ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

2495 SJ SB 24 - SB 41

2495

SB

26

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

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_____

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

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CHAIRMAN

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

LABOR AND COMMERCE COMMITTEE, CHAIRMAN
RESOURCES COMMITTEE
JUDICIARY COMMITTEE
FISHERIES SUB-COMMITTEE

P.O. BOX 143
SITKA, ALASKA 99835

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4916

M E M O R A N D U M

TO: Sen. Bill Ray, Chair
Senate Judiciary Committee

FROM: Sen. Dick Eliason

DATE: May 18, 1983

RE: SB 26 - "An Act providing for immunity from civil liability for certain persons who render services in response to hazardous materials emergencies."

As requested, I have reviewed the above-referenced legislation and I am now reporting my findings to you.

SB 26, introduced by Senators Ziegler and Halford, would add a new section to the "Alaska Good Samaritan Act" to include civil liability cases involving a person responding to a hazardous materials emergency. This legislation would grant immunity from civil liability to those individuals who render assistance during a hazardous materials emergency at the request of trained professionals. It does not guarantee immunity in cases of gross negligence or intentional misconduct.

SB 26 - IMMUNITY FROM CIVIL LIABILITY TO PERSONS RESPONDING TO HAZARDOUS MATERIALS EMERGENCIES.

SECTION 1

(a) GRANTS CIVIL LIABILITY EXEMPTION TO A PERSON REQUESTED TO RESPOND TO A HAZARDOUS MATERIALS EMERGENCY FOR AN ACT OR OMISSION WHILE GIVING AID.

(b) DOES NOT PRECLUDE LIABILITY FOR A PERSON RENDERING AID IF THAT PERSON CAUSES DAMAGES THROUGH GROSS NEGLIGENCE, RECKLESS OR INTENTIONAL MISCONDUCT; OR THROUGH SIMPLE NEGLIGENCE IN THE ORDINARY CONDUCT OF THAT PERSON'S BUSINESS(EXCEPT FOR THOSE REQUIRED TO RESPOND TO AN EMERGENCY BY THEIR PROFESSION); OWNS, LEASES OR CONTROLS THAT WHICH IS INVOLVED IN THE ACCIDENT; OR A PERSON EXPECTING REIMBURSEMENT FOR SERVICES.

(c) IMMUNITY GRANTED IN (a) EXTENDS TO THE PERSON'S EMPLOYER OR ANY PERSON OR ENTITY RESPONSIBLE FOR THE PERSON RESPONDING TO THE EMERGENCY FOR ACTS OR OMISSIONS OF THE PERSON.

(d) DEFINES HAZARDOUS MATERIAL AS A SUBSTANCE CLASSIFIED AS HAZARDOUS BY THE STATE OR FEDERAL GOVERMENTS OR A CHEMICAL, PETROLEUM PRODUCT, GAS, OR OTHER SUBSTANCE THAT IS LIKELY TO CAUSE HARM IF RELEASED

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

☒ Expenditure Type
☐ Revenue Type

I. REQUEST
Bill/Resolution No. SB 26
Title "...immunity from civil liability..."
Requested by Senate HSS Date

II. FISCAL DETAIL
Agency Affected Department of Public Safety
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected Alaska State Troopers
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL	0	0	0			

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						
	0	0	0			

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No fiscal impact is anticipated.

RECEIVED
FEB 8 1983
LEGISLATIVE FINANCE

IV. DATE January 19, 1983 PREPARED BY Francis C. Allan Phone 269-5691
DIVISION State Troopers Initials mck
DEPARTMENT OF PUBLIC SAFETY Initials

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82) OMB Reviewed by: Eric Lascheyer

ALASKA STATE FIREFIGHTERS ASSOCIATION
P.O. Box 187 Juneau, Alaska 99802

SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

Hearing on Senate Bill No. 26 "Providing for Immunity from Civil Liability for Certain Persons who Render Service in Response to Hazardous Materials Emergencies"

May 2, 1983

Mr. Chairman:

My name is E. Robert Haag representing the Alaska State Firefighters Association and the Alaska Fire Chiefs Association.

We wish to speak in favor of Senate Bill No. 26 now before your Committee. Our two Associations, at their annual meetings last October 1982, passed a number of resolutions pertaining to the Fire Service. One of the resolutions concerned supporting of a State enacted "Hazardous Materials Good Samaritan Act".

Senate Bill No. 26 would provide for a new section to AS 09.65 to add to the "Alaska Good Samaritan Act" (AS 09.65.090) a section "Civil Liability for Responding to Hazardous Material Emergency". The existing AS 09.65.090 covers only "Civil Liability for Emergency Aid". A copy of this section is enclosed for your general information. It covers "a person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person....".

Alaska Fire Chiefs and Firefighters are concerned since incidents involving hazardous materials are happening with increased frequency in all areas of the State of Alaska. These incidents often require immediate assistance of

persons with technical expertise to advise the Fire Service as to how to deal with the hazardous materials accident or spill. Many persons, outside of the Fire Service, who are technical experts, are reluctant to provide advice because of fear of legal liability.

Take an example of a Fire Chief in a small community who encounters a hazardous materials accident. When he arrives on the scene he finds a powdered substance spilled from a container. He does not know what it is and the container is not marked. His quick reaction is to call the local high school chemistry teacher to see if he can possibly identify the powder. That teacher could refuse to make a test in fear of a civil liability. If the proposed Statute were law, that same teacher would feel more at ease to make the test since he could be protected under the "Civil Liability Act".

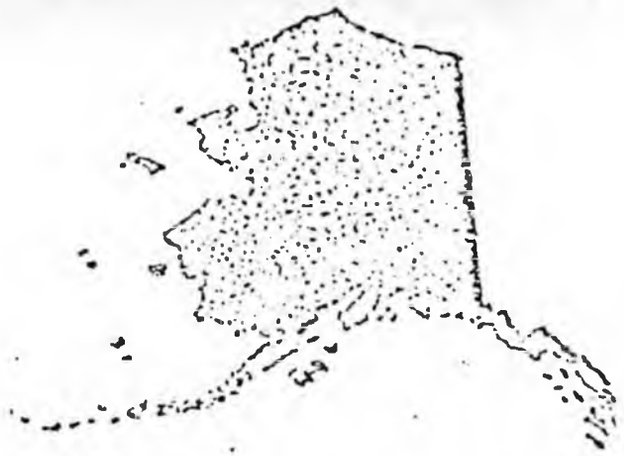
A number of States have enacted "Good Samaritan Acts" similar to the proposal before your Committee.

Mr. Chairman and members of the Committee, we strongly urge your "DO PASS" on this Bill so that it may proceed through the Senate and the House to become a valuable Statute. The saving of even one life, by the passage of this Bill, would make you feel proud that you had an important part in its becoming law.

Mr. Chairman, if we can provide you with any information to assist in the Bill's passage, please let us know.

We thank you for your valuable time in allowing us to testify.

Alaska Fire Chiefs' Association



RESOLUTION No. 82-3

WHEREAS incidents involving hazardous materials are happening with increased frequency in all areas of the State of Alaska; and

WHEREAS these incidents often require assistance of persons with technical expertise to help with their management; and

WHEREAS many persons outside of the fire service are reluctant to provide this advice because of legal liability,

NOW, THEREFORE, BE IT RESOLVED that the Alaska Fire Chiefs' Association support the concept of a State enacted "Hazardous Materials Good Samaritan Act" patterned on similar acts recently enacted in other states; and

BE IT FURTHER RESOLVED that the Alaska Fire Chiefs' Association urges the Alaska State Legislature to pass such a law in the next legislative session.

APPROVED in conference October 20, 1982 in Ketchikan, Alaska.

_____

BASIL J. SANDS, Jr., President

ALASKA STATE FIREFIGHTERS ASSOCIATION

RESOLUTION No. 82-16

WHEREAS incidents involving hazardous materials are happening with increased frequency in all areas of the State of Alaska; and

WHEREAS these incidents often require assistance of persons with technical expertise to help with their management; and

WHEREAS many persons outside of the fire service are reluctant to provide this advice because of legal liability,

NOW, THEREFORE, BE IT RESOLVED that the Alaska State Firefighters Association support the concept of a State enacted "Hazardous Materials Good Samaritan Act" patterned on similar acts recently enacted in other states; and

BE IT FURTHER RESOLVED that the Alaska State Firefighters Association support and assist the Alaska Fire Chiefs' Association in this regard.

ACTION Passed DATE: October 23, 1982

Leigh Gallagher

LEIGH GALLAGHER, President, ASFA

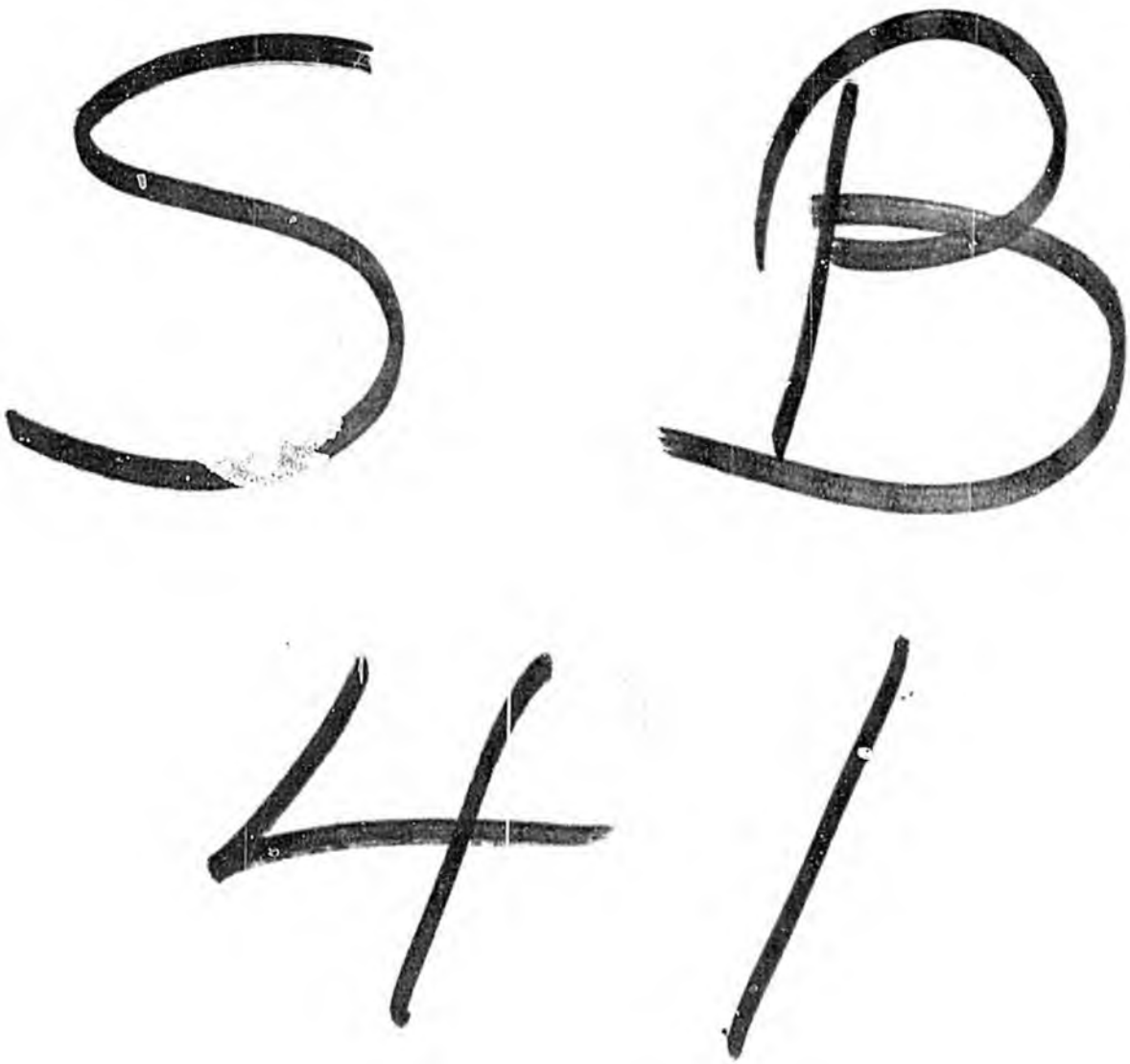
GOOD SAMARITAN ACT

Sec. 09.65.090. Civil liability for emergency aid. (a) A person at a hospital or any other location who renders emergency care or emergency counseling to an injured, ill, or emotionally distraught person who reasonably appears to the person rendering the aid to be in immediate need of emergency aid in order to avoid serious harm or death is not liable for civil damages as a result of an act or omission in rendering emergency aid.

(b) This section does not preclude liability for civil damages as a result of gross negligence or reckless or intentional misconduct. (§ 1 ch 32 SLA 1957; am § 1 ch 119 SLA 1971; am § 38 ch 102 SLA 1976)

Cross references. — As to constitutionality of ch. 102, SLA 1976, see notes to AS 09.55.536 and Alas. Const., art. II, § 14.

Effect of amendments. — The 1976 amendment rewrote subsection (a) and deleted the second sentence of subsection (b) which read "Gross negligence means reckless, wilful, or wanton misconduct."



COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations.

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

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MEMBERS HAVING
OTHER RECOMMENDATIONS:

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CHAIRMAN

Revised 12-20-82

LAND SETTLEMENT

BRIEFING PAPER

UA Trust Lands Background
Settlement Agreement
Proposed Compensation

A statewide system of higher education

The University of Alaska

THE UNIVERSITY OF ALASKA

Jay Barton, President

Briefing Paper

UNIVERSITY LANDS SETTLEMENT AGREEMENT

November, 1982

For further information contact: Merry Tuten
Director of Land Management
(Statewide)
474-7421

EXECUTIVE SUMMARY

The Settlement Agreement provides a method for calculating compensation due the University as a result of improper management of University grant land. Compensation is provided for:

- easements and rights of way granted by the State without University approval or compensation
- residential, utility, commercial, agricultural, and private recreation leases let and administered at less than fair market value
- material (gravel/sand) removed for use by state agencies without payment to the University
- uncollected revenues from state sales of resources such as coal, oil and gas, and timber
- free use permits, land management transfers, reserved use requests, and special land use permits issued without University approval or compensation
- legislative withdrawals of University lands for parks and preserves without University approval or compensation
- land exchanges which have only been partially completed without the University receiving its share of the land to be exchanged

To compensate the University for these actions, the Settlement Agreement provides for the transfer of title, management, and control of University grant lands from the State to the University. The State and University agree that the University would more properly manage these lands to produce income and support the University. The Settlement Agreement also provides for the appropriation of funds and/or the conveyance of state "replacement" lands to equal the dollar value of the compensation owed the University. The Settlement Agreement provides a detailed method for calculating the compensation for items above and results in a total dollar amount.

BACKGROUND

The University of Alaska originally received its lands from the Federal Government by two Acts of Congress, in 1915 and 1929. These Acts were extensions into the Territory of Alaska of the Land Grant College concept pioneered by the Morrill Act of 1862 which established Land Grant Universities throughout the Continental United States. Under these two congressional Acts the University was granted 110,000 acres of land which were to be held in trust and were reserved for the exclusive use and benefit of the University of Alaska for the support of higher education in Alaska.

Upon statehood the new State of Alaska accepted the trustee responsibility for these "grant" lands. Since the purpose of the federal grant was to produce income to support the University the State should have actively managed and developed these lands. Instead, the State treated the University Grant Lands as though they were State lands and made them available at less than fair market value. In addition, the legislature passed laws that transferred University lands into nonprofit making uses such as state parks and wildlife withdrawals without compensating the University. As a result of these legislative and administrative actions the University lost considerable acreage and income. During the twenty years of State management only $2.7 million in income was produced from the entire 110,000 acre federal land grant. These proceeds were deposited into the University of Alaska Permanent Fund and the interest earnings were used to support University programs.

In 1978 the University intervened in litigation between a private company and the State questioning the State's right to withdraw University grant land into state parks without compensating the University. While this lawsuit proceeded through the court system the University filed a second suit against the State in order to clarify the ownership and trustee responsibilities surrounding all University grant lands.

In 1981 the Alaska Supreme Court rendered a decision on the first lawsuit in which the University had intervened. The court reaffirmed that University grant lands are for "the exclusive use and benefit of the University, that such lands cannot be taken without compensation," and

that the State is required by the federal legislation conveying the land grant "to manage said University lands to effect the purpose of the trust, which is the production of income for the benefit of the University."

The second lawsuit is still pending in Superior Court. However, following the Supreme Court's ruling in favor of the University on the first lawsuit, the University entered into negotiations to settle all litigation with the State Departments of Natural Resources, Administration, and Revenue and, after 13 months of negotiation, reached an out-of-court settlement (enclosed).

During the 1981 - 1982 legislative session the State and University sought the legislature's ratification of this out-of-court settlement. Although both the House and Senate passed the initial bill unanimously, other issues unrelated to the land settlement question were added to the final bill and it was consequently defeated in committee. The legislature did, however, appropriate $500,000 to the University and the State in order to implement the terms of the Agreement. The State and University will be seeking ratification of the Settlement Agreement during the 13th Alaska Legislature.

ISSUES

1. Why should the University own land and be in the land management business?

The federal government granted trust land for the exclusive use and benefit of the University of Alaska. The Alaska Supreme Court has held that the university's grant lands must be managed "to effect the purposes of the trust, which is the production of income for the benefit of the university." However, the state manages and disposes of its lands for purposes other than to maximize earnings. Accordingly, the purposes for managing university trust lands and state-owned lands are completely different. Furthermore, the state has disposed of university trust land and products therefrom at less than current market value. For these reasons, the university's board of regents has felt compelled to assume direct responsibility for the control and management of university trust lands.

2. What will the University do with the money it receives from its trust lands?

Income produced by the university's lands is deposited into the university's permanent fund which is held and managed by the state Department of Revenue. The state informs the university how much investment income it will receive from its permanent fund and the university informs the state how that income will be used. No change in this procedure or in legislation governing the university permanent fund is required at this time. For further information on the university's permanent fund and its use, the reader's attention is invited to the university briefing paper entitled "University of Alaska Permanent Fund."

3. Does the Settlement Agreement benefit the state?

Yes. The agreement resolves a long standing legal issue at minimal cost to the public, clarifies Department of Natural Resources responsibilities, and provides the university with its original federal endowment. The settlement will also benefit the state by enabling its university to become a better, higher quality university, at lower cost to the state, than would be possible without the federal endowment.

4. Why does the State "owe" the university any compensation since the legislature funds the university every year?

The Alaska Supreme Court held that the university is entitled to compensation for takings by the state of university trust land at less than fair market value. This compensation is a single "one-time" payment stemming from a judicial decision. This payment is necessary to re-establish the land grant trust endowment provided by the Congress to provide financing in perpetuity to help support the university. Congress intended that this endowment funding be provided in addition to, not simply to replace, annual general fund support of the university by the state.

5. If the legislature appropriates funds and land as compensation for past actions, will the university be able to support itself from land revenues?

No, investment earnings will not be large enough in the foreseeable future to have any significant influence on the amount of general funds needed to support the university.

RECOMMENDATIONS

Calculations of compensation due the university under the terms of the settlement agreement are shown on the next page. Accordingly, the university now recommends that: the terms of the out-of-court settlement between the university and the state Department of Natural Resources be ratified by the legislature.* Specifically, the university recommends that:

1. It be granted title, management, and control of its federally granted trust lands.

2. It receive cash and land compensation from the state in accordance with the closing statement shown below.

3. Alaska statutes be corrected to reflect the transfer of university trust lands from public ownership to management by the university's board of regents.

* Under the terms of the settlement agreement, the state Department of Natural Resources must review the university's calculation of compensation to determine whether or not it agrees with the grand total so derived. This review has not, as of this writing, been completed.

12/20/82

CLOSING STATEMENT

Compensation due the University of Alaska computed in accordance with the settlement agreement--

SOURCES OF COMPENSATION	IN LAND*	IN CASH	
Leased Lands	$ 15,364,693		
Uncollected Revenues		$ 154,454	
Material Sales		42,418	
Rights of Way		2,177,763	
Liquidated Damages	0		
Back Pay for Leases		2,344,676	
Legislative Withdrawals	6,085,536		
Conveyances & Incomplete Land Exchanges	112,859		
TOTALS:	$ 21,563,088	$ 4,719,311	$ 26,282,399 **

*For land compensation, the university will exchange its previously withdrawn and encumbered lands, for which compensation is due, for unencumbered state lands of equal value placed into replacement pools for this purpose by the Department of Natural Resources.

The university relinquishes:	The university gains:
Category	Replacement Pool Parcels
Leased Lands	Replacement Pool #1 - All parcels
Conveyances and Incomplete Land Exchanges	Replacement Pool #2 - (previously approved by BOR on 9/30/82) Parcel as needed to equal the fair market value of lands relinquished to the state
Legislative Withdrawals	
Municipal Selections (only if agreement is reached with the Municipality)	

** This number may change slightly during the process of concluding negotiations. However, regardless of the total amount of compensation, the categories to be taken in cash and in land will be as specified above.

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

LABOR AND COMMERCE COMMITTEE, CHAIRMAN
RESOURCES COMMITTEE
JUDICIARY COMMITTEE
FISHERIES SUB-COMMITTEE

P.O. BOX 143
SITKA, ALASKA 99835

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4916

M E M O R A N D U M

TO: Senator Bill Ray, Chair
Senate Judiciary Committee

FROM: Senator Dick Eliason

DATE: March 10, 1983

RE: CSSB 41(Res) --- "An Act relating to the transfer of the ownership and management of University of Alaska trust land..."

As requested, I reviewed the above-referenced bill and I am now reporting my findings to you.

Under two congressional Acts, in 1915 and 1929, the University of Alaska was granted 110,000 acres of land which were to be held in trust and were reserved for the exclusive use and benefit of the University for the support of higher education in Alaska. Upon statehood, the State of Alaska accepted trustee responsibility for these "grant" lands.

It is the University's contention that the land was improperly managed, disposed of and leased by the State. The University of Alaska initiated two law suits which asked for the return of the land and for monetary compensation. In 1981, the Alaska Supreme Court rendered "that University grant lands are for the exclusive use and benefit of the University, and that such lands cannot be taken without compensation."

Following the Supreme Court's ruling, the University entered into negotiations with the State Departments of Natural Resources, Administration, and Revenue. After 13 months of negotiation, a settlement agreement was reached. CSSB 41 ratifies this document.

Senator Kerttula has indicated his interest in proposing an amendment which would state that 33% of all income generated from the trust lands shall be apportioned to renewable resource instruction and related facilities. A proposed draft is attached.

At my request, Esther Wunnicke, Commissioner of the Department of Natural Resources, met with the Attorney General's office to review the technical language in CSSB 41. All parties involved are satisfied with the language.

CSSB 41 will resolve the question of ownership and management of these "grant" lands. I recommend that this matter be taken care of as expeditiously as possible.

A M E N D M E N T

Offered in the SENATE BY THE JUDICIARY COMMITTEE

TO: CSSB 41(Res)

Page 2, line 2?:

Delete all ma. rial and insert the following:

"university;

(9) report each year within the first 10 days of the convening of a regular session of the legislature on the expenditures made during the preceding fiscal year from the funds of the University of Alaska that are derived from sales, leases, exchanges, or transfers of the land of the university or of interests in land of the university that were conveyed to the University of Alaska in settlement of the claim of the University of Alaska to land granted to the state in accordance with the Act of March 4, 1915 (38 Stat. 1214), as amended, and in accordance with the Act of January 21, 1929 (45 Stat. 1091), as amended."

SENATE JUDICIARY COMMITTEE

LETTER OF INTENT

CSSB 41 (Resources) am

It is our intent that the University of Alaska Board of Regents utilize at least 40% of its Land Grant Trust Fund income for the University Land-grant mission of capital projects and teaching support for agricultural, forestry, fishing and mineral development and education.

Furthermore, as indicated by our amendment to the Resources Committee substitute for Senate Bill 41, it is our intent to require annual reports from the Board of Regents, to be submitted within 10 days of the start of each legislative session, setting forth details as to the Board's past, present and future compliance with the above-stated legislative intent.

Bill Ray

Senator Bill Ray - Chairman

Joe Josephson

Senator Joe Josephson - Vice Chairman

Richard Eliason

Senator Richard Eliason

Fritz Pettyjohn

Senator Fritz Pettyjohn

Robert Ziegler

Senator Robert R. Ziegler

CHAPTER = 14.40
SECTION = 14.40.390
TITLE = 14

HEADINGS TITLE 14.
Education.
CHAPTER 40.
The University of Alaska and the Community Colleges.
ARTICLE 3.
Property and Funds of the University of Alaska.

CITATION Sec. 14.40.390.

CATCH LINE

FEDERAL LAND GRANTS TO AGRICULTURAL COLLEGE AND SCHOOL OF MINES REACCEPTED FOR UNIVERSITY.

TEXT The state assents to the provisions and accepts the benefits of the grants of land authorized by the Act of Congress of January 21, 1929, 45 Stat. 1091 1093, as amended by the Act of Congress of September 19, 1966, 80 Stat. 811, for the Agricultural College and School of Mines as integral parts of the University of Alaska, and the University of Alaska is designated the beneficiary under that Act.

HISTORY (Sec. 37-10-12 ACLA 1949; am sec. 1 ch 63 SLA 1967)

SB 41

AS14.40.170 DOCUMENT= 1 OF 1 PAGE = 1 OF 2
CHAPTER = 14.40
SECTION = 14.40.170
TITLE = 14
HEADINGS TITLE 14.
Education.
CHAPTER 40.
The University of Alaska and the Community Colleges.
ARTICLE 2.
Board of Regents and President of the University of Alaska.
CITATION Sec. 14.40.170.
CATCH LINE
DUTIES OF BOARD OF REGENTS.
TEXT (a) The Board of Regents shall
(1) appoint the president of the university by a majority vote of the whole board, and the president may attend meetings of the board;
(2) fix the compensation of the president of the university, all heads of departments, professors, teachers, instructors and other officers;
(3) confer such appropriate degrees as it may determine and prescribe;
(4) have the care, control and management of all the real and personal property of the university;
(5) keep a correct and easily understood record of the minutes of every meeting and all acts done by it in pursuance of its duties;
(6) under procedures to be established by the commissioner of administration, and in accordance with existing procedures for other state agencies, have the care, control, and management of all money of the university and keep a complete record of all money received and disbursed.
(b) The Board of Regents may
(1) adopt reasonable rules, orders and plans with reasonable penalties for the good government of the university and for the regulation of the Board of Regents;
(2) determine and regulate the course of instruction in the university with the advice of the president.
HISTORY (Sec. 37-10-6 ACLA 1949; am secs. 1, 2 ch 46 SLA 1977)

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

POUCH M
JUNEAU, ALASKA 99811
PHONE:

(907) 465-2400

February 10, 1983

The Honorable Richard I. Eliason
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Eliason:

As you requested, we have reviewed the Resources Committee Substitute for Senate Bill 41 in consultation with the Attorney General's Office, and are satisfied with the language of the CS.

On January 31, we testified in support of the bill before a joint meeting of the House and Senate Resources Committees. The Agreement which SB 41 ratifies was signed by the Commissioner of Revenue, Administration and Natural Resources in March of 1982. This department has consistently supported the Agreement as an equitable resolution of the questions raised by the State's prior management of University grant lands, and of the 1981 Alaska Supreme Court decision on that subject.

Please let me know if you have any comments or questions.

Sincerely,

Esther C. Wunnicke

Esther C. Wunnicke
Commissioner

'0-J9 LH

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 28, 1983

SUBJECT: Amendment for SB 41

TO: Senator Jalmar M. Kerttula

FROM: Richard A. Bradley
Legislative Counsel

Your letter to Senator Eliason stated that we are drafting an amendment to SB 41; because your request did not specify a particular version of SB 41 and Anna did not suggest a particular bill, it seems that the best answer is simply to provide you with suggested language and then at a later time we may insert it into a bill.

I may say that the subject of the use of university land is slightly outside the narrow subject of SB 41 and CSSB 41 (Resources), which is the ". . . transfer of the ownership and management of University of Alaska trust land . . . ." If you wish to be prudent on this subject, I suggest "An Act relating to University of Alaska trust land; and providing for an effective date." in place of the existing language.

As far as the particular substantive language to achieve your goal, I suggest:

> * Sec. . AS 14.40 is amended by adding a new section to read:
>
> Sec. 14.40.445. INCOME FROM TRUST LAND. No less than one-third of the income received by the Board of Regents from the management or disposal of land conveyed to the Board of Regents under AS 14.40.-170(a)(4)(B) may be apportioned to the agricultural experiment station and to agricultural, fishery, and forestry instruction enrichment and to related research programs.

If I may be of further assistance, please advise.

RAB:ljb
9/022

Alaska State Legislature

Senate

Office of the President

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

MEMORANDUM

TO: Senator Richard Eliason

FROM: Senator Jay Kerttula
Senate President

RE: amendment to SB 41, concerning the University of Alaska Trust Land Settlment Agreement.

In the spirit of the 1862 federal legislation creating land grant institutions, I feel the University of Alaska should allocate a percentage of its income from the land trust to renewable resource instruction and their related facilities.

Legal Services is drafting an amendment to SB 41 stating that 33% of all income generated from these trust lands shall be apportioned to the Experimental Farm and Agriculture, Fisheries, and Forestry instruction enrichment and their related research programs.

cc: Bill Berrier, Legal Services

JK:ak:jdk

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

M E M O R A N D U M March 4, 1983

SUBJECT: Dedicated funds and SB 41

TO: Senator Bill Ray

FROM: Richard A. Bradley
Legislative Counsel

You have suggested that the amendment to SB 41 contained in my memorandum of February 28, 1983, to Senator Kerttula in fact constitutes the establishment of a dedicated fund. I regret to say that I agree.

Until State v. Alex, 646 P.2d 203 (Alaska 1982), it would not have constituted a dedicated fund because the source of the funds establishing the dedicated fund were not "the proceeds of a state tax or license" (Article IX, section 7, Alaska Constitution). At that time, section 7 was read strictly and if the source of the funds was not "a state tax or license", no violation was found.

Since that decision, it has been clear that the purpose of section 7 is to "prohibit not only the dedication of taxes, but also [the dedication of] such revenue as the proceeds from the sale of state lands". Alex, supra, at 210.

Accordingly, the amendment drafted is unconstitutional.

If I may be of further assistance, please advise.

RAB:ljb

cc: Senator Jalmar M. Kerttula

1/001

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

LABOR AND COMMERCE COMMITTEE, CHAIRMAN
RESOURCES COMMITTEE
JUDICIARY COMMITTEE
FISHERIES SUB-COMMITTEE

P.O. BOX 142
SITKA, ALASKA 99835

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4916

MEMORANDUM

TO: Senator Bill Ray, Chair
Senate Judiciary Committee

FROM: Senator Dick Eliason

DATE: March 10, 1983

RE: CSSB 41(Res) --- "An Act relating to the transfer of the ownership and management of University of Alaska trust land..."

As requested, I reviewed the above-referenced bill and I am now reporting my findings to you.

Under two congressional Acts, in 1915 and 1929, the University of Alaska was granted 110,000 acres of land which were to be held in trust and were reserved for the exclusive use and benefit of the University for the support of higher education in Alaska. Upon statehood, the State of Alaska accepted trustee responsibility for these "grant" lands.

It is the University's contention that the land was improperly managed, disposed of and leased by the State. The University of Alaska initiated two law suits which asked for the return of the land and for monetary compensation. In 1981, the Alaska Supreme Court rendered "that University grant lands are for the exclusive use and benefit of the University, and that such lands cannot be taken without compensation."

Following the Supreme Court's ruling, the University entered into negotiations with the State Departments of Natural Resources, Administration, and Revenue. After 13 months of negotiation, a settlement agreement was reached. CSSB 41 ratifies this document.

Senator Kerttula has indicated his interest in proposing an amendment which would state that 33% of all income generated from the trust lands 'shall be apportioned to renewable resource instruction and related facilities. A proposed draft is attached.

At my request, Esther Wunnicke, Commissioner of the Department of Natural Resources, met with the Attorney General's office to review the technical language in CSSB 41. All parties involved are satisfied with the language.

CSSB 41 will resolve the question of ownership and management of these "grant" lands. I recommend that this matter be taken care of as expeditiously as possible.

Previously, this fund was referred to as the University of Alaska Permanent Fund. Several reports on the fund have been presented to the Board of Regents, and a briefing paper on the fund has been distributed.

During a discussion of the fund with the Board of Regents Finance and Business Management Committee on December 2, 1982 in Anchorage, regents pointed out that additional Board of Regents policy was needed to govern how annual earnings from the fund were to be used. Legislators have also asked related questions in connection with the land settlement legislation they are now considering.

Existing Regents' policy is as follows:

Permanent Fund 05.07.01

Funds available as provided by Alaska Statutes 14.40.400 are restricted and may not be expended for any purpose other than for land management activities without the approval of the Board of Regents.

Approval to rewrite Regents' policy 05.07.01 as follows is requested:

FOR BOARD OF REGENTS TO APPROVE 4/15/83

Land Grant Trust Fund 05.07.01

Funds available as provided by Alaska Statutes 14.40.400 are restricted and may not be expended for any purpose other than for land management activities without the approval of the Board of Regents. Such expenditures may include, with specific Board of Regents approval in each case, required funding of an emergency nature, the provision of a margin of support over and above what would otherwise be possible through underlying funding provided by the State to enhance the quality of the University's fisheries, agricutural, forestry, minerals and other academic programs, and money for faculty development, to improve the quality of the faculty and to keep faculty members up-to-date.

This item has been reviewed by Land Management Director, Merry Tuten, Vice President Carter and President Barton.

The President recommends that:

MOTION

"The Finance and Business Management Committee recommends that the change in policy as shown above be approved by the Board of Regents. This motion is effective March 11, 1983."

POSSIBLE ADDITION -- Part of the annual investment earnings each year will not be spent but will be used to increase investment capital, to increase earnings in subsequent years. The annual income so retained for investment each fiscal year will be an amount equal to the increase in the federal government's Consumer Price Index for the previous calendar year.

Alaska State Legislature

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3834
(907) 465-3835

Senate

Committee on Resources

M E M O R A N D U M

TO: Senate Judiciary Committee Members

FROM: Senator Bettye Fahrenkamp

RE: Committee consideration of SB 41

DATE: March 21, 1983

As prime sponsor of SB 40 and 41, legislation to transfer title, management and control of university lands to the University and making appropriations for prior disposal or use of these lands, I am concerned that we not change the original intent of their permanent fund.

SB 40 would appropriate $4.2 million to the University's permanent fund. Prior to 1935 the income from this permanent fund was held in trust by the Department of Revenue and be expended exclusively for the agricultural school at the school of mines. In 1935 the Territorial Legislature passed a law giving the University's Board of Regents the exclusive right to determine how the income from the permanent fund would be spent while maintaining the fund itself in trust.

Any effort to take this prerogative from the Board of Regents is counter to the original federal Trust Law which was the basis for constitutionally dedicating this fund. It has never been intended that the Legislature should make these decisions and currently is not the practice.

It is my concern that should the Committee decide to act favorably on SB 40 and 41 that they would maintain the integrity of the existing permanent fund by allowing the University to manage and control their own lands and the interest proceeds from the aggressive and productive management of these lands.

STATE OF ALASKA
THE LEGISLATURE

to Sen. Ellis

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M March 14, 1983

SUBJECT: SB 41 amendments

TO: Senator Jalmar M. Kerttula

FROM: Richard A. Bradley
Legislative Counsel

After our conversation Tuesday, I reviewed the laws relating to the University and its funding. The context of your question derives from your earlier request that the University be required to apportion no less than one-third of the income received by the University from the so-called trust land to "the agricultural experiment station and to agricultural, fishery, and forestry instruction enrichment and to related research programs."

The only problem with that approach was that it violated the prohibition against dedicated funds. Article IX, section 7, Alaska Constitution.

After discussing the matter with you in the latter part of last week, I agreed to draft bill language, presumably for inclusion into SB 41, that would limit the University to the expenditure of the income from the trust lands only under an appropriation made by law.

I may say that this amendment should be considered unnecessary. The income from assets of the state, whether they go to the "general fund" or some other fund, should be understood to be covered under Article IX, section 13, which provides that: "No money shall be withdrawn from the treasury except in accordance with appropriations made by law". Since the University is a part of the state government, the requirement clearly applies to them.

* Sec. . AS 14.40.290(a) is amended to read:

(a) The University of Alaska shall hold all property acquired by it. The Department of Administration,

upon requisitions by the Board of Regents signed by its president and secretary if consistent with an appropriation made to the University of Alaska by the legislature, shall pay to the treasurer of the Board of Regents all federal land grant college funds coming into the possession of the Department of Administration and subject to requisition by the Board of Regents and shall disburse federal funds in aid of land grant colleges in accordance with the federal statute providing for disbursement and with an appropriation made to the University of Alaska by law.

* Sec. . . AS 14.40.400(c) is amended to read:

(c) The income from the trust fund shall be used exclusively for the Agricultural College and School of Mines under appropriations made by law.

If I may assist further, please advise.

RAB:ljb
1/040

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

LABOR AND COMMERCE COMMITTEE, CHAIRMAN
RESOURCES COMMITTEE
JUDICIARY COMMITTEE
FISHERIES SUB-COMMITTEE

P.O. BOX 143
SITKA, ALASKA 99835

POUCH V
JUNEAU, ALASKA 99811
(907) 465-4916

MEMORANDUM

TO: Senator Bill Ray, Chair
Senate Judiciary Committee

FROM: Senator Dick Eliason

DATE: March 10, 1983

RE: CSSB 41(Res) --- "An Act relating to the transfer of the ownership and management of University of Alaska trust land..."

As requested, I reviewed the above-referenced bill and I am now reporting my findings to you.

Under two congressional Acts, in 1915 and 1929, the University of Alaska was granted 110,000 acres of land which were to be held in trust and were reserved for the exclusive use and benefit of the University for the support of higher education in Alaska. Upon statehood, the State of Alaska accepted trustee responsibility for these "grant" lands.

It is the University's contention that the land was improperly managed, disposed of and leased by the State. The University of Alaska initiated two law suits which asked for the return of the land and for monetary compensation. In 1981, the Alaska Supreme Court rendered "that University grant lands are for the exclusive use and benefit of the University, and that such lands cannot be taken without compensation."

Following the Supreme Court's ruling, the University entered into negotiations with the State Departments of Natural Resources, Administration, and Revenue. After 13 months of negotiation, a settlement agreement was reached. CSSB 41 ratifies this document.

Senator Kerttula has indicated his interest in proposing an amendment which would state that 33% of all income generated from the trust lands shall be apportioned to renewable resource instruction and related facilities. A proposed draft is attached.

At my request, Esther Wunnicke, Commissioner of the Department of Natural Resources, met with the Attorney General's office to review the technical language in CSSB 41. All parties involved are satisfied with the language.

CSSB 41 will resolve the question of ownership and management of these "grant" lands. I recommend that this matter be taken care of as expeditiously as possible.

Sherman Carter
Executive Vice President
474-7448

University of Alaska
Fairbanks, Alaska 99701

March 15, 1983

TO: President Barton and Members of the Board of Regents

FROM: Sherman Carter

SUBJECT: Regents' Policy Governing Expenditure of Income From Land Grant Trust Fund

An annotated extract from agenda materials for the Regents' Finance and Business Management Committee meeting which was held on 11 March is attached. The committee voted to add the word "minerals" to the proposed policy statement as shown on the extract.

The committee also decided that the Board of Regents should consider, during its meeting on 14-15 April, adopting a statement of policy which would cause some investment earnings each year to be reinvested, rather than spent, in order to "inflation-proof" the fund. A possible addition to the proposed regents' policy to accomplish this purpose is shown on the bottom of the page attached.

The financial history of the fund is shown on page 3 of the attached yellow booklet. I have included in that booklet, on the page opposite to page 3, numbers to show how principal and income would have been changed over the years if 6 percent of the investment income each year had been retained for investment. The actual consumer price index, of course, differed from year to year; it was 3.9 percent in 1982 and 8.9 percent in 1981. But, for the decision which the regents now wish to make, the 6 percent number used, rather than actual annual changes in the consumer price index for each of the preceding 20 years, may be adequate. Or, the wholesale price index or another index of inflation might be used.

Here are related considerations:

1. Issue #2 on page 6 of the yellow booklet discusses the matter of the need to "inflation-proof" the principal of this fund.

2. The proposed policy statement without the possible addition allows the Board of Regents maximum flexibility. In some years, not all earnings have been spent;

the regents have elected to retain certain income for investment and use in the future. During the current fiscal year, all investment earnings will be needed and used for land management activities, for the salary and operating costs for an assistant legal counsel who has worked on land matters, and for the rent of office space.

3. The legislature, in passing out the land bill, seemingly may include restrictions on use of the annual income. As of this writing, my impression is that Senator Kerttula favors including legislation which would cause at least one-third of the earnings to be used for the university's agricultural experiment station, fisheries, forestry and other programs dealing with renewable resources.

4. If the aforementioned-restriction on the use of the fund's income were the only one, this would in itself not be too much of an imposition for the university to live with, in my personal view. But in some years, as during the current fiscal year, the regents may determine that there are even more critical things which need to be done with these investment earnings.

5. In all work regarding the use of income from the land-grant trust fund, the university administration has worked (a) to maximize the regents' authority over, and to minimize regents' restrictions on, the use of these investment earnings, and (b) to resist the use of this income to cause a simple, direct offset and reduction to be made in general fund support for the university.

Unless I am instructed to do differently, I shall recommend that President Barton submit to the Board of Regents, for its April meeting, the amended policy statement shown on the page immediately below, for consideration, adoption or change. If regents wish to receive any further information or would like to have other action taken in any of these regards, I request that they please let me know.

SFC/pe

Attachments

7. University of Alaska Land Grant Trust Fund

Previously, this fund was referred to as the University of Alaska Permanent Fund. Several reports on the fund have been presented to the Board of Regents, and a briefing paper on the fund has been distributed.

During a discussion of the fund with the Board of Regents Finance and Business Management Committee on December 2, 1982 in Anchorage, regents pointed out that additional Board of Regents policy was needed to govern how annual earnings from the fund were to be used. Legislators have also asked related questions in connection with the land settlement legislation they are now considering.

Existing Regents' policy is as follows:

Permanent Fund 05.07.01

Funds available as provided by Alaska Statutes 14.40.400 are restricted and may not be expended for any purpose other than for land management activities without the approval of the Board of Regents.

Approval to rewrite Regents' policy 05.07.01 as follows is requested:

Land Grant Trust Fund 05.07.01

FOR BOARD OF REGENTS TO APPROVE 4/15/83

Funds available as provided by Alaska Statutes 14.40.400 are restricted and may not be expended for any purpose other than for land management activities without the approval of the Board of Regents. Such expenditures may include, with specific Board of Regents approval in each case, required funding of an emergency nature, the provision of a margin of support over and above what would otherwise be possible through underlying funding provided by the State to enhance the quality of the University's fisheries, agricutural, forestry, minerals and other academic programs, and money for faculty development, to improve the quality of the faculty and to keep faculty members up-to-date.

This item has been reviewed by Land Management Director, Merry Tuten, Vice President Carter and President Barton.

The President recommends that:

MOTION

"The Finance and Business Management Committee recommends that the change in policy as shown above be approved by the Board of Regents. This motion is effective March 11, 1983."

POSSIBLE ADDITION -- Part of the annual investment earnings each year will not be spent but will be used to increase investment capital, to increase earnings in subsequent years. The annual income so retained for investment each fiscal year will be an amount equal to the increase in the federal government's Consumer Price Index for the previous calendar year.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 28, 1983

SUBJECT: Amendment for SB 41

TO: Senator Jalmar M. Kerttula

FROM: Richard A. Bradley
Legislative Counsel

Your letter to Senator Eliason stated that we are drafting an amendment to SB 41; because your request did not specify a particular version of SB 41 and Anna did not suggest a particular bill, it seems that the best answer is simply to provide you with suggested language and then at a later time we may insert it into a bill.

I may say that the subject of the use of university land is slightly outside the narrow subject of SB 41 and CSSB 41 (Resources), which is the ". . . transfer of the ownership and management of University of Alaska trust land . . . ." If you wish to be prudent on this subject, I suggest "An Act relating to University of Alaska trust land; and providing for an effective date." in place of the existing language.

As far as the particular substantive language to achieve your goal, I suggest:

> * Sec. . AS 14.40 is amended by adding a new section to read:
>
> Sec. 14.40.445. INCOME FROM TRUST LAND. No less than one-third of the income received by the Board of Regents from the management or disposal of land conveyed to the Board of Regents under AS 14.40.-170(a)(4)(B) may be apportioned to the agricultural experiment station and to agricultural, fishery, and forestry instruction enrichment and to related research programs.

If I may be of further assistance, please advise.

RAB:ljb
9/022

Alaska State Legislature

Senate

Office of the President

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

MEMORANDUM

TO: Senator Richard Eliason

FROM: Senator Jay Kerttula
Senate President

RE: amendment to SB 41, concerning the University of Alaska Trust Land Settlment Agreement.

In the spirit of the 1862 federal legislation creating land grant institutions, I feel the University of Alaska should allocate a percentage of its income from the land trust to renewable resource instruction and their related facilities.

Legal Services is drafting an amendment to SB 41 stating that 33% of all income generated from these trust lands shall be apportioned to the Experimental Farm and Agriculture, Fisheries, and Forestry instruction enrichment and their related research programs.

cc: Bill Berrier, Legal Services

JK:ak:jdk

STATE OF ALASKA

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

POUCH M
JUNEAU, ALASKA 99811
PHONE:

(907) 465-2400

February 10, 1983

The Honorable Richard I. Eliason
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Eliason:

As you requested, we have reviewed the Resources Committee Substitute for Senate Bill 41 in consultation with the Attorney General's Office, and are satisfied with the language of the CS.

On January 31, we testified in support of the bill before a joint meeting of the House and Senate Resources Committees. The Agreement which SB 41 ratifies was signed by the Commissioner of Revenue, Administration and Natural Resources in March of 1982. This department has consistently supported the Agreement as an equitable resolution of the questions raised by the State's prior management of University grant lands, and of the 1981 Alaska Supreme Court decision on that subject.

Please let me know if you have any comments or questions.

Sincerely,

Esther C. Wunnicke

Esther C. Wunnicke
Commissioner

:JGLH

Appropriations (special and transfers-- U of A land settlement)

SENATE BILL NO. 40, by Senators Fahrenkamp, Bennett, Moss and Sturgulewski. Appropriates $4.2 million to the Dept. of Revenue for deposit in the fund established under AS 14.40-400. That account is a trust fund for money from the sale or lease of lands granted to the University by the federal government. The purpose of the payment is the settlement of certain claims of the University of Alaska to certain state land under paragraph 10(a) of the Settlement Agreement between the state and the Univ. of Alaska Board of Regents that was submitted to the Legislature on March 26, 1982. (See SB 41, below.)

Provides for the transfer of up to $148,000 from the University's FY 83 operating budget to the Dept. of Law for expenses related to the implementation of the Settlement Agreement.

Effective on the effective date of SB 41, which ratifies the Settlement Agreement.

Introduced January 18 and referred to Resources, Health, Education & Social Services and Finance.

U of A Land Settlement

SENATE BILL NO. 41, by Senators Fahrenkamp, Bennett, Moss, Sturgulewski and Ferguson. Provides for the settlement of certain claims and litigation and transfers ownership and management of certain land from the Dept. of Natural Resources to the Board of Regents of the University of Alaska.

Ratifies the terms of the document entitled "Settlement Agreement Between the Department of Natural Resources, the Department of Revenue, and the Department of Administration and the University of Alaska and the Board of Regents, as trustees for the University of Alaska," which was submitted to the Alaska Legislature on March 26, 1982.

Sec. 4 amends the duties of the Board of Regents in AS 14.40.170(a)(4) to officially grant the Regents responsibility for the care, control and management of the lands conveyed to the University by the settlement.

Sec. 5 adds that the Regents must also: "(7) adopt reasonable rules for the management of the land of the university;" and "(8) provide public notice of sales, leases, and transfers of the land of the university or of interests in land of the university."

Sec. 6 adds to AS 14.40: "14.40.365. LAND OF THE UNIVERSITY OF ALASKA NOT PUBLIC LAND. Notwithstanding any other provision of the law, the land owned by the University of Alaska is not and may not be treated as public land of the state."

Provides for an immediate effective date.

Introduced January 18 and referred to Resources, Health, Education & Social Services and Finance. (See HB 28, similar and HB 46, identical.)

SB 16 (cont'd)

City School District; new secondary programs; enrollment increases; and the impact of BIA school transfers. However, the BIA school transfer cost can properly be funded through use of the established Federal Budget Impact Fund. If that source were used to meet the costs of the BIA school transfers, the appropriation amount in SB 16 could be reduced by $7,901,600.

Appropriation (assistance to municipalities)

SENATE BILL NO. 17, (see pages 5;87). On January 31 the Community & Regional Affairs Committee submitted an amendment to SB 17. It would appropriate the money to the Municipal Assistance Fund for distribution to municipalities for the fiscal year ending June 30, 1983 (original bill reads "1984"). The bill is now in Finance.

Appropriations (spec. & transfers/U of A land settlement)

SENATE BILL NO. 40, (see page 13). Reported back to the Senate on February 1 by Resources with a majority of the committee recommending it do pass. Senators Mulcahy and Paul Fischer signed "no recommendation." To Health, Education & Social Services.

U of A Land Settlement

SENATE BILL NO. 41, (see page 13). On February 1 the Health, Education & Social Services Committee referral was waived.

Reported back to the Senate on February 4 by Resources with the committee recommending it be replaced with Resource Committee Substitute and that it do pass. The bill was given an additional referral to the Judiciary Committee. To Judiciary, then Finance.

The Resources CS rewords new duties of the Board of Regents added by bill (Sec. 5). Board would be required to "(7) adopt reasonable rules for the prudent trust management and the long-term financial benefit to the university of the land of the university" and "(8) provide public notice of sales, leases, exchanges, and transfers of the land of the university or of interest in land of the university." (Underlined words added by Judiciary CS.)

Resources

Expands new section added by Sec. 6 of bill regarding control of U of A lands. As amended by the Judiciary CS, the new section would read: "LAND OF THE UNIVERSITY OF ALASKA NOT PUBLIC DOMAIN LAND. Notwithstanding any other provision of law, university-grant land, state replacement land that becomes university-grant land on conveyance to the university, and any other [THE] land owned by the University of Alaska is not and may not be treated as state public domain land [PUBLIC LAND OF THE STATE]. Title or interest to land described in this section may not be acquired by adverse possession, prescription, or in any other manner except by conveyance from the university. The land is subject to condemnation for public purpose in accordance with law." (Underlined material added, bracketed material deleted from original bill by ~~Judiciary~~ CS.)

Resources

Adds new Sec. 8 to bill stating that nothing in the settlement offered by the bill precludes or prejudices negotiations between plaintiffs and the defendants in a pending case, Verne T. Weiss v.

SB 41 (cont'd)

State of Alaska.

Adds new Sec. 9 which directs the Board of Regents to submit a report to the Legislature within 10 days of the convening of the 1985 session (first session of the 14th Legislature) outlining the goals, objectives, and plans of the university for the management of the trust lands.

Const. Convention Question (info. in election pamphlet)

SENATE BILL NO. 54, (see page 19). Reported back to the Senate on February 2 by State Affairs with the committee recommending it do pass. To Rules.

Office of Budget & Management (creating)

EXECUTIVE ORDER NO. 53, (see page 70). On February 1 the State Affairs Committee found EO 53 to be satisfactory and recommended that it be allowed to become law. The Health, Education & Social Services referral was waived and the bill was sent to Finance.

BILLS PASSED (Senate)

Joint Commit. on Legis. Reform (establishing)

CS FOR SENATE CONCURRENT RESOLUTION NO. 2 (RLS), (see page 87). Reported back to the Senate on February 3 by Rules with a majority of the committee recommending it be replaced with Rules Committee Substitute and that it be placed on the Feb. 3 calendar.

The Rules CS changes the termination date of the committee to February 1, 1984 or upon submission of final report, whichever is first. (Under original, the committee would have terminated on adjournment of the 1983 session, or upon submission of final report, whichever came first.)

February 3 the Rules CS was adopted 11-8-1. Nays: Fischer, Gilman, Halford, Kelly, Pettyjohn, Rodey, Sturgulewski, Ziegler. Absent: Moss.

An amendment by Halford (Am. No. 1) to include at least one member of the minority on the committee was defeated on voice vote. CSSCR 2(Rls) then passed the Senate, 11-8-1 (same yeas and nays). Senator Gilman gave notice of reconsideration of his vote.

February 4, on reconsideration, the Senate failed to rescind its action in failing to adopt Amendment No. 1, 8-8-3-1. Passed on reconsideration, 16-0-3-1. Excused: Bennett, Fahrenkamp, Sackett. Absent: Moss.

order question, it is inappropriate to address the excessiveness issue at this point. We do not think that further briefing on the excessiveness issue would be of any significant value, although the parties may choose to address the issue further.

As to appellant Smith, the judgment of the superior court is Affirmed. As to appellant Mossberg, the judgment of conviction is Affirmed. Decision of the sentence appeal is postponed pending further briefing and oral argument before this court.

BURKE and BOOCHEVER, JJ., not participating.

STATE of Alaska, Appellant,

v.

UNIVERSITY OF ALASKA, Appellee.

No. 4579.

Supreme Court of Alaska.

Feb. 27, 1981.

State brought action for injunctive relief, damages and declaratory judgment that developers were trespassing on land which was within state park and which had been granted to State by federal government for support of University of Alaska. University intervened and sought declaratory judgment whether such land could be used for purposes other than support of University. The Superior Court, Third Judicial District, Anchorage, James K. Singleton, J., determined that inclusion of university lands in state park constituted a breach of federal trust, invalidated portion of statute including such land within park, and awarded attorney fees to University, and State appealed. The Supreme Court, Connor, J., held that: (1) such land, which had been granted for support of University, could not be used for other public purposes; (2) inclusion of the land within state park violated provision of federal grant under which land was to be held in trust for University; (3) state constitutional provision did not preclude legislature from disposing of university land without obtaining University's approval; (4) proper remedy would not be invalidation of statute, but, rather, the remedy of inverse condemnation and either awarding monetary damages or exchanging lands having an equal fair market value; (5) attorney fees were not covered by rule providing that failure of party to serve cost bill and notice as required by such rule would be construed as a waiver of his right to recover costs; (6) permitting University to file request for attorney fees 13 days after judgment was not abuse of discretion; (7) award of $15,000 in attorney fees was excessive; and (8) trial court was not precluded from awarding attorney fees, though both parties were state entities.

Affirmed in part, reversed in part, and remanded.

1. Public Lands ⇐51

Lands, which federal government granted to territory of Alaska for support of University of Alaska, could not be used for other public purposes, though Congress repealed statutory provision to effect that lands granted to the territory were to be held by the territory in trust. AS 14.40.390, 14.40.400, 38.05.005, 38.05.065, 38.05.066, 41.-20.210; 48 U.S.C. (1964 Ed.) § 354a(a, b–f); Const. Art. 12, § 13.

2. Public Lands ⇐51

Inclusion of land within state park, without compensation to University of Alaska, violated provision of federal grant under which land was to be held in trust for University. AS 41.20.210; 48 U.S.C. (1964 Ed.) § 354a(b–f).

3. Public Lands ⇐51

Principle that trustee has a duty to administer private trust solely in interest of beneficiaries is applicable to federal land granted to state for school purposes.

4. Colleges and Universities ⇐6(5)

Statute, which provided that no disposal of university lands could be made without approval of Board of Regents of University of Alaska, would be applicable only to disposals of land by Commissioner of Natural Resources, and did not apply to disposal of university lands by the legislature. AS 38.05.030(a).

5. Colleges and Universities ⇐6(5)

State constitutional provision, which stated that University of Alaska had title to all real and personal property set aside for or conveyed to it and that its property was to be administered and disposed of according to law, did not preclude legislature from disposing of university land without obtaining University's approval. Const. Art. 7, § 2; Art. 8, §§ 2, 7; Art. 12, § 11; Laws 1978, c. 182, § 3(c); AS 14.40.170(4), 38.05.-030(a), 41.20.210.

6. Colleges and Universities ⇐2

Statute creating state park, in which University of Alaska's land was included, did not impliedly repeal statute providing that no disposal of university lands could be made without approval of University's Board of Regents. AS 14.40.170(4), 38.05.-030(a), 41.20.210.

7. Declaratory Judgment ⇐204

Issue whether, if board of regents wishes to dispose of university land granted to state under certain act, the Commissioner of Natural Resources had to carry out the disposal was not ripe for review where the requested disposal was not made by Department of Natural Resources because the land had been included in state park and there was no reason to assume that there was a general problem or that there was a likelihood of a recurring controversy concerning such issue if the University of Alaska was not compensated. 48 U.S.C. (1964 Ed.) § 354a.

8. Eminent Domain ⇐266

Proper remedy, in regard to breach of trust arising when statute creating state park included University of Alaska's land within the park without compensation, would not be the invalidation of the statute, but, rather, the remedy of inverse condemnation and either awarding monetary damages or exchanging lands having an equal fair market value. 48 U.S.C. (1964 Ed.) § 354a; AS 41.20.210, 41.20.210(11).

9. Costs ⇐203

Though attorney fees were costs, such fees were not covered by rule providing that party entitled to costs was to serve on each of the other parties to the action or proceeding a cost bill, together with notice when application was to be made to the clerk to tax costs, that cost bill was to distinctly set forth each item claimed and that failure of a party to serve a cost bill on notice as required by the rule was to be construed as a waiver of his right to recover costs. Rules of Civil Procedure, Rule 79(a).

10. Costs ⇐199

It is within discretion of trial court to impose a time limit for filing for attorney fees.

11. Costs ⇐199

In action involving issue whether lands granted by federal government for support of University of Alaska could by used for other public purposes, permitting University to file its request for attorney fees 13 days after the judgment was not abuse of discretion. Rules of Civil Procedure, Rule 82.

12. Costs ⇐172

In action which related to issue whether lands originally granted to state by federal government for support of University of Alaska could be used for other public purposes and in which University requested an award of attorney fees in the amount of $16,196, award of $15,000 in attorney fees to University was excessive, in light of fact that there was no evidence that State's claim was frivolous, vexatious or devoid of good faith. Rules of Civil Procedure, Rule 82.

13. Colleges and Universities ⇐1

University of Alaska enjoys, in some limited respects, a status which is coequal rather than subordinate to that of the exec-

utive or legislative arms of government. AS 14.40.040; Const. Art. 7, §§ 2, 3.

14. States ⇨215

In action involving issue whether lands originally granted to State by federal government for support of University of Alaska could be used for other public purposes, trial court was not precluded from awarding University attorney fees against State, though both parties were state entities and it was asserted that the fees would ultimately come from the same fund. AS 14.40.040; Const. Art. 7, §§ 2, 3.

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Brian J. Farney and Mary Louise Molenda, Abbott, Lynch & Farney, Anchorage, for appellee.

OPINION

Before RABINOWITZ, C. J., CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

CONNOR, Justice.

The principal issue in this case is whether lands that were originally granted to the state by the federal government for the support of the University of Alaska may now be used for other public purposes. The state contends that university lands can be included in Chugach State Park without paying compensation. The superior court held that the inclusion of the university lands in the state park constituted a breach of trust and invalidated the portion of AS 41.20.210 which included the university land in the park. It awarded substantially full attorney's fees to the university.

We conclude that the trial court was correct in holding that it was a breach of a federal trust to include university land in the park without compensation, but we conclude that invalidating the statute was error. The proper remedy in this case is to award compensation to the university. We also hold that it was improper to award substantially full attorney's fees to the university.

I. Facts

The facts in this case are not in dispute. A group of real estate developers (Village Developers, *et al.*) wished to build a housing development known as Innsbruck Village. All the proposed land for the development, consisting of about 710 acres, is a privately owned inholding within the boundaries of Chugach State Park. Between this enclave of private land and the park boundary are two sections of land designated as Sections 11 and 14 of Township 15 North Range 1 West, Seward Meridian. In 1961, the state received the patent to the bulk of the land in these two sections[1] from the United States under the authority of the Act of January 21, 1929, ch. 92, 45 Stat. 1091 (1929), which allows the state to select 100,000 acres of vacant unreserved land from the federal domain for the "use and benefit" of what is now the University of Alaska. This is not land to be used as the site of a university campus; rather, it is an asset of the university to be used for its support through its retention and use or its eventual sale.

The real estate developers wished to widen and reroute a portion of a then existing road that provided the only access into the private land. This road cuts across the two sections of university land. In July, 1977, the developers applied to both the university and the state Department of Natural Resources for permission to do the road work. The university granted its permission in December, but on April 5, 1978, the Department of Natural Resources denied its permission.

At the time the state denied its permission, a survey crew employed by the developers had already been on the road for several days and had cut some trees and brush. On April 12, the state filed a com-

1. The remaining land in the sections is private land acquired under homestead entry prior to the state patent.

plaint seeking an injunction halting any further work, a declaratory judgment that the developers were trespassing, and damages.

The developers, in their answer and a motion for partial summary judgment, stated among other defenses and counterclaims that the court should not permit the state to treat the university land as park land. The state, in opposing this contention, maintained that the land belonged to the state, the legislature had included the land in Chugach State Park, and therefore it had to be managed in a manner compatible with park land. The state further took the position that the Board of Regents of the university had no power to force the state to grant a right of way over this land and that the university's permission to the developers had no effect.

At a hearing on the summary judgment motion, the court decided to permit the University of Alaska to intervene as a party. The court was concerned that any decision regarding the relatively minor dispute between the developers and the state over a piece of road construction could have a far-reaching effect on the future management of university lands. When the university intervened as a defendant, it sought a declaratory judgment not only as to the land specifically involved in the road dispute, but also as to the total 5,040 acres of university land included in Chugach State Park.[2]

In a memorandum decision, the trial court concluded, first, that the land granted to the university continued to be retained in trust for the university under the federal grant; second, that by placing the university land in Chugach State Park the state violated the purpose of the trust; third, that under Alaska law, the Board of Regents must be consulted whenever there is a disposition of land, and there was no approval by the Board to place this land in a state park; and forth, that when the Board of Regents seeks a disposal of its land, as was done in this case by approval of the road building plan, the state Department of Natural Resources must acquiesce, and carry out the disposal as a ministerial duty. The trial court's ultimate conclusion was that the university lands were not part of the Chugach State Park because the legislature's enactment including the lands in the park was invalid. A final order to this effect was entered.

The state has appealed from the court's judgment. After the court entered its final order, the state and the developers settled. The only remaining dispute is between the university and the state.

II. Violation of Federal Trust

[1] The state's principal argument in this appeal is that the grant of 100,000 acres of federal land for the support of higher education in the Territory of Alaska under the 1929 Act is no longer restricted to the narrow purpose envisioned by that Act. While the state recognizes that the 1929 Act originally required university lands to be managed solely for the benefit of the university, the state apparently now believes that these lands may be managed with multiple objectives in mind, some of which may be compatible with the support of the university and some which may not be compatible. It does not believe that the university must be compensated for placing the land in the state park. The state's reasoning is based on the action of Congress, which has repealed certain sections of the original 1929 land grant.

A review of the subsequent history of the 1929 land grant shows that the state's argument is without support. We agree with the trial court that putting university lands into a state park without compensation to the university was a breach of the trust.

A. The 1929 Act.

The 1929 Act originally consisted of seven sections. The first, which is still in effect, is a habendum clause describing the size of the grant and its purpose. In particular, it

2. The university apparently did not sue when Chugach State Park was first created because of uncertainty as to whether university lands within the state park boundaries were to be treated as private inholdings or managed like other park lands.

states that the land is granted "for the *exclusive* use and benefit of the Agricultural College and School of Mines" (now the University of Alaska) (emphasis added). Section 2 of the Act, which is also in effect, states that the land grant cannot be used for the support of any religious institution. The remaining five sections, which are now repealed, contained detailed provisions relating to the sale or disposal of land. For example, they required that land be sold to the highest bidder at a public auction, that timber and other products from the land be sold at their appraised value, and that funds derived from the sale of lands be held in trust. Transactions in violation of the Act were "null and void," and the Attorney General of the United States was empowered to enforce the Act.

Language which is nearly identical to that contained in sections 3 through 7 of the 1929 Act appears in sections 10 and 28 of the New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910), which makes grants of extensive amounts of federal land for school purposes to those states. The reason for these provisions in the New Mexico-Arizona Enabling Act was explained by the United States Supreme Court in *Lassen v. Arizona*, 385 U.S. 458, 463–64, 87 S.Ct. 584, 587, 17 L.Ed.2d 515, 520 (1967):

> "All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories. Senator Beveridge, the committee's chairman, made clear on the floor of the Senate that the committee's determination to require the restrictions sprang from its fear that the trust would be exploited for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898. The violations had there allegedly consisted of private sales at unreasonably low prices, and the committee evidently hoped to prevent such depredations here by requiring public notice and sale. 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." (footnotes omitted).

The nearly identical language used in the grant of land to the Territory of Alaska was undoubtedly placed in the Act to prevent the same kind of abuses by the territorial government.

The State of Alaska acquired the rights to the land granted by the 1929 Act by section 6(k) of the Alaska Statehood Act, Pub.L.No.85–508, 72 Stat. 339 (1958), which provides in relevant part:

> "Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission."

Article XII, section 13, of the state constitution provides that any land taken by the state under a federal grant will be accepted under the "terms or conditions of the grants."[3] In *Wessells v. State Department of Highways*, 562 P.2d 1042 1051 n.34 (Alaska 1977), we recognized that acceptance of grants of school lands under this section created a trust with the state acting as trustee.

B. The 1966 repeal.

In 1966, the United States Congress repealed sections 3 through 7 of the 1929 Act. Pub.L.No.89–588, 80 Stat. 811 (1966). The state asserts that this repeal means that there are no longer any federal restrictions on the use of the land granted under the 1929 Act. Its principal contention is that the repealing of section 3 of the Act removed any federal trust obligations. Section 3 had provided, in part:

3. The full text of article XII, section 13, provides:

> "*Consent to Act of Admission.* All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people."

As 14.40.390 implements the above section, and AS 14.40.400 establishes a trust fund for revenues derived from university lands.

"[I]t is hereby declared that all lands granted to said Territory are hereby expressly transferred and confirmed to the said Territory and shall be by the said Territory held in trust . . . ."

The state concludes that, once this language was repealed, the state could establish its own guidelines for how the land should be used.

The legislative history of the repeal, the history of the school land grants in general and the plain wording of the habendum clause of section 1 make this theory of the state unsupportable.

First, it is abundantly clear from the legislative history that Congress was willing to repeal sections 3 through 7 of the 1929 Act because it was satisfied that Alaska had adequate procedures in its own statutory law to prevent the type of abuses that the repealed sections were designed to prevent. In particular, it should be noted that in its first session in 1959, Alaska's new state legislature enacted a bill that provided for the disposal of public lands and resources along principles nearly identical to those contained in sections 3 through 7 of the 1929 Act. Like the 1929 Act, the state law required that lands and resources be sold to the highest bidder. *See* Ch. 169, art. IV, § 2, and art. VI, § 3, SLA 1959. In floor debates on the bill, Representative Rivers from Alaska was asked by one of his colleagues to clarify that Alaska had adequate procedural safeguards to manage university lands. Because of Alaska statutory law, Representative Rivers could assure him that such protections existed. It hardly seems possible that Representative Rivers intended to convey the message the state now asserts, that in fact the state would be free to use university lands for any purpose which it saw fit under some broad concept of the "public interest."[4]

Second, the state's argument fails to appreciate that, if Congress had intended to allow land to be used for other than university purposes, this would have signaled a major shift in federal land policy. The statehood enabling acts of at least nine other western states contain allocations of acreage for school trust lands totaling approximately 40 million acres. *See* Note, *Compensation for Highway Easements Over School Trust Lands*, 42 Wash.L.Rev. 912, 912 n.5 (1967). In 1962, Arizona's legislature petitioned Congress to modify is enabling act so that municipalities could use school trust lands for parks, schools and other public purposes and compensate the trust at less than fair market value. Bills introduced by the Arizona congressional delegation failed to pass both houses. *See* Udall, *Arizona's Public Lands—Mixed Blessing, Mixed Burden*, 8 Ariz.L.Rev. 11, 13 (1966). It does not seem reasonable to conclude that Alaska, alone among western states, was to be treated so differently.

Finally, it is clear that the language of the 1929 Act that was not affected by the 1966 repeal continues to impose a trust obligation upon the state. As noted above, the habendum clause, which remains in effect, continues to require that the land be used

4. The following conversation took place:

"Mr. HALL: I see no objection to the land of a land-grant college or university, or otherwise, being sold to the highest bidder. Does the gentleman mean to inform me directly that the laws of the State of Alaska now care for this, in lieu of the Federal restrictions?

Mr. RIVERS of Alaska: Yes; and it is so stated in the report, which says that the change by the Congress would not be immediately effective because conforming legislation is still in effect or being considered by the State . . . .

Mr. HALL: Mr. Speaker, I believe the gentleman knows I am a "States' righter" in most areas, and I believe in the 10th Amendment to our Constitution. If he is implying to me that the State of Alaska now has inherent in its own code and laws the fact that it will make sales at public auction, and that they will maintain necessary restrictions for the protection of the State university and the State of Alaska—that is all I need.

Mr. RIVERS of Alaska: Mr. Speaker, I will say that the State will impose its own appropriate restrictions. But I must also say that the present law allows the sale of university lands by sealed bids as well as by public auction. With that one modification, I warrant all that the gentleman requires.

Mr. HALL: Mr. Speaker, I withdraw my reservation."

112 Cong.Rec. H. 21,749 (1966)

for the "exclusive use and benefit" of the university.

C. The trust violation.

[2] Because the land was to be held in trust for the university, we must determine whether inclusion of the land in Chugach State park caused a breach of the trust. The trial court concluded that the inclusion of university land in the park violated the trust provision of the federal grant. We agree. The use that can be made of park lands as compared to state lands in general is severely restricted. Trees may not be cut, minerals may not be removed, nor can the land be used for raising farm animals. The general principle is that park lands are to be managed in a way that will increase "the value of a recreational experience."[5] It is apparent that this objective is incompatible with the objective of using university land for the "exclusive use and benefit" of the university. The implied intent of the grant was to maximize the economic return from the land for the benefit of the university. This intent cannot be accomplished if the use of the land is restricted to any significant degree.

[3] It is well established in private trusts that "[i]t is the duty of a trustee to administer the trust solely in the interest of the beneficiaries." II A. Scott, The Law of Trusts § 170, at 1298 (3d ed. 1967). *See* G. Bogert, The Law of Trusts and Trustees § 541, at 157 (rev. 2d ed. 1978). *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 587, 17 L.Ed.2d 515 (1967), makes clear that the same private trust law principles are to apply to federal land granted to the states for school purposes.[6] *Lassen* involved the question of whether and how much compensation must be paid by a state when it uses school lands for a highway right of way.

The Court noted that the enabling act granting the school land "unequivocally demands . . . that the trust receive the full value of any lands transferred from it. . . ." 385 U.S. at 466, 87 S.Ct. at 588, 17 L.Ed.2d at [illegible] Further, the intent of Congress was that "the grants provide the most substantial support possible to the beneficiaries and that *only* those beneficiaries profit from the trust." 385 U.S. at 467, 87 S.Ct. at 589, 17 L.Ed.2d at 522 (emphasis added).[7] As noted in a more recent Supreme Court case, *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302, 96 S.Ct. 910, 915, 47 L.Ed.2d 1, 8

5. 11 AAC 18.010 provides:

"On public lands located within the boundaries of a state park, surface or subsurface mineral (including gravel and rock) exploration or extraction, removal or cutting of timber or other plant growth, grazing or pasturing of domestic animals, or other activities which do not increase park values or which do not add to the value of a recreational experience are incompatible uses and are prohibited without a permit from the director. The director shall issue a permit if he determines that the

(1) ecology of state park lands will not be irreparably damaged or imperiled;

(2) state park lands are protected from pollution;

(3) public use values of the state park are maintained and protected; and

(4) public safety, health and welfare will not be damaged or imperiled."

6. At least two courts have specifically concluded that the law of private trusts is applicable to land held by the state in trust for schools. *See Keys v. Carter*, 318 So.2d 862, 864 (Miss 1975); *State v. Rosenberger*, 187 Neb. 726, 193 N.W.2d 769, 773 (1972). As discussed in the text, the acceptance by Alaska of university lands created a trust. *Wessells v. State Dept. of Highways*, 562 P.2d 1042, 1051 n.34 (Alaska 1977). The state has apparently recognized that at least as to funds derived from university lands, private trust law applies. *See* 1963 Op. Att'y Gen.No.13 (Alaska May 31, 1963), which liberally cites private trust law authorities in determining the proper management of the fund created by AS 14.40.400. The state offers no explanation why the lands granted to the university should be treated differently from funds derived from them, and we cannot find any logical reason why they should be.

7. It is clear in both these quoted passages that the Court reached this conclusion by examining those provisions of the New Mexico-Arizona Enabling Act which, like former sections 3 through 7 of the 1929 Act, provided for detailed procedures for maximizing the profit from the disposal of land. However, as discussed in detail above, repeal of those sections in the Alaska act was not meant to change this policy. It was only meant to allow the state to use its own similar procedures. Therefore, the language in *Lassen* is equally applicable to this case.

(1976), the ultimate conclusion of *Lassen* is that "even where the State itself is the acquisitor, the Act's designated beneficiaries were to derive the full benefit of the grant." [8]

The state conjectures that there may still be an economic return from these lands because at some point in the future the Department of Natural Resources may allow ski tows or concession stands to be placed on them. The Supreme Court in *Lassen* rejected this type of speculation about the possible future value of land. The Arizona Supreme Court had concluded that it was safe to presume that a highway always increases the value of adjacent lands in an amount equal to the value of the right of way that has been taken. The United States, as amicus curiae, had suggested that, instead of using a presumption, any compensation paid into a trust be reduced by any proved enhancement. The Supreme Court rejected both arguments and concluded that the school trust had to be compensated for the actual appraised value of the land taken.

From the foregoing discussion, we conclude that the state has breached the trust by not compensating it for the value of the university land included in the park. The appropriate remedy is discussed in detail below.

III. Legislature's Power to Dispose of University Lands

[4] As discussed above, the trial court concluded that the disposal of university land without compensation violated a trust created by the 1929 Act. The court further concluded, however, that the state legislature had no power to dispose of university land without the express permission of the Board of Regents. The court reasoned that AS 38.05.030(a) prevents any disposal of university lands by the Commissioner of Natural Resources without the approval of the Board of Regents, and, because this was a disposal of land without the Board's approval, it was invalid.

While we agree with the trial judge's conclusion that this was a "disposal" of land, we conclude that AS 38.05.030(a) only covers disposals of land by the Commissioner of Natural Resources.[9] The creation of Chugach State Park was a disposal by the legislature, not by administrative action, and therefore AS 38.05.030(a) is inapplicable.

[5] The university argues, on the basis of article VII, section 2, of the Alaska Constitution, that the legislature cannot control university land. That section provides:

> "The University of Alaska is hereby established as the state university and constitutes a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law."

The trial court concluded:

> "The apparent intention of the framers of the Constitution was to insure that the University had legal title to all land and property actually utilized by it in its educational capacity."

This is a reasonable interpretation of the section, and in fact the legislature has given

8. Of all the states that received federal land grants for schools in their enabling acts prior to *Lassen* only Arizona, *Arizona Highway Dept. v. Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965); and to a limited extent Wyoming, *Ross v. Trustees of Univ. of Wyo.*, 222 P. 3 (Wyo.1924), *aff'd on rehearing*, 31 Wyo. 464, 228 P. 642 (1924); had concluded that a public purpose use of school lands did not require compensation to a school trust fund. *See State ex rel. Galen v. Dist. Court*, 42 Mont. 105, 112 P. 706 (1910); *State ex rel. Johnson v. Central Neb. Pub. Power & Irrigation Dist.*, 143 Neb. 153, 8 N.W.2d 841 (1943); *State Highway Comm'n v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956); *State Highway Comm'n v. State*, 70 N.D. 673, 297 N.W. 194 (1941); Note, *Compensation for Highway Easements over School Trust Lands*, 42 Wash.L. Rev. 912, 913 n.6 (1967).

9. AS 38.05.005 .040 governs the administration of public lands by the Commissioner of Natural Resources. AS 38.05.030(a) provides in part:

> "The sale, lease or other disposal of university lands shall be made by the commissioner . . . No sale, lease, exchange or other disposal of university lands may be made without the approval of the Board of Regents of the University of Alaska."

title to lands in the area of the Fairbanks campus to the university. Ch. 182, § 3(c), SLA 1978. Moreover, the university takes any land it may have title to "according to law." As the state points out, only the legislature can make laws effecting the disposal of land, not the Board of Regents,[10] so even if the university did have title to the land, the legislature would still be empowered to dispose of it.[11] The only veto power the Board of Regents has over disposals of land is defined by statute. Consequently, we believe that the legislature was free to dispose of this land without obtaining the approval of the university. In any event, as the federal patent makes clear, the state, not the university, was the grantee.

The natural resources article of the Alaska Constitution grants extensive powers to the legislature to control state lands. Article VIII, section 2, provides that

> "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."

It is clear that these lands "belong" to the state. Additionally, article VIII, section 7, provides for reserving from the public lands areas which have recreational value.

[6, 7] The university objects to this interpretation of the natural resources article which allows the legislature wide latitude of control over its lands. It contends that it allows politics to intrude into the management of university affairs. However, if the trust fund for university lands is fully compensated at the appraised value of the property, as *Lassen* requires, it is difficult to imagine how the legislature can have any impact on university policy or academic freedom.[12]

Thus we hold that the legislature had the power to dispose of the land in question.

IV. Remedy

[8] The trial court held that the portions of AS 41.20.210(11) which included university land in the park were invalid, and rejected the remedy of inverse condemnation and either monetary damages for the taking of the university land or an exchange of lands having an equal fair market value. In the trial court's view, the remedy of inverse condemnation would result in the judiciary "injecting itself unnecessarily into the political sphere" and could force an unanticipated allocation of resources by the state.[13]

10. *See* Alaska Const., art. XII, § 11. Terms such as "according to law" refer to the legislature's power to make laws.

11. Nebraska has apparently concluded that its legislature does not have the power to make direct disposals of land. *See State ex rel. Johnson v. Central Neb. Pub. Power & Irrigation Dist.*, 143 Neb. 153, 8 N.W.2d 841, 848 (1943). However, the Nebraska Constitution specifically provides for a method of management and disposal of school lands. The Alaska constitution has left these determinations to the legislature.

12. The university suggests that, by enacting AS 41.20.210, creating Chugach State Park, there was an implied repeal of AS 38.05.030(a). This is not a logical or necessary construction. AS 41.20.210 withdrew the particular university land involved from the operation of the management mechanism created by AS 38.05.030(a) and AS 14.40.170(4), which grants certain management powers to the Board of Regents. The university also has sought a declaration that when the Board of Regents wishes to dispose of university land granted to the state under the 1929 Act the Commissioner of Natural Resources must carry out the disposal. In this case, it is clear that the requested disposal was not made by the Department of Natural Resources because the land had been included in the state park. There is no reason to assume that this is a general problem or that there is a likelihood of a recurring controversy concerning the issue if the university is compensated. Therefore, we do not believe the issue is ripe for review. *See Jefferson v. Asplund*, 458 P.2d 995, 999 (Alaska 1969) (regarding declaratory judgments).

13. One commentary argues that inverse condemnation should not be an available remedy when the state's taking is a purely nonphysical, regulatory one. The only remedy that should be available, according to this view, is declaratory or injunctive relief invalidating the statute; otherwise, legislatures would become reluctant to try new approaches to land use problems because the state or municipality might suddenly find itself liable for numerous damage claims. This would not occur if the law were merely declared invalid. Furthermore, invalidating the law leaves it to the legislature to determine whether it wishes to reenact a similar law with the certain knowledge that it will now have to pay something for it. Permitting

While there is some merit to the argument in the context of a private damage action, we believe that it is inapplicable in this case. If damages are awarded here, it will, at the most, involve a transfer of either lands or funds from one governmental entity to another. Moreover, the legislature has nearly total control over appropriations to the university. Thus, there is no issue of the allocation of resources between the private and public sectors.

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 Chugach State 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. *See* 1 C. Sands, Sutherland Statutory Construction § 2.01 (4th ed. 1972).

The New Jersey Supreme Court based a decision on this rationale in *Lomarch Corp. v. Mayor of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968). Rather than declare a statute that provided for reserving private land for parks invalid, the court concluded that the statute should be construed in such a way that it required compensation, even though the statute and a municipal ordinance enacted under it did not mention the subject. *Cf. Maryland-National Capital Park & Planning Commission v. Chadwick*, 286 Md. 1, 405 A.2d 241, 250 (1979) (striking down a plan similar to New Jersey's on the ground that the regulation constituted a taking and was therefore unconstitutional in that it failed to award any compensation). We do not decide whether we will follow *Lomarch* in an action by a private property owner [14] but we do find its reasoning appropriate in this case where no private damage actions are involved.

Thus, it is necessary to remand this case to determine the value of the lands taken. We conclude that the university should receive the full appraised value of the land that was placed in the park. The applicable date on which the fair market value of the land should be determined is the date the Chugach State Park act was enacted. This is in accordance with our holding that the statute which created Chugach State Park required compensation, and with our decision in *City of Anchorage v. Nesbett*, 530 P.2d 1324, 1334-36 (Alaska 1975). Finally, we believe the parties should be given an election to pay monetary damages or arrange a mutually agreeable land exchange.

V. Attorney's Fees

Following judgment, the university moved in the superior court for an award of $16,196.00 in attorney's fees incurred in defending the underlying action. The court granted a partial award of $15,000.00. The state raises numerous objections to the court's award of attorney's fees: that the university waived its right to recover attorney's fees by failing to comply with the requirements of Civil Rule 79(a) that a cost bill be filed within ten days of judgment, and by failing to set forth the charges incurred with sufficient particularity; that the court's award of substantially full attorney's fees was unreasonable and an abuse of discretion; and that one state agency should not be ordered to pay attorney's fees to another state agency.

[9] Initially, the state argues that the trial court erred in refusing to apply the requirements of Civil Rule 79(a) to the university's request for attorney's fees. Civil Rule 79(a) provides in part:

> "Within 10 days after the entry of judgment, a party entitled to costs shall serve on each of the other parties to the action or proceeding a cost bill, together with a notice when application will be made to the clerk to tax costs. The cost bill shall distinctly set forth each item claimed in order that the nature of the

an inverse condemnation action places the allocation of public resources into the hands of the private litigants. Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan.L.Rev. 1439 (1974).

14. As noted, *Lomarch* involved compensation to private property owners.

charge can be readily understood.... Failure of a party to serve a cost bill and notice as required by this subdivision shall be construed as a waiver of his right to recover costs."

The state contends that the university waived its right to recover attorney's fees by its failure to comply with the requirement that a cost bill be served within ten days of judgment. The university filed its request for attorney's fees in the superior court thirteen days after judgment. The trial court ruled that it would be unfair to treat any delay in filing the motion for attorney's fees as a waiver (citing Civil Rule 94), given the established position of the superior court in the Third Judicial District that the procedures in Rule 79 do not govern Rule 82 motions for attorney's fees.

We have never directly addressed the question of whether a request for attorney's fees is governed by the procedural requirements of Rule 79. However, on two occasions we have intimated that Rule 79 does not govern attorney's fees, by considering the issue of attorney's fees after holding that the right to recover costs was waived for failure to establish compliance with Rule 79(a). *See Curran v. Hastreiter*, 579 P.2d 524 (Alaska 1978);[15] *M-B Contracting Co. v. Davis*, 399 P.2d 433 (Alaska 1965).

We conclude that, while attorney's fees are costs,[16] they are not covered by the literal requirements of Civil Rule 79(b).[17]

[10, 11] It is within the discretion of the trial court to impose a time limit for the filing for attorney's fees. The trial court did not abuse its discretion in this case by permitting the request thirteen days after the judgment.

[12] When granting attorney's fees, the trial court indicated that the amount requested by the university, $16,196.00, was reasonable due to the high quality and extensive nature of the work required, but it felt constrained by this court's decisions to grant only a partial award. The state contends that the amount awarded, $15,000.00, provides "substantially full attorneys fees" and is per se unreasonable. In *Moses v. McGarvey*, 614 P.2d 1363, 1370 (Alaska 1980), we stated that "complexity may be considered in determining the amount to be awarded, but that factor alone does not justify the award of full fees."

We have consistently held that an award of full attorney's fees is "manifestly unreasonable" in the absence of a bad faith defense or vexatious conduct by the losing party. *E. g., Davis v. Hallett*, 587 P.2d

15. *Curran* states:

"Although appellees specify as error the superior court's failure to award both costs and attorney's fees, they request that the case be remanded only for a determination of attorney's fees. There is no indication in the record that appellees complied with Civil Rule 79(a) which requires a party seeking costs to serve on each of the other parties within 10 days after entry of judgment 'a cost bill, together with a notice when application will be made to the clerk to tax costs.' The rule also provides that '[f]ailure of a party to serve a cost bill and notice as required by this subdivision shall be construed as a waiver of his right to recover costs.' Thus, appellees have apparently waived their right to costs. *See M-B Contracting Co., Inc. v. Davis*, 399 P.2d 433, 436-37 (Alaska 1965). In *M-B Contracting*, after invoking Rule 79(a) to bar consideration of an appeal as to costs, this court considered the separate issue of attorney's fees."

579 P.2d at 530 n.20.

16. AS 09.60.010 provides:

"Except as otherwise provided by statute, the supreme court shall determine by rule or order what *costs, if any, including attorney fees*, shall be allowed the prevailing party in any case." (emphasis added).

17. Alaska R.Civ.P. 79(b) reads:

"*Items Allowed as Costs.* A party entitled to costs may be allowed premiums paid on and expenses of posting, undertakings, bonds or security stipulations, where the same have been furnished by reason of express requirement of law or on order of the court; the necessary expense of taking deposition for use at trial and producing exhibits; the expense of service and publication of summons or notices, and postage when the same are served by mail; filing fees and other charges made by the clerk of the court and fees for transcripts required in the trial of a case in the superior court. In addition to the items allowed as costs by law and in these rules, a party shall be allowed any other expenses necessarily incurred in order to enable a party to secure some right accorded him in the action or proceeding."

1170, 1171–72 (Alaska 1978); *Malvo v. J. C. Penney Co.*, 512 P.2d 575, 587 (Alaska 1973). In *Stepanov v. Gavrilovich*, 594 P.2d 30, 37 (Alaska 1979), an award of substantially full attorney's fees was held to be "contrary to the philosophy expressed in *Malvo*. . . ."

The attorney's fees awarded the university are over ninety per cent of what it requested, and there is no evidence that the state's claim was frivolous, vexatious or devoid of good faith. The award is excessive and must be reduced on remand.[18]

[13, 14] Finally, the state suggests that the court is precluded from awarding attorney's fees when both parties are state entities, claiming that the fees will ultimately come from the same fund. This argument was not presented to the superior court, and therefore it need not be considered. In any event, the argument is without merit. The university is a corporation of independent authority established by the Alaska Constitution, article VII, sections 2 and 3. It has the statutory power to "sue and be sued" in its own name, AS 14.40.040; and it is "an instrumentality of the sovereign which enjoys in some limited respects a status which is co-equal rather than subordinate to that of the executive or the legislative arms of government." *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121, 128 (Alaska 1975) (footnote omitted). Attorney's fees would be paid out of segregated appropriations given to each entity. Each entity has an interest in preserving its own funds, and the university, as the prevailing party, is entitled to an award of fees.

In conclusion, we affirm the trial court's decision that the inclusion of university lands in Chugach State Park by statute, without compensation to the university, was a breach of the federal trust. We hold, however, that the court erred in invalidating the statute. The proper remedy is to permit an award in inverse condemnation. We also hold that the court erred in awarding substantially full attorney's fees against the state.

AFFIRMED in part, REVERSED in part, and REMANDED.

BOOCHEVER, J., not participating.

18. The state also argues that the university failed to comply with the requirements of Rule 79(a) that a cost bill "distinctly set forth each item claimed in order that the nature of the charge can be readily understood." On remand, the university should provide the state and the court with more complete records, including brief descriptions of the services included.

Andrew KAGAK, Appellant,

v.

STATE of Alaska, Appellee.

No. 5228.

Supreme Court of Alaska.

March 13, 1981.

Defendant was convicted in Superior Court, State of Alaska, Fourth Judicial District, Barrow, Jay Hodges, J., of assault with a dangerous weapon and of shooting with intent to wound. Defendant appealed from sentence of 15-year term of imprisonment on the shooting with intent to wound count. The Supreme Court held that in view of fact that defendant during latter stages of commission of a previous armed robbery offense had aimed loaded pistol at police officer and pulled trigger, the pistol misfiring, and in view of fact that defendant had been out of jail only five months when he brandished loaded 12-gauge shotgun at young girl, threatened to kill her, and then shot another person in shoulder at point blank range, 15-year sentence was not inappropriate on his conviction for shooting with intent to wound.

Affirmed.

T. H. WESSELLS, Appellant,

v.

STATE of Alaska, DEPARTMENT OF HIGHWAYS, Appellee.

No. 2834.

Supreme Court of Alaska.

April 6, 1977.

The holder of a lease from the State brought action for declaratory relief. From a decision of the Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., the lessee appealed. The Supreme Court, Boochever, C. J., held that in the lease, a paragraph expressly reserving right to grant an easement or right-of-way across the leased property did not permit granting easements only to third parties but authorized the State to effect inter-agency management transfers of the easement. That construction of the easement provision would be adopted so as to effectuate the reasonable expectations of the parties, though to a certain extent such construction required, reading in a 100-foot requirement relative to the easement. The provision thus permitted the State a right-of-way no more than 100 feet in width, and where the State elected to terminate the entire leasehold estate, taking of the remaining area would be treated as inverse condemnation. Upon the taking of school lands, the trust was to receive the full value of its particular interest which was being condemned, but the holder of the unexpired leasehold interest in the land was also entitled to just compensation for the value of that leasehold interest.

Reversed and remanded.

1. Eminent Domain ⇐82

Within traditional framework of eminent domain, lessee has compensable interest in land.

2. Eminent Domain ⇐82

Right of lessee to compensation for property taken may be waived or contracted away by terms of lease.

3. Easements ⇐1

A "right-of-way" is generally conceded to be class of easement.

See publication Words and Phrases for other judicial constructions and definitions.

4. Public Lands ⇐142⅜

State has statutory authority to reserve an easement, and the authority adequately encompasses power to include conditions in a lease of state lands which subject leased lands to right-of-way or easement in interest of the state. AS 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

5. Public Lands ⇐142⅜

To ascertain meaning of "reserve the right to grant" and meaning of word "easement" in lease from State, court would first look to both language of lease and extrinsic evidence to determine if wording of lease was ambiguous, and if language was ambiguous, court would consider extrinsic evidence, but if language was found to be unambiguous, it would be construed according to terms of lease alone. AS 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

6. Contracts ⇐143(2)

Mere fact that two parties disagree as to interpretation of contract term does not create ambiguity; ambiguity exists only where disputed terms are reasonably subject to differing interpretation after viewing contract as a whole and extrinsic evidence surrounding the disputed terms.

7. Appeal and Error ⇐837(10), 841

Where case had been determined by cross motions for summary judgment, the motions being based solely on pleadings and uncontested exhibits consisting of lease and of leases in chain of title, extrinsic evidence considered on appeal was limited to uncontested evidence and to statutes and other matters of which court could take judicial notice; the "clearly erroneous" standard applicable to factual findings of trial court was inapplicable.

8. Evidence ⇐23(1)

Court could take judicial notice of fact that state has highway program to which it

appropriates substantial sums of money each year.

9. Public Lands ⇐142⅜

In lease from State, paragraph expressly reserving right to grant easement or right-of-way across the leased property was ambiguous, allowing construction of language in accordance with reasonable expectations of the parties. AS 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

10. Landlord and Tenant ⇐37

Where language of lease was ambiguous, it would be construed in accordance with reasonable expectations of parties, and court in performing such function would weigh language of lease as well as extrinsic evidence.

11. Public Lands ⇐142⅜

Ambiguity in lease was subject to rule that ambiguities are construed against party that supplied and drafted the form, which in particular case was the State, the lessor and subject to rule that ambiguities are construed against lessor and that construction permitting continued performance of lease is favored.

12. Public Lands ⇐142⅜

In lease from State, paragraph expressly reserving right to grant easement or right-of-way across leased property did not permit granting easements only to third parties but authorized State to effect interagency management transfer of easement. AS 38.05.020(a), (b)(2), 38.05.030(b), 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

13. Landlord and Tenant ⇐37

Contract or lease is to be construed within context of entire instrument.

14. Easements ⇐42

In view of lease provisions for cancellation or termination, which did not provide for cancellation or termination by creation of an easement, lease paragraph expressly reserving right to grant easement or right-of-way across leased property did not contemplate such an easement as would terminate the lease. AS 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

15. Easements ⇐44(1)

Where lease provision expressly reserving right to grant easement or right-of-way across leased property was ambiguous as to size of easement which parties intended to create, ambiguity would be resolved in manner consistent with reasonable expectations of the parties. AS 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

16. Easements ⇐42

Under "doctrine of unlimited reasonable use," scope of easement unspecified in a grant is regarded as unlimited insofar as it is reasonable in relation to object of the easement.

See publication Words and Phrases for other judicial constructions and definitions.

17. Easements ⇐42

General policy behind unlimited reasonable use doctrine is acceptable, but court will not blindly apply the doctrine and ignore other rules of construction or extrinsic evidence which shows that unlimited reasonable use is not reasonable expectation of parties; doctrine of unlimited reasonable use is but one factor to be considered in construction of grant of easement.

18. Easements ⇐44(2)

Easement provided for in lease from State would be construed, in order to give consideration to reasonable expectations of the parties, as encompassing right-of-way no more than 100 feet wide. AS 19.05.080, 19.10.010, 19.10.015, 38.05.020(a), (b)(2), 38.05.030(b), 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

19. Easements ⇐42

Construction of easement provision in lease would be adopted so as to effectuate reasonable expectations of parties, though to certain extent such construction required reading in a 100-foot requirement relative to the easement. AS 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

20. Eminent Domain ⇐266

Where provision of lease from State permitted a State right-of-way no more than 100 feet in width, and State elected to

terminate entire leasehold estate, taking of remaining area would be treated as inverse condemnation. AS 19.05.080, 19.10.010, 19.10.015, 38.05.020(a), (b)(2), 38.05.030(b), 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

21. Public Lands ⇐142¾

Under grant of lands under Alaska Statehood Act and consent by people of Alaska to terms and conditions of the federal act, there was created a trust of school lands. Act July 7, 1958, § 6(k), 72 Stat. 343; Const. art. 12, § 13.

22. Eminent Domain ⇐155

Upon taking of school lands, trust was to receive full value of its particular interest which was being condemned, but holder of unexpired leasehold interest in land was also entitled to just compensation for value of that leasehold interest. Act July 7, 1958, § 6(k), 72 Stat. 343; Const. art. 12, § 13; AS 38.05.030(e), 38.05.105, 38.05.310.

23. Eminent Domain ⇐123, 147

State provision limiting compensation in case of school lands to value of improvements was valid as to portion of leasehold taken which was held to have been properly reserved previously by the State for right-of-way; as to balance of leased premises, lessee was entitled to compensation on basis of judicially approved formula. AS 38.05.035(a)(14), 38.05.070, 38.05.085, 38.05.120.

24. Eminent Domain ⇐206

It would be presumed that lease rent as provided for in lease from State was originally established at fair market value in accordance with statutory requirements, but rental might have increased since last reappraisal, and, if so, increase created compensable value.

Robert L. Hartig and J. Michael Robbins, Cole, Hartig, Rhodes, Norman & Mahoney, Anchorage, for appellant.

Richard P. Kerns, Asst. Atty. Gen., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, ERWIN and BURKE, JJ.

BOOCHEVER, Chief Justice.

This appeal from summary judgment involves the interpretation of a provision in a lease issued by the State of Alaska, Division of Lands. Paragraph 6 of the lease expressly reserves the right to grant an easement or right-of-way across the leased property. The central question before this court is whether that paragraph authorizes the state to utilize the entire parcel for highway purposes without compensating Wessells for his leasehold interest. Additionally, Wessells seeks review of the trial court's award of attorney's fees to the state.

The principal facts are undisputed. In August of 1972, Wesway Steel Company, of which Wessells is a majority shareholder, assigned its interest in certain leased property to Wessells. This assignment was approved by the State of Alaska. Thus, Wessells secured a forty-four-year leasehold interest with renewal rights. Wessells' leasehold comprised 12.785 acres of school trust lands and is located in Anchorage, Alaska, adjacent to the International Airport Road in the vicinity of the Minnesota bypass and the Alaska Railroad right-of-way. It was used for commercial and industrial purposes. This property was part of a larger parcel originally leased by the Division of Lands to Jet Terminals, Inc. in 1961 for a term of fifty-five years with a renewal preference.

Wessells now holds the land subject to the terms of the original lease to Jet Industries. Paragraph 6 of that lease is a form clause which appears to be inserted in many state leases and provides:

> The lessor expressly reserves the right to grant easements or rights-of-way across the land herein leased if it is determined to be in the best interests of the State to do so; provided, however, that the Lessee shall be entitled to compensation for all improvements or crops which are damaged or destroyed as a direct result of such easement or right-of-way.

Other provisions in the lease set forth the conditions of termination and cancellation. The lease also provides for adjustments in

rental value at five-year intervals to "be based primarily upon a reappraised annual rental value . . ." Wessells' leasehold was last revalued in 1971 at which time his quarterly rental became $886.00.

In early January of 1973, the Division of Lands conveyed a right-of-way encompassing Wessells' entire leasehold to the Department of Highways. This conveyance was formally effectuated as an interagency land management transfer pursuant to an agreement of January 23, 1973. The Department of Highways paid the Division of Lands $585,700.00 for the right-of-way.

Wessells was notified of these transactions by letter and was informed that any compensation due him for improvements under Paragraph 6 would be paid by the Department of Highways. The Department tendered $35,000.00 as the fair market value of improvements, but Wessells refused the offer.

Mr. Wessells sought declaratory relief in the superior court to determine the parties' obligations under Paragraph 6 of the lease, claiming a right to compensation for the reduction in the value of the leasehold.[1]

The state admitted the facts but contended that pursuant to Paragraph 6, it had the right to devote the entire parcel to highway use without compensation beyond the value of improvements. Both parties moved for summary judgment.

After hearing oral argument, the trial court granted the state's motion. It found that Paragraph 6 was unambiguous and authorized the state to utilize the entire leasehold for highway or related purposes without compensating Wessells other than for improvements placed on the land. Mr. Wessells has appealed from the decision below.[2]

We have examined Paragraph 6 of this lease and must disagree with the trial court's finding. We find that the Paragraph 6 of the lease is ambiguous, and that Mr. Wessells may be entitled to partial compensation for his leasehold interest.

[1, 2] We begin with the premise that within the traditional framework of eminent domain, a lessee has a compensable interest in land.[3] It also is clear that "the right of the lessee to compensation, as any other right, may be waived or contracted away by the terms of the lease. . . ."[4] This brings us full circle back to the lease and the meaning of Paragraph 6.

[3, 4] The state argues that Paragraph 6 permits its use of the property without compensation. Wessells argues to the contrary. There are two portions of Paragraph 6 which are contested in this case. First, we must view the wording "The lessor expressly reserves the right to grant." Wessells claims this language permits

1. His amended complaint included a count for interference with a sublease contract and additionally prayed for over $7,000.00 in lost rentals from the sublease, in an amount to be specifically proven at trial.

2. In addition, Mr. Wessells contests the amount of $4,000.00 attorney's fees to the state. In view of our decision, we do not reach that issue.

3. *Alamo Land and Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 96 S.Ct. 910, 47 L.Ed.2d 1 (1976); *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946); *A. W. Duckett & Co. v. United States*, 266 U.S. 149, 45 S.Ct. 38, 69 L.Ed. 216 (1924). *See United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973); 2 Nichols' Law of Eminent Domain § 5.23 at 5-87 (rev'd 3rd ed. 1976).

4. *Phillips Petroleum Co. v. Bradley*, 205 Kan. 242, 468 P.2d 95, 98 (1970). *See Alamo Land and Cattle Co., Inc. v. Arizona, supra; United States v. Petty Motor Co., supra. See also People, Dept. of Public Works v. Amsden Corp.*, 33 Cal.App.3d 83, 109 Cal.Rptr. 1, 4 (1973). In *State v. Crosby*, 410 P.2d 724, 726 (Alaska 1966), this court stated that:

> The fundamental issue here is whether the State may take appellee's land for highway purposes without payment of just compensation. It may if the reservation in the patent for a highway right-of-way is valid; it may not if the reservation is invalid.

See also 4 Nichols' Law of Eminent Domain § 12.42[1] at 12-488 and 12-489 (rev'd 3rd ed. 1976).

granting easements only to third parties. The state argues that under the above language, it is authorized to effectuate an interagency management transfer of an easement. Second, we must view the use of the word "easement" or "right-of-way."[5] Wessells contends that the use of the word "easement" does not permit a use which effectively destroys his entire twelve-acre estate. The state argues to the contrary.[6]

[5–7] To ascertain the meaning of "reserve the right to grant" and the meaning of the word "easement," we shall follow the principles of contract interpretation set forth in *National Bank of Alaska v. J.B. L.&K. of Alaska, Inc.*, 546 P.2d 579, 584–86 (Alaska 1976). This involves a two-stage analysis.

In the first stage, we will look to both the language of the lease and extrinsic evidence to determine if the wording of the lease is ambiguous.[7] The mere fact that two parties disagree as to the interpretation of a contract term does not create an ambiguity. An ambiguity exists only where the disputed terms are reasonably subject to differing interpretation after viewing the contract as a whole and the extrinsic evidence surrounding the disputed terms.[8]

If we determine that the language is ambiguous, we will proceed to the second stage of analysis and consider extrinsic evidence to attempt to resolve this ambiguity.[9] On the other hand, if the language is found to be unambiguous, it is construed according to the terms of the lease alone.[10]

5. A "right-of-way" is generally considered to be a class of easement. *Kurz v. Blume*, 407 Ill. 383, 95 N.E.2d 338, 339 (1950); Black's Law Dictionary, pp. 599, 1489 (4th ed. 1961).

6. Wessells also challenges the authority of the state to reserve the right to create easements. The authority of the state to reserve or grant easements, however, is beyond question. AS 38.05.035(a)(14) states:

> When he [the Director of the Division of Lands] finds the interests of the state will be best served he may . . . approve contracts for the . . . lease . . . and in addition to the conditions and limitations imposed by law, he may impose additional conditions or limitations in the contracts as he, with the consent of the commissioner, determines will best serve the interests of the state.

Similar authority may be found in the language of AS 38.05.070, AS 38.05.085 and AS 38.05.120. There appears, therefore, clear authority for the state to reserve an easement. This statutory authority adequately encompasses the power to include conditions in a lease of state lands which subject the leased lands to a right-of-way or easement in the interests of the state. *See State v. Crosby*, 410 P.2d 724, 727 (Alaska 1966).

7. *National Bank of Alaska v. J.B.L.&K. of Alaska, Inc.*, 546 P.2d 579, 584–86 (Alaska 1976).

8. *Modern Construction, Inc. v. Barce, Inc.*, 556 P.2d 528 (Alaska 1976); *National Bank of Alaska v. J.B.L.&K. of Alaska, Inc.*, *supra*, at 584–86.

9. *National Bank of Alaska v. J.B.L.&K. of Alaska, Inc.*, *supra*, at 584–86. We note that the case at bar was determined by cross-motions for summary judgment. These motions were based solely on the pleadings and uncontested exhibits consisting of Wessells' lease itself and the leases in his chain of title. The extrinsic evidence considered on appeal is thus limited to uncontested evidence and to statutes and other matters of which this court may take judicial notice. As we have stated in *National Bank of Alaska v. J.B.L.&K. of Alaska, Inc.*, *supra* at 586:

> In reviewing the superior court's findings, it should be noted that this Court is not bound by the "clearly erroneous" standard applicable to factual findings made by the court. The evidence relating to the parties' situations at the time they entered the contract was not disputed. Where the facts relating to surrounding circumstances are not in dispute, interpretation of the words of the contract is treated in the same manner as questions of law, and the standard used in reviewing factual findings is inapplicable.

See also Day v. A & G Construction Co., Inc., 528 P.2d 440, 443 (Alaska 1974). *Peters v. Juneau-Douglas Girl Scout Council*, 519 P.2d 826, 834 (Alaska 1974).

10. This court has stated in the past that where a term is clear and unambiguous, the intent of the parties is to be ascertained solely from the written instrument. *National Bank of Alaska v. J.B.L.&K. of Alaska, Inc.*, 546 P.2d 579, 582–83 (Alaska 1976); *Port Valdez Co. v. City of Valdez*, 437 P.2d 768, 771 (Alaska 1968). *See Pepsi Cola Bottling Co. v. New Hampshire Ins. Co.*, 407 P.2d 1009, 1013 (Alaska 1965). The above proposition has been the subject of controversy to the extent that it excludes extrinsic evidence from contract analysis. *See National Bank of Alaska v. J.B.L.&K. of Alaska, Inc.*, *supra* at 583. Where, however, the language is

We focus our attention first on the meaning of the words "reserve the right to grant" to determine whether this wording is ambiguous. Mr. Wessells contends that a "right to grant" is different from a "right to reserve to the state." He argues that the former involves a conveyance to a third party, while only the latter would permit the grantor to utilize the property. Wessells concludes that an interagency land management transfer is not a "grant" to a third party and is therefore not authorized by Paragraph 6 of the lease. Based on the definitions in the legal dictionaries and on the case law,[11] Mr. Wessells' analysis does have technical merit. Paragraph 1 of the lease itself specifies that the "lessor shall mean the State of Alaska," and title has at all times remained in the state. Therefore, Wessells' interpretation is one reasonable interpretation of the lease.

On the other hand, the state claims that the language "reserves the right to grant" was reasonably understood by the parties as permitting the state to transfer a right-of-way from the Division of Lands to the Department of Highways for highway purposes. It suggests that in the context of this transaction, an interagency transfer of an easement was reasonably contemplated as a grant. Looking to the extrinsic evidence in this case, we find that the state's analysis of the lease is also a reasonable interpretation.

We note that the Department of Natural Resources, Division of Lands, and the Department of Highways were created by the legislature as two separate agencies with separate and distinct sources of authority. Although acting on behalf of the state, the Division of Lands and the Department of Highways appear to function as independent entities. Under Chapter 5 of Title 38, the Commissioner of the Department of Natural Resources, who supervises the Division of Lands,[12] has authority to enter into agreements with other state agencies.[13] The Director of the Division may approve contracts for the sale, lease or other disposal of available lands, imposing terms and conditions which he deems in the best interest of the state.[14] The provisions of Title 38 are not applicable, however, to:

> Any power . . . or authority . . . granted to . . . the Department of Highways . . . to acquire, use, or lease . . . real property or any interest in real property.[15]

The authority of the Department of Highways to acquire property or rights-of-way is granted by the legislature under a separate title, AS 19.05.080.

[8] We also consider the fact that the lease was drafted by the state. It would not be reasonable to expect that the Division of Lands intended to provide for easements for third parties but not for other state agencies. It seems more reasonable to conclude that the provision was inserted

found to be clear and unambiguous even *after* viewing the extrinsic evidence, the procedure of construing the intent of the parties solely from the written instrument is applicable.

11. A grant of an easement is often defined as a conveyance to another party. *See, e. g., Porto Rico Ry. Light & Power Co. v. Colom*, 106 F.2d 345, 354 (1st Cir.), *cert. denied*, 308 U.S. 617, 60 S.Ct. 263, 84 L.Ed. 516 (1939); *Chicago, Wilmington and Franklin Coal Co. v. Menhall*, 42 F.Supp. 81, 82 (E.D.Ill.1941). Wessells also cites *Rusk v. Grande*, 332 Mich., 665, 52 N.W.2d 548, 551 (1952), which states: "one cannot have an easement in his own estate in fee." While the facts are not on point, the principle is stated.
A "reservation" is defined in cases as a right in favor of the grantor which is created out of or retained in the granted premises. *Phoenix Title and Trust Co. v. Smith*, 101 Ariz. 101, 416 P.2d 425, 431 (1966); *Board of County Comm'ners of Weld County v. Anderson*, 34 Colo.App. 37, 525 P.2d 478, 482 (1974); *Nelson v. Bacon*, 113 Vt. 161, 32 A.2d 140, 145 (1943); ". . . a reservation, moreover, cannot create an estate or interest in a stranger to the deed but can operate only to the benefit of the grantor therein."

12. AS 38.05.020(a).

13. AS 38.05.020(b)(2).

14. AS 38.05.035(a)(14).

15. AS 38.05.030(b).

to provide for flexible highway planning and development. This conclusion is supported by the statutory authority noted above which permits the imposition of conditions or limitations which "will best serve the interests of the state." A condition permitting the state to effectuate an interagency transfer for highway purposes is more consistent with state interests than is a condition which allows the granting of a right-of-way only to a third party taking title in its own name. Moreover, the court may take judicial notice of the fact that the state has a highway program to which it appropriates substantial sums of money each year. To facilitate this program, it is in the interests of the state to avoid paying for the use of lands which it has leased to others. This interest could be realized only if the contested language was inserted to benefit the state as a whole by providing for interagency transfers to the Department of Highways.

[9–11] Since both the state's interpretation and Wessells' interpretation of the wording "reserve the right to grant" are reasonable, we find this language ambiguous.

Having found this language ambiguous, we proceed to construe the language in accordance with the reasonable expectations of the parties.[16] In performing this function, we must weigh the language of the lease as well as the evidence discussed above. We also consider several established rules of contract interpretation. First, ambiguities are construed against the party that supplied and drafted the form,[17] in this case, the state. Second, ambiguities are construed against the lessor.[18] Third, a construction of an ambiguous provision which permits the continued performance of a lease is favored.[19]

[12] In spite of these general rules of construction, we are convinced by the extrinsic evidence discussed above that the parties would reasonably expect the term to permit transfers to other state agencies by the state as well as grants of such easements to totally independent third parties. We think that the state's arguments reflect the reasonable expectations of the parties more accurately than do Wessells' technical arguments and hold that the language "reserves the right to grant" contemplates permitting the Department of Highways to utilize the right-of-way.[20]

We focus next on the dispute centering around the words "easement and rights-of-way." We again view this language in light of the two-stage procedure established in *National Bank of Alaska v. J.B.L.&K. of Alaska, Inc., supra*, to determine if the language is ambiguous.

The state argues that the words "easement and rights-of-way" contemplate an easement which is unlimited in size and which, in effect, may terminate the entire estate. The state cites cases holding that a properly-created easement permits the dominant estate to use as much of the servient land as is reasonably necessary to effectuate the purpose of the easement. Where the scope of an easement is unspecified in a grant, it has been held to be "unlimited" so

16. Contracts should be interpreted to comply with the reasonable expectations of the parties. *Day v. A & G Constr. Co., Inc.*, 528 P.2d 440, 444 (Alaska 1974); *Hendricks v. Knik Supply, Inc.*, 522 P.2d 543, 546 (Alaska 1974). *See Smalley v. Juneau Clinic Bldg. Corp.*, 493 P.2d 1296, 1305 (Alaska 1972).

17. *Modern Construction, Inc. v. Barce, Inc.*, 556 P.2d 528, 530 (Alaska 1976); *Hahn v. Alaska Title Guaranty Co.*, 557 P.2d 143, 144–45 (Alaska 1976); *Pepsi Cola Bottling Co. of Anchorage v. New Hampshire Ins. Co.*, 407 P.2d 1009, 1013 n. 4 (Alaska 1965); *Lumbermen's Mutual Casualty Co. v. Continental Casualty Co.*, 387 P.2d 104, 108 (Alaska 1963). In *Birmingham Trust National Bank v. Midfield Park, Inc.*, 295 Ala. 136, 325 So.2d 133 (1976), the court stated that an ambiguity in an easement would be construed against the landowner at whose insistence the agreement was entered and who prepared the agreement.

18. *Blume v. Bohanna*, 38 Wash.2d 199, 228 P.2d 146, 149 (1958).

19. *Blume v. Bohanna, supra.*

20. In light of our disposition of this issue, we need not address the state's alternative argument that an interagency transfer is a "grant" within the meaning of Paragraph 6.

long as reasonable in relation to the object of the easement.[21] The state's position has technical merit and is one "reasonable interpretation" of this lease.

On the other hand, in light of extrinsic evidence, Wessells' interpretation of the word "easement" is also reasonable. If we were dealing with a tract of land 100 feet square, we would have less difficulty in construing the provision as authorizing a utilization of the entire leasehold estate. Here, however, the leasehold encompasses a twelve-acre tract, roughly triangular in shape, and of considerable width at its base. We do not believe that in Alaska one could reasonably expect a right-of-way of such dimensions. Moreover, AS 19.10.015 declares that all officially proposed and existing highways on public lands not reserved for public use are 100 feet wide. Although the section does not apply to highways which are specifically designated to be wider than 100 feet, it does indicate that normally, state highways are 100 feet in width. Similarly, AS 19.10.010 dedicates tracts 100 feet wide between each section of land owned or acquired by the state for use as a public highway.[22]

[13, 14] Mr. Wessells' interpretation of the word "easement" becomes even more persuasive when the word is viewed in the context of other provisions of the lease.[23] Paragraphs 15 and 16 of the lease are the only provisions for cancellation or termination.[24] They do not provide for cancellation or termination by creation of an easement. Analysis of these provisions lends considerable support to the claim that "easement" was not used in a way which contemplated terminating the lease.

[15, 16] Since both the state and Mr. Wessells have presented reasonable interpretations of the word "easement," we find that the term is ambiguous as to the size of the easement which the parties intended to create.[25] Thus, we must next attempt to

21. *Missouri Public Service Co. v. Argenbright*, 457 S.W.2d 777, 783 (Mo.1970) ("easement granted or reserved in general terms, without any limitations as to its use, is one of unlimited reasonable use"); *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex.1974) ("unlimited reasonable use").

22. AS 19.10.010 also dedicates a tract four rods wide (sixty-six feet) between all other sections in the state.

23. A contract or lease is to be construed within the context of the entire instrument. In *Modern Construction, Inc. v. Barce, Inc.*, 556 P.2d 528, 530 (Alaska 1976), we quoted Professor Williston stating:

> The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable. (footnote omitted)

In *McBain v. Pratt*, 514 P.2d 823, 828 (Alaska 1973), we stated:

> We are not inclined to approve an interpretation of a contract which creates conflict among its provisions. Wherever possible, repugnant portions of a contract must be harmonized. An interpretation will not be given to one part which will annul another. (footnotes omitted)

24. Paragraphs 15 and 16 of the lease specify:

> 15. This lease may be cancelled, in whole or in part, under one or more of the following conditions:
>
> A. While in good standing by mutual agreement in writing of the respective parties hereto.
>
> B. If issued in error with respect to material facts.
>
> C. If the leased premises are being used for an unlawful purpose.
>
> 16. If the Lessee should default in the performance of any of the terms, covenants or stipulations herein contained or of the regulations promulgated pursuant to Chapter 169, SLA 1959, as amended, and said default shall not be remedied within 30 days after written notice of such default has been served upon the Lessee by the Lessor, the Lessee shall be subjected to such legal action as the Lessor shall deem appropriate, including but not limited to, the forfeiture of this lease. No improvements may be removed by the Lessee during any period in which this lease is in default. In the event that this lease shall be terminated because of a breach of any of the terms, covenants, or stipulations contained herein the annual rental payment last made by the Lessee shall be retained by the Lessor as liquidated damages.

25. Again, since the issue of interpreting "easement" was disposed of on the basis of motions for summary judgment in which the parties relied solely on undisputed documentary evidence, there is no necessity for remanding to the superior court to resolve conflicts of fact in the extrinsic evidence. (*See* Footnote 9, *supra*.)

resolve that ambiguity in a manner consistent with the reasonable expectations of the parties.[26] We again look to the extrinsic evidence previously discussed, to the provisions of Paragraph 6 and to other portions of this lease. Also relevant here are the established rules of construction that ambiguities are construed against the party that supplied and drafted the form (the state), that ambiguities are construed against the lessor (again, the state) and that a construction of an ambiguous provision which permits the continued performance of a lease is favored.[27] Against these considerations, we must weigh the state's technical argument that an unspecified easement should be controlled by the doctrine of "unlimited reasonable use." As mentioned previously, under that doctrine, the scope of an easement unspecified in a grant is regarded as unlimited insofar as it is reasonable in relation to the object of the easement.[28]

[17, 18] Under the circumstances of this case, we are persuaded that the extrinsic evidence, rules of construction and provisions of the lease concerning termination outweigh reliance on the "unlimited reasonable use doctrine."[29] In particular, we are influenced by the size of Mr. Wessells' land and the unusual circumstances resulting in the loss of the entire estate. We do not think it reasonable that the parties intended an "easement" to terminate a lease of over twelve acres of land and think that a reasonable expectation under these circumstances would encompass a right-of-way no more than 100 feet wide.

We are further influenced by the fact that the state could easily have eliminated the ambiguity by preparing the lease with adequate specificity to put the lessee on notice of the possibility of termination by means of an easement. Paragraph 6 might have included language authorizing the state to utilize an easement *even though the creation of that easement might terminate the entire estate.*[30] To uphold the termination of the lease under the language actually used in Paragraph 6 would encour-

26. To assist us in resolving this question, no authority has been presented which is squarely in point. The closest case is *State ex rel. Symms v. Nelson Sand & Gravel, Inc.*, 93 Idaho 574, 468 P.2d 306 (1970). The State of Idaho had granted a lease which included the right to remove gravel. Paragraph 16 of that lease provided:

> That there is expressly reserved the right to permit for joint use such easement or right of way upon, through or in the lands hereby leased, occupied or used as may be necessary or appropriate to the working of the same or of other lands containing mineral deposits, and the treatment and shipment of products thereof by or under authority of the lessor, its lessees or permittees, and for other public purposes.

Symms, supra at 309.

An interstate highway was routed across the leased land, and the state contended that no compensation was due for the reason that the right-of-way was being used "for other public purposes." The court held that the reservation was limited to rights-of-way for access to adjacent lands containing mineral deposits and for the purpose of transporting to market minerals mined on other leaseholds. The Idaho court refused to read the phrase "and for other public purposes" literally as it would mean:

> that the state could grant a leasehold one day and appropriate the entire leasehold the next day without any liability to the lessee as long as the appropriation was for a public purpose. It is our conclusion "and for other public purposes" has reference to uses by other lessees of the state lands only.

Symms, supra at 310.

While not directly in point, the *Symms* case supports Mr. Wessells' argument, at least to the extent that the Idaho court construed the provision to prohibit a termination of the lease. The trial court found the dissent of District Judge Oliver in *Symms* more persuasive. The dissent would have construed "other public purposes" literally to include the state's acquisition for an interstate highway.

27. *See* Footnotes 17–19, *supra*.

28. *See* Footnote 21, *supra*.

29. Where an ambiguity surrounds the word "easement," the doctrine of "unlimited reasonable use" may be at odds with extrinsic evidence or other rules of construction, such as resolving ambiguities against the drafter. While we agree with the general policy behind the unlimited reasonable use doctrine, we will not blindly apply the doctrine and ignore other rules of construction or extrinsic evidence which show that unlimited reasonable use is not a reasonable expectation of the parties. The doctrine of unlimited reasonable use is but one factor to be considered.

30. One common way to avoid the ambiguity is stated in 4 Nichols' Law of Eminent Domain

age the use of vague language in leases and would inevitably lead to misunderstandings and legal disputes in the future.[31]

[19, 20] We therefore conclude that the ambiguous provision pertaining to the size of the right-of-way authorized by Paragraph 6 should be resolved by limiting the right-of-way to 100 feet in width.[32] Within that limitation, the right-of-way may follow such route as is reasonably necessary for the state's purposes. Since the state has elected to terminate the entire leasehold estate, the taking of the remaining area should be treated as an inverse condemnation.[33]

[21, 22] The state additionally argues that Mr. Wessells should receive no compensation for his leasehold interest other than for improvements. The argument is based on the fact the lands are school lands,[34] which may be leased only at appraised fair market value and which must be reappraised every five years.[35] From this, the state draws the conclusion that the leasehold can have no value over and above the agreed rentals. The United States Supreme Court, however, disposed of a similar argument involving the taking of Arizona leased school trust lands. In *Alamo Land & Cattle Co., Inc. v. State of Arizona*, 424 U.S. 295, 96 S.Ct. 910, 47 L.Ed.2d 1 (1976), the court stated that upon a taking of the lands, the trust was to receive the full value of its particular interest which was being condemned, but that the holder of an unexpired leasehold interest in land is also entitled to just compensation for the value of that leasehold interest. During the life of the lease, the trust receives from the lessee the fair rental value, and upon a subsequent condemnation, the trust is entitled to the full value of the reversionary interest that is subject to the outstanding lease, plus the value of the rental rights under the lease. The Supreme Court held expressly, however, that the trust was not to receive

§ 12.42[1] at 12–488 (rev'd 3rd ed. 1976) which states:

> It has become customary in drawing leases of valuable city property to insert a so-called "condemnation clause" a provision that, upon the taking by eminent domain of the whole or a part of the premises leased, the term shall come to an end. Under such a lease, the tenant has no estate or interest in the property remaining after the taking to sustain a claim for compensation . . . .

556 P.2d 530, 534 (Alaska 1976); *Hollaus v. Arend*, 511 P.2d 1074, 1075 (Alaska 1973); *Rego v. Decker*, 482 P.2d 834, 838 (Alaska 1971).

31. We note that this analysis of specificity in the lease is equally applicable to the state's drafting of "reserving the right to grant" discussed in the first part of this decision. In that situation, however, the state was fortunate in that the weight of extrinsic evidence permitted us to resolve the issue in its favor. We nevertheless urge the state to rewrite this provision in order to make it clear and avoid confusion and litigation on this point in the future.

32. We realize that we are to a certain extent reading in the 100-foot requirement relative to this easement. We believe this to be necessary to effectuate the reasonable expectations of the parties. This is consistent with our treatment of land contracts where vagueness and ambiguity must be resolved. In the past, we have not hesitated to fill in gaps in real estate transactions within the context of specific performance cases so as to carry out the reasonable expectations of the parties. *Jackson v. White*,

33. *See State v. Crosby*, 410 P.2d 724 (Alaska 1966).

34. Two sections in each township of Alaska were reserved for the support of schools by Congressional act, 48 U.S.C. § 353. The Alaska Statehood Act provided that those lands were granted to the State of Alaska "for the purposes for which they were reserved." PL 85–508, 72 Stat. 339, 343 (1958). The people of Alaska consented to the terms and conditions of the federal act by art. XII, sec. 13 of the Constitution of the State of Alaska. The grant and its acceptance created a trust. *Alamo Land & Cattle Co. v. State of Arizona*, 424 U.S. 295, 96 S.Ct. 910, 47 L.Ed.2d 1, 5–6 (1976); *Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1976).

35. AS 38.05.030(e) provides that the lease of school lands be in accordance with the provisions of the Alaska Land Act, AS 38.05., which provides that "No land may be . . . leased for less than the approved appraised market value . . . ." with exceptions not here applicable. AS 38.05.310. Periodic rental adjustments must be made every five years. AS 38.05.105.

additionally the value, if any, of the leasehold interest.[36]

As to the compensation due the lessee, the court stated:

> Ordinarily, a leasehold interest has a compensable value whenever the capitalized then fair rental value for the remaining term of the lease, plus the value of any renewal right, exceeds the capitalized value of the rental the lease specifies. The Court has expressed it this way:
>
> "The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew . . . , less the agreed rent which the tenant would pay for such use and occupancy." *United States v. Petty Motor Co.*, 327 U.S. 372 at 381, 66 S.Ct. 596, 90 L.Ed. 729.
>
> A number of factors, of course, could operate to eliminate the existence of compensable value in the leasehold interest. Presumably, this would be so if the Enabling Act provided, as the New Mexico-Arizona Act does not, that any lease of trust land was revocable at will by the State, or if it provided that, upon sale or condemnation of the land, no compensation was payable to the lessee. The State, of course, may require that a provision of this kind be included in the lease. (citations omitted)[37]

[23, 24] Alaska's provision limiting compensation to the value of improvements is thus valid as to the portion of the leasehold taken which we have held properly to have been reserved for a right-of-way. As to the balance of the leased premises, Mr. Wessells is entitled to compensation on the basis of the *Petty Motor Co.* formula quoted in *Alamo, supra.* It may be presumed that the lease rent was originally established at fair market value in accordance with statutory requirements. The rental value may, however, have increased since the last reappraisal. If so, the increase creates a compensable value.[38] Such increase may occur due to changes in economic conditions or possibly by a creative use made of the premises which was not reasonably anticipated at the time the rentals were established. In determining damages, the court must consider the state's right of reappraisal which arises every five years. We cannot, however, agree with the state's contention that the trust imposed on school lands precludes payment other than for improvements.

We hold that to the extent, if any, that Mr. Wessells may prove such damages, he is entitled to additional compensation.[39]

REVERSED AND REMANDED.

36. *Alamo, supra,* 424 U.S. at 303, 96 S.Ct. at 916, 47 L.Ed.2d at 9.

37. *Id.* 424 U.S. at 304, 96 S.Ct. at 916, 47 L.Ed.2d at 9.

38. *Id.*, 424 U.S. at 305, 96 S.Ct. at 917, 47 L.Ed.2d at 10.

39. The author of this opinion, with whom Justice Rabinowitz agrees, believes that in all cases, serious consideration should be given to permitting the introduction of relevant extrinsic evidence to determine the reasonable expectations of the parties. An analysis that initially uses extrinsic evidence solely for the purpose of ascertaining whether a provision is ambiguous and then focuses on the same evidence to resolve the ambiguity seems artificial and unduly cumbersome. Moreover, this two-tiered approach offers little advantage over one which initially turns to extrinsic evidence for such light as it may shed on the reasonable expectations of the parties.

> Under the approach suggested here, the courts may hear all relevant circumstances bearing on the interpretation of a disputed term. This should better enable them to attain the ultimate goal of interpreting the language in accordance with the reasonable expectations of the parties. As Professor Corbin points out:
>
> [S]eldom in a litigated case do the words of a contract convey one identical meaning to the two contracting parties or to third persons. Therefore, it is invariably necessary, before a court can give any meaning to the words of a contract and can select one meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence shall be heard to make the court aware of the "surrounding circumstances," including the persons, objects, and events to which the words can be applied and which caused the words to be used.
>
> 2 Corbin, Contracts § 536 at 28 (1960). *See also* " 'Meaning' in the Law of Contracts," E. Allen Farnsworth, 76 Yale L.Rev. 939 (1967).

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

☐ Expenditure Type
☐ Revenue Type

I. REQUEST
Bill/Resolution No. Senate Bill No. 24
Title "An act relating to assaulting a police officer,...(etc.)..."
Requested by Senate Judiciary Date

II. FISCAL DETAIL
Agency Affected Public Safety
Program Category Affected Administration of Justice
BRU, Program, Or Subprogram(s) Affected Alaska State Troopers
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No fiscal impact is anticipated.

Office of Management and Budget
Reviewed by: Mike Mayer, Program Budget Analyst
Division of Budget Review

IV. DATE January 21, 1983 PREPARED BY Francis C. Allan Phone 269-5691
DIVISION State Troopers Initials mck
DEPARTMENT OF PUBLIC SAFETY Initials 1/24/83

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/82)

SB 41 TITLE & SPONSOR SUMMARY 13:24 2/07/83 PAG

AMENDED TITLE:
AN ACT RELATING TO THE TRANSFER OF THE OWNERSHIP AND MANAGEMENT OF UNIVERSITY OF ALASKA TRUST LAND FROM THE DEPT OF NATURAL RESOURCES TO THE BOARD OF REGENTS OF THE UNIVERSITY OF ALASKA; & PROVIDING AN EFFECTIVE DATE

PRIME SPONSOR: FAHRENKAMP.

CO-SPONSORS: BENNETT, MOSS, STURGULEWSKI, FERGUSON.

CURRENT STATUS: 1/18/83 IN (S) RESOURCES

REFERRAL: HESS (WAIVED 2/1/83)
JUDICIARY 2/4/83
FINANCE
RULES

SB 41 SENATE ACTION 13:25 2/07/83 PAGE

DATE	SEQ	PAGE	LEGISLATIVE ACTION
01/18/83	01	0029	FIRST READING -- COMMITTEE REPORTS
		2/4/83	RESOURCES - C.S -- DO PASS
		2/1/83	HESS - WAIVED - JUDICIARY Added
			FINANCE
			RULES
****	**	**	*** *** ***

AB 41

FOLLOW-UP RE MATERIALS FROM SENATE RESOURCES:

U of A claims that state grossly mismanaged the lands - any merit to the allegations? If so, what was the case(s) litigated

REPORT FROM ATTYS IN AG'S OFFICE WHO HANDLED THE LAW SUIT(S) TO ASCERTAIN ISSUES INVOLVED, MERITS, BASIS FOR SETTLEMENT, ETC

1st law suit in 1978 - private party sues State; U of A intervenes. In 1981 S/Ct held (Cir Ct) that State had trustee obligations.

WHY DION'T DEPT OF NATURAL RESOURCES SEEK LEGISLATIVE APPROVAL BEFORE FINALIZING THE SETTLEMENT AGREEMENT

2d law suit - 78 U of A sues state. When S/Ct decision on 1st case came down in 81, was decided to settle with U of A

WERE THERE ANY INDIVIDUAL RECOMMENDATIONS WHEN THE BILL WAS PASSED OUT OF SEN RESOURCES

$500K WAS ALREADY APPROPRIATED BY THE LEGISL IN 81-82 SESSION TO IMPLEMENT THE SETTLEMENT AGREEMENT EVEN THOUGH THE BILL ITSELF DION'T PASS (BECAUSE OF AMENDMENTS TO IT?)

WHAT HAPPENS IF SETTLEMENT ISN'T RATIFIED

IN THEIR POSITION PAPERS, U of A HEAVILY RELY ON THE SUPREME COURT'S HOLDING IN THE 1978

CASE. IS THIS CONSTRUCTION OF THE DECISION VALID

U of Q TAKES POSITION THAT THE INVESTMENT EARNINGS FROM ITS "PERMANENT FUND":

yellow U of A position paper Brookhart p2

> "WILL NOT BE LARGE ENOUGH IN THE FORESEEABLE FUTURE TO HAVE ANY SIGNIFICANT INFLUENCE ON THE AMOUNT OF GENERAL FUNDS REQUESTED TO SUPPORT THE UNIVERSITY."

Yet, U of A's own figures INDICATE THAT INVESTMENT INCOME FOR FY82 WAS @ $ 612K/683K

FURTHERMORE, U of A goes on to argue that INVESTMENT EARNINGS SHOULD BE exempt vis à vis general fund APPROPRIATIONS

SB 41

Sen Kerttula:

an amendment designating or guaranteeing that some of the permanent fund investment income be used for specific purposes

HOW MUCH, EXACTLY, WILL BE ADDED TO THE "PERMANENT FUND" AS A RESULT OF THE SETTLEMENT?

@ # 22 mill in LAND
@ # 5 mill in CASH

M of Q v.
3AN-79-2801 Civ. Filed 4/23/79

BREACH of TRUST OBLIGATIONS IMPOSED BY FED LAW

2/13/82 - BOR APPROVES SIA
AS OF THIS ~~DATE~~, BOR WAS FULLY AWARE THAT SIA HAD NOT BEEN REVIEWED OR APPROVED BY GOVERNOR OR LEGISL

THE RESOLUTION ITSELF CLEARLY STATES THAT BOR IS TRUSTEE OF ALL LANDS TRANSFERED UNDER THE SIA & WHL PROCEEDS THEREFROM

TO: Sheila
Senator Eliason's Office

FROM: John
Senate Judiciary Committee

DATE: February 9, 1983

RE: SB 41

Here is the package of materials I've recently received from the Resources Committee on the above.

I haven't had a chance to fully review these materials and was thus unable to weed out the irrelevant stuff.

Also, as I indicated, it is very likely that a substantive amendment to the bill will be forthcoming in the near future.

Feel free to call if you or Senator Eliason have any questions.

Alaska State Legislature

Senate

Resources Committee

Official Business
Senator Bettye Fahrenkamp
Chairman

Pouch V
State Capitol
Juneau, Alaska 99811

January 21, 1983
1:30 p.m.

Beltz Room
Room 211 Capitol

With the House Resources Committee

MEMBERS PRESENT

SENATE	HOUSE
Senator Fahrenkamp	Rep. Ringstad
Senator Sturgulewski	Rep. Liska
Senator Ziegler	Rep. Larson
Senator Mulcahy	Rep. Uehling
Senator Eliason	
Senator Paul Fischer	
Senator Vic Fisher	

Briefing on University of Alaska Lands Settlement

Dr. Jay Barton, Pres., University of Alaska introduced members of the Board of Regents.

Merry Tuten, Director of Lands, University of Alaska summarzied past negotiations withthe State of Alaska, Department of Natural Resources regarding University of Alaska trust lands. It is the University of Alaska's contention that the land was improperly managed, disposed of and leased by the State. The University of Alaska initiated two law suits which asked for return of land and for monetary compensation. The Alaska Supreme Court ruled in favor of the University on one lawsuit. At this point the University and DNR agreed to negotiate and an agreement was reached.

Ms. Tuten stated that two bills will be before the legislature this session. (1) An appropriation bill for 4.2 million dollars to the U of A plus $148,000 to transfer deed to keep clear title. (2) A bill to ratify the agreement, to transfer compensatory land to the U of A and to transfer management of all U of A lands to the University.

Senator Sturgulewski inquired about DNR reviewing the University's calculation on compensation to determine whether or not it agrees with the grand total. Ms. Tuten replied they were close to agreement. Sen. Sturgulewski also asked about the intervention of the Municipality of Anchorage into the law suit. Ms. Tuten replied that the Municipality of Anchorage intervened in the second law suit to protect its interest in selecting University lands under the Municipal Entitlement Act. The Municipality is not a party to negotiations with the State of Alaska.

Merry Tuten concluded by saying the role of the legislature is to approve the agreement and appropriate the settlement monies and lands.

Mark Wittow, DNR, stated that the report by Merry was factual and correct.

The meeting was adjourned at 2:00 p.m.

Alaska State Legislature

Senate

Resources Committee

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

Bettye Fahrenkamp
Chairman

January 31, 1983
3:10 p.m.

Senate Finance Room

With the House Resources Committee

MEMBERS PRESENT

SENATE	HOUSE
Senator Fahrenkamp, Chairman	Representative Ringstad, Chair.
Senator Ziegler, Vice Chairman	Representative Shultz, Co-chair
Senator Eliason	Representative Cowdery
Senator Paul Fischer	Representative Larson
Senator Vic Fischer	Representative Uehling
Senator Mulcahy	Representative Vaska
Senator Sturgulewski	

Hearing: SB 40 and SB 41 ... University of Ak. Lands Settlement

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Esther Wunnicke, Commissioner, Department of Natural Resources gave background information on the University of Alaska Lands Agreement between the University and the State of Alaska.

Merry Tuten, Director of Lands, University of Alaska explained the need and land selection rationale for Senate Bill 41. The bill provides for the transfer of the management of the University of Alaska trust land from DNR to the Board of Regents of the University and the selection of State lands by the University to settle a lawsuit.

Ms. Tuten described the process by which the University undertook to select 45,000 acres of state land. Two pools were established under the settlement agreement. Pool 1 is state lands which the University has been using. There are roughly 400 acres worth 1.6 million dollars in Pool 1. Pool 2 started with 150,000 acres of state lands which the state identified and put into the pool for the University to select. The University and the State had these lands appraised to determine highest and best use and the current fair market value, and then went through a process of putting the 150,000 acres in priority order. The three major value categories are: (1) education, (2) natural resources and (3) ability to produce income from other than natural resources.

Once in priority order, the University returned to the settlement agreement to determine total compensation and found that damages came to 26 million dollars. Roughly 4.2 million dollars in the settlement are for damages not compensated by lands; i.e. damages as a result of uncollected revenues on the part of the State. The University of Alaska went back to the replacement pool in priority order and identified 22 million dollars worth of damages. The University has identified 10 parcels

of land which will be developed in the next two years. Areas of development include land development, the sale of gravel and other materials, continued participation in State oil and gas lease sales, and an in-depth look at mineral resources.

Senator Sturgulewski moved and asked unanimous consent for amendments No. 1, 2, 3, 4, and 5. There were no objections.

Amendments number 1 - 3 were proposed by the University to clarify that rules be adopted to provide for prudent trust management of the lands and adequate notice of land actions, that University lands are not to be treated as state public domain lands, and that the lands are not subject to adverse possession. Senator Kerttula proposed an amendment which would clarify that the bill would not adversely affect an on-going court suit involving the State of Alaska. Senator Sturgulewski proposed an amendment to one of the University's amendments clarifying that management of the lands would be for the financial benefit of the University and another amendment requiring a report to the Legislature on management plans for the lands involved.

Senator Sturgulewski moved and asked unanimous consent that SB 41 be moved from committee with individual recommendation. There were no objections.

S.B. 40 is an appropriation bill which is divided into two parts: (1) The appropriation of 4.2 million dollars to the University of Alaska permanent fund will be held in trust and invested by the Department of Revenue. The University of Alaska Board of Regents may expend only the interest earnings. $148,000 is appropriated from the unexpended funds of the University. (2) Of the $148,000 appropriated to the Department of Law which was the amount assigned to implement the settlement agreement, $69,000 will go to the University of Alaska and $79,000 to DNR to hire qualified people. There will be only one massive title transfer. The University will quitclaim deed certain interests to the State and the State will quitclaim deed certain lands to the University. This is thoroughly reviewed by DNR and the University so that there is no infringement upon any third party interests.

Senator Sturgulewski moved and asked unanimous consent that SB 40 be moved from committee with individual recommendation. There were no objections.

Meeting adjourned at 3:40 p.m.

LAND GRANT TRUST FUND

BRIEFING PAPER

Legislative History
Financial Summary
Survey of Similar Funds

THE UNIVERSITY OF ALASKA

Jay Barton, President

Briefing Paper

"UNIVERSITY OF ALASKA LAND GRANT TRUST FUND"

December, 1982

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EXECUTIVE SUMMARY

Congressional acts in 1915 and 1929 granted the University of Alaska about 113,000 of land for its exclusive use and benefit. In 1967 the Alaska legislature directed the state Department of Revenue to establish a separate fund in which all money derived from these university trust lands would be deposited. As of June 30, 1982, the fund totaled $5,462,670.

Investment earnings from this University of Alaska land grant trust fund, also referred to as the university's "permanent fund", are made available to the university for use as specified by the university's Board of Regents. During the current year, such earnings are being used for land management, rental charges for office space, legal expenses and rental charges for computer hardware. No problems have arisen with respect to the use of such income. However, questions have been asked regarding what will be done with this income if it increases as a result of the pending land settlement.

The land settlement is expected to result in equal value land being transferred to the university by the state to replace university trust land previously withdrawn by the state for other uses. Any cash paid by the state to the university as a result of the settlement would pass to the state Department of Revenue for deposit into the University of Alaska land grant trust fund invested and managed by that department.

The principal in this fund will increase over time. However, the investment earnings will not be large enough in the foreseeable future to have any significant influence on the amount of general funds requested to support the university. Falling interest rates will require a larger principal balance for investment than now exists in the fund just to sustain the current flow of investment earnings.

Currently, the state informs the university how much investment income it will receive from its permanent fund and the university informs the state how that income will be used. No change in this procedure or in legislation governing the University of Alaska land grant trust fund is indicated at this time.