon Forest Practices Act. William R. Cook, Assistant Attorney General, Oregon, pers.comm., _____, 1990.

³⁰⁰ *Ibid.* See also Washington Department of Natural Resources, "Timberlands Acquisition Plan: Commissioner of Public Lands Brian Boyle - DNR request legislation - SB 65536 and HB 2804." Press release, n.d.(1989 - 90) and "Free trade, the forests and the future: A position paper on log exports by Washington Commissioner of Public Lands Brian Boyle," Washington Department of Natural Resources.(September, 1989).

³⁰¹ *Id.*

³⁰² Washington Department of Natural Resources. Forest Land Management Program 1984 - 1993. Proposed. (November, 1983). Codified as R.C.W. §79.68.030 and §79.68.040.

In *Jerke v. Department of State Lands*,³⁰³ the Montana Supreme Court upheld state legislation which provides that "full market value shall encompass the concept of sustained yield." Sustained yield, it is believed in Montana, plays an important role in educational finance, resource stability and in the state's economy.³⁰⁴ Accepting less than maximum income is allowed in the management of the state lands if the action will maintain the long-term productivity of the land and guarantee income to the beneficiaries in the long run.³⁰⁵

Sustained yield is not legislated in the Idaho statutes or constitution. The constitution states that the endowment trust lands will be managed "... in such a manner as will secure the maximum long term financial return to the institution to which granted."³⁰⁶ A state forest management plan for one of Idaho's seven regions does mention sustained yield, however, when discussing achievement of harvest potential.³⁰⁷

Both Oregon's county forest land and state trust land forests are managed on a sustained yield basis according to Department policy, although without direct statutory provision.³⁰⁸ Beyond this, the timber harvest is constrained to prevent significant declines in future harvest levels when determining the maximum sustained yield from the trust forests.³⁰⁹

4. Management for Multiple Use

Management for multiple uses on state trust lands varies from the common conception of multiple use as it's applied to federal lands. In the states' case, multiple uses must either contribute to the overall generation of revenues for the trust, must be revenue neutral, or must be funded by other sources. Comparing the states' language with the federal government's multiple use language provides an interesting contrast since the concepts are frequently

³⁰³ Western States Survey Responses, supra, n. 40 at 81. *Jerke v. Department of State Lands* 597 P.2d 49 (1979).

³⁰⁴ Jackson, Economic returns and the management of Montana's forest resources. [Prepared at the request of the Joint Interim Subcommittee No. 2 of the Montana Legislature] (December, 1983).

³⁰⁵ Montana Department of State Lands. Forest Management Standards and Guidelines. [Forestry Division] (March, 1988) at 1-3.

³⁰⁶ Article IX, §8 of the Idaho Constitution, cited in Idaho Forestry Opportunities, 1980 - 1990. Note however that the version of the Idaho constitution included with the annotated code does not have the phrase "long term" included in § 8.

³⁰⁷ *Id.*, at 10. See also Gruenhagen, Seymour, and Parker, Pavette Lakes Area Forest Inventory Report, 1987 Remeasurement. [Idaho Department of Lands] (May 1989).

³⁰⁸ See for example Long Range Timber Management Plan, Southern Oregon Region State Forests. Report 3-0-2-220. [Oregon State Forestry Department]. (August, 1987) at 10.

³⁰⁹ *Id.*, at 10, 11.

confused. The federal Multiple Use Sustained Yield Act of 1940, the basis for all subsequent multiple use management in federal legislation and regulations, defines multiple use as:

"... the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people ... and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."³¹⁰

Contrast this definition with the mandate of the Washington Multiple Use Act:

"The legislature hereby directs that a multiple use concept be utilized by the department of natural resources in the management and administration of state-owned lands under its jurisdiction of the department where such a concept is in the best interests of the state and the general welfare of the citizens thereof, and is consistent with the applicable trust provisions of the various lands involved."³¹¹

Multiple use in Washington is based much more on revenue production than is the comparable federal legislation, being defined as:

"The management and administration of state-owned lands under jurisdiction of the department of natural resources to provide for several uses simultaneously on a single tract and/or planned rotation of one or more uses on and between specific portions of the total ownership consistent with the provisions of RCW 79.68.010."³¹²

Similar language is found in the Oregon statutes, where fish and wildlife environment, landscape expanse, protection against flood and erosion, recreation, and production and protection of water supplies are allowed, again as long as these uses are not detrimental to the trust purposes.³¹³

How then are these concepts applied in practice? Washington trust lands are open for hunting and fishing use unless posted with the approval of the department.³¹⁴ Another eleven uses are also identified as being compatible with the obligations of the department to fulfill its trusteeship obligations; uses, including those listed, must be conducted without financial impact unless compensation is provided.³¹⁵ In Oregon public access to state trust lands is assured; and there is also a requirement in statutes to give consideration to multiple values in the sale, exchange, and leasing of state trust lands.³¹⁶ However lands cannot be dedicated to

³¹⁰ 74 Stat 215; 16 U.S.C. 528-531. Emphasis added.

³¹¹ R. C. W. §79.68.010. Emphasis added.

³¹² R. C. W. §79.68.020.

³¹³ O. R. S. §530.500

³¹⁴ R. C. W. §79.01.244.

³¹⁵ R. C. W. §79.68.050.

³¹⁶ O. R. S. §273.051(2)(b). These requirements do not carry over to county forest lands.

uses which preclude income generation.³¹⁷ Multiple use management is allowed in Montana,³¹⁸ which includes grizzly bear habitat in its multiple use management.³¹⁹

Idaho, of the four states, is the only one without a multiple use statute.³²⁰ It has, however, reserved from sale "all state-owned lands chiefly valuable for forestry, reforestation, recreation, and watershed protection..." as state forests.³²¹ Within the Department of Lands' policies, the objectives for state forested lands "... shall be ... to improve timber productive capacity and assure maximum long-term financial returns to the endowment trusts without permanently diminishing other uses such as watershed, forage, recreation, wildlife habitat and enjoyment of the aesthetic quality."³²²

The trust responsibility with respect to the forest lands is bi-directional: non-revenue producing uses are not allowed if they are deleterious to revenue producing uses. On the other hand, as seen in the Idaho policies cited above, and similarly interpreted in the other three states, revenue production is not allowed to generate negative externalities for other uses, including amenity values. This illustrates the longer term the relationship between revenues and protection of the trust corpus, i.e. that one component will not be carried out to the detriment of the other component of the trust responsibility.

V. CONCLUSIONS

Revenue production for the beneficiaries is, we have taken some trouble to emphasize, just one aspect of granted land and permanent fund management. Beneficiaries are likely to look with increasing interest at these resources in times of budget crises and fiscal constraint. There is ample justification for this. Trust principles have, in the last half century, emerged as a

³¹⁷ Western States Survey Responses, supra, n. 40, at 63, regarding differentiation between state trust and county forest lands.

³¹⁸ M. C. A. §77-1-203. Recommendations for enhanced multiple-use management are found in Performance Audit: State-owned and Leased Land. Report 82P-17. State of Montana, Office of the Legislative Auditor.(June, 1983).

³¹⁹ Montana Department of State Lands. Interim Grizzly Bear management Standards and Guidelines. Forestry Division. (December, 1988).

³²⁰ Western States Survey Responses, supra, n. 40 at 63. op cit.

³²¹ I. C. A. §58-133.

³²² Idaho Department of Lands Operation Manual O.M. 901. Cited in Gruenhagen, D.J., P. Seymour, and J. Parker, supra, n. 302, at 46. The Operation Manual provides internal operational policies for staff direction. The Idaho Forest Practices Act (I.C.A., Title 38, Ch. 13), applicable to state as well as private land, states that its policy is to maintain and enhance trees, soil, air, water, wildlife and aquatic habitat by regulating forest practices. Stefanie Balzarini, Deputy Attorney General, State of Idaho, personal communication, March, 1991.

dominant theme in trust land case law, and beneficiaries have been increasingly active and successful in pressing their claims in state courts. However it is clear that the current emphasis on maximum economic returns is not an accurate or viable interpretation, of either trust principles or of the trust documents. We have found the trust documents, not in a federal-state compact, but in state decisions and state commitments. That, and a proper emphasis on the trustee's duty to protect the trust property, have led us to argue that there is more flexibility in trust land management mandate than might first appear. And, we have found a considerable degree of flexibility on the ground, in the management of trust timber resources in four states.

This discussion leads to a number of conclusions relating to the relationship between the trust lands and resources and the beneficiaries. Moreover, it suggests that the time may be ripe to exhume the state trust lands from their obscure place in history and their invisible place in contemporary public resource management and consider what they have to teach us.

The principal conclusion is that in making management decisions, the state land office must think clearly about who is the beneficiary of their particular trust, and of their actions. There is enormous variation in the definition of beneficiaries in state documents which gives the state considerable room for defining a variety of management regimes and priorities.

Second, lest those of the environmentalist persuasion be put off by the duty to make the trust productive, it is important to note that management for revenue generation within the trust principle typically leads—and is required to lead—to conservative decisions, especially in regard to long-term rather than short-term management because of the requirement to protect the corpus of the trust. Further, revenue generation does not require and has not led exclusively to profit maximizing behavior on the part of the state trustees. Social benefits are allowed to be incorporated in management decisions as long as they can be shown to meet beneficiary needs.

Environmentalists may be concerned that amenity dominated management of lands "better suited for preservation" is precluded by the trust notion. But, even here there is room for balance. The is the same situation that leads states to maneuver their trust holdings from marginal to highly productive lands, as long as the costs of these transactions is less than the increased revenues in the long term. The trust concept gives states a basis for repositioning their holdings. Moreover, the state trust land manager's vision of a portfolio as opposed to specific acres suggests a meaningful option. They do not hold onto those lands, especially at the cost of alternative management expenditures for higher producing lands. The trust concept suggests that they should not hold lands that are not producing benefits for the beneficiaries. It leads to a conclusion that the appropriate disposition of those lands that are not producing

benefits, economic or otherwise, is to sell or exchange them with other state, federal or private land managers.

Similarly, the trust notion mandates that costs of management decisions are fully accounted for. Benefits of management actions are not apportioned or shifted to other users that don't pay for them. This prevents the creation of, for example, below-cost timber sales where recreational benefits are included. This means that there is a basis for arguing against the cross subsidization of outputs that plagues multiple use management on federal lands.

The trust resources, their peculiar and instructive mandate, ought to be studied and appreciated, for their rich and wonderful history, the benefits their diverse management produces, and the lessons that comparative analysis can teach us about public resources and resource management.

SEPTEMBER 23, 1994

ADDENDUM TO

**“Original Mental Health Land To Be Designated
As Mental Health Trust Land, April 28, 1994”**

REVISIONS TO
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND
FEE ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
CRM-0022	C028S053E13	HANS	36.860	SKGB4	Add
CRM-0023	C028S053E14	HANS	17.100	SKGB4	Add
CRM-0028	C028S053E14	HANS	0.290	SKGB4	Add
CRM-0029	C028S053E14	HANS	11.350	SKGB4	Add
CRM-0036	C028S053E24	HANS	28.360	SKGB4	Add
CRM-0197-02	C028S055E28	HANS	20.000	SKGB3	Add
CRM-0198-02	C028S055E28	HANS	20.000	SKGB3	Add
CRM-0199-02	C028S055E28	HANS	20.000	SKGB3	Add
CRM-0206-02	C028S055E28	HANS	25.000	SKGB3	Add
CRM-0259	C028S056E30	HANS	12.080	SKGB3	Add
CRM-0377	C029S057E10	HANS	3.330	SKGB3	Add
CRM-0393-02	C029S057E15	HANS	40.000	SKGB3	Add
CRM-0571	C030S058E14	HANS	17.380	SKGB2	Add
CRM-0572	C030S058E14	HANS	19.340	SKGB2	Add
CRM-0605-B	C030S059E27	HANS	40.000	SKGA2	Add
CRM-0704	C031S059E13	HANS	11.370	SKGA2	Add
CRM-0723-01	C031S059E24	HANS	7.500	SKGA2	Add
CRM-0923	C039S064E25	JNO	386.200	JUNB3	Add
CRM-1138-03	C040S065E07	JNO	16.124	JUNB3	Add
CRM-1227	C040S066E33	JNO	1.050	JUNB2	Add
CRM-1229	C040S066E33	JNO	1.250	JUNB2	Add
CRM-1246	C040S066E33	JNO	1.250	JUNB2	Add
CRM-1247	C040S066E33	JNO	1.300	JUNB2	Add
CRM-2086	C058S079E35	PTBG	2.150	PETD3	Add
CRM-2617-01	C074S089E12	KTN	157.000	KETB6	Add
CRM-2950	C074S090E29	KTN	20.550	KETB6	Add
CRM-3129-02A	C075S090E08	KTN	140.000	KETB6	Add
CRM-3157-02A	C075S091E19	KTN	138.000	KETB5	Add
CRM-3158-01	C075S091E28	KTN	473.340	KETB5	Add
CRM-3171	C075S091E35	KTN	3.670	KETB5	Add
CRM-3392-01	C076S091E11	KTN	1.310	KETB5	Add
CRM-3392-02	C076S091E11	KTN	3.390	KETB5	Add
FM-0138-01	F003N008E29	CHNA	3.500	CIRA5	Add
FM-0138-02	F003N008E29	CHNA	4.460	CIRA5	Add
FM-0160-01	F003N008E30	CHNA	132.600	CIRA5	Add
FM-0160-03	F003N008E30	CHNA	0.360	CIRA5	Add
FM-0202-01	F003N008E31	CHNA	34.750	CIRA5	Add
FM-0221-01	F003N008E31	CHNA	2.500	CIRA5	Add
FM-0221-03	F003N008E31	CHNA	56.700	CIRA5	Add
FM-0221-04	F003N008E31	CHNA	0.450	CIRA5	Add
FM-0231-Z01	F003N008E21	CHNA	16.800	CIRA5	Add
FM-0231-Z02	F003N008E22	CHNA	15.000	CIRA5	Add
FM-0231-Z04	F003N008E26	CHNA	10.330	CIRA5	Add
FM-0389-02	F001N002W35	FBKS	0.010	FAID2	Add
FM-0429-02	F001N003W17	FBKS	7.000	FAID3	Add
FM-0429-03	F001N003W17	FBKS	2.000	FAID3	Add
FM-0439-01	F001N003W36	FBKS	112.545	FAID3	Add
FM-0691-G01	F005S004E16	SLCA	14.000	XBDB6	Add
FM-0691-G03	F005S004E21	SLCA	95.000	XBDB6	Add

REVISIONS TO
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND
FEE ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
FM-0706-01	F005S004E35	SLCA	238.000	XBDB6	Add
FM-0718-01	F005S004E35	SLCA	1.340	XBDB6	Add
FM-0719-01	F005S004E35	SLCA	0.150	XBDB6	Add
FM-0749-A	F006S004E04	SLCA	200.000	XBDB6	Add
FM-0824-02	F007S006E18	SLCA	9.960	XBDB6	Add
FM-0952-A01	F001S003W29	FBKS	566.750	FAID3	Add
FM-1008-02	F001S003W32	FBKS	7.800	FAID3	Add
FM-1080	F004S007W18	NENA	9.550	FAIC5	Add
FM-1175-01	F004S008W02	NENA	33.000	FAIC5	Add
FM-1175-02	F004S008W02	NENA	119.230	FAIC5	Add
FM-1179	F004S008W02	NENA	17.910	FAIC5	Add
FM-1204	F004S008W05	NENA	40.380	FAIC5	Add
FM-1415-01	F004S008W32	NENA	19.100	FAIC5	Add
FM-1553-02	F011S024W22	LMIN	24.000	MMKD5	Add
FM-1605	F011S024W26	LMIN	3.000	MMKD5	Add
FM-1663-02	F012S006W03	HLV	7.200	HEAD4	Add
FM-5003	F003N008E29	CHNA	2.400	CIRA5	Add
SM-0018	S016N002E07	MOA	315.480	ANCB6	Add
SM-0243-02	S020N006E13	MTSU	14.650	ANCD4	Add
SM-0315-01	S006S014W02	HOMR	5.000	SELC5	Add
SM-0342	S007S013W01	HOMR	0.220	SELC4	Add
SM-0476	S003N011W30	KSOL	19.950	KENB4	Add
SM-0484	S003N012W33	KSOL	27.080	KENB4	Add
SM-0494-A	S005N008W01	KSOL	10.000	KENC2	Add
SM-0699	S005N009W12	KSOL	2.470	KENC3	Add
SM-0700	S005N009W12	KSOL	2.700	KENC3	Add
SM-0702	S005N009W12	KSOL	3.550	KENC3	Add
SM-1420	S008N011W32	KSOL	80.000	KENC4	Add
SM-2004	S017N004W13	MTSU	5.000	ANCC8	Add
SM-2007	S017N004W13	MTSU	1.010	ANCC8	Add
SM-2503	S026N004W06	TALK	16.360	TALB1	Add
SM-5007	S016N003W03	MTSU	9.760	ANCC8	Add
SM-5012	S008S013W20	HOMR	4.610	SELB5	Add
SM-5013	S016N002E01	MOA	229.710	ANCC6	Add
SM-5014	S016N002E06	MOA	10.000	ANCC6	Add
SM-5016	S026N004W06	TALK	1.938	TALB1	Add
SM-5025	S008S013W21	HOMR	1.230	SELB4	Add
Total Parcels	86	Total Acres	4245.047		

Add means this parcel is to be added to the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Fee Estate', list dated April 28, 1994.

REVISIONS TO
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND
FEE ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
CRM-0505	C030S057E04	HANS	57.290	SKGB3	Delete
CRM-1038	C040S059E06	GTVS	22.950	JUNB6	Delete
CRM-1594	C055S063E34	STKA	0.180	SITA5	Delete
CRM-2617	C074S089E12	KTN	200.370	KETB6	Delete
CRM-3129-02	C075S090E08	KTN	1500.880	KETB6	Delete
CRM-3157-02	C075S091E19	KTN	152.000	KETB5	Delete
CRM-3166	C075S091E35	KTN	3.580	KETB5	Delete
CRM-3392-03	C076S091E11	KTN	0.300	KETB5	Delete
CRM-5029	C040S064S01	JNO	101.540	JUNB3	Delete
FM-0138	F003N008E29	CHNA	7.000	CIRA5	Delete
FM-0160	F003N008E30	CHNA	132.960	CIRA5	Delete
FM-0202	F003N008E31	CHNA	34.750	CIRA5	Delete
FM-0221	F003N008E31	CHNA	57.150	CIRA5	Delete
FM-0429	F001N003W17	FBKS	10.000	FAID3	Delete
FM-0439	F001N003W36	FBKS	112.550	FAID3	Delete
FM-0540	F001S004E11	CHNA	6.500	XBDD6	Delete
FM-0690-B	F005S004E17	SLCA	2.210	XBDB6	Delete
FM-0691-G	F005S004E16	SLCA	127.000	XBDB6	Delete
FM-0706	F005S004E35	SLCA	238.500	XBDB6	Delete
FM-0718	F005S004E35	SLCA	1.490	XBDB6	Delete
FM-0719	F005S004E35	SLCA	1.500	XBDB6	Delete
FM-0788	F007S005E12	SLCA	6.250	XBDB6	Delete
FM-0824	F007S006E18	SLCA	9.960	XBDB6	Delete
FM-0952-A	F001S003W29	FBKS	567.760	FAID3	Delete
FM-1175	F004S008W02	NENA	119.230	FAIC5	Delete
FM-1176	F004S008W02	NENA	3.330	FAIC5	Delete
FM-1415	F004S008W32	NENA	8.750	FAIC5	Delete
FM-1560	F011S024W33	LMIN	5.000	MMKD5	Delete
SM-0475	S003N011W30	KSOL	27.280	KENB4	Delete
SM-2191	S017N004W24	MTCU	5.000	ANCC8	Delete
Total Parcels	30	Total Acres	3523.260		

Delete means this parcel is to be deleted from the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Fee Estate', list dated April 28, 1994.

REVISIONS TO
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND
MINERAL ESTATE - HYDROCARBON ONLY

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
SM-0997-B	S006N011W29	KSOL	120.000	KENC3	Add
SM-1624	S014N004W04	MTSU	0.450	ANCB8	Add
SM-1625	S014N004W04	MTSU	1.270	ANCB8	Add
SM-1626	S014N004W04	MTSU	2.910	ANCB8	Add
SM-1627	S014N004W04	MTSU	3.510	ANCB8	Add
SM-1628	S014N004W04	MTSU	4.890	ANCB8	Add
SM-1831	S015N004W20	MTSU	3.326	TYOB1	Add
SM-1845	S015N004W19	MTSU	475.800	TYOB1	Add
SM-1848	S015N004W30	MTSU	598.870	TYOB1	Add
SM-1860	S015N005W24	MTSU	297.040	TYOB1	Add
Total Parcels	10	Total Acres	1508.066		

Add means this parcel is to be added to the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Fee Estate, Mineral Estate - Hydrocarbon Only', list dated April 28, 1994.

REVISIONS TO
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND
MINERAL ESTATE - HYDROCARBON ONLY

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
SM-0494-A	S005N008W01	KSOL	10.000	KENC2	Delete
SM-0699	S005N009W12	KSOL	2.470	KENC3	Delete
SM-0700	S005N009W12	KSOL	2.700	KENC3	Delete
SM-0702	S005N009W12	KSOL	3.550	KENC3	Delete
SM-1420	S008N011W32	KSOL	80.000	KENC4	Delete
SM-2004	S017N004W13	MTSU	5.000	ANCC8	Delete
SM-2007	S017N004W13	MTSU	1.010	ANCC8	Delete
Total Parcels	7	Total Acres	104.730		

Delete means this parcel is to be deleted from the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Fee Estate, Mineral Estate - Hydrocarbon Only', list dated April 28, 1994.

REVISIONS TO
ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND
MINERAL ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
SM-0279-A	S020N006E30	MTSU	24.000	ANCD4	Delete
SM-0280-A	S020N006E30	MTSU	32.500	ANCD4	Delete
Total Parcels	2	Total Acres	56.500		

Delete means this parcel is to be deleted from the 'Original Mental Health Land To Be Designated as Mental Health Trust Land Mineral Estate' list dated April 28, 1994.

ORIGINAL MENTAL HEALTH LAND TO BE DESIGNATED AS MENTAL HEALTH TRUST LAND
Coal, Oil and Gas ONLY

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
SM-5500	S007N011W06	KSOL	40.000	KENC4	Add
SM-5501	S007N011W06	KSOL	39.180	KENC4	Add
SM-5502	S007N011W07	KSOL	29.610	KENC4	Add
SM-5503	S007N011W07	KSOL	37.930	KENC4	Add
SM-5504	S007N011W14	KSOL	20.750	KENC4	Add
SM-5505	S007N011W14	KSOL	37.180	KENC4	Add
SM-5506	S007N011W14	KSOL	14.980	KENC4	Add
SM-5507	S007N011W14	KSOL	80.000	KENC4	Add
SM-5508	S007N011W21	KSOL	25.170	KENC4	Add
SM-5509	S007N011W21	KSOL	80.000	KENC4	Add
SM-5510	S007N011W22	KSOL	37.610	KENC4	Add
SM-5511	S007N011W22	KSOL	27.930	KENC4	Add
SM-5512	S007N011W27	KSOL	39.870	KENC4	Add
SM-5513	S007N011W27	KSOL	40.000	KENC4	Add
SM-5514	S007N011W28	KSOL	80.000	KENC4	Add
SM-5515	S007N011W28	KSOL	26.650	KENC4	Add
SM-5516	S007N011W28	KSOL	30.560	KENC4	Add
Total Parcels	17	Total Acres	687.420		

Add means this parcel is to be added to the 'Original Mental Health Land To Be Designated as Mental Health Trust Land, Coal, Oil and Gas Only' list dated April 28, 1994.

SEPTEMBER 23, 1994

ADDENDUM TO

**“Other State Land To Be Designated as Mental
Health Trust Land, April 28, 1994”**

REVISIONS TO
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND
MINERAL ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
F82863-R	F001S010E	Salcha	184320.00	XBD	Add
F82863-R	F001S011E	Salcha	0.000	XBD	Add
F82863-R	F001S012E	Salcha	0.000	XBD	Add
F82863-R	F001S013E	Salcha	0.000	XBD	Add
F82863-R	F001S014E	Salcha	0.000	XBD	Add
F82863-R	F002S010E	Salcha	0.000	XBD	Add
F82863-R	F002S011E	Salcha	0.000	XBD	Add
F82863-R	F002S012E	Salcha	0.000	XBD	Add
Total Acres			184320.000		

The Salcha Mineral Estate Tract (F82863-R) is subject to existing federal mining claims, as follows:

Federal Mining Claims

F001S010E	12
F001S011E	136
F001S012E	0
F001S013E	0
F001S014E	0
F002S010E	84
F002S011E	43
F002S012E	0

Add means this parcel is to be added to the 'Other State Land To Be Designated As Mental Health Trust Land Fee Estate' list, April 28, 1994.

REVISIONS TO
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND
MINERAL ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
F82863	F001S004E	Salcha	116745.30	XBD	Delete
F82863	F001S005E	Salcha	0.000	XBD	Delete
F82863	F001S006E	Salcha	0.000	XBD	Delete
F82863	F002S004E	Salcha	0.000	XBD	Delete
F82863	F002S005E	Salcha	0.000	XBD	Delete
F82863	F002S006E	Salcha	0.000	XBD	Delete
F82863	F002S007E	Salcha	0.000	XBD	Delete
Total Acres			116745.300		

Delete means this parcel is to be deleted from the 'Other State Land To Be Designated As Mental Health Trust Land Mineral Estate' list, dated April 28, 1994.

REVISIONS TO
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND
MINERAL ESTATE - HYDROCARBON ONLY

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
S50219	S006N011W29	Kena	160.000	KENC4	Add
Total Parcels	1	Total Acres	160.000		

Add means this parcel is to be added to the 'Other State Land To Be Designated As Mental Health Trust Land Fee Estate, Mineral Estate - Hydrocarbon Only' list, dated April 28, 1994.

REVISIONS TO
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND

FEE ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
C20571	C055S063E17	STKA	2.318	SITA5	Add
C20797	C067S081E36	KTN	1.290	PETA3	Add
C20798	C067S081E36	KTN	1.380	PETA3	Add
C20799	C067S081E36	KTN	1.530	PETA3	Add
C20800	C067S081E36	KTN	1.110	PETA3	Add
C20817	C068S076E23	KTN	14.000	CRGD5	Add
C70925	C073S084E34	KTN	13.000	CRGB2	Add
Total Parcels 7		Total Acres		34.628	

Add means this parcel is to be added to the 'Other State Land To Be Designated As Mental Health Trust Land Fee Estate' list, dated April 28, 1994.

REVISIONS TO
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND

FEE ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
F20284	F002N001E16	FBKS	240.000	LIVA2	Delete
F20285	F002N001E16	FBKS	80.000	FAID2	Delete
F20312	F002N001W36	FBKS	320.000	FAID2	Delete
F20444	F003N001W36	FBKS	80.000	LIVA2	Delete
F20445	F003N001W36	FBKS	4.636	LIVA2	Delete
F20446	F003N001W36	FBKS	5.146	LIVA2	Delete
F20447	F003N001W36	FBKS	4.686	LIVA2	Delete
F20448	F003N001W36	FBKS	4.636	LIVA2	Delete
F20449	F003N001W36	FBKS	4.636	LIVA2	Delete
F20450	F003N001W36	FBKS	3.774	LIVA2	Delete
F20451	F003N001W36	FBKS	13.865	LIVA2	Delete
F20452	F003N001W36	FBKS	6.795	LIVA2	Delete
F20453	F003N001W36	FBKS	5.305	LIVA2	Delete
F20454	F003N001W36	FBKS	5.000	LIVA2	Delete
F20455	F003N001W36	FBKS	5.000	LIVA2	Delete
F20456	F003N001W36	FBKS	5.027	LIVA2	Delete
F20457	F003N001W36	FBKS	4.128	LIVA2	Delete
F20458	F003N001W36	FBKS	4.578	LIVA2	Delete
F20459	F003N001W36	FBKS	5.252	LIVA2	Delete
F20460	F003N001W36	FBKS	5.033	LIVA2	Delete
F20461	F003N001W36	FBKS	5.125	LIVA2	Delete
F20530.001	F007S006E16	SLCA	19.460	XBDB6	Delete
F20530.002	F007S006E16	SLCA	3.200	XBDB6	Delete
F20530.003	F007S006E16	SLCA	400.000	XBDB6	Delete
F20692	F011S007W16	HLY	640.000	HEAD4	Delete
F20698	F012S007W16	HLY	640.000	HEAD4	Delete
S20012	S001N001W36	SWRD	120.000	SEWA7	Delete
S20077	S003S015W36	HOMR	120.000	SELD5	Delete
S20535	S017N002W16	MISU	40.000	ANCC8	Delete
S20537	S017N002W36	MTSU	0.710	ANCC7	Delete
S20538	S017N002W36	MTSU	0.707	ANCC7	Delete
S20539	S017N002W36	MTSU	0.793	ANCC7	Delete
S20540	S017N002W36	MTSU	0.850	ANCC7	Delete
S20541	S017N002W36	MTSU	0.772	ANCC7	Delete
S20542	S017N002W36	MTSU	0.913	ANCC7	Delete
S20543	S017N002W36	MTSU	1.007	ANCC7	Delete
S20544	S017N002W36	MTSU	0.625	ANCC7	Delete
S20545	S017N002W36	MTSU	0.611	ANCC7	Delete
S20546	S017N002W36	MTSU	0.785	ANCC7	Delete

REVISIONS TO
OTHER STATE LAND TO BE DESIGNATED AS MENTAL HEALTH LAND

FEE ESTATE

PARCEL	MTRS	COMMUNITY	ACRES	QUAD	ACTION
S20547	S017N002W36	MTSU	0.845	ANCC7	Delete
S20548	S017N002W36	MTSU	0.973	ANCC7	Delete
S20567	S018N001W36	MTSU	320.000	ANCC7	Delete
S20569	S019N002E36	MTSU	15.000	ANCC6	Delete
F70015	F003N001E36	FBKS	640.000	LIVAl	Delete
F70015	Tract A, ASC 930010, and Tracts C-1 and C-4 ASC 930008	FBKS	5137.280	LIVAl FAID1	Delete

Total Parcels 45

Total Acres 8917.153

Delete means this parcel is to be deleted from the 'Other State Land To Be Designated As Mental Health Trust Land Fee Estate' list, dated April 28, 1994.


MEMORANDUM**Department of Natural Resources****State of Alaska
Office of the Commissioner**

TO: All Legislators

DATE: September 21, 1994

FILE NO:

TELEPHONE NO: 762-2483

FROM:  Harry A. Nash
CommissionerSUBJECT: Special Session
Draft Legislation

Attached are final draft copies of the two bills to be considered during the upcoming special session intended to assure resolution of the mental health lands litigation. Although the concepts in the final drafts have been discussed with you previously, we wanted to provide you this opportunity to consider the specific language prior to the Governors' transmittal of the final bill.

Please call either myself or Jerry Gallagher at 762-2483 on Thursday if you have any questions or comments.

_____ BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SPECIAL SESSION

BY THE _____ RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act making and amending appropriations relating to the mental health trust
2 fund and the mental health trust income account; and providing for an effective
3 date."

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

5 * Section 1. Section 1(a), ch. 6, FSSLA 1994, is amended to read:

6 (a) The sum of \$200,000,000 is appropriated to the mental health trust fund
7 (AS 37.14.031), added by sec. 11, ch. 66, SLA 1991, from the following sources, in
8 the amounts listed, to capitalize the mental health trust fund:

9	SOURCE	APPROPRIATION
10	<u>(1)</u> Mental health trust income account (AS 37.14.011) [BALANCE ON JUNE 30, 1995]	\$33,000,000
13	<u>(2)</u> Department of Natural Resources - mental health trust income in the	11,700,000

1 general fund

2 (3) Proceeds from sale of Department of 25,000,000

3 Natural Resources land sale

4 contract portfolio

5 (4) Budget reserve fund (art. IX, sec. 17(c), 130,300,000

6 Constitution of the State of Alaska)

7 * Sec. 2. Section 1(b), ch 6, FSSLA 1994 is amended to read:

8 (b) The appropriations made by (a), (f), and (g) of this section are contingent
9 upon

10 (1) the enactment into law of a bill passed by the Eighteenth Alaska
11 State Legislature that amends ch. 66, SLA 1991, and contains other provisions relating
12 to the mental health land trust and mental health land trust litigation (Weiss v. State,
13 4FA-82-2208 Civil); and

14 (2) not later than December 15, 1994,

15 (A) the superior court of the State of Alaska having made a
16 final determination that the state has satisfied its obligation to reconstitute the
17 mental health trust under State v. Weiss, 706 P.2d 681 (Alaska 1985); and

18 (B) the superior court having entered an [A FINAL] order
19 dismissing Weiss v. State, 4FA-82-2208 Civil; AND

20 (C) THE TIME FOR APPEALS OF THAT DETERMINATION
21 AND THAT ORDER HAVING EXPIRED WITH NO APPEALS HAVING
22 BEEN TAKEN AS OF THAT DATE OR ANY APPEALS TAKEN HAVING
23 BEEN FINALLY RESOLVED AND THE ORDER DISMISSING WEISS V.
24 STATE, 4FA-82-2208 CIVIL, HAVING BEEN AFFIRMED ON APPEAL.]

25 * Sec. 3. Section 1(e), ch. 6, FSSLA 1994 is amended to read:

26 (e) The appropriations made by (a), (f), and (g) of this section are for the
27 capitalization of funds and do not lapse.

28 * Sec. 4. Section 1, ch. 6, FSSLA 1994 is amended by adding new subsections to read:

29 (f) If the money available for appropriation from a funding source identified
30 in (a)(1), (3), or (4) of this section is less than the amount appropriated by any of those
31 paragraphs, then the amount necessary to cover the shortfall is appropriated from the

1 unappropriated balance of mental health trust income deposited in the general fund.

2 (g) If the money available for appropriation from a funding source identified
3 in (a)(2), (a)(3), (a)(4), or (f) of this section is less than the amount necessary to
4 entirely fund any of the appropriations made by (a)(2), (a)(3), (a)(4), or (f) of this
5 section, then an amount equal to the shortfall, remaining after the appropriation under
6 (f) of this section is made, is appropriated from the unappropriated money in the
7 mental health trust income account (AS 37.14.011).

8 * **Sec. 5.** If the amount in the mental health trust income account (AS 37.14.011) is
9 insufficient to fund appropriations from that account passed by the Eighteenth Alaska
10 Legislature or a previous legislature, and enacted into law, the amount necessary to fund those
11 appropriations is appropriated from the general fund to the mental health trust income account
12 (AS 37.14.011).

13 * **Sec. 6.** (a) On the date that AS 37.14.011(a) is repealed, the balance of the mental
14 health trust income account (AS 37.14.011) is transferred to the general fund.

15 (b) The unexpended, unobligated, and unencumbered balances of appropriations from
16 the mental health trust income account (AS 37.14.011) that lapse after the repeal of
17 AS 37.14.011(a) lapse into the general fund.

18 * **Sec. 7.** Expenditures, made in accordance with law, from the mental health trust income
19 account (AS 37.14.011) on or after June 24, 1994, and before the effective date of this section,
20 are ratified.

21 * **Sec. 8.** (a) The sum of \$200,000,000 and an amount equivalent to the amount deposited
22 in the mental health trust fund (AS 37.14.031) that is attributable to inflation proofing
23 \$200,000,000 of the principal of that fund, determined as of the date of the repeal of AS
24 37.14.031, is appropriated from that fund to the general fund.

25 (b) The unexpended and unobligated balance remaining in the mental health trust fund
26 (AS 37.14.031) after the appropriation made by (a) of this section is appropriated to the
27 mental health trust income and proceeds account (AS 37.14.013).

28 * **Sec. 9.** The unexpended and unobligated balance in the mental health trust settlement
29 income account (AS 37.14.036) on the date of the repeal of AS 37.14.036 is appropriated to
30 the mental health trust income and proceeds account (AS 37.14.013).

31 * **Sec. 10.** Sections 8 and 9 of this Act take effect only if a dismissal of *Weiss v. State*,

1 4FA-82-2208 Civil, by the superior court is reversed on appeal, including a petition for
2 certiorari to the United States Supreme Court.

3 * **Sec. 11.** Section (1)(c), ch. 6, FSSLA 1994, is repealed.

4 * **Sec. 12.** Sections 1 - 7 and 11 are retroactive to June 24, 1994.

5 * **Sec. 13.** If they take effect under sec. 10 of this Act, secs. 8 and 9 of this Act take effect
6 on the date that an order of dismissal entered by the superior court of Weiss v. State, 4FA-82-
7 2208 Civil, is reversed on appeal, including a petition for certiorari to the United States
8 Supreme Court. The attorney general shall certify that date to the lieutenant governor and the
9 revisor of statutes.

10 * **Sec. 14.** Except as provided in sec. 13 of this Act, this Act takes effect immediately
11 under AS 01.10.070(c).

_____ BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SPECIAL SESSION

BY THE _____ RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced:

Referred:

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the mental health land trust, the mental health trust income
2 account, and the mental health land trust litigation, Weiss v. State, 4FA-82-2208
3 Civil, and amending ch. 66, SLA 1991, and ch. 5, FSSLA 1994 relating to the
4 trust, the account, and the litigation; and providing for an effective date."

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

6 * Section 1. AS 37.14.036(a), as added by sec. 11, ch. 66, SLA 1991 and
7 amended by sec. 15, ch. 5, FSSLA 1994, is further amended to read:

8 (a) The mental health trust settlement income account is established
9 as a separate account of the Alaska Mental Health Trust Authority. The
10 mental health trust settlement income account consists of

11 (1) fees, charges, income earned on assets, and other money
12 received by the trust that is not attributable to the principal of the trust

1 under AS 37.14.031(d): and

2 (2) money deposited in the account in accordance with
3 appropriations or allocations made by law.

4 * Sec. 2. Section 58, ch. 66, SLA 1991, as repealed and reenacted by sec. 37, ch. 5,
5 FSSLA 1994, is amended to read:

6 Sec. 58 (a) This Act takes effect only if, not later than December 15, 1994,

7 (1) the superior court of the State of Alaska has made a
8 [FINAL] determination that the state has satisfied its obligation to reconstitute the
9 mental health trust under State v. Weiss, 706 P.2d 681 (Alaska 1985); and

10 (2) the superior court has entered an [A FINAL] order
11 dismissing Weiss v. State, 4FA-82-2208 Civil []; AND

12 (3) THE TIME FOR APPEALS OF THAT DETERMINATION
13 AND THAT ORDER HAS EXPIRED WITH NO APPEALS HAVING BEEN TAKEN
14 OR ANY APPEALS TAKEN HAVE BEEN FINALLY RESOLVED AND THE
15 ORDER DISMISSING WEISS V. STATE, 4FA-82-2208 CIVIL, HAS BEEN
16 AFFIRMED ON APPEAL].

17 (b) The attorney general shall advise the lieutenant governor and the revisor
18 of statutes whether the determination required by (a)(1) of this section has been made
19 and[.] whether the [FINAL] order required by (a)(2) of this section has been entered
20 [, AND WHETHER, AS REQUIRED BY (a)(3) OF THIS SECTION, THE TIME
21 FOR APPEALS OF THAT DETERMINATION AND THAT ORDER HAS EXPIRED
22 WITH NO APPEALS HAVING BEEN TAKEN AS OF THAT DATE OR ANY
23 APPEALS TAKEN HAVE BEEN FINALLY RESOLVED AND THE ORDER
24 DISMISSING WEISS V. STATE, 4FA-82-2208 CIVIL, HAS BEEN AFFIRMED ON
25 APPEAL].

26 * Sec. 3. (a) Section 39, ch. 5, FSSLA 1994, is amended to read:

27 * Sec. 39. AS 37.14.009(b), 37.14.011(b), 37.14.011(c) [37.14.011], 37.14.021,
28 37.14.036(c); AS 38.05.800; AS 47.30.031(b)(2); secs. 1, 2, 4, and 5, ch. 132, SLA
29 1986; secs. 7 - 10, ch. 48, SLA 1987; and secs. 49, 50, 53 - 57, ch. 66, SLA 1991, are
30 repealed.

1 (b) The amendment made by (a) of this section is intended to revive AS 37.14.011(a),
2 establishing the mental health trust income account in the general fund. This subsection
3 provides the expression of intent to revive required by AS 01.10.100(c).

4 * **Sec. 4.** Section 40(a), ch. 5, FSSLA 1994, is amended to read:

5 (a) For the purpose of reconstituting the mental health trust established under
6 the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956), as required
7 by the Alaska Supreme Court's decision in State v. Weiss [WEISS V. STATE], 706
8 P.2d 681 (Alaska 1985), the following land is designated as mental health trust land:

9 (1) the original mental health land listed in "Original Mental Health
10 Land To Be Designated as Mental Health Trust Land, April 28, 1994," as amended
11 by the additions and deletions listed in the September 23, 1994 addendum to the
12 April 28, 1994 list described in this paragraph, both of which are located in the
13 office of the director of the division of lands, Department of Natural Resources, in
14 Anchorage, Alaska; and

15 (2) the state land listed in "Other State Land To Be Designated as
16 Mental Health Trust Land, April 28, 1994," as amended by the additions and
17 deletions listed in the September 23, 1994 addendum to the April 28, 1994 list
18 described in this paragraph, both of which are located in the office of the director
19 of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

20 * **Sec. 5.** Section 40(b), ch. 5, FSSLA 1994, is amended to read:

21 (b) All land designated as mental health trust land under this section remains
22 subject to all encumbrances or interests of record, noted on records maintained by the
23 Department of Natural Resources, or otherwise existing on the date that the land is
24 designated as mental health trust land [EFFECTIVE DATE OF THIS SECTION].

25 * **Sec. 6.** Section 41(a), ch. 5, FSSLA 1994, is amended to read:

26 (a) Except for the land described in sec. 40 of this Act,

27 (1) the conversion to general grant land by sec. 3(a), ch. 181, SLA
28 1978, and sec. 1(a), ch. 182, SLA 1978, of all land obtained by the state under the
29 Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956), and not listed
30 in "Original Mental Health Land To Be Designated as Mental Health Trust Land,
31 April 28, 1994," as amended by the additions and deletions listed in the

1 September 23, 1994 addendum to the April 28, 1994 list described in this
2 paragraph, both of which are located in the office of the director of the division of
3 lands, Department of Natural Resources, in Anchorage, Alaska, is confirmed and
4 ratified; and

5 (2) land patented to or approved for patent to the state under the
6 Alaska Mental Health Enabling Act after July 1, 1978, and not listed in "Original
7 Mental Health Land To Be Designated as Mental Health Trust Land, April 28, 1994,"
8 as amended by the additions and deletions listed in the September 23, 1994
9 addendum to the April 28, 1994 list described in this paragraph, both of which
10 are located in the office of the director of the division of lands, Department of Natural
11 Resources, in Anchorage, Alaska, is redesignated as general grant land if it was not
12 converted to general grant land by sec. 3(a), ch. 181, SLA 1978, and sec. 1(7), ch. 182,
13 SLA 1978.

14 * Sec. 7. Section 41(b), ch. 5, FSSLA 1994, is amended to read:

15 (b) The land affected by this section includes the land listed in "Original
16 Mental Health Land Not To Be Returned to Mental Health Trust Status, April 28,
17 1994," as amended by the additions and deletions listed in the September 23, 1994
18 addendum to "Original Mental Health Land To Be Designated as Mental Health
19 Trust Land, April 28, 1994," all of which are located in the office of the director
20 of the division of lands, Department of Natural Resources, in Anchorage, Alaska.

21 * Sec. 8. Section 48, ch. 5, FSSLA 1994, is amended to read:

22 * Sec. 48. If the conditions of sec. 58, ch. 66, SLA 1991, as amended by sec.
23 37 of this Act, are not met on or before December 15, 1994, [OR ON A DATE
24 DETERMINED BY THE GOVERNOR UNDER SEC. 47 OF THIS ACT,] then ch.
25 66, SLA 1991, is repealed and secs. 3 - 9, 12 -16, 19 - 21, 23 - 30, 33 - 36, 43, and
26 46 of this Act do not take effect.

27 * Sec. 9. Section 49, ch. 5, FSSLA 1994, is amended to read:

28 * Sec. 49. If the conditions of sec. 58, ch. 66, SLA 1991, as amended by sec.
29 37 of this Act, are met on or before December 15, 1994, [OR ON A DATE
30 DETERMINED BY THE GOVERNOR UNDER SEC. 47 OF THIS ACT,] then AS
31 37.14.013, added by sec. 10 of this Act, AS 37.14.023, added by sec. 11 of this Act,

1 AS 47.30.546, and sec. 44 of this Act are repealed.

2 * **Sec. 10.** Section 50, ch. 5, FSSLA 1994, is amended to read:

3 * **Sec. 50.** Subject to sec. 48 of this Act, secs. 3 - 9, 12 - 16, 19 - 21, 23 - 30,
4 33 - 36, 43, and 46 of this Act take effect December 16, 1994 [, OR ON A DATE
5 DETERMINED BY THE GOVERNOR UNDER SEC. 47 OF THIS ACT].

6 * **Sec. 11.** Section 51, ch. 5, FSSLA 1994, is amended to read:

7 * **Sec. 51.** Sections 48 and 49 of this Act take effect December 16, 1994 [, OR
8 ON A DATE DETERMINED BY THE GOVERNOR UNDER SEC. 47 OF THIS
9 ACT].

10 * **Sec. 12.** AS 37.14.011(a) is repealed on the date that the director of the office of
11 management and budget, Office of the Governor, certifies to the revisor of statutes that the
12 mental health trust income account (AS 37.14.011) is no longer needed to finance
13 appropriations enacted by law.

14 * **Sec. 13.** Section 47, ch. 5, FSSLA 1994 is repealed.

15 * **Sec. 14.** (a) The benefits conferred on the beneficiaries of the mental health trust under
16 ch. 66, SLA 1991, chs. 5 and 6, FSSLA 1994, a bill enacted by the Second Special Session
17 of the Alaska State Legislature that amends ch. 6, FSSLA 1994 and becomes law, and this
18 Act, are intended as part of a comprehensive settlement of the mental health trust land
19 litigation, Weiss v. State, 4FA-82-2208 Civil, and related cases.

20 (b) Sections 3 - 9, 12 - 16, 19 - 21, 23 - 30, 33 - 36, 43, and 46, ch. 5, FSSLA 1994
21 and ch. 66, SLA 1991, as amended by ch. 5, FSSLA 1994 and this Act, are repealed on the
22 date that an order of dismissal entered by the superior court of Weiss v. State, 4FA-82-2208
23 Civil, is reversed on appeal including a petition for certiorari to the United States Supreme
24 Court. The attorney general shall certify that date to the lieutenant governor and the revisor
25 of statutes.

26 * **Sec. 15.** (a) If ch. 66, SLA 1991 and secs. 3 - 9, 12 - 16, 19 - 21, 23 - 30, 33 - 36, 43,
27 and 46, ch. 5, FSSLA 1994 are repealed under sec. 14 of this Act, provisions of the Alaska
28 Statutes that were

29 (1) enacted by ch. 66, SLA 1991 and those sections of ch. 5, FSSLA
30 1994 are repealed;

31 (2) amended by ch. 66, SLA 1991 and those sections of ch. 5, FSSLA

1 1994 are amended to read as they did on the day before the effective date of the amendments
2 made by the repealed laws; however, unless inconsistent with this Act, amendments to those
3 provisions that were made after the enactment of ch. 66, SLA 1991 and before the effective
4 date of this section are not affected by this Act; and

5 (3) repealed by ch. 66, SLA 1991 and those sections of ch. 5, FSSLA
6 1994 are revived to read as they did on the day before the effective date of the repeal;
7 however, a provision that was repealed by ch. 66, SLA 1991 and has been repealed by other
8 legislation enacted after ch. 66, SLA 1991 and prior to the effective date of this section or that
9 was repealed by ch. 5, FSSLA 1994 and has been repealed by other legislation enacted after
10 ch. 5, FSSLA 1994 and prior to the effective date of this section is not revived.

11 (b) AS 37.14.013 and 37.14.023, enacted by secs. 10 and 11, ch. 5, FSSLA 1994, and
12 repealed by sec. 49, ch. 5, FSSLA 1994, are revived.

13 (c) The effective date of a repeal, amendment, or revival described in (a) and (b) of
14 this section is the date that the attorney general certifies to the lieutenant governor and the
15 revisor of statutes under sec. 14(b) of this Act.

16 (d) The provisions of (a)(3) and (b) of this section provide the expression of intent
17 to revive required by AS 01.10.100(c).

18 * **Sec. 16.** If ch. 66, SLA 1991 and secs. 3 - 9, 12 - 16, 19 - 21, 23 - 30, 33 - 36, 43, and
19 46, ch. 5, FSSLA 1994 are repealed under sec. 14 of this Act, all grants made and contracts
20 entered into by the Alaska Mental Health Trust Authority prior to the effective date of the
21 repeal are ratified and responsibility for the administration of all grants and contracts of the
22 authority is transferred to the Department of Health and Social Services.

23 * **Sec. 17.** In ch. 66, SLA 1991 and ch. 5, FSSLA 1994, the revisor of statutes shall change
24 references to the "mental health trust income account," as established by AS 37.14.036, to the
25 "mental health trust settlement income account."

26 * **Sec. 18.** Section 3 of this Act is retroactive to June 24, 1994.

27 * **Sec. 19.** Sections 1 and 17 of this Act take effect December 16, 1994.

28 * **Sec. 20.** Except as provided in sec. 19, this Act takes effect immediately under
29 AS 01.10.070(c).

LAW OFFICES
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9/29/94
Joint
HFC/SFC
MIT
Walker/Bohstain

September 20, 1994

Julian L. Mason III
Ashburn and Mason
1130 West Sixth Avenue, Suite 100
Anchorage, Alaska 99501

Re: Weiss et al., v. State

Dear Julian:

We understand the State is preparing legislation to correct deficiencies in the proposed settlement -- the Salcha land exchange, other corrections to the land lists, and the availability of funds to complete the cash portion of the State's commitment. This is our proposal. If it is accepted we will recommend the settlement to our clients without further change.

1. Land Lists.

Yesterday we provided the State with the list of Substitute Lands that were included on the list that made up the valuation used in the State's Exhibit A, but are not on the HB 201 lists. The total value of such omitted land is \$6.3 million¹, bringing the estimated total omitted lands to \$86.2 million. The remaining category to resolve from our perspective is parcels that have been reduced from what they were when they were used on your Exhibit A. The omitted parcels need to be added to the to be conveyed lists in the Special Session.

2. Proposed Amendments

Enclosed are proposed amendments (redline and clean versions) to the proposed settlement that incorporate the representations we understood the State to make at the preliminary approval hearing and address the other items we need resolved before we will recommend the settlement for approval.

¹ The Substitute Land list takes into account the "technical corrections" we have been provided by the State.

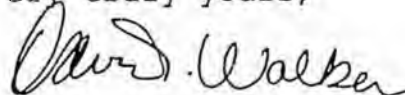
Julian I. Mason III
September 20, 1994
Page 2

3. Original Trust Coal.

Original Trust Coal, as we have previously stated, should not be removed from the Trust. We recognize the coal lessees' interest in ensuring that they will be able to mine coal at a fair profit. We remain interested in accomplishing this.

Time is short. We are prepared to do what it takes to attempt to reach an agreement that will allow us to finally put this matter to rest.

Very truly yours,



David T. Walker



James B. Gottstein

cc: Vern T. Weiss
Alaska Mental Health Association
Bruce Botelho
G. Thomas Koester
Tom Waldo/Eric Jorgenson

Jim Gottstein
Philip Volland
Mark Davis
Rick Johannsen
Jeff Jessee

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Proposed HB 201 Settlement Amendments

David Walker
Jim Gottstein
September 19, 1994

A. HB 201, Section 9(a)(2).^[1]

*Sec. 9. AS 37.14.009(a)(2), added by sec. 10, ch. 66 SLA 1991 is amended to read:

(a) The Alaska Mental Health Trust Authority

* * *

(2) shall contract with the Department of Natural Resources to manage the land assets of the trust; the contract must provide for the recording of at least one conveyance to the authority by quitclaim deed of mental health trust land in each recording district in the state in which mental health trust land is located and, without charge to the Trust, for a boundary survey of mental health trust land parcels that do not have such a survey * * *.

B. HB 201, Section 16, AS 37.14.039(a)^[2]

Sec. 37.14.039. TRUST INCOME ACCOUNT ADMINISTRATION. (a) The mental health trust income account shall be administered by the Alaska Mental Health Trust Authority. Expenditure of funds by the Alaska Mental Health Trust Authority under AS 37.14.041 (a)(1) through (5) may be made without, and free of legislative appropriation.

C. HB 201, Section 49^[3]

Sec. 49. If the conditions of sec. 58, ch. 66 SLA 1991, as amended by sec. 37 of this Act, are met on or before December 15, 1994, or on a date determined by the governor under sec. 47 of this Act, then Secs. 1, 10, 11, 40⁴(c), 42, and 44 of this Act, AS 37.14.013, added by sec. 10 of this Act, AS 37.14.023, added by sec. 11 of this Act, AS 47.30.546, and sec. 44 of this Act are repealed.

D. Settlement Agreement, Section IV. 1.^[4]

1. Transfer of Land by Quitclaim Deed and Delivery of Conveyances. Land and interests in land conveyed to the Trust Authority shall be granted in trust to the "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated

Add 41
Sec. 41

as mental health lands pursuant to Section 40(a)(1)&(2). Upon approval of this settlement by the court and dismissal of this action, the deeds shall be placed in escrow for delivery to the Authority upon its request. The parties recognize that certain of these deeds will use parcel numbers which reference the State maps that describe the lands in Attachment A in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the Authority, without charge to the Trust, to

(a) complete the preparation of recordable deeds for delivery to the Authority,

(b) complete the identification of encumbrances and interests of record pertaining to the parcels to be conveyed to the Trust Authority as provided in Part V of "MH/work plan 7/28/94" for delivery to the Authority, and

(c) accomplish a boundary survey for parcels that do not have such a survey

as soon as practicable after dismissal. With respect to "(c)," such surveys may take as long as ten years and the State will work with the Trust Authority to prioritize surveying in accord with the Authority's desires.

E. Settlement Agreement, Section V. 6.¹⁵¹

6. Development of Contracts, Operational Procedures and Regulations. The Authority and DNR shall negotiate in good faith and shall contract for the management of trust assets upon terms that are mutually agreeable to the Authority and DNR, including without limitation, the amount of reimbursement to DNR under AS 37.14.041(a)(4)(B) to be added by section 16 of HB 201, and which reflect the duties and responsibilities imposed on the Authority and DNR pursuant to HB 201 and reflect that the Trust Authority is the client of DNR. DNR and the Trust Authority will provide for the management of Trust Lands for the maximum benefit of the beneficiaries and in a manner that achieves fair market value for use of Trust Land. The parties recognize that the details of contracting procedure, management of trust land, and other operational policies are left to be resolved under HB 201 by the Authority, DNR and other entities through a cooperative and public rulemaking process. Subject to the foregoing, the parties' understanding and intent on how this process will work is set forth in Attachments C and D, which the parties acknowledge are not contractual but are expressions of intent and interpretation only. To facilitate the development of a management unit, and policies and procedures reflecting the intent of the parties in entering into this agreement prior to the effective operation of the Authority, DNR agrees to consult with

a transition team of representatives from the beneficiary community to advise and deliberate with DNR and the affected state agencies.

F. Settlement Agreement, Section VI.5⁽⁶⁾

5. Modification and Future Enforcement. By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, ~~and acknowledge that the trust is reconstituted in accordance with State v. Weiss, 706 P.2d 681 (Alaska 1985).~~ The provisions of Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and are incorporated herein by reference~~acknowledged that the trust is reconstituted.~~ If the Legislature materially alters or repeals any of those provisions, the plaintiffs' shall have the right to reinstate all the claims that they had after the 1978 redesignation, including without limitation, all of their claims to all of the land granted under the Alaska Mental Health Enabling Act of 1956, sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such relief as may be appropriate in light of the plaintiffs' claims. In the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a) or (b), 41, 43, 46, 47, 49, 50 or 51 of HB 201 or invades the corpus of the Trust, or any combination thereof, the State hereby agrees that the beneficiaries have the right to reinstate all of their original claims that the Trust has been broken or improperly taken apart free from the impact of HB 201 or any subsequent legislation and hereby waives any argument to the contrary. In light of the dismissal of each parties' claims and in light of this being a class action, no modification of the agreement may be made except in writing signed by all the parties and approved by the court after notice to the class. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

G. Settlement Agreement, Section VI.6(c).⁽⁷⁾

6. Settlement and Dismissal.

* * *

(c) Subject to the beneficiaries' right to reinstatement of all of their original claims, including without limitation all of those enumerated in this settlement agreement in the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a), 40 (b), 41, 43, 46, 47, 49, 50, or 51 of HB 201 and Sections 1 and 2 of HB 371, or any combination of these sections, ~~dismissing with prejudice all~~

class claims, including without limitation those of plaintiffs and plaintiffs-intervenors, known or unknown, asserted or unasserted, that arise on or before the date of dismissal and arise from or relate to the 1978 redesignation legislation, any other actions taken by the state since statehood in managing and administering the land granted to the state under the Mental Health Enabling Act or the proceeds generated from that land, or any other actions taken by the state since statehood in managing and administering the trust created by the Alaska Mental Health Enabling Act.

* * *

(g) Expunging the Renotice of Lis Pendens, subject to the plaintiffs right to reinstatement of all claims, including without limitation all of those enumerated in this settlement agreement in the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a), 40 (b), 41, 43, 46, 47, 49, 50, or 51 of HB 201 or invades the corpus of the Trust, or any combination thereof.

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Page: 1

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"1" All Original Trust Land has such a boundary survey or will be surveyed prior to patent. Under the current settlement proposal, some of the parcels conveyed to the Trust Authority will not be surveyed. This will mean that it will not be possible to tell on the ground what the location is of some of these parcels. This will be a significant hindrance to economic utilization of the property. The Trust Authority can theoretically use the Trust's income or require users to survey the ground, but this will prove to be an obstacle to the development of the property. The Trust Authority's using the Trust's income is likely to draw objection from those who think the money should be used for the mental health program instead even if spending the money on survey will increase the Trust's income. Until the land is surveyed, some potential users may not be interested in pursuing the option of using Trust land. In addition, just having the built in delay factor of not having a survey will cost the Trust income. Basically, fairness dictates that the State provide boundary surveys. The related proposed amendment to the settlement agreement, Section IV. 1 makes clear that the surveys can take 10 years and that DNR and the Trust Authority will coordinate in which order surveys should occur.

Page: 1

~~Page: 1~~

"2" This amendment is to make clear that it is the legislature's intent that the Trust Authority is authorized to spend the Trust's income free of further legislative appropriation (ie., other than the initial appropriation of the \$200 million and conveyance of the land to the Trust).

Page: 1

~~Page: 1~~

"3" This change repeals the "cram-down" or "non-settlement" portions of HB 201 if the settlement is approved. Unless this is done, it would appear that the State is reserving the right to argue that HB 201 prevents the beneficiaries from re-asserting their claims to all Original Trust Land. The court found the right of the beneficiaries to re-assert their claims was a deterrent against the Legislature changing the HB 201 settlement and this was critical to the court granting preliminary approval.

Page: 1

~~Page: 1~~

"4" The amendments to this section (a) conforms the survey requirement to the amendment to HB 201 above, and (b) puts into the settlement agreement that DNR will deliver the title information it is already developing to the Trust Authority.

Page: 2

~~Page: 2~~

"5) The amendments to this section conform the settlement agreement to the testimony of Commissioner Noah at the July 1994 court hearing about how the Trust's land is to be managed.

Page: 3

~~Page: 3~~

"6) The changes to this section conform the settlement agreement to the representations made by the State's attorney to the court at the July 1994 hearing regarding the beneficiaries' right to reassert their claims in the event the Legislature changes the HB 201 settlement's terms..

Page: 3

~~Page: 3~~

"7) These are other technical changes to the Settlement Agreement to conform it to the State's representations to the court regarding the beneficiaries' right to reassert their claims in the event the Legislature changes the HB 201 settlement's terms.

Proposed HB 201 Settlement Amendments

David Walker
Jim Gottstein
September 19, 1994

A. HB 201, Section 9(a)(2).

*Sec. 9. AS 37.14.009(a)(2), added by sec. 10, ch. 66 SLA 1991 is amended to read:

(a) The Alaska Mental Health Trust Authority

* * *

(2) shall contract with the Department of Natural Resources to manage the land assets of the trust; the contract must provide for the recording of at least one conveyance to the authority by quitclaim deed of mental health trust land in each recording district in the state in which mental health trust land is located and, without charge to the Trust, for a boundary survey of mental health trust land parcels that do not have such a survey * * *.

B. HB 201, Section 16, AS 37.14.039(a)^[2]

Sec. 37.14.039. TRUST INCOME ACCOUNT ADMINISTRATION. (a) The mental health trust income account shall be administered by the Alaska Mental Health Trust Authority. Expenditure of funds by the Alaska Mental Health Trust Authority under AS 37.14.041 (a)(1) through (5) may be made without, and free of legislative appropriation.

C. HB 201, Section 49

Sec. 49. If the conditions of sec. 58, ch. 66 SLA 1991, as amended by sec. 37 of this Act, are met on or before December 15, 1994, or on a date determined by the governor under sec. 47 of this Act, then Secs. 1, 10, 11, 40(c), 42, and 44 of this Act, are repealed.

D. Settlement Agreement, Section IV. 1.

1. Transfer of Land by Quitclaim Deed and Delivery of Conveyances. Land and interests in land conveyed to the Trust Authority shall be granted in trust to the "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated as mental health lands pursuant to Section 40(a)(1)&(2). Upon approval of this settlement by the court and dismissal of this

action, the deeds shall be placed in escrow for delivery to the Authority upon its request. The parties recognize that certain of these deeds will use parcel numbers which reference the State maps that describe the lands in Attachment A in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the Authority, without charge to the Trust, to

- (a) complete the preparation of recordable deeds for delivery to the Authority,
- (b) complete the identification of encumbrances and interests of record pertaining to the parcels to be conveyed to the Trust Authority as provided in Part V of ``MH/work plan 7/28/94'' for delivery to the Authority, and
- (c) accomplish a boundary survey for parcels that do not have such a survey

as soon as practicable after dismissal. With respect to ``(c),'' such surveys may take as long as ten years and the State will work with the Trust Authority to prioritize surveying in accord with the Authority's desires.

E. Settlement Agreement, Section V. 6.

6. Development of Contracts, Operational Procedures and Regulations. The Authority and DNR shall negotiate in good faith and shall contract for the management of trust assets upon terms that are mutually agreeable to the Authority and DNR, including without limitation, the amount of reimbursement to DNR under AS 37.14.041(a)(4)(B) to be added by section 16 of HB 201, and which reflect the duties and responsibilities imposed on the Authority and DNR pursuant to HB 201 and reflect that the Trust Authority is the client of DNR. DNR and the Trust Authority will provide for the management of Trust Lands for the maximum benefit of the beneficiaries and in a manner that achieves fair market value for use of Trust Land. The parties recognize that the details of contracting procedure, management of trust land, and other operational policies are left to be resolved under HB 201 by the Authority, DNR and other entities through a cooperative and public rulemaking process. Subject to the foregoing, the parties' understanding and intent on how this process will work is set forth in Attachments C and D, which the parties acknowledge are not contractual but are expressions of intent and interpretation only. To facilitate the development of a management unit, and policies and procedures reflecting the intent of the parties in entering into this agreement prior to the effective operation of the Authority, DNR agrees to consult with a transition team of representatives from the beneficiary community to advise and deliberate with DNR and the affected

state agencies.

F. Settlement Agreement, Section VI.5

5. Modification and Future Enforcement. By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses. The provisions of Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and are incorporated herein by reference. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' shall have the right to reinstitute all the claims that they had after the 1978 redesignation, including without limitation, all of their claims to all of the land granted under the Alaska Mental Health Enabling Act of 1956. In the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a) or (b), 41, 43, 46, 47, 49, 50 or 51 of HB 201 or invades the corpus of the Trust, or any combination thereof, the State hereby agrees that the beneficiaries have the right to reinstate all of their original claims that the Trust has been broken or improperly taken apart free from the impact of HB 201 or any subsequent legislation and hereby waives any argument to the contrary. In light of the dismissal of each parties' claims and in light of this being a class action, no modification of the agreement may be made except in writing signed by all the parties and approved by the court after notice to the class. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

G. Settlement Agreement, Section VI.6(c).

6. Settlement and Dismissal.

* * *

(c) Subject to the beneficiaries' right to reinstatement of all of their original claims, including without limitation all of those enumerated in this settlement agreement in the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a), 40 (b), 41, 43, 46, 47, 49, 50, or 51 of HB 201 and Sections 1 and 2 of HB 371, or any combination of these sections, dismissing all class claims, including without limitation those of plaintiffs and plaintiffs-intervenors, known or unknown, asserted or unasserted, that arise on or before the date of dismissal and arise from or relate to the 1978 redesignation legislation, any other actions taken by the state since statehood in managing and administering the land granted to the state under the Mental Health Enabling Act or the proceeds generated from that land, or any other actions taken by

the state since statehood in managing and administering the trust created by the Alaska Mental Health Enabling Act.

* * *

(g) Expunging the Renotice of Lis Pendens, subject to the plaintiffs right to reinstatement of all claims, including without limitation all of those enumerated in this settlement agreement in the event the Legislature materially alters or repeals Sections 2 through 9, 12 through 40(a), 40 (b), 41, 43, 46, 47, 49, 50, or 51 of HB 201 or invades the corpus of the Trust, or any combination thereof.

jg\amha94\lit\201cnsdr\fnlapprv1\amendi.cln

4/21/94 RECONSTITUTION PROPOSAL
(STATE/VOLLAND)

9/20/94
Joint
HFC-SFC
MHT
Gottstein

Third Party Purchases (oil and gas estate only)	5.9
muni ent. and <fmv sales (mineral & oil and gas estates only)	79.4
Long term leases	4.3
Ag tracts-good standing (oil and gas estates only)	1.6
Ag tracts-not in good standing (oil and gas estates only)	4.9
Mat Valley Moose Range (mineral & coal estates only)	19.1
Su Flats (oil and gas estate only)	17.7
Unleased sub parcels Healy	146.8
Unleased sub parcels Beluga	26.0
MRTL encumbered with mining 25% of NSR value	32.6
Undisputed MRTLS	495.5
Returned from Munis	18.0
State agency use-unoccupied	14.7
Healy coal leases under current rules	42.2
Beluga coal leases under current rules	13.7
Thorne Bay	2.3
Uncontested PSLs (SCLDF less state objections)	83.4
New subdivision PSLs from DNR (at \$1500/acre)	3.6
New PSLs oil and gas estate only from DNR	10.4
New PSLs from munis	1.0
New mineral estate only areas	80.5
Cash	200.0
Ft. Knox	8.2
Plaintiffs Total	1,311.8

Document: STATE'S EXHIBIT "A"

Used as: EXHIBIT, PRELIMINARY
APPROVAL HEARING HB 201

Date: JULY 1994

Missing Parcels

9/24/94
Joint
HFC/SFC
Gottskin

Category	Missing parcel value as of Sept. 8, 1994	Missing parcel value after technical corrections
Total MRTLS Fee Estate	\$ 33,216,898.00	\$ 26,808,093.00
TPP Oil and Gas Estate	\$ 1,138,476.00	\$ 466,045.00
AG tracts not in good standing Oil and Gas Estate Only	\$ 630,986.00	\$ -
Muni ent. and < FMV sales Mineral and Oil and Gas Estates	\$ 5,594,895.00	\$ 20,288,006.00
Beluga Unleased Fee Estate	\$ 26,011,003.00	\$ 26,011,003.00
Healy Unleased Fee Estate	\$ 13,253,812.00	\$ 13,253,812.00
Long term Leases Fee Estate	\$ 58,240.00	\$ -
Mat Valley Moose Range Mineral and Coal Estates	\$ 199,329.00	\$ 199,329.00
Uncontested PSLs Fee Estate	\$ 6,337,241.00	\$ 7,780,744.00
	\$ 86,440,880.00	\$ 94,807,532.00

9/24/94
Walker
Joint
HFC/SFC
MIT
Walker

**ANCHORAGE ALLIANCE for the MENTALLY ILL
P.O. BOX 243302
ANCHORAGE, AK 99524-3302**

September 23, 1994

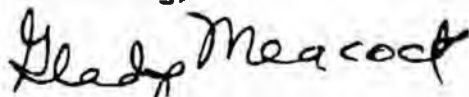
Dear Alaskan Senators and Representatives:

The Board of Directors of the ANCHORAGE ALLIANCE for the MENTALLY ILL urge that you incorporate the changes to the Mental Health Lands Trust settlement as recommended by attorneys Gottstein and Walker. Only with those changes can the settlement be an acceptable replacement for the original mental health lands trust as set up by the Federal Government.

As an advocacy group and as family members of the mentally ill we are concerned with the needs of the beneficiaries. We do not feel that the Governor's proposed settlement was developed with the original beneficiaries in mind. It seems rather to have been developed to satisfy the lawyers of the "intervenor" and to satisfy those who need clear title to land which has been under a cloud since this lawsuit began in 1982.

Please, as 1994 Alaskan legislators, take this opportunity to correct a wrong done by those legislators who attempted to abolish the trust in 1978. Make this a settlement which can be acceptable to those for whom the trust was originally developed, the mentally ill of Alaska. Incorporate the changes as proposed by attorneys Jim Gottstein and David Walker.

Sincerely,



Gladys Meacock
President



**FAIRBANKS
ALLIANCE
for the
MENTALLY
ILL**

P.O. BOX 72643 • FAIRBANKS, ALASKA 99707 • (907) 457-3733

September 24, 1994

Dear Senators and Representatives:

The Fairbanks Alliance for the Mentally Ill urges you to not to merely rubber stamp the governor's bill but to make the changes recommended by attorneys Gottstein and Walker. As Fred Pratt says in his excellent column in today's Fairbanks Daily Newsminer, this legislation was basically written by the governor's people and the intervenors. Most of the mentally ill citizens of Alaska, their families and advocates feel that this settlement does not replace the original mental health lands trust adequately. It is basically a deal for the intervenors and the state government.

As an advocacy group, we are concerned with the needs of the beneficiaries. The current settlement and the changes recommended by the governor are still not adequate. If you will make the changes recommended by Gottstein and Walker, most beneficiary groups will accept the deal, otherwise we owe it to the beneficiaries to go back to the table. I am enclosing a copy of Fred Pratt's column as he expresses FAMI's position very well.

This trust was given to people with mental illness by the Federal Government. They have a right to have it adequately reconstituted. A legislature took it away and you have an opportunity to restore it. If the changes proposed by Walker and Gottstein are made, FAMI will recommend to its members and other regional alliances, that this settlement be accepted.

I urge you to spend these three days working for your mentally ill constituents.

Sincerely:

Jeanette Grasto
President

Our new number is 456-4704

Coal leases, contract finality still issues for special session

The Legislature meets to take up the Mental Health Trust issue Monday. The big question is: how far will they go?

The governor called the special session to change three specific things in the settlement act that the Legislature passed last May.

The current settlement proposal is more the governor's than the Legislature's since it was worked out between the governor's people and two of the four attorneys representing the trust's beneficiaries. It was presented to the Legislature at the end of the session and passed without a lot of tinkering by that body. The problems that surfaced during court briefs and hearings this summer could kill the pact.

The Legislature will doubtless pass the governor's proposals, but they are free to add to them. With major groups of plaintiffs still opposing the settlement, the Legislature might decide to sweeten the pot a little and bring them on line.

If the Legislature just rubber-stamps the governor's proposed amendments, the settlement might well still die in court this winter.

The opposition to the settlement comes from two lawyers for the original plaintiffs who brought the class action case in 1982, David Walker of Juneau and Jim Gottstein of Anchorage. As long as these people and the various groups dealing with mental illness in our state oppose the settlement, it's very much in question.

Hickel's people negotiated the settlement primarily with two attorneys who represent "intervenor" in the case, alcoholics and others outside a strict meaning of the term "mentally ill" that want to be recognized as beneficiaries of the trust as well.

Gov. Walter Hickel's people negotiated the settlement with the intervenors rather than the core group of beneficiaries. In speeding through this process before the end of the regular legislative session, they made a few errors.

They offered land northeast of Salcha that the state won't own any time soon, and they offered money from a source where there isn't

The opposition to the settlement comes from two lawyers for the original plaintiffs who brought the class action case in 1982, David Walker of Juneau and Jim Gottstein of Anchorage. As long as these people and the various groups dealing with mental illness in our state oppose the settlement, it's very much in question.



Fred
Pratt

enough money. They also put a strict Dec. 15 deadline on having the court accept the settlement, with a possible extension of only 45 days.

In a way, they painted themselves into a corner. If the court rejects the settlement as unfair to the plaintiffs, as it might in its current form, they would have only the first month of a new Legislature to fix the problems.

Hickel's special session solves this problem, but the basic fairness of the deal remains an issue. The plaintiffs feel they are getting far less than they should to let the state off the hook for its illegal attempt to abolish the trust in 1978.

But if the Legislature wants to tackle the larger issue, they now have an exact prescription from the plaintiffs themselves.

Walker wrote Alaska State Senate President Rick Halford, R-Chugiak, Sept. 5 promising he and Gottstein would support the settlement if only three more changes were made.

The first change they want is to have the legislation formally incorporate commitments made about the settlement in court by the state's attorneys and officials. Primary among these is an under-

standing that if the Legislature ever amends the settlement in the future the plaintiffs will have the right to re-institute all their current legal claims.

This would be a powerful tool for the benefit of everyone involved. It would enlist the thousands of individuals, businesses and local governments who got trust land on the side of the trust to keep the Legislature from tampering with it again.

Second, Walker wants the original trust land now in state coal leases returned to the trust. Much of this land is leased by the Usibelli Coal Mine, which bought the leases from the Department of Natural Resources and understandably wants to keep that landlord and the terms of those leases it made at the time.

But the 1985 Alaska Supreme Court decision in this case ordered all original trust land to be returned to the trust unless it was "sold", and the plaintiffs maintain "sold" doesn't mean "leased." Walker maintains the only reason the leases were not included in the settlement is because Usibelli lobbied to have them removed.

Third, Walker and Gottstein want some clearer language on how the land is surveyed and identified, and what encumbrances exist on access and use.

If these three changes aren't included, he points out, he can kill the settlement by a late appeal of any ruling for it at the Dec. 15 deadline.

So will the legislators take a few extra days to make these changes, or will they just kick the governor's deal through as fast as they can?

Fred Pratt, a free-lance writer living in Fairbanks, is a reporter and long-time observer of Alaska politics.

Resolution # _____-94
Alaska Mental Health Association

Whereas, the Alaska Mental Health Association has identified serious deficiencies in the currentl; proposed settlement of the Mental Health Trust Lands Litigation, Weiss v. State, 4FA 82-2208 Civ.; and

Whereas a Special Session of the Legislature has been called starting September 26th, for the express purpose of correcting deficiencies in the proposed settlement; and

Whereas failure to address the deficiencies of the proposed settlement identified by the Association will cause the December 15, 1994 deadline to be missed either through denial of approval based upon the opposition to the proposed settlement or appeal from a ruling granting approval,

NOW THEREFORE BE IT RESOLVED, that the Alaska Mental Health Association urges the Legislature and the Administration to address the points set forth in David Walker's letter of September 5, 1994 to the satisfaction of the Association and Vern Weiss; and

BE IT FURTHER RESOLVED THAT THE Alaska Mental Health Association urges all plaintiffs' counsel to oppose approval of the proposed settlement unless these criteria are met and that they use all appropriate means to protect the interests of the beneficiaries.

CERTIFICATION

The undersigned hereby certifies that the foregoing resolution was approved by the Board of Directors of the Alaska Mental Health Association at a meeting held September 13, 1994, duly called, at which a quorum existed and acted throughout.

Dated: 9-13-94

By: Marilyn J. Talmage
Marilyn J. Talmage,
Secretary

**ANCHORAGE
RESIDENCES for the
MENTALLY
ILL, Inc.**

P. O. Box 91641, Anchorage, Alaska 99509-1641
Tel: (907) 277-6361

**FOR DISTRIBUTION TO ALL LEGISLATORS
OF HOUSE AND SENATE**

September 25, 1994

Dear Legislator:

This concerns the question of settlement of the Alaska Mental Health Trust Land litigation and the special session for which you have gathered.

Anchorage Residences for the Mentally Ill, known as ARMI came into existence as a spin-off of the Alaska Alliance for the Mentally Ill (AKAMI), but the views of AKAMI do not represent the views of either ARMI or of the Anchorage Alliance for the Mentally Ill (AAMI).

Many of you know me as Mike Rose, and, as you know, I have testified on this subject before committees of the legislature on a number of occasions over the past several years. I am also a former president of AAMI, and the father of a son who suffered 17 years of mental illness.

You have received a letter from the Fairbanks Alliance of the Mentally Ill (FAMI) with a copy of a September 23, 1994 column by Fred Pratt in the Fairbanks News-Miner. Those two documents fairly represent the views of ARMI.

Essentially the same views were expressed in the September 5 letter from Attorney David Walker to the President of the Senate, Rick Halford. Thus, it is patently incorrect to state that Walker and Jim Gottstein and their clients are opposed to settlement. The three amendments they have proposed are reasonable, and would assure support of the settlement by the great majority, if not all of the beneficiaries.

As I am informed and believe, these views of ARMI are shared at least by the following:

Anchorage Alliance for the Mentally Ill
Fairbanks Alliance for the Mentally Ill
Railbelt Alliance for the Mentally Ill
Kenai Alliance for the Mentally Ill

Wasilla Alliance for the Mentally Ill
Kodiak Alliance for the Mentally Ill
Iris Alliance for the Mentally Ill (Juneau)

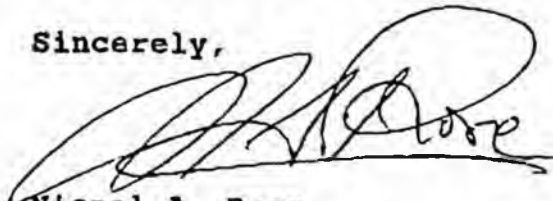
In other words, South Central, Kodiak, Fairbanks, and part of Juneau, altogether amounting to somewhere between 80 and 90 percent of the population of Alaska, and thus a similar percentage of the mentally ill, their families and advocates in Alaska. That is the group of primary beneficiaries on behalf of whom the trust was created and the litigation undertaken. Their opposition would weigh heavily on the court.

This offer of support by these beneficiaries represents a considerable compromise from the former unanimous support by all beneficiaries of Senator Duncan's SB 65 of two years ago (not Ch.66, but his original bill). The present settlement, even with the Gottstein/Walker amendments represents a significantly less generous package than Ch.66.

- Please do, for once, put on your trustee hat and do something for the beneficiaries rather than just pass what the Governor and his AG have handed you.
- Legislative settlements have failed each of four prior times.
- The court cannot amend the settlement, it can only approve or disapprove, and approval is doubtful if settlement is not concurred in by a substantial number of the beneficiaries

Wouldn't it make sense to do a little more than the Governor asks and assure yourselves of support by these beneficiaries?

Sincerely,



Nissel A. Rose
Executive Director

Resolution

Kenai Alliance for the Mentally Ill

WHEREAS, the Kenai Alliance for the Mentally Ill is a support and advocacy group for the families and friends of people suffering from mental illness, and

WHEREAS, HB 201, the states proposed settlement for the Mental Health Trust settlement for the Mental Health Trust Lands Litigation, has been signed into law, and

WHEREAS, HB201 contains language that is unreasonable and punitive with the December 15, 1994 date for final approval (if approved after 12-15-94 there would be no \$200,000,000., Trust Authority nor program elements), and

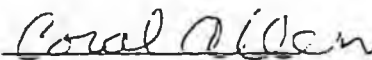
WHEREAS, land selected to reconstitute the trust was based on the interests of 3rd parties and the state rather than on the interests of the beneficiaries, and

WHEREAS, HB201 fails to comply with private trust law principles (as has been ruled) and fails to manage the trust solely in the interests of the beneficiaries (nor even substantially in the interests of the beneficiaries).

Now therefore, **BE IT RESOLVED**, that the Kenai Alliance for the Mentally Ill opposes the acceptance of HB201 and urges the removal of the state as trustee to the trust, and

BE IT FURTHER RESOLVED, that the Kenai Alliance for the Mentally Ill urges all plaintiffs' counsel to attempt to ensure that if HB201 is accepted by the court that the beneficiaries will get to keep, through this and future administrations and legislatures, whatever they are granted by this settlement.

DATED: 7-28-94


Coral Allen President
**KENAI ALLIANCE for the
MENTALLY ILL**



KODIAK ALLIANCE for the MENTALLY ILL
BOX 2191
Kodiak, Alaska 99615 Phone # 486-1938

June 11, 1994



NAMI

Al Finneseth, Ph.D., President
Mental Health Association in Alaska
4050 Lake Otis Pkwy, Suite 202
Anchorage, Alaska 99508

Re: Mental Health Trust Litigation

Dear Dr. Finneseth,

I am writing to express K.A.M.I.'s support for the Mental Health Association's long-standing commitment and efforts on behalf of the beneficiaries of the Mental Health Land Trust. We also commend your personal efforts to involve the wider beneficiary and mental health community in the process.

Unless the issues of the extent and legality of Trust Authority control are decided positively and the Trust Authority is to have effective control of Trust assets, the Kodiak Alliance for the Mentally Ill opposes support of the HB 201 proposed settlement. I also believe that the issues raised by Jim Gottstein such as liability for Hazardous Substances must be handled adequately in the settlement agreement.

K.A.M.I. has met and passed the enclosed resolution. If the settlement agreement does not adequately address the concerns expressed in the resolution, K.A.M.I. urges the Mental Health Association to take whatever steps are necessary to oppose the proposed settlement and protect the rights of the beneficiaries.

Thank you again for your efforts.

Sincerely,

Jeanne R. Peschier
President
Kodiak Alliance for the Mentally Ill

cc: Jim Gottstein

Resolution 94-01

KODIAK ALLIANCE for the MENTALLY ILL

Whereas, HB 201 has passed the Alaska Legislature and is expected to be signed into law, and

Whereas, HB 201 contains a deadline of December 15, 1994 for final approval by the courts of its "settlement" provisions (unless extended for up to 45 days by the Governor) or else the provisions of HB 201 that attempt to remove the legal basis for the beneficiaries' claims to Trust property go into effect, and

Whereas, it is questionable whether legislation can remove the beneficiaries' claims to Trust property, and

Whereas, final approval by the courts of a proposed settlement by December 15, 1994 is extremely unlikely, and

Whereas, substantial questions have been raised about the terms, legality and benefit of the "settlement" provisions of HB 201, and

Whereas, K.A.M.I. believes it is not right to support a settlement of the Mental Health Trust Lands Litigation, Weiss v. State, 4FA 82,2208 Civ., unless the over-all settlement is fair, the terms are clear, and the benefits are certain to be received.

NOW THEREFORE BE IT RESOLVED, that K.A.M.I. opposes acceptance of the HB 201 "settlement" unless clarifications can be made in the settlement agreement and anticipated consent decree satisfactory to counsel for Vern Weiss and the Alaska Mental Health Association which fairly reconstitutes the Trust, is enforceable, and ensures that the Trust Authority has the power to effectively manage the Trust,

BE IT FURTHER RESOLVED, that in the event a settlement agreement and consent decree to counsel for Vern Weiss and the Alaska Mental Health Association is not negotiated, counsel for all plaintiffs are urged to use all appropriate means to protect the interests of the beneficiaries.

DATED:

6/11/94

Jeanne L. Lechner

MENTAL HEALTH CONSUMERS OF ALASKA
RESOLUTION

WHEREAS, HB 201 of the 1994 Legislative Session and an associated settlement agreement have been presented to the court as a proposed settlement of the mental health trust litigation, Weiss v. State, 4FA 82-2208 Civ, and

WHEREAS, Mental Health Consumers of Alaska is entirely composed of beneficiaries of the Trust who have received in-patient mental health services or been in need of such services, and

WHEREAS, Mental Health Consumers of Alaska has carefully considered the written and oral presentations made by attorneys supporting and opposing the proposed settlement, and

WHEREAS, the original Trust grant is extremely valuable land that properly managed is likely to adequately fund Alaska's mental health program, and

WHEREAS, the Trust land under the proposed settlement is composed entirely of the less desirable land that no one objected to being in the Trust, and

WHEREAS, DNR management of the land without the clear direction to manage it solely for Trust purposes creates a conflict of interest that will inevitably lead to greatly diminished return from the Trust Land, and

WHEREAS, the income from the \$200 million cash payment does not begin to make up the difference or fund an adequate mental health program, and

WHEREAS, the State has reserved the right to unilaterally change the terms of the proposed settlement, and

WHEREAS, the right of the beneficiaries to be placed in exactly the same position as they are in now if the Legislature exercises its right to unilaterally change the settlement is not sufficiently clear to be a deterrent,

NOW THEREFORE BE IT RESOLVED, that Mental Health Consumers of Alaska opposes acceptance of the currently proposed settlement of the mental health trust litigation, and

BE IT FURTHER RESOLVED, that counsel for all plaintiffs are urged to oppose approval of the currently proposed settlement and take all appropriate actions to protect all of the beneficiaries' rights.

Certification

I, Cruz D. Bilbao, acting Secretary of Mental Health Consumers of Alaska hereby certify that the foregoing resolution was properly adopted by Mental Health Consumers of Alaska at its regular board of directors meeting held September 8, 1994 at which a quorum existed and acted throughout.

Post-IT Fax Note

7671

DATE	2/5/94	1000	1
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Resolution
RAILBELT ALLIANCE for the MENTALLY ILL

WHEREAS, The Railbelt Alliance for the Mentally Ill is an organization representing a large number of families and consumers of mental health services in the Railbelt who are beneficiaries of the mental health lands trust, and;

WHEREAS, HB 201, which purports to enact a new settlement of the Mental Health Trust Lands Litigation, Weiss v. State, 4FA-82-2208 Civ., has been signed into law, and;

WHEREAS, HB 201 contains a deadline of December 15, 1994 for final approval by the courts of its "settlement" provisions (unless extended for up to 45 days by the Governor) or else the provisions of HB 201 that attempt to remove the legal basis for the beneficiaries' claims to Trust property go into effect, and;

WHEREAS, it is questionable whether legislation can remove the beneficiaries' claims to Trust property, and;

WHEREAS, final approval by the courts of a proposed settlement by December 15, 1994 is extremely unlikely, and;

WHEREAS, there are substantial questions about the terms, legality and benefit of the "settlement" provisions of HB 201;

Now Therefore, BE IT RESOLVED, that the Alliance finds the settlement as currently written is insufficient, and opposes acceptance of a HB 201 "settlement" unless changes are made in the settlement agreement, satisfactory to counsel for Vern Weiss and the Alaska Mental Health Association, to ensure that the settlement fairly reconstitutes the Trust, is enforceable, and that the Trust Authority has the power to effectively manage the Trust; and

BE IT FURTHER RESOLVED, that the Alliance urges all plaintiffs' counsel to oppose preliminary approval of the proposed settlement and to take appropriate steps to protect the rights of the beneficiaries.

DATED: 6/30/94

Jenasy Jensen, Pres.

DN'R
Materials

AKAMI

4050 Lake Otis Suite 103
Anchorage, Alaska 99508
(907) 561-3127
FAX (907) 561-2717

September 19, 1994
Patrick E. Murphy
2400 Douglas Hwy., No.2
Juneau, Alaska 99801
907-364-2374

Board of Directors
Alaska Alliance for the Mentally Ill
110 W. 15th Ste. B
Anchorage, AK 907-277-1300

Re: Findings and Recommendations of the Alaska Alliance Evaluation Committee on the
Mental Health Lands Trust Proposed Settlement.

Dear Board of Directors,

I was asked by you to chair a committee to do a detailed evaluation of the proposed settlement of the Mental Health Lands Trust case. The case is set for final approval hearings before the Honorable Judge Mary Greene beginning October 24, 1994. My qualifications for this task as stated by the Board at its meeting on September 2, 1994 were my twenty years of practice as an attorney, my prior involvement as co-chair for a time of the Beneficiary Coalition Group that worked on past settlements and my personal involvement with mental health issues due to my son's 12 year bout with mental illness.

The other members of the committee included Dick Wilson (former state-wide mental health board member), Wes Terwilliger, and Tom Ryan (all AKAMI Board Members).

As we all know the Mental Health Trust lands issue is an extremely complex one and has been since the 1985 Alaska Supreme court's decision in State v. Weiss. Three prior major attempts were made at settlement through legislation, in 1987 (chapter 48), 1990 (chapter 210), and 1991 (chapter 66). These settlements all failed because of the complexity of the issues and the many parties involved; the Legislature, Executive branch, all five beneficiary groups, land owners, business groups, and environmental

ALASKA ALLIANCE FOR THE MENTALLY ILL

1

interests. The present settlement is the fourth attempt which I will call the HB 201 1994 settlement for the rest of this letter.

I have spent approximately 25 hours reviewing all the court documents presented to Judge Greene at the evidentiary hearings between July 12-22, 1994. I also spoke to attorney Jeff Jesse and AKAMI President John Malone who favor the settlement as well as speaking for almost three hours with attorney David Walker and Jim Gottstein who oppose the settlement. Commissioner Harry Noah was next on my list. He is the State's lead representative in this case. The focus of this meeting was the past, current, and future management by the state of Trust lands. Particularly the framework of the management under the new DNR Trust Unit and that unit's relationship with the Trust Authority created under the current settlement.

A breakdown of the players supporting and opposing the HB 201 settlement is as follows:

Supporting

Alaska Legislature
Governor
Executive Branch
Beneficiary Groups -
(except those in the opposition column)
Environmental groups
Business, coal, and oil interests
Land owner groups

Opposing

Alaska Mental Health Association
Represented by Attorney Gottstein
Vern Weiss and Earl Hilliker
Represented by Attorney Walker

Rather than try to summarize the entire nine years of litigation and all the parties positions in this letter, The committee is going to use the following procedure in an effort to be an "honest broker":

1) Provide each AKAMI Board member and Affiliate President a copy of Judge Greene's excellent 58 page decision that sets out background and history, a detailed summary of the proposed settlement, the standards for approval of a settlement, a detailed discussion of each objection to the settlement raised by attorneys Gottstein and Walker, a discussion of the risks of future litigation and a review of the valuation issues. If we write a letter to all our members we will not be able to include the Judge's decision.

2) Provide each member the August 10, 1994 position paper prepared by those favoring the settlement and the August 26, 1994 position paper prepared by attorneys Gottstein and Walker.

I will say up front that the Alaska Alliance Evaluation Committee favors the HB 201 settlement with the qualifications noted below. We believe the August 10, 1994

position paper by Jeff Jesse to be closer to our own position and more accurately reflects our view of the settlement. So we would ask that anyone receiving this letter to give the August 10, 1994 letter a careful reading. Our committee would also add an important cautionary note to all our members prompted by what we consider to be questionable communication with some of our members by one of the attorneys. This was a pre-filled out response to Judge Greene prepared by Attorney Gottstein and mailed to our members. This complex issue is of the utmost importance to us, and requires careful deliberation. We doubt that forms already filled out by one of the attorneys opposed to the litigation will have much impact on Judge Greene's decision one way or the other. We ask that our members take all views including ours into consideration and make a well-reasoned decision.

Attorneys opposing the settlement raised several valid points before Judge Greene which we have been working to get resolved and included in the settlement. Judge Greene while granting preliminary approval of the settlement on July 29, 1994 was concerned about these particular matters. Attorneys Jesse and Volland and our AKAMI President, John Malone, have been working almost nonstop to resolve these final issues holding up a settlement everyone can live with. As you are aware there will be a special session on September 26-29, 1994 in which the following issues raised by those opposing the settlement will be resolved:

- 1) Substitute land will be included in the settlement for the 116,000 acres of land in the Salcha area (Fairbanks) which can not be legally conveyed at this time as a part of the settlement.
- 2) All \$200 million of the cash payment will be deposited in the corpus of the trust prior to a final settlement.
- 3) Technical errors in the list of land to be conveyed will be corrected.

There are three additional issues which have been argued by counsel opposed to settlement which should not impede the HB 201 settlement.

4) If the proposed settlement is not approved by December 15, 1994, certain punitive "cram down" provisions in HB 201 go into effect. In all likelihood these legislative efforts would be held to be invalid by the court. In any case, the parties most likely to invoke them are the two attorneys opposing the settlement. This issue in our minds rates little importance in evaluating the settlement.

5) At the July 1994, hearing before Judge Greene attorneys for the State of Alaska assured Judge Greene in open court and on record "that if there was a material change, the class would have all the claims they have today and would be free to assert them." In other words, Judge Greene asserted in her opinion in case of a breach by the State the beneficiaries would be free to file a new action asserting all claims they have today. Attorneys Walker and Gottstein want these statements

made part of the settlement agreement.

6) Additionally, Commissioner Noah's testimony at this July 1994 hearing that the State had previously not managed the Trust with regard to its fiduciary obligations, has not met these fiduciary obligations in the past but must do so, regardless of this litigation.

Attorneys Walker and Gottstein also want the statements of Commissioner Noah to be made part of the settlement agreement, and we agree. We both support this and we are working to make this happen. We believe that it will happen by the time you receive this letter or by the end of the special session. With these six corrections all requests, except the following two made by the two opposing attorneys, will have been met (see the attached September 5, 1994 letter from attorney Walker to Senate President Halford):

1) They wish to fashion a compromise regarding identification of the encumbrances on and survey the land to be conveyed by the Trust. It must be remembered that most of the land in this State has not been surveyed and the encumbrances are unknown. The State received this land from the Federal government. The Trust is receiving the same degree of title that the State had received from the Federal Government. The Trust will have to resolve the individual survey and encumbrance problems as they arise at the time of disposal. This is not a valid basis for preventing a settlement.

2) They wish to include the coal resources that are a part of the original Trust grant in the reconstruction package. As we know, neither party can get everything they wish in a settlement. Judge Greene made a detailed twelve page analysis of the value being received by the beneficiaries (see page's 45-57) which I am not going to repeat. Our committees' analysis is that the value received outweighs the considerable risk of litigation.

The committee wishes to make two final points. First, we believe Judge Greene has probably overstated what is possible in a case of breach by the State when she said "they would be free to file a new action asserting all the claims they have today." We believe there are certain lands on which we could lose our leverage once this settlement is signed. We believe the following would likely be lost if a future breach occurred:

1) We would not be able to reassert claims to 40,000 acres of "Mom and Pop" land once settlement is completed. However, prior to this settlement Mr. Gottstein had already gone on record indicating the tenuous hold we have on these lands and his willingness to release these "hostages."

2) We may be able to reassert claims on 10,000 acres of Municipal lands.

3) We may be able to reassert claims on the remaining approximately 385,000 acres of legislatively designated lands, as they would remain in State ownership.

Most likely any future court action involving a reassertion of claims on original trust lands due to a material breach of this agreement, would first be viewed by how this litigation is being dismissed. Under the current proposed settlement and statute, we are dismissing "with prejudice." This means that we may have given up the right to reassert claims to the trust lands conveyed under this agreement. (These lands are the previously described 435,000 acres.) Being bound by this prejudice would in all probability be weighed against the enforcement provisions contained in the proposed settlement agreement. This prejudice should not limit or render those provisions meaningless. There is probably no way anyone can say with any degree of certainty, under this or any other settlement, of how we would prevail in the event of future legal action over a material breach in regard to the reassertion of claims to the original trust lands that will be conveyed by this settlement.

However, it must be remembered that we are not without security in the case of a breach by the State. We have 935,000 acres of land, \$200 million in cash and the likely right to reassert claims to the 385,000 acres of legislatively designated land, and possibly the 10,000 acres of Municipal lands.

As our second and final point, we favor the settlement because, it is now or never. We say this for the following reasons:

- 1) If this settlement fails there will not be a "settlement number five." Litigation is then our only recourse.
- 2) Such litigation would be conducted in a very hostile public, legislative and judicial environment.
- 3) Any future settlement in this case because of the extreme complexity would be subject to as many, or more problems.
- 4) Our AKAMI leadership has not been happy with the representation we have received in several instances over the last nine years. "Our attorney" is one of the opposing attorneys and the leadership feels that many times we were not consulted and that our input was disregarded. There is little assurance that we would be treated any differently in the future.

With all of the preceding in mind, we must remain focused on what this settlement really does for us. No one is advocating that this be viewed as a perfect settlement. As previously stated, it is the result of complex negotiations involving very complex issues that necessarily involved a great many players all of whom desired particular outcomes from the negotiations. This would be true of any negotiated settlement in this matter. In our minds, the benefits achieved far exceed any we would receive in a litigated settlement. Reference is made to the August 10, 1994 position paper by Jeff Jesse which is attached to this letter and sets out the list of benefits gained by virtue of the settlement.

settlement. Reference is made to the August 10, 1994 position paper by Jeff Jesse which is attached to this letter and sets out the list of benefits gained by virtue of the settlement.

In conclusion, we must remember that we represent many hundreds of constituents that are direct beneficiaries of mental health services, their families, friends and supporters when we speak. We are all responsible for a well-reasoned position in this matter. Therefore, we urge your support for the HB 201 settlement and ask you to communicate this support through letters and petitions from each AKAMI Affiliate to Judge Greene.

Sincerely,

Patrick E. Murphy

Patrick E. Murphy

Signed by:

Date 9/19/94 Dick Wilson *Dick Wilson*

Date 9-19-94 Wes Terwilliger *Wesley B. Terwilliger*

Date 9-19-94 Tom Ryan *Tom Ryan*

MEMORANDUM

Department of Natural Resources

State of Alaska

Division of Land

TO: Commissioner Noah

DATE: September 23, 1994

TELEPHONE NO.: 762-2239

FROM: Bruce Phelps, Project Manager ^{Fr}
Mental Health Settlement Unit

SUBJECT: Explanation of Land List
Revisions

The State and Plaintiffs who favor settlement agreed to review parcels designated or not designated as Trust land to ensure that each side obtained the benefit of the bargain. The parties in the settlement agreed that certain types of land would be designated as Trust land (such as those that are unencumbered, subject only to leases. The parties also agreed that certain types of land would not be designated as Trust land (such as those sold to moms & pops, within LDA's, lands conveyed to municipalities, subject to coal leases, or within an agricultural project.

The land list corrections address parcels which were not correctly identified in the April 28, 1994 list.

The following description is organized by the category of the land list revisions:

OTL - Fee Estate

Additions: 86 parcels, 4,245 acres, were added for the following reasons:

- * They were missed or incorrectly identified in the original title research and the parcel is appropriate for conveyance. Examples include parcels that were simply missed or that had been sub-parcelized and the conveyable portion of the parcel was not included.
- * The parties agreed that certain parcels containing unused or vacant areas of an area managed by a state agency could be conveyed. Examples include areas of unused land or no longer needed gravel pits.

Deletions: 30 parcels, 3523 acres, were deleted for the following reasons:

- * Parcels were incorrectly identified as conveyable in the original title research and were later found to be non conveyable. Parcels were conveyed out of state ownership or contained public uses that had been consistently classified as non-conveyable. For example, a QCD was found to exist or a parcel was issued as a community park.
- * The parties agreed that certain parcels were appropriate for deletion because they contained sensitive public facilities or areas.

OTL - Hydrocarbon Only

Additions: 10 parcels, 1,508 acres, were added because DNR had agreed to convey the hydrocarbon portion of the mineral estate within those areas of the Cook Inlet Basin south of the Little Susitna River that DNR recognized as having some O&G potential. Ten tracts were missed.

Deletions: 7 parcels, 104 acres, were deleted because certain parcels that had been identified as conveyable hydrocarbon (only) are now included as conveyable under the fee estate. They were deleted from the hydrocarbon list to avoid confusion over which portion of the estate is being conveyed.

OTL - Coal, and O&G Only

Additions: 17 parcels, 687 acres, were added because subsequent title research uncovered that the state still owns the coal, oil and gas portion of the mineral estate to 17 parcels within the Kenai peninsula. These parcels were missed in the 1988 title research and DNR classified this area as conveyable for the hydrocarbon portion of the mineral estate.

OTL - Mineral Estate Only

Deletions: 2 parcels; 56 acres. DNR conveyed only the mineral estate within the Matanuska Valley Moose Range LDA. Recent title research determined that there were two private inholdings within the LDA boundary. Private inholdings are excluded from the LDA.

Other State Land - Fee Estate

Additions: 7 parcels; 34 acres. The parties agreed to re-examine the factual reasons why DNR objected to parcels being added to the Trust. Seven parcels were added because the original reason for the objection was no longer found to be valid or portions of the parcel were appropriate for conveyance.

Deletions: 45 parcels, 8,917 acres. Those parcels containing school trust land were deleted. The State and Plaintiffs who favor settlement did not want to create another trust problem, this time involving the school trust. The previous settling Plaintiffs were not concerned with this potential problem and DNR had consistently used these types of lands in previous settlements and exchanges. In addition, the public use area (C5137 acres) of the Fort Knox mining project in Fairbanks was also deleted. The Plaintiffs, State and Amex (Ft. Knox) had previously agreed that this public use area would not be designated as Trust land.

Other State Land - Hydrocarbon Only

Additions: 1 parcel, 160 acres. A parcel having conveyable hydrocarbon portion of the mineral estate within the Kenai Peninsula was missed. This area had been consistently classified as conveyable (hydrocarbon) only.

Other State Land - Mineral Estate Only

Deletion: The Salcha mineral estate parcel was deleted (117,000 acres) because of a military withdrawal and the presence of a bombing/firing range.

Addition: The Salcha mineral estate replacement parcel was added (184,000 acres) to replace the initial parcel. The additional acreage was required to allow an equal value replacement, required under the Settlement Agreement.

Commissioner Noah
September 23, 1994

page 3

PARCEL/ACREAGE SUMMARY

	<u>Parcels</u>	<u>Acres</u>
Fee Estate		
Additions	93	4,279
Deletions	<u>(75)</u>	<u>(12,440)</u>
Net	18	(8,161)
 Mineral Estate		
Additions	30	186,675
Deletions	<u>(9)</u>	<u>(116,906)</u>
Net	21	69,769
 Fe Estate & ME		
Additions	123	190,954
Deletions	<u>(84)</u>	<u>129,346</u>
Net	39	(61,608)

** Mental Health PSL/OTL Data -- 21SEP94 --
 ** summary by election district **

ELECDISI	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
700 (unknown)		0	1	0.00	0.18
A01 Ketchikan		8	5	937.26	1,857.13
A02 Sitka-Wrangell		2	0	4.47	0.00
B03 Downtown Juneau		4	0	4.85	0.00
B04 Hendenhall Valley		2	1	402.32	101.54
C05 Southeast Islands		23	2	362.27	80.24
D07 Homer		6	2	58.09	147.29
D08 Seward-Soldotna		4	5	18.72	138.72
E09 Kenai-Nikiski		20	1	1,047.42	80.00
N27 Palmer		4	3	569.84	71.50
N28 Wasilla-Talkeetna		14	17	1,422.13	380.60
O29 University-Ester		6	3	696.11	690.31
Q33 NE Fairbanks		13	28	184,599.85 *	118,436.24
Q34 North Pole-Denali		9	13	606.03	2,089.57
R36 Rural Interior		7	4	225.79	136.31
		===== 122	===== 85	===== 190,955.16 **	===== 124,209.62

* Increase in acreage (mineral estate only) required for equal value exchange to replace parcel F82863.
 ** Increase in acreage in large part required for equal value exchange to replace parcel F82863. Only the mineral estate in this estate is being covered.

** Mental Health PSL/OTL Data -- 21SEP94 --
 ** summary by borough **

BOROI	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
00 (not in Borough)		15	5	300.63	159.26
03 Juneau City & Borough		6	J	407.17	101.54
04 Sitka City & Borough		1	1	2.32	0.18
06 Denali Borough		1	2	7.20	1,280.00
07 Fairbanks North Star Borough		26	41	185,854.41 *	119,936.12
08 Haines Borough		17	1	329.96	57.29
09 Kenai Peninsula Borough		30	8	1,124.23	366.00
10 Ketchikan Gateway Borough		8	5	937.26	1,857.13
13 Matanuska-Susitna Borough		18	20	1,991.97	452.10
		===== 122	===== 84	===== 190,955.16 **	===== 124,209.62

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BORO	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
00 (not in Borough)	C20797	1	0	1.29	0.00
	C20798	1	0	1.38	0.00
	C20799	1	0	1.53	0.00
	C20800	1	0	1.11	0.00
	C20817	1	0	14.00	0.00
	C70925	1	0	13.00	0.00
	CRM-1038	0	1	0.00	22.95
	CRM-2086	1	0	2.15	0.00
	FM-1080	1	0	9.55	0.00
	FM-1175	0	1	0.00	119.23
	FM-1175-01	1	0	33.00	0.00
	FM-1175-02	1	0	119.23	0.00
	FM-1176	0	1	0.00	3.33
	FM-1179	1	0	17.91	0.00
	FM-1204	1	0	40.38	0.00
	FM-1415	0	1	0.00	8.75
	FM-1415-01	1	0	19.10	0.00
	FM-1553-02	1	0	24.00	0.00
	FM-1560	0	1	0.00	5.00
	FM-1605	1	0	3.00	0.00

00 (not in Borough)		15	5	300.63	159.26
03 Juneau City & Borough	CRM-0923	1	0	386.20	0.00
	CRM-1138-03	1	0	16.12	0.00
	CRM-1227	1	0	1.05	0.00
	CRM-1229	1	0	1.25	0.00
	CRM-1246	1	0	1.25	0.00
	CRM-1247	1	0	1.30	0.00
	CRM-5029	0	1	0.00	101.54

03 Juneau City & Borough		6	1	407.17	101.54
04 Sitka City & Borough	C20571	1	0	2.32	0.00
	CRM-1594	0	1	0.00	0.18

04 Sitka City & Borough		1	1	2.32	0.18
06 Denali Borough	F20692	0	1	0.00	640.00
	F20698	0	1	0.00	640.00
	FM-1663-02	1	0	7.20	0.00

06 Denali Borough		1	2	7.20	1,280.00
07 Fairbanks North Star Borough	F20284	0	1	0.00	240.00
	F20285	0	1	0.00	80.00
	F20312	0	1	0.00	320.00
	F20444	0	1	0.00	80.00
	F20445	0	1	0.00	4.64
	F20446	0	1	0.00	5.15

BORO	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
07 Fairbanks North Star Borough	F20447	0	1	0.00	4.69
	F20448	0	1	0.00	4.64
	F20449	0	1	0.00	4.64
	F20450	0	1	0.00	3.77
	F20451	0	1	0.00	13.86
	F20452	0	1	0.00	6.79
	F20453	0	1	0.00	5.30
	F20454	0	1	0.00	5.00
	F20455	0	1	0.00	5.00
	F20456	0	1	0.00	5.03
	F20457	0	1	0.00	4.13
	F20458	0	1	0.00	4.58
	F20459	0	1	0.00	5.25
	F20460	0	1	0.00	5.03
	F20461	0	1	0.00	5.13
	F20532-001	0	1	0.00	19.46
	F20530.002	0	1	0.00	3.20
	F20530.003	0	1	0.00	400.00
	F70015	0	1	0.00	640.00
	F82863	0	1	0.00	116,745.26
	F92863-R	1	0	184,320.00	0.00
	FM-0138	0	1	0.00	7.00
	FM-0138-01	1	0	3.50	0.00
	FM-0138-02	1	0	4.46	0.00
	FM-0160	0	1	0.00	132.96
	FM-0160-01	1	0	132.60	0.00
	FM-0160-03	1	0	0.36	0.00
	FM-0202	0	1	0.00	34.75
	FM-0202-01	1	0	34.75	0.00
	FM-0221	0	1	0.00	57.15
	FM-0221-01	1	0	2.50	0.00
	FM-0221-03	1	0	56.70	0.00
	FM-0221-04	1	0	0.45	0.00
	FM-0231-201	1	0	16.80	0.00
	FM-0231-202	1	0	15.00	0.00
	FM-0231-204	1	0	10.33	0.00
	FM-0389-02	1	0	0.01	0.00
	FM-0429	0	1	0.00	10.00
	FM-0429-02	1	0	7.00	0.00
	FM-0429-03	1	0	2.00	0.00
	FM-0439	0	1	0.00	112.55
	FM-0439-01	1	0	112.54	0.00
	FM-0540	0	1	0.00	6.50
	FM-0690-B	0	1	0.00	2.21
	FM-0691-G	0	1	0.00	127.00
	FM-0691-G01	1	0	14.00	0.00
	FM-0691-G03	1	0	95.00	0.00
	FM-0706	0	1	0.00	238.50
	FM-0706-01	1	0	238.00	0.00
	FM-0718	0	1	0.00	1.49

* Increase in acreage (mineral estate only) required for equal value exchange to replace parcel F82863.

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ELECDISI	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
700 (unknown)	CRM-1594	0	1	0.00	0.18
A01 Ketchikan	CRM-2617	0	1	0.00	200.37
	CRM-2617-01	1	0	157.00	0.00
	CRM-2950	1	0	20.55	0.00
	CRM-3129-02	0	1	0.00	1,500.88
	CRM-3129-02A	1	0	140.00	0.00
	CRM-3157-02	0	1	0.00	152.00
	CRM-3157-02A	1	0	138.00	0.00
	CRM-3158-01	1	0	473.34	0.00
	CRM-3166	0	1	0.00	3.58
	CRM-3171	1	0	3.67	0.00
	CRM-3392-01	1	0	1.31	0.00
	CRM-3392-02	1	0	3.39	0.00
	CRM-3392-03	0	1	0.00	0.30
-----		8	5	937.26	1,857.13
A02 Sitka-Wrangell	C20571	1	0	2.32	0.00
	CRM-2086	1	0	2.15	0.00
-----		2	0	4.47	0.00
B03 Downtown Juneau	CRM-1227	1	0	1.05	0.00
	CRM-1229	1	0	1.25	0.00
	CRM-1246	1	0	1.25	0.00
	CRM-1247	1	0	1.30	0.00
-----		4	0	4.85	0.00
B04 Mendenhall Valley	CRM-0923	1	0	386.20	0.00
	CRM-1138-03	1	0	16.12	0.00
	CRM-5029	0	1	0.0	101.54
-----		2	1	402.32	101.54
C05 Southeast Islands	C29797	1	0	1.29	0.00
	C20798	1	0	1.38	0.00
	C20799	1	0	1.53	0.00
	C20800	1	0	1.11	0.00
	C20817	1	0	14.00	0.00
	C70225	1	0	13.00	0.00
	CRM-0022	1	0	36.86	0.00
	CRM-0023	1	0	17.10	0.00
	CRM-0028	1	0	0.29	0.00
	CRM-0029	1	0	11.35	0.00
	CRM-0036	1	0	28.36	0.00
	CRM-0197-02	1	0	20.00	0.00
	CRM-0198-02	1	0	20.00	0.00
	CRM-0199-02	1	0	20.00	0.00

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ELECDISI	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
C05 Southeast Islands	CRM-0206-02	1	0	25.00	0.00
	CRM-0259	1	0	12.08	0.00
	CRM-0377	1	0	3.33	0.00
	CRM-0393-02	1	0	40.00	0.00
	CRM-0505	0	1	0.00	57.29
	CRM-0571	1	0	17.39	0.00
	CRM-0572	1	0	19.34	0.00
	CRM-0605-B	1	0	40.00	0.00
	CRM-0704	1	0	11.37	0.00
	CRM-0723-01	1	0	7.50	0.00
	CRM-1038	0	1	0.00	22.95
-----		23	2	362.27	80.24
D07 Homer	S20077	0	1	0.00	120.00
	SM-0315-01	1	0	5.00	0.00
	SM-0342	1	0	0.22	0.00
	SM-0475	0	1	0.00	27.28
	SM-0476	1	0	19.95	0.00
	SM-0484	1	0	27.08	0.00
	SM-5012	1	0	4.61	0.00
	SM-5025	1	0	1.23	0.00
-----		6	2	58.09	147.28
D08 Seward-Soldotna	S20012	0	1	0.00	120.00
	SM-0494-A	1	1	10.00	10.00
	SM-0699	1	1	2.47	2.47
	SM-0700	1	1	2.70	2.70
	SM-0702	1	1	3.55	3.55
-----		4	5	16.72	138.72
E09 Kenai-Nikiski	S50219	1	0	160.00	0.00
	SM-0297-B	1	0	120.00	0.00
	SM-1420	1	1	80.00	80.00
	SM-5500	1	0	40.00	0.00
	SM-5501	1	0	39.18	0.00
	SM-5502	1	0	29.61	0.00
	SM-5503	1	0	37.93	0.00
	SM-5504	1	0	20.75	0.00
	SM-5505	1	0	31.18	0.00
	SM-5506	1	0	14.98	0.00
	SM-5507	1	0	80.00	0.00
	SM-5508	1	0	25.17	0.00
	SM-5509	1	0	80.00	0.00
	SM-5510	1	0	37.61	0.00
	SM-5511	1	0	27.93	0.00
	SM-5512	1	0	39.87	0.00
	SM-5513	1	0	40.00	0.00

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BOROI	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL	
07 Fairbanks North Star Borough	FM-0718-01	1	0	1.34	0.00	
	FM-0719	0	1	0.00	1.50	
	FM-0719-01	1	0	0.15	0.00	
	FM-0749-A	1	0	200.00	0.00	
	FM-0788	0	1	0.00	6.25	
	FM-0824	0	1	0.00	9.96	
	FM-0824-02	1	0	9.96	0.00	
	FM-0952-A	0	1	0.00	567.76	
	FM-0952-A01	1	0	566.76	0.00	
	FM-1008-02	1	0	7.80	0.00	
	FM-5003	1	0	2.40	0.00	

	07 Fairbanks North Star Borough		26	41	185,854.41 **	119,936.12
08 Haines Borough	CRM-0022	1	0	36.86	0.00	
	CRM-0023	1	0	17.10	0.00	
	CRM-0028	1	0	0.29	0.00	
	CRM-0029	1	0	11.35	0.00	
	CRM-0036	1	0	28.36	0.00	
	CRM-0197-02	1	0	20.00	0.00	
	CRM-0198-02	1	0	20.00	0.00	
	CRM-0199-02	1	0	20.00	0.00	
	CRM-0206-02	1	0	25.00	0.00	
	CRM-0259	1	0	12.08	0.00	
	CRM-0377	1	0	3.33	0.00	
	CRM-0393-02	1	0	40.00	0.00	
	CRM-0505	0	1	0.00	57.29	
	CRM-0571	1	0	17.38	0.00	
	CRM-0572	1	0	19.34	0.00	
	CRM-0605-B	1	0	40.00	0.00	
	CRM-0704	1	0	11.37	0.00	
	CRM-0723-01	1	0	7.50	0.00	

	08 Haines Borough		17	1	329.96	57.29
	09 Kenai Peninsula Borough	S20012	0	1	0.00	120.00
S20077		0	1	0.00	120.00	
S50219		1	0	160.00	0.00	
SM-0315-01		1	0	5.00	0.00	
SM-0342		1	0	0.22	0.00	
SM-0475		0	1	0.00	27.28	
SM-0476		1	0	19.95	0.00	
SM-0484		1	0	27.08	0.00	
SM-0494-A		1	1	10.00	10.00	
SM-0699		1	1	2.47	2.47	
SM-0700		1	1	2.70	2.70	
SM-0702		1	1	3.55	3.55	
SM-0997-B		1	0	120.00	0.00	
SM-1420		1	1	80.00	80.00	
SM-5012		1	0	4.61	0.00	

BOROI	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL	
09 Kenai Peninsula Borough	SM-5025	1	0	1.23	0.00	
	SM-5500	1	0	40.00	0.00	
	SM-5501	1	0	39.18	0.00	
	SM-5502	1	0	29.61	0.00	
	SM-5503	1	0	37.93	0.00	
	SM-5504	1	0	20.75	0.00	
	SM-5505	1	0	37.18	0.00	
	SM-5506	1	0	14.98	0.00	
	SM-5507	1	0	80.00	0.00	
	SM-5508	1	0	25.17	0.00	
	SM-5509	1	0	80.00	0.00	
	SM-5510	1	0	37.61	0.00	
	SM-5511	1	0	27.93	0.00	
	SM-5512	1	0	39.87	0.00	
	SM-5513	1	0	40.00	0.00	
	SM-5514	1	0	80.00	0.00	
	SM-5515	1	0	26.65	0.00	
	SM-5516	1	0	30.56	0.00	

	09 Kenai Peninsula Borough		30	0	1,124.23	366.00
	10 Ketchikan Gateway Borough	CRM-2617	0	1	0.00	200.37
CRM-2617-01		1	0	157.00	0.00	
CRM-2950		1	0	20.55	0.00	
CRM-3129-02		0	1	0.00	1,500.88	
CRM-3129-02A		1	0	140.00	0.00	
CRM-3157-02		0	1	0.00	152.00	
CRM-3157-02A		1	0	138.00	0.00	
CRM-3158-01		1	0	473.34	0.00	
CRM-3166		0	1	0.00	3.58	
CRM-3171		1	0	3.67	0.00	
CRM-3392-01		1	0	1.31	0.00	
CRM-3392-02		1	0	3.39	0.00	
CRM-3392-03		0	1	0.00	0.30	

10 Ketchikan Gateway Borough		8	5	937.26	1,857.13	
13 Matanuska-Susitna Borough	S20535	0	1	0.00	40.00	
	S20537	0	1	0.00	0.71	
	S20538	0	1	0.00	0.71	
	S20539	0	1	0.00	0.79	
	S20540	0	1	0.00	0.85	
	S20541	0	1	0.00	0.77	
	S20542	0	1	0.00	0.91	
	S20543	0	1	0.00	1.01	
	S20544	0	1	0.00	0.63	
	S20545	0	1	0.00	0.61	
	S20546	0	1	0.00	0.78	
	S20547	0	1	0.00	0.84	
S20548	0	1	0.00	0.97		

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ELECDS1	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL	
E09 Kenai-Nikolski	SM-5514	1	0	80.00	0.00	
	SM-5515	1	0	26.65	0.00	
	SM-5516	1	0	30.56	0.00	
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E09 Kenai-Nikolski		20	1	1,047.42	80.00	
N27 Palmer	S20569	0	1	0.00	15.00	
	SM-0018	1	0	315.48	0.00	
	SM-0243-02	1	0	14.65	0.00	
	SM-0279-A	0	1	0.00	24.00	
	SM-U280-A	0	1	0.00	32.50	
	SM-5013	1	0	229.71	0.00	
	SM-5014	1	0	10.00	0.00	
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N27 Palmer		4	3	569.84	71.50	
N28 Wasilla-Talkeetna	S20535	0	1	0.00	40.00	
	S20537	0	1	0.00	0.71	
	S20538	0	1	0.00	0.71	
	S20539	0	1	0.00	0.79	
	S20540	0	1	0.00	0.85	
	S20541	0	1	0.00	0.77	
	S20542	0	1	0.00	0.91	
	S20543	0	1	0.00	1.01	
	S20544	0	1	0.00	0.63	
	S20545	0	1	0.00	0.61	
	S20546	0	1	0.00	0.78	
	S20547	0	1	0.00	0.84	
	S20548	0	1	0.00	0.97	
	S20567	0	1	0.00	320.00	
	SM-1624	1	0	0.45	0.00	
	SM-1625	1	0	1.27	0.00	
	SM-1626	1	0	2.91	0.00	
	SM-1627	1	0	3.51	0.00	
	SM-1628	1	0	4.89	0.00	
	SM-1831	1	0	3.33	0.00	
	SM-1845	1	0	475.80	0.00	
	SM-1848	1	0	598.87	0.00	
	SM-1860	1	0	297.04	0.00	
	SM-2004	1	1	5.00	5.00	
	SM-2007	1	1	1.01	1.01	
	SM-2191	0	1	0.00	5.00	
	SM-2503	1	0	16.36	0.00	
	SM-5007	1	0	9.76	0.00	
	SM-5016	1	0	1.94	0.00	
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	N28 Wasilla-Talkeetna		14	17	1,422.13	380.60
O29 University-Ester	FM-0389-02	1	0	0.01	0.00	
	FM-0429	0	1	0.00	10.00	

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ELECDS1	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
O29 University-Ester	FM-0429-02	1	0	7.00	0.00
	FM-0429-03	1	0	2.00	0.00
	FM-0439	0	1	0.00	112.55
	FM-0439-01	1	0	112.54	0.00
	FM-0952-A	0	1	0.00	567.76
	FM-0952-A01	1	0	566.76	0.00
	FM-1008-02	1	0	7.80	0.00
	-----		-----		-----
O29 University-Ester		6	3	696.11	690.31
Q33 NE Fairbanks	F20284	0	1	0.00	240.00
	F20285	0	1	0.00	80.00
	F20312	0	1	0.00	320.00
	F20444	0	1	0.00	80.00
	F20445	0	1	0.70	4.64
	F20446	0	1	0.00	5.15
	F20447	0	1	0.00	4.62
	F20448	0	1	0.00	4.64
	F20449	0	1	0.00	4.64
	F20450	0	1	0.00	3.77
	F20451	0	1	0.00	13.86
	F20452	0	1	0.00	6.79
	F20453	0	1	0.00	5.30
	F20454	0	1	0.00	5.00
	F20455	0	1	0.00	5.00
	F20456	0	1	0.00	5.03
	F20457	0	1	0.00	4.13
	F20458	0	1	0.00	4.58
	F20459	0	1	0.00	5.25
	F20460	0	1	0.00	5.03
	F20461	0	1	0.00	5.13
	F70015	0	1	0.00	640.00
	F82863	0	1	0.00	116,745.26
	F82863-R	1	0	184,320.00*	0.00
	FM-0138	0	1	0.00	7.00
	FM-0138-01	1	0	3.50	0.00
	FM-0138-02	1	0	4.46	0.00
	FM-0160	0	1	0.00	132.96
FM-0160-01	1	0	132.60	0.00	
FM-0160-03	1	0	0.36	0.00	
FM-0202	0	1	0.00	34.75	
FM-0202-01	1	0	34.75	0.00	
FM-0221	0	1	0.00	57.15	
FM-0221-01	1	0	2.50	0.00	
FM-0221-03	1	0	56.70	0.00	
FM-0221-04	1	0	0.45	0.00	
FM-0231-201	1	0	16.80	0.00	
FM-0231-202	1	0	15.00	0.00	
FM-0231-204	1	0	10.33	0.00	
FM-0540	0	1	0.00	6.50	

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ELEC/DIST	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
Q33 NE Fairbanks	FM-5003	1	0	2.40	0.00
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Q33 NE Fairbanks		13	28	184,599.85 **	118,436.24
Q34 North Pole-Denali	F20530.001	0	1	0.00	19.46
	F20530.002	0	1	0.00	3.20
	F20530.003	0	1	0.00	400.00
	F20692	2	1	0.00	640.00
	F20698	6	1	0.00	640.00
	F82863	0	1	0.00	0.00
	FM-0690-B	0	1	0.00	2.21
	FM-0691-G	0	1	0.00	127.00
	FM-0691-G01	1	0	14.00	0.00
	FM-0691-G03	1	0	95.00	0.00
	FM-0706	0	1	0.00	238.50
	FM-0706-01	1	0	238.00	0.00
	FM-0718	0	1	0.00	1.49
	FM-0718-01	1	0	1.34	0.00
	FM-0719	0	1	0.00	1.50
	FM-0719-01	1	0	0.15	0.00
	FM-0749-A	1	0	200.00	0.00
	FM-0788	0	1	0.00	6.25
	FM-0824	0	1	0.00	9.96
	FM-0824-02	1	0	9.96	0.00
	FM-1204	1	0	40.38	0.00
	FM-1663-02	1	0	7.20	0.00
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Q34 North Pole-Denali		9	13	606.03	2,089.57
R36 Rural Interior	FM-1080	1	0	9.55	0.00
	FM-1175	0	1	0.00	119.23
	FM-1175-01	1	0	33.00	0.00
	FM-1175-02	1	0	119.23	0.00
	FM-1176	0	1	0.00	3.33
	FM-1179	1	0	17.91	0.00
	FM-1415	0	1	0.00	8.75
	FM-1415-01	1	0	19.10	0.00
	FM-1553-02	1	0	24.00	0.00
	FM-1560	0	1	0.00	5.00
	FM-1605	1	0	3.00	0.00
-----		-----	-----	-----	-----
R36 Rural Interior		7	4	225.79	136.31
=====		=====	=====	=====	=====
		122	85	190,955.16 **	124,209.62

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BORO1	PARCEL	PRCL_ADD	PRCL_DEL	ACREADD	ACREDEL
13 Matanuska-Susitna Borough	S20567	0	1	0.00	320.00
	S20569	0	1	0	15.00
	SM-0018	1	0	315.4	0.00
	SM-0243-02	1	0	14.65	0.00
	SM-0279-A	0	1	0.00	24.00
	SM-0280-A	0	1	0.00	32.50
	SM-1624	1	0	0.45	0.00
	SM-1625	1	0	1.27	0.00
	SM-1626	1	0	2.91	0.00
	SM-1627	1	0	3.51	0.00
	SM-1628	1	0	4.89	0.00
	SM-1831	1	0	3.33	0.00
	SM-1845	1	0	475.80	0.00
	SM-1848	1	0	598.87	0.00
	SM-1860	1	0	297.04	0.00
	SM-2004	1	1	5.00	5.00
	SM-2007	1	1	1.01	1.01
	SM-2191	0	1	0.00	5.00
	SM-2503	1	0	16.36	0.00
	SM-5007	1	0	9.76	0.00
	SM-5013	1	0	229.71	0.00
	SM-5014	1	0	10.00	0.00
	SM-5016	1	0	1.94	0.00

13 Matanuska-Susitna Borough		18	20	1,991.97	452.10
=====					
		122	84	190,955.16 **	124,209.62

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Deane Materials

from
Koster

September 21, 1994, 5:00 p.m.

SECTION-BY-SECTION ANALYSIS OF SPECIAL SESSION SUBSTANTIVE BILL

Sections 1 and 17 change the name of the new account into which trust income will be deposited and from which the Trust Authority will fund grants and contracts (AS 37.14.036) from "mental health trust income account" to "mental health trust settlement income account." This will distinguish that new account from the old mental health trust income account (AS 37.14.011) that will be repealed when it is no longer needed to fund existing mental health appropriations. Section 19 gives these sections a December 16, 1994 effective date.

Section 2 provides that the deadline for dismissal of the case applies only to proceedings in the superior court and not to appeals or a petition for certiorari to the United States Supreme Court. This will prevent a party using the delay inherent in appeals or certiorari to prevent the settlement taking effect. Sections 14 and 15 provide for the repeal of the settlement incentive provisions in the unlikely event the superior court's dismissal of the case is reversed on appeal or on a petition for certiorari to the United States Supreme Court; in other words, the plaintiffs will not get the benefits of the settlement unless the state and the public also get the benefits of the settlement. In the unlikely event the superior court's dismissal is reversed, section 16 ratifies any grants and contracts made by the Trust Authority and transfers the responsibility for administering them to the Department of Health and Social Services.

Sections 3 and 18 reinstate the mental health trust income account (AS 37.14.011(a)) as of June 24, 1994 (the date of its repeal under ch. 5, FSSLA 1994). That account is the funding source for \$33,000,000 of the \$200,000,000 appropriation to capitalize the mental health trust fund (AS 37.14.031) under ch. 6, FSSLA 1994, and for other mental health capital and operating appropriations. This will ensure that those appropriations have a valid funding source. Section 12 repeals the account when it is no longer needed to fund those appropriations.

Sections 4, 6, and 7 incorporate the additions to and deletions from the lists of lands to be conveyed to the trust. The additions and deletion cure the Salcha problem and correct other errors on the original land lists. Section 5 makes a conforming amendment to ensure that the new land added to the trust remains subject to valid existing rights.

Sections 8, 9, 10, 11, and 13 repeal the governor's authority to extend the December 15, 1994 deadline. That authority is no longer necessary in light of the change made by section 2.

Section 20 gives everything but sections 1 and 17 an immediate effective date (under section 19, they take effect December 16, 1994).

September 21, 1994, 5:00 p.m.

SECTION-BY-SECTION ANALYSIS OF SPECIAL SESSION APPROPRIATION BILL

Sections 1, 2, 3, and 4 provide that, to the extent there are amounts exceeding the amounts already coming from mental health fund revenue on deposit in the general fund and the mental health trust income account, those amounts may be used as supplemental funding sources to make up any shortfalls from the funding sources for the \$200,000,000 appropriation in ch. 6, FSSLA 1994, to capitalize the mental health trust fund (AS 37.14.031). Section 1 also provides that the deadline for dismissal of the case applies only to dismissal by the superior court.

Section 5 appropriates from the general fund the amount necessary to fund appropriations from the mental health trust income account if there is not enough in that account to fund them.

Section 6 provides that any balance in the mental health trust income account on the date of its repeal is transferred to the general fund, and that any unexpended, unobligated, and unencumbered balances of appropriations from that account that lapse after the repeal of that account lapse into the general fund.

Section 7 ratifies all expenditures made in accordance with law from the mental health trust income account after June 24, 1994 (the date of its repeal under ch. 5, FSSLA 1994) and the effective date of this Act.

Section 8, 9, 10, and 13 provide that, in the unlikely event the superior court's dismissal is reversed on appeal or on a petition for certiorari to the United States Supreme Court, the \$200,000,000 appropriation to capitalize the mental health trust fund (AS 37.14.031) and any additional amounts attributable to inflation proofing that \$200,000,000 is appropriated to the general fund. They also provide, in that unlikely event, that any remaining balance in the mental health trust fund (AS 37.14.031) and the unexpended and unobligated balance in the mental health trust settlement income account (AS 37.14.036) are appropriated to the mental health trust income and proceeds account (AS 37.14.023).

Section 11 repeals the governor's authority to extend the December 15, 1994 deadline by forty-five days.

Section 12 makes sections 1 - 7 and 11 retroactive to June 24, 1994, the effective date of ch. 6, FSSLA 1994.

Section 14 gives everything but sections 8 and 9 an immediate effective date (under sections 10 and 13, sections 8 and 9 take effect only upon the superior court's dismissal of the case being reversed on appeal or on a petition for certiorari).

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and)
next friend of CARL WEISS,)
a minor child, and EARL)
HILLIKER, on behalf of)
themselves and all others)
similarly situated; the)
ALASKA MENTAL HEALTH)
ASSOCIATION, MARY C. NANUWAK)
and JOHN MARTIN, on behalf)
of themselves and all others)
similarly situated; ANITA)
BOSEL, FRANCES DOULIN, SHARON)
GOODWIN, and GABRIEL MAYOC;)
and H.L., M.K., and ALASKA)
ADDICTION REHABILITATION)
SERVICES,)

Plaintiffs,)

vs.)

STATE OF ALASKA,)

Defendant.)

Case No. 4FA-82-2208 Civil

FILED in the Trial Courts
State of Alaska, Fourth District

JUL 29 1994

By _____
Clerk, Trial Courts
Deputy

MEMORANDUM DECISION AND ORDER RE:
PRELIMINARY APPROVAL OF HB 201 PROPOSED
SETTLEMENT AGREEMENT

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I. INTRODUCTION

Two motions for preliminary approval of a new proposed settlement agreement, filed June 10, 1994, are before the court. The court held an evidentiary hearing and oral argument on July 12 - 22, 1994, regarding whether the proposed settlement should be preliminarily approved. Plaintiffs Anita Bosel, Frances Doulin, Sharon Goodwin, and Gabriel Mayoc ["Bosel"], H.L., M.K., and Alaska Addiction Rehabilitation Services ["H.L."] and defendant State of Alaska ["State"] urge the court to grant preliminary approval of the proposed settlement. Plaintiffs Vern Weiss and Earl Hilliker ["Weiss"], and the Alaska Mental Health Association, Mary C. Nanuwak, and John Martin ["AMHA"] oppose preliminary approval of the settlement.

Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited ["Public Interest Intervenors"] filed a memorandum supporting the proposed settlement. Marathon Oil Company and Union Oil Company of California ["Oil Company Intervenors"] also filed a response supporting preliminary approval of the proposed settlement.

II. BACKGROUND

This class action began in November 1982, with allegations that the State had breached its obligations to the beneficiaries of the mental health lands trust.

The mental health lands trust was created by Congress in the Alaska Mental Health Enabling Act of 1956 ["Enabling Act"]. Pub. L. No. 84-830, 70 Stat. 709 (1956). The Enabling Act transferred responsibility for mental health programs from the federal government to the Territory of Alaska and granted one million acres of land to the Territory to aid in the financial support of a comprehensive mental health program.¹ Pub. L. No. 84-830, §§ 101, 202, 70 Stat. 709 (1956). Section 202(e) stated:

All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska 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. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be disposed of in such a 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. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

Section 6(k) of the Alaska Statehood Act confirmed and transferred the mental health trust to the State. Pub. L. No. 85-508, § 6(k), 72 Stat. 339 (1958).

¹In 1956 no mental health program existed in Alaska; the federal government transported mentally ill and mentally retarded people in need of hospitalization to the Morningside Hospital in Portland, Oregon. The history surrounding passage of the Enabling Act was discussed in the court's Memorandum Decision and Order of April 27, 1988, which analyzed congressional intent regarding the beneficiaries of the trust.

The State of Alaska managed the mental health lands without maintaining separate accounting for the trust. In the 1970's there was pressure on the legislature to convey state-owned land to private individuals and municipalities. Because the mental health trust lands were some of the first land parcels to be selected by Alaska, trust lands were among the most attractive state lands for both private development and public purposes. In 1978, the legislature removed mental health lands from trust status and redesignated them as general grant lands.² Ch. 181, § 3(a), SLA 1978. A percentage of all State land revenue was to be paid to the mental health trust fund to compensate the trust, but no money was ever appropriated by the legislature to the fund. See Ch. 181 § 4, SLA 1978.

The State proceeded to transfer large amounts of original trust land after the redesignation legislation. A large amount of original mental health trust land was set aside for public purposes such as parks, recreation, and wildlife habitat. Much of the trust land located within municipal boundaries was transferred to municipalities, who later sold some land to private individuals. Many of the trust lands most suitable for development were sold to private individuals through the State's land sale programs. Overall, up to 50,000 acres were conveyed to private individuals, over 40,000 acres were conveyed to municipalities, and over 350,000

²State general grant lands are those granted to Alaska through subsections (a) and (b) of Section 6 in the Alaska Statehood Act. Pub. L. No. 85-508, § 6(a) and (b), 72 Stat. 339 (1958).

acres were placed in legislatively designated areas³ such as state forests, parks, and wildlife areas. Only about 35-40% of the original one million acres of trust land remain unencumbered and in unfettered state ownership.

Weiss and Hilliker, the original named plaintiffs, filed this lawsuit as a class action on November 26, 1982. They claimed that the State breached the trust by failing to account for trust revenues, using the revenue from trust lands for purposes other than mental health services, and redesignating trust lands as general grant lands. In January 1983, the suit was certified as a class action, and the class was defined as "all persons who are residents of the State of Alaska and who will require mental health services in the future which are not available in the State of Alaska."⁴ Weiss v. State, 4FA-82-2208, Order Certifying Action (Super. Ct. Jan. 26, 1983) (Judge Taylor). AMHA intervened in 1986 and added claims that the conveyances of trust land to third parties were invalid. In March 1987, Bosel intervened to represent

³Legislatively designated areas are lands designated by law as a state park, state forest, state game refuge, state wildlife refuge, state game sanctuary, state recreational area, state recreational river, state wilderness park, state marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range. See Ch. 66, §§ 54(6), 55(b), SLA 1991.

⁴The beneficiaries of the trust are composed of at least "those individuals suffering from psychiatric illness who may require hospitalization and the mentally defective and retarded" as well as "chronic alcoholics suffering from psychoses and senile people who as a result of their senility suffer major mental illness." Memorandum Decision and Order, at 17 (April 27, 1988).

mentally defective and mentally retarded individuals. H.L. intervened in June 1987 to represent chronic alcoholics.

In October 1985, the Alaska Supreme Court upheld the superior court's finding that the State breached its trustee obligations under the mental health land trust. State v. Weiss, 706 P.2d 681, 684 (Alaska 1985). The Supreme Court also invalidated the 1978 legislation redesignating mental health trust lands as general grant lands and held that, to the extent possible, the trust should be returned to its position prior to the legislation.⁵ The court specifically declined to rule on questions regarding the title to

⁵Specifically, the Supreme Court stated:

It follows from our conclusion that the redesignation legislation is invalid that the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. The case is remanded so that requisite findings can be made. We take this opportunity to provide some guidance to the trial court to simplify its task.

Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of the lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

State v. Weiss, 706 P.2d 681, 684 (Alaska 1985).

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4FA-82-2208 Civil
MD&O

mental health lands held by third parties.⁶ See Weiss, 706 P.2d at 684 n.4.

The parties have struggled to agree on an adequate remedy since the Supreme Court decision. Major attempts at settlement were made through legislation in 1987 (Chapter 48), 1990 (Chapter 210), and 1991 (Chapter 66). None of these proposed settlements has obtained preliminary approval.

Chapter 48 involved the concept of the State "renting" mental health lands from the trust. The trust was to be reconstituted entirely with land within legislatively-designated areas and the original trust lands not in legislatively-designated areas were to be released from trust status. The reconstituted trust was to have the same fair market value as the original one million acres of mental health lands. The State was to compensate the trust by "renting" the reconstituted trust lands at an annual amount of

⁶This issue was raised in AMHA's complaint after the Supreme Court's decision. The plaintiffs and the State disagree on which trust lands have been "sold" within the meaning of the court's opinion. The State contends that any disposition, even designation as a park, means the land has been "sold." Plaintiffs have argued that the term "sold" applies only to land conveyed to bona fide purchasers, which of course would not include municipalities. They contend that this lawsuit was sufficiently well-known that all or nearly all purchasers had at least constructive notice of the trust's interest and the State's breach of trust. See Settling Plaintiffs' Memo. Supporting Motion for Preliminary Approval, at 8 (July 1, 1992). Since it is possible that the amount of the State's past mental health expenditures exceed the value of "sold" trust land, it is possible that the trust would not receive any cash reimbursement even if substantial amounts of land were "sold." It is in the interest of the State to maximize the amount of lands "sold" and the amount of past mental health expenditures. It is in the interest of the trust to minimize both categories.

eight percent of the fair market value of trust lands with the value of the lands to be redetermined every five years. Until fair market value of the lands was established, five percent of the State's unrestricted general fund revenues was deemed to be the income of the trust. Chapter 48 also created an Alaska Mental Health Board to determine the needs of the mental health program and transmit funding recommendations to the governor and legislature.

Chapter 48 failed as a possible settlement because the parties could not determine fair market value of the trust lands. The fair market value of trust lands was estimated according to procedures approved by the Interim Mental Health Trust Commission⁷ at \$2.243 billion. The State considered this figure much too high. The Commissioner of the Department of Natural Resources wrote to the Alaska Mental Health Board on April 17, 1990, announcing that the department would not follow the procedures. Impasse resulted.

The legislature then enacted a different settlement proposal in Chapter 210, which eliminated the need for a land value determination. Chapter 210 provided for compensation to the trust in the amount of six percent of the State's unrestricted general revenues. Plaintiffs rejected this proposal because State revenues were expected to fall to a level at which the trust was unlikely to receive fair compensation for the value of trust lands. The

⁷The Interim Mental Health Trust Commission was originally established under Chapter 132, SLA 1986.

court held that the legislature could not settle the lawsuit unilaterally with such legislation, particularly in view of the Supreme Court's mandate to reconstitute the trust "to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." Memorandum Decision and Order, at 8-9 (July 9, 1990).

Plaintiffs obtained an injunction prohibiting the State from taking any further action on mental health lands. See Memorandum Decision and Order (July 9, 1990). The plaintiffs also filed lis pendens on all original mental health lands. Around 6,000 land transactions were affected by the injunction and/or lis pendens. This placed many purchasers of small parcels in a difficult position: they made all of their payments to the State for land purchased in a state land sale, but were still unable to obtain patent to the land. Because of the cloud on their title, many of these individual purchasers have found themselves unable to sell the land or obtain financing for construction. Certain developments on state land, such as mining operations, also have been delayed due to the uncertainty of title.

In May 1991, after negotiations between the State and class counsel, the Alaska Legislature passed Chapter 66. The legislation contained amendments to the state's mental health program and established a process to select land for an entirely land-based reconstitution of the mental health land trust. On April 6, 1992, a proposed settlement agreement, incorporating Chapter 66,

was signed by the State and three of the four class counsel.⁸ Because of H.L.'s allegations of improprieties during negotiations, an evidentiary hearing regarding settlement negotiations was held in September 1992, and continued in January 1993.

The legality of portions of Chapter 66 dealing with reconstitution of the mental health land trust was challenged by the Public Interest Intervenors. The portions of the Chapter 66 settlement affecting Cook Inlet oil and gas leases on state land were challenged by Marathon Oil Company and Union Oil Company of California ("Oil Company Intervenors"). The Public Interest Intervenors' challenge to Chapter 66 was addressed in the court's Memorandum Decision and Order regarding Public Interest Intervenors' Complaint (April 26, 1993). The Oil Company Intervenors' challenge to provisions in the proposed settlement which effected their oil and gas leases on state land in Cook Inlet was addressed in the court's Memorandum Decision and Order (May 14, 1993). Both decisions were appealed.⁹

On October 4, 1993, the court denied a motion made by H.L. and Bosel for partial summary judgment and held that intervening plaintiff class members have the same status as original named

⁸Counsel for Bosel, Jeff Jessee, withdrew from the Chapter 66 settlement in December 1992.

⁹If this settlement is approved, the Oil Company Intervenors plan to file motions to the Alaska Supreme Court requesting dismissal of their appeals as moot and vacation of the orders on which the appeals are based. Response of Oil Company Intervenors, at 4 (July 1, 1994).

plaintiffs and class members. If a settlement receives final approval, all members of the class will be bound by that decision.¹⁰

On December 30, 1993, the court refused to grant preliminary approval to the Chapter 66 settlement. See Memorandum Decision and Order, at 122 (Dec. 30, 1993). The court found that the proposed settlement had serious deficiencies because the agreement permitted any party to terminate the settlement agreement even after final approval and dismissal of this case. See Memorandum Decision and Order, at 121 (Dec. 30, 1993).

Negotiations of a new settlement started in January 1994. In a special session following the 1994 legislative session, HB 201 and HB 371 were passed amending Chapter 66 and establishing a new settlement.¹¹

The HB 201 settlement includes more cash and less land than the Chapter 66 settlement. It is supported by the State, Bosel, and H.L. It is opposed by Weiss and AMHA. The settlement is supported by the Public Interest Intervenors, who participated in negotiations concerning land to be included in the reconstituted trust. The Oil Company Intervenors support HB 201, but declined

¹⁰Of course class members who object to a settlement may appeal any decision granting final approval.

¹¹HB 201 has become Chapter 5, FSS SLA 1994, and the accompanying appropriations bill, HB 371, became Chapter 6, FSS SLA 1994, after Governor Hickel signed the bills on June 23, 1994. Because the settlement legislation has been called "HB 201" in most of the documents submitted to the court, this memorandum will continue to use the terms "HB 201" and "HB 371."

to sign the settlement agreement due to a disagreement with the State over provisions relating to attorneys' fees.¹²

The HB 201 settlement is summarized below. Additional information regarding the settlement and the negotiation process will be discussed as it relates to specific issues raised by the factors the court must consider in making the preliminary approval decision.

III. SUMMARY OF THE PROPOSED SETTLEMENT

The settlement components of HB 201 are contained in sections 2 through 9, 12 through 41, 43, 46, 47, 50, and 51. A proposed settlement agreement submitted with H.L.'s Motion for Preliminary Approval has been signed by the State, H.L., and Bosel. Settlement Agreement and Stipulation to Terms of Dismissal (June 10, 1994). HB 201 to a great extent incorporated the Chapter 66 provisions that are designed to improve the mental health program for beneficiaries, but section 39 of HB 201 repeals the trust reconstitution provisions of Chapter 66. HB 201 reconstituted the trust with a specific land package and a \$200 million cash payment.

¹²The Oil Company Intervenors do not support Section VI, paragraph 4 of the settlement, which states:

Attorney fees and costs shall be awarded and paid as determined by the court. Paragraph 6(e) requires dismissal of appeals to the Supreme Court because they are moot. The parties request that attorney fees be awarded as if the orders had not been appealed.

Oil Company Intervenors' Response, at 3-4 (July 1, 1994).

Most of the settlement terms become effective only if this action is dismissed and any appeals are resolved by December 15, 1994.¹³

HB 201 §§ 37.

Chapter 66 was a "process" settlement, which set guidelines for choosing the lands for return to the trust; HB 201 is a "product" settlement with lands already selected and a definite amount of money (\$200 million) appropriated in HB 371 for the trust fund.¹⁴ Section 40(a) of HB 201 returns approximately 568,000 acres of original trust land to the reconstituted trust and designates approximately 353,000 acres of other state land as substitute trust land to replace original trust land that will not be returned to the trust. The original trust land to be reconstituted into the trust includes approximately 435,000 acres in fee, approximately 55,000 acres of mineral estate, and approximately 78,500 acres of oil and gas interests. See Aff. Harry A. Noah (State M/Prelim. Appr., at 3 n.4, Exh. A). Lands returned to the trust will include only the mineral estate or oil and gas interests where the surface has been conveyed to third parties or is within legislatively designated areas such as the Matanuska

¹³The governor may extend the deadline for up to 45 additional days. HB 201 § 47.

¹⁴Section 1 of HB 371 provides that the Mental Health Trust Fund, established by section 12 of HB 201, is funded by: (1) \$33 million from the existing mental health trust income account; (2) \$11.7 million from the Department of Natural Resources (DNR) trust income account in the general fund; (3) \$25 million from sale of DNR land sale contracts; and (4) \$130.3 million from the constitutional budget reserve fund.

Valley Moose Range. H.L. and Bosel Mem. Sup. M/Prelim. Appr., at 5 (June 10, 1994). Other state land to be transferred includes 111,000 acres in fee,¹⁵ 217,000 acres of mineral estate,¹⁶ and approximately 25,000 acres of oil and gas interests.¹⁷ See Aff. Harry A. Noah (State M/Prelim. Appr., at 3 n.5, Exh. A).

The reconstituted land trust will consist of a total of 930,000 acres, the value of which is estimated by H.L. and Bosel to be between \$1.0 and \$1.1 billion. H.L. and Bosel Mem. Sup. M/Prelim. Appr., at 2, 4, 6-7 (June 10, 1994). Weiss and AMHA estimate the value of the lands to be \$560 million. Weiss Opp. to Prelim. Appr., at 6 (July 1, 1994).

A mental health trust fund will be established to receive revenues attributable to the principal of the trust. HB 201 §§ 12-14. As compensation for the original trust lands not returned to the trust, the fund will start with the \$200 million cash payment appropriated in HB 371. The Alaska Permanent Fund Corporation will manage the trust fund. HB 201 §§ 3, 4. HB 201 provides that the

¹⁵Of this "other state land" to be conveyed in fee, approximately 41,000 acres was selected for its surface value, 4,252 acres for timber value, and approximately 65,000 acres for its mineral potential, including approximately 9,077 acres adjacent to the Fort Knox mining project. H.L. M/Prelim. Appr., at 6.

¹⁶Approximately 116,000 acres of this land is located near Salcha and has been selected by the state but not tentatively approved by the federal government. It is part of a military withdrawal. Unless the military withdrawal is released, it is not likely that this land could be conveyed to the trust in the foreseeable future.

¹⁷The oil and gas interests are located in the lower Kenai peninsula and lower Susitna Valley.

"cash principal of the mental health trust fund shall be retained perpetually in the fund for investment by the Alaska Permanent Fund Corporation." HB 201 § 14 (to be codified as AS 37.14.035(a)).

Earnings from the trust fund along with trust land revenues not attributable to principal will be deposited in a mental health trust income account.¹⁸ HB 201 §§ 3, 14, 15. The income account will be administered by the Alaska Mental Health Trust Authority.¹⁹ HB 201 § 16 (to be codified as AS 37.14.039(a)). Money in the trust income account may be used by the Trust Authority for: (1) awarding grants and contracts to ensure an integrated comprehensive mental health program for the state;²⁰ (2) obtaining private and federal grants for the above purpose; (3) soliciting gifts, bequests, and contributions for the above purpose; (4) reimbursing the Alaska Permanent Fund Corporation and DNR for the cost of managing trust assets; (5) offsetting the effects of inflation on

¹⁸At the end of each fiscal year, the Alaska Permanent Fund Corporation must transfer the net income of the trust fund to the mental health trust income account. HB 201 § 14 (to be codified at AS 37.14.035(b)). In addition, money deposited prior to December 15 in the existing mental health trust income and proceeds account will be deposited in either the income account or trust fund established by HB 201. Settlement Agreement, art. V, sec. 5 (June 10, 1994).

¹⁹The Alaska Mental Health Trust Authority is created by section 26 of Chapter 66, SLA 1991. A seven-person board of trustees will govern the Trust Authority. Ch. 66 § 26, SLA 1991. Board members must be appointed by the governor and confirmed by the legislature. HB 201 § 24. The board has the duty to preserve and protect the trust corpus under AS 37.14.009, which is added by section 10 of Chapter 66 and amended by section 9 of HB 201.

²⁰Section 16 of HB 201 also adds AS 37.14.045, which specifies the terms under which grants and contracts may be added.

the trust fund; and (6) meeting the necessary administrative expenses of the Trust Authority. HB 201 § 16 (to be codified as AS 37.14.041(a) and AS 37.14.045). The proposed settlement agreement states directly that the Trust Authority may use the money in the trust income account for these purposes without further legislative appropriation.²¹ Settlement Agreement, art. V, sec. 4, at 12 (June 10, 1994). If money in the income account is not needed for the necessary expenses of the state's mental health program, the Trust Authority is required to transfer the money to the unrestricted general fund for other purposes.²² HB 201 § 16 (to be codified as AS 37.14.041(b)).

The governor is required to submit to the legislature a separate appropriations bill limited to the state's integrated comprehensive mental health program and similarly the legislature is required to make appropriations for the mental health program in a separate bill. HB 201 §§ 4, 7. The bill must be accompanied by a report explaining the differences between the appropriations proposed by the governor and the Trust Authority's recommendations for expenditures from the general fund for the state's mental health program. HB 201 § 5. HB 201 also provides that if the governor vetoes any appropriations for the mental health program, the governor's veto message must explain the vetoes in light of the

²¹It is not known whether this is permissible under the Alaska Constitution.

²²Such a transfer is permitted by the Enabling Act. P.L. 84-830, § 202(e), 70 Stat. 709 (1956).

Trust Authority's recommendations for expenditures from the general fund for the mental health program. HB 201 § 6.

Under HB 201, the reconstituted land corpus of the trust will be managed by the Department of Natural Resources ("DNR"). HB 201 § 17. Section 17 of HB 201 describes the standards applicable to DNR's management of trust lands:

(a) Mental health trust land shall be managed consistent with the trust principles imposed on the state by the Alaska Mental Health Enabling Act, P.L. 84-830, 70 Stat. 709 (1956).

(b) Subject to (a) of this section, the department

(1) shall manage mental health trust land under those provisions of law applicable to other state land;

(2) may exchange other state land for mental health trust land under the procedures set out in AS 38.50;

(3) may correct errors or omissions in the legal descriptions of mental health trust land.

(c) The commissioner shall adopt regulations under AS 44.62 (Administrative Procedure Act) to implement this section. The regulations adopted under this subsection must, at a minimum, address

(1) maintenance of the trust land base;

(2) management for the benefit of the trust;

(3) management for long-term sustained yield of products from the land; and

(4) management for multiple use of trust land.

Thus, to the extent that trust principles imposed by the Enabling

Act do not conflict, general state land law will apply. The regulations which are to be adopted must address the four listed management provisions.²³ HB 201 requires that a separate unit of DNR be established whose responsibility is to manage the trust land.²⁴ HB 201 § 22. The land management provisions in sections 17-18 and 22 take effect immediately and remain in effect whether or not the settlement is approved by the December 15 deadline. See HB 201 §§ 17, 22, 48, 52.

HB 201 purports to confirm and ratify the 1978 redesignation of original trust lands not returned to the reconstituted trust. See HB 201 § 41. HB 201 also provides the legislature's estimate of the amount for past mental health expenditures. HB 201 § 42.²⁵

The improvements to Alaska's mental health program enacted under Chapter 66 are made effective by the settlement provisions of HB 201 with only a few amendments. See HB 201 §§ 19-21, 30-36, 37; Ch. 66 § 26-48. The program portion of the Chapter 66 settlement has involved little controversy; most regard the program

²³These four management principles are derived from a monograph entitled "The School Trust Lands: A Fresh Look at Conventional Wisdom" by Fairfax, Souder, and Goldenman. Exh. B (evidentiary hearing). The article is published at 22 Environmental Law 797.

²⁴The proposed settlement agreement requires that during the development of the initial policies and procedures for the separate DNR unit managing trust land, DNR will consult with a transition team of representatives from the beneficiary community. Settlement Agreement, art. V, § 6, at 13-14 (June 10, 1994). Commissioner Noah testified that he is doing so.

²⁵This provision becomes important only if this attempt at settlement does not succeed.

portion as a valuable addition to state law.

IV. STANDARD FOR PRELIMINARY APPROVAL

Under Alaska Civil Rule 23(e), a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Alaska R. Civ. P. 23(e). Because the Alaska rule is identical to the federal rule, federal cases may provide guidance in its application to the present case. See State v. Alex, 646 P.2d 203, 213 (Alaska 1982). The settlement approval process in class actions is composed of four parts: (1) preliminary approval of the settlement by the court; (2) notice to the class; (3) a formal fairness hearing; and (4) final approval by the court. See Manual for Complex Litigation, Second § 30.43, at 241 (West 1985) ["MCL 2d"]. The primary purpose behind court approval of the settlement of a class action is the protection of class members "whose rights may not have been given due regard by the negotiating parties." Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 624 (9th Cir. 1982).

The standard for preliminary approval includes an inquiry into both the fairness and the adequacy of the proposed settlement. In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379, 1383 (D. Md. 1983). The court must make a preliminary evaluation of the fairness of the proposed settlement agreement by considering

whether the proposed settlement:

- (1) appears to be the product of serious, informed, noncollusive negotiations;
- (2) has no serious deficiencies;
- (3) does not improperly grant preferential treatment to class representatives or segments of the class; and
- (4) falls within the range of possible approval.

MCL 2d § 30.44, at 241. Preliminary approval is not a finding that the settlement is actually fair, reasonable, and adequate.²⁶ In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379, 1384 (D. Md. 1983). Final approval of the settlement remains discretionary with the court even after preliminary approval. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992); S.E.C. v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984); Newberg on Class Actions, Third Edition § 11.41, at 11-88 (3d ed. December 1992 & Supp. June 1993) ["Newberg on Class Actions 3d"]. The purpose of preliminary approval is to ascertain whether there is any reason to expend the time and money to notify class members of the proposed settlement and proceed with a formal fairness hearing. Armstrong v. Board of School Directors, 616 F.2d 305, 314

²⁶The settlement must be "fair, adequate, and reasonable" in order to receive final court approval. E.g., Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1291 (9th Cir. 1992); MCL 2d, § 30.44, at 242 ("The settlement must be fair, reasonable, and adequate under the circumstances.").

(7th Cir. 1980). Notice and a formal fairness hearing would be "futile gestures," if the court did not find the settlement to be within the range of possible approval.²⁷ Newberg on Class Actions 3d § 11.25, at 11-36; see In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379, 1384 (D. Md. 1983).

The court may only approve or disapprove a settlement agreement. MCL 2d § 30.41, at 237. The court may make suggestions for changes, but has no authority to directly amend a settlement. See Id. However, "[n]othing prevents the court from receiving successive settlement proposals or from submitting successive settlement proposals to the class for its evaluation." Newberg on Class Actions 3d § 11.25, at 11-37 to 11-38.

The burden is on the proponents to show that a proposed settlement should be approved. See MCL 2d § 30.44, at 241-42; Newburg on Class Action, Third Edition § 11.42, at 11-94 (1992).

²⁷However, where a court rejects a settlement, it "may indicate what modifications would make the settlement acceptable to it." Little Rock School District v. Pulaski County, 921 F.2d 1371, 1388 (8th Cir. 1990). If changes for the proposed settlement are suggested in the court's decision, the parties may be able to agree on appropriate changes before notice is given to the class. See MCL 2d, § 30.41, at 237 n. 88. If substantial changes are made, the agreement may be resubmitted for preliminary approval, additional notice to the class, and another hearing. Id.

V. DISCUSSION

A. Is the Proposed Settlement the Product of Serious, Informed, Noncollusive Negotiations?

1. Factual background

On December 30, 1993, the court denied motions for preliminary approval for the Chapter 66 settlement. As early as January 6, 1994, the State began exploring the possibility of a new settlement. After a January 25, 1994 meeting, Mr. Volland believed that a mixed land and cash settlement was possible.²⁸ Aff. Volland ¶ 6.

The State presented plaintiffs with an initial offer in mid-February. The plaintiff groups and third-party intervenors discussed the State's proposal several times. The State invited counterproposals from any of the plaintiff attorneys. On March 14, Mr. Volland submitted a counteroffer to the State that involved the formation of a permanent endowment fund for the state's mental health program. See Aff. Volland ¶ 14. Although Mr. Volland submitted the counteroffer on behalf of his clients alone, meetings with counsel and representatives for other plaintiff groups convinced him that the principles of his counteroffer were generally acceptable to plaintiff groups. Aff. Volland, ¶¶ 14-16. Neither Mr. Walker nor Mr. Gottstein presented a counteroffer to the State.

²⁸The Chapter 66 settlement was a land-based settlement without any significant cash component. The State refused to consider a settlement with a large cash component during the negotiations which led to the enactment of Chapter 66.

Mr. Volland involved other interest groups in the negotiations. The Public Interest Intervenors played an active role in negotiating the contents of the list of lands to be included in the reconstituted trust under HB 201. Public Interest Intervenors' Response, at 4 (July 1, 1994). Representatives from the coal industry and oil and gas industry were also involved in the negotiation process. Mr. Volland sought to involve affected parties so that if a settlement was reached, it would be accepted broadly and would not suffer the attacks from non-parties which plagued the Chapter 66 settlement.

A series of meetings ensued among the State, plaintiffs' attorneys, and attorneys for third-party intervenors. See Aff. Volland, ¶¶ 16-19 (filed June 10, 1994); Aff. Harry Noah, ¶¶ 5-6 (filed June 10, 1994); Aff. Brian Bjorkquist, ¶ 7 (filed June 10, 1994). By March, negotiations over land focused on identifying lands from those which had been proposed as substitute lands during the Chapter 66 settlement implementation which would also satisfy the concerns of the Public Interest Intervenors. Aff. Volland, ¶ 16. Negotiations also dealt with the desire of Weiss and AMHA to expand the list of returnable original trust lands. Id.

Numerous meetings between the various parties occurred, primarily to negotiate land issues. See Aff. Volland, ¶¶ 18-20. On April 15, the State responded to the counterproposal with additional changes, including management of trust land by DNR.

Aff. Volland ¶ 20. Discussions during mid-April also appear to have frequently involved the cash endowment. Aff. Volland, ¶ 21-23.

Mr. Volland apparently interpreted a letter sent to him by Mr. Gottstein dated April 19th as supporting his counterproposal and authorizing him to pursue settlement on those terms. See Aff. Volland ¶ 21. On the other hand, Mr. Gottstein viewed the letter as confirming an actual agreement between plaintiffs' counsel made at a previous meeting. See Aff. Gottstein, at ¶ 9, Exh. A (filed July 1, 1994); H.L. M/Prelim. Appr., Exh. D (June 10, 1994).

On April 25, Mr. Volland attended a meeting with representatives of beneficiaries; they were generally supportive of the proposal with the exception of certain land management provisions. Aff. Volland ¶ 25. Around April 22, Mr. Walker and Mr. Gottstein announced they would not recommend the proposed settlement to their clients. Aff. Volland, ¶ 24.

Because all counsel for the plaintiffs did not agree to the basic terms of the settlement, the State was unwilling to completely abandon its pursuit of an independent legislative resolution of the litigation. Aff. Volland, ¶ 27. For this reason, HB 201 has different effective dates and conditions for the various provisions. As a result of efforts by counsel for Weiss and AMHA, last minute amendments to the bill included section 47, which permits the governor to extend the December 15th deadline by 45 days if the extension is made by November 30, 1994.

Between late January and the final negotiations for HB 201 in May, plaintiffs' counsel held several meetings with members of the mental health community to discuss the settlement proposal. Although not all settlement negotiation sessions were attended by all counsel, counsel for all plaintiffs and third parties were kept informed about negotiations and were invited to attend sessions appropriate to their interests. There have been no allegations of exclusion from negotiations.

2. Serious, informed, noncollusive negotiations

In order to warrant preliminary approval, settlement negotiations must be serious, informed, and noncollusive. MCL 2d § 30.44, at 241. Weiss and AMHA concede that "the negotiations were conducted seriously by all parties in the sense that everyone worked very hard at it" and H.L. and Bosel "were earnest negotiators." Weiss Opp. to Prelim. Appr., at 8. However, Weiss and AMHA assert that this proposed settlement was not the product of serious, informed, noncollusive negotiations.

Weiss and AMHA assert that the negotiations were not serious because (1) Eosel and H.L. did not pay appropriate attention to detail, and (2) the State insisted on pursuing its legislation to attempt to improve its litigation position.²⁹ The court disagrees.

²⁹HB 201 contains many provisions designed to assist the State in litigation. Section 1 contains a long list of legislative findings which essentially set out the State's litigation posture. The non-settlement provisions would reconstitute the mental health lands trust with certain original mental health trust lands and

The court finds that Bosel and H.L. paid attention to detail. Mr. Volland carefully considered the proposals made by Mr. Walker and Mr. Gottstein. Except where he disagreed with the analysis, Mr. Volland actively attempted to include their suggestions in the ultimate product. He was not always successful. However, the essential characteristic of negotiation and settlement is that everyone makes some concessions and no one gets everything desired. The State's insistence on pursuing the non-settlement provisions of HB 201 does not mean the negotiations were not serious. When it was apparent that not all of the plaintiffs' attorneys were willing to enter into the agreement, the State recognized that final approval could be denied. The State went forward with its contingency plan. The State submitted the first settlement proposal in February and later responded to plaintiffs' counterproposal. While parts of the legislation obviously were intended to pressure plaintiffs to agree to a settlement and to discourage challenges to the settlement agreement and appeals from approval if obtained, this does not mean the State was not serious in negotiations.

Weiss and AMHA assert that attorneys for H.L. and Bosel were not sufficiently informed about land issues to the extent

substitute lands (the same lands as those in the settlement), and declare a set-off of \$1.32 billion from 1978 to 1994. HB 201 §§ 40-42. If valid, the result of litigation would be reconstitution of the trust with the same lands contained in this settlement. There would be no other benefits to the class and no cash component for the fund.

necessary to negotiate the complex land issues in the interest of the class. Weiss and AMHA assert that Mr. Gottstein is the most knowledgeable about land issues among plaintiffs' attorneys. They argue that Mr. Volland and Mr. Jessee used improper valuation numbers in evaluating the proposal. They argue that it was error to include 116,000 acres in the Salcha area that has only been selected by the State and is subject to a military withdrawal. They argue that the failure to include favorable terms from the Chapter 66 settlement such as survey at state expense and warranty of title demonstrate that counsel were not sufficiently informed.

The court disagrees and finds that Mr. Volland and Mr. Jessee were sufficiently informed. It is true that they do not have the most experience in these land issues among plaintiffs' attorneys. However, they did not operate in a vacuum. They made extensive use of the expertise found in the Mental Health Trust Lands Project.³⁰ The vast majority of lands to be included in the reconstituted trust under this proposed settlement agreement were lands proposed for inclusion in the reconstituted trust under the Chapter 66 proposed settlement by Weiss and AMHA.³¹ Moreover, all attorneys, including Mr. Gottstein, were involved in the negotiation of the

³⁰The Mental Health Trust Lands Project was established by Mr. Walker and Mr. Gottstein for implementation of the Chapter 66 settlement. The Project had many land experts employed. It also contracted with other experts.

³¹Of the land types listed in Exhibit A (evidentiary hearing) to be in the trust only four categories were not substitute lands proposed by the Lands Project under Chapter 66 implementation. They total one percent of estimated value.

land list for this proposed settlement. The questioned values were ones supplied by the Lands Project; they were not ones developed by Mr. Volland or Mr. Jessee. Finally, no agreement of this magnitude is perfect and in settlement no one gets everything desired. The court does not believe that any purported "errors" were the result of counsel not being informed.³²

Counsel for Weiss and AMHA contend there are indications of collusion between the State and counsel for H.L. and Bosel. Weiss Opp. to Prelim. Appr., at 11. They contend that counsel for H.L. and Bosel violated an agreement with counsel for Weiss and AMHA

³²It is true that the inclusion of the 116,000 acre Salcha parcel is problematic. At least part of the problem was recognized in the proposed settlement agreement. The provision states:

- d. Replacement of Mineral Estate Only Parcel from "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994"

The State and beneficiary plaintiffs who are parties to the Settlement Agreement shall by August 1, 1994, identify for purposes of replacing land, an area of mineral estate only land at least equal in acreage and at least equal in revenue generating capability (i.e. estimated mineral value) to the land to be replaced within portion(s) of the approximate 116,000 acre Salcha mineral estate only parcel F-82863 (with errors or omissions in the legal description, if any, corrected) listed in "Other State Land To Be Designated as Mental Health Trust Land, April 28, 1994" that are now known to be contaminated with or affected by hazardous substances, (i.e. the Stewart Creek Impact Zone, which is generally identified on the map attached as Exhibit 2), unless otherwise agreed to by the parties. The parties shall also attempt to minimize the impact, if any, the replacement of land may have on the development potential of the Salcha mineral estate only parcel F-82863.

Attachment B to Settlement Agreement, at 1 (June 10, 1994).

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set out in Mr. Gottstein's letter of April 19. Aff. Walker, ¶¶ 132-34 and Exh. 36 (filed July 1, 1994). They assert that counsel for H.L. and Bosel gave up the requirement of adequate funding from the general fund for the mental health program and then negotiated away the "endowment concept" for the trust. They assert that supporting legislation with the December 15 deadline is collusive, especially in light of the known constitutional issue regarding the Trust Authority's ability to spend the income of the trust without further legislative authorization.³³ They assert that the negotiation of a "confusing" agreement is further evidence of collusion.

The court disagrees and finds that the agreement is not the product of collusion. The court finds that the attorneys had legitimate disagreements over the interpretation of their April agreements. The court finds that counsel for Bosel and H.L. negotiated in good faith with the interests of the class in mind. Moreover, counsel for Weiss and AMHA were free to negotiate directly with the State throughout the process. There can be disagreement about the result, but the process was fair and non-collusive.

In summary, the court concludes that the proposed settlement is the product of serious, informed, noncollusive negotiations.

³³The point is that the deadline precludes testing the constitutionality of the Trust Authority's power in the Alaska Supreme Court.

B. Is the Proposed Settlement without Serious Deficiencies?

Weiss and AMHA have raised seven points which they assert are serious deficiencies which should preclude preliminary approval: (1) termination by appeal; (2) unenforceability of the settlement; (3) indefinite terms; (4) invalidity of the land lists; (5) difficulties with DNR's work; (6) illegality of the management regime; and (7) lack of effective control by the Trust Authority. Each issue will be discussed.

The settlement provisions of HB 201 and HB 371 are effective only if the December 15 deadline is attained for dismissal of this action and the conclusion of all appeals. HB 201 §§ 37, 48-51. The proposed settlement agreement provides that if this court dismisses this action after final approval of the settlement, but the deadline is missed because of an appeal, any party can seek relief under Alaska Civil Rule 60(b)(6). Moreover, the parties have agreed that "the failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief from judgment and no party shall oppose such a motion." Settlement Agreement, art. VI, sec. 7, at 17 (June 10, 1994). Weiss and AMHA argue that any party's ability to terminate the agreement by filing an appeal is a serious deficiency.

The court agrees that the effect of appeal on the settlement provisions is problematic. In essence, despite the investment of many hours and significant money by everyone in the approval

process, any party can destroy the settlement by filing an appeal from a grant of final approval.³⁴ Nevertheless, the court does not see this as a problem sufficient to warrant denial of preliminary approval. Although time and money will be wasted if the process fails because of a missed deadline, the claims of the class will not be adversely impacted. They will be in the same position that they would be if preliminary approval was denied. Moreover, if the settlement fails for this reason, it will be known soon -- no later than the end of January 1995. The lost time should not adversely impact the class or its claims.

Weiss and AMHA's second point relates to the enforcement of the settlement. They question the enforceability of three aspects of settlement: (1) the "endowment concept";³⁵ (2) correction of land list problems; and (3) the payment of the \$200 million to the trust, especially the \$25 million designated to come from the sale of DNR's land sale contract portfolio [see HB 371 § 1(a)].

It is true that there is no guarantee in this proposed

³⁴The parties favoring settlement informed the court at the evidentiary hearing that they are looking for a solution to the problem. However, the court doubts a solution can be found. Assuming the court issues and distributes a decision granting final approval on the date scheduled (November 15), a dissenter could wait until December 15 to file a notice of appeal. Even if the governor had opted for the permissible 45 day extension of the deadline, the Supreme Court would have only 45 days to act. There are few cases in the history of the state which have been decided within 45 days of the date the notice of appeal was filed.

³⁵The court understands this term as used here to mean a Trust Authority with freedom to spend trust income without legislative approval.

settlement that the Trust Authority's power or, indeed, its existence will not be changed by a future legislature. It is important to focus on what remedy is provided if the legislature makes a material change in the provisions of HB 201 which create the Trust Authority. The portions of HB 201 which create the Trust Authority are incorporated into the proposed settlement agreement.³⁶ Settlement Agreement, art. I, sec. 1. If the legislative change was material, the class would be entitled to invoke the remedy found in art. VI, sec. 5: they would be free to file a new action asserting all the claims they have today.³⁷ While there are no guarantees, the fact that this litigation would begin anew should provide a reason for future legislatures not to act detrimentally to the class. There are risks associated with this which should be analyzed by the class; the court does not believe the risks are so great so as to require denial of preliminary approval.

Weiss and AMHA point out that there are known and identified problems with the land list to reconstitute the trust adopted by the legislature in HB 201. They assert that those problems can only be corrected with legislation. Since no one can say what the legislature will do, there are no guarantees that the changes will

³⁶The Settlement Agreement does not use the word "incorporate." However, at the evidentiary hearing, the court ensured that incorporation was the intent of the agreement.

³⁷The court ensured at oral argument that it was the State's intent that if there was a material change, the class would have all claims they have today and would be free to assert them.

be made. The State acknowledges that some of the identified problems may require new legislation to correct.

Exhibit 2 to the Wareham affidavit (filed 7/1/94) lists many "errors and omissions" in the land lists on which the settlement is based. Some of the problems are serious, e.g., the 116,000 acre parcel near Salcha which is not likely to be conveyed, other problems are insignificant, e.g., listing a parcel on both the conveyable list and the non-conveyable list.³⁸ There are certainly a number of technical corrections which need to be made; it is possible that many will require new legislation. Some errors may be corrected under DNR's authority to exchange trust land with other state land and to "correct errors or omissions in the legal descriptions of mental health trust land." HB 201 § 17 (to be codified as AS 38.05.801(b)(2) and (3)).³⁹ However, it is likely

³⁸The court views this as insignificant because the list that controls should be the conveyance list.

³⁹Article III of the Proposed Settlement Agreement provides a process for correction of technical problems with the lands list:

1. The parties agree that any omissions, overinclusions, inconsistencies or errors now known or discovered in the lists of original and substitute trust lands transferred to the trust pursuant to Sections 40(a)(1)&(2) of HB 201 shall be resolved as follows:

(a) The State and the plaintiffs, and the State and the Trust Authority, once established, shall identify to the other party any omissions, overinclusions, inconsistencies or errors in the lists of original and substitute trust lands as soon as such problems are known or discovered, along with such information or other explanation as is necessary to determine the reason for the claimed omission or error.

(b) Any errors or omissions to the legal descriptions of the lists of original and substitute lands submitted pursuant to Sections 40(a)(1)&(2) of HB

that not all problems can be corrected without new legislation.

The court views this as a problem. It is essential that the beneficiaries obtain the benefit of their bargain. The beneficiaries are not assured of the benefit of the bargain if they are dependent on an act of a future legislature. The parties favoring settlement have advised the court that they are looking for a solution. The court believes they should have an opportunity to find one. If they have not found a solution by the time of the final approval hearing, the court (and the beneficiaries) will be forced to examine the degree of risk posed by the problem and the impact on the settlement if no solution is found.⁴⁰ However, the court will not deny preliminary approval on

201 necessary to accomplish the intent of the parties shall be corrected by the Department of Natural Resources (DNR) pursuant to the authority granted DNR under Sec. 17 of HB 201.

(c) Any additions, deletions, or substitutions to the list of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1)&(2) necessary to accomplish the intent of the parties shall be obtained by legislative amendment or by transfer, exchange, or conveyance.

(d) As of the date of executing this agreement, the parties have identified in Attachment B the initial omissions, overinclusions, or substitutions to the lists of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1)&(2) which they agree to correct pursuant to the terms of (b) and (c) above.

Settlement Agreement, at 5-6.

⁴⁰It is certainly possible that failure to find a solution to the problem associated with the Salcha property could lead to non-approval. The acreage is large -- 116,000 acres, over 10% of the reconstituted trust acreage. The court does not know the value of the parcel, but assumes it may also be significant.

this basis.

The final enforcement issue raised by Weiss and AMHA relates to the enforceability of the "promise to pay the \$200 million." Weiss Opp. at 17 (filed July 1, 1994). Weiss and AMHA argue that unless the full \$200 million is in the trust fund at the time of dismissal, the State's promise to pay is unenforceable under article IX, section 13 of the Alaska Constitution. Weiss Opp. at 17. The constitutional provision states:

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Alaska Const., art. IX, § 13.

HB 371 appropriated \$200 million to the "mental health trust fund" from these sources in these amounts:

Mental health trust income account balance on 6/30/95	\$ 33 million
DNR - mental health trust income in the general fund	\$ 11.7 million
Proceeds from sale of DNR land sale contracts portfolio	\$ 25 million
Budget reserve fund	\$130.3 million

These funds were appropriated. Moreover, section 1(e) of HB 371 provides that the appropriations "do not lapse." Thus, the only way the fund would not receive the sums is if they do not exist. The only item whose future existence is questioned is the proceeds from DNR land sale contract portfolio. DNR is currently in the beginning stages of offering the portfolio for sale. Commissioner

Noah has recently begun inquiries regarding other sources of revenue to replace this item if it is unavailable. The court views the possible unavailability of the \$25 million as a problem. However, there is a reasonable probability that it will be resolved by the time of final approval. If it is not resolved, the court and class members will have to evaluate the agreement in that light. The court does not find the problem to be a deficiency which precludes granting preliminary approval, but it may be an issue for consideration at final approval.

The third "serious deficiency" argued by Weiss and AMHA relates to their criticism that the proposed settlement agreement "is very unclear as to very critical terms." The court disagrees. To the extent that important issues were highlighted at the evidentiary hearing, the questions of interpretation were resolved by ascertaining the intent of the parties.⁴¹ In light of the fact that the assumed ambiguities were resolved in the beneficiaries' favor, there is no risk to the class from them.

Weiss and AMHA next assert that the land lists are of "questionable validity." Weiss Opp. at 18 (filed July 1, 1994). The claim is made that the land lists do not identify the boundaries of a large number of parcels. Admittedly, the lists do

⁴¹Specifically, the State stated its intent was (1) that the trust would not be charged for access to state land; (2) that it intended that the settlement provisions of HB 201 were incorporated into the agreement; and (3) that if the remedy provisions of art. VI, sec. 5 were invoked, the plaintiffs could reassert all claims they have today.

not contain legal descriptions. The court does not find that to be a serious deficiency. The court expects further evidence if the parties actually believe that approval should be denied on this basis.

Weiss and AMHA assert that "DNR is unlikely to accomplish the required land work accurately or in a timely manner." Weiss Opp. at 19 (filed July 1, 1994). This argument is not supported by any admissible evidence.⁴² At this point it would be mere speculation to conclude that DNR cannot do the job it is required to do.

Weiss and AMHA argue that the management regime under the proposed settlement is illegal. They assert that the settlement would have to have the standard that the trust be "managed solely in the best interests of the beneficiaries under private trust law principles." Weiss Opp. at 20 (filed July 1, 1994).

HB 201 requires that trust land be "managed consistent with the trust principles imposed on the state by the [Enabling Act]," but specific trust management standards are not specified in either HB 201 or the proposed settlement agreement. HB 201 § 17. To the extent not inconsistent with the Enabling Act, the trust lands are subject to the same provisions of law applicable to other state lands. Id. HB 201 requires DNR to adopt management regulations which must address at least four management principles:

- (1) maintenance of the trust land base;
- (2) management for the benefit of the

⁴²The opposition referred to the affidavit of Ms. Hayes, which was struck because she was unavailable for cross-examination.

trust;

(3) management for long-term sustained yield of products from the land; and

(4) management for multiple use of trust land.

HB 201 § 17 (to be codified as AS 38.05.801(c)).⁴³ DNR is required to consult with the trust authority before adopting regulations under AS 38.05.801(c). HB 201 § 9 (to be codified as AS 37.14.009(a)).

The statute and agreement are intentionally vague on the issue of the required management standard. In order to assure the support of the environmental and resource industry interest groups, language acceptable to all was adopted. The battle, if there is to be one, was reserved for the regulatory process. It is important that the class understand that it may require more litigation to ensure that regulations actually comply with the Enabling Act. Of course, it is possible that DNR will adopt regulations that satisfy the Act. It is also possible that all interest groups can be accommodated in the regulatory process. However, there are risks of future litigation presented by this approach.

The court disagrees with Weiss and AMHA regarding the illegality of the standard. What the class is entitled to is management under the requirements of the Enabling Act. This

⁴³These standards were promoted by Mr. Volland based on the article by Fairfax, et al. discussed earlier. If there is legislative history to the effect that the Fairfax article was considered by the legislature, the court's concerns about the standards would be greatly alleviated.

legislation cannot diminish those requirements because of the supremacy of federal law; this statute does not purport to diminish those requirements. If the Enabling Act requires management solely in the interest of the beneficiaries and under private trust principles, HB 201 does not displace that standard. The treatment of the issue in the settlement means that it may require further litigation to achieve the result. The court does not believe this is a serious deficiency. It is an issue which the class and court must analyze in final approval.

Finally, Weiss and AMHA argue that "lack of effective control of trust management by the Trust Authority is a serious deficiency." Weiss Opp. at 20 (filed July 1, 1994). Essentially, they argue that DNR management of trust lands without more control and supervisory authority by the Trust Authority results in a serious deficiency.

The court agrees with Weiss and AMHA that DNR's past trust management has been substandard. DNR generally has managed the lands as if there was no mental health lands trust and as if DNR had no fiduciary obligations to the beneficiaries of the trust. However, there are certain factors which indicate that past behavior may not be the best indicator of the future.

HB 201 requires DNR to establish a separate trust management unit to manage the reconstituted mental health trust lands. Personnel in the separate trust unit will be applying only trust management principles and working under one set of policies and

regulations. Management of trust land through this separate unit should make DNR more cognizant of its fiduciary responsibilities with regard to trust lands.

Commissioner Noah has acknowledged that with or without settlement DNR must change its management of trust lands. For the first time in the court's memory, someone in authority in DNR has acknowledged DNR's fiduciary obligations toward the trust regardless of this litigation and that DNR has not met those obligations in the past. To the extent that acknowledgement is the first step to cure, this is a hopeful sign.

The court concludes that this is not a serious deficiency in the settlement. It may be a concern for the class, but it does not automatically bar approval in the court's analysis. First, the court sees the hopeful signs noted. Second, if this case goes to litigation, the class will likely have DNR management of trust land.⁴⁴

The court has also examined the settlement for serious deficiencies. None has been found.

For these reasons, the court concludes that the settlement does not have serious deficiencies which would preclude preliminary approval.

⁴⁴It is possible that the "trustee" could be removed. However, the court is not aware of any instance where the trustee of a public land trust has been removed by a court.

C. Is the Proposed Settlement without Improper Preferential Treatment of Segments of the Class?

The program portion of the settlement has changed little since the Chapter 66 proposal, and the court previously found no preferential treatment in that settlement. See Memorandum Decision and Order at 103-07 (Dec. 30, 1993). The program priorities in Chapter 66 do not favor any of the four major subgroups within the class. Memorandum Decision and Order at 104 (Dec. 30, 1993). No funds will be distributed directly to class representatives or other class members. The trust will be managed for the benefit of all trust beneficiaries.

Disparate treatment is possible, although not probable, under the HB 201 funding scheme. H.L. and Bosel expect the grants and contracts issued directly by the Trust Authority using money from the trust income account to fund services or programs which supplement the state's basic mental health program rather than for the basic program itself. See H.L. M/Prelim. Appr., at 19, 23. Assuming that to be true, if membership on the board of trustees of the trust authority becomes unbalanced, it is possible that some beneficiary groups might receive preferential treatment. However, this is mere speculation. A balanced membership within the Trust Authority's board of trustees should result in a balanced distribution among beneficiary groups of money from the trust

income account.⁴⁵

The court concludes that the proposed settlement does not contain any preferential treatment of a segment of the class to an extent that would preclude preliminary approval.

D. Does the Proposed Settlement Fall within the Range of Possible Approval?

There is no purpose in sending notice of a proposed settlement to the class if it does not appear preliminarily to be within the range of approval. Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. 531, 535 (N.D. Ill. 1973). In order to determine whether a settlement is within the range of possible approval, the court must make a preliminary evaluation based on the general standards for final approval of "fairness" and "adequacy" within the unique context of preliminary approval. In re Mid-Atlantic Toyota Antitrust Litigation, 564 F. Supp. 1379, 1383-85 (D. Md. 1983). Final approval requires a finding that the settlement as a whole is "fair, adequate, and reasonable." Class Plaintiffs v. City of Seattle, 955 F.2d at 1291; Newberg on Class Actions 3d § 11.41, at 11-91; MCL 2d § 30.44, at 242. However, a "settlement need not

⁴⁵Weiss and AMHA argue that the Trust Authority could spend trust income for the benefit of someone other than the beneficiaries. The court concludes that the money could only be spent in furtherance of the integrated comprehensive mental health program and, thus, that is not legally possible. See HB 201 § 16 (to be codified as AS 37.14.041(a)(1) and AS 37.14.045(a)). As well, the Trust Authority has the duty to deal with trust beneficiaries impartially. HB 201 § 8 (to be codified as AS 37.14.007(b)(12)).

provide the best or speediest relief imaginable to be fair, adequate, and reasonable." Officers for Justice, 688 F.2d at 636; see also 2 H. Newberg, Newberg on Class Actions, Second § 11.45, at 460-61 (2d ed. 1985 & Supp. 1992) ("[a] settlement does not have to be a brilliant one in order to secure judicial approval").

The most important factor in evaluating fairness is a comparison between the likely result of litigation and the remedy provided in the settlement. See Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14, 67 L.Ed.2d 59, 67 n.14 (1981); Armstrong, 616 F.2d at 314; Newberg on Class Actions 3d § 11.41, at 11-93 to 11-94; MCL 2d, § 30.44, at 242 ("whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued"). Other factors the court may consider in final approval include:

- (1) Expense, complexity, and likely duration of further litigation;
- (2) Extent of discovery completed;
- (3) Experience and views of counsel;
- (4) Amount of opposition to the settlement;
- (5) Defendant's ability to pay (what constitutes a feasible remedy);
- (6) Presence of collusion in reaching a settlement.

Class Plaintiffs v. City of Seattle, 955 F.2d at 1291; Armstrong, 616 F.2d at 314; Newberg on Class Actions 3d § 11.43, at 11-97. The court also must consider whether the interests of the class

were adequately represented by the named plaintiffs and counsel. Malchman v. Davis, 706 F.2d 426, 433 (2nd Cir. 1983). The relative importance of the various factors depends upon the nature of the claims, type of relief sought, and the unique circumstances of an individual case. Class Plaintiffs v. City of Seattle, 955 F.2d at 1291; Officers of Justice, 688 F.2d at 625. In evaluating the fairness of a settlement, the court as well as the parties must remember that "compromise is the essence of a settlement." S.E.C. v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984); Cotton, 559 F.2d at 1330. A settlement may compromise some potential remedies available to the class, if as a whole the settlement is fair, reasonable, and adequate. Armstrong, 616 F.2d at 315, 317.

Although this is only the preliminary approval stage, it is useful to examine whether the agreement is within the range of acceptable results, considering those factors that would be examined at the final approval stage.

1. Comparison with further litigation

The HB 201 settlement would reconstitute the trust with land in the form of 550,000 acres in fee and 378,000 acres of subsurface estate plus \$200 million cash.

The agreement purports to require most of the land to be conveyed to the trust authority prior to final approval of the settlement.⁴⁶ Settlement Agreement, art. IV, § 1, at 6-7. The

⁴⁶The proposed settlement agreement provides:

1. Transfer of Land by Quitclaim Deed And Delivery

proposed settlement agreement states that prior to dismissal of the action, the State will tender to the court the deeds for conveying the listed state lands to the Trust Authority.⁴⁷ Settlement Agreement, art. IV, § 1, at 6-7.

Mental health trust land selections not yet conveyed to the State by the federal government will be conveyed as the State receives them. DNR will consult the Trust Authority when it

of Conveyances. Land and interests in land conveyed to the Trust Authority shall be granted in trust to the "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated as mental health lands pursuant to Sections 40(a)(1)&(2). Upon approval of this settlement by the court and dismissal of this action, the deeds shall be placed in escrow for delivery to the Authority upon its request. The parties recognize that certain of these deeds will use parcel numbers which reference the State maps that describe the lands in Attachment A in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the Authority to complete the preparation of recordable deeds for delivery to the Authority as soon as practicable after dismissal.

Settlement Agreement, art. IV, § 1, at 6-7 (June 10, 1994).

⁴⁷ The conveyances from DNR to the Trust Authority probably will not be complete before the case is dismissed under the present compressed schedule. See Weiss Opp. at 19. The HB 201 settlement agreement acknowledges that full legal descriptions may not be available at the time the deeds are tendered to the court. Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994). Some parcels are likely to be described only with parcel numbers corresponding to numbered parcels on DNR maps. Id. The State "agrees to use its best efforts and to work with the [Trust] Authority to complete the preparation of recordable deeds for delivery to the Authority as soon as practicable after dismissal." Settlement Agreement, art. IV, § 1, at 7 (June 10, 1994).

determines the annual conveyance priorities submitted to the Bureau of Land Management. Settlement Agreement, art. IV, § 9, at 11 (June 10, 1994). In addition, if the land parcels eventually conveyed to the State from the federal government are different from those described on the lists referenced in HB 201, the State will compensate the trust with other land of a similar character, equal value, and similar revenue-producing potential. Settlement Agreement, art. IV, § 2 (June 10, 1994).

The Settlement Agreement contains no provision to compensate the trust for encumbrances that are inconsistent with the revenue-producing mandate of the trust. Settlement Agreement, art. IV, § 3, at 8 (June 10, 1994). The State will bear the recording costs for all documents required by the agreement, but there is no requirement that the State pay surveying costs. See Settlement Agreement, art. IV, § 5 (June 10, 1994). Costs could be quite high for surveying parcel boundaries, easements, and other encumbrances. The Trust Authority will obtain quitclaim deeds only, but in the settlement agreement the State warranted that "it has the legal authorization necessary to convey the land or interest in land" for lands to be conveyed. Settlement Agreement, art. IV, sec. 2, at 7 (6/10/94). The agreement provides for compensation with other land if the warranty is violated. Id.

An appropriation bill, HB 371, has already been passed to fund the \$200 million payment into the trust fund created by section 12 of HB 201. This monetary corpus will be managed by the Alaska Per-

manent Fund Corporation, which has demonstrated acceptable management of the permanent fund for the state's oil revenues. Income from investment of the trust fund will provide some trust revenue even without land development. Thus, at least some income stream is assured from the beginning for the Trust Authority's use in making grants and contracts under section 16 of HB 201.

In addition, the HB 201 settlement includes the program improvements contained in the Chapter 66 settlement with few changes.⁴⁸ A Trust Authority would be created whose duties include ensuring that trust assets are managed consistent with the Enabling Act [HB 201 § 9]. The Trust Authority's purpose is to ensure an integrated comprehensive mental health program. The Trust Authority would have the power to spend income from the trust without further legislation.⁴⁹ The Trust Authority must develop a budget for the integrated comprehensive mental health program. HB 201 § 27 (to be codified as AS 47.30.046(a)).

HB 201 strengthens the budgeting process for the mental health program. First, a budget for general fund appropriations is prepared by the Trust Authority as noted above. Second, if the governor's appropriations bill for funding the mental health program differs from the Trust Authority's budget, the governor

⁴⁸The program improvements contained in Chapter 66 will be repealed automatically if the deadline for dismissal is not met. See HB 201 § 48.

⁴⁹The class should be aware that this provision may not withstand a constitutional challenge should one be raised. It is a risk to be evaluated by the class.

must provide a report which explains the reasons for the differences. HB 201 § 5 (to be codified as AS 37.14.003(b)). Third, in the event of a veto of an appropriation, the governor must explain the veto in light of the Trust Authority's recommendations. HB 201 § 6 (to be codified as AS 37.14.003(c)). Fourth, appropriations for the mental health program must be made in a separate bill limited only to those appropriations. HB 201 § 7 (to be codified as AS 37.14.005(b)). Fifth, the legislature must issue a report explaining any differences between the Trust Authority's recommended general fund budget and the appropriation bill passed. Id. at AS 37.14.005(c).

In summary, the proposed settlement would provide: (1) reconstitution of the trust with some original mental health trust lands, some substitute lands, and \$200 million; (2) program improvements; (3) the Trust Authority; and (4) budget process advantages.

Litigation results are, of course, unknown. However, it is very clear that program improvements, the Trust Authority, and budget process advantages could not be obtained through litigation.⁵⁰

It is difficult to compare the results of litigation versus the settlement results with respect to the trust corpus. The task

⁵⁰It is possible that the court could order that DNR be removed as trustee of the lands. However, it is unclear what trustee would be appointed. Moreover, it would be an extraordinary act to remove a trustee of a public trust named by the Congress.

is difficult in part because of the difficulties of assessing litigation risk for lands to be returned to the trust, and more importantly, because of problems with valuation. The court will analyze the issues from various perspectives.

If HB 201 is valid, the result of further litigation is clear. The trust would be reconstituted with exactly the same lands as those in the settlement. The trust would be managed by DNR. The class would not receive the other benefits of the settlement: \$200 million, the Trust Authority, the program enhancements and the budget advantages. If HB 201 is valid, it is clear that the class would benefit from the settlement. However, this court has once before questioned the legislature's ability to settle the case unilaterally. See Memorandum Decision and Order Re: Preliminary Injunction, at 8-9 (July 10, 1990). Therefore, it is also important to look at results of litigation if HB 201 is not valid.

In a best-case scenario, in litigation the trust would be reconstituted with all of the original mental health trust lands. DNR would manage the trust, unless removed as trustee by the court. There would be no warranty of title or survey beyond that done before federal patent.⁵¹ If the plaintiffs succeeded in having all the original trust lands returned to the trust, the trust would not

⁵¹The court understands the surveys to have been large "four-corners" surveys.

receive any cash compensation.⁵² The best-case scenario is not very likely because it is likely that some of the original land would be classified as "sold."

In a worst-case scenario, in litigation the trust would receive the original mental health lands that are undisputedly not "sold." It is entirely possible, if not likely, that there would be no cash component.⁵³ This worst-case scenario would not occur unless HB 201 was declared invalid.

The court concludes that the likely result is somewhere between the best and worst-case scenarios. It is likely that some of the lands which the State maintains have been "sold,"⁵⁴ would not be returned to the trust. It is also likely that the set-off would be large enough that the trust would not receive cash

⁵²The State has to pay cash only to reimburse the trust for original trust lands "sold" by the State after the 1978 legislation. See Weiss v. State, 706 P.2d at 684. This scenario hypothesizes that no land would be classified as "sold."

⁵³The court's analysis is that it is likely that the State's set-off will exceed the value of lands which the court determines were "sold." In order for the trust to receive cash as a result of litigation, the value of the lands "sold" would have to be more than the State's set-off for expenditures on the mental health program since 1978. See Weiss v. State, 706 P.2d at 684. The State has expended a substantial sum of money on the mental health program since 1978, though the parties dispute what sums should be included. In HB 201, the legislature set the amount at more than \$1.3 billion. The most generous estimates of value of the entire original mental health trust lands are in the range of \$1.9 - 2.0 billion.

⁵⁴The State maintains that sales to third-party purchasers, the Cook Inlet Regional Corporation exchange, lands used by other state agencies, and lands in legislatively designated areas ["LDA's"] were "sold."

compensation for those "sold" lands. One valuation⁵⁵ would place these values on those disputed lands:

Third-party purchasers	\$150 million
CIRI	45 million
State agencies	15 million
LDA's	<u>200 million</u>
TOTAL	\$410 million

If that valuation is correct, there is \$410 million worth of land which distinguishes the best and worst case scenarios. Of course, this analysis suffers from the same problem as most others: whether the valuation is correct.

There has been substantial dispute about the value of these lands from the beginning of settlement attempts. Questions over value led to the demise of the Chapter 48 settlement attempt. The Interim Mental Health Trust Commission placed a value on original mental health trust lands at about \$2.2 billion in 1989; the State valued the lands at about \$564 million. See Interim Mental Health Trust Commission Final Report (Dec. 20, 1989) (filed April 3, 1990). The valuation question has not disappeared.

The court believes that two principles are important to apply in evaluating the valuation questions with respect to the settlement versus the result of litigation: (1) in comparing the original trust with the reconstituted trust, it is most important to use the same assumptions and approach; and (2) all valuations

⁵⁵The court believes this valuation to be made under Chap. 66 assumptions, but it is not clear.

of the land value are based on probabilities.⁵⁶ In light of the first principle, the court will examine the various methods under the same assumptions.

Substantial valuation work was done by the Mental Health Lands Project to value original trust lands and proposed substitute lands under the Chapter 66 implementation efforts. These valuations were made assuming the provisions of the Chapter 66 settlement and therefore the values may not be sound for this settlement. Under Chapter 66 assumptions, the value of the original trust lands totalled \$1.9 billion. Using those same assumptions, the reconstituted trust is valued at \$1.1 billion. In light of the litigation risks associated with recovering all of the original lands, and the addition of \$200 million and the other benefits of the settlement, the court concludes that evaluated this way, this settlement is within the range of acceptable settlements.

Mr. Erickson, an expert retained by Weiss and AMHA, asserts that the provisions of this settlement make the land much less valuable than it would have been under the provisions of Chapter 66. He has made discounts for (1) DNR management,⁵⁷ (2) quitclaim deeds versus warranty deeds, (3) lack of survey, and (4) split

⁵⁶The most significant field in anyone's valuation is for mineralized lands. However, very little is actually known about the lands. While the original lands have been the subject of geological survey, very little core drilling has been done. Thus all values are guesses, educated guesses, but guesses nonetheless.

⁵⁷Mr. Erickson assumes the worst: the trust will be managed under the rules applicable to other state lands with no concern for the fact it is trust land.

estate and access problems. Under his evaluation, the land in the reconstituted trust is worth \$566 million to which he adds the \$200 million cash for a grand total of \$766 million for the settlement. He did not perform the same calculations for the original trust lands, and it is important not to compare that number to \$1.9 billion because the numbers are based on different assumptions.

No one provided the court with a breakdown of the \$1.9 billion valuation so that Mr. Erickson's approach could be applied to obtain a value of the original mental health trust lands. In order to provide the best comparison possible with the limited data available to the court, the court has taken the Interim Mental Health Trust Commission's valuation of the original trust lands (which with Dr. Metz' revised mineral valuation totals \$2.0 billion) and applied the approach. The results are found in the chart attached as Appendix A.⁵⁸ Applying Mr. Erickson's discounts to the Interim Commission's values and assuming that one-half of the lands were under DNR lease, the discounted value of original trust lands is \$921.5 million.⁵⁹

Using these figures, the comparison is between \$921.5 million with a reduction for the risks of litigation versus a land package

⁵⁸The court has used the aggregate percentage discounts as set out in Exhibit 4 (evidentiary hearing) prepared by Mr. Erickson.

⁵⁹Of course this number could be very inaccurate if the values used in the Chapter 66 valuation which totalled \$1.9 billion are very different from the Interim Commission's values. Additionally, as shown in Appendix A, if less than one-half of the lands were under DNR lease, the reduced value of the original trust lands is much smaller.

worth \$566 million, a cash component of \$200 million and other benefits of the settlement. Under this approach the settlement is within the range of possible approval.

The final approach on which the court has received testimony comes from Samuel Smith, chief of the Division of Mining in DNR. Mr. Smith has analyzed the mineral value of lands which will not be returned to the trust. He starts with Dr. Metz's⁶⁰ calculation for mineral values on lands which will not be returned, \$620 million. Mr. Smith has discounted that number for three of four factors on which he believes Dr. Metz erred. His revised value is \$130 million. In light of the fact that mineralized land forms the bulk of everyone's valuation of original trust land, Mr. Smith's calculations, though partial and preliminary, would suggest that this settlement is within the range of acceptable settlements.

In summary, it is too soon for the court to determine what is the best valuation of the trust, but using consistent rules in any approach suggests that this settlement is within the range of acceptable settlements. However, several assumptions have been made which may be in error. The court expects to look at this issue carefully at the final approval stage.

It is important that the class considers the importance of cash to them. In essence this settlement trades some land which might be returned to the trust for cash. Risk averse individuals

⁶⁰Dr. Metz was hired by plaintiffs to do valuations on the mineral estate of original trust lands.

stress the importance of having cash now against the possibility of earning money in the future. Those willing to take more risks may regard cash as a bad trade for the possibility of earning much larger amounts later. This philosophical difference is part of the conflict between plaintiffs' attorneys.

2. Trial

A trial would be extremely expensive, lengthy, and complex, probably involving defendant classes as well as the plaintiff class.⁶¹ A defendant class of third-party holders of interests in state land could contain thousands of members and require several separate subclasses. The cost to all parties in time and money would be enormous. The cost is not, perhaps, of significant interest to the class, since fees are paid by the State. However, delay should be significant. It could be years before the litigation is resolved if the case is not settled. The improvements to the mental health program and the reconstitution of the trust could be delayed for many years.

3. Discovery

While plaintiffs have not received access to all DNR records concerning agricultural parcels that contain original trust land,

⁶¹Weiss and AMHA already have filed motions to certify defendant classes for municipal and coal-lessee defendants. See Motion to Certify Class of Municipal Defendants (March 29, 1994); Motion to Certify Class of Coal Lessee Defendants (July 14, 1994).

they know much more about the original trust lands and potential trust lands than they did in 1991 when Chapter 66 was passed. At this point plaintiffs' attorneys seem to have sufficient information about original trust lands and state lands in general to adequately evaluate the current proposal of a mixed land and cash settlement.

4. Opposition

The amount of opposition within the class cannot be fully evaluated by the court until the fairness hearing after the class has notice. Therefore the court can draw no conclusions at this time with regard to opinions of the class regarding the fairness and adequacy of the proposed settlement agreement.

5. Collusion

Weiss and AMHA imply that counsel for H.L. and Bosel negotiated a settlement favorable to the State in order to encourage the State to withdraw from the Chapter 66 settlement, which H.L. and Bosel opposed. Weiss Opp. to Prelim. Appr., at 11. Weiss and AMHA contend that H.L. and Bosel negotiated outside the parameters of what they had agreed the settlement should contain. Despite Weiss and AMHA's claims to the contrary, the court concludes there was no collusion during the negotiations.

In summary, based on this preliminary examination, the court concludes that this settlement is within the range of possible

final approval.

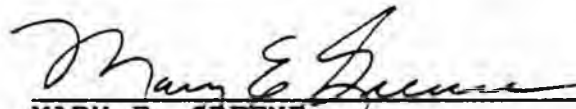
VI. CONCLUSION AND ORDER

The HB 201 settlement appears to provide sufficient benefits to the class to justify preliminary approval. The negotiations apparently were serious, informed, and noncollusive. Deficiencies in the settlement are not sufficiently serious to warrant disapproval at this preliminary stage. There is no disparate treatment of any of the major groups of plaintiff class members. There are problems presented; some of them may be resolved by the time of the final approval hearings. There are also risks presented which need to be carefully evaluated by the class. However, the requirements for preliminary approval have been met.⁶²

Thus,

IT IS HEREBY ORDERED that the court grants preliminary approval to the settlement filed June 10, 1994.

DATED at Fairbanks, Alaska this 29th day of July, 1994.



MARY E. GREENE
Superior Court Judge

I certify that on 7-29-94
a copy of this form was sent
to: Walker Gottstein Jesse
Volland Bjorkquist Johannsen
~~Morford~~ Rubini Koester
Machentanz Jorgensen Rehbock
Mason
Clerk: KS H

⁶²Preliminary approval does not mandate final approval if class comments or other evidence at hearings shows that the HB 201 settlement is not in the best interests of the class or does not meet the standards for final approval.

Erickson Discount Calculations

Applied to Interim Mental Health Trust Commission Value Estimates

	<u>Oil & Gas</u>	<u>Timber</u>	<u>Surface</u>	<u>Coal</u>	<u>Mineral Land Under DNR Lease¹</u>	<u>Mineral not un- der DNR Lease</u>	<u>Total</u>
Value (in millions) \$.5	36	666.5	.4	650	650	\$2,000
Erickson Aggregate Discounts	20%	69%	64%	0%	19%	78%	
Amount of Discount	.1	25.8	426.5	0	123.5	143	718.9
Remaining Value \$.4	11.2	240	.4	526.5	143	<u>\$921.5</u> million

¹This chart assumes that 50% of mineralized land was under DNR lease. If none was under DNR lease the reduced value of the land is \$538 million. The court believes that the actual amount of mineralized land under DNR lease is very small.

WALTER J. HICKEL
GOVERNOR



SB 382
SB 383
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

September 26, 1994

The Honorable Rick Halford
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a substantive bill and an appropriation bill that relate to the mental health trust, the mental health trust income account, and the mental health trust litigation, Weiss v. State, 4FA-82-2208 Civil. These bills do not, however, change the substance of the proposed settlement already enacted. While enactment of these bills may not be absolutely necessary for the court to grant final approval of the proposed settlement, they will clarify and implement certain provisions in the proposed settlement. This will significantly improve the probability of final court approval.

The bills have three main components: (1) corrections to the lists of land designated as mental health trust land or removed from the trust; (2) clarifying the funding sources for the \$200,000,000 appropriation to capitalize the mental health trust fund and for certain other mental health operating and capital appropriations; and (3) clarifying and amending legal deadlines to remove obstacles to the settlement actually taking effect.

With regard to the first of these components, corrections made by the substantive bill would add certain parcels to and delete certain parcels from the lists of land designated as mental health trust land under ch. 5, FSSLA 1994. This provision also would amend the list of land identified as removed from the trust under ch. 5, FSSLA 1994. (Although this second change is not legally required, it will serve to prevent any ambiguity.) The most significant correction relates to approximately 116,000 acres near Salcha, the mineral estate of which is designated as trust land. That land is included within a federal military land withdrawal and may never become available for designation to the trust. Accordingly, the parties have agreed to replace that land with other land of similar character and income producing potential. The other corrections

The Honorable Rick Halford
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are technical and address problems discovered after the legislature adjourned from the first special session this year.

In granting preliminary approval of the settlement, the trial court encouraged the parties to find solutions to the problems with the land lists, especially the federal military withdrawal of the Salcha land. The court also warned that the court and beneficiaries would be forced to examine the degree of risk posed by those problems and the impact on the settlement if no solutions are found. The substantive bill provides the solution to these problems.

The second component addresses a change in conditions affecting the funding sources of the \$200,000,000 appropriation to capitalize the mental health fund. It now appears there may be a shortfall from one or more of the funding sources for that appropriation. Therefore, the appropriation bill provides that shortfalls may be made up through additional amounts from the mental health land revenue on deposit in the general fund and the mental health trust income account. In addition, there is ambiguity as to the funding source for \$33,000,000 of the \$200,000,000 appropriation to capitalize the mental health trust fund and certain other mental health appropriations. The \$33,000,000 was appropriated from the mental health trust income account (AS 37.14.011), but that account was repealed on June 24, 1994, (secs. 39 and 52, ch. 5, FSSLA 1994). To resolve the ambiguity, the substantive bill revives the mental health trust income account (AS 37.14.011(a)) retroactive to June 24, 1994. It also provides for the repeal of the account when it is no longer needed to finance appropriations enacted by law. Finally, because the revenues that previously went into the account (AS 37.14.011(b) and (c)) now go into the general fund, the appropriation bill also provides that the general fund is to cover any shortfall in funding appropriations from the account. (And, to distinguish it from the mental health trust income account that will be repealed once it is no longer necessary, the name of the new account into which trust income will be deposited and from which the Mental Health Trust Authority will fund grants and contracts is changed to the "mental health trust settlement income account.")

In granting preliminary approval, the trial court identified the potential shortfall in the \$200,000,000 appropriation as a problem. As with the land lists, the trial court encouraged the parties to find a solution. The court further warned that it and the beneficiaries would be forced to examine the degree of risk posed by the funding source problem and the impact on the settlement if no solution is found. Provisions in the substantive and appropriation bills take care of these potential problems.

Finally, the bills modify the requirement for dismissal of the mental health trust litigation for the settlement to become effective. First, they provide that the deadline

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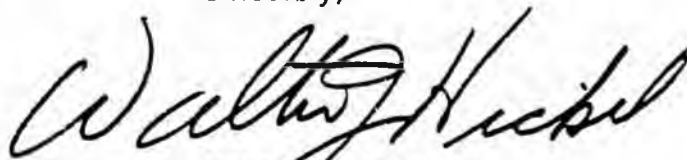
only applies to dismissal of the case by the superior court. This modification will preclude any person or party from unilaterally preventing the settlement from taking effect simply by appealing the dismissal to a higher court. In the unlikely event the superior court's dismissal is reversed on appeal, the settlement provisions are repealed through sunset clauses. Second, they clarify that the statutory benefits offered the mental health community under the settlement become effective if the litigation is dismissed by the specified deadline, December 15, 1994. Third, because the settlement takes effect upon dismissal by the superior court, the authorization for the governor to extend the deadline by up to 45 days is repealed.

In granting preliminary approval of the settlement, the trial court noted as "problematic" the possibility of a party preventing the settlement from taking effect simply by filing an appeal. These modifications eliminate that possibility and give all the terms of the settlement a common effective date.

The people of Alaska will substantially benefit from the final resolution of this almost 12-year-old litigation. The proposed settlement offers significant advantages to the mental health community, many of which could not be obtained through continued litigation. In addition, settlement will enable the mental health community to focus its energies on the important task of delivering mental health services rather than on the litigation. The rest of the Alaska public also will benefit from the significant savings of litigation expenses and from the lifting of the cloud the litigation has placed on development of state and private land.

I urge your prompt action on these measures.

Sincerely,

A handwritten signature in black ink, reading "Walter J. Hickel". The signature is written in a cursive, flowing style with a large initial "W".

Walter J. Hickel
Governor