ALASKA LEGISLATURE 1126
HOUSE and SENATE FINANCE COMMITTEE FILES, 1993-1994 200

The difficulties that third parties are now experiencing are the difficulties the State, the Beneficiaries and others have tried to avoid by continuing to look for a settlement to this issue.

THE INNOCENT THIRD PARTIES CAUGHT IN THE CROSSFIRE

There are over 6,000 questionable actions that have occurred on Mental Health Trust Lands that are open for reversal. Prospective activities on Mental Health Trust Lands have been suspended, or are in limbo. For example, the Wishbone Hill Coal Mining Project has been put on hold pending determination of certain legal questions. Usibelli Coal Mine operates substantially on Mental Health Trust Lands and its future operations are planned to be substantially on Mental Health Trust Lands. The Diamond Chuitna Coal Project in the Beluga Coal Field is also on hold. People who have received patents to Mental Health Trust Lands, like the Moms and Pops, may lose their land[1]. Lessees of Trust lands may have their leases declared invalid. Municipalities which received Trust lands face the possibility of losing the land despite the fact that they've already spent time and money in planning for its use.

1991 - SETTLEMENT ATTEMPT #3 CHAPTER 66

During the 1991 session, legislation was once again introduced in an effort to reach a settlement. Lengthy negotiations with the Legislature resulted in the agreement to create a Mental Health Trust Authority to serve as a Trustee. However, the Administration refused to consider a cash based settlement. With less than two weeks left in the session, the Administration and three of the four plaintiff groups began negotiating what would become Chapter 66. Chapter 66, if approved, would:

1) Create the Mental Health Trust Authority as Trustee,

2) Return as much of the original Trust land as possible to the Trust,

3) Exchange other comparable state land for original Trust land that cannot be returned,

4) Begin the exchange process before Chapter 66 is approved by the courts pursuant to a Settlement Agreement negotiated by the parties after the session,

5) Hypothecate (pledge as security) 6.7 million acres of State land to be foreclosed upon in the event the land exchange is not completed before December of 1994.

6) Become effective only after the settlement is finally approved by the courts, the Weiss case is dismissed, and the time for any appeals has expired.

1 On the other hand, the Beneficiaries have tried to eliminate unnecessary hardship, and when no harm to the trust is apparent, the Beneficiaries have uniformly agreed to modify the injunction to allow things to proceed

1991 - LAWSUITS OVER CHAPTER 66

In October of 1991, a group representing tourism, sport fishing, environmental and other public interests sued to intervene in the lawsuit. They believe that Chapter 66 violates State law, the State Constitution, and the Statehood Act. They object to transferring to the Trust hundreds of thousands of acres of multiple use public lands that were never in the original Trust. They also object to nullifying numerous state land use planning processes in which thousands of Alaskans participated in good faith. The intervention was expected and initially welcomed by the settling parties as they believed that favorable decisions on these issues would "bulletproof" the settlement against challenges after approval. Unfortunately, the settling parties failed to understand how long these issues would take to resolve and the consequences in the meantime.

After over a year and a half, these challenges are still pending in the Superior Court. A decision is not expected until the spring or summer of 1993. The losing party will then, no doubt, appeal to the Alaska Supreme Court. After that appeal, the losing party can then ask the U.S. Supreme Court to review the Statehood Act issue relating to the ability of the State to transfer the mineral estate to the Trust as a part of the exchange. Only after all of this litigation is concluded can the courts finally approve or disapprove Chapter 66. While nobody can predict how long this will all take, it is safe to assume that it will be measured in years not months.

To make matters worse, during the exchange process, the plaintiffs discovered that the ***State did not have lands comparable to those which would be lost***. Therefore, they were forced to look to income producing lands which the State had not anticipated would become involved in the exchange process. The Cook Inlet oil and gas fields, Glacier/Winner Creek in Girdwood, Leask Lakes in Ketchican, hydroelectric sites throughout Southeast Alaska, airport lands and the proposed site for the new Capital building in Juneau are just a few of the lands which may have to be placed into the Trust.

Most recently, in response to these actions, the Cook Inlet oil and gas producers, Marathon and Unocal entered the litigation to protect their interests. They do not believe that the State has the right to transfer their leases to the Trust and that the Settlement Agreement is illegal. Despite the objections of the State, the court has allowed the oil companies to intervene and the litigation over their claims is just beginning. Other affected parties such as Municipal governments and coal producers have also considered intervention.

In the meantime, the ***injunction and lis pendens[2] on the original one million acres*** of Trust land remains. In addition, ***title to the 6.7 million acres of hypothecated***

2 A lis pendens is a notice filed in the record of title that a claim has been made against the land

lands is clouded by the prospect that foreclosure may occur anytime after 1994. Further, under the terms of the Settlement Agreement the ***plaintiffs have already selected 550,000 acres of other State land*** for possible exchange. This land must be segregated and closed to mineral entry or disposal. Finally, since these ***additional selections can continue to be made from any State land, virtually the entire inventory of State land outside of Legislatively Designated Areas is subject to being brought into the litigation*** at any time.

EFFECTS ON DEVELOPMENT

This cloud on millions of acres of State land will remain for years to come while lawsuits over Chapter 66 continue. This has created an international perception that Alaskan land and natural resources are off limits to development. This perception is widely held in both the natural resource investment community and international markets for Alaskan resources and is fostered by Alaska's competitors.

This perception of a land "freeze" is not limited to specific projects, resources, or problems like Wishbone Hill, expansion of the Girdwood ski resort or the consequences of higher utility rates in Southeast Alaska. The length of and uncertain results from the lawsuits, together with the potential for more land to be selected and therefore tied up at any time, combine to create a global stigma about development in Alaska at a time when we can least afford it.

Both the State and the Settling Plaintiffs justifiably claim that they are willing to work with affected parties on specific problems. However, the belief in this freeze will continue because of the possibility, even probability, that any valuable mineral deposit, transportation or pipeline corridor, or strategic surface estate will be tied up in this dispute.

FAILED ATTEMPT TO RELEASE THE "MOMS & POPS"

When the State realized how long the litigation over Chapter 66 would take and the hardship that would be suffered by innocent third parties, it realized the need to ask the Superior Court for "relief" for the over 3,000 so-called Moms and Pops. The State's plan, agreed to by the Settling Plaintiffs, would have modified the injunction and removed the cloud in the record of title. The Settling Plaintiffs could agree to this only with the condition that if Chapter 66 was not approved, *the Trust would be able to reassert its claims to the land.* The court rejected this "relief" last month stating that it could be considered nothing more than a "cruel hoax visited on the third parties" because at this point in time "the likelihood of final approval [of Chapter 66] is speculative, at best".

THE "UNHOLY ALLIANCE"

By early 1992, a number of diverse interest groups normally at odds found that they were united in their opposition to pursuing the land exchange portion of the proposed settlement. The Resource Development Council, Alaska Center for the Environment, Alaska Miner Association. Susitna Valley Association. Sierra Club Legal Defense Fund. Alaska Coal Association, Non-settling plaintiffs and now Marathon and Unocal realized that an amendment to Chapter 66 is needed. These groups all agree that the settlement must be within the State's ability to pay and offer fair compensation to the Trust.

1993 - AMENDMENTS TO CHAPTER 66 SENATE BILL 67

Last session, the members of this unusual coalition united behind an amendment to Chapter 66 which could finally settle the Mental Health Lands Trust litigation. Reintroduced this session by the Senate Resources Committee, Senate Bill 67 would:

1) Retain the portion of Chapter 66 that creates the Mental Health Trust Authority as the Trustee while maintaining the Legislature's ability to appropriate Trust funds,

2) Retain the portion of Chapter 66 which returns as much of the original Trust land as possible to the Trust,

3) Eliminate the land exchange which has led to the litigation over Chapter 66,

4) Instead of the land exchange, continue the current allocation of 6% of the State's unrestricted General Fund Revenue to the Trust income account in place since 1990,

5) Hypothecate (pledge as security) only those original Trust lands that are now in Legislatively Designated Areas (370,000 acres) to insure that the 6% allocation is made. This would free up the 6.7 million acres currently pledged as security.

WHERE DO WE GO FROM HERE?

There is unprecedented and widespread support for amending Chapter 66. Development and environmental interests, local governments, the majority of the Beneficiaries, the thousands of third party hostages, Chambers of Commerce, and many legislators realize the necessity of amending Chapter 66 now.

Unfortunately, the current administration has refused to consider any amendments to Chapter 66. Unless Alaskans become informed and communicate directly with the Governor and their legislators, we face years of litigation while development is discouraged on millions of acres of land. Alaska cannot afford such a divisive, expensive, and lengthy attempt at a settlement.

MENTAL HEALTH LANDS TRUST
THE OFFSET

Attorney General Cole has stated that in Chapter 66 "the state gave up a $1.3 billion offset which the Alaska Supreme Court held that the state is entitled to". (Letter to Senator Mike Miller dated February 3, 1993).

However, the ***Supreme Court actually said*** that "To the extent that former mental health lands have been **sold** since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that the expenditures exceeded the value of lands **sold** , the state need not furnish cash as part of the reconstitution." (State v. Weiss, 706 P. 2nd 681 at 684.) (emphasis added).

SO. WHAT IS THE OFFSET?

The value of the offset would depend on the outcome of lengthy litigation over how much the State has actually spent on mental health and whether any of the land was legally "sold".

The Interim Mental Health Trust Commission estimated the offset at only $200 million.

The State has inflated the offset to $1.3 billion by including expenditures of the Dept. of Law, D.N.R., Dept. of Administration, etc. *in addition to* program costs. (At the same time the State claims the entire 1,000,000 acres of land is worth only $565 million.)

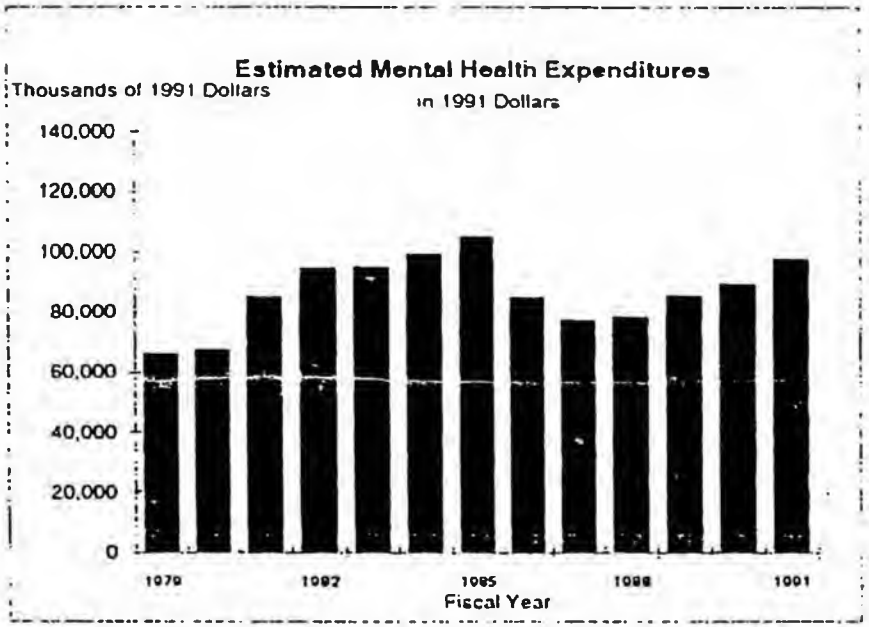
"SOLD"?

Returnable Land 315,000 acres	Must be returned to the trust.
Encumbered 150,000 acres	Can be returned subject to encumbrances.
Legislatively Designated Areas (LDAs) 370,000 acres	Set aside by legislature for parks, wilderness, forests, etc.
Municipalities 83,000 acres	Paid nothing. Had actual notice of breach of trust.
Settlement 40,000 acres	Traceable land to be returned to trust.
Moms & Pops 50,000 acres	Paid value. Notice of trust status in record of title.

Estimated Mental Health Expenditures from Unrestricted General Fund Revenue

(in Thousands of Dollars)

Agency/Budget Request Unit	Fiscal Year 1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
Department of Administration	530	586	754	1,119	1,154	1,184	1,217	1,683	1,680	1,682	1,847	1,953	1,588
Department of Law	13	30	44	48	43	40	38	73	42	54	52	59	67
Department of Education	3,147	3,560	4,155	4,803	5,493	6,017	6,715	1,844	1,684	1,676	1,751	1,859	2,226
Dept. of Health and Social Services	29,881	33,246	46,619	53,391	55,193	59,019	64,822	62,501	59,528	63,452	72,779	80,009	92,900
Department of Public Safety	1,095	2,418	3,595	3,972	3,511	3,278	3,152	826	483	619	587	673	0
Department of Corrections	2,042	2,222	2,479	3,320	3,981	5,956	7,043	966	952	1,039	1,178	1,195	1,222
Total Estimated Expenditure	36,708	42,062	57,646	66,655	69,374	75,494	82,987	67,892	64,380	68,521	[illegible]	85,749	98,092
Cumulative Estimated Expenditure	36,708	78,770	136,416	203,071	272,445	347,939	430,926	498,819	563,198	631,720	709,914	795,663	893,755
FY 79 - FY 85	36,708	78,770	136,416	203,071	272,445	347,939	430,926						
FY 86 - FY 91								67,892	132,272	200,793	278,988	364,737	462,829
Total Estimated Expenditure in 1991 Dollars	66,340	67,632	85,083	94,714	94,972	99,419	105,317	85,197	77,377	78,869	85,881	89,607	98,092
Cumulative Estimated Expenditure in 1991 Dollars	66,340	133,972	219,055	313,769	408,740	508,160	613,476	698,673	776,050	854,919	940,799	1,030,407	1,128,499
Mental Health Expenditures As Percentage of General Fund Unrestricted Revenues	3.24%	1.68%	1.55%	1.62%	1.91%	2.23%	2.55%	2.21%	3.58%	2.97%	3.58%	3.42%	3.47%



Prepared by the Legislative Research Agency (91.242)

Source: Mental Health Lands Trust Review. Summary Schedule and Analysis - Potential State Mental Health Expenditures
State of Alaska, Office of Management and Budget - Division of Budget Review, Operating Budget Funding summary, All Funds, By Agency, BRU & Component, January 28, 1991
Note: Program Receipts have been removed from totals given.

Sunday March 21/1993 D.N.Miner

State fails in Mental Health Trust controversy

Fred Pratt

The million-acre chess board on which Mental Health Trust controversy is played out has 3,162 special "pawns" on the state's side.

As we all know, pawns are coldly sacrificed to create positional advantage for the more powerful and important pieces behind them.

The pawns on the white side are the unfortunate beneficiaries of the trust. The black pawns are the people who bought trust land from the state and now have title to their land frozen because of the state's illegal action in seizing the trust's assets 15 years ago.

The state of Alaska, the "black king" in this game, is weeping a bucket of crocodile tears on behalf of its pawns. In January, state attorneys tried to get Fairbanks Superior Court Judge Mary Greene to lift a three-year-old injunction barring sale of these lands, which total almost 50,000 acres.

The state failed. Before the third-party landholders blame Judge Greene or the Mental Health Trust beneficiaries, they should look at why the state failed.

The Legislature and former Gov. Jay Hammond dissolved the Mental Health Trust in 1978 and took the land. They later leased, gave, sold or exchanged about one-third of it to outside parties.

In 1985 the Alaska Supreme Court ruled this action illegal. The court clearly made the point that trustees managing a trust, which is what the Legislature is, cannot just appropriate the assets of the trust for their own use.

The management of the Mental Health Trust was an obligation willingly taken on by the state of Alaska in the Alaska Statehood Act. If any other trustee outside government had done such a thing, he would go to jail.

The people who acquired Mental Health Trust land from the state unwittingly fenced stolen property. If they lose their land back to the trust, they have a great case for a lawsuit against the state for selling them such land in the first place.

After the 1985 decision the state and the trust beneficiaries tried to settle the case without having to take back all this land and expose the state to thousands of expensive lawsuits. The state, however, blocked earlier settlements and now seeks to turn the ire of the third-party landholders on the court or the plaintiffs in the lawsuits, rather than own up to its own sins.

The motion to have Judge Greene lift the injunction on the third-party landholder "pawns" was an empty gesture, as Judge Greene's order clearly shows.

She notes that she can modify or cancel a standing injunction only for certain reasons. She can do it if it can be shown to be no longer necessary, if it creates an undue hardship, if the plaintiffs have been delaying a reasonable resolution, or if the state has a substantial likelihood of winning its case.

Judge Greene clearly disposed of each of these matters in a nine-page decision.

She pointed out that plaintiffs agreed to the first settlement only two years after the 1985 ruling, but it was the state that torpedoed that settlement process in 1990, not the beneficiaries. Second and third settlement bills passed the Legislature in 1990 and 1991, but these "solutions" are mired deeply in new problems.

Judge Greene also raised the question of whether she could clear land title to these parcels by simply lifting the injunction.

That could just shift legal questions to another court. Judge Greene pointed out that if this happened, lifting the injunction would be "nothing more than a cruel hoax visited on the third parties."

"They get no relief; they would receive a worthless piece of paper and unmarketable title," she noted. "If they transferred their interest in the land, they would be selling a lawsuit and both they and the purchasers would ultimately have to litigate."

State attorneys suggested the trust could be compensated by exchange of other state land of comparable value for the land granted the third party buyers. Judge Greene notes correctly that the state's inability to work within past agreements on determining value of land killed the first settlement.

She also notes that the state's likelihood in prevailing is weak at a time when two of the four plaintiffs' groups refuse to accept its current settlement, and when it's strongly opposed by environmental groups, hunting clubs, fishing organizations and outdoor recreation interests, as well as coal developers and major oil companies.

State attorneys appealed Judge Greene's decision to the Alaska Supreme Court. Two weeks ago the Alaska Supreme Court rejected that appeal, without comment.

Free-lance journalist Fred Pratt has been covering Alaska business and politics for the past 18 years.

Voice of The Times

The Anchorage Times

Publisher: BILL J. ALLEN
"Believing in Alaskans, putting Alaska first
Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN
The Anchorage Times Conunentary in this sogment of the *Anchorage Daily News* does not represent the views of the *Daily News*. It is written and published under an agreement with former owners of *The Times*, in the interests of preserving a diversity of viewpoints in the community.

Tossing in the towel

THE APPARENT failure of the mental health trust settlement agreement probably is being greeted with some cheers across the state. Most people who have followed the issue are frustrated by all the legal tangles and delays that have come with efforts to rebuild the original land trust set up by the federal government almost 40 years ago. The rebuilding is necessary because of a 1985 court order which said the state had no business dissolving the trust in 1978, an action which followed years of neglect and non-management of the mental health lands.

Putting the trust back together, however, has become as complicated as unscrambling eggs. Two years ago, it appeared Attorney General Charlie Cole and then Resource Commissioner Harold Heinze had come up with a solution. They reached agreement in 1991 with attorneys for the mental health groups and won approval by the Legislature to replace land originally held in trust with state lands of equal value and comparable in character.

It was an involved plan, one that permitted mental health lawyers and trustees to identify state public lands on a tentative basis pending final approval by the court of the whole agreement. And identify lands they did: oil leases in Cook Inlet, coal fields, ski resorts, gold mines and anything else of potential value. Each piece of land selected, however, meant planned development activities there were put in limbo, making developers more and more disenchanted with the plan. That wasn't the only problem.

AS PART OF the 1991 settlement agreement, the state was to be free to issue patents on previously purchased small tracts of mental health lands. Alaskans who own these so-called "mom and pop" lands are now prohibited from selling, exchanging or otherwise developing the land until the legal cloud is lifted.

The agreement was supposed to make that possible. It didn't.

A Superior Court judge rejected releasing any of the original trust lands until the whole agreement is finalized. Last week, the Supreme Court backed the decision.That prompted Gov. Walter Hickel to give notice that the state would back out of the agreement — unless lawyers can figure out another way to free up the so-called mom and pop lands. That's not likely to happen. More likely, the issue will now go back to the Legislature for resolution.

Bills are moving in both houses which abandon the idea of replacing trust with state lands to generate revenue. Instead, the new legislative proposals would commit annual funding from the state treasury to cover mental health needs. A Senate bill would earmark 6 percent of general revenue each year for the mental health trust, while a House bill would commit 3 percent.

This alternative is bad policy and would set a bad precedent. But given that the best alternative just fell apart, it may be the only politically possible resolution.

NEWS RELEASE

STATE OF ALASKA

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FOR RELEASE: March 15, 1993
No. 93-061

MENTAL HEALTH SETTLEMENT GIVEN 60 DAYS

JUNEAU--Governor Walter J. Hickel today gave lawyers on both sides of the mental health trust controversy 60 days to reach an agreement to release third parties from the case or the state will exercise its option to terminate the settlement agreement entered into in April 1992.

"We have no desire to roll this issue back to square one," Hickel said, "but that's what's at risk if we can't find an acceptable solution for those innocent third parties who bought land that was once part of the mental health trust and now can't get title to it."

The Governor's action was sparked by the most recent rejection by the courts of a joint request by the state and the settling plaintiffs to have a preliminary injunction modified to allow the state to issue patents to individuals who have paid off their land. The patents would extricate those landowners from the issue and allow them to sell, exchange or otherwise develop their land.

Fairbanks Superior Court Judge Mary E. Greene denied the joint motion on Janaury 14. The Alaska Supreme Court denied the state's petition to review her decision on March 8.

The Mental Health Lands Trust was created by Congress in 1956 and dissolved in 1978 by the state legislature, which promised that in its place 1.5 percent of income from resource development on state lands would be allocated to mental health programs. In 1982, after no such amount was ever appropriated, mental health advocates sued the state and won. In 1985, the Supreme Court ordered that the trust be reconstituted and that fair market value should be paid for those lands that had been sold, subject to a set-off for state mental health expenditures.

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PRESS ADVISORY

March 24, 1993

FOR IMMEDIATE RELEASE
FOR MORE INFORMATION CONTACT: Walt Baldwin, 276-4849

STATE REFUSES TO LIVE UP TO LATEST PROPOSED SETTLEMENT OF MENTAL HEALTH LANDS TRUST

With little fanfare, a press release issued by Governor Walter J. Hickel on March 15, 1993 signaled the State's intention to withdraw from the latest attempt to settle the Mental Health Lands Trust litigation.

While giving the impression that this action is based on the State's failure to gain the release of the third party land owners known as "Moms & Pops", in fact, the State had already refused to comply with the terms of the Settlement Agreement (see attachments 1 and 2).

"Of course I knew it was in trouble when the State wrote a letter on February 25, 1993, refusing to allow the Settling Plaintiffs'Attorneys to pick the land needed, as agreed to in the Settlement Agreement, to replace land that the State stole from the original Trust", said Walt Baldwin.

In light of these developments a number of groups representing Trust beneficiaries agreed upon a resolution calling attention to the real reason the State has threatened to withdraw from the settlement (see attached Resolution).

STATE of Alaska,
Appellant/Cross-Appellee,

v.

Vern T. WEISS, et al.,
Appellee/Cross-Appellant.

Nos. S–653, S–678.

Supreme Court of Alaska.

Oct. 4, 1985.

Class action was brought against State for breach of public trust in enacting legislation redesignating federal mental health grant lands as general grant lands. The Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., ruled the legislation could not be invalidated, but that the State breached its duties as trustee by removing federal grant lands from the trust. The state appealed, and plaintiffs cross-appealed. The Supreme Court, Compton, J., held that: (1) the State breached its duties as trustee in redesignating the land, and (2) the redesignation legislation was invalid.

Affirmed in part, reversed in part and remanded.

1. Public Lands ⇐62

In passing the Alaska Mental Health Enabling Act, the United States Congress intended to create a trust, to be based on a corpus of one million acres of federal land, to help effectuate the creation and operation of mental health care facilities in the state, and the state, as trustee, had no power to alter the status of the property grant, thereby effectively terminating the trust. Alaska Mental Health Enabling Act, § 101 et seq., 70 Stat. 709; Laws 1978, c. 181, § 3(a).

2. Public Lands ⇐62

In passing act [Laws 1978, c. 181, § 3(a)] redesignating trust lands given state by United States Congress under Alaska Mental Health Enabling Act as general grant land, the State went beyond the power which had been granted it with respect to the land by Congress and the redesignation act was therefore invalid. Alaska Mental Health Enabling Act, § 101 et seq., 70 Stat. 709.

G. Thomas Koester, Asst. Atty. Gen., Norman C. Gorsuch, Atty. Gen., Juneau, for appellant/cross-appellee.

Stephen C. Cowper, Fairbanks, for appellee/cross-appellant.

Russ Winner, McGrath & Associates, Anchorage, for amicus curiae Cook Inlet Region, Inc.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and COMPTON, JJ.

OPINION

COMPTON, Justice.

The State of Alaska ("state") appeals from a judgment of the superior court holding that the state breached its duty as trustee of federal mental health grant lands when the legislature redesignated the property as "general grant land." For the reasons set forth below, we affirm the holding to this extent, but reverse the superior court's conclusion that the redesignation legislation was valid.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1956 the United States Congress passed the Alaska Mental Health Enabling Act (AMHEA) which, insofar as it concerns this case, granted the Territory of Alaska one million acres of federal land to be held in public trust to help effectuate the creation and operation of mental health care facilities in Alaska. Pub.L. No. 84–830, 70 Stat. 709 (1956). Section 202(e) of the Act specifically provides:

> *All lands granted* to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, *shall be administered by the Territory of Alaska as a public trust* and such proceeds

> and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. (emphasis added)

The state managed these lands without maintaining a separate account until 1978. The Alaska State Legislature made its practice law in 1978 when it passed the following statutory provision:

> REDESIGNATION AND DISPOSAL OF MENTAL HEALTH LAND
>
> (a) Land granted to the state under the Mental Health Enabling Act of 1956, 70 Stat. 709, and patented to or approved for patent to the state on July 1, 1978 and land designated as mental health land which was received by the state in exchange for land granted under that federal land grant is redesignated as general grant land and shall be managed and disposed of by the Department of Natural Resources under applicable provisions of law.

Ch. 181, § 3(a), SLA (1978).

Alaska has provided continuous mental health care since statehood. The record indicates that between 1959 and 1982 the state spent over $222,000,000 on mental health care. Generally speaking, there has been a constant increase from 1959 to the present in mental health expenditures: slightly less than $1,200,000 was expended in 1959, and slightly more than $29,000,000 was expended in 1982. The record does not indicate how much of the trust land at issue has been disposed of, nor the total value of such disposed land. In the state's answer to the complaint, it alleges that "state expenditures for mental health purposes exceeded revenues from mental health grant lands in all years for which revenues from those lands were tabulated separately." The record does indicate that as of 1973, total revenues from these mental health trust lands amounted to $19,555,582. The state's total expenditures to that point amounted to $66,726,176.

Weiss *et al.* filed a class action in 1982 alleging that the state breached the public trust by 1) failing to account for revenues realized, 2) using revenues for purposes other than mental health care and 3) passing legislation redesignating the property "general grant land." Plaintiffs sought declaratory relief invalidating the redesignation legislation; injunctive relief compelling the state to administer the trust according to the law; general relief establishing a trust account "for the receipt of funds generated from all lands selected by the State of Alaska under the aforesaid mental health land grant...."

The superior court ruled that invalidation of the redesignation legislation was not an available remedy, based on *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981). However, the court did hold that the state breached its duties as trustee by removing the federal grant lands from the trust. As a remedy, the court ordered that

> [t]he public trust established by P.L. 84-830, 70 Stat. 709, shall recover from the defendant State of Alaska an amount equal to the fair market value of all lands conveyed from the trust as of the date of conveyance, plus prejudgment interest from the date of each conveyance. For the purposes of this judgment, all lands remaining in the trust as of July 19, 1978, shall be considered as having been removed from trust status by the State of Alaska on that date....

The court also ordered a set-off for all monies spent by the state on mental health care.

The state appeals from the judgment, except the holding that the redesignation legislation was valid. Weiss *et al.* cross-appealed the trial court's failure to rule the legislation invalid.

II. DID THE STATE BREACH THE PUBLIC TRUST CREATED BY CONGRESS WHEN IT REDESIGNATED PROPERTY IN THE TRUST AS "GENERAL GRANT LAND?"

A. Nature of the Trust.

The state argues, essentially, that the redesignation is of no legal consequence because the state has always provided public mental health programs in the past and, implicitly, will provide them in the future. The state maintains that providing such programs fulfills its obligations according to AMHEA, freeing the grant lands for other public purposes. Textual support for this position comes from the portion of Section 202(e) which states that "proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska." It is suggested that this language means Congress intended that the land grant serve as a revenue base guarantee. Great emphasis is placed on the legislative history of AMHEA which establishes that Congress did not wish to limit the use of grant lands *exclusively* to mental health programs.[1]

[1] Despite these observations, we think it irrefutable that Congress intended to create a trust, to be based on a corpus of one million acres of federal land. It is a commonplace of the law that without trust property there can be no trust. Restatement (Second) of Trusts § 74 (1959).[2] When the state, through the legislature, altered the status of the property grant the trust was thereby effectively terminated. The state, as trustee, had no power to do this and consequently breached its duty to preserve the corpus.[3] The fact that the state has provided mental health care in the past and will most likely do so in the future is no justification for termination of the trust. Whether a beneficiary can rely on the *bona fides* of a trustee to continue voluntarily to uphold the terms of a defunct trust is quite beside the point. We decline the opportunity to encourage the state, or any trustee for that matter, to determine unilaterally when to terminate a trust without specific authority to do so.

B. Remedy.

[2] Having concluded that the state breached the trust, we find it necessary on the facts of this case to invalidate the redesignation statute, Ch. 181, § 3(a), SLA (1978). *State v. University of Alaska*, 624

1. The debates in the House and Senate are too lengthy to reproduce in their entirety here, but certain remarks are representative of the discussions. Senator Jackson commented that "[t]he income from sales or leases will be used to support the mental health program in Alaska. The income will be held in trust for that purpose. Any money received over and above the need for the mental health program may be used for other public purposes." He further noted that the language change was not of a fundamental nature, and thus said that, "[t]he purpose of granting 1 million acres is the same as in all other similar grants, such as the public school land-grant program." 102 Cong.Rec. 9761 (June 7, 1956).

We note that the language in the federal grant was changed from designating the proceeds of the land grant to be used as a public trust for Alaska's mental health program, to saying that the proceeds "shall first be applied to meet the necessary expenses of the mental health program" only because of worry among members of Congress that the land may actually have a value far in excess of the necessary health care expenses. The record in this case shows that income from the land grant was actually less than state expenditures for mental health programs.

2. Section 74 provides: "A trust cannot be created unless there is trust property."

3. Our reliance upon basic trust law principles finds ample support in the precedents of this court and the United States Supreme Court. *See Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981). Both *Lassen* and *University of Alaska* involved federal grants to be used by states for school purposes. Those cases stand for the proposition "that the same private trust law principles are to apply to federal land granted to the states for school purposes." *University of Alaska*, 624 P.2d at 813. There is no reason to treat federal lands granted for mental health purposes differently.

P.2d 807, 815 (Alaska 1981) does not compel a different result. In that case, the federal government had granted 100,000 acres to the state "for the exclusive use and benefit" of the University. *Id.* at 811. Years after the grant, the state included 5,040 acres of the trust land in a state park. This action was not in itself a breach of the trust so long as the University was paid fair market value for the land. We inferred that the legislature intended to pay the University for this disposition, stating:

> It is also logical to assume that the legislature intended to compensate the University for the loss of its land. This view gives the statute creating [the park] a reading that is in accord with the well recognized canon of statutory construction that, when possible, legislation should be construed in a way that upholds its validity.

524 P.2d at 816.

Unlike the situation in *University of Alaska*, the present case does not involve a disposition of a portion of trust lands for a specific use. Instead, the entire corpus of the trust is intermingled with the general grant lands of the state. No particular use of the trust lands is specified and it may be years before much of the land is used. While it was reasonable to infer a legislative intent to pay for 5,040 acres for which there was a present park land use in *University of Alaska*, it is not reasonable to infer that the legislature meant to pay for a quantity of trust land approaching one million acres for which in large part there is no present use. Thus, the payment remedy imposed in *University of Alaska* is not appropriate here. Because the state in passing the redesignation act went beyond the power which had been granted it with respect to the trust lands by Congress, the redesignation act must be declared invalid.

It follows from our conclusion that the redesignation legislation is invalid that the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective. The case is remanded so that requisite findings can be made. We take this opportunity to provide some guidance to the trial court to simplify its task.

Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.[4]

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings consistent with this opinion.

MOORE, J., not participating.

In the Matter of the Application of: John L. McKAY, Jr., An Applicant for admission to the Practice of Law in Alaska and Membership in the Alaska Bar Association.

No. S-667.

Supreme Court of Alaska.

Sept. 27, 1985.

Applicant for Bar filed an appeal with Board of Governors of the Alaska Bar As-

4. Amicus raises questions regarding the title held by conveyancees and bona fide purchasers of mental health lands. In view of our disposition of this case, we deem it unnecessary to address those issues at the present time.

PROPOSED REVISIONS TO SB 67/HB 201

Page 1, line 9:
Delete "(a)".

Page 1, line 10:
Change entire line to read:
"(a) Except as provided in AS 38.05.800, the Alaska Mental Health Trust Authority"

Page 2, after line 8:
Insert:
"(b) In exercising its power under (a)(1), (2) or (3) of this section, the authority or its contractor under (a)(4) of this section is not bound by the provisions of AS 38.04 or AS 38.05, except that it shall

(1) comply with AS 38.05.285 subject to its obligations under AS 37.17.007;

(2) 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] of a preliminary decision to dispose of trust land and consider any written comments submitted within 30 days of such notice prior to making a final decision; and

(3) give public notice in the manner provided under AS 38.05.945(b) and (c) of any final decision to dispose of trust land."

Page 2, line 21:
After "section" insert:
"In this section, "unrestricted general fund revenue of the state" means all the categories of accounting for money accruing to the state general fund that,

under the statewide accounting system as established on the effective date of this Act, were identified as revenue that was not restricted by law to a specific use."

Page 3, lines 8-24:
Make this subsection (b) of AS 38.05.800

Page 3, line 8:
Insert a new subsection (a) to read:

"(a) For purposes of this section:

(1) "conveyed or encumbered" means (A) covered by a land sale contract issued by the state or a municipality; (B) covered by a patent executed in favor of any person, entity, native corporation, municipality, or the University of Alaska; (C) selected by a native corporation under 43 U.S.C. § 1611; (D) covered by a claim of a native for an allotment under 43 U.S.C. § 1634 or by a certificate of allotment issued under applicable federal law; and (E) identified for conveyance pursuant to a land exchange agreement between the state and a native corporation, but not yet covered by a patent;

(2) "department" means the Department of Natural Resources;

(3) "land" includes both the surface estate and the mineral estate;

(4) "lease" means any oil and gas lease, coal lease, mining lease, land lease, and any other mineral or surface lease; and

(5) "right-of-way" means any right-of-way permit or easement, or any road, utilities, or

other improvements constructed pursuant to an approved land use application or permit or letter of entry issued by the department and for which no right-of-way permit has yet been issued."

Page 3, line 14:

Change entire line to read: "(A) a lease;"

Page 3, line 24:

Insert new subsections to read:

"(c) any land included in the corpus of the mental health trust shall be subject to the terms, conditions, and provisions of any lease, timber contract, material sale contract, land use permit, right-of-way, prospecting permit, exploration permit, or water right issued by the United States or the state on or before the effective date of this Act;

(d) any land included in the corpus of the mental health trust shall be subject to any mining claim or mining leasehold location that was acquired and continued in compliance with applicable laws and regulations on or before the effective date of this Act and that is continued in compliance with applicable laws and regulations thereafter;

(e) the department shall manage all land that is subject to any interest identified in (c) and (d) of this section for as long as such interest remains in effect;

(f) all land that is subject to any interest identified in (c) and (d) of this section shall be governed only by and managed by the department only pursuant to the laws and regulations applicable to

general grant land and not pursuant to any laws or regulations applicable to the other land of the trust except that the proceeds from the management of such land shall be included in the mental health trust income account in accordance with AS 37.14.036;

(g) with respect to any particular lease, timber contract, material sale contract, land use permit, right-of-way, prospecting permit, exploration permit, water right, mining claim, or mining leasehold location, the owner of such interest, the department, and the mental health trust authority established under AS 47.30.011 may agree to waive the provisions of (e) and (f) of this section in which case the land involved will then be governed only by the laws and regulations applicable to the other land of the trust and will be managed like the other land of the trust;

(h) all land granted to the state under the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, that is not included in the corpus of the mental health trust under (b) of this section is released and removed from the trust and shall no longer be subject to any of the provisions of the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, or any claim of the trust;

(i) after giving public notice in the manner provided under AS 38.05.945(b) and (c), all land included in the corpus of the mental health trust under (b) of this section shall be conveyed by patent by the commissioner of the department to the mental health trust authority established under AS 47.30.011 and the trust authority takes its title

subject to any interest described in (c) and (d) of this section and subject to all of the provisions of this section."

EXPLANATION OF PROPOSED REVISIONS TO SB 67/HB 201

1. The amendment to AS 37.14.009(a) is a cross-reference to the overriding provisions of AS 38.05.800 which divest the trust authority of land management authority over trust lands that are currently subject to third party interests (discussed more fully in paragraph 6 below).

2. To the extent that the trust authority is not divested of land management authority over trust lands by virtue of AS 38.05.800, the amendments to AS 37.14.009(b) add two safeguards of the public interest applicable to management of trust lands in lieu of AS 38.04 and AS 38.05. These amendments are intended to establish a public process for trust land management decisions and to insulate the bill from legal challenges under Article VIII, Section 10 of the Alaska Constitution.

2.1 Subsection (b)(1) requires land management decisions to comply with the state constitution and the principles of multiple purpose use consistent with the public interest. However, this subsection also recognizes that the trust principles established in AS 37.14.007, added by Chapter 66, SLA 1991, must take priority if they conflict with multiple purpose use.

2.2 Subsection (b)(2) provides a 30-day public comment period to precede final land disposal decisions. This period is intended to ensure that trust beneficiaries, trust land developers, people who use trust lands for other purposes, and other members of the public have an opportunity to have their views considered by the trust authority.

2.3 Subsection (b)(3) requires public notice of final decisions to dispose of trust lands.

3. The proposed revision to AS 37.14.036(c) adds a definition of "unrestricted general fund revenue of the state" to the bill.

4. A new subsection (a) containing key definitions is added to AS 38.05.800.

4.1 In order to clarify that the land in the trust corpus will include both surface and mineral estates, "land" is so defined.

4.2 In order to make the entire section read more easily, and to specifically cover as many types of leasehold estates as possible, "lease" is now a defined term.

4.3 The Department of Law has expressed concern over the ambiguity inherent in stating that "conveyed or encumbered" land is not being returned to the trust. To satisfy this concern, "conveyed or encumbered" is now defined. Conveyances to native corporations, municipalities, and the University of Alaska are now specifically included as "conveyed or encumbered" land. In addition, ANCSA selections are now defined as being "conveyed or encumbered." Finally, the Department of Law had concluded that under SB 67/HB 201 land with native allotment claims would go back to the trust and that the trust would be compelled to challenge these claims. To avoid this problem, lands covered by native allotment claims are now also defined as "conveyed or encumbered."

4.4 A definition of "right-of-way" is included to reflect the fact that roads and other improvements are constructed pursuant to land use permits and letters of entry. In some cases these valid rights have never been reflected in a right-of-way permit because the issuance of such permits has been barred by the superior court's preliminary injunction since July 9, 1990.

5. The existing language in AS 38.05.800 would become new subsection (b) of the section.

6. New subsections (c) through (i) would be added to AS 38.05.800.

6.1 New subsection (c) clarifies that any land remaining in the corpus of the trust remains subject to the terms, conditions, and provisions of all third party rights. This new subsection validates such third party interests, thus satisfying another concern of the Department of Law. (Chapter 66 currently contains no such provision, although the settling plaintiffs did agree in the Chapter 66 settlement agreement that the trust would take all of its land subject to third party interests.) Subsection (c) is not intended to validate or question the validity of RS 2477 rights-of-way which may or may not exist.

6.2 New subsection (d) clarifies that trust land will also remain subject to any mining claims or leasehold locations that were acquired and continued in compliance with current applicable law. Unlike the third party interests covered by subsection (c), there is no legal document to reflect the terms of mining claims or leasehold locations

(unless they are subsequently converted to a mining lease, which is covered by subsection (c)) and DNR normally makes no "validity" determination. The holders of mining claims and leasehold locations would therefore be subject to the status quo under SB 67/HB 201 -- they would face the same challenges from the trust that they could face from the state -- the trust simply takes subject to the claimant's rights, if any. If the claimant can satisfy the legal requirements of a valid claim, the claim will be valid. Original mental health trust land has been closed to mineral entry since November 5, 1985 pursuant to court and DNR orders so the only mining claims or leasehold locations of concern will be those that were validly located prior to that date.

6.3 Neither subsection (c) nor (d) use the common legal term "valid existing rights," because the Weiss plaintiffs have asserted that there are no valid third party rights in mental health trust land. Therefore, the revisions provide that the trust takes subject to any of the mentioned interests, whether or not they are valid from the point of view of the Weiss plaintiffs. As previously mentioned, the one exception is that the trust would stand in the state's shoes in being able to challenge any mining claim or leasehold location that has not been acquired and continued in accordance with existing applicable law.

6.4 New subsection (e) is a mandatory provision requiring DNR to manage all land that is subject to any third party interest enumerated in subsections (c) and (d) for as long as the enumerated interest remains in effect. This provision eliminates the possibility of litigation by third parties against the trust and the state on the ground that third parties have a contractual right to have DNR as their land manager.

6.5 New subsection (f) further provides that DNR will manage all land covered by third party interests pursuant to the laws and regulations applicable to general grant land, except that all proceeds from such lands shall be placed in the mental health trust income account. Again, this provision is necessary to prevent litigation by third parties against the trust and the state for breach of their contract rights.

6.6 By defining "land" in subsection (a) as both the surface and mineral estates, the proposed revisions clarify that if any interest has been carved out of either estate, then DNR must manage the entire estate like general grant land for as long as the third party interest remains in effect. This provision is necessary to avoid "split estate" problems that are likely to cause litigation. For example, in the case of an oil and gas lease, if DNR manages the

subsurface estate but the trust authority manages the surface estate, the trust authority might attempt to take action to impair the contract rights of the oil and gas lessee (such as by charging a surface use fee for the lessee's drilling rigs and equipment).

6.7 New subsection (g) allows a third party contract holder, the trust authority, and DNR to waive DNR's management of the land in question. This gives any affected third party the option to seek a three-way agreement with DNR and the trust to have the land subject to the third party's interest managed by the trust authority pursuant to whatever land management regulations and standards the trust authority eventually adopts for normal (unencumbered) trust lands.

6.8 New subsection (h) specifically states that all original mental health trust land not included in the corpus of the trust pursuant to AS 38.05.800 is released and removed from the trust and is no longer subject to any of the provisions of the original 1956 act. (Again, this is a provision which is implied, but is not explicitly stated, in Chapter 66.)

6.9 New subsection (i) specifically provides that DNR will actually convey the land that is being returned to the trust to the trust authority and that the trust authority takes its title subject to all protected third party interests and the restrictions of AS 38.05.800. The same public notice process (a 30-day public comment period) contemplated for conveyances of land under Chapter 66 from DNR to the trust authority will apply to reconstitution of the trust under SB 67/HB 201.

7. These revisions remove the concerns set forth in Sections V, VI, VIII, X.3, and X.4 of Charlie Cole's February 3, 1993 letter to Senator Mike Miller. The proposed revisions to SB 67/HB 201 are, like Chapter 66 itself, a "settlement" of the dispute different from that mandated by the Alaska Supreme Court in 1985. Although there is nothing in that 1985 decision indicating that the state has a "fiduciary duty" to manage trust lands solely to maximize revenue to the trust, even if this were true, this would be in direct conflict with third party contract rights. The proposed revisions protect these third party rights as long as the particular land interest remains in effect. When the third party land interest expires, terminates, or is surrendered, the subject land reverts to the trust for management pursuant to whatever standards have been adopted by the trust authority.

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ATTORNEY GENERAL SAYS CHAPTER 66 AMENDMENTS MAY NOT BE NECESSARY

In a brief filed Wednesday, May 5, in superior court, the Attorney General said that legislation to amend Chapter 66 may not be necessary:

> **"Even if the legislature does not pass the settling parties' proposed legislation, however, there are other options that the parties can explore."**

See pages 2-3 of the State's opposition brief (attached).

For more information, contact Jeff Jessee, 344-1002.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK, and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, AND GABRIEL MAYOC; and E.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,

Plaintiffs,

v.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 Civil

OPPOSITION TO MOTION TO STAY PROCEEDINGS

Defendant State of Alaska ("state") opposes Marathon Oil Company and Union Oil Company of California's ("oil company intervenor-lessees") Motion to Stay Proceedings. Contrary to oil company intervenor-lessees' allegations, the termination of the settlement agreement on May 11, 1993 is not a certainty. It would prejudice the other parties to this litigation, as well as the public, to stay proceedings on issues this court has found "crucial to the issues before the court." See Order re: Intervention of Marathon and Union Oil Companies (January 22, 1993).

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Oil company intervenor-lessees give the impression that the settlement agreement will automatically terminate on May 11, 1993, the 60th day following the state's letter invoking Article III, section 31(c) of the Settlement Agreement. This is not true. Section 31(c) gives the parties at least sixty days to try to reach another agreement for relief to third-parties, however, nothing in that section prohibits the parties from jointly agreeing to extend the time within which to reach another agreement.

Prior to the court's April 26, 1993 Memorandum Decision and Order Re: Intervenors' Complaint ("Memorandum Decision") the state and settling plaintiffs had been exploring a variety of ways to provide relief to the affected third-parties. The Memorandum Decision, however, suggested a straightforward legislative resolution of the settlement's legal problems that would make it more likely that the court would ultimately approve the settlement and, as a result, provide relief to those third-parties. Since April 26, as oil company intervenor-lessees' noted, the parties have devoted their energies toward a legislative solution. See oil company intervenor-lessees' Memorandum in Support of Motion to Stay Proceedings at 3 n.1 ("oil company intervenor-lessees' memorandum"); See also B. Arke, "Hickel puts priority on mental health lands bill," Anchorage Daily News, at B-2 (May 4, 1993) (copy attached).

Even if the legislature does not pass the settling parties' proposed legislation, however, there are other options

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that the parties can explore. With all indications pointing toward chapter 66 being a legal and constitutional vehicle to settle this litigation and, thereby, providing the relief to affected third-parties, it is less likely the state would terminate the settlement agreement because of concerns about providing relief to third-parties. Indeed, approval of chapter 66 as settlement may provide the most expeditious relief to affected third-parties.

The court has stayed the proceedings on preliminary approval for seventy days to give the state and settling parties time to try to reach agreement concerning the hypothecated land list and the application of AS 38.04 and 38.05 to the reconstitution. A prompt decision by the court with respect to the oil company intervenor-lessees' complaint would assist the parties in their negotiations. If the court granted summary judgment in favor of the state and settling plaintiffs, the parties would be even more inclined to reach agreement to "save" the settlement. If the court granted summary judgment in favor of the oil companies, either in whole or in part, the parties would then have the opportunity to respond to that decision at the same time they are negotiating over the two other problems. It would prejudice the state, settling plaintiffs, and the public, for the parties to spend substantial amounts of time and money to attempt to resolve two problems with the settlement, if several months later the settlement were to fail because the court were to find that oil and gas leases may not be transferred

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to the trust authority.

Moreover, it should be pointed out that the possibility of the termination of the settlement agreement is nothing new and has not been a compelling reason in the past for any of the court's decisions. The possibility of termination was obvious on January 14, 1993 when the court denied the state and settling plaintiffs' joint motion for relief for third-parties. The court issued that decision a week before granting the oil companies intervention, conditioned upon expedited discovery and briefing, so that their issues could be promptly addressed. See Order Re: Intervention of Marathon and Union Oil Companies at 2 (January 22, 1993). This court, in denying the re-filed joint motion on April 19, 1993, again recognized the obvious possibility that either party might terminate the settlement agreement,[1] yet such possibility did not result in this court piecemealing its recent Memorandum Decision addressing environmental intervenors' challenges to chapter 66.

Staying the proceedings on oil company intervenor-lessees' complaint will only serve to further the strategy of opponents to chapter 66 who have brought challenges to chapter 66 seriatim so as to perpetually extend the preliminary approval process. The issues related to the oil company intervenor-lessees' complaint have been fully briefed and will be ripe for decision as soon as oral argument is concluded. It will further

[1] See Order at 2 (April 19, 1993) (The state's notice of termination "is merely the exercise of a right which the court knew the State had and could use").

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the interests of judicial economy to conduct the oral argument and render the decision now while the issues are still fresh in both the court's and the parties' attorneys' minds.

That the court should render a prompt decision on oil company intervenor-lessees' claims holds true even if the settlement embodied in chapter 66 and the settlement agreement is "terminated." This is because the issues raised by oil company intervenor-lessees' complaint in intervention will not necessarily become mooted by termination of the settlement agreement. These issues are: "(1) lease assignability, (2) applicability of the Administrative Procedure Act ["APA"] to DNR order 135 and the broad land-use provisions of the Settlement Agreement, and (3) the legality of the Agreement's provision regarding sharing of confidential materials." Oil company intervenor-lessees' memorandum at 2.

With respect to the first issue, the parties to this litigation will be faced with the issue of whether oil and gas leases may be transferred from DNR to "trust status" even if there is no settlement and the state and plaintiffs are back in litigation. There are at least three active oil and gas leases on original trust land.[2] Pursuant to the Alaska Supreme Court's

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[2] In the affidavit of Carol Wilkinson attached as exhibit 1 to the state's Reply to Opposition of Marathon and Unocal to Summary Judgment Motions of State and Settling Plaintiffs (April 17, 1993), the state identified leases ADL numbers 21129 and 359150 as active oil and gas leases containing original mental health trust land still owned by the state. In preparing this opposition the state re-reviewed file 359150 and determined that that lease had been terminated in December 1990.

(continued...)

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direction in Weiss v. State, all original trust lands that have not been sold must be returned to trust status. In any reconstitution of the trust, the court will almost certainly need to resolve the issue of whether oil and gas leases on original trust land may be returned to trust status, either by conveyance to the Trust Authority under chapter 66 or otherwise.

Although there would be no "trust authority" in a litigated reconstitution, it is undisputed that the reconstituted trust lands will be administered as trust lands rather than as general grant lands. This means that the objections oil company intervenor-lessees' raise with respect to the proposed Trust Authority managing oil and gas leases would apply with equal force to the state managing oil and gas leases returned to reconstituted trust status. See e.g. oil company intervenor-

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[2] (...continued)

The settling plaintiffs have identified oil and gas leases ADL numbers 21129 (lessee: Shell), 60553 (lessee: Chugach Electric), 319688 (lessee: Chugach Electric), 359157 (lessee: Micallef), 359159 (lessee: Danco) as active leases containing original trust land still owned by the state (compare tables I and II of the affidavit of David L. Thomas attached as exhibit B to Memorandum in Support of Motion of Settling Plaintiffs for Summary Judgment Dismissing Complaint in Intervention of Oil Companies (March 22, 1993). The state terminated leases 359157 and 359159; however, that termination is being appealed. C.f. James W. White's Motion to Amend Preliminary Injunction filed in this case on July 30, 1992; State's Opposition to James W. White's Motion to Amend Preliminary Injunction dated August 17, 1992; Orders Denying James W. White's Motion to Amend Preliminary Injunction, Denying J. White's request for Hearing, and Denying Intervention of J. White all dated September 1, 1992.

It appears then, that there are at least three active oil and gas leases containing original trust land still owned by the state - - ADL numbers 21129, 60553 and 319688.

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lessees' Memorandum in Support of Motion for Summary Judgment, 16-32 (March 22, 1993); Reply of Marathon and Unocal to State and Settling Plaintiffs' Oppositions to Motion for Summary Judgment, 16-12, 27 (April 19, 1993).

While none of the three remaining original trust land leases are Marathon or Union leases, the arguments raised by oil company intervenor-lessees against the transfer of their leases also apply to oil and gas leases held by other persons and companies. Indeed, oil company intervenor-lessees, in all their briefing, have not once drawn a distinction between an oil and gas leases issued on original trust land and an oil and gas leases issued on general grant land.[3] The state used the same standard lease forms for leasing original mental health trust lands and general grant lands. See State's Nonopposition to Settling Plaintiffs' Summary Judgment Motion and Opposition to Marathon and Unocal's Summary Judgment Motion at 13 and Exhibit 2 thereto (April 6, 1993); State's Memorandum in Support of Motion for Summary Judgment with Respect to Issues Raised in Marathon and Unocal's Complaint, Exhibit 14 at 34-38 (March 22, 1993)("state's memorandum"); and Memorandum in Support of Motion of Settling Plaintiffs for Summary Judgment Dismissing Complaint in Intervention of Oil Companies, Affidavit of David Thomas, Exhibit E at 5-7 (March 22, 1993) ("settling plaintiffs'

[3] Table II of David Thomas' affidavit referenced in footnote 2 identifies ten oil and gas leases containing both original trust land and general grant land where either Union or Marathon was, or is, the lessee.

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memorandum"). Just because "[a] 'strict reconstitution' of the trust pursuant to Weiss is not of direct concern to Marathon and Unocal"[6] that does not mean that a strict reconstitution is of no concern to the state or the public. Either the oil and gas leases can be transferred to trust status or they cannot be transferred. Having had the issue of the transferability of the leases raised, and having fully briefed it, the state is not willing to drop this issue and risk later litigation by other oil and gas lessees challenging the return of their leases to trust status.

With respect to the second and third issues, the applicability of the APA to the negotiating and drafting of a settlement agreement and department order, and the sharing of confidential information between the state and settling plaintiffs, these issues are almost certain to arise in any future proposed settlement of this litigation. The settling plaintiffs have been adamant that any settlement of this case must be accompanied by a settlement agreement. Both the state and settling plaintiffs have articulated their strong beliefs that a settlement agreement cannot be and should not be promulgated as a regulation. See e.g. state's memorandum at 45-49; settling plaintiffs' memorandum at 68-74. The state and settling plaintiffs have also explained why a department order such as Department Order #135 is not a regulation and need not be promulgated like one. State's memorandum at 49-54; settling

[6] Oil company intervenor-lessees' memorandum at 5.

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plaintiffs' memorandum at 59-68. Similarly, the state and settling plaintiffs negotiated a procedure in the settlement agreement for the sharing of confidential information between them that the parties strongly believe is legal and constitutional. They would likely use the same procedure again in any future settlement agreement that includes a land exchange as part of the compensation provided.

Thus, even if the parties terminate the current settlement agreement, should they enter into any future settlement agreement, the APA and confidentiality issues will likely rise again. Therefore, it is important to the settling parties for the court rule on the cross motions for summary judgment. Even if the APA and confidentiality issues become technically moot in the event the parties decide to terminate the proposed settlement agreement (of course, these issues are not now moot as the settlement agreement is very much alive), a court may still resolve disputes that are "moot" under the public interest exception to the mootness doctrine. Alaska Fish Spotters Assoc. v. State, 838 P.2d 798, 800 n.1 (Alaska 1992) (regulation that was the subject of appeal was withdrawn after briefs submitted to court, court decided case under public interest exception to the mootness doctrine). The public interest exception involves consideration of three main factors:

> (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may repeatedly circumvent review of the issues, and (3) whether the issues presented are so important to the public interest as to

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justify overriding the mootness doctrine. Peninsula Marketing Ass'n v. State, 817 P.2d 917, 920 (Alaska 1991). The public interest exception to the mootness doctrine applies to the trial courts as well. See Kitlutsisti v. Arco Alaska Inc., 592 F. Supp. 832, 838 (D. Alaska 1984) appeal dismissed and vacated 782 F. 2d 800.

The issues raised by oil company intervenor-lessees fall squarely within the public interest exception. As explained above, the APA and confidentiality provision are likely to arise again if there is a future settlement agreement. Applying the mootness doctrine, and staying the proceedings, would mean that the parties would face substantial uncertainty if they attempted to negotiate any future settlement. If the parties knew in advance that they must approach the negotiation of a settlement agreement as though the state were promulgating a regulation, then the parties would try to figure out a way to do so. If, however, the parties are not advised that this is the law until after they agree to another settlement agreement, then, they would be forced to start all over again resulting in a tremendous waste of time and effort - -all at public expense. In addition to this being a costly path to follow, it would also frustrate the public interest in a prompt resolution of this litigation. The more guidance the court can provide to the parties, the more likely it is that the parties may someday reach a mutually agreeable and lawful settlement.

In sum, the issues raised by oil company intervenor-

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lessees are far from moot. A prompt decision on their complaint can only help to expedite the resolution of this litigation. The state urges the court to deny oil company intervenor-lessees' motion to stay the proceedings.

Respectfully submitted this 5 day of May, 1993.

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5-5-93
SFC-93
#79

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated; the ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN, on behalf of themselves and all others similarly situated; ANITA BOSEL, FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC; and H.L., M.K., and ALASKA ADDICTION REHABILITATION SERVICES,

Plaintiffs,

and

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

Intervenor-Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 Civil

FILED in the Trial Courts
State of Alaska, Fourth District

APR 26 1993

Clerk, Trial Courts

By _____ Deputy

MEMORANDUM DECISION AND ORDER
RE: INTERVENORS' COMPLAINT

I certify that on 4-26-93 copies of this form were sent to CLERK.

Walker
Goldstein
Jessee
Volland (RY+G)
AGO - Anch.
Johannsen (Perkins Coie)
Clayford (JH+R)

Rubini (BHB+C)
Hachenburg
Jorgenson
Rehbock (A+R)
Haaven (BP+K)

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INTRODUCTION

Three dispositive motions regarding the intervenors' complaint are before the court. The State has sought summary judgment as to all counts in the intervenors' complaint. Vern T. Weiss and Earl Hilliker, the Alaska Mental Health Association, Mary C. Nanuwak, and John Martin,[1] ["Settling Plaintiffs"] have sought dismissal under Civil Rule 12(b)(6) or, in the alternative, summary judgment, and have joined in the State's motion.[2] The Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited, [the "Intervenors,"] have sought summary judgment and declaratory judgment.

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

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

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

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

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

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

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such a manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

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

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

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

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

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

Vern Weiss and Earl Hilliker filed this lawsuit as a proposed class action in 198? They claimed that the legislative redesignation in 1978 was a breach of trust and they sought relief from the court on behalf of all beneficiaries. They maintained that the state breached the public trust by failing to account for revenues realized, using revenues for purposes other than mental health care, and redesignating the mental health lands as general grand land. The superior court ruled that the state breached its duties as trustee by removing the mental health trust lands from the trust and redesignating them as general grant lands, but ruled that invalidation of the redesignation legislation was not an available remedy. As a remedy, the superior court ordered that the trust was to recover from the state an amount equal to the fair market value of lands conveyed from the trust as of the date of conveyance plus pre-judgment interest from the date of each conveyance. Additionally, the superior court ordered a set-off for all money spent by the state on mental health care. Both sides appealed from that decision.

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[3] Legislatively designated areas are lands designated by law as a state park, state forest, state game refuge, state wildlife refuge, state game sanctuary, state recreational area, state recreational river, state wilderness park, state marine park, state special management area, state public use area, critical habitat area, bald eagle preserve, bison range, or moose range. See Chapter 66, Section 54(6).

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

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

> Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of the sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that the expenditures exceeded the value of land sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.

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

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

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

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

Chapter 66 involves two principle components in

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

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

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

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

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

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

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

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

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

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

Article VIII, Section 10 of the Alaska Constitution provides:

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

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

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

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

usage, may denote a mandatory obligation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 7. Bartlett cautioned:

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

Id.

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

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

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

this proposal clarified its intent:

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

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

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

2 Proceedings at 1107.

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

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

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

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

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

4 Proceedings at 2452.

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

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

4 Proceedings at 2469-70.

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

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

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

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

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

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

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

State's Exhibit 15, at 4.

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

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

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

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

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

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

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

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

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

As Delegate Fischer later described:

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

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

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

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

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

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

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

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

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

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

[6] Chap. 66, § 55(e)(1)(3)(4)&(6).

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

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

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

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

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

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

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

The State argues that if anything other than public

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

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

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

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

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

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

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

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

The reconstitution of the mental health lands trust is

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

a unique event. The legislature was confronted with a situation which is much closer to that involving the university trust lands than that involving general grant lands. It is apparent that the mental health trust lands should not be managed under the same principles applicable to all state lands. Indeed that was the fallacy that led to the State's breach of trust in 1978. It is also apparent that the lands must be managed under trust principles. The court concludes that the legislature could determine, consistent with the provisions of Article VIII, Section 10, that the only safeguard of the public interest necessary for the disposal of trust lands by the AMHTA was the inclusion of trust duties. Many of the framers' concerns regarding price are encompassed by trust principles -- the trustee could not dispose of land at an unfairly low price without breaching the obligation to manage the trust solely in the interests of the beneficiaries. The trustee cannot use disposals to exploit trust lands without violating the obligation to "use care and skill to preserve trust property." Clearly the trustee must manage the trust corpus to eliminate fraud and collusion that would injure the beneficiaries. The court concludes that the legislature's choice between competing interests, in light of the restrictions placed on the lands by virtue of the trust, did not violate the requirements of Article VIII, Section 10.

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

Article IX, Section 15 of the Alaska Constitution provides:

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

The Permanent Fund amendment was effective February 21, 1977.

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

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

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

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

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

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

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

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

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. (emphasis added)

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

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

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

> In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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. . . .
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> 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:
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> > 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.
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> 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.
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> 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 misappli .tion of its lands and funds.

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