ALASKA LEGISLATURE
HOUSE and SENATE FINANCE COMMITTEE FILES, 1993-1994

995

69

ASSUMPTIONS USED IN RECONSTRUCTION OF THE MENTAL HEALTH LANDS TRUST

1. That as much of the original Mental Health Trust Lands available should go back into the trust.

2. That protecting the lands not returnable to the trust is important to a wide range of people and groups throughout the state. (these lands are owned by private individuals, municipalities, and lands set aside for parks, state forests and wildlife refuges).

3. This bill builds on the approach laid out in Chapter 66, to substitute other state lands to act as a portion of the compensation package for the original trust broken up in 1978.

4. The compensation to the trust for subsurface values lost from the original trust has been one of the major sticking points in the long term battle over this issue. This land package addresses that issue by attempting to either return original trust land subsurface estate to the trust or to substitute similar geologic lands to the trust.

5. The administration has not used the 1.3 billion dollar offset *as part of reconstructing the trust.

   *(the offset was defined by the Supreme Court in 1985 as the money the state has spent on mental health programs since 1978. that amount is approximately 1.3 billion dollars).

SUMMARY OF ACREAGE AND PARCELS RECONSTRUCTION OF MENTAL HEALTH TRUST

- Original Entitlement, Mental Health Trust Lnds: 1,000,000 acres
- Land not to be returned to the Mental Health Trust: 530,865 acres

Land Categories	Acres
Third Party Purchasers	45,845
Municipal Conveyances	43,331
University Settlement	3,708
CIRI Land Exchange	28,449
State Agencies	3,565
Native Allotments	3,817
LDAs	232,017
State Forests (Haines, TVSF)	131,955
Chena Condemnation	5,335
Other	32,843
Total	530,865

- Land available to be returned to the Mental Health Trust from original Entitlement:*

total estate	466,180

- Land proposed to be designated as Mental Health Trust Land: (substitute Lands)

Substitute Land (total estate)	356,884
Subsurface only	127,037
	483,921

* In addition there are 98,398 acres of subsurface only lands available to be returned to the Trust.

- Total of all lands to be returned or designated as Mental Health Trust Land:

	Acres		Acres
Total estate		Split estate	
Original Lands	446,180	Original Lands	98,398
State Replacement Land	360,184	State Replacement Land	127,037
Total	826,364	Total	225,435

Alaska State Legislature

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Representative Ronald L. Larson
District 27

April 22, 1993

David T. Walker
417 Harris Street
Juneau, Alaska 99801

Re: Proposed Mental Health Trust Lands Legislation SB 67/HB 201

Dear Mr. Walker:

Responding briefly to your letter of yesterday, suggesting that "short, uncomplicated legislation could be enacted which would be very productive" in resolving the Chapter 66, Mental Health Land Trust issue. Your suggestions and my comments follow:

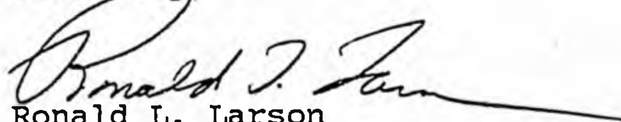
Amend SB 67/HB 201 to enact the April 6, 1992 settlement agreement. It rarely occurs to the Legislature to enact regulations or agreements especially when the Attorney General has given notice of intention to withdraw the State from an agreement. But, if it were done, it would only follow full discussion, review and recommended approval by either Judiciary Committee of the Legislature. No such recommendation exists and to my knowledge, your suggestion was never raised during the two months SB 67 was in Senate Judiciary Committee.

Replace the hypothecated land with 550,000 acres of substitute Trust lands selected by the plaintiffs and designate as collateral, lands in Cook Inlet oil and gas fields. If the Finance Committee were to consider the appropriation of specific lands of the State to any given public purpose it would only do so at the recommendation of the Resource Committee. Again, no such, committee recommendation exists.

Direct the escrow of receipts from the above substitute lands so they might ultimately be conveyed to the Trust. For better or for worse Chapter 66 SLA 1991 has a floating effective date - when the Weiss case is dismissed, the law takes effect. Until such time the State continues to set aside each year six percent of the General Fund in the Mental Health Trust Income Account. And, appropriations will continue to be made from that account to adequately fund mental health programs.

With this session of the Legislature days from adjournment, the "uncomplicated legislation" you suggest is not uncomplicated and therefore, as of this date no further Finance Committee action has been scheduled.

Sincerely,



Ronald L. Larson
State Representative

Enclosure

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DAVID T. WALKER
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April 21, 1993

HAND DELIVERED

Representative Ronald L. Larson
Co-Chairman
House Finance Committee
Capitol Building, Room 502
Juneau, Alaska 99811

Representative Eileen MacLean
Co-Chairman
House Finance Committee
Capitol Building, Room 507
Juneau, Alaska 99811

Re: Proposed Mental Health
Trust Lands Legislation
SB 67/HB 201

Dear Representatives Larson and MacLean:

As brief introduction, I represent Vern Weiss, the original named plaintiff in Weiss v. State, 4FA-82-2208 Civil. This letter is also written on behalf of Jim Gottstein who represents the Alaska Mental Health Association, et al, in Weiss. The litigation was begun by the Alaska Mental Health Association through Mr. Weiss and later the Association became a formal named plaintiff on behalf of trust beneficiaries. Mr. Weiss and the Alaska Mental Health Association then are the parties that originally commenced the Mental Health Trust Lands litigation and have had primary responsibility for prosecuting it for its ten year course. We are writing you with respect to SB 67, which has companion legislation in the House known as HB 201.

In 1991, Chapter 66 SLA 1991 was negotiated by the Administration and us[1] and passed as a proposed settlement of the class action lawsuit. Any such settlement must necessarily be a "proposed" one because under the rules applying in class actions any settlement has to be approved by the court as fair and equitable to the class (including that it is legal). The approval process is well under way for Chapter 66 with the court's initial rulings expected

1/ Along with Jeff Jessee, representing mentally retarded and mentally defective beneficiaries who intervened later in the litigation.

within the next 60 days or so.[2] The basic structure of the Chapter 66 reconstitution of the Trust[3] is to return as much original Trust Land to the Trust as possible and replace the balance with state land as comparable as practicable and equal in value. All reconstituted Trust Land will then be managed for Trust purposes, i.e., generation of revenue for the mental health program.

As expected, Chapter 66 has been vigorously challenged in court by environmental and other organizations represented by the Sierra Club Legal Defense Fund. Recently, Unocal and Marathon Oil Companies entered the lawsuit to claim that the State has no right to transfer their oil and gas leases to the Trust. Some beneficiaries also object to Chapter 66 because it does not guarantee adequate funding for the mental health program. It is fair to say that the delay in settlement approval is related to these parties' challenges in court. In addition to the parties formally challenging the settlement in court, industry interests are unhappy with the delay in resolving this situation (as are we).

SB 67/HB 201 have been proposed by these interests as a way to resolve all their problems with Chapter 66 and immediately resolve the litigation. To do this it is proposed that SB 67/HB 201 substitute a percentage of unrestricted general fund revenues (6% in SB 67 and 3% in HB 201) for original Trust land not returned to the Trust. Unfortunately, passage of SB 67/HB 201 in their current form cannot resolve the litigation quickly and, in our view, cannot be approved as a settlement.

As mentioned, under judicial rules the court must approve any class action after notice and an opportunity to object is given to all class members. First, a proposed settlement is presented to the court for "preliminary approval." Preliminary approval is granted if the proposed settlement is "within the range of possible approval and has no obvious defects" (such as being illegal). If preliminary approval is granted, notice is given to the class[4], the court receives comments, holds one or more hearings and determines if the settlement should be granted final approval. The court can suggest changes, but may not force the parties to reach a different settlement. Of course, any trial court determinations are subject to appeal.

2/ While in one sense the rulings are "initial," the issues have been so extensively briefed by the parties that the court's impending rulings should give a clear view of how the trial court will ultimately treat the proposed settlement. However, everyone expects the non-prevailing party(ies) to pursue all available appeals.
3/ Chapter 66 also provides detailed rules regarding how trust funds will be applied in support of the mental health program.
4/ A 90 day comment period may very well be a minimum.

As indicated previously, we believe the parties will soon receive the trial court's determinations regarding initial fairness and legality of the Chapter 66 settlement. If SB 67 or HB 201 were to pass, this process would have to start over and it has taken over a year to reach this stage with respect to Chapter 66, without including the time required for the settling parties to draft a basic settlement document to present to the court for consideration.

Substantively, there are two very serious legal questions associated with SB 67/HB 201. The first is whether a settlement in which the Trust gives up title to the bulk of its assets for an unenforceable under-secured promise to pay money can be approved as fair. While the proponents of SB 67/HB 201 have striven mightily to come up with techniques to minimize the chances of the State breaching (consistent with the proponents' unwillingness to put their interests on the line), the separation of powers doctrine and specifically Article IX, Section 13 of the Alaska Constitution prohibits the courts from enforcing any debt owed by the State. In our view, this attribute of SB 67/HB 201 means that such legislation will not be approved as a settlement.[5]

The second major problem with the proposed legislation is that it raises the question of whether the requirement that the State pay a fixed percentage of the general fund into the mental health trust income account amounts to a dedicated fund prohibited by Article IX, Section 7 of the Alaska Constitution. The only way this question can be answered is by the courts. The proponents of SB 67/HB 201 want the beneficiaries to ignore the potential dedicated fund problem and hope that nobody else will raise it. This would be imprudent because it would expose the beneficiaries to the unacceptable risk that they will have released all their claims to Trust property only to have the settlement challenged later by any citizen and declared illegal. There is virtually no chance that the dedicated fund issue will not be raised.

Thus, while we share everyone's frustration with the time being taken for resolution of the Chapter 66 settlement, there is absolutely no way that SB 67/HB 201 can resolve the litigation quickly. More importantly from our perspective, SB 67/HB 201 takes us significantly backward and, will most probably result in the original litigation being revived (including the claim to lands conveyed to third parties and lands placed in legislative

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5/ In fact, the 1978 legislation redesignating Mental Health Trust land as general grant land which was invalidated by the Alaska Supreme Court in Weiss v. State, 706 P.2d 681 (1985) included a promise to pay a percentage of funds earned from state lands to the Trust (albeit a smaller amount than currently proposed).

designations),[6] because, it suffers from substantially greater infirmities than Chapter 66. To aid in your understanding of this complex issue, we have enclosed a chart which analyzes the interest groups' goals vis a vis Chapter 66, litigation and SB 67/HB 201, as well as a brief description of these approaches. We believe that any unbiased review will confirm that at this point SB 67/HB 201 are extremely counter-productive.

All of this is not to say that the legislature can not be constructive in the current situation. In fact there is short, uncomplicated legislation that could be enacted which would be very productive.

The first element of the legislation would confirm, approve and ratify the April 6, 1992 settlement agreement filed in Weiss. In essence the legislation would enact the settlement agreement. By doing this all of the legal challenges to the current settlement are eliminated except those based upon the claim that the legislature does not have the constitutional authority to enter into the settlement.

A second element of the legislation would replace the approximately seven million acres of land currently hypothecated to the Trust with the approximately 550,000 acres of onshore land nominated by the Plaintiffs as Proposed Substitute Land plus the approximately 1.5 million acres of the existing collateral of last resort (offshore Cook Inlet oil and gas fields). The remaining currently hypothecated lands would be released. We have discussed this with our clients and they have agreed to this (although it would take court approval). The reason for this amendment to Chapter 66 is that a good deal of the opposition to Chapter 66 is related to the 7 million acres of land currently hypothecated to the Trust.

The third element of the legislation would direct the State to escrow receipts from new development on Proposed Substitute Land so that if such land is ultimately conveyed to the Trust, the funds received will be deposited into the Trust Fund.[7] After land is

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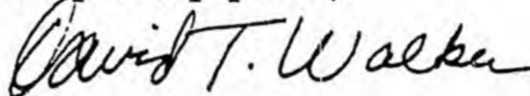
6/ The State has repeatedly attempted to have these claims dismissed to no avail. A legal memorandum issued in January 1990 describing these claims and their legal bases was widely distributed in 1990 and is available upon request. The State's disregarding of the legal principles described in that memorandum resulted in the imposition of the preliminary injunction against the State doing anything on Mental Health Trust Land without court approval and the placing of a cloud on all third party interests in Mental Health Trust Lands.

7/ The Department of Law has indicated there is no authority to place such funds in escrow under current law.

nominated as Proposed Substitute Land, in order to protect the Trust's future interest, the Plaintiffs must approve any transactions. If funds received from such new activity can never be deposited into the Trust fund, there are many fewer transactions that it makes sense for the Plaintiffs to approve.

We recognize that there has been intense pressure to pass SB 67/HB 201 as a way to immediately resolve the Mental Health Trust Lands litigation. Unfortunately, that route leads to calamity. We hope that in the rush to adjournment, you will find time to appraise the Weiss litigation and avoid limited - perspective fixes to Chapter 66 that will only exacerbate the situation. We also hope that you will accept our suggestions to enhance the acceptability of the Chapter 66 settlement to the court as a way to help all of us through this morass sooner than any other course of action presently under consideration by the legislature.

Very truly yours,



David T. Walker

Enclosure

cc: James B. Gottstein
Jeffrey L. Jessee
Philip R. Volland
Charles E. Cole
Charles P. Boddy
Robert B. Stiles
Walt Baldwin
Peter J. Maassen
G. Thomas Koester
Wendy S. Feuer
Brian D. Bjorkquist
Kent V. Dawson
Richard S. Thwaites, Jr.
Vern T. Weiss

Rep. Larson

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

May 4, 1993

Hon. Ramona Barnes, Speaker
Alaska House of Representatives
Eighteenth Alaska Legislature, First Session
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear Speaker Barnes:

After meeting with the settling plaintiffs in Weiss, we agree that two minor amendments should be made in the proposed language that was distributed to you earlier today to resolve Judge Greene's concerns in the mental health trust lands litigation. The amendments are reflected in the proposed language attached to this letter.

We are available to explain these proposed amendments. We urge your favorable consideration on this matter.

Very truly yours,

Charles E. Cole
Attorney General

CEC:cl

cc w/ enc.: Rep. Gail Phillips
Rep. Ron Larson
Rep. Eileen MacLean

Pat Ryan, Chief of Staff
Kris Lethin, Legislative Liaison
Office of the Governor

Hon. Glenn A. Olds, Commissioner
Dept. of Natural Resources

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past two years in settling the mental health lands mess will become a dead letter.

We urge your favorable consideration of the proposed amendments.

Very truly yours,

Charles E. Cole
Attorney General

CEC:cl

cc w/ enc.: Rep. Gail Phillips
Rep. Ron Larson
Rep. Eileen MacLean

Pat Ryan, Chief of Staff
Kris Lethin, Legislative Liaison
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Philip R. Volland
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Peter J. Maassen
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Brian D. Bjorkquist, Assistant Attorney General
Wendy S. Feuer, Assistant Attorney General

5/4/93

REVISED

Proposed Amendments to CSHB 201(RES) and CSSB 67(JUD)

Page 1, line 2:

Following "mental health trust":

Delete all material

Insert "; and providing for an effective date.""

Page 1, lines 3 - 7:

Delete all material

Page 1, line 9 - page 11, line 9:

Delete all material

Insert the following:

"* **Section 1.** Section 55(g), ch. 66, SLA 1991, is amended to read:

(g) **Except for public notice as provided under AS 38.05.945(b) and (c), the** [THE] provisions of **AS 38.04, AS 38.05, and** AS 38.50 do not apply to exchanges under this section.

* **Sec. 2.** Section 55(h), ch. 66, SLA 1991, is amended to read:

(h) If agreement cannot be reached between the plaintiffs in Weiss v. State of Alaska, 4FA-82-2208 Civil, and the commissioner of natural resources under (f) of this section as to appropriate lands to be conveyed to the trust as compensation or as to the

value of the original lands taken or of replacement lands, the Alaska Supreme Court shall resolve the disagreements using the criteria set out in this section**, but may not give deference to the commissioner's finding under (j) of this section**. The Alaska Supreme Court may order the commissioner of natural resources to convey appropriate state land to the trust without further legislative authorization.

* **Sec. 3.** Section 55, ch. 66, SLA 1991 is amended by adding new subsections to read:

(i) The commissioner of natural resources shall give public notice as provided under AS 38.05.945(b) and (c) of proposed exchanges negotiated under (f) of this section, or exchanges proposed by either the plaintiffs in Weiss v. State of Alaska (4FA-82-2208 Civil) or the commissioner of natural resources under (h) of this section. In the notice, the commissioner shall provide for a written comment period of at least 30 days. The commissioner shall hold a public hearing in the area of the land proposed to be conveyed to the trust under the proposed exchange.

(j) Following public notice of a proposed exchange under this section and the public hearing, the commissioner shall make, and give notice of, a written finding as to whether the proposed exchange meets the criteria of (b) - (e) of this section.

(k) In order to obtain judicial review of the commissioner's finding under (j) of this section and of the exchange, a person must

(1) have submitted written or oral comment in response

to a notice published under (i) of this section;

(2) demonstrate that the person has an interest that will be adversely affected by the exchange if the exchange becomes final; and

(3) within 30 days after the commissioner gives notice of the commissioner's finding, file a notice of appeal with the court with jurisdiction under sec. 57 of this Act.

* **Sec. 4.** Section 56(a), ch. 66, SLA 1991, is repealed and reenacted to read:

(a) To secure the reconstitution of the trust as provided in secs. 54 and 55 of this Act, the following land is hypothecated to the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709:

(1) original mental health land that will be returned to the trust under sec. 54 of this Act; and

(2) up to 1,500,000 acres of other state land as negotiated by the commissioner of natural resources and the plaintiffs in Weiss v. State of Alaska, 4FA-82-2208 Civil, using the criteria set out in secs. 55(d) and (e) of this Act, for the exchange of land to the trust in return for original mental health land not returned to the trust; the total amount of land hypothecated to the trust under this paragraph, in conjunction with land hypothecated to the trust under (1) of this subsection, shall be sufficient to reconstitute the trust.

* **Sec. 5.** Section 58, ch. 66, SLA 1991, is amended to read:

Sec. 58. **(a) Sections 56(a) and (b) of this Act take effect**

on the effective date of an Act passed by the Eighteenth Legislature amending provisions of ch. 66, SLA 1991 that relate to reconstitution of the corpus of the mental health trust.

(b) Sections 1 - 55, 56(c) and (d), and 57 of this [THIS] Act **take** [TAKES] effect upon entry of a final order dismissing Weiss v. State of Alaska, 4FA-82-2208 Civil, and the expiration of any time for appeal. The superior court shall advise the lieutenant governor and the revisor of statutes when the final settlement and order of Weiss v. State of Alaska has been approved.

* **Sec. 6.** If ch. 66, SLA 1991, is finally disapproved as a settlement of Weiss v. State, 4FA-82-2208 Civil, this Act is repealed.

* **Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

/Rep. [illegible]

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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May 4, 1993

Hon. Ramona Barnes, Speaker
Alaska House of Representatives
Eighteenth Alaska Legislature, First Session
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear Speaker Barnes:

On April 26, 1993, Superior Court Judge Mary E. Greene ruled that the legislation settling the mental health trust lands litigation (Chapter 66, SLA 1991) was constitutional in all respects except one. In her view, the pledging of the land on the "Hypothecated Lands List" to the trust as security for the state's performance of its obligations under ch. 66 was not valid because it did not contain adequate standards to guide the commissioner of natural resources in negotiating the list with the plaintiffs.

Judge Greene went out of her way to point out, however, that the legislature could easily cure the problem:

> Obviously, it would be very easy for the legislature to remedy this problem. If the legislature amended section 56(a) to adopt a specific, known list or <u>delegated the task of preparing a new list with adequate standards</u>, the difficulty would be eliminated.

Memorandum Decision and Order Re: Intervenors' Complaint (April 26, 1993) at 82, n. 42 (emphasis added).

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The attached proposed amendments to CSHB 201(RES) would implement Judge Greene's suggestion for curing ch. 66 by delegating to the commissioner of natural resources the task of preparing a new Hypothecated Lands List, to consist of (1) original mental health land that will be returned to the trust under sec. 54, ch. 66, and (2) up to 1.5 million acres of other state land, selected under the criteria set out in secs. 55(d) and (e), ch. 66, for identifying land to be exchanged to the trust in return for original mental health land not returned to the trust. (This will reduce the amount of state land hypothecated to the trust from the 6.7 million acres on the original Hypothecated Land List to no more than 1.5 million acres and, because the same standards will be used fcr hypothecation as for exchanges, make it likely that the same land that is hypothecated will ultimately be exchanged to the trust.)

The proposed amendments also make a technical amendment to ch. 66 by exempting the process for reconstituting the trust from the planning and classification requirements of AS 38.04 and AS 38.05, and substituting procedures by which the public may participate in the reconstitution of the mental health trust. Judge Greene found that the planning and classification requirements of AS 38.04 and AS 38.05 would apply to the reconstitution process under ch. 66 as currently written. The proposed amendments to CSHB 201(JUD) will result in substantial savings of both time and money in completing the reconstitution process and bringing this issue to final closure.

In effect, Judge Greene has determined that ch. 66, SLA 1991 is a constitutionally permissible means to settle this divisive and costly lawsuit that has adversely impacted many people in the state. Passage of the amended version of CSHB 201(JUD) that we are proposing will (1) significantly advance the final settlement of the case, and (2) free most of the land on the original Hypothecated Lands List for development.

If this legislation is not enacted before the legislature adjourns, the chances are strong that the settlement agreement reached with the Weiss plaintiffs under ch. 66 will be terminated and the headway we have made over the

PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1029 WEST THIRD AVENUE, SUITE 300 • ANCHORAGE, ALASKA 99501 • (907) 279-8561

April 26, 1993

James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501

Re: **CSSB 67(JUD) and CSHB 201(RES)**

Dear Jim:

Thank you for your letter of April 22, 1993 commenting on CSSB 67, CSHB 201, and the additional amendments our coalition proposed on April 15, 1993.

As you know, my two clients, Usibelli Coal Mine, Inc. and the Diamond Chuitna coal project, have worked very hard in both the 1992 and 1993 legislative sessions to try to structure a compromise that all of the interested parties could accept. Charlie Boddy and Bob Stiles have both invested a significant amount of time and money in this effort, as have all of the members of our settlement coalition. I am sorry that we have been unable to satisfy your concerns.

Because your letter states clearly that you are not interested in working with us on these bills, I will not respond to the specific questions and objections you have raised. I do, however, want to respond to a few of the statements made in your letter.

On page 3 you discuss the dedicated fund issue and summarize a conversation you and I had about this issue. What I intended to suggest in our conversation was that if you had any doubt about the merits of this issue, it would be best to address the issue after you had first taken a look at the specific language we were going to propose in the additional amendments. My thought process was that if you were willing to work with us on the bills, we could then determine by further research whether there really is a dedicated fund issue, or that we could fix any problem with additional drafting. This constitutional issue is a complicated subject which I felt deserved some serious thought and analysis before

[14166-0010/AA931130.008]

TELEX: 32-0319 PERKINS SEA • FACSIMILE: (907) 276-3108
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being thrown up as yet another roadblock to a compromise designed to end the Chapter 66 litigation. As we have discussed, if there is a dedicated fund problem under CSSB 67 and CSHB 201, then the exact same legal problem exists with respect to the "step-down" funding provision in Chapter 66. Frankly, if you are so sure that this issue would have to be addressed by the court if CSSB 67 or CSHB 201 were to pass, then I do not understand why you have not brought it to the court's attention in the litigation over Chapter 66.

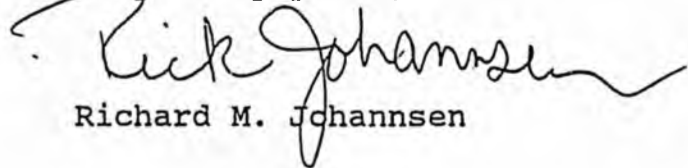
On page 4 of your letter you mention that a constitutional amendment could solve both the "unenforceability" and dedicated fund problems but that you understand the proponents of CSSB 67 and CSHB 201 "are unwilling to consider such an approach." I want to clarify for you that our "willingness" is not the issue. Our settlement coalition simply feels it is unrealistic from a political standpoint to pursue this approach. Not only do we think the required vote could not be obtained, but we fear that there would be organized political opposition to any such constitutional amendment and that this would only result in animosity on the part of the general public towards the beneficiaries of mental health services.

As I have testified in front of the legislature, we do not believe that Chapter 66 will survive all of the court challenges and appeals. Based upon this belief, you are correct that my clients prefer a litigated reconstitution of the trust in accordance with the supreme court's 1985 decision over the protracted litigation concerning the legality and fairness of Chapter 66. If no final settlement can be reached promptly, we would simply rather spend our time, energy and money resolving the issues raised by the supreme court.

Can I assure you or anyone that amending Chapter 66 with CSSB 67 and CSHB 201 will end the litigation? Of course not. But we have a very broad-based coalition (two of the named plaintiff beneficiary groups, the public interest intervenors, the oil company intervenors, and the resources development community) supporting these bills. If you were willing to work with us and if you were willing to make reasonable accommodations, we do believe that any litigation over an amended Chapter 66 could be minimized.

We hope there may be other opportunities to work constructively together and to settle the case, but we think Chapter 66 in its current form is not the answer. Once again, I want to thank you for taking the time to respond to the legislative proposals supported by our coalition. If you should change your mind and desire to work with us, I hope you will give me a call.

Very truly yours,



Richard M. Johannsen

pw

cc: Joe Usibelli, Jr.
Charles P. Boddy
Robert B. Stiles
Kent V. Dawson
Charles E. Cole
Wendy S. Feuer
Sen. Drue Pearce
Sen. Steve Frank
Rep. Ron Larson
David T. Walker
Thomas S. Waldo
Jeffrey L. Jessee
Philip R. Volland
Peter J. Maassen
G. Thomas Koester
Brian D. Bjorkquist
Rep. Eileen Maclean

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Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

M E M O R A N D U M — April 21, 1993

SUBJECT: Mental Health Trust; Amendment 8-LS0728\O.2 to HB 201

TO: Representative Ron Larson
Co-chair, House Finance Committee
Attn: Jay Hogan

FROM: Pam Finley PF
Assistant Revisor

Please be advised that the enforcement provisions in AS 37.14.046 (in both secs. 9 and 10) and sec. 17 may violate the state constitution by delegating legislative and executive power to the Authority and the courts, and by failing to keep legislative, executive, and judicial power sufficiently separate.

PF:lmb
93-131.lmb

AMENDMENT

OFFERED IN THE HOUSE
TO: CSHB 201(RES)

Page 1, line 7, after "trust;":

Insert "**amending Rules 60 and 65 of the Alaska Rules of Civil Procedure;**"

Page 1, after line 8:

Insert new bill sections to read:

"*** Section 1.** PURPOSE. The provisions of ch. 66, SLA 1991, as amended by this Act, are intended to constitute settlement of Weiss v. State of Alaska, No. 4FA-82-2208 Civil. The obligations imposed upon the state by ch. 66, SLA 1991, as amended by this Act, are to remedy past breaches by the state of the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, and to place the trust as nearly as possible in the position it would be in today and in the future had the trust not been breached.

*** Sec. 2.** SCOPE OF STATE'S OBLIGATION WITH RESPECT TO ALLOCATION OF MONEY TO THE MENTAL HEALTH TRUST INCOME ACCOUNT. The obligation of the state under AS 37.14.036(c), added by sec. 7 of this Act, to allocate money to the mental health trust income account anticipates future changes in the unrestricted general fund revenue of the state, increased demands on the revenue of the state from other sources, and future changes in the mental health program of the state."

Page 1 line 9:

Delete "**Section 1**"

Insert "**Sec. 3**"

Renumber the following bill sections accordingly.

Page 1, line 11:

After "dispute", insert "or cause of action"

Delete "AS 37.14.036(c) - (e)"

Insert "AS 37.14.036(c) and, when required, to issue a mandatory permanent injunction under AS 37.14.046"

Page 4, line 1, after "section":

Insert ", and shall inform the authority in writing by August 31 of each year of the amount allocated under this subsection from the general fund to the mental health trust income account during the preceding fiscal year"

Page 4, lines 6 - 26:

Delete all material and insert:

"* Sec. 8. AS 37.14 is amended by adding a new section to read:

Sec. 37.14.041. SECURITY FOR ESTABLISHMENT OF TRUST INCOME ACCOUNT. (a) To secure the allocation of amounts required under AS 37.14.036(c), the following land and minerals that were granted to the state under the enabling Act are pledged as security to the mental health trust:

(1) land and minerals that are, on the effective date of ch. 66, SLA 1991, designated by law as a state park, state forest, state game refuge, state wildlife refuge, state migratory waterfowl refuge, state game sanctuary, state recreation area, state recreation 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;

(2) minerals in other land conveyed to the state that, before the effective date of ch. 66, SLA 1991, have been reserved by the state or that on and after the effective date of ch. 66, SLA 1991, must be reserved by the state; however, for purposes of this paragraph, minerals owned or to be owned by the University of Alaska are not considered reserved or to be reserved by the state.

(b) Title to land and minerals described in (a)(1) of this section and to reserved minerals described in (a)(2) of this section remains in the state and

(1) notwithstanding the grant of the land and minerals to the state under the enabling Act or the pledge of the land and minerals as security,

(A) the state may continue to conduct all activities on the land and minerals that are authorized by law;

(B) an interest in land or mineral interest issued by or acquired from the state is valid; and

(2) so long as a default in the obligation to make the allocation required by AS 37.14.036(c) does not exist, income from that land and minerals, except as a deposit may be otherwise directed by the state constitution or by law, shall be

(A) deposited in the state general fund; and

(B) considered unrestricted general funds of the state.

(c) Upon default, the foreclosure of the land and minerals pledged as security under (a) and (b) of this section, including the parcels to be foreclosed and the manner of foreclosure, shall be determined by the superior court, subject to AS 37.14.046(b)(2).

* Sec. 9. AS 37.14 is amended by adding a new section to read:

Sec. 37.14.046. ENFORCEMENT OF MENTAL HEALTH TRUST INCOME ACCOUNT PAYMENT OBLIGATION. (a) If the allocation required under AS 37.14.036(c) is not made in a timely manner, the chief executive officer of the authority shall notify each of the following in writing of the state's failure to make the allocation:

(1) the governor;

(2) the commissioner of revenue;

(3) the president of the senate; and

(4) the speaker of the house of representatives.

(b) If the allocation is not made within 15 days after the giving of the notice under (a) of this section, the authority may exercise either or both of its rights under this subsection:

(1) the authority may bring an action in the nature of mandamus in the superior court to require the commissioner of revenue to make the allocation required by AS 37.14.036(c); in that action,

(A) the superior court shall immediately issue a mandatory permanent injunction; notwithstanding AS 09.40.230, the court shall issue the

injunction without regard to

(i) the adequacy of any legal remedy or the remedy of foreclosure under this section;

(ii) any balancing of the equities, hardships, or practicalities; and

(iii) any difficulty of enforcement;

(B) if there is a dispute over the dollar amount of the allocation required under AS 37.14.036(c), the court shall direct the commissioner of revenue to immediately allocate an amount equivalent to the greater of

(i) the dollar amount allocated by the commissioner of revenue under AS 37.10.036(c) during the prior fiscal year; or

(ii) the required allocation amount last reported by the commissioner to the authority under AS 37.14.036(c); and

(C) a dispute over the amount of the allocation required by AS 37.14.036(c) shall be resolved de novo after the order under (B) of this paragraph is issued;

(2) the authority may foreclose on some or all of the land and minerals pledged as security under AS 37.14.041; the foreclosure procedures available to the trust are those that are customarily available to the beneficiary of a deed of trust under normal commercial practice and state law; a foreclosure under this paragraph does not affect the obligation of the state to continue making the full annual allocation required under AS 37.14.036(c).

(c) An interested person may also bring an action under (b)(1) of this section. If an interested person brings an action under this subsection, the interested person shall move to join the authority as a defendant under applicable court rule unless the authority also files an action under (b)(1) of this section.

(d) Notwithstanding any other provision of law, a mandatory permanent injunction issued under (b)(1) of this section is not subject to modification or dissolution due to changed circumstances in the state's financial condition.

* **Sec. 10.** AS 37.14 is amended by adding a new section to read:

Sec. 37.14.046. ENFORCEMENT OF MENTAL HEALTH TRUST INCOME ACCOUNT PAYMENT OBLIGATION. (a) If the allocation required under

AS 37.14.036(c) is not made in a timely manner, the chief executive officer of the authority shall notify each of the following in writing of the state's failure to make the allocation:

(1) the governor;

(2) the commissioner of revenue;

(3) the president of the senate; and

(4) the speaker of the house of representatives.

(b) If the allocation is not made within 15 days after the giving of the notice under (a) of this section, the authority may exercise either or both of its rights under this subsection:

(1) the authority may bring an action in the nature of mandamus in the superior court to require the commissioner of revenue to make the allocation required by AS 37.14.036(c); in that action,

(A) the superior court may issue a permanent injunction;

(B) if there is a dispute over the dollar amount of the allocation required under AS 37.14.036(c), the court shall direct the commissioner of revenue to immediately allocate an amount equivalent to the greater of

(i) the dollar amount allocated by the commissioner of revenue under AS 37.10.036(c) during the prior fiscal year; or

(ii) the required allocation amount last reported by the commissioner to the authority under AS 37.14.036(c); and

(C) a dispute over the amount of the allocation required by AS 37.14.036(c) shall be resolved de novo after an order under (B) of this paragraph is issued;

(2) the authority may foreclose on some or all of the land and minerals pledged as security under AS 37.14.041; the foreclosure procedures available to the trust are those that are customarily available to the beneficiary of a deed of trust under normal commercial practice and state law; a foreclosure under this paragraph does not affect the obligation of the state to continue making the full annual allocation required under AS 37.14.036(c).

(c) An interested person may also bring an action under (b)(1) of this section. If an interested person brings an action under this subsection, the interested person

shall move to join the authority as a defendant under applicable court rule unless the authority also files an action under (b)(1) of this section."

Renumber the following bill sections accordingly.

Page 6, line 29, after "game refuge":

Insert "state migratory waterfowl refuge,"

Page 6, line 30:

Delete "recreational area, state recreational river"

Insert "recreation area, state recreation river"

Page 10, following line 16:

Insert a new bill section to read:

"* **Sec. 17.** Section 57, ch. 66, SLA 1991, is repealed and reenacted to read:

Sec. 57. CONCLUSION OF PENDING LITIGATION. This Act, and any amendments to it, may serve as the basis of a settlement by the parties of the unresolved issues in Weiss v. State of Alaska, 4FA-82-2208 Civil. If this Act and any amendments to it are to serve as the basis of a settlement of Weiss v. State of Alaska,

(1) the court before which the settlement is agreed to and filed may prepare an order or decree setting out the basis of the settlement;

(2) the court may incorporate the provisions of this Act, as amended, by reference into its order or decree;

(3) the order or decree entered by the court under (2) of this section is an independent basis for the obligations imposed by this Act, as amended;

(4) the obligations imposed by this Act, as amended, that are incorporated into the court's order or decree may not be modified without approval of the superior court; and

(5) changed circumstances in the financial condition of the state are not grounds for modification of the court's order or decree."

Renumber the following bill sections accordingly.

Page 10, line 17:

Delete all material and insert:

"* **Sec. 18.** Sections 54, 55, and 56, ch. 66, SLA 1991, are repealed."

Page 10, line 19:

Delete "sec. 1"

Insert "sec. 3"

Page 10, line 26:

Delete "sec. 8"

Insert "sec. 12"

Page 11, line 4:

Delete "sec. 8"

Insert "sec. 12"

Page 11, following line 4:

Insert new bill sections to read:

"* **Sec. 22.** COURT RULE CHANGES. AS 37.14.046(d), added by sec. 9 of this Act, has the effect of amending Rule 60 of the Alaska Rules of Civil Procedure by excluding the factor identified in that subsection from consideration as a basis for modification of a final judgment or order. AS 37.14.046(b)(1)(A), added by sec. 9 of this Act, has the effect of amending Rule 65 of the Alaska Rules of Civil Procedure by requiring the superior court to issue mandatory permanent injunctions without regard to a showing by the party seeking injunctive relief that the standards applicable to temporary restraining orders, preliminary injunctions, and permanent injunctions are met.

* **Sec. 23.** Section 9 of this Act takes effect only if sec. 22 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

* **Sec. 24.** If sec. 9 of this Act takes effect under sec. 23 of this Act, sec. 10 of this Act does not take effect.

* **Sec. 25.** If sec. 9 of this Act does not take effect under sec. 23 of this Act, sec. 10 of

this Act takes effect under secs. 27 and 28 of this Act."

Renumber the following bill sections accordingly.

Law offices of
JAMES B. GOTTSTEIN
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(907) 274-7686
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James B. Gottstein
Jill C. Wittenbrader

April 22, 1993

Richard M. Johannsen
Perkins Coie
1029 West Third Avenue, Suite 300
Anchorage, Alaska 99501

Re: SB67/HB201

Dear Rick:

You and Jeff Jessee have asked us to address the language of SB67/HB201 for some time, most recently in connection with your April 15, 1993 proposed amendments. As you know, we have felt that SB67/HB201 have at least two serious legal problems which would likely lead to their rejection by the court. One of these problems is unenforceability. You have attempted to address enforceability in your recent proposed amendments. The other serious problem, whether the bills create a prohibited dedicated fund, is not perceived as a subject the legislature can address.[1] Because of these fundamental problems we are anxious to avoid the appearance that we are negotiating the terms of these bills.

In light of the effort your group has put into drafting this legislation we agree it is only fair to give you our thoughts. In doing so, we are not negotiating the terms of SB67/HB201, we are not endorsing SB67/HB201, even if our suggestions were accepted, and we have not changed our fundamental analysis that the SB67/HB201 approach is likely to fail as a settlement of the Weiss litigation for the reasons noted.[2]

Our comments will be directed to CSSB67(Jud) and CSHB201(Res) as if they were amended by your April 15 1993 transmittal.

Sec. 2.

We are opposed to requiring DNR to manage the lands. DNR is not equipped to manage the lands appropriately. The fiscal note

[1]We frankly feel that the unenforceability issue is similarly incapable of legislative correction.
[2]We do understand that Usibelli prefers going back to the original litigation over consummating the Chapter 66 settlement. We think passage of SB67/HB201 will accomplish that goal of Usibelli.

prepared by DNR confirms this because no particul[illegible] personnel are assigned to manage Trust land but rather a port[illegible] of DNR personnel expense is allocated to the Trust. This will lead to continued lack of attention to Trust lands, and, as will be discussed below, use of the Trust to fund general DNR functions.

We note that at line 15 of page 2, the addition of the words "and dispose of" appears to require disposal of the land and minerals. Simply using the word "manage" ought to be sufficient.

Sec. 3.

The imposition of AS 38.05.285 on the management of Trust land is inappropriate. Multiple use and other State constitutional provisions relating to management of general grant land do not apply to the management of Trust land. Providing that in case of conflicts, trust management principles apply does not solve this problem, because (1) it sets up an inappropriate management criteria in the first place, and (2) provides [illegible]o much opportunity for legal challenges to actions on Trust land.

Sec. 4.

<u>See</u>, comments below regarding "802" lands.

New Sec. 5.

New Section 5 proposed in your April 15th transmittal amends AS 37.14.031, added by Section 11 of Chapter 66 to provide that the Trust fund will be a separate fund within the Permanent Fund or the Treasury. Which is it? Who decides? If it is the Permanent Fund, is that part of the Treasury? If not how can funds be removed from the treasury and deposited into the Permanent Fund without an appropriation without running afoul of Article 9, Section 13 of the Constitution.

Sec. 5 (Old).

This section which contains the compensation scheme, is the one with the fundamental problems. First, it is fundamentally unenforceable (we will address the remedy section where it comes up). Second, it raises the question of whether a binding commitment to pay or allocate a percentage of unrestricted general fund revenues is a constitutionally prohibited dedicated fund.

With respect to the former, Article 9, Section 13 of the Alaska Constitution provides that

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law.

Similarly AS 09.50.270 provides in part, "No attachment or execution shall issue against the State." Article 9, Section 13 of the Constitution, makes any promise to pay or stated alternatively any debt based compensation to the trust (which is the essence of SB67/HB201) inherently unenforceable. We do not believe the court would approve a settlement wherein the beneficiaries release all of their rights to unreturned Trust land in exchange for an unenforceable promise to pay. Indeed, the 1978 legislation purporting to redesignate Mental Health Trust Land as general grant land that was invalidated in *State v. Weiss*, 706 P.2d 681 (Alaska 1985) contained a promise to pay a percentage of funds received from all State lands. It is very hard to see how SB67/HB201 are different in this material aspect from the legislation invalidated in *Weiss*.[3]

With respect to the dedicated fund issue, Article 9, Section 7 of the Alaska constitution prohibits dedicated funds except for (1) the permanent fund, (2) when required by the federal government for state participation in federal programs, and (3) dedications existing upon the date of ratification of the Constitution. The first and third exceptions clearly do not apply.[4] It is conceivable that the second exception applies which would make the dedication permissible. However, prudence requires that the issue be decided by the courts because the beneficiaries can not bear the risk that the dedication of a percentage of general fund revenues to the Trust is unconstitutional. You have suggested in conversation that this issue not be brought up by us and maybe no one else will. This would not be prudent because the issue could be raised after the beneficiaries had released their claim to Trust land, leaving them with nothing.

Frankly, we could live with the time involved to resolve this issue as long as the Chapter 66 option was preserved as a

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[3]The issue of enforceability does not impugn the intentions of the legislature. It simply reflects the undeniable fact that future legislatures may be faced with situations where, in their view, the public interest requires a breach, particularly if there are no penalties involved. In order to avoid any enforceability questions, it would be a simple matter to transfer sufficient income producing State assets to equal the anticipated payment requirement. For example, the recently identified Sunfish oil field in Cook Inlet is expected to generate royalties in the $130 million per year range. This is completely new revenue, not previously expected by the State. Of course, this would require resolution of the 6(i) issue. At least the trial court's ruling on this issue is imminent.

[4]The constitution was ratified in April of 1956 while the Alaska Mental Health Enabling Act was not passed until July of 1956.

backup[5], but believe the parties urging adoption of SB67/HB201 are unwilling to take the time involved. Similarly, a constitutional amendment could solve both the unenforceability and dedicated fund problems but we understand the proponents of SB67/HB201 are unwilling to consider such an approach.

The definition of unrestricted general fund revenues, while an improvement over no definition, is insufficient. The definition should list all current sources of revenues that are considered restricted (or not unrestricted). Otherwise, it will be quite easy to get into later disagreement over what was or was not restricted on the effective date. To say that "all categories of accounting for money accruing to the general fund that were not restricted" is too open-ended. First, I don't know what a "category of accounting" is. Second, new categories could be created. Also, since there will be some time before the effective date, new restrictions could be made to apply between now and the effective date.

Sec 6 (Old - as amended).

We recognize the effort that you and your group have put in to address the enforceability issue with your new proposed amendments to Section 6. We understand that the mandatory injunction approach (in the event the allocation is not made) was arrived at because you could not identify any other approach that would withstand constitutional scrutiny. In our view, the critical issue in evaluating the problem is to focus on "who's money is it?" In other words, are funds that have been "allocated" to the Mental Health Trust Income Account "owned" by the Trust. If so, it appears that a mandatory injunction transferring ownership of the funds from the State to the Trust would be unconstitutional under Article 9, Section 13 of the Alaska Constitution. If the Trust does not truly "own" the funds, then the hard won right of the beneficiaries to enforce the State's fiduciary obligations respecting expenditure of Trust funds would be nullified by Article 9, Section 13. This seems explicitly recognized in your amendment where it provides the mandatory injunction will issue "without regard to any difficulty of enforcement." The result seems to be that the payment obligation would still end up being unenforceable. Now, to the extent that you desired this to be tested in court, it would not

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[5] In this regard, my client, the Alaska Mental Health Association is probably much more willing to consider an enforceable percentage of general fund revenues than Mr. Weiss, who I understand to be convinced the State will never live up to a payment obligation, regardless of the enforceability provisions. Because of my belief that sufficient enforceability provisions are not likely to be achievable, Mr. Weiss's position and the Association's are probably not, as a practical matter, any different.

be objectionable to me as long as Chapter 66 is retained as an option.

With respect to inadequacy of security issues, clarifying that foreclosed LDA land is to be received by the Trust free and clear of any legislative restrictions has not been addressed. While proponents of SB67/HB201 can hypothesize that it may be better to leave that question open as a way to prevent a gung-ho development administration from breaching the payment obligation in order to open the LDAs to development, it simply is insufficient as a reason to deny the Trust an appropriate remedy.

In addition, the collateral is clearly insufficient (even with the addition of the subsurface of conveyed land) to secure the debt because only a small part of the original Trust land not to be returned is serving as collateral for all of the land not to be returned. Obvious additions to the collateral would be subjecting the "802" interest protections and any municipal land that has not been conveyed out of municipal ownership as of the date of enactment to foreclosure. Usibelli has indicated that it is sure the State won't breach the compensation obligation. If so, then it should not object to making its "802" interest protections subject to foreclosure in the event of default. The same is true with respect to the LDA management issue upon foreclosure. This brings up the concept of protection of the security. Under the proposed legislation, the State may do anything it wants on the pledged land, including reducing or eliminating its value as collateral. This substantially reduces its value as security.

Finally, the foreclosure procedures should specify more clearly, the rights upon foreclosure. Who conducts the sale? We assume non-judicial foreclosure rights are intended, but without elimination of the allocation obligation. It would appear that summary foreclosure of all parcels was intended. If so, it should be stated specifically. Since it would not appear that actual sales of the parcels to be foreclosed to third parties is contemplated, it seems a more direct approach could be taken. This is the rental or lease approach that we have previously indicated would be preferred to a security interest approach. Under this approach, title to the "pledged" land would remain in the Trust, with the State "leasing" or "renting" the right to use the land. If the allocation were not made the "lease" could be terminated and all rights returned to the Trust without going through a foreclosure proceeding. The notice periods required to exercise such rights need not change from your proposed amendments.

Sec. 7 (Old).

We have been advised by our consultants that the lack of a survey will substantially reduce if not completely eliminate the ability to manage Trust lands effectively. Without a survey it will not be possible to locate accurately which lands are Trust lands which are 802 lands and which are general grant lands. In addition, eliminating the requirement for survey for conveyances is completely contrary to property law as it has been consistently applied for centuries. Tentative Approval under the Statehood Act and Interim Conveyances under ANCSA were adopted solely as interim measures, with patents to follow after survey. Abandoning the requirement that property has to be sufficiently described to locate it on th ground in order to validly convey it for the sole purpose of saving survey costs is short-sighted and ill-advised.[6]

Sec. 8 (Old).

Trust land that has been disapproved for conveyance to municipalities (Subsection (C)) should not be exempt from conveyance to the Trust.

No Trust Land was purchased so that Subsection (D) is inapplicable.[7]

Just because land has been selected by a Native corporation (Subsection (E)) does not mean the corporation would receive the land even absent the Trust's selection. There is no reason for the Trust to give up land because of Native corporation selections where the Native corporations would not receive the land in any event.

The same is true of Native allotment applications (Subsection F).

Land identified for exchange but not yet conveyed (Subsection (G)) should, by definition be identifiable right now. DNR should do so and the lands be evaluated, rather than wait for later and end up in dispute.

Many ILMAs have been granted where the receiving agency does not use the land for direct public services and/or uses the land

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[6]DNR's calculation of the cost of surveys was based upon a full township and sections survey where much cheaper platted metes and bounds surveys would suffice. We estimate that the cost of the latter type of survey would reduce the cost to about 20% of that estimated by DNR.
[7]It is possible that existing Trust land was encumbered with restrictions because of conditions imposed by accepting grants relating to the improvement of those parcels.

to earn revenue. ILMAs and the like are susceptible to identification and, in fact, the various departments have been stonewalling on the "smallest practicable tract" determination that is being undertaken under the Settlement Agreement. Justification for continuation of each ILMA, including the necessary area should be required. If the departments have not complied with this process the land should be returned to the Trust.

Sec. 9 (Old).

The whole "802" process is clearly inappropriate as trust management. To the extent that the percentage is meant to compensate for this inappropriate management, the "802" provisions should be subject to continuing performance by the State of its obligations under the settlement. See above discussion regarding Section 6 (Old) as amended.

In any event the "802" lands should only include contracts as of the date of enactment, not the effective date.

We are not sure of the intent of subsection (f). If the idea is to validate all existing mining claims and leases on Trust land, it should say that. Continuation of management of these interests the same as general grant land should also depend upon the State's performance.

Sec 10 (Old).

Using Trust funds to pay for DNR's management is a raid on the Trust fund and undoubtedly will be used to fund non-Trust functions. This is particularly true because of the way DNR proposes to allocate a portion of individuals to the Trust. The cost of managing 802 interests should not be borne by the Trust.

Sec 11 (Old).

See comments on Section 10, above.

Sec. 13 (Old).

SB67/HB201 should not repeal Sections 54-57 of Chapter 66, except conditionally upon final approval, including exhaustion of appeals. In this way, if SB67/HB201 were to fail, Chapter 66 would be resurrected. In fact, it seems to us that the Chapter 66 and SB67/HB201 approaches could proceed contemporaneously in order to have some solution by the time of the effective date of approval.

Sec. 15 (Old).

The Trust's security interest in Trust Land should be recognized.

Sec. 16 (Old).

As discussed above, the land should be surveyed.

Secs. 17-19 (Old).

These effective date provisions are a whizzer-go-round. Literal reading of these sections requires approval of the current settlement (including rejection of legal challenges) before SB67/HB201 become effective. It does not appear that this is what is intended although your client's stated intention that it prefers the litigated approach to Chapter 66 makes us wonder if these effective date provisions are intended to make SB67/HB201 effective only if Chapter 66 would otherwise be approved. If the intent is that it becomes effective when Chapter 66 as amended by SB7/HB201 is approved by the courts as a final settlement including exhaustion of all appeals, that is what it should say.

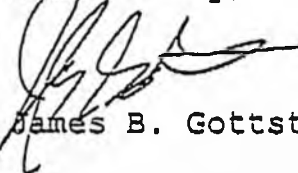
Sec. 21 (New).

The grounds for modification of the consent decree should track those negotiated in the Settlement Agreement. It is also not clear what the intent is in saying that changes to unrestricted revenues are anticipated. Is the statement that the obligations are to place the Trust in the same position as if the State had not breached the Trust, an attempt to buttress the legislation against a citizen/taxpayer attack on the settlement as a giveaway?

As we indicated at the beginning, our addressing the proposed legislation should not be taken or expressed as an indication that we are negotiating on these bills. We think our comments make clear that SB67/HB201 as presently proposed are not viable vehicles for the settlement of the *Weiss* litigation. You know we also believe that whether it is us or someone else, legal challenges are almost certain to be raised and therefore the settlement consideration process under these bills will tend to be as long as the process under Chapter 66. With respect to the land returned to the Trust under the proposed legislation, and its management regime, it is our opinion that the Trust would be better off without it. That is why the enforceability/security provisions are so critical.

I know that you have worked very hard on this legislation including attempting to address our concerns. Unfortunately, in our view, the approach insisted upon by your group can not form the basis of a settlement of the Mental Health Trust Lands litigation.

Yours truly,



James B. Gottstein

cc: facsimile
Alaska Mental Health Association
Sen. Drue Pearce
Rep. Ron Larson
Thomas S. Waldo
Charles E. Cole
Jeffrey L. Jessee
Philip R. Volland
Charles P. Boddy
Robert B. Stiles
David T. Walker
Vern T. Weiss
Sen. Steve Frank
Rep. Eileen Maclean
Peter J. Maasen
G. Thomas Koester
Wendy S. Feuer
Brian D. Bjorkquist
Kent V. Dawson

jg\amha\leg93\rjsb67.ltr

Attachment #2
4/29/94 am

Mental Health Association in Alaska
4050 Lake Otis Parkway, Suite 202 • Anchorage, Alaska 99508-5221 • (907) 563-0880 • Fax (907) 563-0881

Resolution #002-94

WHEREAS, The Alaska Mental Health Association has served as a lead plaintiff in the Mental Health Lands Trust litigation; and,

WHEREAS, The Alaska Mental Health Association and its volunteer governing Board of Directors has responsibly focused upon the legal evolution of the reconstitution of the Mental Health Lands Trust as directed by the Alaska Supreme Court without losing sight of the best interests of the beneficiaries of the Trust; and,

WHEREAS, the Board of Directors of the Alaska Mental Health Association believes that the best interests of the beneficiaries will be best served by the inclusion of the provisions of CHAPTER 66 which establishes a bona fide Trust authority under rules and principles of trust management, defines a comprehensive mental health program, and contains improvements to the mental health program obtained by years of litigation and negotiation; and,

WHEREAS, the Board of Directors of the Alaska Mental Health Association believes that the interests of the beneficiaries will be enhanced by the $200 million trust fund offered in negotiations this year;

NOW THEREFORE BE IT RESOLVED, that the Board of Directors of the Alaska Mental Health Association supports and recommends for approval by the court a settlement which incorporates the terms presented to the beneficiaries on April 26, 1994, including the list of lands agreed to by the parties on April 15, 1994, provided that private trust law principles apply to the management of the Trust assets under the effective direction of the Trust Authority.

Resolution #002-94

CERTIFICATION

The undersigned hereby certifies that the foregoing resolution was unanimously approved by the Board of Directors of the Alaska Mental Health Association at a meeting held April 28, 1994, duly called, at which a quorum existed and acted throughout.

Dated: April 28, 1994

By: Al Finneseth
Al Finneseth, Ph.D.
President

By: Aniela B Pellissier
Aniela B. Pellissier, RN
1st Vice President

By: James Parsons
Dr. James C. Parsons
2nd Vice President

By: Marilyn Talmage
Marilyn J. Talmage, M.Ed.
Secretary/Treasurer

By: Jack C. King
Jack King
Member-At-Large

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,

and

ALASKA CENTER FOR THE ENVIRONMENT, ALASKA SPORTFISHING ASSOCIATION, LYNN CANAL CONSERVATION, NORTHERN ALASKA SIERRA CLUB, SOUTHEAST ALASKA CONSERVATION COUNCIL, SUSITNA VALLEY ASSOCIATION and TROUT UNLIMITED,

Intervenor-Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 Civil

FILED in the Trial Courts
State of Alaska, Fourth District

APR 26 1993

Clerk, Trial Courts
By ______________ Deputy

MEMORANDUM DECISION AND ORDER RE: INTERVENORS' COMPLAINT

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INTRODUCTION

Three dispositive motions regarding the intervenors' complaint are before the court. The State has sought summary judgment as to all counts in the intervenors' complaint. Vern T. Weiss and Earl Hilliker, the Alaska Mental Health Association, Mary C. Nanuwak, and John Martin,[1] ["Settling Plaintiffs"] have sought dismissal under Civil Rule 12(b)(6) or, in the alternative, summary judgment, and have joined in the State's motion.[2] The 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, [the "Intervenors,"] have sought summary judgment and declaratory judgment.

The Intervenors have brought a broad-based constitutional attack on the proposed settlement reached in this case between the State and the Settling Plaintiffs. The legislative vehicle for that settlement, Chapter 66, SLA 1991 ["Chapter 66"], is the subject of the attack. The Intervenors have made the following claims: (1) Chapter 66 violates Article VIII, Section 10 of the Alaska Constitution by its failure to include adequate safeguards

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[1] At the time the motion was filed a third group of plaintiffs had joined the settlement. They have since withdrawn.

[2] Alaska Civil Rule 12(b)(6) permits the dismissal of a complaint for failure to state a claim upon which relief can be granted. The court may consider only material contained in the pleadings in ruling on a motion to dismiss for failure to state a claim. See, e.g., Kollodge v. State, 757 P.2d 1024, 1026 (Alaska 1988). Where matters outside the pleadings are considered, the motion must be treated as a motion for summary judgment. Alas. R. Civ. P. 12(b). The court is relying on many materials outside the pleadings in these motions. Thus, all motions are treated as motions for summary judgment.

the Tanana Valley State Forest consistent with Alaska Statutes 41.15.300-.330 and 41.17.200-.230 and .400 and management plans adopted under those statutes. Before turning to each of the claims made, it is useful to place these motions in the context of the broader framework of this litigation.

The mental health lands trust was created by Congress in 1956. It was one of the major features of the Alaska Mental Health Enabling Act ["Enabling Act"], Public Law No. 84-830, 70 Stat. 709 (1956). Section 202 of the Enabling Act contained a one million acre land grant from the federal government to the Territory of Alaska. Section 202(e) created the trust:

> 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 sold, leased, mortgaged, exchanged, or otherwise 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.

The State of Alaska, as successor to the Territory, managed the lands in the mental health lands trust without maintaining separate accounting. In the 1970's there was growing

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INTRODUCTION

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of the public interest in connection with the disposal of state lands and interests therein; (2) Chapter 66 violates Article IX, Section 15 of the Alaska Constitution by failing to provide for payments to the Permanent Fund; (3) Chapter 66 violates Article II, Section 13 of the Alaska Constitution by mixing appropriations with other matters in a single bill; (4) Chapter 66 may not become law because it did not pass three readings in each house of the legislature, as required by Article II, Section 14 of the Alaska Constitution; (5) Section 56 of Chapter 66 excessively delegates legislative powers to the Department of Natural Resources and the settling plaintiffs in violation of the separation of powers implicit in the Alaska Constitution; (6) the Alaska state legislature breached its fiduciary duty with respect to the public trust in lands and natural resources when it purported to enact Section 56 of Chapter 66; (7) Chapter 66 violates Section 6(i) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), and Article VIII, Section 9 of the Alaska Constitution by its failure to require reservation of the state's right to mineral deposits; (8) Alaska Statutes 38.04 and 38.05 preclude the commissioner of natural resources from conveying any land to the Alaska Mental Health Trust Authority ["AMHTA"] pursuant to Section 55 of Chapter 66 unless the conveyance is consistent with classifications and land use plans adopted pursuant to those statutes; and (9) the AMHTA will be required to manage the trust lands included within the Haines State Forest Management Area and

the Tanana Valley State Forest consistent with Alaska Statutes 41.15.300-.330 and 41.17.200-.230 and .400 and management plans adopted under those statutes. Before turning to each of the claims made, it is useful to place these motions in the context of the broader framework of this litigation.

The mental health lands trust was created by Congress in 1956. It was one of the major features of the Alaska Mental Health Enabling Act ["Enabling Act"], Public Law No. 84-830, 70 Stat. 709 (1956). Section 202 of the Enabling Act contained a one million acre land grant from the federal government to the Territory of Alaska. Section 202(e) created the trust:

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The State of Alaska, as successor to the Territory, managed the lands in the mental health lands trust without maintaining separate accounting. In the 1970's there was growing

pressure on the legislature to convey lands owned by the state to both municipalities and to private individuals. Additionally, there was pressure to set aside some state lands for public purposes such as parks, recreation, and wildlife habitat The lands which had been selected as mental health lands were among the most attractive state lands for both private ownership and public purposes. Much of the land surrounded municipalities. Much of the land was in areas prime for development. Additionally, much of the land was in areas well-suited for retention for public purposes. The mental health lands were among the first that had been selected by the state, since selection began prior to statehood.

In 1978, the legislature enacted chapters 182 and 181, SLA 1978. Those acts redesignated the mental health lands as general grant lands to be managed as all other state lands. The act contained a proviso for the payment to the mental health trust for the loss of the lands "subject to legislative appropriation of sufficient funds." No money was ever appropriated.

Following the 1978 redesignation, the State proceeded to convey and reclassify many of the most desirable lands which had been selected as mental health trust lands. Up to 50,000 acres were conveyed to third parties. Over 40,000 acres were conveyed to municipalities. Over 350,000 acres were placed in legislatively

designated areas[3] such as state forests, parks, and wildlife refuges. Today only about 35% of the original one million acres is unencumbered.

Vern Weiss and Earl Hilliker filed this lawsuit as a proposed class action in 1982. They claimed that the legislative redesignation in 1978 was a breach of trust and they sought relief from the court on behalf of all beneficiaries. They maintained that the state breached the public trust by failing to account for revenues realized, using revenues for purposes other than mental health care, and redesignating the mental health lands as general grand land. The superior court ruled that the state breached its duties as trustee by removing the mental health trust lands from the trust and redesignating them as general grant lands, but ruled that invalidation of the redesignation legislation was not an available remedy. As a remedy, the superior court ordered that the trust was to recover from the state an amount equal to the fair market value of lands conveyed from the trust as of the date of conveyance plus pre-judgment interest from the date of each conveyance. Additionally, the superior court ordered a set-off for all money spent by the state on mental health care. Both sides appealed from that decision.

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[3] Legislatively 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 Chapter 66, Section 54(6).

The Alaska Supreme Court held that the state breached the public trust created by Congress when it redesignated property in the trust as general grant land. State v. Weiss, 706 P.2d 681 (Alaska 1985). The court invalidated the redesignation statute. However, the Alaska Supreme Court disagreed with the remedy proposed by the superior court. Instead, the court held, "that the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." Weiss, 706 P.2d at 684.

The Alaska Supreme Court provided the following guidance to the trial court on remand:

> 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 the 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 the expenditures exceeded the value of land 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.

Weiss, 706 P.2d at 684 (footnote omitted). The court specifically declined to rule on questions raised by the amicus regarding the title held by the conveyancees and bona fide purchasers of mental health trust lands. See Weiss, 706 P.2d at 684 n.4.

The Supreme Court's "guidance" created almost as many

issues as it resolved. Because the set-off is only applicable to lands "sold," it is in the beneficiaries' interest to have as few lands as possible be classified as "sold." Thus, serious questions regarding the title held by third parties to whom lands had been conveyed as well as the effect of knowledge of the trust violation on possible bona fide purchaser status have presented major difficulties. Additionally, serious questions are created by what expenditures by the state should be included within any set-off made. Important questions arose regarding the future of lands placed in legislatively designated areas such as state forests, parks, and wildlife refuges. These and other unresolved issues have led the parties to attempt settlement on several occasions.

The most recent attempt to settle this lawsuit received legislative approval in 1991. Near the close of the 1991 legislative session, most of the attorneys for the parties reached accord on a framework for resolution of the case. This framework was adopted by the legislature in Chapter 66, SLA 1991. The parties continued negotiating a settlement agreement. On April 6, 1992, the proposed settlement agreement was signed by three of the four attorneys representing plaintiffs and Attorney General Cole; it was approved by Governor Hickel and Department of Natural Resources Commissioner Harold Heinze. It was then presented to the court for approval. Litigation over the proposed settlement is on-going.

Chapter 66 involves two principle components in

settlement of the litigation. First, it provides a land-based solution for the reconstitution of the trust. It also creates a new mechanism for managing the trust and developing the comprehensive mental health program for Alaska. To do so the Alaska Mental Health Trust Authority ["AMHTA"] was created. It is primarily the first component of the settlement mechanism, the reconstitution of the trust, that is at issue in the Intervenors' complaint.

The reconstituted trust is designed to include both original mental health trust lands and substitute lands. Section 54 of Chapter 66 provides which of the original mental health trust lands are to be reconveyed to the trust. Essentially, original mental health trust lands that have not been conveyed or encumbered by the state and are not in legislatively designated areas are to be returned to the trust. Additionally, original mental health trust lands "subject only to oil and gas leases, coal leases, or timber contracts" are to be returned to the trust. Original mental health trust lands in the Haines and Tanana Valley State Forests are to be returned to the trust. Other original mental health trust lands, acceptable to the plaintiffs, that are not in legislatively designated areas and have not been conveyed out of state ownership may be reconveyed. Since it is clear that the trust cannot be reconstituted solely with original trust lands under these rules, Chapter 66, Section 55 provides for a mechanism for the selection of substitute lands to be conveyed to the trust

as compensation for those lost. The substitute land is designed to be of equal fair market value and as comparable as practicable with the lands that have not been returned. Additionally, Chapter 66, Section 56 provides security to the beneficiaries should the state default on the reconstitution. Specifically, Section 56 created a pool of lands "hypothecated to the mental health trust." Subsection (d) provides:

> Upon default, or if the trust is not reconstituted by December 1, 1994, the foreclosure of the hypothecated lands, including the parcels to be foreclosed and the manner of foreclosure, shall be determined by the [Alaska Supreme Court].

Chapter 66 is not immediately effective. Pursuant to Section 58 of Chapter 66, the act only becomes effective "upon entry of a final order dismissing [this litigation] and the expiration of any time for appeal."

More detailed background and analysis of the various provisions of law is included where necessary in the discussion of the specific arguments made in these motions.

I. DOES CHAPTER 66, SLA 1991 VIOLATE ARTICLE VIII, SECTION 10 OF THE ALASKA CONSTITUTION?

The Intervenors claim that Article VIII, Section 10 of the Alaska Constitution has been violated through the enactment of Chapter 66, SLA 1991. The Intervenors maintain that Article VIII, Section 10, mandates that the legislature enact "other safeguards of the public interest" for any disposal of state lands. They argue that Chapter 66 contains no such safeguards for the disposal of lands by the AMHTA.

The Settling Plaintiffs and the State argue that public notice is the only requirement of Article VIII, Section 10 of the Alaska Constitution and that Chapter 66 meets that requirement. Alteratively, they maintain that Chapter 66 provides adequate safeguards of the public interest to satisfy constitutional requirements. The State also argues that Chapter 66 can and should be construed as authorizing the Alaska Mental Health Trust Authority to act consistently with whatever safeguards are constitutionally required by Article VIII, Section 10, thus avoiding the danger of unconstitutionality.

A. Does Article VIII, Section 10 Require the Enactment of "Other Safeguards of the Public Interest" in Addition to Public Notice?

Article VIII, Section 10 of the Alaska Constitution provides:

> No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense. ARCO Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992); Kochutin v. State, 739 P.2d 170, 171 (Alaska 1987). When interpreting a constitutional provision, the court should examine (a) the plain meaning of the language, (b) the purpose of the provision, and (c) the intent of the framers. ARCO Alaska, 824 P.2d at 710; Kochutin, 739 P.2d at 171. Because a constitutional provision must be ratified by the voters, the court must also examine the provision in light of the meaning that the voters would have placed on its provisions. State v. Lewis, 559 P.2d 630, 637 (Alaska 1977).

The Settling Plaintiffs and the State argue that Article VIII, Section 10, requires only public notice when the state disposes of land and allows the legislature to provide for such "other safeguards" as are deemed appropriate. They argue that this is the plain meaning of the constitutional provision and that the use of the word "may" requires that the court find that this confers discretion on the legislature and does not impose a mandatory duty.

The Intervenors assert that Article VIII, Section 10 is ambiguous but the best interpretation requires both public notice and other safeguards of the public interest; the legislature is given the discretion to choose what safeguards are appropriate in addition to public notice. The Intervenors argue that the use of the word "may" is not necessarily permissive, but depending on the

usage, may denote a mandatory obligation.

The court concludes that Article VIII, Section 10 is ambiguous. It is not unreasonable to read this provision in either way suggested by the parties. It is consistent with the structure of the provision to hold that only public notice is required, but that the legislature may adopt other safeguards of the public interest. It is also consistent with the structure to hold that the phrase "as may be prescribed by the legislature" modifies both "public notice" and "other safeguards," and that the duty to provide public notice and other safeguards is mandatory on the legislature in providing for the disposal of state lands.

The constitutional history suggests that the Intervenors are correct in their interpretation of Section 10 as imposing a mandatory requirement for "other safeguards of the public interest."

Issues related to the proposed state's handling of its natural resource wealth and lands were among the most important discussed at the constitutional convention. The importance of such issues was highlighted by the Constitutional Studies prepared by the Public Administration Service before the convention began. One portion of the studies begins:

> Of the many problems and issues facing the Delegates at College, none has so great a long-range importance as that involving Alaska's lands and resources. The lands and resources problem may be stated thus: What should be the nature, scope, and possible verbiage of constitutional provisions, if any, that may be necessary to assure that the lands and natural resources of the new State of

Alaska will be developed (1) to their highest potential and (2) for the benefit of all people of Alaska? The two aims of development are not incompatible and are both of equal importance.

Public Administration Service, 1 Constitutional Studies, Chapter 3, at 1 (1955) (emphasis in original). The report concluded:

> In the first flush of statehood, the average Alaskan will react, and very justifiably so, against the unnecessary restrictions which have bound him for so many years. He will not take kindly to the substitution of state red tape for federal red tape, nor should he. But the Alaskan will, as he thinks over his situation, be aware that any state control over resources which his judgment tells him is necessary is his control, ordained by him through the political process and subject to control and change through the same media.
>
> Psychologically, the emphasis in the first days of statehood, so far as land and resources policy is concerned, will be in the direction of disposing of the patrimony as rapidly as possible, to get it into private hands so that immediate, and long-delayed, development may commence at once. Yet precipitate action could easily result in a situation which the people would have cause to regret in a few years.
>
> This will be the critical point in Alaskan development, not alone for resources policy but for the entire future for the State of Alaska. The stakes are huge, and they will attract persons and corporations interested in them. Some of the ventures will be legitimate, some speculative, and some insidious. If the drive is for slam-bang disposal, without discrimination and the choice of terms of sale or lease, the interests of all the people of Alaska will suffer. If disposition of the land and its resources is made at ridiculously low prices, the parable of Jacob, Esau, and the bowl of pottage will be repeated; Alaska's patrimony will have been dissipated for the small-benefit of exploitation, or the non-benefit of fraud.
>
> . . . .
>
> No constitutional provisions can be devised

> which will present a perfect and complete barrier to the determined commission of lands and resources fraud or to "giving away" of the resources of the people to interests for purpose of exploitation rather than orderly development. But provisions can be devised which will make it easier for the public officials of the state to carry their burdens.

Id. at 54-56 (emphasis in original).

The keynote speaker at the opening session of the constitutional convention, E.L. Bartlett, Alaska's delegate in Congress, focused his speech principally on an issue which he felt to be among the most serious facing the delegates, "the decision taken upon the vital issue of resources policy." 6 Alaska Constitutional Convention Proceedings, ["Proceedings"] Appendix II, at 3. Bartlett stressed the challenge ahead for the State of Alaska blessed with a vast land grant and with great resources. He discussed the mistakes of the past, "the story of Alaska natural resources has too often been one of exploitation with very little of the great wealth extracted going to pay for necessary governmental services and for the permanent development of a sound economy for the people." Id. at 4. He went on to state:

> There will be a perfectly normal and healthy desire, upon the assumption of statehood, to get resources development going rapidly at any and all costs. Reaction against the years of red tape imposed by the federal bureaucracy which stifled development is quite natural and understandable. But in their eagerness to get resources development, the people of Alaska should not lose sight of the absolute necessity for long range policy in the resources field. A degree of caution and judgment exercised at the early stages of Alaska statehood, which includes most basically the deliberations of this Convention, will be repaid many-fold in true future development -- not exploitation or non-use.

> If the public domain of Alaska is frittered away without adequate safeguards, the State of Alaska will wend a precarious way along the road that leads eventually to financial insolvency.

Id. at 5-6. Bartlett warned of the dangers of fraud, exploitation and corruption. He noted:

> Alaskans will not want, and above all else do not need, a resources policy which will prevent orderly development of the great treasures which will be theirs. But they will want, and demand, effective safeguards against the exploitation of the heritage by persons and corporations whose only aim is to skim the gravy and get out, leaving nothing that is permanent to the new state except, perhaps, a few scars in the earth which can never be healed.

Id. at 7. Bartlett cautioned:

> A failure to write into fundamental law basic barriers to minimize fraud, corruption, non-development, and exploitation may well be viewed fifty years from now as this Convention's greatest omission. No perfect system of safeguards can be devised. The ingeniousness of man in interpreting constitutions and statutes to his own ends can never be completely limited.

Id.

The best evidence of the framers' intent can be found by tracking the progress of the provision which became Article VIII, Section 10 through the convention proceedings. Section 10 of the Committee on Resource's first proposal to the constitutional convention required both public notice and other safeguards:

> Disposals or leases of state lands or interests therein shall be preceded by such public notice and other appropriate safeguards of the public interest as the legislature shall determine. Each such transaction shall be subject to review or audit, as prescribed by law.

6 Proceedings, Appendix V, at 79. The Committee's commentary to

this proposal clarified its intent:

> Certain safeguards of the public interest are essential in public land transactions. Such transactions may vary in importance from routine matters to those of substantial value. If general constitutional provisions impose too rigid requirements, the land administration could become hopelessly ensnarled in red tape. As a result this section of the constitution provides for the legislature to establish public notice, review or audit and other safeguards to protect the public interest. As requirements change and many transactions become routine, appropriate modifications can be made in procedures if rigid requirements are not specified in the constitution itself.

6 Proceedings at 85. Delegate Riley, the secretary of the Committee on Resources, used similar language in introducing this section to the general body:

> The tenth section is very brief. I think that has merit as compared with most state constitutions I have checked on this point, and it simply sets up safeguards for observing the public interests in the disposal of all the public domain. Such matters as advertising, sales, competitive auctions, competitive bidding, where the sales will be held and under what conditions, we believe can all be spelled out amply by the legislature without its enlarging this article in the constitution.

2 Proceedings at 1107.

The next draft was submitted in January 1956. The provision, now renumbered Section 12, provided:

> Disposals or leases of state lands or interests therein shall be preceded by such public notice and other appropriate safeguards of the public interest as the legislature shall prescribe.

6 Proceedings, Appendix V, at 95. The only change made in the commentary to the provision quoted earlier was the deletion of the

words "review or audit." See 6 Proceedings at 100. Mr. Riley described this provision to the delegates:

> Section 12, by contrast with many state constitutions, gives very brief mention of the fact that the legislature shall establish appropriate safeguards of the public interest in measures it takes for the disposition of natural resources.

4 Proceedings at 2452.

The discussion on the floor of the convention illustrates that the delegates contemplated something beyond public notice as a mandatory requirement:

> Metcalf: Mr. Riley, on Section 12, I take it it's the meaning and intention of the Committee that before the state can lease or sell any land or interest they'll be publicly advertised so the highest bidder may have the chance to get it, and not be handled the way it is now?
>
> Riley: That's the underlying thought. Some state constitutions spell all this administrative procedure out in detail. "The sale shall be at 10:00 a.m. on the courthouse steps after 30 days advertising . . ." and that sort of thing and we felt that to be a legislative concern, and we need only suggest it.

4 Proceedings at 2469-70.

The next and final change in what became Article VIII, Section 10 was made by the Committee on Style and Drafting.[4] The proposal revised Article VIII, Section 10 to its present form. Mr. Sundborg, chairman of the Committee on Style and Drafting, reported that, "no substantive changes have been made in this report." 5

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[4] This committee was precluded by convention rules from making substantive alterations to the proposals. Permanent Rules, Constitutional Convention of Alaska, Rule 16(c) (1955); V. Fischer, Alaska's Constitutional Convention at 61 (1975).

Proccedings at 3630. Committee member Hurley advised, "There are considerable changes in phrasing but no changes in substance." Id. at 3632.

This constitutional history demonstrates that the framers were not interested only in public notice. Rather, it is clear that they intended a mandatory obligation on the legislature to establish other appropriate safeguards in addition to public notice to protect the public interest in state lands. The framers contemplated discretion in the legislature to provide other safeguards of the public interest, but they clearly expected and required something beyond public notice.

The power of a constitution stems directly from the people who ratify it. Thus, unlike statutes, it is necessary to look beyond the intent of the members who enacted the provision. With constitutions, it is also "necessary to look to the meaning that the voters would have placed on its provisions." State v. Lewis, 559 P.2d 630, 637-38 (Alaska 1977).

The widely distributed document, A Report to the People of Alaska from the Alaska Constitutional Convention, is one of the best sources for discerning the intent of the people in ratifying a provision of the constitution. See State v. Lewis, 559 P.2d at 638. The Report stated,

> All leases or disposals of state lands or interests are made subject to procedures to protect the public interest and the rights of all citizens in the public domain or in property rights previously acquired.

State's Exhibit 15, at 4.

The purpose of a particular constitutional provision may be found in the goals and concerns expressed by the framers. The purpose of Article VIII in general stems from the framers' recognition of the need for careful and wise management of state land. The framers regarded Alaska's land and natural resources as its most valuable assets. Moore v. State, 553 P.2d 8, 30 (Alaska 1976). The delegates at the constitutional convention were concerned with avoiding the exploitation and squandering of natural resources and with preventing the disposal of state land at extremely low prices. See V. Fischer, Alaska's Constitutional Convention, at 132-33 (1975). Clearly, the framers intended to safeguard the public interest. See 6 Proceedings, Appendix V, at 100.

The Alaska Supreme Court has stated that the Article VIII provisions are a constitutional mandate to the legislature to enact procedural safeguards, such as those found in AS 38.05, to ensure wise use of state public lands. Moore v. State, 553 P.2d at 25, 30-31. Earlier, the Alaska Supreme Court stated that Article VIII reflects the framers' recognition of the necessity of legal safeguards in the disposal of state lands to avoid exploitation of natural resources. Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006, 1011, 1015 (Alaska 1967).

It is similarly apparent that the framers intended that the legislature use its wise discretion in determining which

safeguards of the public interest should be applied in various circumstances. The framers expressed the goal of natural resource management in Article VIII, Section 1:

> It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Section 2 goes on to provide the general authority for the legislature in resource management:

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

The framers reflected not only a commitment to development of the state's natural resources but also for the preservation of special areas designed for other uses. Article VIII, Section 7 provides:

> The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.

As Delegate Fischer later described:

> However, having set forth [the goals of Sections 1 and 2 of Article VIII] the committee's task thereafter was not necessarily an easier one. It realized that policies which promoted maximum use and development could be inconsistent with maximum benefit to the people or with the general public interest, as defined by Bartlett and others concerned about exploitation and destruction of resources and the environment.
>
> Specifying resource management policies, for example, proved difficult. Thus, considerable discussion was given to the proposal that the

> replenishable resources -- fish, forest, wildlife, and others -- should be managed for sustained yield. . . . Similarly, in establishing and identifying the state public domain, the committee agreed to include a provision for state acquisition and holding of areas of natural beauty and recreation and other values. Resolution of potential inconsistencies between these and maximum use policies could not take place in the convention. It was a problem passed on to the legislature of the future state.

V. Fischer, Alaska's Constitutional Convention, at 133 (1975).

Article VIII, Section 10 reflects that general philosophy. It mandates that the legislature adopt public notice and other safeguards of the public interest before disposing of state land, but it left to the legislature the task of balancing the various interests involved in deciding what safeguards to provide.

The court concludes, based on this examination of the language of the provision, the framers' intent, the voters' intent, and the purpose of the provision, that Article VIII, Section 10 requires both public notice and other safeguards of the public interest established by the legislature before the State may dispose of state lands or interests therein.

B. Does Chapter 66 Provide Constitutionally Adequate "Safeguards of the Public Interest" for the Disposal of Lands by the AMHTA?

The State and Settling Plaintiffs assert that Chapter 66 meets the constitutionality requirement for "other safeguards of the public interest." They assert that the provisions of Chapter 66 which require that the AMHTA manage the trust in accordance with

trust principles[5] impose the type of safeguards of the public interest envisioned by the framers. Moreover, they argue, "noncommercial" environmental values are protected by Chapter 66 in at least three ways: (1) the settlement assures that original mental health trust lands placed in legislatively designated areas, such as parks and refuges, will not be returned to the trust for development; (2) noncommercial environmental values must be considered by the Commissioner of Natural Resources in deciding which lands proposed for substitution should be conveyed to the AMHTA[6]; and (3) the trust lands will be subject to state and local police powers. Finally, the State asserts that the AMHTA can adopt whatever procedural safeguards are constitutionally required through the regulatory process.[7]

The Intervenors assert that Chapter 66 does not meet the requirements of Article VIII, Section 10. They assert that trust duties do not protect the broad public interest. Moreover, they argue, the AMHTA cannot be exempt from obligations to safeguard the broad public interest. They argue that none of the "so-called safeguards" asserted by the State is adequate. Finally, they assert that the regulatory process is inadequate because the responsibility under the constitution belongs to the legislature.

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[5] Chap. 66, § 10, to be codified as AS 37.17.007(b) and AS 37.14.009(a)(1).

[6] Chap. 66, § 55(e)(1)(3)(4)&(6).

[7] Chap. 66, § 26, to be codified as AS 47.30.031, requires the AMHTA to adopt regulations.

The Intervenors argue that any attempt to interpret Chapter 66 as delegating the responsibility for providing safeguards of the public interest through the rulemaking authority would be a re-write of the statute. See State v. Fairbanks North Star Borough, 736 P.2d 1140, 1142 (Alaska 1987).

The court concludes that the only provisions of Chapter 66 which potentially fall within "other safeguards of the public interest" are the trust duties outlined in Chapter 66, Section 10, to be codified as AS 37.14.007(b) and AS 37.14.009(a). Under the provisions of the new AS 37.14.007:

> (a) The Alaska Mental Health Trust Authority, established by AS 47.30.011, is the trustee of the trust established under the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709.
>
> (b) In exercising the powers, duties, and responsibilities as trustee, the authority is under a duty to the public and the trust beneficiaries to
>
> (1) administer the trust solely in the interest of the beneficiaries;
>
> (2) keep and render clear and accurate accounts with respect to the administration of the trust;
>
> (3) make public and available complete and accurate information as to the nature and amount of the trust property;
>
> (4) exercise a high degree of care in administering the trust;
>
> (5) take reasonable steps to take and keep control of the trust property;
>
> (6) use care and skill to preserve the trust property;
>
> (7) take reasonable steps to realize on claims that are held in trust;
>
> (8) defend against actions that may result in a loss to the trust estate, unless under all the circumstances, considering the other duties owed to the trust, it is reasonable not to make the defense;
>
> (9) separately account for trust property;
>
> (10) ensure that trust property is designated as property of the trust;

> (11) use care and skill to make the trust property productive; however, nothing in this paragraph shall prevent the state from using trust property directly or indirectly, by contractual stipulation or otherwise, as a component of the state's mental health trust program; and
> (12) deal impartially with the different trust beneficiaries as provided in AS 47.30.056.

AS 37.14.009(a)(2) allows the AMHTA to "sell, lease, exchange, or otherwise dispose of land in the trust" where consistent with the primary obligation of the AMHTA to "manage the assets of the trust in a fiduciary manner to fulfill the purposes of the trust," under AS 37.14.009(a)(1).

The other provisions which the State advocates fulfill the purpose of Article VIII, Section 10 clearly do not do so. First, the State argued that Chapter 66 protects non-commercial environmental interests by (1) protecting existing legislatively designated areas from returning land to the trust; (2) requiring consideration of non-commercial environmental values before the Commissioner conveys substitute land to the trust; and (3) not exempting trust lands from the police powers. It is true that each of these factors protect non-commercial interests. However, neither the first nor the last have anything to do with the disposal of state lands by the Trust Authority. The second concerns a different disposal, the disposal which occurs when the Commissioner conveys general grant land to the trust as substitute land, not the disposal when the AMHTA conveys land within the trust to others.

The State argues that if anything other than public

notice is required by Article VIII, Section 10, the court should construe Chapter 66 to mandate the AMHTA to adopt such safeguards by use of its rulemaking authority. The court disagrees. First, the obligation to provide for "other safeguards of the public interest" falls directly on the legislature's shoulders. The Trust Authority has different obligations; it must be loyal first and foremost to the beneficiaries of the trust. While not all safeguards are antithetical to the interests of the trust, the focus of the Trust Authority must first be to its fiduciary obligations. Where restrictions would adversely affect the purpose of the trust, to provide income for the mental health program of the state, the Trust Authority could not adopt such regulations, even if those regulations were necessary to safeguard the public interest. Finally, the court concludes that such an interpretation would not be construing the legislation to avoid unconstitutionality, but rather would be rewriting the legislation. See State v. Fairbanks North Star Borough, 736 P.2d 1140, 1142 (Alaska 1987); Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978).

The constitutional history discussed in the previous section reveals that the framers had many concerns regarding the disposal of state lands. They talked about preventing fraud and corruption. They talked about providing procedural safeguards such as public notice and other similar mechanisms. They talked about making certain the state got fair value for the land. They also

talked about wise decision making and preventing exploitation. They talked about wise development, not development at all costs. Nonetheless, it is essential to consider not only what they talked about but to focus on what they did. What the framers did was mandate that the legislature provide "public notice and other safeguards of the public interest." The framers left it to the legislature to decide how to balance the competing interests and to determine precisely what safeguards would be provided.

The parties both point to the actions of the first state legislature as an aid in determining what the framers intended in Article VIII, Section 10.[8] The Intervenors point out that the fundamental requirements of AS 38.04 and AS 38.05[9] for "public auction procedures, lease procedures, best interest findings, study and review requirements, and notice appraisal obligations" were enacted by the first Alaska state legislature to fulfill its constitutional obligation. The State points out that the same first state legislature exempted the university trust lands from the coverage of most of those provisions. See article XIII, section 3(a), chapter 169, SLA 1959. The legislature left university trust lands subject to management by the Board of

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[8] Thirteen of the fifty-five delegates to the constitutional convention were numbers of the first legislature. Compare V. Fischer, Alaska Const. Convention, App. E (1975) with SLA 1959, at V-VI. Thomas Stewart, the secretary of the convention, was also a member of the first legislature.

[9] Chapter 66 exempts the AMHTA from all requirements of AS 38.04 and AS 38.05 except public notice. See Chap. 66, Sec. 10, to be codified as AS 37.14.009(b).

Regents[10] under the general trust principles set out in §§ 37-10-6, 37-10-11, 37-10-13 and 37-10-20 ACLA 1949. See also AS 14.40.170(4),(7)&(8); AS 14.40.350; AS 14.40.360; and AS 14.40.250 for current requirements. These provisions are very similar to those provided in Chapter 66 for the management and disposal of mental health trust lands: public notice for disposals and overall management under trust principles.

These two actions by the first legislature highlight an important principle: the requirement for "other safeguards of the public interest" may require the adoption of different provisions depending on the situation. When the legislature considers general grant lands, the entire panoply of the framers' concerns over the wise management of the state's resource wealth come into play. When the legislature considers a much much smaller land grant made under trust principles, it is possible to consider a narrower scope of interests and concerns. The framers wisely left the balancing and the choice of procedural details to the legislature under broad constitutional goals and ideals. Of course, this is not to say that the legislature has unfettered discretion. Those broad constitutional principles set limits and guidelines within which the legislature's choices must fall.

The reconstitution of the mental health lands trust is

[10] Article VII, section 2 of the Alaska Constitution provides that the University holds title to all its real property and that "[i]ts property shall be administered and disposed of according to law."

a unique event. The legislature was confronted with a situation which is much closer to that involving the university trust lands than that involving general grant lands. It is apparent that the mental health trust lands should not be managed under the same principles applicable to all state lands. Indeed that was the fallacy that led to the State's breach of trust in 197[illegible]. It is also apparent that the lands must be managed under trust principles. The court concludes that the legislature could determine, consistent with the provisions of Article VIII, Section 10, that the only safeguard of the public interest necessary for the disposal of trust lands by the AMHTA was the inclusion of trust duties. Many of the framers' concerns regarding price are encompassed by trust principles -- the trustee could not dispose of land at an unfairly low price without breaching the obligation to manage the trust solely in the interests of the beneficiaries. The trustee cannot use disposals to exploit trust lands without violating the obligation to "use care and skill to preserve trust property." Clearly the trustee must manage the trust corpus to eliminate fraud and collusion that would injure the beneficiaries. The court concludes that the legislature's choice between competing interests, in light of the restrictions placed on the lands by virtue of the trust, did not violate the requirements of Article VIII, Section 10.

II. DOES CHAPTER 66 VIOLATE ARTICLE IX, SECTION 15 OF THE ALASKA CONSTITUTION?

Article IX, Section 15 of the Alaska Constitution provides:

> At least twenty-five per cent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.

The Permanent Fund amendment was effective February 21, 1977.

The Intervenors argue that Chapter 66 violates Article IX, Section 15 of the Alaska Constitution. They acknowledge that the supremacy clause of the United States Constitution[11] precludes application of Article IX, Section 15 to original mental health lands whose income is used for mental health purposes. However, they argue, section 202(e) of the Alaska Mental Health Enabling Act would not preempt application of Art. IX Section 15 to substitute lands nor to excess revenues not necessary for the mental health program of the state. The Intervenors next assert that the comprehensive budgeting process enacted in Chapter 66 would preclude payment of the required percentage of mineral revenues from trust lands to the Permanent Fund.

The Settling Plaintiffs argue that Article IX, Section 15 does not apply to the trust lands. First they argue that

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[11] Art. VI, cl. 2, U.S. Const.

Article IX, Section 15 by its terms applies only to mineral revenue "received by the State"; the Settling Plaintiffs argue that the trust is not "the State" for purposes of this provision. Second they argue that the substitute lands are merely lands exchanged under the provisions of section 202(e) of the Enabling Act and, as such, are subject to the same protection as original trust lands.

The State argues that the supremacy clause and section 202(e) of the Enabling Act supersede Article IX, Section 15 so that the revenue from trust lands must first be used to meet the necessary expenses of the State's mental health program. The State argues that substitute lands must be treated the same as original trust lands because they are "exchanged" as allowed by section 202(e). The State argues that to the extent that it is not preempted by section 202(e), Article IX, Section 15 will apply fully to the lands held by the trust. The State argues that because the Permanent Fund amendment is self-executing, it does not matter that Chapter 66 never mentions payment of a percentage of mineral revenue to the Permanent Fund.

The first question is whether Article IX, Section 15 by its terms applies to mineral revenues received by the trust under the provisions of Chapter 66. Article IX, Section 15 applies to mineral revenues "received by the State." The court concludes that this includes money received by the Trust. Common sense dictates this result in light of the total absence of constitutional history or intent which would lead to a different result.

The second question presented relates to the nature of the substitute lands, i.e., lands exchanged under section 55 of Chapter 66 for those original lands which are not reconveyed to the mental health lands trust. The Intervenors argue that they do not lose their character as general grant lands. The State and the Settling Plaintiffs assert that they become trust lands and should be treated the same as original trust lands. The court agrees with the State and Settling Plaintiffs.

Section 202(e) of the Alaska Mental Health Enabling Act envisioned that lands could be exchanged and the exchanged lands would be part of the mental health lands trust. Section 202(e) provides:

> 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 sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. 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. (emphasis added)

The Congress clearly expressed its intent that lands could be exchanged as provided by the legislature and that the exchanged

lands would be a part of the trust. Exchanged land is a "proceed" from a disposition of land. The restrictions on the legislature's authority stem only from a trustee's responsibility to act consistently with the intent of the trust, i.e., to provide funding for the comprehensive mental health program for Alaska.

This result is consistent with the Alaska Supreme Court's decision in Weiss v. State, 706 P.2d 681 (Alaska 1985). There, in its "guidance to the trial court" for reconstituting the trust, the Supreme Court stated:

> 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.

706 P.2d at 684. The court recognized that in order to effectuate a meaningful remedy for the breach of trust in reconstituting the trust, the lands which came back to the trust must be of the same character as those which were in the trust before the redesignation. This necessarily means that exchanged lands become trust lands like the original trust lands.

No one, not the State, the Permanent Fund, nor the Trust, suffers from this interpretation. When the legislature reclassified the mental health trust lands a substantial amount of trust property was treated as general grant lands. This exchange merely replaces those lands lost to the trust with lands of comparable value. There is nothing on the face of this statute which would lead one to conclude that this exchange is a raid on the Permanent Fund. In fact, in light of the criteria set out in

section 55(d) to judge whether exchanged land is "as nearly as practicable, land of comparable character,"[12] it appears that the most likely exchange is mineral revenue-producing land for mineral revenue-producing land. Assuming an adequate supply of substitute lands, the exchange process should yield a reconstituted trust very like the original trust.

The next question is whether section 202(e) of the Enabling Act preempts application of the Permanent Fund amendment to the substitute lands. The court concludes that it does. The supremacy clause of the United States Constitution mandates that the laws of the United States are supreme and that they override anything in the constitution or laws of any state to the contrary. The Alaska Supreme Court, reasoning from the United States Supreme Court's decision in Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58, 55 L.Ed.2d 179, 188-89 (1978), has described the analysis to be used in questions of federal preemption:

> [T]he appropriate analysis is bipartite: first, looking to the "policy, intent and context" of the federal statute, whether the state regulation is expressly or implicitly declared preempted; second, even if no declaration is found, whether the statutes conflict to the extent that (1) it is impossible to comply simultaneously with the dual regulation or (2) the state regulation obstructs the execution of the purpose of the federal regulation.

Webster v. Bechtel, Inc., 621 P.2d 890, 897 (Alaska 1980).

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[12] These factors are (1) terrain; (2) use; (3) location; (4) development potential; (5) income potential; (6) accessibility; and (7) other physical characteristics. Chap. 66, § 55(d).

Section 202(e) requires that money received from the use or sale of mental health trust lands "shall first be applied to meet the necessary expenses of the mental health program of Alaska." This is an obvious conflict with the Permanent Fund amendment which requires the deposit of at least 25% of mineral revenues into the Permanent Fund. So long as the income and proceeds from trust land are used for mental health purposes, section 202(e) is inconsistent with Article IX, Section 15. Section 202(e) must prevail.[13]

The final question relates to money in the trust derived from mineral revenues but which is not used for mental health purposes. Chapter 66 provides that such money may be appropriated from the mental health trust income account to the general fund. Chapter 66, Section 10. No provision is made in Chapter 66 for payment of any of those funds to the Permanent Fund. The court concludes there is no conflict with section 202(e), since so long as the necessary expenses of the mental health program of Alaska

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[13] The Intervenors do not question this logic; they question whether, for substitute lands, it is impossible to comply with both section 202(e) and Article IX, Section 15. To establish a system that complies with both, the Intervenors posit a system where the State retains an interest in substitute lands which is not conveyed to the trust. The problem with the suggestion is that such a system conflicts with section 202(e) which treats exchanged land as trust land.

Even if Article IX, Section 15 was applied to the substitute lands, the court concludes that the self-effecting nature of the provision results in no violation. As the State argues, the 25% of mineral revenues would automatically be conveyed to the Permanent Fund before any funds were deposited in the mental health trust income account.

are met first, the income may be used for other state purposes.[14] The question then turns on whether Chapter 66 violates Article IX, Section 15 with respect to these funds.

It is important to remember in this analysis that the minimum requirement of Article IX, Section 15 (payment of 25% of mineral revenues) is self-executing. See Davis v. Burke, 179 U.S. 399, 403, 45 L.Ed. 249, 251 (1900) ("A constitutional provision may be self-executing if it supplies a sufficient rule by means of which the . . . duty may be enforced."); Alaska Const., art. XII, sec. 9 (constitutional provisions to be construed to be self-executing whenever possible). Thus, the fact that Chapter 66 fails to mention any payment to the Permanent Fund is not necessarily a constitutional death knell for the statute. The question is whether the constitution, AS 37.13.010(a) and Chapter 66 can reasonably be read together to avoid unconstitutionality.

The process governing appropriations of excess funds from the mental health trust income account to the general fund is found in sections 26 and 10 of Chapter 66. The process begins with the budget submitted to the governor by the AMHTA. Chapter 66, Section 26, to be codified as AS 47.30.046(a)(3). Nothing would preclude

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[14] The State argues that these funds are not subject to Article IX, Section 15 because they become "mental health trust revenues" due to the commingling of mineral and non-mineral revenues in the income account. The court disagrees. It is certainly possible to account for all such funds; Chapter 66, section 11, to be codified as AS 37.14.036(b) would allow the AMHTA to establish subaccounts in the income account to simplify the accounting procedures necessary to prevent commingling.

the AMHTA from designating 25% of the total sum not necessary for the comprehensive mental health program as money for deposit in the Permanent Fund and reporting the remaining 75% as money available for return to the general fund. The governor's responsibilities are found in Section 10, to be codified as AS 37.14.003(b), and the legislature's obligations in Section 10, to be codified as AS 37.14.005(c). Both of these provisions require findings to be made if either branch of government deviates from the AMHTA's budget. Nothing would prevent either from recognizing the constitutional mandate to deposit 25% of whatever the excess was determined in the permanent fund. Thus, the court concludes that the provisions are not irreconcilable.

Based on the foregoing, the court concludes that Chapter 66 does not violate Article IX, Section 15 of the Alaska Constitution.

III. DOES CHAPTER 66 VIOLATE SECTION 6(i) OF THE ALASKA STATEHOOD ACT?

The Intervenors assert that Chapter 66 violates Section 6(i) of the Alaska Statehood Act, Pub.L.No. 85-508, 72 Stat. 339 (1958). Section 6(i) provides:

> All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (a) and (b) of this section are made upon the express conditions that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: Provided, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the District of Alaska.

The lands referenced in Section 6(i), the grants made under Section 6(a) and (b), are what are frequently referred to as the general grant lands, i.e., the two 400,000 acre selections from the national forests and vacant public lands adjacent to established communities [Section 6(a)], and the 102,550,000 acre selections from the vacant federal public lands [Section 6(b)].

The land granted to the Territory in the Alaska Mental Health Enabling Act, the original mental health trust land, was not subject to the restriction on disposal of mineral rights found in Section 6(i) of the Statehood Act. That grant was confirmed and transferred to the State of Alaska upon admission under Section