

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672  
5680 HOUSE HEALTH, EDUCATION & SOCIAL SERVICES 84

## A Review and Critique of the Process of Valuation

- Envisioned mutuality of purpose: fair market value
- The reality of IMHTC dealing with a matter in litigation

## THE LINKING OF THE APPRAISAL PROCESS

- VALUE THEORY
- VALUATION THEORY
- APPRAISAL THEORY
- VALUE PREMISE

## VALUE THEORY

- A. Answers why a particular property, or an interest therein, has worth
- B. Defines the sources and bases of an asset's worth
- C. Currently recognized elements of an asset's worth include:
  - ---Utility (both as the ability to satisfy needs and for practical use)
  - ---Scarcity (of supply)
  - ---Demand
  - ---Ratio of exchange
  - ---Ability to transfer ownership

VALUATION THEORY

- A. Valuation theory is the method of estimating, measuring and predicting a defined worth.
- B. Valuation theory enables us to focus on the various methods that are used to arrive at a value estimate.
- C. Valuation theory further allows and recognizes that there is a distinction between value and price that may be commanded in a market at a given point in time. This suggests the following:

C. Valuation theory further allows and recognizes that there is a distinction between value and price that may be commanded in a market at a given point in time. This suggests the following:

1. Value is a collection of elements that comprise worth, each of which must be defined.
2. Price is an historical fact that may or may not coincide with an assets recognized worth at the same point in time.
  - a. Some examples of Price not being representative of Value are seen during periods of economic depression and recession and in liquidation sales.

## APPRAISAL THEORY

- A. Appraisal theory is the logic format by which Value Theory is linked to Valuation Theory as it relates to a specific defined interest, i.e. any one of several estates subject to ownership in any given parcel of real property at a specific point in time.
  - 1. Appraisal theory is the logical relationship between the Source of Value and its estimation.
- B. It is perhaps the failure to recognize the theoretical underpinnings of this analysis that results in the inability to link different value concepts, such as sales comparison, income capitalization or cost approach, to an assets worth.
  - 1. There is still a lingering perception that within the many land estates that are the subject of valuation, that these approaches somehow constitute equivalent value measures. They do not.

## VALUE PREMISE

- A. DEFINITION OF VALUE PREMISE
- B. EXAMPLES OF VALUE CHARACTERISTICS
- C. POSITIONING THE VALUE PREMISE
- D. THE NATURE OF THE DEBATE

A. DEFINITION OF VALUE PREMISE

- The emphasis of the appraisal logic placed on the characteristics of value as they relate to an identified estate, i.e. timber, mineral, surface etc..

## B. EXAMPLES OF VALUE CHARACTERISTICS

1. **Surface estate:** Dependent on size, location and market activity may be valued by all three methods. Comparable sales would only be appropriate where such a market within a comparable context exists for the subject being valued.

a. Surface estates are unique in that demand must be created in place. Commodity estates (minerals, oil & gas, etc.) in theory can respond to demand anywhere within the global market place.

2. **Large mineral estate:** Typically by income approach

a. Large mineral estates have a very limited market of qualified developers.

b. Large mineral estates are usually developed via Joint Venture and leasing arrangements, not outright purchase.

c. Large mineral estates are usually promoted into development by their owners.

## C. POSITIONING THE VALUE PREMISE

Identifying the varying value premises and the different emphasis that can be placed on each value characteristic, leads to a valuation process that supports the appropriate positioning of the value premise.

1. Here is where Highest and Best Use analysis focuses.

a. The considerations in such analysis generally are:

- Is the use legally permissible?
- Is the use currently feasible?
- Is the use functionally compatible?
- Is the use most profitable?

b. Current management practices are not a consideration in this evaluation. It is assumed that a property shall be managed to its highest and best use.

2. Highest and Best Use is not a fact to be found. It is a judgment decision on the part of the valuator.

#### D. THE NATURE OF THE DEBATE

- The foregoing considerations applied to the IMHTC/DNR rendering of value for Mental Health Trust Lands shows that the debate is not one of Value or Valuation Theory, but where the parties asserted a different value premise for several estates under consideration that led to different appraisal methodologies being applied. The failure of DNR to accept the value characteristics of the mineral estate, as approved by the majority of the IMHTC, led to the most serious value diminution of the trust corpus.

## The TRUST

- The Supreme Court stated there is a Trust.
- To have a Trust there must be a Corpus.
- There appears to be no Statutory Authority to manage the Trust properly.
- Reserving: No provision for reserving for the depletion of non-renewable resources.

## Chapter 48 SLA 1987, The Legislature's Settlement Proposal

- Purpose: To reconstitute a mental health trust through identification of land in legislatively designated areas that is equal in value to the land selected by and patented to the state under section 202 of the Alaska Mental Health Enabling Act.

## The Opportunity for Legislative Action

- Return to the Courts
- SB493/ HB548

tion of particular reports, items, persons, or enterprises. (§ 5 ch 18 SLA 1980)

**Sec. 37.13.205. Regulations.** The board may adopt regulations under the Administrative Procedure Act (AS 44.62) to interpret and implement this chapter. (§ 12 ch 81 SLA 1982)

**Sec. 37.13.210. Definitions.** In this chapter

(1) "board" means the Board of Trustees of the Alaska Permanent Fund Corporation;

(2) "corporation" means the Alaska Permanent Fund Corporation. (§ 5 ch 18 SLA 1980)

## Chapter 14. Trust Funds.

### Article

1. Mental Health Trust Income Account (§§ 37.14.010 — 37.14.050)
2. Public School Trust Fund (§§ 37.14.110 — 37.14.170)
3. Alaska Children's Trust Fund (§§ 37.14.200 — 37.14.270)

Revisor's notes. — Section 4, ch. 182, SLA 1978 purported to add an article 2, entitled "University Fund," to this chapter. Section 27 of ch. 182 made that article effective on the date that the Board of Regents voted to approve the matters under

consideration as provided in § 24 of the act. However, the Board of Regents disapproved all matters on August 17, 1978; consequently, that article 2 was ineffective.

### Article 1. Mental Health Trust Income Account.

#### Section

11. Mental health trust income account
21. Utilization of the mental health trust income account

Cross references. — For legislative findings and purpose of the Act that enacted AS 37.14.011 and 37.14.021 and re-

pealed the former provisions of this article, see § 1, ch. 48, SLA 1987 in the Temporary and Special Acts.

*Sec. 37.14.010. Mental health fund established. [Repealed. § 13 ch 48 SLA 1987.]*

**Sec. 37.14.011. Mental health trust income account.** (a) The mental health trust income account is established as a separate account in the general fund.

(b) The amount determined under (c) of this section as the fair market rental of the land constituting the mental health trust corpus

the earnings of the trust and the commissioner of revenue shall annually allocate that amount from the general fund to the mental health trust income account.

(c) The fair market rental value of the land constituting the mental health trust corpus is equal to eight percent of the fair market value of the land. Following the initial determination of the fair market value of the land selected by and patented to the state under sec. 202 of the Alaska Mental Health Enabling Act, the commissioner of natural resources shall redetermine the fair market value of the land constituting the mental health trust corpus at least every five years and provide the redetermined value to the commissioner of revenue and the board established under AS 47.30.661. (§ 2 ch 48 SLA 1987)

Cross references. — For mental health land trust, see AS 38.05.800; for a transitional provision and duties of the commissioner of revenue until the mental health land trust has been reconstituted under AS 38.05.800, see § 11, ch. 48, SLA 1987 in the Temporary and Special Acts.

Sec. 37.14.020. Mental Health Fund Advisory Board created. [Repealed. § 13 ch 48 SLA 1987.]

Sec. 37.14.021. Utilization of the mental health trust income account. Money in the mental health trust income account established in AS 37.14.011(a) shall first be appropriated by the legislature to meet the necessary expenses of the mental health program of the state. In making annual appropriations from the mental health trust income account, the legislature shall consider the recommendations of the Alaska Mental Health Board established under AS 47.30.661, including recommendations regarding capital improvements. After the necessary expenses of the state's mental health program have been funded, the legislature may make appropriations from the mental health trust income account for other public purposes. (§ 3 ch 48 SLA 1987)

Secs. 37.14.030 — 37.14.050. Powers and duties of board; fund utilization; contributions. [Repealed. § 13 ch 48 SLA 1987.]

Article 2. Public School Trust Fund.

Section	Section
116. Public school trust fund established	150. Contributions
117. Public School Fund Advisory Board created	160. Duties of the commissioner of revenue
118. Powers and duties of board	170. Investments
119. Utilization of income	

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Title 37  
Public Finance

1 ALASKA MENTAL HEALTH BOARD INTERIM REPORT  
2 ON CHAPTER 48 REVISIONS (6.6.4)  
3 January 1990  
4

5 INTRODUCTION  
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7 In 1987, when the Alaska State Legislature adopted revisions to Alaska law  
8 which reconstituted the Mental Health Lands Trust and created the Alaska  
9 Mental Health Board, it was with the hope that these changes would resolve  
10 the issues raised in the Weiss v. State lawsuit. All parties to the suit felt  
11 that a workable compromise was better than the continuation of litigation,  
12 and they expected that the Legislative changes set forth in Chapter 48 would  
13 form the basis of a settlement.  
14

15 The plaintiffs in the Weiss suit expected that these legislative changes  
16 would ensure that the monies set aside for the Alaska Mental Health Trust  
17 would be used first and foremost to meet the needs of the mentally ill. They  
18 contemplated that these needs would be determined by the Alaska Mental  
19 Health Board and that upon identification the Legislature would  
20 appropriate funds to meet those needs. It was their expectation that only  
21 after the basic needs of the trust beneficiaries were met would the  
22 Legislature take advantage of the statutory provisions that allowed excess  
23 revenues from the trust to be used for general expenses of the State.  
24

25 The legislative changes have not worked. First, the Greene decision  
26 identified a group of beneficiaries not contemplated by the original Weiss  
27 litigants. Not only were considerable questions raised about the proper way  
28 to identify who beneficiaries of the Trust were, but also considerable  
29 confusion was created about the role of the Alaska Mental Health Board.  
30 The Board has been forced to function in two conflicting roles at once. As  
31 the statutorily mandated body charged with responsibility to identify needs  
32 of Trust beneficiaries, it has had to act as a neutral arbiter of claims to the  
33 Trust's funds from all of the beneficiaries, including those identified in the  
34 Greene decision. At the same time, as the body charged with representing  
35 the mentally ill, the Board has been required to be an advocate on behalf of a

1 specific population that competes with other trust beneficiaries for the  
2 Mental Health Trust Funds.

3  
4 Second, and perhaps more important, there has been insufficient  
5 appropriation of Trust funds to meet the needs of the Trust beneficiaries.  
6 Over the last three years, the Alaska Mental Health Board has identified  
7 needs far in excess of those being presently met. Each year, the Board has  
8 made modest recommendations, not sufficient even to meet identified  
9 needs, but at least sufficient to begin to redress some of the severe  
10 shortcomings of Alaska's Mental Health Program. Even these minimal  
11 recommendations have not been accepted. More money has been  
12 transferred from the Mental Health Trust Lands income account into the  
13 general fund than was spent on the entire Mental Health Program. The  
14 Weiss litigants, have concluded -- reasonably in the estimate of most  
15 members of the Alaska Mental Health Board -- that the reconstitution of  
16 the Mental Health Trust has resulted in no real change in the way in which  
17 Trust revenues are spent. An additional concern, which may become more  
18 important over the years, is that the Department of Natural Resources  
19 (DNR), which has a broad range of responsibilities for the management of  
20 State lands, has full authorization over the management of Mental Health  
21 Trust lands as well. There is no agency or group with a particular  
22 mandate to represent the beneficiaries of the Trust who can review the  
23 management decisions of the DNR to make sure that, over the years,  
24 management decisions which are based solely on the best interests of the  
25 Trust are made and that the value of trust lands are not eroded over time.

26  
27 The Alaska Mental Health Board, has recognized the serious nature of  
28 these problems for some time. Beginning in July of 1988 the Board  
29 facilitated a series of meetings with affected groups to discuss the proper  
30 way to define the beneficiaries of the Trust. After this Greene group issued  
31 its report the Board adopted "A Policy Report Pertinent to the Greene  
32 Decision", a report discussing the implications of the Greene decision. In  
33 April of this year, the Board passed a resolution calling for public hearings  
34 to examine the role of the Board in light of the Greene decision. The Board  
35 delegated to its Legislative Committee the task of gathering information  
36 that might lead to proposed changes to Chapter 48. The Committee has

1 held public hearings and devoted two work sessions to the subject. The  
2 purpose of this report is to outline the conclusions and recommendations of  
3 the committee.

#### 4 5 BACKGROUND

6  
7 None of these issues is new. The Legislature reviewed the proper role of a  
8 mental health board and the proper mechanism for funding programs  
9 from the Trust in-depth in 1986 when originally attempting to reach a  
10 settlement of the Weiss litigation. At that time, the Joint Special Committee  
11 on Mental Health Trust Land suggested three possible alternatives. The  
12 first alternative was a "secured revenue stream". Under this proposal,  
13 eight percent of all State unrestricted general fund revenues would be  
14 dedicated to the mental health program, secured by a pledge of State assets  
15 which could be executed upon in the event that the Legislature failed to  
16 appropriate sufficient funds to meet the necessary expenses of the mental  
17 health program.<sup>1</sup>

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19 The second alternative was reconstitution of the Mental Health Land Trust  
20 and the creation of a Mental Health Trust Corporation which would be  
21 responsible for managing the assets of the Trust. The unencumbered Trust  
22 land would be re-transferred, and a cash settlement of lands encumbered  
23 or patented would be made. This alternative was less desirable, because of  
24 the difficulty and expense inherent in identifying, transferring, and then  
25 subsequently managing the Trust lands.

26  
27 Finally, the Legislature recognized the alternative of permitting the court-  
28 ordered reconstitution of the Trust to take place under court supervision.

29  
30 In supporting the secured income stream alternative, the Joint Committee  
31 recognized the inherent difficulty with that solution. There was no way to  
32 guarantee that the Legislature would necessarily appropriate sufficient  
33 funds each year to meet the needs of the Mental Health program.

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<sup>1</sup> See report to the Legislature of the Joint Special Committee on Mental Health Trust Land, January, 1987, pg. 14, this was the preferred alternative

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"Earmarking" Trust land income in the general fund and appropriating an amount equal to the income is permissible, but it does not insure that income will go toward funding mental health programs. Since one Legislature cannot bind future Legislatures, enactment of a law stating that income will be spent on mental health programs is subject to the will of each Legislature and dependent on annual appropriation of funds.<sup>2</sup>

The Joint Committee recommended a Statement of Legislative Intent as a means of guiding future legislatures as to the appropriate levels of funding.

At the same time, the joint Committee recognized that present funding levels were inadequate.

State appropriations for mental health programs have grown from slightly less than \$1.2 million in 1959 to slightly more than \$23.4 million in 1986. However, when an inflation factor is applied, actual State spending on mental health has declined over the last few years.

The draft Mental Health Plan, released in August 1986, estimates the cost of developing a comprehensive mental health system at \$106.9 million in annual operating costs, an increase over FY87 operating expenditures of approximately \$82.1 million. It also identifies a need for \$102.1 million in one-time capital costs.

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[I]n the Committee's view, the draft clearly demonstrates that Alaska's current level of mental health funding is

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<sup>2</sup> *Id.* pg 8-9

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insufficient to serve our mentally ill population. It should be noted that the Alaska Alliance for the Mentally Ill has testified that the draft falls short of the goals of an adequate program.

The Committee's view is supported by testimony received from the National Conference of State Legislatures (NCSL). Their review of Alaska's mental health program led to several recommendations, primarily that our programs be expanded.<sup>3</sup>

The Interim Mental Health Trust Commission reached a similar conclusion, ultimately suggesting that a revenue-stream option be adopted by the Legislature.<sup>4</sup> The Interim Mental Health Trust Commission also recognized the necessity of binding the Legislature in a constitutionally accepted manner so that future legislatures would be required to use the revenues generated to meet the needs of the mental health program:

Furthermore, the enabling legislation should be very clear that the Legislature intends to fully fund an adequate mental health program in perpetuity. To satisfy the court-ordered reconstitution, such an arrangement would have to include collateral -- an identifiable, quantifiable entity -- which could be redeemed by the Trust in the event that the promised revenue stream failed to materialize or was somehow diverted. . . . While falling short of binding the hands of future legislatures, such a surety bond would make them always cognizant of the revenue stream legislation's original intent.<sup>5</sup>

These recommendations were the genesis of the present Chapter 48.

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<sup>3</sup> *Id.* at pg. 19-21  
<sup>4</sup> Report to the Legislature by the Interim Mental Health Trust Commission, February 1987, at pg 199  
<sup>5</sup> *id.* at pg., 19-21.

1  
2 As enacted, Chapter 48 did not include any provisions for enforcement.  
3 Over the last three funding cycles, funding for the mental health program  
4 has continued to be inadequate. In FY88, the Alaska Mental Health Board,  
5 recognizing the need for a phasing in of increased funding for mental  
6 health programs, recommended increased program funding of \$15,322,400  
7 over the Governor's proposed operating budget. Despite the fact that even  
8 this recommendation was far below the minimum necessary to fund an  
9 adequate program for the State and meet the goals of the Comprehensive  
10 Mental Health Plan, only \$8,868,900 in additional operating funds was  
11 appropriated. Similarly, FY89 recommendations of the Alaska Mental  
12 Health Board were \$15,791,800 in additional operating funds over the prior  
13 year's base budget. Only \$5,026,000 more than the base, was appropriated  
14 while \$47,072,733.93 was transferred from the Mental Health Trust income  
15 account into the general fund.<sup>6</sup> The result has been that mental health  
16 services throughout the state have failed to keep pace with rising demand.  
17 Similarly, the Board's recommendations to meet long standing capital  
18 improvement requirements have been rejected. The needs identified in the  
19 State Comprehensive Mental Health Plan are being funded at a fraction of  
20 the amount necessary to meet the Plan's goals.

21  
22 In 1978, when the Legislature re-designated Trust lands as general grant  
23 lands, the Legislature failed to ever make the necessary appropriations to  
24 compensate for the loss, and the Mental Health Trust was never funded.  
25 This was the reason for the Weiss suit in the first place. It is the perception  
26 of many members of the Alaska Mental Health Board, as well as of the  
27 Weiss litigants, that a variation of this situation continues to exist under  
28 the Chapter 48 revisions. Mental Health Trust funds are used for general  
29 fund purposes with little regard to the requirement that the Mental Health  
30 Trust account be spent first to meet the needs of the mental health  
31 program.

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<sup>6</sup> Letter from Milt Barker, Department of Revenue, December 1, 1989

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PROPOSED RESOLUTIONS

The AMHB, IMHTC, relevant advocacy groups, and litigants generally agree that changes to the present structure must be made. The Legislative Committee has received a broad spectrum of recommendations. These range from recommendations that nothing be done or that the status of the Alaska Mental Health Board be diminished, to proposals that the entire way in which the State approaches funding and operation of mental health programs be modified. Some examples of proposed ways of resolving the conflicts raised by the present Chapter 48 follow.

PROPOSAL A      Status quo with a Re-definition of the Alaska Mental Health Board's Responsibilities

The Legislative Committee received several suggestions to the effect that little change should be made to the present system. In response to our request for information, the Department of Natural Resources indicated that:

The only change the Commission anticipates at this point is a proposal to alter the five-year reappraisal requirement. We have indicated support for an indexing system which would automatically adjust the value of the trust lands. As yet, however, there has been no uniform agreement concerning the adjustment methodology.<sup>7</sup>

Under this approach, there would be no changes to the present procedure for determining how Trust revenues are spent. The provisions of Chapter 48 requiring that eight percent of the land value be placed in the Mental Health Trust income account would remain in effect and the Legislature would continue to appropriate on the basis of its perception of the needs of

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<sup>7</sup> Letter, Rod Swope, Commissioner Designate to the Interim Mental Health Trust Commission, to Nelson G. Page, September 6, 1989.

1 the mental health program of the State, with unexpended revenue going to  
2 the general fund.

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4 The Division of Mental Health and Developmental Disabilities also prefers a  
5 limited approach.

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I would like to have the presently constituted Mental Health Board able to give its entire attention and effort to the hospital and community mental health services administered by the Division.

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The Governor's Council for the Handicapped and Gifted, the Older Alaskans' Commission, and the SOADA Board are already serving planning, advisory, evaluation and advocacy functions for the other Mental Health Trust beneficiaries, and there is no other board to provide these functions for the "mentally ill who may require hospitalization" nor for the other recipients of traditional mental health services.<sup>8</sup>

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Thus, the Mental Health Board would be divested of its present responsibility for oversight and budget recommendations regarding all trust beneficiaries. Although this would eliminate the confusion which has resulted from the Greene decision, relieving the Board from its dual, and often conflicting role of being an advocate for one group while being an umbrella organization representing all groups, it would leave no entity with responsibility for trust oversight and would tend to perpetuate a fragmented and uncoordinated approach to the delivery of mental health services.

In the Committee's view, limited modifications to the Alaska Mental Health Board's role and structure do not change the problems with the

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<sup>8</sup> Letter, Todd R. Risley, Director, Division of Mental Health and Developmental Disabilities, to Nelson G. Page, October 16, 1989.

1 present system. Rather than strengthening the level of commitment the  
2 Legislature must make to using Mental Health Trust funds for mental  
3 health programs, this approach would decrease what, in the view of many,  
4 is an already inadequate incentive on the part of the Legislature to spend  
5 Trust funds appropriately. At present, despite the conflicting nature of its  
6 role, the Alaska Mental Health Board does serve as a guardian and  
7 watchdog over the Trust and the uses for which Trust revenues are spent.  
8 There is no other group which has either the legislative mandate or the  
9 responsibility to act as an umbrella speaking on behalf of all beneficiaries of  
10 the Trust. Although a re-definition of the Alaska Mental Health Board's  
11 responsibilities would end ambiguity in the Board's role, it would also  
12 end the Board's ability to protect and defend the Trust leaving nothing in its  
13 place. For these reasons, it is the view of the Committee that an  
14 independent board of trustees whose responsibility is to the Trust, and not  
15 just to the individual constituent groups, must exist. The Committee has  
16 been struck by the unanimous nature of the consensus among all affected  
17 groups on that principle, even if the details remain to be worked out.

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19 PROPOSAL B      Creation of a Separate Trustee  
20                              Without Operating Authority

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22 A more extensive modification of Chapter 48 would be to create a separate  
23 board of trustees with responsibility for the Trust. Such a separate board of  
24 trustees would not have responsibility for advocacy on behalf of any one  
25 group of beneficiaries to the Trust. At a minimum, the Board would be  
26 given responsibility for oversight of the way in which the Department of  
27 Natural Resources manages Trust land, would have responsibility for  
28 ensuring that the value of the Trust lands was maintained over time, and  
29 would have responsibility for defining who are the beneficiaries of the Trust  
30 and what services can properly be funded from the Trust. The Alaska  
31 Mental Health Board would remain the advisory and planning board  
32 advocating on behalf of the "traditional" mental health programs, similar  
33 to the Governor's Council for the Handicapped and Gifted, the Older  
34 Alaskans' Commission, and the Advisory Board on Alcoholism and Drug  
35 Abuse. At the same time, however, the independent Trustee Board would

1 take over the responsibility for protecting and advocating on behalf of the  
2 Trust itself.

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4 Although the exact scope and nature of the independent Board of Trustees  
5 remains to be determined, at a minimum, the Board would be a separate  
6 entity with separate legal status akin to the Alaska Power Authority, the  
7 Alaska Public Utilities Commission, or the Permanent Fund Board. As  
8 such, it would have the capacity to sue and be sued and to hire its own  
9 counsel to provide independent legal representation. At a minimum, the  
10 Board of Trustees would be charged with the responsibility to :

- 11  
12 1. Oversee and approve land management decisions of the  
13 Department of Natural Resources, as they affect the Mental  
14 Health Trust lands, and to negotiate with the State when it  
15 became necessary to revalue State land. Under the present  
16 Chapter 48, such re-valuation is to take place every five years;  
17
- 18 2. Invest and oversee any designated funds, such as funds  
19 appropriated for capital improvements;  
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- 21 3. Determine annually the extent to which the needs of the  
22 beneficiaries of the Mental Health Trust have been met, based  
23 on the goals and objectives of the Alaska State Comprehensive  
24 Mental Health Plan, and to certify annually the extent to which  
25 the needs have been met or not met;  
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- 27 4. To review and approve expenditures from the Trust to ensure  
28 that the expenditures are properly charged to the Trust.  
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30 This independent Board of Trustees would have the power to promulgate  
31 regulations to implement its authority, the power to hire and fire its  
32 employees, and the power to set employees salaries, as a necessary element  
33 of its independence.

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35 Under this proposal, the language of Chapter 48 would be amended to  
36 prohibit the expenditure of funds held in the Mental Health Trust revenue

1 account without either (1) approval of the Board of Trustees, or (2) in the  
2 event that the Board of Trustees does not approve, a specific finding from  
3 the Legislature that the expenditure is necessary and appropriate to meet  
4 the needs of the Mental Health program of the State of Alaska. In addition,  
5 Chapter 48 would be amended to provide that no reappropriation to the  
6 general fund from the Mental Health Trust revenue account could take  
7 place unless (1) the trustees had certified that the necessary expenses of the  
8 Health program had been met for the previous year, or (2) in the event that  
9 the trustees did not so certify, the Legislature had made a specific finding to  
10 that effect.

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12 For this structure to work, the members of the Board of Trustees would  
13 have to act with a clear fiduciary responsibility for the Mental Health Trust  
14 and the beneficiaries of that Trust. It would be essential that members of  
15 the Board of Trustees consist of individuals who could fairly, impartially  
16 and knowledgeably review and evaluate the needs of the Trust and of the  
17 beneficiaries of the Trust. Ideally, this Board of Trustees would take over  
18 the present responsibility of the Alaska Mental Health Board to ensure that  
19 the plans of the various entities and agencies responsible for the mental  
20 health program are integrated and comprehensive.

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22 **PROPOSAL C**      Separate Trust with Operating Authority

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24 Most proposals for modification of Chapter 48, however expansive, do not  
25 change the underlying way in which mental health services are provided in  
26 the State of Alaska. The services are delivered through the Department of  
27 Health and Social Services and funding levels are determined by the  
28 legislative process. Recent actions in other parts of the United States have  
29 focused attention upon the feasibility of creating a public authority or  
30 corporations into which the assets or income of the Alaska Mental Health  
31 Trust would be transferred. This public authority would be empowered and  
32 authorized to do those things set forth in Proposal B. In addition it would  
33 act as an operating authority, providing mental health services for the State  
34 of Alaska. The general outlines of the program and the goals of the  
35 program would be set by the Legislature, and additional funding, as  
36 necessary, would be available through appropriations through the

1 Legislature or, in the case of capital expenditures, through a bonding  
2 power given to the public authority. The primary responsibility for the  
3 payment for and delivery of mental health services would be with this  
4 "Mental Health Authority".

5  
6 Similar broad and sweeping changes to the method for delivering mental  
7 health services have been enacted in the states of Washington and  
8 Wisconsin. In those states, the legislature contracts through a separate  
9 authority with regional mental health entities to provide mental health  
10 services on a local level. The overriding advantage of this system is that it  
11 provides incentives for greater local responsiveness to meet individual  
12 needs and creates a system which de-emphasizes institutionalization and  
13 in which dollars more closely follow patient needs.

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## RECOMMENDATIONS

It has become obvious to the Legislative Committee that additional work needs to be done. There is a clear consensus that Chapter 48 needs to be amended, and that the Amendments need to include the creation of an independent Board of Trustees which can, at a minimum oversee the actions of the State in funding and administering the Mental Health program and the Mental Health Trust lands. It is important to remember that the Weiss lawsuit is still pending. Unless and until the Weiss litigants are satisfied that a reasonable structure has been created, there is always the possibility that a court-ordered restructuring of the Trust will be required, which all parties presently still agree is an undesirable outcome.

Realistically, it is unlikely that the necessary study and review of these issues can be completed in time for any action to be taken by this legislative session. The Legislative Committee recommends, therefore, that work be done with an eye toward creating well thought-out and comprehensive changes during the 1990/91 legislative session. In the meantime, the Board, the Legislature, and the Executive Branch, should work toward reaching a consensus on the necessary changes. Specifically, the Committee recommends the following:

**A. Approve the Recommendations of the Interim Mental Health Trust Lands Commission.**

The Legislative Committee is not prepared to recommend changing some basic aspects of Chapter 48. Specifically, the "dedicated revenue stream" approach to funding has much to recommend it. The alternative, a re-transferring of Mental Health Trust lands to create a trust corpus, has the same problems and difficulties as always: it will be difficult to do, very expensive, and may result in a situation in which Mental Health Trust dollars go to managing the Trust lands, and not toward benefitting the beneficiaries of the Trust. After 2-1/2 years of study and deliberation, the Interim Mental Health Trust Lands Commission has issued its recommendations regarding the value of Mental Health Trust lands.

1 These important recommendations are the result of careful analysis and  
2 reasoned decision-making. They are essential to making the "dedicated  
3 revenue stream" approach successful. At a minimum the Legislature  
4 should act this session to adopt procedures approved November 7,1989 by the  
5 IMHTC. Thus, the Committee's first recommendation is that the  
6 Legislature should resolve the long-standing issue of Mental Health Trust  
7 lands valuation by accepting the procedures adopted by the  
8 recommendation of the Interim Mental Health Trust Commission during  
9 this legislative session.

10

11 **B. PREPARE COMPREHENSIVE PROPOSALS FOR THE 1991**  
12 **LEGISLATIVE SESSION**

13

14 The Committee recommends that no specific changes in Chapter 48 be  
15 made during this legislative session so that a more comprehensive  
16 approach to an overhaul of Chapter 48 and of the Alaska Mental Health  
17 program can be undertaken during the following legislative session. The  
18 changes outlined in this report provide only a summary of possible options  
19 and do not purport to be a comprehensive view of the possible ways in which  
20 a separate Board of Trustees could function. Alaska is not the only state  
21 that has been faced with these issues over the last few years. There is a  
22 wealth of information and knowledge which can and should be evaluated  
23 for precedent to determine the best way to structure mental health services  
24 delivery for the State of Alaska. The Legislative Committee recommends,  
25 therefore, that the Legislature appropriate sufficient funds for the purpose  
26 of conducting a study which will lead to comprehensive recommendations  
27 for enactment of legislation during the 1990/91 session.

28

29 **C. AUGMENT THE BOARD'S COMMITTEE STRUCTURE ON AN INTERIM**  
30 **BASIS**

31

32 Finally, the Legislative Committee recognizes that if no changes are made  
33 to Chapter 48 and to the structure of the Alaska Mental Health Board at the  
34 present time, the built-in conflict between the Alaska Mental Health  
35 Board's role as an advocate for the traditional Mental Health program and  
36 its role as a neutral arbiter of claims to the Trust's funds will continue, at

1 least on an interim basis. The Legislative Committee wishes to emphasize  
2 its belief that the Alaska Mental Health Board, on the whole, has done an  
3 excellent job of attempting to juggle these conflicting responsibilities.  
4 However, those beneficiaries of the Trust who are not presently required by  
5 statute to be represented on the Alaska Mental Health Board must be made  
6 to feel that their interests are being given full and fair consideration by the  
7 Board when it acts in its capacity as planning and oversight body for the  
8 Mental Health Trust as a whole. This issue was recognized by Governor  
9 Cowper in a letter which he sent to the Board February 17, 1989, in which he  
10 requested that the Board itself make recommendations as to any changes  
11 that should be implemented in its membership and structure.

12  
13 The Legislative Committee believes that, for the time being, no formal  
14 changes need to be made to the structure and membership of the Board.  
15 Instead, in order to ensure that the interests of all of the beneficiaries are  
16 represented on an interim basis, and, as importantly, in order to ensure  
17 that these beneficiaries perceive that their interests are adequately  
18 represented, the Legislative Committee recommends that the Board take  
19 the step of augmenting its Committee structure by adding to each of its  
20 committees voting members from one or more of the affected beneficiary  
21 groups. This augmentation would be on an interim basis until final  
22 recommendations can be made as to changes in the Board's structure and  
23 in Chapter 48. This recommendation can be implemented by the Board  
24 itself, and does not require any legislative changes. The Board has already  
25 had experience with this arrangement. Its Budget Committee has been an  
26 augmented committee for the last year, and the Legislative Committee itself  
27 welcomed and benefitted substantially from the participation of several  
28 interested parties. Thus, the Legislative Committee recommends Board  
29 Committees be expanded by the Executive Committee in accordance with  
30 established Board procedures to provide reasonable representation of  
31 beneficiary groups. The Committee further recommends that the  
32 committee expansions include coordination with the three affected boards  
33 and coalition attorneys representing plaintiffs in the litigation.

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920 FOURTH STREET, SUITE B  
JUNEAU, ALASKA 99901  
(907) 580-1537

January 23, 1990

HAND DELIVERED

Senator Jack Coghill  
Senate  
Capitol Building, Room 30  
P. O. Box V  
Juneau, Alaska 99811

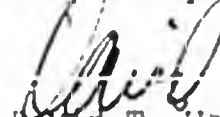
Re: Mental Health Trust Land Settlement

Dear Senator Coghill:

I have enclosed a copy of Jim Gottstein's January 19, 1990 legal memorandum addressing the status of the mental health trust lands litigation settlement under Chapter 48 (48 SLA 1987).

It remains Jim's and my fervent hope that the consequences described in the memorandum can be avoided. The Plaintiffs have followed and supported the legislative solution and proposed settlement provided by Chapter 48. Chapter 48 requires the Commissioner of the Department of Natural Resources to determine the value of the trust under the procedures approved by the Interim Mental Health Trust Commission. The Commission has established the procedures to be followed by the Commissioner in valuing the trust. Now the valuation, and necessarily the settlement, is in the hands of the Commissioner. Unless the Commissioner follows the valuation procedures established by the Interim Mental Health Trust Commission the beneficiaries will have no real choice but to pursue the remedies discussed in the memorandum to protect their interests and the trust. I will be happy to meet with you at any time to discuss this matter. I will contact you following the January 24, 1990 meeting of the Interim Mental Health Trust Commission to provide an update on the status.

Very truly yours,

  
David T. Walker  
Counsel for the Class

DTW:ndp

Enclosure



# LAWS OF ALASKA

1987

Source

CSHB 92(Fin) am

Chapter No.

48

## AN ACT

Relating to the Alaska Mental Health Trust; and providing  
for an effective date.

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

THE ACT FOLLOWS ON PAGE 1, LINE 9

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO  
THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES  
DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL  
REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY  
LINE OF EACH BILL SECTION.

Approved by the Governor June 4, 1987  
Actual Effective Date Sections 1-10 take effect July 1,  
1987, remainder of Act takes effect September 6, 1987

AN ACT

Relating to the Alaska Mental Health Trust;  
and providing for an effective date.

\* Section 1. FINDINGS AND PURPOSE. (a) The legislature finds

(1) the United States Congress passed the Alaska Mental Health Enabling Act of 1956, P.L. No. 84-830, 70 Stat. 709, "To confer upon Alaska autonomy in the field of mental health, transfer from the Federal Government to the Territory the fiscal and functional responsibility for the hospitalization of committed mental patients, and for other purposes;"

(2) in sec. 102 of the Alaska Mental Health Enabling Act, the Congress granted the territory the right to select up to 1,000,000 acres of federal land to serve as a source of funds to support the territory's mental health program;

(3) in subsection 102(e), the Congress specifically provided that the land so granted, as well as any income from the land and proceeds from dispositions of the land, were to be administered as "a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska," that "Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide," that the land may be "sold, leased, mortgaged, exchanged or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska," and that the Alaska Legislature must exercise this broad authority "in a manner compatible with

Chapter 48

the conditions and requirements imposed by this Act."

(4) In requiring that the proceeds and income of the 1,000,000-acre land grant "first be applied to meet the necessary expenses of the mental health program of Alaska," it was the intent of the Congress that additional public funds be appropriated by the legislature to supplement the proceeds and income from the land grant if those proceeds and income are insufficient to meet the necessary expenses of the mental health program of Alaska;

(5) If the proceeds and income from the 1,000,000-acre land grant exceed the necessary expenses of the mental health program of Alaska, the Congress authorized the legislature to appropriate the excess proceeds and income for other public purposes;

(6) because of the highly desirable location and character of much of the land selected by the state under the Act, for example, in and around major population centers, suitable for parks and game refuges, and other uses, and the difficulties associated with disposing of or dedicating the land for purposes that would not result in the receipt of funds that could be used for mental health purposes, for example, satisfaction of municipal entitlements, placement in parks and game refuges, and other uses, without compensation to the trust, the Tenth Alaska State Legislature enacted ch. 181 and 182, SLA 1978, which, among other things, redesignated all mental health lands as general grant lands;

(7) both ch. 181 and 182, SLA 1978, also created the mental health fund into which, as compensation to the trust, a sum equal to one and one-half percent of all revenue received from the management of state land was to be deposited and from which only the income could be appropriated exclusively for mental health purposes;

(8) a significant difference between ch. 181 and 182, SLA 1978, was that ch. 182 made the deposit of one and one-half percent of all public

income of the 1,000,000-acre land necessary expenses of the program of the Congress that the legislature to supplement those proceeds and income of the mental health pro-

the 1,000,000-acre land health program of Alaska, state the excess proceeds

location and character of Act, for example, in and game refuges, and depositing of or dedicating the receipt of funds that game refuges, and other Alaska State Legislature her things, redesignated

also created the mental trust, a sum equal to one the management of those income could be appro-

31 and 182, SLA 1978. 5 percent of all public

land revenue into the mental health fund "subject to legislative appropriation of sufficient funds";

(9) because ch. 182, SLA 1978 became law after ch. 181, SLA 1978 became law, the provisions of ch. 182, SLA 1978 have been considered controlling, including specifically the provision that deposits to the mental health fund would be "subject to legislative appropriation of sufficient funds";

(10) the legislature has never appropriated funds to the mental health fund;

(11) a class-action lawsuit, *Weiss v. State*, 7FA-82-2208, was filed on November 16, 1982, seeking a judicial determination that the Alaska Mental Health Enabling Act had established a "public trust" under which the state had received the 1,000,000-acre land grant, that the 1978 legislation redesignating mental health land as general grant land was a breach of that trust, and that the appropriate remedy was to invalidate the 1978 legislation and return mental health land to trust status;

(12) in *State v. Weiss*, 706 P.2d 681 (Alaska 1985), the Alaska Supreme Court held that the Alaska Mental Health Enabling Act established a public trust, that the 1978 legislation redesignating mental health land as general grant land was a breach of the trust, and that the appropriate remedy was to return mental health land still in state ownership to trust status and, for mental health land that the state had "sold" between 1978 and the date of the court's decision, to compensate the trust for the fair market value of mental health land so "sold" as of the date of their "sale," subject to a set-off for state mental health expenditures during the same period.

(13) while the court returned mental health land to trust status, it did not specify the nature of the state's obligations with respect to managing the trust land, leaving significant questions unanswered that may

Chapter 48

1 require additional costly and time-consuming litigation;

2 (14) continued costly and time-consuming litigation over mental  
3 health trust land management is not in the public interest because it  
4 diverts attention from the goal the Congress sought to achieve through the  
5 Act's land grant, the funding of a mental health program;

6 (15) continued costly and time-consuming litigation over mental  
7 health trust land management is not in the public interest because it has  
8 the potential to be extremely divisive, pitting the advocates of stringent  
9 mental health trust land management against those who envision state-owned  
10 mental health land managed for its highest and best use, including convey-  
11 ance to municipalities in satisfaction of municipal entitlements, placement  
12 in parks and game refuges, and other uses, without a major expenditure to  
13 compensate the mental health trust for the fair market value of the land;

14 (16) continued costly and time-consuming litigation over mental  
15 health trust land management is not in the public interest because advo-  
16 cates of stringent mental health trust land management may seek the in-  
17 validation of state conveyances of mental health land to third parties,  
18 particularly municipalities and Native corporations organized under the  
19 Alaska Native Claims Settlement Act, a course of action that at best will  
20 place a cloud on the third parties' title to those lands and at worst will  
21 result in those third parties losing title to their lands, causing economic  
22 and other harm and further dividing those who advocate stringent mental  
23 health trust land management from those who believe all state-owned land,  
24 including mental health land, should be managed for its highest and best  
25 use;

26 (17) continued costly and time-consuming litigation over mental  
27 health trust land management is not in the public interest because advo-  
28 cates of stringent mental health trust land management may seek the in-  
29 validation of legislative designations of mental health land as state

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1 parks, state game refuges, state forests, etc., placing the future use of  
2 the land for the designated purposes in doubt and further dividing those  
3 who advocate stringent mental health trust land management from those who  
4 believe all state-owned land, including mental health land, should be  
5 managed for its highest and best use;

6 (18) the failure of the Alaska legislature to deal with the  
7 current situation by properly reconstituting the mental health trust at  
8 this time will lead to continued costly, time-consuming, and divisive liti-  
9 gation, which is not in the public interest;

10 (19) the same problems that led to the 1978 redesignation of  
11 mental health land as general grant land, for example, the desirability of  
12 managing mental health land for its highest and best use, including the  
13 satisfaction of municipal entitlements, inclusion in parks and game ref-  
14 uges, will continue to pose difficulties in the state's efforts to accom-  
15 modate the public's needs generally with the obligation to administer  
16 mental health land as a trust;

17 (20) under art. VIII, sec. 2, Constitution of the State of  
18 Alaska, as construed by the Alaska Supreme Court in *State v. University of*  
19 *Alaska*, 624 P.2d 807 (1981), the legislature has the authority to remove  
20 land from trust status if the trust is compensated for the fair market  
21 value of the land;

22 (21) the state is not now, and in the foreseeable future will not  
23 be, in a position to compensate the mental health trust in money for the  
24 fair market value of mental health land;

25 (22) even if the state were able to compensate the mental health  
26 trust in money for the fair market value of mental health land, there is a  
27 substantial legal question whether that compensation, as the corpus of the  
28 trust, could be preserved in perpetuity or whether the prohibition on  
29 dedicated funds in art. IX, sec. 7, Constitution of the State of Alaska,

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would require that those funds be made available for appropriation by the legislature under the terms of the Alaska Mental Health Enabling Act;

(23) under art. VIII, sec. 2. Constitution of the State of Alaska, and subsection 202(e) of the Alaska Mental Health Enabling Act, the legislature has broad authority over all state land, including mental health land, and can permissibly remove mental health land from trust status if, consistent with its trust responsibilities, it simultaneously designates other state land of equivalent value as mental health land;

(24) the Congress' goal of funding a mental health program, and the public interest in having attention focused on the problems of the mentally ill and not questions regarding mental health trust land management, will be best served by establishing a mechanism for generating revenue from mental health land that minimizes the number and complexity of related land management decisions;

(25) reconstituting the mental health trust with state land that has a substantial likelihood of remaining in state ownership in perpetuity, and compensating the mental health trust for state use of that land through annual identification of an amount of state general fund revenue equal to the fair market rental value of the land as a separate account in the general fund, would minimize the number and complexity of land management decisions and would result in the following benefits to the mental health trust:

(A) it would ensure that the mental health trust corpus will be preserved in perpetuity;

(B) it would reconstitute a mental health trust corpus equal in value to the original 1,000,000-acre mental health trust corpus, with no reduction (in the nature of a set-off) for state mental health expenditures;

(C) it would make the entire mental health trust corpus

productive in that each acre of mental health trust land would produce its fair market rental value annually;

D) the mental health trust would not incur administrative expenses;

E) it would focus attention on questions related to the state's mental health programs and the levels of appropriations for those programs;

36) reconstituting the mental health trust with state land that has a substantial probability of remaining in state ownership in perpetuity would result in the following benefits to the state generally:

a) it would free all mental health land not in legislatively designated areas for nontrust uses;

b) the only significant expenditure of public funds that would be required would be appropriations for appraisal of the land to ensure equal value, an expenditure that would be required no matter what form of trust reconstitution is selected; and

c) it would establish an additional safeguard against disposal of the newly designated mental health trust land, that, in those legislatively designated areas, in that, prior to such disposal, equal value replacement land would have to be identified and designated as trust land.

The legislature will best serve the public interest by reconstituting the mental health trust with land in legislatively designated areas, continuing to use that land for the legislatively designated purposes, compensating the trust for the use of the land through annual payments in an amount of general fund revenue equal to the fair market rental value of the land and designation in the general fund of that amount of funds to the special mental health trust income account, and creating a board to assist and advise the legislative and executive

able for appropriation by the  
Mental Health Enabling Act;  
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100-acre mental health trust  
to be a set-off for state  
  
mental health trust corpus

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1 branches of government on matters relating to the mental health program of  
2 Alaska.

3 (b) The purposes of this Act are

4 (1) to implement the intent of the Congress underlying sec. 201  
5 of the Alaska Mental Health Enabling Act that mental health land be admin-  
6 istered in a way that makes funds available for the support of Alaska's  
7 mental health program;

8 (2) to the extent practicable, to eliminate the need for costly,  
9 time-consuming and divisive litigation over the state's management of  
10 mental health land;

11 (3) to ensure that the attention of the public and the govern-  
12 ment is focused on mental health programs, as contemplated by the Congress,  
13 and not on issues relating to the management of mental health land;

14 (4) to reconstitute a mental health land trust through identi-  
15 fication of land in legislatively designated areas that is equal in value  
16 to the land selected by and patented to the state under sec. 202 of the  
17 Alaska Mental Health Enabling Act;

18 (5) to remove from trust status the land selected by and pat-  
19 ented to the state under sec. 202 of the Alaska Mental Health Enabling Act  
20 that is not in legislative designated areas, thereby freeing them for other  
21 uses;

22 (6) to validate each deed, contract for sale, lease, easement,  
23 right-of-way, permit, mineral lease disposal, reservation of land for  
24 public use by statute, or land management actions, including use classi-  
25 fications under AS 39.05.100 and interagency land management assignments by  
26 the Department of Natural Resources, that may have been called into ques-  
27 tion by the Supreme Court's decision in State v. Weiss, 706 P.2d 681  
28 (Alaska 1985), returning mental health land to trust status;

29 (7) to identify a portion of annual state general fund revenues

the mental health program of  
Congress underlying sec. 202  
mental health land be admin-  
for the support of Alaska's  
eliminate the need for costly,  
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have been called into ques-  
ice v. Weise, 706 P.2d 681  
trust status;  
state general fund revenue.

equal in amount to the fair market rental value of mental health land, as  
compensation to the trust for the continued use of the land in legisla-  
tively designated areas for the legislatively designated purposes; and

(8) to create a board to assist and advise the legislative and  
executive branches of government on matters relating to the mental health  
program of Alaska.

Sec. 2. AS 37.14 is amended by adding a new section to read:

Sec. 37.14.011. MENTAL HEALTH TRUST INCOME ACCOUNT. (a) The  
mental health trust income account is established as a separate ac-  
count in the general fund.

(b) The amount determined under (c) of this section as the fair  
market rental of the land constituting the mental health trust corpus  
is the earnings of the trust and the commissioner of revenue shall  
annually allocate that amount from the general fund of the state to  
the mental health trust income account in the general fund of the  
state.

(c) The fair market rental value of the land constituting the  
mental health trust corpus is equal to eight percent of the fair  
market value of the land. Following the initial determination of the  
fair market value of the land selected by and patented to the state  
under sec. 202 of the Alaska Mental Health Enabling Act, the com-  
missioner of natural resources shall redetermine the fair market value  
of the land constituting the mental health trust corpus at least every  
five years, and provide the redetermined value to the commissioner of  
revenue and the board established under AS 47.30.661.

Sec. 3. AS 37.14 is amended by adding a new section to read:

Sec. 37.14.021. UTILIZATION OF THE MENTAL HEALTH TRUST INCOME  
ACCOUNT. Money in the mental health trust income account established  
in AS 37.14.011(a) shall first be appropriated by the legislature to

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11 meet the necessary expenses of the mental health program of the state.  
21 In making annual appropriations from the mental health trust income  
31 account, the legislature shall consider the recommendations of the  
41 Alaska Mental Health Board established under AS 47.30.66<sup>1</sup>, including  
54 recommendations regarding capital improvements. After the necessary  
64 expenses of the state's mental health program have been funded, the  
74 legislature may make appropriations from the mental health trust  
84 income account for other public purposes.

94 \* Sec. 4. AS 38.05 is amended by adding a new section to article 11 to  
104 read:

114 Sec. 38.05.800. RECONSTITUTION AND ADMINISTRATION OF MENTAL  
124 HEALTH LAND TRUST. (a) The commissioner of natural resources, under  
134 procedures approved by the interim mental health trust commission,  
144 shall determine the fair market value, as of the effective date of  
154 this section, of all land selected by and patented to the state under  
164 the Alaska Mental Health Enabling Act. The commissioner shall report  
174 the determination of that value to the board established under AS 47.  
184 30.66<sup>1</sup>.

194 (b) The commissioner of natural resources, with the approval of  
204 the interim mental health trust commission, shall identify land within  
214 legislative designations that is equal in value to all land selected  
224 by and patented to the state under sec. 302 of the Alaska Mental  
234 Health Enabling Act that is not in legislative designations.

244 (c) All land selected by and patented to the state under the  
254 Alaska Mental Health Enabling Act that is within legislative designa-  
264 tions, together with all land identified by the commissioner under  
274 (b) of this section, constitutes the corpus of the mental health land  
284 trust.

294 (d) Upon reconstitution of the trust under this subsection, land

selected by and patented to the state under sec. 302 of the Alaska Mental Health Enabling Act that is not within legislative designations is removed from trust status.

(e) The land within legislative designations that constitutes the mental health land trust shall continue to be administered for the legislatively designated purposes. The trust shall be compensated for the continued use of the mental health trust land for the legislatively designated purposes as provided in AS 37.14.011.

(f) Before the state may remove land that is part of the mental health trust corpus from trust status, and in addition to any other requirements of law, the commissioner of natural resources, consistent with the state's trust responsibilities, shall identify replacement land, equal in value at the time of replacement, within legislative designations and incorporate them into the mental health trust corpus. The commissioner of natural resources annually shall report any actions under this subsection to the board established under AS 47.30.661.

Sec. 5. AS 39.25.10(c)(9) is amended by adding a new subparagraph to read:

(L) Alaska Mental Health Board;

Sec. 6. AS 47.30 is amended by adding new sections to read:

Sec. 47.30.661. ALASKA MENTAL HEALTH BOARD. The Alaska Mental Health Board is established. For budgetary purposes, the board is located within the Department of Health and Social Services. The board is the state planning and coordinating agency for the purposes of federal and state laws relating to the mental health program of the state. The purpose of the board is to assist the state in ensuring an integrated comprehensive mental health program.

Sec. 47.30.662. COMPOSITION. (a) The board consists of the

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1 commissioner of health and social services, or the commissioner's  
2 designee, and not fewer than nine nor more than 12 other members,  
3 appointed by the governor, with due regard for population and balanced  
4 geographic representation of the state.

5 (b) At least one-third of the members shall be consumers of  
6 mental health services, or parents or guardians of consumers.

7 (c) At least one-third of the members shall be either public or  
8 private providers of mental health services.

9 (d) The remaining members shall be representatives of the public  
10 at large.

11 Sec. 47.10.663. TERM OF OFFICE. (a) Board members serve  
12 staggered terms of three years.

13 (b) A vacancy occurring in the membership of the board shall be  
14 filled by appointment of the governor for the unexpired portion of the  
15 vacated term.

16 (c) Members may be removed only for cause, including, but not  
17 limited to, poor attendance or lack of contribution to the board's  
18 work.

19 Sec. 47.10.664. OFFICERS AND STAFF. (a) The board, by a major-  
20 ity of its membership, shall annually elect a chair and other officers  
21 if it considers necessary from among its membership.

22 (b) The board will have a paid staff provided by the Department  
23 of Health and Social Services, including, but not limited to, an  
24 executive director who shall be selected by the board from candidates  
25 recommended by the department. The executive director is on the particu-  
26 larly exempt service and may hire additional employees in the particu-  
27 larly exempt service of the state. The executive director and the staff of the  
28 board shall be directly responsible to the board in the performance of  
29 their duties.

Sec. 47.30.665. BYLAWS. The board, on approval of a majority of its membership and consistent with state law, shall adopt and amend bylaws governing its composition, proceedings, and other activities consistent with state law and including, but not limited to, provisions concerning a quorum to transact board business and other aspects of procedure, frequency and location of meetings, and establishment, functions, and membership of committees.

Sec. 47.30.666. POWERS, DUTIES, AND RESPONSIBILITIES OF THE BOARD. The board shall

(1) measure the extent of the mental health need and, as necessary, conduct independent studies, evaluate the statewide mental health information system, and review the current mental health program of the state;

(2) provide a public forum for discussion of issues regarding current and potential services to persons served by the mental health program of the state;

(3) determine the needs, including those currently unmet, of the persons to be served by the mental health program of the state;

(4) review reports from the Department of Natural Resources regarding the valuation of the mental health land trust and the status of mental health trust land, from the Department of Revenue regarding allocations to the mental health income account, and from other departments regarding the current and projected revenue for the support of the mental health program of the state;

(5) subject to disclosure restrictions imposed by state or federal confidentiality or privacy laws, have access to information in the possession of state agencies;

(6) in conjunction with the Department of Health and Social Services, prepare and annually update a long-term comprehensive state

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1 mental health plan, to include the projected need and the services,  
2 facilities, and resources for the mental health program of the state  
3 to meet that need;

4 (7) in conjunction with the Department of Health and Social  
5 Services, develop, prepare, adopt, and periodically review and revise  
6 as necessary an annual state implementation plan to meet the needs of  
7 persons served by the mental health program of the state;

8 (8) in conjunction with the Department of Health and Social  
9 Services, and before developing the annual state implementation plan,  
10 evaluate the effectiveness of the prior year's implementation plan and  
11 evaluate program performance and recommend improvements, set priori-  
12 ties, and establish criteria to utilize in funding allocations;

13 (9) report at least annually to the legislature, governor,  
14 and commissioner of health and social services, and meet with appro-  
15 priate legislative committees, concerning the board's activities,  
16 including its evaluation of the effectiveness of the prior year's  
17 implementation plan, and its recommendations to meet the necessary  
18 operating and capital expenses of the mental health program of the  
19 state;

20 (10) serve as an advocate before the executive and legisla-  
21 tive branches of government and the public on behalf of those served  
22 by the mental health program of the state;

23 (11) discourage duplication of services and promote effi-  
24 cient and coordinated use of federal, state, and private resources in  
25 the provision of mental health services; and

26 (12) review applicable statutes, regulations, and policies  
27 and recommend appropriate changes.

28 Sec. 47.30.669. DEFINITION. In AS 47.30.661 - 47.30.669,  
29 "board" means the Alaska Mental Health Board established in

AS 47.30.6b1.

• Sec. 7. Section 1(b), ch. 132, SLA 1986, is amended to read:

(b) The commission established under (a) of this section consists of three [FIVE] members, including the commissioner of natural resources, or the commissioner's designee [AND THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES, OR THEIR DESIGNEES], and two [THREE] members and two [THREE] alternates [APPOINTED BY THE GOVERNOR] as follows:

(1) a member and an alternate representing the plaintiffs who were [,] appointed by the governor from a list of three names submitted to the governor by the plaintiffs in *Wales v. State*, + FA 82-2208 Civil;

(2) a member and an alternate representing the intervenors who were [,] appointed by the governor from a list of three names submitted to the governor by the intervenors in *Wales v. State*, + FA 82-2208 Civil [; AND

(3) A MEMBER AND AN ALTERNATE REPRESENTING THE GOVERNOR'S MENTAL HEALTH ADVISORY COUNCIL, APPOINTED BY THE GOVERNOR FROM A LIST OF THREE NAMES SUBMITTED TO THE GOVERNOR BY THE GOVERNOR'S MENTAL HEALTH ADVISORY COUNCIL.

• Sec. 8. Section 1(c), ch. 132, SLA 1986, is amended to read:

(c) The members of the commission shall elect a presiding officer. A majority of the commission constitutes a quorum. The affirmative vote of two [THREE] members is required to take official action. A vacancy does not impair the power of the remaining members to exercise the powers of the commission.

• Sec. 9. Section 2, ch. 132, SLA 1986, is repealed and reenacted to read:

Sec. 2. RESPONSIBILITIES OF THE COMMISSIONER OF NATURAL RE-

ed need and the services.  
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7.30.6b1 - 7.30.6b9.  
board established in

Chapter 48

1 SOURCES AND THE COMMISSION. (a) The commission shall review proce-  
2 dures proposed by the commissioner of natural resources to determine  
3 the fair market value, as of the effective date of AS 38.05.800, of  
4 all land selected by and patented to the state under sec. 202 of the  
5 Alaska Mental Health Enabling Act, and review the final determination  
6 of the fair market value determined under those procedures.

7 (b) The commission shall review the identification by the com-  
8 missioner of natural resources under AS 38.05.800 of land within  
9 legislative designations that is equal in value to all land selected  
10 by and patented to the state under sec. 202 of the Alaska Mental  
11 Health Enabling Act that is not in legislative designations.

12 (c) In the exercise of the commission's responsibilities under  
13 this section, the commission and its staff may review the records of  
14 the Department of Natural Resources that are made confidential by law  
15 or regulation. An individual who acquires information made confiden-  
16 tial by law or regulation in the performance of functions authorized  
17 by this Act and discloses it without proper authority violates AS 11-  
18 56.660.

19 (d) The commissioner of natural resources is responsible for the  
20 management of the mental health land of the state as a public trust  
21 under P.L. 84-830, 70 Stat. 709. Except as provided in law of this  
22 section, the commissioner of natural resources may not sell, lease, or  
23 exchange mental health trust land of the state or an interest in the  
24 mental health trust land of the state without the prior approval of  
25 the commission. In reviewing a proposal for the sale, lease, or ex-  
26 change of mental health trust land from the commissioner of natural  
27 resources, the commission may approve the proposal of the commissioner  
28 on its determination that the proposal is consistent with the terms of  
29 the trust established by the Alaska Mental Health Enabling Act.

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(e) The commissioner of natural resources may transfer trust land to the federal government under AS 38.05.035(b)(9) without approval of the commission. The commissioner of natural resources shall advise the commission of an intention to transfer trust land to the federal government and, after the transfer, shall make every effort to acquire replacement land to fulfill the state's remaining entitlement based on a prioritization, approved by the commission, of existing valid mental health selections.

\* Sec. 10. Section 6, ch. 132, SLA 1986, is repealed and reenacted to read:

Sec. 6. This Act is repealed on the certification of the commissioner of natural resources that the mental health land trust has been reconstituted under AS 38.05.800 to

- (1) the Alaska Mental Health Board established under AS 47.30.661;
- (2) the lieutenant governor; and
- (3) the revisor of statutes.

\* Sec. 11. TRANSITIONAL PROVISIONS. Beginning with fiscal year 1989 and continuing until the commissioner of natural resources certifies to the commissioner of revenue that the mental health land trust has been reconstituted under AS 38.05.800, as enacted in sec. 4 of this Act, the commissioner of revenue shall annually allocate from the general fund of the state to the mental health trust income account in the general fund an amount equal to five percent of the unrestricted revenue of the state for the fiscal year.

\* Sec. 12. Notwithstanding AS 47.30.663(a), as added by sec. 6 of this Act, of the initial appointees to the Alaska Mental Health Board appointed under AS 47.30.662, as added by sec. 6 of this Act, one-third shall serve for one year terms, one-third shall serve for two year terms, and one-third

Commission shall review procedural resources to determine date of AS 38.05.800, or rate under sec. 202 of the law the final determination use procedures.

Identification by the commission 38.05.800 of land within value to all land selected 202 of the Alaska Mental Health Board designations.

responsibilities under law may review the records of information made confidential by law information made confidential of functions authorized authority violates AS

is responsible for the state as a public trust provided in (c) of this Act may not sell, lease, or convey an interest in the land prior approval of the state, lease, or exchange. Commissioner of Natural Resources. Approval of the commissioner consistent with the terms of the Enabling Act.

Chapter 48

1 For three year terms.

2 \* Sec. 13. AS 37.14.010, 37.14.020, 37.14.030, 37.14.040, 37.14.050,  
3 AS 47.30.605; and sec. 3, ch. 132, SLA 1986, are repealed.

4 \* Sec. 14. Sections 7 - 10 of this Act take effect July 1, 1987.

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MEMORANDUM

FROM: JAMES B. GOTTSTEIN  
TO: INTERESTED PARTIES  
DATE: January 19, 1990  
RE: LEGAL ANALYSIS OF STATUS OF MENTAL HEALTH TRUST LANDS AND RELATED ISSUES

Summary and Purpose

The Commissioner of the Department of Natural Resources is expected to announce on January 24, 1990 that she does not intend to follow the procedures to determine the fair market value of one million acres of Mental Health Trust Lands which the Interim Mental Health Trust Commission (Commission) approved pursuant to Chapter 48 SLA 1987 (Chapter 48). If this expected action occurs, the Plaintiffs in the Mental Health Trust Lands lawsuit, Weiss v. State, 4FA-82-2208 Civ., will be forced to challenge title to approximately 750,000 acres of Mental Health Trust Lands and take other actions, as necessary steps to protect their rights against the continuing breach of the trust by the State of Alaska in properly discharging its fiduciary responsibilities in managing the trust.

The land categories are:

370,000	acres designated as state parks, refuges, etc.;
40,000	acres to Municipalities;
40,000	acres to Native corporations <sup>1</sup> ;
45,000	acres to individuals;
3,000	acres to the University of Alaska; and
<u>280,000</u>	acres in less than total conveyances.
778,000	

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1. It does not appear this would include a large portion of the Beluga Coal Field conveyed to Cook Inlet Region Inc., as a result of its exchange under the Alaska Native Claims Settlement Act.

The purposes of this memorandum are to outline the relevant facts and legal authority for such actions.

## I. FACTUAL BACKGROUND

In 1956, the Congress, in order to correct a longstanding problem in providing an adequate mental health program in Alaska, granted Alaska, in trust, one million acres of land to generate income "first for the necessary expenses of the mental health program of Alaska". Unfortunately, after selecting the best lands available, Alaska never administered the trust properly. This included transferring Mental Health Trust Lands to third parties without adequate compensation. Starting in the mid-Seventies, the State began to recognize this was illegal, and at the same time there was a tremendous clamor for land by municipalities and other interested parties (without paying for it, of course).<sup>2</sup> In 1978<sup>3</sup> the legislature purported to abolish the trust by "redesignating" Mental Health Trust Lands as General Grant Lands.<sup>4</sup> While a theoretical compensatory monetary fund was established, Mental Health Trust Lands were never valued to determine the proper compensation, and more importantly, not a single penny was ever paid into this account. Immediately after the "redesignation", municipalities, Native corporations and individuals began to receive large amounts of the best Mental Health Trust Lands without paying fair value for them.

A lawsuit was brought in 1982 by the Alaska Mental Health Association, through Steve Cowper<sup>5</sup>, naming Vern Weiss and Karl Hilliker as representatives of people needing mental health services, the beneficiaries of the Mental Health Lands Trust, to declare the legislative action in abolishing the trust invalid. The Supreme Court, in 1985, did just that and ordered "the trust be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." State v. Weiss., 706 P.2d 681 (Alaska 1985). However, the state

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2.This was the period of the "Beirne Initiative" where residents were to be allowed to stake "undesigned" state land for private ownership.

3.In the same package of legislation providing land to residents enacted as a response to the "Beirne Initiative".

4.Chapters 181 and 182 SLA 1978.

5.Governor Cowper has apparently been advised by the Attorney General's Office that as former attorney for the plaintiffs it is inappropriate or improper for him to take an active role in resolving the lawsuit. This has left a policy vacuum.

desired to avoid reversing previous actions it had taken on Mental Health Trust Lands, and the plaintiffs in the lawsuit were challenging conveyances of trust lands to third parties (for the reasons set forth below). An alternative method of reconstituting the trust was agreed on between the plaintiffs and the state. This approach was enacted as Chapter 48 SLA 1987 (Chapter 48).

Among other things, Chapter 48 provided that Mental Health Trust Lands be valued and an equal value of lands in legislative designations (state parks, refuges, critical habitats, and the like) be constituted as a replacement trust, with 8% of the value being deposited every year into the Mental Health Trust Income Account. Under Section 4 of Chapter 48, the value is to be determined by the Commissioner of the Department of Natural Resources under procedures approved by the Interim Mental Health Trust Commission (Commission). On November 7, 1989, after more than two years of a tremendous amount of work, the Commission approved its final procedures for determining the value of Mental Health Trust Lands. At this time, all indications are that the Commissioner is intending to refuse to follow these procedures. If the Commissioner fails to follow the approved valuation procedures the proposed settlement of the litigation will be nullified and the plaintiffs will be forced to challenge the legal status of the hundreds of thousands of acres of Mental Health Trust Lands described above and take other steps to protect their rights.

## II. APPLICABLE LAW

A. General Considerations. In the Weiss decision (this case), *supra.*, the Alaska Supreme Court confirmed that "basic trust law principles" apply to the administration of the Mental Health Lands Trust. In doing so, at footnote 3, the court cites the United States Supreme Court case of Lassen v. Arizona, 385 U.S. 458, 87 S. Ct. 584, 17 L.Ed.2d 515 (1967), and its own previous decision in State v. University of Alaska, 624 P.2d 807 (Alaska 1981).

76 American Jurisprudence, 2d, Trusts, Section 315 describes generally the trustee's duties as follows<sup>6</sup>:

A trustee must act in good faith in the administration of the trust, and this requirement means that he must act honestly and with finest and undivided loyalty to the trust, not merely with that standard of honor required of men dealing at arm's length in the workaday world, but with a punctilio of honor the most sensitive. He must act with such high good faith in the

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6. References to footnotes are generally omitted throughout this memorandum.

exercise of decisions in the administration of the trust, and in the investigation and determination of facts as a basis for his judgment and decisions. He must avoid all situations and relations tending in the least to interfere with the discharge of his duties, or in which honesty may be a strain on him. Any exceptions in his conduct to the high standard of honor governing him renders him fully liable for all ensuing damages to the trust estate. Courts of equity have been uncompromising in their hostility to any laxness on the part of a trustee and inquire in proper cases into his administration of the trust to determine his honesty and loyalty. The liberality with respect to a trustee of provisions in a trust instrument or declaration in no way diminishes the trustee's duty to act in utmost good faith.

Section 316, Trusts, 76 American Jurisprudence, 2d., describes how a trustee must act exclusively in the trust's interests:

A trustee in his administration of the trust is under the duty of acting exclusively and solely in the interest of the trust estate or the beneficiaries within the terms of the trust, and is not to act in his own interest or in the interest of a third person. He must act for and not against the trust estate or the beneficiary. In general, any act of the trustee in hostility to the interest of the trust estate is a breach of trust. He may not without breach of duty take part in any transaction concerning the trust, where he has an interest in such transaction adverse to that of the beneficiary.

A trustee is under a duty to refrain from situations wherein his own interests are brought into conflict with those of the trust, irrespective of good or bad faith on his part. He must not do anything tending to interfere with his exercise of a wholly disinterested and independent judgment.

In conformance with the above described standard of conduct by a trustee, one of the basic principles of trust law is that the trustee must keep trust property separate from his individual property. Section 179 Restatement of the Law of Trust, 2d.

Similarly, a trustee may not engage in self-dealing with trust property.

A trustee is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries, and it is a well established general rule that a trustee should not engage in self-dealing \* \* \*.

\* \* \*

The prohibition against self-dealing or mingling of funds by a trustee does not depend upon any question of fraud, but is made absolute to avoid the possibility of fraud and to avoid the temptation of self-interest.

76 American Jurisprudence, 2d., Section 319. This is not a new principle. In the 1823 United States Supreme Court case of Wormley v. Wormley, 8 Wheaton 421, 5 L.Ed 651 (1823), Justice Story wrote:

No rule is better settled than that a trustee cannot become a purchaser of the trust estate. He cannot be at once vendor and vendee. He cannot represent in himself two opposite and conflicting interests. As vendor he must always desire to sell as high, and as purchaser to buy as low, as possible; and the law has wisely prohibited any person from assuming such dangerous and incompatible characters.

In the case of the Mental Health Lands Trust, the dishonest and unscrupulous actions of the state in the administration of the trust<sup>8</sup> makes a mockery of the just enunciated standards of conduct. The following is a description of the remedies appro

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7. While the state, as a whole, has acted abominably with respect to the trust, the state is composed of many different parts, and with some notable exceptions it is hard to cast particular individuals as culpable. The 1978 legislature, for example, can say it intended to compensate the trust and no bad faith was involved. From 1973 until the lawsuit, DNR can say it was just following state law. The 1987 Legislature can say it acted in good faith in enacting Chapter 48 and expected the Commissioner of DNR to follow the procedures approved by the Commission. On the other hand, the administration's budgeting process clearly does not properly allocate trust funds "first to the necessary expenses of the mental health program", and the Legislature certainly has not corrected this in its appropriations. Similarly, DNR has not been at all concerned with making sure the trust is fairly compensated.

8. The barest outline of facts given here does not even scratch the surface of the repeated, deliberate and determined efforts of the state to avoid its trust responsibilities and convert trust property to its own use without compensation to the beneficiaries of the trust, who, after all, are among the most defenseless in the population.

priate for this breach of trust, including the rights of the beneficiaries to pursue trust property into the hands of third parties, and hold third parties accountable to the trust in the event of their participation in the breach of trust.

B. Only Purchasers For Value Without Notice Have Valid Title to Mental Health Trust Lands.

1. General Requirements.

Only bona fide purchasers -- that is people who have paid value for trust property and are without notice, either actual or imputed of the trust or the breach of trust have valid title to Mental Health Trust Lands. The reason for this rule is that as between the clearly innocent beneficiary and a third party who has obtained trust property, the beneficiary should not suffer the loss, unless the third party can prove he was innocent as well. In proving his innocence, the law charges the third party with knowledge of certain facts and with the duty to make an inquiry into other facts where he should have been wary. Bogert in *The Law of Trusts and Trustees, Revised Second Edition*<sup>9</sup>, devotes a whole chapter (43) to the "Bona Fide Purchaser Rule".

Section 881 of Bogert states the basic bona fide purchaser rule:

A most important rule which limits the power of a beneficiary or other holder of an equitable interest to pursue and claim property is the doctrine to the effect that the transfer of the legal estate in property to a bona fide purchaser for value cuts off all equities in the same property. Thus if a trustee holds under the trust the legal title to real estate (the trust not being on the record), and the trustee sells the land to a purchaser who does not know of the trust, or have reason to know of it, and who pays a valuable consideration for the legal title, the latter gets an interest free and clear of the trust, and the beneficiary cannot get the aid of a court of law or equity in obtaining the legal title or possession.

Section 887 of Bogert states:

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9. Hereafter referred to as "Bogert".

It is well settled that in order to have the benefit of the bona fide purchaser rule, the taker of the legal title must have "paid value," or must have been a taker "for a valuable consideration."

## 2. Notice.

Section 891 of Bogert discusses the various categories of notice as follows:

The cases and statutes describe the person who can qualify for the protection of the rule as "an innocent purchaser", or a "bona fide purchaser", or a "purchaser without notice" of the equity in favor of another person which, it is claimed, has been cut off. The fact of which it is alleged the purchaser had no notice may be either (1) the mere existence of the trust or other equity or (2) the extent of the powers of the trustee under a known trust. In discussing these problems the courts and writers use various words and phrases, not always consistently, for example, "knowledge", "notice", "actual notice", "implied notice", "constructive notice", "absolute notice", and "facts putting on inquiry". It is believed that confusion can be avoided by using the single word "notice", and defining it to include awareness of a fact which the party either had actually, or should have possessed, or which the law regards him as possessing.

One who is a purchaser of property which is subject to an equity may be in any one of several different situations with regard to notice as to whether the property comes to him charged with an equity or free from all equities.

(1) He may have no knowledge or information, either actual or imputed under a statute or otherwise, which would lead a reasonable man either to know that there was an equity attached or to inquire further with respect to the possibility of such equity being attached. In this case he is an "innocent purchaser," or "purchaser without notice."

(2) He may have knowledge, coming to him or his agent through the senses of sight or hearing, which shows that the property in question is being transferred to him subject to an equity. In this case he may be said to be a "purchaser with actual notice."

(3) He may have notice of an equity, imputed to him through recording or other statutes, in which case he is usually called a purchaser "with constructive notice." For purposes of public policy the statutes treat him as having notice, whether or not he is actually conscious of the existence of the equity.

(4) He may have knowledge of facts about the ownership of the property, either actually acquired by himself or his agent, or imputed to them under statutes, which, while not sufficiently strong to lead an ordinarily prudent man to a positive belief that the property is subject to an equity, is of sufficient force to compel an ordinarily careful man to inquire further regarding a possible equity. If such is the case, the purchaser is charged by the court with notice of the facts regarding the equity which a reasonable inquiry would have revealed. A purchaser of this type is one "put upon inquiry," and if the inquiry ought to have led to notice of the equity he is treated by the court as if he had had actual notice of it.

(5) A purchaser may become a purchaser with notice because of a combination of the factors of actual notice, constructive notice, and notice acquired from facts putting on inquiry. Thus he may have information from each of the three types of sources, no one of which, standing alone, would make him a purchaser with notice of an attached equity, but which, in combined effect, give him the requisite knowledge to make him a mala fide purchaser.

(Emphasis added)

Section 892 states:

If the proof shows that the purchaser was conscious of the existence of any equity against the property, there is no doubt that he cannot get the benefit of the bona fide purchaser rule.

Section 893 of Bogert "Constructive Notice under Recording Acts", states:

From the time of filing for record, all purchaser of the property involved, and in many cases creditors are charged with knowledge of the existence and contents of the document in question. It is clear that these statutes are frequently of importance in giving to a purchaser from a trustee or other holder of property subject to an equity notice of the existence and terms of the trust. This notice is generally called "constructive". It exists no matter what may be the purchaser's actual knowledge. Thus one purchasing land

is charged with notice of the terms of the recorded deed to his grantor and with the terms of all prior recorded deeds in the chain of title. If the grantor or a predecessor of the grantor is described in the deed by which he acquired title as a trustee, with or without details of the trust, the purchaser is deemed to know of the existence of such a trust and of such details as to names of beneficiaries, purposes of the trust, powers of the trustee, etc., as are given in the recorded instrument. Such facts thus treated as being known to the purchaser may give him constructive notice that he will take the property subject to an equity in favor of the beneficiary, or they may merely put him on inquiry as to whether he will get title free of the trust or not.

\* \* \*

At common law the mere pendency of some actions with regard to the title to property made a purchaser during the pendency of the action take subject to the claims of the parties as later adjudicated. Statutes now provide that in an action affecting the title to realty a notice of the pendency of the action may be filed in the real property record office, and that it shall be constructive notice to purchasers of the realty pendente lite. These statutes constitute another source of constructive notice to purchasers of realty who claim to be bona fide purchasers.

Section 894 of Bogert states:

If the prospective purchaser of the trust property, or of other property subject to an equity, learns of facts personally or through an agent which, while not conclusively showing the existence of a trust or other equity, would lead an ordinarily prudent man to a belief that there was a possibility that an equity existed, the purchaser has a duty to make a reasonable inquiry concerning the existence and nature of the possible equity, and he will be charged with knowledge of the facts concerning the equity which a reasonable investigation would have brought to light.

Section 894 of Bogert, states:

In most cases where there is a written trust instrument, and the purchaser knows of it, or could have learned of it with reasonable effort, he will be charged with the duty of examining that instrument.

\* \* \*

The duty to inquire may be merely as to the existence of a trust or other equity, or it may include also the extent of the powers of the trustee and the question whether the trustee has duly exercised the powers granted to him.

The 1823 United States Supreme Court case of Wormley v. Wormley, cited above, demonstrates again this is not a new legal principle.

The next point for consideration is, whether the defendants, Veitch, and Castleman and McCormick, were bonae fidei purchasers of the Frederick lands, without notice of the breach of trust. If they had notice of the facts, they are necessarily affected with notice of the law operating upon those facts; and their general denial of all knowledge of fraud will not help them, if in point of law, the transaction is repudiated by a court of equity. If they were bonae fidei purchasers, without notice, their title might have required a very different consideration.

\* \* \*

It appears to us therefore, that the circumstances of the case can lead to no other result than that Castleman and McCormick were not purchasers without notice of the material facts constituting the breach of trust; and that, therefore, the Frederick lands ought in their hands to stand charged with the trust in the marriage settlement.

Interestingly, in Justice Johnson's separate opinion he objected to the characterization of the transactions as being in bad faith or unfair, but nevertheless agreed with the result:

I can see nothing but liberality in the conduct of Strode towards Wormley, and little else than improvidence, caprice, and ingratitude in the conduct of the latter.

\* \* \*

Nevertheless, there are canons of the court of equity which have their foundation, not in the actual commission of fraud, but in that hallowed orizon, "lead us not into temptation."

\* \* \*

It is unquestionable, from the evidence, that both Veitch, and Castleman and M'Corrick, must be affected by both legal and actual notice of the transactions of

Strode. They are, therefore, liable to the same decree which ought to be made against the latter.

It is, however, some satisfaction to me to be able to vindicate their innocence, while I feel myself compelled to subject them to a serious loss. The rule which requires this adjudication, may, in many cases, be a hard one, but is a fixed rule, and has the sanction of public policy.

C. Identifiable Trust Property not in the Hands of a Bona Fide Purchaser Can be Returned to the Trust.

Bogert at Section 866 states:

"The law is now well settled that as between the cestui que trust<sup>[10]</sup> and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust." [citation omitted]

This doctrine has been expressed by the Supreme Court of California in the following words: "It is well settled that the beneficiary of a trust may follow and recover the trust fund if any property in the hands of the trustee or of those taking with notice can be identified either as the original property of the cestui que trust, or as the product of it."

This right of the beneficiary is not that of a lienholder or a preferred creditor. It is based on a property right in the res or its substitute. "The right of the beneficiary to pursue a fund and impose upon it the character of a trust is based on the principle that it is the property of the beneficiary, not upon any right of lien against the wrongdoer's general estate; and this, whether the property sought to be recovered is in the form in which the beneficiary parted with its possession or in a substituted form.

(Emphasis added).

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10. Beneficiary or purpose of a trust.

The court in Rogers v. Rogers 473 N.E. 226 (N.Y. 1984) stated:

[O]ne who possesses equity in an asset is entitled to restitution of the asset by a subsequent title holder who paid no value even if the latter had no knowledge of the predecessor's equitable interest.

In Paolino v. Channel Home Centers, 668 F.2d 721, 723 (3rd Cir. 1982) the court said:

If a purchaser of property from a trustee knew, or should have known, that disposition of the property was a breach of trust, the purchaser is charged with the same trust.

With respect to a donee of trust property, Section 868 of Bogert states:

A donee who receives trust property transferred to him in breach of trust, although he does not know of the breach, is liable to return the trust property or its product as long as he holds it.

That these general trust law principles apply to trust lands such as Mental Health Trust Lands cannot be seriously questioned. See Murphy v. State of Arizona, 181 P.2d 336 (Ariz. 1947). Indeed, Murphy held that deeds issued in violation of the trustee's authority were "null and void" and subsequent holders whether bona fide purchasers or not, did not have good title because there was nothing to purchase<sup>11</sup>:

If \* \* \* these enactments [conditions upon which trustee may dispose of trust property] are mandatory upon  
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11. The court in Murphy described the reasons for the trust restrictions thusly:

The sad experience of Congress with the handling by these twenty-three states of the granted lands, the sale thereof, and the investment of monies derived from a disposition of the granted lands, brought about a new policy which found expression in the Enabling Act for New Mexico and Arizona. The dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state, and these granted lands and the monies derived from a disposition thereof were so poorly administered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona.

the Board, or are jurisdictional in effect, or conditions to be performed before power vests in it to make the conveyance, then their deed is a nullity and gives rise to no rights whatever either in the grantee or in purchasers for value from him.

See also The United States Supreme Court case of Alamo Land & Cattle Co. v. Arizona, 424 US 295, 47 L.Ed 2d 1, 96 S.Ct 910 (1976) and U.S. v. 78.61 Acres, 265 F.Supp 564 (USDC Neb. 1967), which was cited with approval by the U.S. Supreme Court in Alamo.

E. Parties who have "Participated in the Breach of Trust are Liable for the Damages Occasioned Thereby.

Bogert, Section 901 states persons participating in a breach of trust can be held liable for the damages to the trust:

The wrong of participation in a breach of trust is divided into two elements: (1) an act or omission which furthers or completes the breach of trust by the trustee; and (2) knowledge at the time that the transaction amounted to a breach of trust, or the legal equivalent of such knowledge.

\* \* \*

[I]f the third party by any act whatsoever assists the trustee in wrongfully transferring the benefits of the trust property to the trustee, another person, or the alleged participant, or aids in destroying or injuring that property, there has been conduct upon which liability can be predicated, \* \* \*.

Section 868 of Bogert states:

[N]o third person shall knowingly aid the trustee in committing a breach of his duties.

\* \* \*

If a third party takes part with the trustee in a breach of trust, the alternative remedies of money claim or tracing of trust property may be applied to him and, as to the trustee, in addition to other relief.

\* \* \*

[T]he trust property or its product has been traced to the hands of the third party-participant and the beneficiary has been able to reach it there. If the bene-

ficiary believes that the third party has participated in a breach and has proceeds of the trust property in his hands, the beneficiary may obtain an accounting from the third party and may ask, in the same suit, for tracing as to all property identified and a money judgment as to the balance.

- D The State should be Enjoined<sup>12</sup> from Further Transfers of Mental Health Trust Lands and Possibly All State Lands; Receipts from All State Lands Are Subject to Impoundment; Traceable Trust Property in the Hands of Third Parties is Subject to the Trust's Claims.

Section 861 of Bogert states:

The court may order the trustee or his successor in interest to perform the trust as a whole, or to take some particular step in trust administration.

\* \* \*

The court may in its discretion require the defaulting trustee to restore to the trust fund or deliver to the beneficiary particular property other than money, by way of restitution in kind.

\* \* \*

[T]he beneficiary may claim part of a trust fund under a constructive trust theory and recover money damages for conversion or misappropriation of the other part.

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12. Under Civil Rule 65(c) a bond will normally be required to obtain an injunction in order to cover any costs which may be incurred if the injunction later turns out to have been wrongfully issued. There are numerous cases, however, which hold that such a bond is not necessary (or may be posted in a nominal amount) if the party seeking it is a public interest litigant, or is indigent. The beneficiaries of the Mental Health Lands Trust qualify under both criteria. See People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319 (9th Cir. 1985); Natural Resources Defense Counsel v. Morton, 337 F.Supp. 167 (D.C.D.C. 1971); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 331 F.Supp. 925 (D.C.D.C.. 1971); Orantes-Hernandez v. Smith, 541 F.Supp. 351 (D.C. Cal. 1982); Bartels v. Biernat, 405 F.Supp. 1012, 1019 (D.C. Wis. 1975); Bass v. Richardson, 338 F.Supp. 478 (D.C.N.Y. 1971); Denny v. Health & Social Services Bd., 285 F.Supp 526, 527 (D.C. Wis 1968).

Section 862 of Bogert states:

For a breach of trust the trustee may be directed by chancery to make a payment of damages to the beneficiary out of the trustee's own funds.

Section 865 of Bogert states:

[I]f the trustee who has defaulted has in his hands the trust res or its substitute, the right of the beneficiary to hold the trustee to personal liability may in some cases be supplemented by a lien upon the res or its substitute.

\* \* \*

And so too, if a third person has in any way rendered himself liable to the beneficiary to pay damages in money and such third person is not a bona fide purchaser but has title to part or all of the trust res, or to any property which is the successor or product of part or all of the trust property, the beneficiary may obtain a decree from the court that the beneficiary's claim for money damages be declared a lien on such property and be satisfied out of it.

\* \* \*

If the beneficiary chooses to rely on money liability plus this equitable lien on the trust property or its proceeds, he has obviously made an election inconsistent with tracing the trust property and claiming it as his equitable property. Under this lien theory the property is that of the defendant trustee or third person absolutely. Under the tracing plan the plaintiff claims that legal title to the res in question is held by the defendant but that it is equitably owned by the plaintiff. The value of the traceable property will usually determine the beneficiary's choice between the lien theory and the tracing method. If a trustee, for example, has stolen trust funds in the amount of \$10,000 and invested them in realty in his own name, and the realty has become worth more than \$10,000 it will be advantageous for the beneficiary to elect to recover that realty in complete satisfaction of the claim for conversion of trust principal. On the other hand, if the real property has decreased in market value to \$8,000, it will be expedient for the beneficiary to obtain a money judgment against the trustee for \$10,000 on account of the misappropriation of the trust principal, sell the realty under a lien and realize \$8,000 therefrom, and still have a claim for \$2,000 under his judgment.

In Moody v. Pitts, 708 S.W. 930 2d. (Texas App. 1986), the court stated:

If a trustee commingles trust funds with the trustee's own, the entire commingled fund is subject to the trust.

In Blair v. Trafco Products, Inc., 369 N.W.2d 900 (Mich. App. 1985) the court said:

[W]here mingling of trust funds with other funds occurs, the cestui que trust has a lien upon the entire fund, and the law presumes that the trust fund was not paid out so long as an amount equal to the trust fund remained.

F. Appointment of A Receiver on Mental Health Trust Lands and Replacement of the State as Trustee.

Restatement of Trusts 2d., Section 107 (a) states a trustee can be removed by a proper court. Relevant comments to that section state:

a. Removal by Court. A court may remove a trustee if his continuing to act as trustee would be detrimental to the interests of the beneficiary. The matter is one for the exercise of a reasonable discretion by the court.

b. Grounds for Removal. The following are, among others, grounds for removal of a trustee: \* \* \* the commission of a serious breach of trust

Section 108 of the Restatement of Trusts 2d., states if a trustee has been removed the court can appoint a new trustee.

Section 199(e) of the Restatement of Trusts 2d., states the beneficiaries can maintain a suit to remove the trustee. Section 519 of Bogert states, "When in the course of the administration of a trust it becomes apparent that the trustee cannot in fairness to the beneficiaries be allowed to continue in the exercise of his powers, he may be removed."

Bogert states at section 867:

Sometimes a court can be induced to appoint a receiver for the trust property in order to protect the trust and conserve its assets, pending its decision on an application for the removal of a trustee or for other relief. The rule regarding receivers has been stated by a Georgia court: "Besides it is an established rule of the Court of Chancery, that when a trust fund is in

danger of being wasted or misapplied, it will interfere on the application of those interested in the fund, and by the appointment of a receiver, or in some other mode, secure the fund from loss."

A New York court has said: "it is said that the appointing of a receiver rests in discretion. This proposition does not teach much. A receiver is proper, if the fund is in danger; and this principle reconciles the cases found in the books.

### III. APPLICATION OF THE LAW TO THE FACTS HERE

#### A. Notice Through Public Records.

There is a very strong argument that everyone is charged with notice of the trust and later the breach thereof because of the following.

(a) Deed. The Patents (deeds) to the state indicate that the grant is pursuant to the Alaska Mental Health Enabling Act.

(b) Provisions of the Alaska Mental Health Enabling Act. The Alaska Mental Health Enabling Act is a public law and all persons taking Mental Health Trust Lands should be either charged with constructive notice of the trust requirements or put on inquiry.

(c) The 1978 Trust Abolishment. The purported redesignation of Mental Health Trust Lands by the legislature in 1978 and the failure to compensate the trust one penny was a matter of public record and persons taking Mental Health Trust Lands should be either charged with constructive notice thereof or put on inquiry.

The legal result of being charged with notice is that one can not be a bona fide purchaser. Thus, under this analysis no third party can have good title to Mental Health Trust Lands, no matter how far removed down in the chain of title.<sup>13</sup> Even if the court does not conclude everyone is charged with notice, under the specifics of many cases, third party conveyees do not have good title.

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13. Of course, there very well may be a cause of action against the State for conveying bad title.

B. Specific Examples.

1. Legislative Designations (Parks, Refuges, etc).

As indicated previously, some 370,000 acres of Mental Health Trust Lands has been designated as state parks, refuges, etc. Since title remains in State ownership there can be no real argument but that these lands remain trust property. Just as clear is that the legislative designations are an improper method of management of Mental Health Trust Lands. Instead these lands have to be managed to achieve maximum income for the beneficiaries (as do all Mental Health Trust Lands). Thus, all of these lands must be commercially developed to the extent it is possible and furthers the purpose of providing income to the Trust. For example, when it will be in the best interests of the beneficiaries of the trust to do so these lands must be opened for mineral development.<sup>14</sup>

2. Municipalities

Since the municipalities were in the forefront of pressuring the state to redesignate Mental Health Trust Lands, not only must the 40,000 acres selected and/or conveyed to Municipalities be returned, but municipalities should be liable to the beneficiaries for participating in the breach of trust.

3. Native corporations.

By far, Cook Inlet Region Inc., has received the lion's share of the 40,000 acres that have been conveyed to Native corporations.<sup>15</sup> There is no question but that Cook Inlet knew of the trust status of the lands and the breach of the trust. It has been Cook Inlet's legal position that Congress authorized its receipt of the bulk of the Beluga Coal Field when it approved the Cook Inlet Land Exchange. However, counsel for Cook Inlet has not explained how Congress could give away something it no longer owned.

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14. That the lands have to be managed to produce maximum income does not mean that the trustee may sacrifice long-term income for immediate income.

15. The 40,000 acre figure does not include lands lost by the state in its lawsuit with Tyonek Native Corporation over conflicting selection rights under the Alaska Mental Health Enabling Act and the Alaska Native Claims Settlement Act Tyonek Native Corp. v. Secretary of the Interior, 836 F.2d 1237 (9th. Cir. 1988), nor the Beluga Coal Field lands exchanged to Cook Inlet in its exchange.

4. Individuals.

(a) Constructive Notice. As indicated above, title to all Mental Health Trust Lands is in dispute, even if formally conveyed by the state to individuals. All of these third party conveyees will be brought into the lawsuit<sup>16</sup> and notified that their rights to Mental Health Trust Lands is in dispute. They will then have to defend their title to Mental Health Trust Lands as a Bona fide purchaser. As outlined above, however, it seems that "constructive notice" of the trust and breach of the trust will be imputed to individuals on the basis of the public records by the court. Even if the court does not charge every individual recipient with constructive notice, then each person receiving Mental Health Trust Lands or interests therein must prove that he paid value for the land and that he did not otherwise have notice, either actual or constructive, of the trust or the breach.

(b) Leases. The same analysis would hold for leases.

5. University of Alaska.

There is no question but that the University of Alaska knew about the trust status of the 3,000 acres it received conveyances of. Indeed, it is particularly flagrant since it received these conveyances in settlement of its lawsuit with the state for the same breach of trust in redesignating University Trust Lands as General Grant Lands.

6. Less than total Conveyances.

Again, the same sort of analysis applies to the other 280,000 acres in less than total conveyances that have been made on Mental Health Trust Lands. However, certain categories of less than total conveyances merit discussion.

(a) Mining Leases. Since the state did not have real mining leases prior to the decision of the Alaska Supreme Court in the 6(i) case<sup>17</sup> and no rents or royalties were ever paid these

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16. Whether individually or as a member of one or more defendant classes.

17. Trustees for Alaska v. State Department of Natural Resources, 736 P.2d 324 (Alaska 1988). In this case, the Alaska Supreme Court ruled that the state's practice of granting rights to extract minerals, although denominated a "lease" was not truly a lease because no rents or royalties were due and that this violated Section 6(i) of the Statehood Act which requires a lease of mineral resources.

leases are invalid.<sup>18</sup> Of course, the operators of these mineral properties are accountable for royalties due to the trust for the minerals that have been removed and arguably for minimum royalty and/or rental payments.

(b) Oil & Gas Leases. It strains credulity to believe that oil companies did not actually know of the trust status of the lands because a detailed assessment of land status and title is normally done by any prudent potential oil and gas lessee.<sup>19</sup>

(c) Public and Charitable Uses. As described above, trust property given for a charitable purpose, where payment of value and lack of notice is not present normally must be returned to the trust.

There are many other types of transactions and circumstances that will no doubt be revealed. The foregoing, rather than intended to be exhaustive, is to illustrate the general principles involved and how they should be applied in particular circumstances.

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18. As recently as May of 1989, the United States Supreme Court held that a flat rate royalty for mineral lands was an invalid method of leasing mineral trust lands and the statute authorizing it invalid as applied to Arizona's School Trust Lands. *Asarco v. Kadish*, 490 US \_\_\_, 104 L.Ed 696, 109 S.Ct. \_\_\_ (1989). This would appear to invalidate the state's current leasing program with respect to its application to Mental Health Trust Lands (However, no new mineral leases have been issued on Mental Health Trust Lands since the Alaska Supreme Court's decision in this case in October of 1985). Interestingly, at footnote 3, the United States Supreme Court specifically acknowledged the difficulty of determining fair market value of minerals, but reaffirmed its previous pronouncements that "whatever the difficulties may be in making such appraisals with complete accuracy, it does not defeat the existence of a "market value" in mineral rights, and it does not suffice as a reason to depart from the ordinary requirements that the law imposes on such transactions.

19. The same is true for mineral properties, but to a lesser extent where the lessee is a "mom and pop" operation which is much more prevalent in mining, particularly placer.

INTERIM MENTAL HEALTH TRUST COMMISSION

DRAFT FINAL REPORT

(December 20, 1989)

on

Approved Procedures for Determining the Fair Market Value  
of  
Alaska's Mental Health Trust Lands

## I. INTRODUCTION AND BACKGROUND

In 1956, the Congress granted the Territory of Alaska the right to select one million acres of land to be managed as a public trust to produce income that would be, "applied first for the necessary expenses of the mental health program of Alaska." However, after selecting the most promising income producing potential lands available at the time, the State never actively managed these lands as a trust. There was no effort to protect the corpus from dissipation or to generate maximum income in the interest of the primary beneficiaries.

To the contrary and from the beginning, lands were conveyed from the trust at, frequently, less than fair market value and for purposes not allowed in the 1956 legislation. The Alaska Legislature even attempted to dissolve the trust in 1978. (Ch. 181, 182, SLA 1978) By October 4, 1985, of the original one million acres, only 194,672 acres of land remained in unencumbered grant land status. (Interim Mental Health Trust Commission, Report to the Legislature, February 1987, "APPENDIX C: THE MENTAL HEALTH LAND TRUST")

In 1982, beneficiaries of the trust sued the state for breach of its trust responsibilities. In October, 1985, the Alaska Supreme Court agreed the state had breached its trust responsibilities and ordered that, "the trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." State v. Weiss

706 P.2d 681 (1985). This reconstitution was deemed impracticable at best by the State and it strenuously resisted the reversal of previous actions taken on mental health trust lands that would be required. Therefore, to help devise an acceptable method of alternative or constructive reconstitution of the trust, and to assure proper trust management in the interim, the legislature in 1986 created this Interim Mental Health Trust Lands Commission (Commission). See Ch. 132 SLA 1986. Under legislative auspices, discussions thereafter took place between all interested parties to seek acceptable alternative means of reconstituting the trust.

In its February, 1987 report to the Legislature, at page 10, the Commission concluded that, "[t]he number, complexity and importance of the questions raised by the Weiss Opinion's trust reconstitution instructions urges a negotiated settlement." The concurrent work of special legislative committees also all supported and adopted the concept of a negotiated resolution. This unanimity culminated in the passage of Chapter 48, SLA 1987 (Chapter 48). Chapter 48 directed a replacement trust corpus be created from lands currently in legislatively designated areas equal in value to the September, 1987, value of the original one million acres received by the State under the 1956 legislation, with the state then to pay "rent" at 8% per year on this value into the mental health trust income account.

Under Chapter 48, this Commission, composed of the Commissioner of the Department of Natural Resources (or her designee),

and two public member, Dr. George Rogers, and Dr. Lidia Selkregg<sup>1</sup> was directly charged with approving procedures on behalf of the Commissioner of the Department of Natural Resources for determining the 1987 fair market value of the original one million acres of mental health trust lands and, also, of identifying lands of equal value among eight million acres of potential replacement lands within legislatively designated areas.

Commencing with its June 9, 1987 meeting and continuing through its meeting of November 7, 1989, the Commission held over thirty public meetings or work sessions in order to evolve its finally approved procedures for determining the fair market value of the original mental health trust lands. Each meeting was public and its subject matter was noticed to all interested parties and an opportunity allowed for all to present and argue their views both orally and in writing<sup>2</sup>.

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1. The chairman of the Commission, Dr. George Rogers, is a professional resource and general economist, having his first contact Alaska resources in 1937 while working in the economics department of Standard oil of California. He has been an Alaska resident since 1945, serving as an economist with the Department of Interior, Resources for the Future and the University of Alaska where he established its Institute of Social and Economic Research in 1960-61. The other public member of the Commission, Dr. Lidia Selkregg, is a professional geologist and planner. Dr. Selkregg has served on the Anchorage Assembly and its Planning and Zoning Commission. She is also a Professor Emeritus at the University of Alaska and developed its planning curriculum. Both of these members have served on many State and Federal land use and natural resources commissions and committees and bring decades of experience in many of the issues being addressed by the Commission.

2. References to documents herein that have not been published, are to documents presented to or prepared by the Commission and kept on file by DNR, acting as the Commission's staff.

At its November 7, 1989 meeting, the Commission (with one dissent) adopted final valuation procedures in conformity with the legislative intent (copy attached as Appendix A). In all instances, standard and specific industry methodologies were adopted, as necessarily modified for use within rather severe constraints of available time and money. The procedures were then forwarded on the same date to the Commissioner of Natural Resources to make the resulting determination of fair market value for the one million acres of mental health trust lands, as required by Chapter 48. This Report is intended to provide in one document the background and rationale supporting adoption of these procedures.

## II. DISCUSSION

### A. FAIR MARKET VALUE

Chapter 48 requires the determination of the "fair market value" of the original corpus and replacement lands. While there was consensus on the general approach and procedures to be followed, the precise definition and means of determining the fair market value has caused continuing disagreement.

In legal memoranda to the Commission, attorneys for the Plaintiffs and the State agreed that "fair market value is the highest price which a hypothetical willing buyer would pay a hypothetical willing seller in a free and open market." (Gottstein, May 4, 1989, Re: Definition of Fair Market Value;" Koester, May 9, 1989, "Fair Market Value.") Additionally, they agreed

"that there is no 'inexorable rule' by which fair market value is to be determined, and that the comparable sales method is not the only one which may be used." (Koester, op. cit., page 4) All parties also agreed on the following statement at the July 12, 1989 Commission meeting:

Fair Market Value for purposes of Chapter 48 means utilization of the best information and methodology available within time and funding constraints to arrive at fair market value.

(Transcript, page 54)

While recognizing the income approach was the appropriate methodology for valuing resources, DNR applied only the market or "comparable sales" approach in valuing the mineral endowment. As late as the September 5, 1989, meeting, the lead staff member for DNR, Mr. Gustafson, stated: "The market approach [comparable sales] is what we always felt is required under terms of the legislation. There are a lot of other ways that you could put a value on this thing. We could have done that too, but we have been faithful to the market approach because that is what the Legislature required." (Transcript, page 55). The Commission does not agree the Legislature required use of only the "comparable sales" ("market") approach for valuation.

Under Congress' intent in the 1956 legislation and subsequent selection of the lands by Alaska, mental health trust lands were to be managed as a public trust for income production rather than as a repository of land for resale. Pursuant to that in-

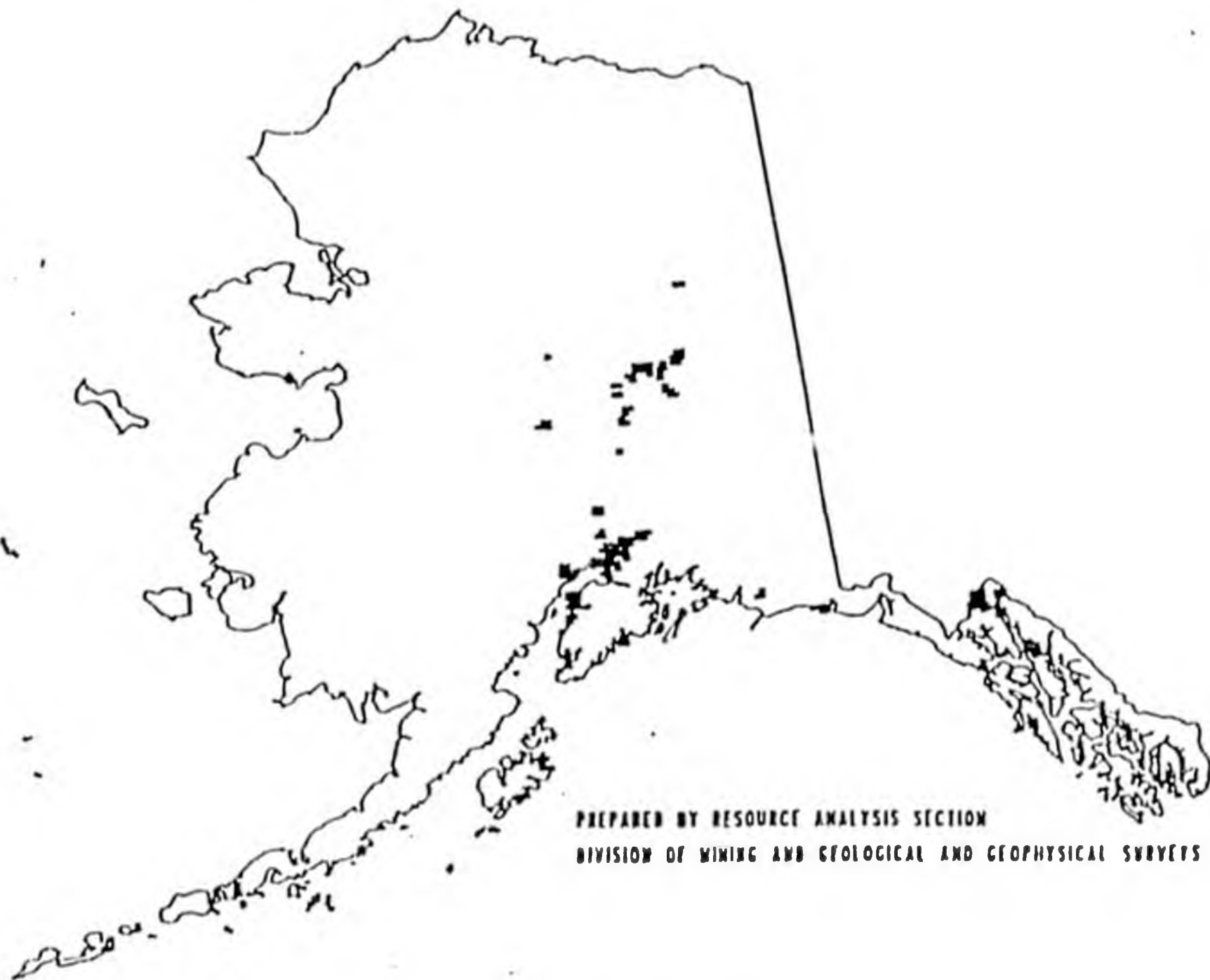
tent, the land selections made by the Territory and State of Alaska between 1956 and 1965 were based upon income analysis. Selections were anticipated to be suitable for development and targeted lands surrounding the principal urban centers and known commercially valuable natural resource lands along or adjacent to the main rail, water, highway and road transportation systems. (Refer to Figure 1).

Approximately half the mental health trust lands were urban and sub-urban lands, selected because their values would appreciate at a high rate in response to community growth. Timber lands were selected with the view that they would become the core of the State's forest system (which they are) and hydro-carbon and mineral lands were selected from the major mining areas of the State.

These selection methodologies are inherently inconsistent with an intent to base mineral value on comparable sales, as value or income would have been derived from these lands without any sales, but through mineral leases, joint ventures, and similar transactions between the trust and developers. Accordingly, rather than being restricted to the comparable sales approach, the Commission adopted procedures that are most appropriate to the valuation being performed. As noted, these are in all instances those used in practice by industry, with appropriate adjustments dictated by lack of funds and time.

FIGURE 1.

TRUST LANDS: MENTAL HEALTH GRANT (1956)



PREPARED BY RESOURCE ANALYSIS SECTION  
DIVISION OF MINING AND GEOLOGICAL AND GEOPHYSICAL SURVEYS

B. ESTABLISHING PROCEDURES

In his June 1987 Review, Commission Chairman Dr. George Rogers recommended that:

Rather than use one appraisal approach (market data) as was done in 1985 and 1986, the accepted approaches most appropriate to each classification should be used. For example the market approach would appear suited to urban residential and commercial lands while the income discounting approach would be best for. . . lands which were selected not for resale but income production management. . . [these] should be valued by contract with a firm experienced in natural resource analysis and valuation rather than another panel of real estate appraisers.

This was not acceptable to DNR but, since consensus was desired, a compromise was reached. The surface estate of the entire corpus would be valued by means of three geographic opinion-of-value panels of three appraisers each, with provision for review, questioning and mediation of any remaining differences. The "review process" of Plaintiffs submitting questions regarding valuations through their review appraisers and the subsequent consideration and resolution of these questions, was deemed

essential to the legitimacy of the process and to overcoming the demonstrated shortcomings of the opinion-of-value process<sup>3</sup>.

The natural resource endowment and value estimates would be accomplished by the natural resources division of DNR, with input from the beneficiaries. Where it was not possible to arrive at a value in-house, this task would be contracted to a consultant.

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3. In 1985 the State attempted to put a value on the trust corpus in response to the initial lower court decision in the Weiss litigation. This effort is an illuminating case study of the role of procedure design and implementing methodology in determining the outcome of a process. A rough opinion of value process was used for the surface, a token value for only part of the sub-surface endowment, and addition of 10.5% interest annually from July 1978 to July 1985. (Alaska Department of Natural Resources, May 1985, "Value Summary Mental Health Land Retained in State Ownership.") To this was added the estimated value of conveyances from the trust prior to July, 1978, giving a total estimate of approximately \$600 million as of July 1985.

There was a great deal of criticism of this 1985 opinion of value panel process, and the majority of the Commission as well as others believed the figure arrived at was too low. During their study of settlement options, for example, the 1986 special legislative joint committee and the Commission used a proxy value for the trust of \$2 Billion. According to the Commission's chairman, the low 1985 estimate was due to an inadequate and incomplete value definition and use of inappropriate methodology. (Rogers, June 19, 1987, "Analysis of Valuations and Appraisals of Mental Health Trust Lands.") Coal, oil and gas subsurface values were limited to token estimates based only on proven reserves, and no value was assigned to other resources with development potential. The surface value panel's instructions were that "only the Market Data Approach (comparable sales) will be used" as the "subject property is being valued as vacant [and unimproved] and no income stream is projected." This further biased the results toward a low value. Value of improvements on MHTL and much of the income producing values were lost without the cost and income approaches.

DNR staff did not agree with the conclusion that the 1985 opinion of value panel results were invalid and defended its exclusive use of the comparable sales approach on grounds of practicality -- it was used customarily by the State, would cost less than other approaches, and the results would not significantly differ (Gustafson letter to Rogers, July 24, 1987). Other methodologies were also deemed by the State to be speculation.