6(k) of the Statehood Act. No claim is made here that the original trust lands which are being returned to the reconstituted trust are subject to the restriction found in Section 6(i).

Chapter 66 provides for the conveyance of some general grant lands to the AMHTA to replace the original trust lands which have been conveyed outside state ownership or are otherwise not being returned to the trust (chiefly lands in legislatively designated areas such as parks and refuges). Chapter 66, Section 55. The Proposed Settlement Agreement notes that the transfers under Sections 54 and 55 of Chapter 66 are to be granted to the "Alaska Mental Health Trust Authority, trustee" by patent, in a form agreed upon. PSA, art. III, § 15(a), at 25. The Proposed Settlement Agreement clarifies that it is in the intent of the State and the Settling Plaintiffs that the mineral estate be conveyed to the Trust. PSA, art. III, § 23, at 30.

The State argues that the conveyances contemplated by Chapter 66 and the Proposed Settlement Agreement do not violate Section 6(i) of the Statehood Act. First, the State argues that the Section 6(i) restriction applies only to conveyances to private parties not to conveyances to state agencies. The State asserts that the AMHTA is a state agency for purposes of the Section 6(i) restriction, using the functional test outlined in Alaska Commercial Fishing and Agricultural Bank v. O/S Alaska Coast, 715 P.2d 707, 708-09 (Alaska 1986). Second, the State argues that Section 22(f) of the Alaska Native Claims Settlement Act ["ANCSA"]

as amended, 43 U.S.C. § 1621(f), allows the state to make this exchange with the trust free of the restriction found in Section 6(i). Finally, the State argues that all conveyances to the AMHTA that are subject to the restrictions of Section 6(i) will remain subject to the restrictions of Section 6(i) under the Proposed Settlement Agreement.

The Settling Plaintiffs endorse the State's argument and offer a similar rationale.

The Intervenors argue that the conveyances to the AMHTA violate Section 6(i) of the Statehood Act. They argue that whether the AMHTA is "the State of Alaska" for purposes of Section 6(i) is a question of federal law controlled by congressional intent in the adoption of Section 6(i). They assert that the plain language of the provision, considered in context, and the legislative history lead to the conclusion that the AMHTA is a governmental subdivision to which the State may not convey the mineral estate without violating Section 6(i). The Intervenors argue that the use of a patent to convey lands to the AMHTA triggers Section 6(i) and the restriction language in conveyances from the AMHTA cannot save the violation. The Intervenors argue that Section 22 of ANCSA is not applicable to this situation.

The court must rely on federal law in deciding this issue related to a violation of a federal statute. That is, it is a question of federal law whether the transfer of the mineral estate

to the AMHTA is a violation of the Statehood Act.[15] See, e.g., National Labor Relations Board v. Natural Gas Utility District of Hawkins County, 402 U.S. 600, 603, 29 L.Ed.2d 206, 209 (1971) ("In the absence of a plain indication to the contrary, it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law.") To answer the question, the court must examine the congressional intent in placing the section 6(i) restriction in the Statehood Act.

The court first looks at the language used in the provision in an effort to ascertain the plain meaning of the statute.[16] The question is whether the AMHTA is the "State of Alaska" so that the proposed conveyances do not violate the restriction. It is important to note that other parts of the Statehood Act use different terminology to refer to a broader group of entities. Section 4 contains the compact disclaiming "all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions . . . ." Section 5 confirms the Territorial property to the State using this language: "The State of Alaska and its political subdivisions, respectively

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[15] The court, therefore, agrees with the Intervenors that whether the AMHTA is a "state agency" under the test adopted in Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast, 715 P.2d 707 (Alaska 1986) is irrelevant.

[16] State law uses a more flexible approach to statutory construction than does federal law. Compare State v. Alex, 646 P.2d 203, 208 n.4 (Alaska 1982) with Public Citizen v. United States Department of Justice, 491 U.S. 440, 452-57, 105 L.Ed.2d 377, 390-13 (1989). Federal law is applicable to this analysis.

shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions." Section 6(j) states "The schools and colleges provided for in this Act shall forever remain under the exclusive control of the State, or its governmental subdivisions, ..." Since Congress used differing terms in these sections of the Statehood Act, it is unlikely that Congress intended them to mean the same thing. See Russello v. United States, 464 U.S. 16,23, 78 L.Ed.2d 17, 24 (1983). Thus, the court concludes that Congress did not intend that mineral rights in lands governed by Section 6(i) could be transferred to the State's "political subdivisions" or "governmental subdivisions."[17] However, since none of the terms were defined by Congress, it remains essential to discern congressional intent in other ways. The most useful of those ways is to examine the legislative history of the restriction in Section 6(i).

The Alaska Supreme Court extensively reviewed the legislative history of Section 6(i) in Trustees for Alaska v. State, 736 P.2d 324 (Alaska 1987). In that case, the court held that the State's method of leasing hardrock mineral land without payment of rent or royalty violated Section 6(i). The court noted that the restrictive language of Section 6(i) was derived from the

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[17] The Alaska Supreme Court has indicated in dicta that mineral rights could not be conveyed to boroughs without violating Section 6(i). See North Slope Borough v. LeResche, 581 P.2d 1112, 1113 n.2 (Alaska 1978).

1927 School Lands Act, 736 P.2d at 333. According to the court:

> The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state. One of the principal objections to Alaska's admittance into the Union was the fear that the territory was economically immature and would be unable to support a state government. . . .
>
> The congressmen who favored statehood conceded that it would impose an additional financial burden on the territory, but they maintained that the Statehood Act sufficiently provided for Alaska's financial well-being. The land grant of 103,350,000 acres was perceived by these congressmen as an endowment which would yield the income that Alaska needed to meet the costs of statehood. Representative Dawson said that:
>
> > All grants include the mineral rights, but these rights must be retained by the State if the lands pass into private ownership. In other words, the mineral rights will always belong to the people of Alaska, and never to private individuals. . . .
> >
> > These provisions are the foundation upon which Alaska can and will build to the enormous benefit of the national economy shared by her sister States. We cannot make Alaska a "full and equal" State in name and then deny her the wherewithal to realize that status in fact.
>
> 104 Cong.Rec. 9361 (1958). . . .
>
> That Congress recognized the financial burden awaiting the new state is clear from its debates. It is equally clear that the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden. Congress, then, granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government.
>
> The leasing restriction in section 6(i) was intended to further the goal of state revenue

> production. As we have discussed, the restriction was taken from the 1927 School Lands Act. That language was copied advisedly so that Alaska would be on an equal but not a favored footing with other public land states with respect to the disposition of mineral lands. The School Lands Act leasing requirement was expressly intended to be productive of proceeds, rents, and royalties, and congressional history indicates that the same result was intended in Alaska.

736 P.2d at 335-38 (citations and footnotes omitted).

Other legislative history confirms that the restrictions placed in Section 6(i) were designed to provide long-term revenue for the State and to prevent the State from squandering its resources. The Report of the Senate Committee on Interior and Insular Affairs, S.Rep. No. 1028, 83rd Cong., 2d Sess., at 30, 32 (1954) on a predecessor bill to the Statehood Act described the restriction:

> Of this vast acreage, 100 million acres is an open grant, that is, the revenues from its use and disposition can be used for the running expenses and the development of the new State, as its people, through their elected representatives, may direct.
>
> . . .
>
> Subsection (k) [later change to (i)] provides that all grants made or confirmed under the act shall include mineral deposits. Thus, the fact that the lands desired by the State are known or believed to be valuable for minerals will not preclude the State from exercising its right of selection with respect to them under the several grants. However, in order to give an added measure of protection to the new State government, which inevitably will be inexperienced and untried, the committee amendment provides for certain restrictions upon the disposition by the State of mineral lands which it may select under the 100-million acre grant provided in subsection (b) or the 2,550,000 acre grant made in subsection (c). The restrictions are that the

> State must retain title to all the mineral in these lands, whenever any of them are sold or granted. The State may dispose of the minerals in these lands only by lease in such manner as the State legislature may direct.

Several key points of congressional intent can be derived from this legislative history. First, Congress intended that the Section 6(a) and (b) lands be used to produce revenue to support the State. Second, Congress wanted to protect the mineral rights in known mineral lands from short-sighted disposition,[18] especially sale to private parties. Third, Congress intended that the mineral rights in such lands be subject to leasing only under rules adopted by the legislature. Fourth, the restriction was intended to ensure long-term revenue for the State. The court must read the restriction in Section 6(i) in light of this congressional intent. See Lassen v. Arizona, 385 U.S. 458, 463-69, 17 L.Ed.2d 515, 519-23 (1967).

The question is this: would transfer to the AMHTA of the mineral estate in lands subject to Section 6(i) be inconsistent with any of those congressional purposes. The court concludes it would not. For purposes of this statute, the AMHTA is "the State of Alaska," not one of its "political" or "governmental subdivisions." First, the mineral estate will not be subject to

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[18] Congress clearly believed that most of the revenue for the State would come from such lands, not the "worthless tundra" of the rest of the State. See House Report No. 624, 85th Cong., 1st Sess., reprinted in 1958 U.S. Cong. & Admin. News 2938.

disposal to third parties.[19] Second, the mineral estate will be used to produce revenue to support the statewide comprehensive mental health program, a valid state purpose. Third, the legislature has established rules for the use of these lands that are consistent with the congressional intent. The lands are to be leased by the AMHTA to provide revenue for the mental health program[20] of the state; the AMHTA must act as a fiduciary to maximize the revenues for the benefit of the beneficiaries. Additionally, the transfer is to remedy the loss of land from a federally-granted public trust which was used to benefit the state's general land pool. Fourth, the transfer of the mineral estate to the AMHTA does not diminish the land's ability to ensure long-term revenue for the state. If anything, the revenue potential is enhanced. Fifth, while the AMHTA will exercise considerable independence, the rules under which it will operate, established by the legislature, are designed to further the congressional purposes of guaranteeing a long-term, adequate revenue stream to fund this state program. Sixth, the focus of the AMHTA is on statewide benefit; neither its membership nor its responsibilities are limited geographically. Finally, the ultimate

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[19] Chapter 66 is silent on this subject. The Proposed Settlement Agreement ensures that the AMHTA will be subject to Section 6(i) restrictions. Without the restrictions from the Proposed Settlement Agreement, a different question would be presented. There would be a much stronger case for a violation of Section 6(i).

[20] If excess revenue is produced, it is to be used by the legislature as a part of the general fund.

decisions regarding spending the income generated by the mineral estate of Section 6(i) lands will be made by the legislature and the governor.[21]

The Intervenors argue that the use of a patent to convey lands to the AMHTA triggers the application of Section 6(i). They point out that the usual method to transfer control of state lands between state agencies is an interagency land management assignment. The court agrees that the use of a patent is troublesome: a literal reading of Section 6(i) would require the reservation language to be placed in any patent issued by the State. However, the United States Supreme Court's decision in Lassen v. Arizona, 385 U.S. 458, 17 L.Ed.2d 515 (1967) suggests that restrictions in a federal land grant need not be read so strictly where the underlying congressional purpose can be served and a different procedure followed.

Lassen involved a disagreement between the Arizona Highway Department and the Arizona land commissioner regarding the acquisition of and payment for highway rights of way and material sites from school trust lands. The school lands grant was very specific in its requirements for sale or leasing of trust lands and

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[21] The Intervenors correctly point out that if the legislature and/or governor disagrees with certain recommendations made by the AMHTA, they must make findings. See Chap. 66, Sec. 10, to be codified as AS 37.14.003(b)&(c) (governor's responsibilities) and AS 37.14.005(c) (legislature's responsibilities). However, those findings are designed to ensure compliance with the trust responsibilities assumed by acceptance of the federal grant for the mental health program.

required public bidding at auction for disposal. The grant also required that land be sold for no less than its appraised price. The Arizona Land Commissioner established rules for the acquisition of rights of way and material sites in trust lands; the rules did not require competitive bidding at public auction, but did require full payment of appraised price. The United States Supreme Court determined that competitive bidding at public auction was not required, but that payment of appraised value was. 385 U.S. 463-70; 17 L.Ed.2d at 519-23. The Court based its decision on the underlying purpose of trust grant: to provide a fund for the support of schools in the state. The Court reviewed the reasons in the legislative history for inclusion of the public auction requirement and determined:

> The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands. We see no need to read the Act to impose these restrictions on transfers in which the abuses they were intended to prevent are not likely to occur, and in which the trust may in another and more effective fashion be assured full compensation.

385 U.S. at 464, 17 L.Ed.2d at 520. The Court held:

> We conclude that it is consonant with the Act's essential purposes to exclude from the restrictions in question and transactions at issue here. The trust will be protected, and its purposes entirely satisfied, if the State is required to provide full compensation for the land it uses. We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program. The State may instead employ the procedures established by the Commissioner's rules, or any other procedures reasonably calculated to assure the integrity of the

> trust and to prevent misapplication of its lands and funds.

385 U.S. at 465, 17 L.Ed.2d ac 520.

The issue related to the use of a patent in this case is very similar to the requirement of competitive auction in Lassen. In each case a literal reading of the restriction in the federal land grant would preclude the action of the state. In Lassen, the state would have had to use competitive auction for the rights of way and material sites to be used by its highway department. Here, the state would have to use a different conveyancing document, such as an interagency land management assignment. In each case, the act required by the restriction is not necessary to fulfill the essential purposes of the act granting the land to the state.[22] The court concludes that the same rationale applies here: Section 6(i) need not be read to preclude a transfer of the mineral rights by a patent to the AMHTA so long as the underlying purposes of the restriction in Section 6(i) are met. So long as the AMHTA is obligated to use the land consistent with trust principles (protecting the corpus of the trust, producing revenue for the mental health program of Alaska, and ensuring that the long-term interest of the beneficiaries is protected) and is precluded from conveying the mineral rights of land subject to the Section 6(i)

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[22] The court assumes that the purpose of the patent is to prevent a breach of trust by the State similar to that which occurred in 1978 in the redesignation of the trust lands. To that extent, the patent serves the congressional intent in the Alaska Mental Health Enabling Act.

restriction, there is no violation of Section 6(i) if a patent is used to transfer the lands to the AMHTA.

The court thus concludes that Chapter 66, as supplemented by the Proposed Settlement Agreement, does not violate Section 6(i) of the Statehood Act.

Although not essential to this decision, it is important to address the State's alternative basis for concluding there is no violation of the restrictions of Section 6(i), viz. that Section 22(f) of ANCSA permits the exchange without the restrictions of Section 6(i). The court disagrees and will briefly discuss the reasons for that disagreement.

Section 22(f) of ANCSA, as amended, provides:

> The Secretary, the Secretary of Defense, the Secretary of Agriculture, and the State of Alaska are authorized to exchange lands or interests therein, including Native selection rights, with the corporations organized by Native groups, Village Corporations, Regional Corporations, and the corporations organized by Natives residing in Juneau, Sitka, Kodiak, and Kenai, all as defined in this Act, and other municipalities and corporations or individuals, the State (acting free of the restrictions of section 6(i) of the Alaska Statehood Act), or any Federal agency for the purpose of effecting land consolidations or to facilitate the management or development of the land, or for other public purposes. Exchanges shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the property exchanged: Provided, That when the parties agree to an exchange and the appropriate Secretary determines it is in the public interest, such exchanges may be made for other than equal value.

43 U.S.C. § 1621(f). The State urges that this literal reading allows an exchange between the State and the State (AMHTA) free of

the restrictions of Section 6(i):

> . . . [T]he State of Alaska [is] authorized to exchange lands or interests therein . . . with . . . the State (acting free of the restrictions of section 6(i) of the Alaska Statehood Act) . . . for the purpose of effecting land consolidations or to facilitate the management or development of the land, or for other public purposes.

The State is correct that a literal reading would allow this transfer free of the restrictions of Section 6(i). However, this cannot end the inquiry.

The State's reading of Section 22(f) of ANCSA would allow it to create a public corporation to which all general grant lands could be conveyed free of the restriction of Section 6(i), so long as the transfer was for a public purpose. This is indeed an odd result based on the literal reading of the statute. As a matter of federal law, where the "plain meaning" of a statute read literally leads to an odd result, the court must go beyond the plain words to look for other evidence of congressional intent. Public Citizen v. United States Department of Justice, 491 U.S. 440, 454, 105 L.Ed.2d 377, 392 (1989). "'The circumstances of the enactment of particular legislation,' for example, 'may persuade a court that Congress did not intend words of common meaning to have their literal effect.'" Id. quoting Watt v. Alaska, 451 U.S. 259, 266, 68 L.Ed.2d 80 (1981).

The amendment of Section 22(f) of ANCSA was designed for a particular purpose: to permit land exchanges such as that between the Cook Inlet Regional Corporation, the federal

government, and the State of Alaska.[23] See H.R. Rep. No. 729, 94 Cong., 1st Sess. 34-35 (1975), reprinted in 1975 U.S. Code Cong. & Admin. News 2376, 2401. The State's interpretation was clearly not intended by Congress.

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[23] See State v. Lewis, 559 P.2d 630, 633 (Alaska 1977) for a discussion of the land exchange.

IV. DOES CHAPTER 66 VIOLATE ARTICLE II, SECTION 13 OF THE ALASKA CONSTITUTION BY COMBINING AN APPROPRIATION WITH SUBSTANTIVE MATTERS IN THE SAME BILL?

Article II, Section 13 of the Alaska Constitution provides, in part:

> Bills for appropriations shall be confined to appropriations.

The sole issue presented in this count of the Intervenors' complaint depends on whether the term "appropriations" as used in this section of the constitution is restricted solely to money or if it includes lands.[24]

The Intervenors argue that "appropriations" should be construed consistently throughout the constitution. Since the Alaska Supreme Court decided in Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) and McAlpine v. University of Alaska, 762 P.2d 31 (Alaska 1988) that the term "appropriations" in Article XI, Section 7[25] included the appropriation of land, the Intervenors argue that the term should have the same meaning for purposes of Article II, Section 13. Further, the Intervenors argue that the purposes of Article II, Section 13 would be served by an interpretation which included appropriation of either land and money.

The State argues that "appropriation" as used in

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[24] There is no dispute that if Chapter 66 includes an "appropriation," it violates Article II, § 13. Similarly, there is no dispute that Chapter 66 designates land for a particular use, the conveyance to the AMHTA.

[25] Article XI, Section 7 of the Alaska Constitution prohibits appropriations by initiative.

Article II, Section 13 includes only money. The State relies on the decision in Thomas v. Rosen, 569 P.2d 793 (Alaska 1977) which involved Article II, Section 15. The State argues that common usage and constitutional intent support its position.

The Alaska Supreme Court has not yet decided what the term "appropriations" means in Article II, Section 13 of the Alaska Constitution. The court has decided the meaning of the term as used in Article II, Section 15, relating to the governor's line item veto power as applied to a bonding proposition. See Thomas v. Rosen, 569 P.2d 793, 797 (Alaska 1977). The court has decided the meaning of the term "appropriations" as used in Article IX, Section 7 as it applies to making such through initiative.[26] See McAlpine v. University of Alaska, 762 P.2d 81, 88-89 (Alaska 1988); Thomas v. Bailey, 595 P.2d 1, 9 (Alaska 1979). These cases are instructive, though not determinative of the issue before the court.

Thomas v. Rosen, 569 P.2d 793 (Alaska 1977), involved a constitutional challenge to the governor's use of the power to reduce an appropriation (Article II, § 15) where the governor reduced a bond authorization from $7.1 million to $4.2 million. The question was, simply, whether the bond authorization bill was an "appropriation bill" within the meaning of Article II, Section

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[26] The court has implied that this definition may not apply to repealing appropriations by initiative. See City of Fairbanks v. Fairbanks Convention and Visitors Bureau, 818 P.2d 1153, 1156-57 (Alaska 1991).

15. 569 P.2d at 795. In answering this question, the Alaska Supreme Court looked first at the framers' intent as gleaned from the proceedings of the Constitutional Convention. The court as well relied on this definition given by the Wisconsin Supreme Court in State ex rel. Finnegan v. Dammann, 264 N.W. 622, 624 (1936):

> An appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.

569 P.2d at 796.[27] The court relied primarily on the purposes which underlie the state debt provisions of Article IX, Section 8 and the separation of powers and checks and balances inherent in the constitutional framework. 569 P.2d 796-97.

Thomas v. Bailey, 595 P.2d 1 (Alaska 1979), involved a constitutional challenge to the Beirne Initiative which purported to enact the Alaska Homestead Act. The question presented was whether the term "appropriations" in Article XI, Section 7 included land as well as money. If appropriations of either land or money was included in the constitutional restriction on the use of the initiative, the Act was unconstitutional. Again the court was primarily guided by the purpose of the constitutional provision. 595 P.2d at 4. Despite constitutional history which could have

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[27] In Thomas v. Bailey, 595 P.2d at 5-6 n.21, the Supreme Court noted that Thomas v. Rosen "defined appropriations according to the [term] and purpose of the specific provision[ ]" it was interpreting and did not purport "to offer a general definition of appropriation."

been interpreted as supporting a "money-only" construction of "appropriations," the court concluded that the term included land as well. The court reasoned that the purpose of the restriction on the initiative power was to prevent "give-away programs, which have an inherent popular appeal, that would endanger the state treasury." 569 P.2d at 7. Alaska's primary asset is its land. The court concluded:

> We see no rational set of policy concerns that would prohibit an initiative from giving away $9,000,000,000 but would permit it to give away 30 million acres, valued at that sum.

595 P.2d at 8 (footnote omitted). Thus, the court determined:

> [T]he Alaska Homestead Act would substantially deplete the state government of valuable assets just as surely as an initiative allotting to residents of specified years large sums of money. In the same manner it constitutes an appropriation and hence may not be enacted by initiative.

595 P.2d at 9.

McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), involved a similar constitutional challenge to an initiative which would have required the University of Alaska to transfer property to a separate community college system created by the initiative. The question was whether the holding of Bailey should be extended to situations not involving give-away programs. Again, the court focused on the purpose of the constitutional restriction:

> Parallel reasoning applies in the present case. Outside the context of give-away programs, the more typical appropriation involves committing certain public assets to a particular purpose. The reason for prohibiting appropriations by initiative is to ensure that the legislature, and only the

> legislature, retains control over the allocation of state assets among competing needs. This rationale applies as much or nearly as much to allocations of physical property as to allocations of money. To whatever extent it is desirable for the legislature to have sole responsibility for allocating the use of state money, it is also desirable for the legislature to have the same responsibility for allocating property other than money. Otherwise, the prohibition against appropriations by initiative could be circumvented by initiatives changing the function of assets the State already owns. We conclude that the constitutional prohibition against appropriations by initiative applies to appropriations of state assets, regardless of whether the initiative would enact a give-away program or simply designate the use of the assets.

762 P.2d at 88-89 (footnote omitted).

This review reveals several important factors. First, the Alaska Supreme Court is primarily guided by the purpose of the constitutional provision in interpreting it. Second, the Court does not apply a rule requiring consistent meaning for terms used throughout the constitution. It is essential, then, to focus on the purpose of the restriction on appropriation bills in Article II, Section 13.

The purpose of requiring that an appropriations bill include only appropriations was to ensure that the legislature would be able to consider various appropriations simultaneously in light of the total revenues and expenditures. 3 Proceedings at 1740. The state budget would include many appropriations, and prioritizing demands for funding as well as balancing the budget would be difficult if appropriations were made "in the hodgepodge fashion" of the Territorial legislature. Id. A good description

of the general purpose of such a rule can be found in a Florida case:

> The enactment of laws providing for general appropriations involves different considerations and indeed different procedures than does the enactment of laws on other subjects. Our state constitution demands that each bill dealing with substantive matters be scrutinized separately through a comprehensive process which will ensure that all considerations prompting legislative action are fully aired. Provisions on substantive topics should not be ensconced in an appropriations bill in order to logroll or to circumvent the legislative process normally applicable to such action. Similarly, general appropriations bills should not be cluttered with extraneous matters which might cloud the legislative mind when it should be focused solely upon appropriations matters.

Brown v. Firestone, 382 So.2d 654, 664 (Fla. 1980).[28]

There is little in the purpose of the appropriations restriction which supports the Intervenors' position. The only rational way to apply the monetary budget appropriation process to state land is to require the governor and legislature to study the entire inventory of state land before every conveyance or

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[28] The "single-subject" rule in Article II, Section 13 is related to the appropriation bill restriction. The purpose of a "single-subject rule," as found in Article II, Section 13, is to prevent the inclusion of hidden "sleepers" and to assure that separate matters receive separate consideration and decision. 2 Constitutional Studies, Chap. V, at 27; see also Gellert v. State, 522 P.2d 1120, 1122 (Alaska 1974); Suber v. Alaska State Bond Commission, 414 P.2d 546, 557 (Alaska 1966). If designation of land to a particular use can be included within a monetary appropriations bill, adequate consideration of whether the land is suitable for the particular use and the many other factors in land decisions might not occur. Land and money are completely different in character. Each parcel of land is unique, while each dollar of money expended or received is the same. The specific relative value of land parcels is never completely certain, while at any given time, one dollar has the same value as another.

designation of a parcel for a particular use. The land equivalent to considering competing needs and setting spending priorities for appropriations is the resource inventory and land use planning process performed by the Department of Natural Resources, the agency which has the technical expertise for this endeavor.

Legislation designating state land for a particular use has frequently combined legal descriptions of specific parcels with substantive provisions governing at least part of the management of the designated area.[29] This makes sense, because the specific land parcels and the management of those parcels are related concerns that often should be considered together.[30]

Because voters ratified the Alaska Constitution, the court must also look to the meaning that voters would have placed on a particular word or phrase. Division of Elections v. Johnstone, 669 P.2d 537, 539 (Alaska 1983). In Bailey, the Alaska Supreme Court observed that although sometimes "appropriation" in the context of land had been used, "the usual context of appropriations [was] setting aside an amount of money and designating it for a particular use." Bailey, 595 P.2d at 5

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[29] See, e.g., AS 41.15.300-.330 (Ch. 95, Sec. 2, SLA 1982) (Haines State Forest Resource Management Area); AS 41.20.507, .515 (Ch. 95, SLA 1982) (Alaska Chilkat Bald Eagle Preserve).

[30] Once a program has been established, it is a relatively simple matter to allocate a certain amount of money for its implementation. However, even if a land program was established in substantive legislation prior to an "appropriation" of land, the particular land designated for the use might necessitate changes in the substantive legislation.

(emphasis added). In the absence of constitutional history to the contrary, it is reasonable to conclude that the voters placed the most common interpretation on the word "appropriations," that is the setting aside and designation of an amount of money, not land.

From the purpose of the provision as discussed by the framers and the likely meaning ascribed by the voters, the court concludes that as used in Article II, Section 13 "appropriations" includes money, not land. Thus, the court concludes that Chapter 66 does not violate Article II, Section 13.

V. DOES SECTION 56 OF CHAPTER 66 REGARDING THE HYPOTHECATED LANDS LIST VIOLATE THE ALASKA CONSTITUTION?

A. Background.

Chapter 66, Section 56 establishes security for the plaintiffs to ensure that the State complies with the reconstitution of the trust. To do so certain state lands are "hypothecated" to the mental health trust. "Hypothecate" means:

> To pledge property as security or collateral for a debt. Generally there is no physical transfer of the pledged property to the lender, nor is the lender given title to the property; though he has the right to sell the pledged property upon default.

Black's Law Dictionary, 742 (6th ed. 1990). Section 56(a) provides:

> To secure the reconstitution of the trust as provided in secs. 54 and 55 of this Act, the land listed in "Lands Hypothecated to the Mental Health Trust, May 1991" located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska, is hypothecated to the mental health trust.

Title to the land remains in the State unless the State defaults on its obligations to return original mental health trust lands to the trust under Section 54, to convey substitute lands to the trust under Section 55, or to allocate funds to the Trust Income Account. Section 56(b). Income from the hypothecated lands remains the unrestricted income of the State. Id. The hypothecated land is to be released "on a pro rata basis" as reconstitution proceeds, but the pool must always be sufficient to provide security for the remaining exchanges. Section 56(c). If the State defaults or if the trust is not reconstituted by December 1, 1994, the

hypothecated lands can be foreclosed in a manner to be determined by the Alaska Supreme Court. Section 56(d).

This portion of the bill which became Chapter 66, Senate Bill 65 ["SB 65"], like most of the land transfer provisions, was added in the closing days of the 1991 legislative session. There had been bills pending to resolve this litigation, but the State and the plaintiffs had not reached agreement. The parties did not agree to use a land-based settlement until approximately May 14, 1991. The amendments to SB 65 necessitated by the proposed land-based settlement were first presented to the legislature on May 17, 1991. 1991 Senate Journal 1403. The bill was passed by both houses on May 20, 1991. 1991 House Journal 1701-02; 1991 Senate Journal 1527. When SB 65 was passed by the legislature, no one in the legislature had seen the Hypothecated Lands List in any form; those who wanted to see it were denied access. The parties to this lawsuit were holding the list confidential and were the only ones who knew its contents.

The first draft of the Hypothecated Lands List was prepared by the Department of Natural Resources and provided to the Settling Plaintiffs on May 17, 1991. A new version was prepared on May 20, 1991. A different version existed on June 18, 1991; it included a new category of land, designated the "Collateral of Last Resort," 2.4 million acres of land in Cook Inlet subject to oil and gas leases. The List was in this form when Governor Hickel signed the bill on June 19, 1991. The List was kept confidential

until the bill was signed by the Governor.

A different list was submitted with the proposed settlement agreement. It bears the date of April 3, 1992. It is not entirely clear to the court that these later versions of the list in existence on June 19 describe the same lands.[31] It appears that some lands in addition to the Cook Inlet lease lands were added between May 20 and June 19.[32]

The first hearing on the package of amendments to SB 65 proposed jointly by the administration and the settling plaintiffs was held on May 17, 1991, jointly before the Senate Finance Committee and Senate Judiciary Committee. St. Ex. 13. DNR Commissioner Heinze was asked questions about the hypothecated lands. The official minutes of the meeting state:

> Commissioner Heinze explained that the department is in the process of identifying those lands. The term "hypothecated" indicates that the state would retain title and income from the land, but the land would be pledged as security against replacement of lands not returned to the trust. The purpose of the collateral is to provide assurance to plaintiffs that the state will perform. To "help the collateral be self-liquidating," the department feels it would be best to choose lands that resemble unreturned lands as closely as possible. The department is attempting to find a mix of collateral lands that look like the kind of replacement lands the trust might want. They should be comparable to

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[31] The State seemingly acknowledges some questions itself in its reply brief, where the State noted "DNR is conducting an audit to determine whether any lands were added erroneously to the Hypothecated Lands List after June 19, 1991." Reply Br. at 94. The State's position is that the List which existed on June 19, when the governor signed the bill, controls.

[32] See St. Reply Br. at 94-95.

> the lands the state is unable to return -- predominantly tracts around existing municipalities and lands designated as parks, refuges, and habitats.
>
> Commissioner Heinze directed attention to a handout (Attachment B) which he explained outlines "some of the kinds of lands we're looking at." Tomorrow, the department expects to sit down with plaintiffs for a more detailed review.

State's Exh. 13-A, at 14. The attachment provided to the committees by Commissioner Heinze provides:

> REPLACEMENT LAND POOL
>
> The Department of Natural Resources is working with representatives of the plaintiffs to assemble a pool of general grant state land to fulfill the requirements of Sec. 55 of HB 79 and SB 65. Entitled "Lands Hypothecated to the Mental Health Trust: May, 1991," this pool will include, to the extent possible, state land similar in terrain, use, location, development potential and accessibility to the original mental health-trust to be replaced. The pool is expected to include the following land types.
>
> - surveyed subdivision lots; including lots available over-the-counter and future land disposal offerings scheduled for FY 92-97. Includes land in Southeast, Southcentral, and Northern regions.
> - commercial and industrial lease tracts in the railbelt; such as the MAPCO refinery at North Pole
> - large tracts of contiguous state land near existing mental health land; including Beluga coal and timber lands, the Willow Capitol site, Kenai timber tracts
> - blocks of commercial timber land, including Fredrick Point near Petersburg, Thorne Bay, Mat-Su tracts
> - agricultural tracts in Mat-Su, Delta, Nenana, etc.

> These areas were identified primarily through examination of the department's adopted area plans, focusing on lands designated for settlement, forestry and minerals. Therefore, most of these lands have already received at least one round of public notice and review. It is intended that there be more land in the pool than will be ultimately needed to reconstitute the trust in accord with the legislation.

Id. at 46. Senator Halford noted that the "replacement land pool" was "essentially land next scheduled for development in Alaska," and expressed concern that what was "security for the trust" was also "the development future of Alaska for the next couple of years." Id. at 15. Commissioner Heinze responded:

> Commissioner Heinze stressed that the settlement speaks to collateral. The state would continue to own the land, manage it, and enjoy the income from it. While it is pledged as collateral, it cannot be sold. The Commissioner voiced his hope that the Authority would select the proposed land since much of the land that will not be returned to the trust is land which the state conveyed through subdivisions to private homeowners. The settlement will provide those homeowners with title to their property. In light of that freedom, the state must replace those tracts with comparable land. The department has proceeded through one, and in some cases several, public processes to identify "these lands as lands that the state would dispose of." The Commissioner concurred that the proposal would use "a large hunk of our lands available for disposal right now in the state . . . [in] creating this pool." He stressed that it is not so much the value of the lands as the fact that they more nearly represent the types of land that will not be returned that is important.
>
> Addressing concerns that the lands would not be utilized, Commissioner Heinze reiterated that the settlement reflects a land-based trust. The purpose is to generate income for the mental health program. Seven appointed, public trustee members will be responsible for management decisions and utilization

of the land.

Id. at 15-16. The Finance Committee attached a Letter of Intent regarding yearly reports to the legislature. Id. at 47.[33]

The next day, May 18, the Senate passed SB 65 and referred it to the House. 1991 Senate Journal 1439-42. The Senate adopted the Finance Committee's letter of intent. Id. at 1440-41.

SB 65 was read in the House for the first time on May 18 and was referred to the House Finance Committee. 1991 House Journal 1606. The House Finance Committee considered SB 65 on May 18 and reported out with a "Do Pass" recommendation to their amended version. Intervenor's Exh. 9, at 1-2. The minutes reflect the following discussion regarding the Hypothecated Lands List:

> Vice-Chair Boyer asked how hypothecated lands were identified. Mr. Koester stated that these were identified in a document that will be "housed" in the Director of the Division of Lands office, Department of Natural Resources, Anchorage. He referenced Section 56.
>
> Representative Brown asked how many acres were contained on the list. Mr. Koester did not know. DAVID WALKER, PLAINTIFFS' ATTORNEY, also did not remember how many acres were on the list. The plaintiffs had their land expert and the Department of Natural Resources get together to make the list. The plaintiffs and the commissioner were satisfied that there must be sufficient collateral to cover the outstanding land transfer, Mr. Walker stated.
>
> Representative Brown asked if the understanding was

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[33] It should be noted that the 12 members of the two committees were present at the joint meeting, as was Senator Sturgelewski. Thus, 13 of the 20 members of the Senate were provided this information.

> that the department will not take action with regard to additional encumbrances. Mr. Walker said the plaintiffs understood that those lands identified on the collateral list should be treated as collateral. The department and the state would do nothing to diminish their value as security; however, it was not the plaintiffs' intention to block all actions on those lands during the time they remained on the list.

Id. at 19.

The full House considered SB 65 (as amended by the House Finance Committee) on May 20, 1991. 1991 House Journal 1700-03. Representative Finkelstein raised a question regarding the legislature's inability to see the Hypothecated Lands List:

> . . . I do have grave concerns, and I know other members do, on section 56. I have been trying to talk to the administration, sponsors and others. Section 56 is on page 39. We are apparently being asked here to approve legislation that includes a list of lands, that are lands that will be used as the back-up for security in this settlement, which is well and fine. I don't have any problem with that concept. But we are unable to find out what those lands are, and we are being told that it is not public information; which amazes me that we could have something referenced to a law that we are supposed to vote on, and it's not public information. I just can't imagine how we can carry out our duties to best represent the public without knowing the choice we're making here. And I won't offer an amendment at this time, because I don't have one that will not cause serious damage to the settlement, but I will be working between now and any later consideration, in trying to find that.

State's Exh. 13-E, at 1-2. Representative Moyer responded:

> Hopefully this gives some comfort to the member asking the question. I think it is the intent of some members to perhaps craft a letter of intent that would clarify, for the record, that the hypothecated lands, at some date tied to the effective date of this act, would in fact, become a public document. The difficulty here is that the

> hypothecation is literally occurring as we speak. I mean it is coming together as a pool of lands, and the whole issue is still very much the subject of litigation. And it's being continued to be negotiated, and as such, it is not a public process. So it is difficult for us to find a lot of comfort there, I know, but later this morning I think we will have a letter of intent that will clarify that, as it comes together, and as it is finally settled, and as the court kind of lays its hands on this settlement, that the hypothecated acreage will, in fact, become public.

Id. at 2-3. The House adopted the bill as amended with a vote of 36-3, with 1 absent. The Senate Finance Committee's letter of intent was also adopted. 1991 House Journal 1702-03.

The bill went back to the Senate. The Senate concurred in the House amendments to SB 65 on May 20, 1991, sometime prior to 5:01 p.m. 1991 Senate Journal 1527-29, 1558.

Later that same day, sometime after 7:58 p.m., the House adopted the letter of intent earlier referenced by Rep. Moyer. 1991 House Journal 1734, 1752. The letter of intent, as adopted by the House and transmitted to the Senate, provided:

> It is the intent of the Legislature that upon the conclusion of negotiations between the Administration and the plaintiffs in Weiss v. State of Alaska which result in the designation of "Lands Hypothecated to the Mental Health Trust, May 1991," as provided in Sec. 56 of this Act, that document shall be made public."

Id. at 1752. The Senate did not adopt this letter of intent and could not have seen it when the Senate last acted on SB 65.

On April 6, 1992, the Department of Natural Resources adopted Dept. Order No. 135 which deals with DNR's management of

the hypothecated lands.[34] The general statement of management standards is found at page 8:

> In general, the Department shall manage Hypothecated Land according to the principle that lands are pledged as security to the Mental Health Trust. This means that any Departmental transaction with respect to Hypothecated Land is first subject to a finding that the transaction is consistent with hypothecation of the parcel (pledged as security to the Mental Health Trust), which includes the finding that no substantial devaluation of the parcel for purposes of Mental Health Trust ownership will result. The following examples are illustrative and not exhaustive and the State and Plaintiffs may agree to different treatment for specific Departmental transactions. Permits for a year or less, revocable at will, where there is no significant chance of harm (such as damage from hazardous substances) are allowed. Material sale applications will be determined on a case by case basis based on factors such as price of the material; whether the material source will be substantially depleted; whether opening the pit would benefit future Mental Health Trust ownership; and the chance of harm to the land. Rights-of-way are generally permitted, however, the alignment shall take into consideration the impact on future development of the parcel. Fair market value leases are allowed, but less than fair market value leases that cannot be increased to fair market value leases upon conveyance to the Mental Health Trust are not appropriate. Sales of Hypothecated Land are generally not to be allowed. Hypothecated Land will normally be available for short term timber sales.
>
> The Department must also review all applications for consistency with all appropriate state statutes and regulations just as any other application must comply with the law.

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[34] This order is exhibit I to the Proposed Settlement Agreement.

B. Was Chapter 66 Passed in Violation of the "Three-Readings" Requirement of Article II, Section 14 of the Alaska Constitution?

Article II, Section 14 of the Alaska Constitution provides, in pertinent part:

> The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it.

The Intervenors assert that Chapter 66 was passed in violation of the "three-readings" requirement of Article II, Section 14. They acknowledge that the title of the bill was read three times in each house of the legislature and that there was no violation of the separate day provisions. Rather, the Intervenors maintain that the passage of Chapter 66 violated the "three-readings" requirement because the Hypothecated Lands List was kept secret from the legislature. The purposes of the three-readings requirement, to ensure that the legislature knows what it is passing and to permit public input, were violated.

The State asserts that there is no requirement in Article II, Section 14 other than that the bill be read. Further the State argues that the issue is nonjusticiable.

The first issue which the court must address is whether this question is justiciable. "There are certain questions involving coordinate branches of the government . . . that the judiciary will decline to adjudicate." Abood v. Gorsuch, 703 P.2d

1153, 1160 (Alaska 1985). These questions are deemed nonjusticiable. "It is not possible to draw the exact boundary separating justiciable and nonjusticiable questions." Abood v. League of Women Voters of Alaska, 743 P.2d 333, 336 (Alaska 1987). There are two classes of questions which fairly clearly fall on one side or the other of this line, however. The first class involves questions regarding the internal, nonconstitutional rules of the legislature. These questions are normally determined to be nonjusticiable. See League of Women Voters, 743 P.2d at 337-38 (question of whether the legislature's Uniform Rule 22 and the Open Meetings Act were violated by non-public sessions on the FY 87 budget held nonjusticiable); Gorsuch, 703 P.2d at 1163-64 (claim that absence of House Speaker from joint session violated Uniform Legislative Rule 51 was nonjusticiable); Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982) (whether legislature violated AS 24.10.020, which prohibited anyone other than Speaker from convening a session of the House was nonjusticiable). The second class involves questions of the constitutionality of the legislature's action in adopting legislation. These questions are normally determined to be justiciable. See Gorsuch, 703 P.2d at 1161-62 (question of what quorum is necessary for confirmation votes is a question of constitutional law and therefore justiciable). See also State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980) (holding legislative annulment statute unconstitutional because it did not require the constitutional

formalities of legislation); Plumley v. Hale, 594 P.2d 497 (Alaska 1979) (examining constitutionality of statute in light of constitutional requirement for individual votes by yeas and nays on final passage (art. II, § 14)).

The question presented here is a question of constitutional law: does the "three-readings" requirement of Article II, Section 14 preclude the legislature from passing a bill incorporating a document which the legislature has not been permitted to view? This question of constitutional law is justiciable.[35]

The "three-readings" requirement of Article II, Section 14 of the Alaska Constitution serves a threefold purpose: (1) it ensures that the legislature knows what it is passing; (2) it ensures an opportunity for the expression of public opinion; and (3) it ensures an opportunity for due deliberation on the bill. See 3 Proceedings 1751-55.

There is no question that these three-fold purposes are not served if the legislature passes a bill incorporating a document which has been kept confidential. The legislature cannot

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[35] In a related argument, the State maintains that the "enrolled bill" doctrine precludes judicial examination of this question. The court concludes that the "enrolled bill" doctrine is not applicable in Alaska. It is an outmoded doctrine, rejected by most modern courts, and is inconsistent with decisions of the Alaska Supreme Court such as Plumley v. Hale, 594 P.2d 497 (Alaska 1979). See, e.g., Yarger v. Board of Regents, 456 N.E.2d 39, 41-42 (Ill. 1983); Consumer Party of Penn. v. Commonwealth, 507 A.2d 323, 332-34 (Pa. 1986); Ass'n of Texas Professional Educators v. Kirby, 788 S.W.2d 827, 829-30 (Tex. 1990).

know what it is passing -- it can only know that it is incorporating a secret document. The public is denied an opportunity to comment on the contents of the document and those directly affected by the contents of the document are denied an opportunity to attempt to influence their representatives. The legislature is not given an opportunity to consider the substance of what they are enacting into law.

The purposes of the "three-readings" requirement were not served here. The legislature knew it was hypothecating lands named in a list which it had not seen and could not see, but it could not know which lands had been pledged. The public could comment on the legislature's action in incorporating a secret document, but no one affected by the hypothecation could specifically comment on the inclusion or exclusion of any parcel of land. The legislature could duly deliberate on their incorporation of a secret list of land, but they could not deliberate on which lands were hypothecated.

The purposes of the "three-readings" requirement were not met by this procedure; the question remains, however, whether the court should interpret Article II, Section 14 to preclude this procedure. A constitutional provision should be given a practical interpretation in accordance with common sense, paying attention to the plain meaning of the language, the purpose of the provision and the intent of the framers. See ARCO Alaska, Inc. v. State, 824 P.2d 708, 710 (Alaska 1992); Kochutin v. State, 739 P.2d 170, 171

(Alaska 1987). The provision must also be examined in light of the meaning the voters would have given it. State v. Lewis, 559 P.2d 630, 637 (Alaska 1977). While adopting the interpretation advocated by the Intervenors would fulfill the purpose of the "three-readings" requirement, such an interpretation cannot be squared with the other canons of constitutional construction. There is nothing in the legislative history to indicate that the framers intended to require anything other than that the bill be read three times on three days in each house. There is nothing in the language which would suggest any requirement other than the required readings. The Alaska Supreme Court has concurred in this statement:

> The governing principle of constitutional construction is to give effect to the intent and purpose of the framers of the constitutional provision and of the people who adopted it. Unless the context suggests otherwise, words are to be given their natural, obvious and ordinary meaning.

Hammond v. Hoffbeck 27 P.2d 1052, 1056 n.7 (Alaska 1981), quoting County of Apache v. Southwest Lumber Mills, Inc., 376 P.2d 854, 856 (Ariz. 1962). Although the purpose of the three-readings requirement was not served by the procedure used, the "natural, obvious and ordinary meaning" of the words used in Article II, Section 14 cannot be stretched to cover this situation. Accordingly, the court concludes that Article II, Section 14 was not violated.

C. Does Section 56 Involve an Unconstitutional Delegation of the Legislature's Authority?

The State asserts that the legislature delegated to DNR its legislative powers to negotiate and prepare a Hypothecated Lands List acceptable to the plaintiffs.[36] The State asserts that this delegation was lawful and constitutional because there were sufficient standards and procedural safeguards in the delegation. The State is inconsistent in its position regarding what the standards in the delegation are. In its initial brief, filed August 31, 1992, the State asserted that detailed guidelines were "unnecessary" because the list was almost complete when the legislature passed the bill and the "intelligible principles" were laid out by Commissioner Heinze in his comments before the Joint Senate Committees on May 17, 1991.[37] St. Br. at 128-30. That is that the Hypothecated Lands List should "resemble unreturned lands as closely as possible." In its reply brief, filed December 7, 1992, the State asserted that the standards are defined to effectuate the purpose of the list: so that if foreclosure occurs "the trust can be reconstituted pursuant to the specific guidelines set forth in §§ 54 and 55 of Chapter 56." St. Reply Br. at 137-38. The State asserts that judicial control of the foreclosure

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[36] Presumably the State also takes the position that the authority to revise the list substantively extended only until the Governor signed SB 65. However, that point is not explicitly made. See footnote 31.

[37] Commissioner Heinze's statements are discussed at pages 62-65 of this Memorandum Decision and Order.

proceedings and the pro rata release of hypothecated lands are sufficient procedural safeguards.

The Settling Plaintiffs assert that there was a valid delegation of legislative authority to the Attorney General in connection with his statutory control over the litigation in which the State is involved. See AS 09.50.300; Public Defender Agency v. Superior Court, 534 P.2d 947, 950 (Alaska 1975).

The Intervenors assert that there are two possible interpretations of Section 56(a) which require different analysis. First, the court could interpret Section 56(a) as incorporating a secret list, prepared by plaintiffs and DNR, extant on the date SB 65 was passed, May 20, 1991. Second, the court could interpret Section 56(a) as a delegation to plaintiffs and DNR to prepare a list. The Intervenors assert that the first interpretation is better, but that under either interpretation, an unlawful and unconstitutional delegation has occurred. The Intervenors assert that a delegation to a private party, such as plaintiffs, is unlawful. The Intervenors assert that there are no standards and inadequate procedural safeguards to make the delegation constitutional.

The Alaska Constitution vests legislative powers in the legislature. Article II, Section 1. The separation of powers that is implicit in the constitution requires that legislative power which is delegated be subject to a sufficient combination of standards and procedural safeguards to ensure that the body to whom

power is delegated does not have unguided and uncontrolled discretionary power. See Municipality of Anchorage v. Anchorage Police Department Employees Association, 839 P.2d 1080, 1086 (Alaska 1992); Boehl v. Sabre Jet Room, Inc., 349 P.2d 585, 588 (Alaska 1960). Before addressing the ultimate question, whether Chapter 66 has sufficient standards and safeguards, it is necessary to interpret the provisions of Section 56(a).

Section 56(a) states:

> To secure the reconstitution of the trust as provided in secs. 54 and 55 of this Act, the land listed in "Lands Hypothecated to the Mental Health Trust, May 1991" located in the office of the director of the division of lands, Department of Natural Resources, in Anchorage, Alaska, is hypothecated to the mental health trust.

The plain meaning of the words used is that certain lands are hypothecated to the mental health trust. Those lands are identified on a list in existence at the time of passage bearing the title "Lands Hypothecated to the Mental Health Trust, May 1991" which list is in fact located in the office of the director of the division of lands in Anchorage. On their face, the words are not at all ambiguous. However, in Alaska that does not end the inquiry into the meaning of the statute.

The Alaska Supreme Court expressly rejected the plain meaning rule in North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 n.7 (Alaska 1978). The court reaffirmed that decision in State v. Alex, 646 P.2d 203, 208-09 n.4 (Alaska 1982). Alaska has adopted a "sliding scale approach" to statutory

interpretation: the plainer the language, the more convincing contrary legislative history must be. Id.

The court set out the entire recoverable legislative history related to the meaning of Section 56(a) in the "Background" section, supra. From that history it is quite clear that the House knew the Hypothecated Lands List was not final on May 20 when the House passed SB 65. Representative Moyer told the entire House that the list was being negotiated as they spoke. State's Exh. 13-E, at 2-3. The House letter of intent clearly envisions making the List public at a future date, after "the conclusion of negotiations between the Administration and the [Weiss] plaintiffs." 1991 House Journal at 1752.

The legislative history in the Senate is not as clear. The Senate could not have seen the House letter of intent when it concurred in the House amendments; the letter was not adopted or transmitted until after the Senate adjourned. The only discussion of the Hypothecated Lands List occurred on May 17 before the Joint Meeting of the Senate Finance and Judiciary Committees. At that time, Commissioner Heinze told the committees that "the department" was in the process of identifying the lands for inclusion on the list. The handout which the Commissioner brought stated "[t]he Department of Natural Resources is working with representatives of the plaintiffs to assemble a pool of general grant state land" to be the Hypothecated Lands List. He told the committees that the department "expects to sit down with plaintiffs for a more detailed

review" the next day, May 18. No Senator ever expressed an intent that the plaintiffs and DNR negotiate a list. Commissioner Heinze's comments are somewhat ambiguous: he never clearly says that the list will not be complete by the time the Senate is expected to act.

The language in the statute is clear; there is nothing from which a reasonable person could infer an intent to delegate the preparation of the Hypothecated Lands List to anyone. The legislative history in the House is clear: they intended a delegation. The legislative history in the Senate is not as clear: thirteen members of the Senate were told that the plaintiffs and DNR were preparing a list which was not completed but it was not absolutely clear whether the list would be completed by DNR before the Senate acted. Although it is a close question, using the "sliding scale approach," the court concludes that the legislative history is sufficiently convincing to overcome the statute's plain meaning. See Peninsula Marketing Ass'n v. State, 817 P.2d 917, 922 (Alaska 1991). Thus, the court concludes that the legislature delegated the task of preparing the Hypothecated Lands List to DNR.

Having concluded that DNR was delegated the responsibility to prepare a Hypothecated Lands List acceptable to plaintiffs, the question is: was this an unconstitutional delegation. The court concludes that it was. There is no one standard discernible from this legislation; the procedural safeguards are almost non-existent.

The State's inability consistently to name the standard applicable is telling. If there was a standard, the State would not have chosen two different ones.[38] The problem stems from the fact that not only must the delegation be implied, but the standards must also be implied.[39] Taking into account the purpose of the statute and the policy, there are a number of different standards that could be chosen. The basic purpose of the nondelegation doctrine is that administrators should not have unguided and uncontrolled discretionary power to govern as they see fit. Municipality of Anchorage, 839 P.2d at 1086. Where the legislation has several different standards that could be implied, the administrator is as unguided as she is in the situation where there are no standards.

The Alaska Supreme Court said in Fairbanks North Star Borough, 736 P.2d 1140, 1143 (Alaska 1987), that the fundamental question in delegation issues is whether the administrator is given guidance sufficiently specific to set the perimeters around the

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[38] The standards named by the State are not the same. Under the "resemble" standard discussed by Commissioner Heinze and promoted first by the State, the delegation would set parameters around like lands, largely using the standards expressed in section 55(d). The "§§ 54 and 55" standard promoted by the State in its reply brief, would eliminate lands in legislatively-designated areas, include original mental health lands expected to be returned to the trust, and apply all of the factors in Section 55(e), such as diversity of lands in the trust and the broader public interest.

[39] It is permissible in certain instances to imply the standard from the general policy and purposes underlying the legislative enactment. See Kenai Peninsula Fisherman's Cooperative Ass'n, Inc. v. State, 628 P.2d 897, 907 (Alaska 1981).

area within which the administrator is to act as directed by the legislature. Here, the commissioner of DNR could not set those perimeters, because he could not possibly tell which ones to set. It is certainly arguable, as the State first asserted, that the commissioner should select lands so that the list would resemble original trust lands not being returned to the trust. That is consistent with the policy of the statute to settle the litigation and provide for security for the state's obligations to reconstitute the trust. It is equally reasonable to argue, as the State later asserted, that the commissioner should use as guidelines the substance of all of Sections 54 and 55 in establishing the list. That too is consistent with the policy of the statute to settle the litigation and provide security. It would also be reasonable to argue that the commissioner should include any state lands acceptable to the plaintiffs in the Hypothecated Lands List regardless of the state or public's interest in retaining those lands. This too is consistent with settlement of the case and securing the state's obligation to reconstitute the trust.[40]

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[40] The Intervenors raise an interesting question regarding what standard the Commissioner did apply. It is impossible to know since there is no decisional document or record accompanying this administrative action. However, it seems clear that he did not use the standard latest advocated by the state, an application of the requirements of Sections 54 and 55. Had he done so, it is almost certain that original mental health lands expected to be returned to the trust under Section 54 would have been included. However, it does not appear that any substantial amount of original mental health lands appear on the Hypothecated Lands List. In fact DNR made a conscious decision to remove any original mental trust lands

general grant lands of the state. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment on count XI of the Public Interest Intervenors' complaint, consistent with this decision.

IT IS SO ORDERED. If any party desires a final judgment with respect to the allegations of the Public Interest Intervenors' complaint, they must file a motion in compliance with Alaska Civil Rule 54(b).

DATED at Fairbanks, Alaska this 26 day of April, 1993.

Mary E. Greene

MARY E. GREENE
Superior Court Judge

Plaintiffs are granted partial summary judgment on Counts VI, VIII, and IX of the Public Interest Intervenors' complaint, consistent with this decision. The Public Interest Intervenors are granted partial summary judgment on Count VII (alternative portion) of their complaint, consistent with this decision.

Part VI. The court has concluded that the conveyance of substitute land selected under Section 55 of Chapter 66 to the Alaska Mental Health Trust Authority is subject to the planning and classification provisions of AS 38.04 and AS 38.05. Accordingly, the Public Interest Intervenors are granted partial summary judgment on Count X of their complaint, consistent with this decision.

Part VII. The court has concluded that even if the planning and classification provisions of AS 38.04 and AS 38.05 were not applied to the reconstitution of substitute lands, the reconstitution would not violate Article VIII, Section 10 of the Alaska Constitution. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment on Count IV of the Public Interest Intervenors' complaint, consistent with this decision.

Part VIII. The court has concluded that the original mental health lands in the Haines and Tanana Valley State Forests will not be subject to the provisions of AS 41 applicable only to the

Plaintiffs are granted partial summary judgment with resp[illegible] Count III of the Public Interest Intervenors' complaint, consistent with this decision.

Part IV. The court has concluded that Chapter 66 does not violate Article II, Section 13 of the Alaska Constitution. The court has concluded that "appropriations" in that section refers only to money, not land. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment with respect to Count V of the Public Interest Intervenors' complaint, consistent with this decision.

Part V. The court has concluded that the hypothecation provision did not result in a violation of the "three-readings" requirement of Article II, Section 14 of the Alaska Constitution. The court has concluded that the legislature intended to delegate the task of preparing the Hypothecated Lands List to the Department of Natural Resources. The court has concluded that the delegation is unconstitutional because Chapter 66 does not contain constitutionally required standards and/or procedural safeguards applicable to the delegation. The court has concluded that the hypothecation of state lands to the mental health trust was not subject to Article VIII, Section 10 of the Alaska Constitution. The court has concluded that the public trust doctrine is not applicable to the public lands. Accordingly the State and Settling

CONCLUSION AND ORDER

Part I. The court has concluded that Article VIII, Section 10 of the Alaska Constitution requires the legislature to provide "other safeguards of the public interest" in addition to public notice. The court has concluded that the legislature provided constitutionally adequate safeguards for the disposal of lands by the Alaska Mental Health Trust Authority. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment with respect to Count I of the Public Interest Intervenors' complaint, consistent with this decision.

Part II. The court has concluded that section 202(e) of the Mental Health Enabling Act preempts application of the Permanent Fund Amendment, Article IX, Section 15, to mineral revenues received from use of original or substitute lands in the mental health lands trust to the extent the revenues are used for the mental health program of Alaska. Article IX, Section 15 will apply to excess revenues designated for other uses. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment with respect to Count II of the Public Interest Intervenors' complaint, consistent with this decision.

Part III. The court has concluded that Chapter 66, as supplemented by the Proposed Settlement Agreement, does not violate section 6(i) of the Alaska Statehood Act. Accordingly, the State and Settling

> inside the trust . . . . So, on balance, I think, even though I have some specific concerns about it, it probably, in the long run, does more for protecting some of these areas that many of us are interested in, and concerned about, and the environmental community is interested in and concerned about, than doing nothing will accomplish.

St. Exh. 13-D, at 5-6. Clearly, Senator Duncan and others would have had no concern without returning the lands from the Haines and Tanana Valley State Forests to the trust if they expected that the lands would be subject to the same provisions as a part of the trust that they were when treated like general grant lands.

Based on the express purposes of Chapter 66 and this legislative history, the court concludes that the legislature intended that the original trust lands returned under Section 54(5) not be subject to those parts of AS 41 which are applicable only to general grant state lands.

land not subject to the plan.[67]

Although the legislative history is rather sparse on this issue, there is some support for this interpretation. The specific topic of forest management provisions arose only once, during the testimony of Sherrie Goll, a resident of Haines, on May 17 before the Joint Meeting of the Senate Finance and Judiciary Committees. Ms. Goll pointed out that there was an area management plan in the Haines State Forest which was carefully developed "to take in all the concerns and multiple use needs of the community." St. Exh. 13-C, at 13. She gave her opinion that if this land was returned to the trust, the restrictions such as buffer strips "would no longer be applicable." Id. at 14. Although Senator Uehling asked Ms. Goll some questions, the Committees never addressed Ms. Goll's concerns. Id. Additionally, although not specific on the issue of forest management plans, the comments of Senator Duncan on the floor of the Senate clearly indicate that a conscious decision was being made to return the Haines and Tanana Valley State Forest lands, with attendant sacrifice, in order to protect a greater amount of land in the other legislatively designated areas. He said:

> So as I looked at it, I'm concerned about transferring in the two forests, the 113,000 acres. But as you put in on balance, as you put it on balance, I think that that is better than having the total amount of legislatively designated lands

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[67] No substitute land would be conveyed to make up for this difference. Chapter 66 assumes the comparability value of original lands returned to the trust.

lands by statute.[64] Additionally, there is a possibility that an application of these forest management provisions which are applicable to general grant lands to original trust lands returned to the trust would defeat the purpose of "fair compensation." Generally original trust lands are returned to the trust without any compensation for a diminution of value.[65] See Ch. 66, §§ 54-55. It is clearly possible for a forest manager, constrained to manage lands for multiple use, to significantly impair the economic value of the land.[66] Clearly that would constitute a breach of trust. See State v. University of Alaska, 624 P.2d 807, 813 (Alaska 1981) (breach of trust found by classification which restricted the use of the land to any significant degree where the intent of the grant was to maximize the economic return from the land for the benefit of the beneficiary). Further, the trust would not be fairly compensated if the fair market value of the land subject to the plan was not as great as the fair market value of

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[64] However, the University has voluntarily complied with the plans, as could the AMHTA.

[65] The Proposed Settlement Agreement provides compensation for some encumbrances on original mental health trust lands returned to the trust. PSA, art. III, § 7(b), at 13-15. This portion would not apply to the type of diminution discussed here.

[66] The court is not applying the "irreconcilable conflict" approach used in the statutory construction in the previous section because the court concludes that there is no reasonable construction which would allow for the operation of both statutes would not be contrary to legislative intent.

exemption from AS 41 for the original mental health lands earlier made part of the Haines and Tanana Valley State Forests. Nevertheless, the court concludes that such an exemption must be implied.

Section 1 of Chapter 66 states that the purpose of the act was "to implement the state's obligation as the trustee" of the mental health lands trust "by providing an integrated comprehensive mental health program" and "by resolving the serious and significant legal questions attending the status of that trust (1) in accordance with State v. Weiss, 706 P.2d 681 (Alaska 1985); [and] (2) in a manner that . . . provides fair compensation to the trust . . . ." Weiss directed that the trust be reconstituted and provided that "[t]hose general grant lands which were once mental health lands will return to their former trust status." 706 P.2d at 684. It was the legislature's express intent to resolve legal questions regarding the status of the trust in accordance with Weiss; thus, the court concludes that it was the legislature's intent to treat original mental health trust lands returned to the trust differently from general grant lands.[63] The forest management plans are only applicable to the general grant lands of the state; they are not applied to the University of Alaska trust

[63] This necessarily follows from the fact that the breach of trust was the reclassification which allowed the state to treat mental health trust lands the same as general grant lands. See Weiss, 706 P.2d at 683.

strongly that the failure to mention AS 41.17 was merely an [oversight]." SP Reply Br. at 46. The Settling Plaintiffs also argue that the Attorney General has the authority to bind the State to this interpretation in the Proposed Settlement Agreement.

The first question to be answered is whether this issue presents an actual case or controversy such that the court should issue a decision. The Alaska Supreme Court adopted Justice Hughes' standard for the "controversy" requirement in AS 22.10.020(g) in Jefferson v. Asplund, 458 P.2d 995, 998-99 (Alaska 1969):

> A "controversy" in this sense must be one that is appropriate for judicial determination . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot . . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.

The concept has been interpreted broadly in Alaska; "the 'basic idea' remains that the conduct of one party adversely affects the interest of another." Keen v. Ruddy, 784 P.2d 653, 656 (Alaska 1989). Accord Bowers Office Products v. University of Alaska, 755 P.2d 1095, 1097 (Alaska 1988). The court concludes that there is an actual controversy with adversity in this instance. If one only compared positions taken by the State and the Intervenors, it would be arguable that no controversy exists. However, it is clear that the positions taken by the Settling Plaintiffs and the Intervenors are clearly adverse and a real dispute is presented. It is, then, appropriate to turn to the merits of the issue presented.

As noted, Chapter 66 does not provide a specific

trust lands" (id. at 166).

The State originally asserted that the AMHTA would not be bound by those provisions of AS 41 that would significantly impair the Trust Authority's ability to maximize economic return from the original trust lands in the Haines and Tanana Valley State Forests that will be returned to the trust. The State argued that it would be inconsistent with the purposes of Chapter 66 to discharge the State's trust obligations in accordance with Weiss and provide fair compensation to the trust if the value of the returned lands was diminished by significant restrictions on the use of the lands. See Ch. 66, sec. 1(a). The State asserted that the legislative history supports this interpretation.

In its reply brief, the State asserts that the court should decline to rule on this issue because there is no case or controversy presented. See AS 22.10.020(g).[61]

The Settling Plaintiffs assert that the AMHTA is permitted to manage trust lands free of the provisions of AS 41.15 and 41.17 that apply to state land but not private land.[62] They maintain that a fair reading of the "overall purpose and intent of Chapter 66, including the direction to manage the Trust 'in a fiduciary manner to fulfill the purposes of the trust' suggests

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[61] AS 22.10.020(g) grants the superior court jurisdiction over declaratory relief actions "[i]n case of an actual controversy." See Jefferson v. Asplund, 458 P.2d 995, 999 (Alaska 1969).

[62] The State and Settling Plaintiffs have also so agreed in art. IV, § 5 of the PSA.

VIII. WILL THE ORIGINAL TRUST LANDS IN THE HAINES AND TANANA VALLEY STATE FORESTS RETURNED TO THE TRUST BE SUBJECT TO FOREST MANAGEMENT PLANS?

The Intervenors assert that the lands in the Tanana Valley and Haines State Forests that are being returned to trust status pursuant to Section 54(5) remain subject to the forest management plans adopted under AS 41.15 or AS 41.17. They point out that nothing in Chapter 66 exempts the AMHTA from compliance with AS 41 and that nothing in the forest statutes exempts mental health lands. See AS 41.15.305(a)(2) & (b); AS 41.17.400.[60] The Intervenors assert that the plain language of Chapter 66 controls and that by saying nothing to exempt the returned lands from the provisions of AS 41, the provisions of AS 41 are applicable. They assert that there is nothing in the legislative history on which to base a legislative intent to imply an exception to the forest management statutes. Finally, they assert that AS 41 and Chapter 66 are not irreconcilable because (1) it is "possible to maximize revenue on forested trust lands within the framework of a multiple use, sustained yield plan adopted under AS 41.15 and 41.17;" (P.I. Int. Br. at 165) and (2) the commissioner's discretion in adopting plans with a wide variety of uses on different lands "is easily broad enough to permit appropriate trust uses on mental health

[60] AS 41.17.400 establishes the Tanana Valley State Forest; it specifically excludes University land. AS 41.15.305 establishes the Haines State Forest Resource Management Area; section 305(a)(2) specifically includes mental health land and section 305(b) specifically excludes private land, University land and borough selections.

trust. The legislature has chosen a mechanism for compensating the trust for that land not returned. At the same time, the legislature is requiring an exchange of land that is designed to be fair to both sides. The commissioner must consider the public interest in retaining the specific land in state ownership and the public benefit from the exchange. The process is not a public one; nonetheless it is guided by standards that provide the kind of safeguards which meet the framers' concerns.

merely returning to the trust those lands wrongly taken from it, no further safeguards are necessary.

The selection process for the substitute lands has a number of safeguards of the public interest. First, generally no land in a legislatively designated area may be transferred to the trust. Sec. 55(b). Second. the exchanges are to be based on "equal fair market value." Sec. 55(c). The land exchanged is to be comparable to the original mental health trust land being retained by the State. Sec. 55(d). Additionally, and perhaps most importantly, Section 55(e) requires the commissioner to consider these factors in determining whether the land should be conveyed to the trust:

> (1) ensuring an appropriate diversity in the character of land in the trust corpus and in state ownership;
>
> (2) additional development and income generating potential as a result of trust ownership;
>
> (3) the public interest in retaining specific land in state ownership;
>
> (4) public benefits resulting from the exchange;
>
> (5) benefits to the trust resulting from the exchange; and
>
> (6) efficiency of land management resulting from the exchange.

The framers' concern for wise management of state land is met by these safeguards. State land should be viewed as a whole in this instance and the context of the transfer must be considered. The State is retaining lands wrongfully taken from the

VII. DOES CHAPTER 66 PROVIDE ADEQUATE SAFEGUARDS OF THE PUBLIC INTEREST FOR THE DISPOSAL OF STATE LANDS TO ALASKA MENTAL HEALTH TRUST AUTHORITY?

The Intervenors argue that should the court find that the transfer of lands to the AMHTA is not subject to the requirements of AS 38.04 and AS 38.05, that Chapter 66 is unconstitutional because it fails to provide adequate safeguards of the public interest as required by Article VIII, Section 10 of the Alaska Constitution. In light of the court's determination, this issue need not be reached. However, for the sake of completeness and in light of the likelihood of appeal, the court has decided to address the issue.

The State asserts that Article VIII, Section 10 does not apply to these transfers to the AMHTA because it is a state agency. The State asserts that even if safeguards beyond public notice are required, constitutionally sufficient safeguards of the public interest were adopted by the legislature.

Assuming that Article VIII, Section 10 applies to these transfers to the AMHTA,[59] the court concludes that there are sufficient safeguards of the public interest in the reconstitution process to satisfy the constitution.

The legislature has provided for the public interest in the return of original mental health trust lands by providing that lands in legislatively designated areas will not be returned to the trust. Ch. 66, § 54(b). Considering that this "disposal" is

[59] The court expressly does not decide this question.

consistent with the legislative intent, avoids conflict or inconsistency and gives effect to the reconstitution of the trust with substitute land and the land use planning provisions generally applicable, the court adopts that construction. See Lake Construction Machinery, Inc., 787 P.2d at 1030. The court concludes that the selection of substitute land for reconstitution purposes is subject to the planning and classification provisions of AS 38.04 and AS 38.05.[58]

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[58] Two additional arguments raised by the parties deserve some discussion. The Settling Plaintiffs argue that only AS 38.50 is applicable to a land exchange. However, that argument ignores DNR's regulations. According to 11 AAC 55.280(7), a "disposal" includes an "exchange of land . . . to another person, entity, or government agency." Under other regulations, disposals are subject to the planning and classification provisions. See 11 AAC 55.020 and .040(i).

The State argues that the contemporaneous administrative construction of Chapter 66 should be given great weight. The court has considered DNR's interpretation that AS 38.04 and AS 38.05 do not apply, but the court does not view the interpretation as binding or particularly weighty in light of other considerations discussed.

procedures are fairly complex,[57] though not as involved as those under AS 38.50.

This examination of the procedures applicable to a land exchange under AS 38.50 and those necessary for reconstitution in compliance with the land use planning provisions of AS 38.04 and AS 38.05 reveals that the legislature could rationally have determined that the process under AS 38.50 was too complex, time-involved and expensive while still deciding to apply the land use planning provisions of AS 38.04 and AS 38.05.

The question remains whether the process for the selection of substitute lands for the reconstitution is inconsistent with the application of land use planning provisions. The State argues an inconsistency exists in that AS 38.04 and AS 38.05 generally require determinations based solely on the "public interest" while Section 55(e) requires determinations based on a balancing of the "public interest" and the best interest of the trust. However, the court concludes that it is not inconsistent, so long as the commissioner's public interest determinations in the land use planning process include the public interest recognized by the legislature in settling this lawsuit and fairly reconstituting the trust.

Since both statutes can be construed in a way which is

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[57] Under 11 AAC 55.030(f) an amendment or special exemption is subject to the planning requirements of AS 38.04.065 which requires "meaningful participation" by the affected governments, agencies and public (AS 38.04.065(b)(8); 11 AAC 55.020(b)).

38.50.130(a). The report is revised after the comment period. AS 38.50.130(b). The lands to be exchanged (both those given and received) must be appraised within one year of the exchange. AS 38.50.020. In summary, a land exchange under AS 38.50 is both time consuming and very costly.

An application of the land use planning provisions of AS 38.04 and AS 38.05 to the reconstitution would not be as expensive or time consuming. First, for any lands currently classified as "settlement" lands, the lands could be conveyed to the AMHTA without further land use planning review.[55] See 11 AAC 55.202. Second, any unclassified land could be transferred to the AMHTA under an interagency land management assignment.[56] See 11 AAC 55.040(i)(7). Third, where reclassification was necessary to accomplish reconstitution of the trust, the procedures are less complex than those under AS 38.50. Reclassification requires public comment by one of these methods: public hearing by the department in person or by teleconference or by solicitation and consideration of written comments. 11 AAC 55.250. However, if reconstitution required amendment of the land use plan, the

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[55] According to the DNR 1991 Report to the Legislature, there are 3.4 million acres of land classified for "settlement" which are eligible for disposal. See P.I. Int. Exh. 19, at 7, 12.

[56] The court recognizes that the Proposed Settlement Agreement calls for deeds, not interagency assignment, but the court is examining legislative intent. There were 8.7 million acres of unclassified state land at the end of 1991. P.I. Int. Exh. 19, at 7,12.

emerge: (1) exempting the exchanges from even the complex procedures in AS 38.50 was troubling to some legislators, (2) no one mentioned excluding the exchange process from the planning and classification provisions of AS 38.04 and AS 38.05, (3) the settling parties wanted a process which involved as few steps as possible with low cost and no way to stop the process, and (4) no one in the legislature commented on the settling parties' goals, although clearly the purpose of Chapter 66 was to settle this litigation and provide a workable way to reconstitute the trust.

It is useful to examine and compare the processes under AS 38.50 and the land use planning provisions of AS 38.04 and 38.05. The exchange process under AS 38.50 is a very complex one. For example, when there is an exchange with value in excess of five million dollars (which this one would likely be), there is mandatory legislative review of the final agreement to exchange. AS 38.50.020(a). There are extensive public notice and hearing requirements, including "at least three public hearings in one or more municipalities close to the state land proposed for exchange" when the value is more than five million dollars. AS 38.50.120(a) & .110. There is a minimum comment period of two weeks after a hearing is held to allow supplemental or additional statements. AS 38.50.120(b). The director of the division of lands must also prepare an extensive report which is disseminated with the notice and involves land characteristics, appraised values, social, economic and environmental impacts and alternatives. AS

under AS 38.50 is between six and nine months." Id. at 7. The process for 6000 such exchanges would become "undoable." Id. at 8. Commissioner Heinze noted that there was nothing wrong with the concept of public notice, "what we are trying to avoid was any other prescriptions, if you will, hoops that we had to jump through." Id. at 9. Later in the same hearing, Senator Duncan again returned to the issue of public notice. Id. at 14-16.

On May 18, Senator Duncan, the original sponsor of SB 65, addressed a number of concerns on the floor of the Senate. He specifically addressed the "proper hearing process" for land exchanges:

> Secondly, there is concern from the environmental community that there won't be a proper hearing process when land exchanges are made to replace that 460,000 acres that has to be exchanged for. And I think that is a legitimate concern. However, the legislation doesn't provide for that. But what it does provide for is that public notice must be given, and according to AS 38.05.945 that notice must be given; it must be published at least 30 days in advance of any action being taken. And I know that is not satisfactory, but I do have a copy of a letter from the environmental community, if I can find it, which stated that they would like to have this exchange process clearly under the normal process of AS 38.50. But as an alternative proposal, they would like us to provide, at a bare minimum, that notice shall be provided to the public in the manner of AS 38.05.945, which is in the bill. That notice is provided for and the public shall have 60 days within which to comment. Well, the legislation provides the 30 days, so we didn't get quite to 60 days, but we are to the 30 day threshold.

St. Exh. 13-D, at 6-7.

From this legislative history several considerations

Attorney General Koester repeatedly stressed the need for a simplified process. In response to an inquiry from Senator Rodey as to why having "no public review of land exchanges" was "good public policy," Commissioner Heinze stressed that the exchange process was one of negotiation [see Ch. 66, § 55(f)] and that the exemption was necessary to ensure that the deal could be concluded. St. Exh. 13-B, at 1-2. He went on to stress that the public interest would be considered under the provisions of Section 55(e) which would protect the state from losing land not in the public interest. Id. at 2. Mr. Koester added:

> One of the careful balances here, that we tried to strike, was the understandable and laudable interest in the public in looking at the lands that are going to be conveyed to the trust, because it does involve a change in management philosophy for those lands. And at the same time, at the goal, the need, the desire to accomplish this realistically and at as low a cost as possible. And the balance that we struck was to, at least in terms of the administrative process, insure [that] public notice is given.

Id. at 3. Senator Rodey responded that even if the provisions of AS 38.50 were not used, it would be wise to provide for at least an "abbreviated public review," at least a comment period. Id. at 5. Later in the same hearing, Senator Duncan raised the question of "exempting these land exchanges from the public review process." Commissioner Heinze again responded that it was necessary to limit the "steps" in the process to ensure that the process could be completed timely. St. Exh. 13-C at 6. Mr. Koester added that experience showed that the "optimum time for a single exchange

> unambiguous statute is enforced as written without judicial construction or modification; however, this rule is not controlling when a seemingly unambiguous statute must be considered in conjunction with another act. In that case, we will examine the legislative history and adopt a reasonable construction which realizes legislative intent, avoids conflict or inconsistency, and gives effect to every provision of both acts.

Lake Construction Machinery, Inc., 787 P.2d 1027, 1030 (Alaska 1990) (citations omitted).

There is nothing in the legislative history of Chapter 66 specific to the issue of the applicability of the planning and classification provisions of AS 38.04 and AS 38.05. There was discussion of the public notice and hearing process of AS 38.50 in the Senate during the Joint Meeting of the Committees of Finance and Judiciary on May 17, 1991,[53] and on the floor of the Senate by Senator Duncan, the original sponsor of SB 65.[54] The only discussion in the House of anything related to planning and classification again concerned public notice; the minutes of the House Finance Committee reflect that there was some limited discussion of public notice. See P.I. Int. Exh. 9 at 21, 22.

In the discussion in the Senate, the focus was on making the transfers of land "doable" in a reasonable amount of time with as few "hoops" as possible. Commissioner Heinze and Assistant

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[53] A transcript of portions of the proceedings can be found in State's Exhibit 13-B. The official minutes can be found in State's Exhibit 13-A.

[54] A transcript of Senator Duncan's comments can be found in State's Exh. 13-D.

(c)."

Looking then at the words used, at least two things are apparent: (1) the legislature was aware of the provisions of AS 38.04 and AS 38.05 and considered whether they should be applicable to disposal and use by the AMHTA; (2) the legislature considered excluding the reconstitution process from general land laws and did exclude it from the land exchange provisions of AS 38.50. These factors point to an intentional decision on the part of the legislature to apply the relevant portions of AS 38.04 and AS 38.05 to the reconstitution process. See Croft v. Pan Alaska Trucking, Inc., 820 P.2d 1064, 1066 (Alaska 1991) (where certain things are specifically designated in a statute, any omissions should be considered as exclusions); Hafling v. Inlandboatmen's Union of the Pacific, 585 P.2d 870, 875 (Alaska 1978) ("The general rule is that exceptions to the operation of a statute are not to be implied, particularly where there is an express exception clause.")

As discussed before, the interpretation of a statute by Alaska courts does not end with the words used, even if they are seemingly unambiguous. The court must examine the legislative history to see if the legislature's intent is different from what the words seem to imply. See, e.g., State v. Alex, 646 P.2d 203, 208 n.4 (Alaska 1982). Additionally, when a statute must be considered in conjunction with another act, this procedure is applicable:

> The interpretation of a statute begins with an examination of the language used. Ordinarily, an

of Title 38 that would naturally apply to this exchange of lands. They assert that since compliance with AS 38.50 is specifically exempted, compliance with other provisions should not be implied. They assert that the legislature neglected to mention AS 38.04 and 38.05 because they obviously assumed that the provisions did not apply.

The court should begin any inquiry into the meaning of a statute with the words used in the statute. Chapter 66 is silent with respect to the general applicability of the planning and classification provisions of AS 38.04 and AS 38.05 to the transfer of land to the AMHTA. There is a specific exclusion of AS 38.50 to the substitution process: Section 55(g) provides that: "[t]he provisions of AS 38.50 do not apply to exchanges under this section." There is also an explicit exclusion of the applicability of AS 38.04 and AS 38.05 to the disposal or use of lands by the AMHTA; Section 10, to be codified as AS 37.14.009(b) provides:

> In exercising its powers under (a)(2) [disposal] or (3) [direct use for the mental health program] of this section, the authority shall give public notice in the manner provided under AS 38.05.945(b) and (c), but is not otherwise bound by the provisions of AS 38.04 or AS 38.05.

Section 54 requires the Commissioner of DNR to convey lands to the AMHTA "after public notice as provided under AS 38.05.945(b) and

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(footnote continued)

reconstituted as envisioned in Chapter 66 under the current classification primarily because the disposal categories are too limited, he did not opine that the trust could not be reconstituted with reclassification or amendment of plans.

reasons.

The State asserts that the language used in Chapter 66 limits the factors to be considered in reconstituting the trust to those specifically set out in Chapter 66. The State asserts that the reconstitution provisions and the planning and classification provisions of AS 38.04 and AS 38.05 address different state interests and impose different, frequently inconsistent, requirements. The State asserts that the legislative history of Chapter 66 reveals a legislative intent to minimize procedural obstacles to the reconstitution of the trust and that that intent would be frustrated by subjecting the reconstitution to land use planning requirements. The State asserts that the contemporaneous administrative construction by both DNR and the Attorney General are particularly important.

The Settling Plaintiffs add an additional argument not adopted by the State.[52] They assert that AS 38.50 is the only part

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[52] In the reply portion of oral argument on these motions, Mr. Gottstein argued for the first time that testimony given by Thomas Hawkins in the evidentiary hearing on the motions for preliminary approval of the proposed settlement agreement be considered as unrebutted evidence that reconstitution could not be accomplished "if you had to comply with the classification." Transcript Hearings January 22, 1993, at 311. The court disregards this argument. First, the matters before the court were summary judgment motions; Civil Rule 56 requires the filing of affidavits. Secondly, no one was aware that the Settling Plaintiffs intended to rely on the expert testimony for this point. Thus, the Intervenors were denied the opportunity to rebut the testimony.

Moreover, even if the court considered Mr. Hawkins' testimony it does not dispose of the issue. The relevant portions of the testimony occur at pgs. 120-23 of the Transcript Hearings 1/21/93. Although Mr. Hawkins opined that the trust could not be

VI. IS THE RECONSTITUTION PROCESS OF THE SUBSTITUTE LANDS SUBJECT TO THE PLANNING AND CLASSIFICATION REQUIREMENTS OF AS 38.04 AND AS 38.05?

The Intervenors assert that the reconstitution process as it relates to substitute lands under Section 55 of Chapter 66 is subject to the planning and classification requirements of AS 38.04 and AS 38.05. The Intervenors argue that since the planning and classification requirements of AS 38.04 and AS 38.05 generally apply to the disposal of state lands, including the exchange of state lands with a government agency,[50] the legislature's failure to exempt the transfer of substitute lands means that the planning and classification requirements of AS 38.04 and AS 38.05 apply. The Intervenors assert that this interpretation is the "plain meaning" of the statute and that there is insufficient legislative history to overcome that plain meaning. The Intervenors conclude that Section 55 does not conflict with the land use planning laws.[51] They also assert that DNR's contemporaneous administrative construction cannot override the plain language of Chapter 66.

The State and Settling Plaintiffs assert that the reconstitution process is not subject to the planning and classification requirements of AS 38.04 and AS 38.05. See PSA, art. III, § 20, at 28. They reach this result for differing

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[50] See 11 AAC 55.280(7).

[51] The Intervenors agree that the land use planning statutes conflict with reconveyance of original mental health trust lands and, thus, the reconveyance of original trust lands is not subject to these provisions.

lands. Article VIII, Section 2 clearly imposes on the state the duty to manage the public lands "for the maximum benefit of its people." That is not the same, however, as the public trust doctrine.

The court thus concludes that the public trust doctrine is not implicated by the legislature's hypothecation of lands.

applicable to the public lands. In Owsichek, 763 P.2d at 494-95, the Alaska Supreme Court determined that the common use clause of Article VIII, Section 3[49] constitutionalized the historic common law principles of the public trust doctrine regarding the management of fish, wildlife and water resources. This imposes upon the State "a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people." Id. at 495. The court also noted that:

> To give meaning and effect to the common use clause, it must provide protection of the public's use of natural resources distinct from that provided by other constitutional provisions.

Id. at 496. Those "other constitutional provisions" referred to by the court include Article VIII, Section 2, which provides:

> 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.

Clearly, if Article VIII, Section 2, imposed public trust doctrine duties on the state, the common use clause would have been superfluous. The court must construe the constitution whenever reasonably possible to give every provision of the constitution meaning and effect. Owsichek, 763 P.2d at 496.

This does not say that the State owes no duty to the citizens of Alaska with respect to the management of the public

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[49] Article VIII, section 3 provides: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

fiduciary. Finally, they assert that the legislature's "blind hypothecation" of lands violated that duty of care.

The State asserts the public trust doctrine[47] has never been and should not be applied to public lands. The State asserts that even if the public trust doctrine is applied, it is inappropriate to apply private trust principles. But even if private trust principles are applied, the State asserts, the legislature did not violate those duties.

The public trust doctrine has been applied to the fish, wildlife and waters of the state as a matter of constitutional law in Owsichek v. State, 763 P.2d 488 (Alaska 1988) and to the submerged and tidal lands as a matter of common law in CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988). Although the Alaska Supreme Court has repeatedly recognized the importance of the public lands and the constitutional protections applicable to the public lands in Article VIII of the Alaska Constitution,[48] the court has never applied the public trust doctrine to the public lands.

The court concludes that the public trust doctrine is not

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[47] The public trust doctrine is a common law doctrine which finds it roots in the obligation of the government to hold wildlife for the benefit of the public which benefit is to be exercised by citizens individually. See Geer v. Connecticut, 161 U.S. 519, 522-29, 40 L.Ed. 793, 794-97 (1886).

[48] See, e.g., North Slope Borough v. LeResche, 581 P.2d 1112, 1114 (Alaska 1978); Moore v. State, 553 P.2d 8, 30-32 (Alaska 1976) (sep. opinion, Rabinowitz, J.); Alyeska Ski Corp. v. Holdsworth, 426 P.2d 1006, 1011 (Alaska 1967).

under the Proposed Settlement Agreement. The Settling Plaintiffs are given the right to exercise all rights and remedies pertaining to the reconstitution of the trust until the trust is reconstituted; this necessarily includes the right to seek foreclosure under Section 56(d). See PSA, art. VI, § 6, at 49; art. III, §§ 28, 29, at 32-33. However, those are the rights to enforce the agreement; that does not mean that the plaintiffs are the secured parties. If foreclosure occurs, obviously the lands will be conveyed to the AMHTA, or the trust if there is no AMHTA, not the plaintiffs.

In sum, the court concludes that Article VIII, Section 10 is not violated by the hypothecation.

E. Does the Hypothecation of Land in Section 56 Violate the State's Duty as Trustee of the Public Lands?

The Intervenors assert that the legislature violated its duty as trustee of the public lands by hypothecating an unknown list of land to the mental health trust in Section 56(a). First, the Intervenors assert that the Alaska Constitution requires that state lands be managed as a public trust for all the people of the state. They assert that this obligation includes fiduciary duties similar to those applicable to private trusts.[46] They assert that the trustee must exercise the duty of care one would expect of a

[46] In their first brief, the Intervenors argued that private trust principles apply to public trusts. P. Int. Br. at 137. The Intervenors receded from this position in their reply brief and now assert that private trust principles provide a useful analogy. P. Int. Reply Br. at 86.

is created which runs to a state agency, many of the concerns of which led to the inclusion of Article VIII, Section 10 are not applicable. The state is not at risk of losing the land; if the worst happens and the land is foreclosed, it will become part of the trust and it will still be used for state purposes.

The court disagrees with the Intervenors' conclusion that the lands are hypothecated to the Settling Plaintiffs under the Proposed Settlement Agreement. The Intervenors are correct that the Settling Plaintiffs have substantial enforcement authority

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(footnote continued)

not be a state agency. The AMHTA has a broad degree of autonomy. The primary limitation results from its trust obligations to implement the Alaska Mental Health Enabling Act of 1956 and manage the trust for the benefit of the beneficiaries. The AMHTA board of trustees must elect a presiding officer (CEO), who in turn may hire other personnel as necessary. Ch. 66, § 26 (to be codified as AS 47.30.026). The AMHTA has authority to set the CEO's salary, provided it is not below the minimum specified in Chapter 66. Id. Under the Proposed Settlement Agreement, the AMHTA will hold real property in its own name. It may sue and be sued. Ch. 66, § 26 (to be codified as AS 47.30.011(c)(2)). It may retain independent counsel when needed and may contract with an investment management entity other than the Alaska Permanent Fund Corporation when deemed in the best interests of the trust beneficiaries. Ch. 66, § 10 (to be codified as AS 37.14.009(a)(5)) and § 26 (to be codified as AS 47.30.011(c)(3)). An annual audit of the AMHTA itself is not mandatory, although an extensive budget report is required. See Ch. 66, § 26 (to be codified as AS 47.30.046). The Alaska Permanent Fund Corporation, however, must submit to the AMHTA an audit report prepared by a certified public accountant. Ch. 66, § 9 (to be codified as AS 37.13.300(b)(3).

On balance the court concludes that for the purposes of the hypothecation of lands to it, the AMHTA is a state agency. Its autonomy stems from the historical breach of trust and the sometimes inconsistent duties that the legislature and governor have with respect to the people as a whole and the beneficiaries. Functionally however, the AMHTA is the state's arm for managing the trust's lands and corpus.

(footnote continued)

of a comprehensive mental health program for the state. The AMHTA is expressly located within the Department of Revenue. Ch. 66, § 26 (to be codified as AS 47.30.011). The governor appoints all seven members of the board. Ch. 66, § 26 (to be codified as AS 47.30.016). The governor may remove a board member only for cause, but this includes poor attendance and lack of contribution to the board's work. Id. at AS 47.30.021(c). The Commissioners of the Departments of Health and Social Services, Natural Resources, and Revenue are designated as advisors to the board. Id. at AS 47.30.041. Duties of the board include "coordinat[ing] with other state agencies," receiving and considering the program and budget recommendations of other state boards and commissions dealing with mental health issues, and making "an annual written report of its activities to the legislature, governor, and the public." Id. at AS 47.30.036. The AMHTA must submit an annual budget report and program evaluation to the legislative budget and audit committee, the governor, the office of management and budget, the commissioner of health and social services, and all entities providing services with money from the trust income, and the report must be available to the public. Id. at AS 47.30.046. The mental health trust fund is established "within the state treasury." Ch. 66, § 11. The trust income account is established "within the general fund of the state." Id. During the first ten years of existence, the trust income account will receive all or a large proportion of its budget from the state general fund. Id. Chapter 66 specifies an honorarium of $200 per day plus the standard per diem and travel expenses for board members attending meetings. Ch. 66, § 26 (to be codified as AS 47.30.016(e)). The AMHTA will contract with the Alaska Permanent Fund Corporation to manage the cash assets of the trust corpus. Ch. 66, § 9 (to be codified as AS 37.13.300) and § 10 (to be codified as AS 37.14.009(a)(5)). The AMHTA may request funding from the general fund when trust income is insufficient. Ch. 66, § 26 (to be codified as AS 47.30.046(a)). The AMHTA can only propose appropriations from the trust income account. The governor and legislature have the ultimate authority to make appropriations from the account, although deviations from the AMHTA's proposal must be explained and justified. Ch. 66, § 10 (to be codified as AS 37.14.003-.005). The trust lands are expressly treated the same as state lands to the extent that they are exempt from general taxation and claims of adverse possession, and they receive state fire protection. Ch. 66, §§ 2, 3, 14. The Administrative Procedures Act is expressly applicable. Ch. 66, § 26 (to be codified as AS 47.30.031). See ASHA v. Dixon, 496 P.2d 649, 651 (Alaska 1972).

There are also factors indicating that the AMHTA might

lands, to protect state lands from exploitation and fraud and to ensure that state lands are not squandered or disposed of at extremely low prices. These purposes would not be served by applying Article VIII, Section 10 to the hypothecation of these lands, primarily because even if the lands are foreclosed, the lands will remain in state ownership, serving the purposes of the people of the State of Alaska.[44] Even if one assumes that the creation of a security interest which runs in favor of a private party would be subject to Article VIII, Section 10, the same need not be said of this hypothecation.

The hypothecation of these lands to the mental health trust is not a disposal of an interest in state lands for purposes of Article VIII, Section 10. Although the AMHTA exercises a substantial degree of authority, the court concludes that for these purposes it is a state agency.[45] Where a security interest in land

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[44] The court acknowledges that the AMHTA has the authority to sell trust lands. However, that is an issue separate from hypothecation.

[45] Whether an entity is a state agency is determined by the purpose involved. See Alyeska Commercial Fishing & Agricultural Bank v. O/S Alaska Coast, 715 P.2d 707, 708-09 (Alaska 1986) ["CFAB"]. Deciding whether an entity is a state agency requires balancing the entity's autonomy against the state's retained control. Id. at 711. The mere retention of some oversight by the state does not transform an entity into a state agency. Id. CFAB discusses a large number of factors that have been used by the court to analyze the relationship between the entity and the State.

Several factors indicating state agency status apply to the AMHTA. The AMHTA was expressly created by the legislature to perform the governmental function of fulfilling the State's trust duties. Chap. 66, §§ 1, 10. It also performs the traditional state government function of coordinating the planning and funding

includes the power to request foreclosure of lands on the Hypothecated Lands List pursuant to Section 56(d). PSA, art. III, §§ 28-29, at 32-33. Additionally, the Settling Plaintiffs have the power to release lands from the List. PSA, art. III, § 21, at 29. Finally, under Department Order No. 135, the Settling Plaintiffs exercise "substantial control" over DNR management of lands on the Hypothecated Lands List according to the Intervenors.

The Intervenors argue further that hypothecation conveys a security interest in land which is an "interest" within the meaning of Article VIII, Section 10. The Intervenors argue that the hypothecation was created without any notice to the public and with inadequate safeguards of the public interest.

The State asserts that the hypothecation is to the trust, not the Settling Plaintiffs. Because the AMHTA is a state agency, the State concludes that the hypothecation is not a "disposal" for purposes of Article VIII, Section 10.

The State asserts that although the hypothecation creates a security interest, that it does not create an interest in state land for purposes of Article VIII, Section 10. The State asserts that whether a security interest is an interest in land depends on the context and purpose. See Brand v. First Federal Savings & Loan Ass'n of Fairbanks, 478 P.2d 829, 832 (Alaska 1970).

The purposes and constitutional history of Article VIII, Section 10 were explored in Part I of this decision. Essentially, the provision was designed to ensure the wise management of state

Hypothecated Lands List resulted from an unconstitutional delegation of authority from the legislature. The hypothecation is unconstitutional as currently written.[42]

D. Does the Hypothecation of State Lands Violate Article VIII, Section 10 of the Alaska Constitution?

Article VIII, Section 10 of the Alaska Constitution prohibits the disposal of an interest in state land without prior public notice and other safeguards of the public interest as established by the legislature. The Intervenors argue that the hypothecation of state lands in Section 56(a) violates that provision.[43]

The Intervenors argue that the hypothecation in Chapter 66 as effectuated through the Proposed Settlement Agreement conveys an interest in land directly to the plaintiffs. Although Section 56(a) hypothecates the land to the mental health trust, the Proposed Settlement Agreement gives the Settling Plaintiffs the right to exercise the rights and remedies pertaining to reconstitution of the trust. PSA, art. VI, § 6(a), at 49. This

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[42] 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 delegated the task of preparing a new list with adequate standards, the difficulty would be eliminated.

[43] Although Chapter 66 was enacted in 1991, the hypothecation will not occur until Chapter 66 is effective, that is until this litigation is dismissed and time for appeal has run. See Chapter 66, Section 58. However, DNR management of lands on the Hypothecated Lands List has changed under Dept. Order No. 135.

This is not a situation where a vague standard can be saved by the procedural safeguards of the statute or the agency. See, e.g., Boehl v. Sabre Jet Room, Inc., 349 P.2d 585, 590 (Alaska 1960). First, agency safeguards, such as public hearings or application of the Administrative Procedures Act, are inapplicable to the process of creating the Hypothecated Lands List. Further, there is no judicial review of the actions involved in choosing lands for inclusion on the Hypothecated Lands List.[41]

For these reasons, the court concludes that the

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that had been included in any version of the list. See St. Exh. 16 ¶ 8. This leads the court to conclude that the Commissioner probably used the standard he talked about, "resembling" unreturned lands.. There is nothing in the legislative history to support the legislature's adoption of that standard; it does not appear that such a standard was ever even proposed to the House.

[41] The State argues that judicial review provides adequate procedural safeguards. But the judicial review to which the State refers comes long after the selection of lands for inclusion on the Hypothecated Lands List. There are two stages of judicial review related to the hypothecation. First, under the Act the Alaska Supreme Court could hear any dispute arising from the pro rata release of hypothecated land under Section 56(c) "as reconstitution of the trust . . . is accomplished." Chap. 66, sec. 57(a). However, Chapter 66 is not effective until this litigation is dismissed and the time for appeal has expired. Chap. 66, sec. 58. Thus, even though the lands were treated differently after April 6, 1992, when the Proposed Settlement Agreement was signed, and DNR Order No. 135 promulgated, the first possible review may be years from that date. Moreover, the review is not of the commissioner's action in including the lands on the Hypothecated Land List in the first instance. Second, should the state default on its obligations to reconstitute the trust, or if reconstitution is not complete by December 1, 1994, foreclosure of lands on the Hypothecated Lands List, "including the parcels to be foreclosed and the manner of foreclosure" are to be determined by the Supreme Court. Chap. 66, §§ 56(d), 57(a). This judicial involvement is also related to different decision making, specifically how the foreclosure is to proceed, not what lands are included on the Hypothecated Lands List, and, thus, available for foreclosure.