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Their report (Metz and Dixon, December 11, 1988) produced within the specified time and data constraints a range of probable values for mineral resulting in a final estimated value of $1.5 billion. After preliminary review by DNR staff and the Institute of Social and Economic Research, DNR contracted with a methodology expert (Professor DeVerle Harris of the University of Arizona) to critique the report using "best practices" as the standard of criticism without allowance being made for cost, time or data limitations.

Harris fully stated the restricted nature of his charge at the outset. Although finding that it did not always follow "best practices", he noted "such analysis is very difficult and usually entails compromises of best practices.. and approximations" and that the less than best practices used by Metz/Dixon might be accepted "if a rough estimate of value is adequate". Harris goes on to say "In fairness to Metz and Dixon, the use of net smelter return methods is consistent with the simplistic treatment of mineral potential and exploration [by DGGS]." (Harris, May, 1989).

He further noted that "replacing [the Metz/Dixon] estimate by best practice will require a much greater effort" and still would result in an estimate based upon professional judgment (report dated May 30, 1989). Apparently this was too inconclusive for DNR and a second contract was entered into with Harris in which

he presented the design of a best practices undertaking and estimated the price at $350,000 (report September 1989)[1].

"Best practices", however, under Harris' proposal would require much more than money. "Much of the geologic analysis by ADGGS personnel will have to be redone for the estimation of mineral endowment". (Harris Sept., 1989). The product of the DGGS effort was a ranking of MHTL by their favorability for mineral deposits, not probabilities for number of deposits required by "best-practices". Metz/Dixon, having no alternative but to use this data, introduced an additional step converting the DGGS rankings into probabilities. They would have preferred to have had the best practices version advocated by Harris (Metz/Dixon, October 1989, pp. 6-7). Harris also noted shortcomings and gaps in the basic data collection and compilations requiring that "the geologic analysis for endowment estimation would have to repeat this initial data and information acquisition" (Harris, September 1989, pp. 3-4)[2]. However, at the November 7, 1989, Commission meeting, which Harris declined to attend, C. Dixon explained how they used generally accepted "rules of thumb" that would not be seriously in error and built in "safety factors" at each step to insure that the valuation would not be overstated.

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1. DGGS had previously advised DNR and the Commission that a $53 million surveying and exploration program would be necessary before they could attempt a valuation.

2. This would not involve acquiring new geologic data, but reworking the same data that DGGS utilized.

In discussing the kinds of expertise required (geoscience of mineral resource formation, regional knowledge of geology, and estimation methodology), Harris rated some of DGGS personnel as "well qualified for the first expertise, at least as to certain deposit types", as "especially well qualified for the second expertise", and "not highly experienced in expertise three". (page 8). Beyond expertise, Harris noted the appearance of conflict of interest because of the litigation (page 9). He recommended contracting with the USGS for mineral endowment estimate and with an outside contractor (such as his Center for Mineral Resource Science) for other phases. (page 10).

Commission Decision

On the basis of the two Harris reports, the ISER study commissioned by DNR ("Review and Analysis of 'Mineral, Coal, and Aggregate Resource Appraisal of Alaska Mental Health Trust Lands," Tuck and Berman, March, 1989), and the Metz/Dixon Reply (October 12, 1989) important areas of broad agreement between all the mineral valuation experts emerged. There was consensus that: (1) a value can be estimated for undiscovered mineral deposits (Harris devoted an entire book to appraisal of undiscovered mineral resources, "Mineral Resources Appraisal", Clarendon Press, Oxford, 1984), (2) the comparable sales approach was not an appropriate method to value the mineral endowment of MHTLs, (3) the use of a discounted net income stream is the appropriate means of estimating the fair market value, and (4) the dominant mineral production from a district comes from a few very large

deposits (Harris, p. 17, Metz/Dixon, p. 12), . The areas of disagreement were related to degree of refinement of the analysis and estimates, on techniques used at each point of procedure (i.e costly econometric modeling vs. accepted industry practices).

Given (1) the unanimity that the discounted cash flow approach utilized by Metz/Dixon was the appropriate methodology; (2) that compromises made from "best-practices" for other portions of the total valuation process were far more serious than for the minerals valuation (e.g. surface and oil & gas), and (3) the complete lack of any viable alternative, the Commission approved the Metz/Dixon approach and methodology for determining fair market value for the mineral endowment of MHTL.

While not approving the values per se, the Commission also notes that the estimate of $1.5 Billion, as a "reality check" of the processes generating the figure, is a reasonable and conservative one. That the Greens Creek mine has a $3.6 billion estimated reserve and Red Dog $20 Billion, lends ample supports that the $1.5 billion advanced by Metz/Dixon for all MHTL is reasonable. Other new projects in advanced stages of exploration are the Fort Knox near Fairbanks, the Kensington Mine project in the Juneau area, and the Golden Zone between Anchorage and Fairbanks.

MINORITY RECOMMENDATION

TO THE COMMISSIONER OF NATURAL RESOURCES

Regarding Procedures to Determine the
Fair Market Value of Alaska's Mental Health
Trust and Replacement Lands

Submitted by: Rod Swope
Commissioner's Designee to the
Interim Mental Health Trust Commission
February 1, 1990

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EXECUTIVE SUMMARY

This minority report documents my dissent from the majority report of the Interim Mental Health Trust Commission (IMHTC) regarding procedures to be used by the Commissioner of the Department of Natural Resources (Commissioner) to determine the fair market value of both the original one million acre mental health trust land grant and the replacement lands in accord with Chapter 48, SLA 1987. In addition, I have set out the procedures which I believe should be used in order to comply with Chapter 48 and the land and resource values which those procedures produce.

I do not take this step lightly. Since joining the IMHTC as the Commissioner's designee in January, 1988, my goal has been to reach consensus with my fellow IMHTC members if and whenever possible.

While I believe my fellow IMHTC members also shared this goal, that approach was abandoned with respect to the valuation procedures finally adopted in the IMHTC majority report. By adopting, in large measure, valuation procedures urged by the attorneys for the plaintiffs and intervenors in the Weiss case, procedures designed to maximize value and not to produce fair market value as required by Chapter 48, the majority left me with no alternative but to dissent.

I dissent from the IMHTC majority report for the following reasons:

1. **The IMHTC exceeded its statutory authority by proposing and adopting its own valuation procedures instead of reviewing and approving only those procedures proposed by the Commissioner**.

Chapter 48 specifies that the IMHTC is to review and approve valuation procedures proposed by the Commissioner. As contemplated by the Legislature, the valuation procedures accordingly would be acceptable to both the plaintiffs' and intervenors' representatives on the IMHTC and to the Department of Natural Resources ("department"). Certain procedures contained in the majority report, however, were not proposed by the Commissioner, are unacceptable to the department, and therefore should not have been approved by the IMHTC majority. By proposing and adopting valuation procedures over the department's objections, the IMHTC has ignored the legislative requirement that, in effect, there be consensus as to the valuation procedures to be employed.

2. **The procedures proposed and adopted by the IMHTC in the majority report do not produce fair market value, as required by Chapter 48; instead, they produce a value substantially greater than fair market value.**

The importance of the value determinations used to determine fair market value cannot be overstated because of the dramatic effect they will have on the overall state budget. Under the valuation procedures adopted by the majority of the IMHTC, the total value of the original one million acre mental health trust land grant would exceed $2.2 billion. Under AS 37.14.021(c), this would result in more than $178 million in otherwise unrestricted state general funds being restricted in the Mental Health Trust Income Account. Under the valuation procedures I believe should be employed, the fair market value of the original one million acre grant equals just over $564 million, resulting in more than $45 million annually in the Mental Health Trust Income Account.

While the remainder of this minority report documents the fact that the procedures adopted by the IMHTC in the majority report do not produce fair market value, the point can be illustrated with three examples..

> Example 1: Surface Estate. The IMHTC initially defined "fair market value," the value required by Chapter 48, as "the most probable selling price in a free and open market," a standard definition in the real estate business. Panels of independent expert appraisers were then given instructions (prepared jointly by the majority of the IMHTC, the lawyers for the plaintiffs and intervenors and the department) to determine fair market value as defined. The lawyers for the plaintiffs and intervenors retained consultants (at state expense and without formal approval of the IMHTC) who were not asked to determine fair market value as defined by the IMHTC and required by Chapter 48. Instead, they were directed to determine "the highest value that can be supported in the market." Following review by those consultants, the panels increased their initial values, on the average, by about 20 percent. The procedures adopted by the IMHTC majority require that those values be further increased by splitting the difference between the final fair market values as determined by the panels and "the highest values that can be supported in the market" as determined by the consultants for the plaintiffs and intervenors.

Example 2: Hardrock Minerals. The procedures adopted by the IMHTC majority to determine the fair market value of the hardrock mineral estate, among many other shortcomings, begin with the assumption that all mineral deposits on mental health lands were developed on the date of valuation. That, of course, is not the case. In fact, there is very little mineral production from mental health lands even today. The consultants hired by the lawyers for the plaintiffs and intervenors acknowledge that this assumption alone produces value many times higher than would be produced if it was assumed that mineral deposits on mental health lands are not developed until sometime in the future:

A. Deposits are developed as of 2006 - the net present value (NPV) is $225 million.

B. Deposits are developed as of 1996 - the NPV is $585 million.

C. Deposits are developed as of 1987 - the NPV is $1.5 billion.

The procedures adopted by the IMHTC majority value the mineral estate at the $1.5 billion figure. It's also conceivable that major deposits will never be discovered in which case the NPV would be zero.

Example 3: Integration. The procedures adopted by the IMHTC combine the various value components -- surface estate, timber, oil and gas, hardrock minerals, coal, and sand and gravel--by simply adding them up. A prospective purchaser in the real world, of course, would not simply add up all the values. He or she would instead determine which uses, if any, are compatible. For example, residential subdivision development and strip mining for coal are not compatible.

3. **The procedures proposed and adopted by the IMHTC in the majority report create substantial problems with respect to reconstituting the trust and periodically redetermining its value.**

Chapter 48 contemplated an exchange of some original mental health lands for other state lands on the basis of equal value. The procedures adopted by the majority of the IMHTC have been used to value the original mental health lands, but they have not been used to value the pool of potential exchange lands. This precludes the exchange contemplated by the Legislature. In

addition, Chapter 48 contemplated periodic revaluation of the lands following the exchange. If the exchange cannot go forward, the legislatively contemplated revaluation also cannot go forward.

In my opinion, the failure of the IMHTC to reach consensus on valuation procedures makes it impossible for the Commissioner to comply with Chapter 48. The procedures approved by the IMHTC majority were not proposed by the Commissioner as required by law; the procedures I believe should be used have not been approved by the IMHTC as required by law. For this reason, I believe the Commissioner should transmit both the majority and minority IMHTC reports to the Legislature, explain that she is unable to comply with Chapter 48 at present, and list three options for legislative consideration: (1) change the law to accept the value determined under the procedures adopted by the IMHTC majority; or (2) change the law to accept the value under the procedures I believe should be used to comply with Chapter 48; or (3) appropriate additional funds to permit the IMHTC to continue seeking consensus. I believe the Commissioner should recommend that the Legislature choose option (2), accepting the value determined under the procedures I believe should be used to comply with Chapter 48.

BACKGROUND

The IMHTC was created by the Legislature in Chapter 132, SLA 1986, to oversee state management of mental health trust lands. In Chapter 48, SLA 1987, the Legislature established a statutory framework for resolving the mental health trust land issue. The three main elements of that resolution are: (1) valuing the original one million acre land grant and all lands in legislatively designated areas (parks, wildlife refuge, etc.) under procedures proposed by the Commissioner and approved by the IMHTC; (2) "exchanging" those original mental health trust lands not in legislatively designated areas for "replacement" lands of equal value in such areas; and (3) "renting" the original mental health trust lands in such areas and the equal value "replacement" lands for 8 percent of their fair market value annually.

Following the passage of Chapter 48, SLA 1987, the Governor appointed Dr. George Rogers of Juneau and Dr. Lidia Selkregg of Anchorage to join the Commissioner to compose the membership of the IMHTC. Dr. Rogers was then selected chairman of the IMHTC. Originally, Deputy Commissioner Lennie Gorsuch represented the Commissioner on the IMHTC, followed later (after January, 1988) by Deputy Commissioner Rod Swope. Assistant Attorney General Tom Koester of the Department of Law served as legal counsel to the IMHTC, while representatives of the Department of Natural Resources (department) provided staff support.

The IMHTC met on August 19 and 20, 1987, and continued to meet regularly through January, 1990. Since passage of Chapter 48, a total of thirty-five (35) IMHTC meetings have been held in either Anchorage or Juneau following at least fourteen (14) days prior public notice.

Although not part of the IMHTC, the attorneys for the plaintiffs and intervenors in the Weiss lawsuit, David Walker and Jim Gottstein, attended almost every IMHTC meeting and actively participated in all aspects of the discussions and valuation process, even to the point of proposing valuation procedures and resultant values. The IMHTC allowed the plaintiffs and intervenors to join in all discussions during IMHTC meetings.

At times, this degree of participation made it extremely difficult to differentiate between IMHTC conclusions and those of the lawyers for the plaintiffs and intervenors. The plaintiffs' and intervenors' lawyers also independently hired appraisal

consultants to review the work of contractual appraisers, retained by the department under procedures developed by the department, the IMHTC, and the lawyers for the plaintiffs and intervenors, and working under instructions developed in the same way, to compose the opinion of value panels for the surface estate valuation. In addition, the plaintiffs and intervenors, acting without formal IMHTC authorization, hired independent mineral consultants, Paul Metz and Colin Dixon, to compile a value for hardrock minerals, coal, and material sources (within the mental health trust land portfolio) using a procedure not previously recommended by the Commissioner or formally discussed or approved by the IMHTC. Mr. Metz and Mr. Dixon also attended several meetings of the IMHTC to present their information and viewpoints.

The most difficult aspect of the entire valuation process proved to be the development and approval of specific procedures under which the department would value mental health trust lands. On several occasions the IMHTC chose to adopt a new valuation methodology even after the department had already completed, at considerable time and expense, the valuation process using the original IMHTC approved methodology. Development of a new valuation methodology frequently seemed to be motivated more by the desire to produce a higher value than to correct the original methodology. As a result, procedures were adopted by the IMHTC that were not proposed by the Commissioner (as required under Chapter 48) and which do not produce fair market value (as Chapter 48 also requires).

Throughout my participation in this process, I strived toward achieving consensus and a common resolution of the various issues with my fellow IMHTC members. However, as it became apparent that the majority of the IMHTC was dissatisfied with the results of the initially approved procedures and began amending them to produce higher values, the consensus approach began to erode. This became particularly apparent in discussions regarding the results of the opinion of values for the surface estate and values for the mineral estate. Thus, as a dissenting member of the IMHTC, I felt it was necessary to submit a minority report.

FINDINGS

1. **The IMHTC exceeded its statutory authority by proposing and adopting its own procedures instead of reviewing and approving only those procedures proposed by the Commissioner.**

The Legislature contemplated and specified that the Commissioner propose valuation procedures which then would be approved by the IMHTC. Section 90 of Chapter 48, SLA 1987 repealed and reenacted section 2(a) of Chapter 132, SLA 1986 to read: "The commission shall approve procedures proposed by the Commissioner of Natural Resources to determine the fair market value, as of the effective date of AS 38.05.800, of all lands selected by and patented to the state under sec. 202 of the Alaska Mental Health Enabling Act, and review the final determination of the fair market value determined under those procedures." (Emphasis added.)

Under AS 38.05.800(a), also enacted as part of Chapter 48, the Commissioner is to determine the fair market value of the original mental health land grant "under procedures approved by the Interim Mental Health Trust Commission."

Simply stated, the Commissioner is to propose valuation procedures to be reviewed and approved by the IMHTC. Once a set of procedures have been approved by the IMHTC, the application of those procedures to the valuation of the mental health land grant and replacement lands is the responsibility of the Commissioner, with the results then reviewed by the IMHTC. The Legislature thus contemplated a three-step process: (1) consensus would be reached as to the procedures to be followed; and (2) the Commissioner would unilaterally implement those procedures to determine fair market value; and (3) the IMHTC would review the final fair market value determined by the Commissioner.

Although the IMHTC initially approved certain valuation procedures proposed by the Commissioner, the IMHTC majority eventually proposed and adopted many of its own procedures not proposed by the Commissioner. Specifically, the procedures adopted by the IMHTC majority for the surface valuation and for the mineral valuation were not proposed by the Commissioner. These actions removed from the Commissioner all discretion and thereby effectively excluded the Commissioner from the valuation process, a result certainly not intended by the Legislature.

Furthermore, the IMHTC in its majority report adopted not only procedures, but also an actual set of resultant values. As mentioned above, only the Commissioner has the authority and responsibility to determine the fair market value of the land. Therefore, the IMHTC again clearly exceeded its statutory authority.

2. **The procedures proposed and adopted by the IMHTC in the majority report do not result in fair market value, as required by Chapter 48; initially they produce a value substantially greater than fair market value.**

AS 38.05.800(a) requires the Commissioner to "determine the fair market value, as of September 8, 1987 of all land selected by and patented to the state under the Alaska Mental Health Enabling Act." At its September 21-22, 1987 meeting, the IMHTC initiated the valuation process by adopting, as proposed by the department, the definition of fair market value found in American Institute of Real Estate Appraisers/Society of Real Estate Appraisers, Real Estate Appraisal Terminology (rev. ed. 1981). This definition specifies "The most probable price in terms of money which a property should bring in a competitive and open market under all conditions requisite to a fair sale." Employing that definition and procedures, the department determined the fair market values for the surface estate and resources associated with the mental health and replacement lands (timber, oil and gas, coal, material sources, and hard rock minerals). Those procedures and values are outlined in this section.

The surface estate of all mental health trust and replacement land was valued by the department using the opinion of value approach. This approach, as amended by the IMHTC to make adjustments for certain disputed values submitted by the lawyers for the plaintiffs and intervenors, was approved by the Commissioner and became the accepted procedure for valuing the surface estate. However, the IMHTC majority report reflects a surface estate valuation procedure and value different from that developed by the IMHTC, approved by the Commissioner, and employed by the department. As a result of this significant departure from accepted and approved procedures, the resulting value does not reflect fair market value and is inconsistent with the fair market value requirement. Once the opinion of value panels completed their work, the plaintiffs and intervenors hired their own appraisal consultants to examine the results. The review appraisers, however, did not employ the same valuation approach used by the department. Instead, the plaintiffs' and intervenors' appraisal consultants were given the following

written instruction: "For all parcels that appear to have been undervalued, provide your estimate of the highest value that can supported in the market." [Walker letter to MacSwain, Olson, Sopp, dated July 19, 1988.] In State v. Alaska Continental Development Corp., 630 p.2d 977, 991 (Alaska, 1980), the Alaska Supreme Court specifically disapproved of a valuation process reflecting "the high end of the market spectrum," stating that such an approach "is contrary to the law in Alaska" that fair market value," or the price a willing buyer would pay a willing seller for the property, is the appropriate measure of just compensation. There was no mention in the instructions to the appraisal consultants of fair market value or most probable selling price. The values determined by the review appraisers, therefore, have no relevance to the task with which the Legislature charged the Commissioner, that of determining the fair market value and not "the highest value that can be supported in the market" of the original one million acre mental health land grant.

The IMHTC also approved the department's recommendation that determination of resource values would employ a two step approach. The first step was to quantify the particular resource(s) in place. The second step was to determine the value to the landowner of that quantity of the particular resource(s) in place.

For the hardrock portion of the mineral valuation, the IMHTC majority report simply adopted the procedures and value contained in the Report by Paul Metz and Colin Dixon ("MDA Report"). The MDA approach employed procedures not recommended by the Commissioner or previously discussed or approved by the IMHTC. Furthermore, it produced a value which is substantially too high for the hardrock mineral component, and suggests a hardrock mineral endowment considerably greater than the facts support.

The resultant surface and resource values then were integrated by the department, recognizing that values could be added where use of the surface was compatible with other resource development, but not where surface use was incompatible with resource development. This was in accord with integration procedures already approved by the IMHTC. However, the majority report uses a different integration approach which involves simple addition of all values--a process totally inconsistent with standard valuation procedures. The issues of parcelization, integration,

replacement lands, redetermination of values, and the valuation process used to determine fair market value for the various resources, are described in more detail in the sections that follow.

Parcelization

The department began the valuation process by proposing procedures for the parcelization of all land. After review by the lawyers for the plaintiffs and intervenors and their "expert appraisers" regarding the parcelization procedures, the department's proposed parcelization procedures were approved by the Commissioner and the IMHTC. Department personnel then parcelized approximately 7.5 million acres of land (mental health trust and replacement land) into over 10,000 parcels.

This parcelization process used the standard larger parcel criteria set out by the courts for determining fair market value in condemnation litigation. The criteria include: unity of ownership, unity of use, and contiguity. There was one exception to this rule. Where an approved survey was in existence identifying separate lots, tracts, or metes and bounds surveys, those surveyed tracts were segregated out from the larger into separate individual parcels.

Surface Estate Valuation

In accordance with the intent of the Legislature, as reflected in the fiscal note accompanying the bill that became Chapter 48, an opinion of value process was to be used to determine the value of the surface estate.

During the legislative discussion concerning Ch. 48, SLA 1987, the department explained the opinion of value process to the Legislature and submitted two different fiscal notes, one to cover the cost of individual standard appraisals and one for the opinion of value process. The Legislature recognized the potential costs and lack of available money to fund individual appraisals for all mental health and replacement lands. Therefore, money was appropriated for the department to conduct the fair market valuation through an opinion of value process, consisting of three panels of appraisers. In other words, funds were appropriated to cover only the cost of an opinion of value process.

This opinion of value process involved three panels comprised of three very experienced and knowledgeable independent appraisers from each of three geographic areas of the state (Southeast Southcentral, and Northern). These appraisers sat as a panel according to geographic area, examined plats, maps and legal descriptions of mental health land, and rendered an opinion of value for each parcel of property examined. They brought a variety of work experience and market knowledge with them to contribute to the opinion of value panel process. The use of a three member panel for each geographic area provided an optimum cross section of local market conditions, market demand, and varied sales data. The comprehensive appraisal files of the department were also made available to each panel.

The IMHTC and the lawyers for the plaintiffs and intervenors approved, word by word, the "Request for Proposal" (RFP) sent out by the department to all appraisers in the state in order to solicit interest in being a member of one of the opinion of value panels. Two department employees and the two IMHTC members representing the plaintiffs and intervenors, after consultation with their respective attorneys, evaluated all of the RFP's submitted. They scored each proposal and selected nine appraisers to compose the three separate panels of the most qualified appraisers in the respective regions (i.e, Southeast, Southcentral and Northern).

The process used by the panels was not an "appraisal" in the strictest accepted definition of the term. Appraisal reports were not required nor were field inspections conducted for every parcel. However, this was fully recognized by both the Legislature and IMHTC.

The theory of the opinion of value process is that some parcels may be valued high and some parcels may be valued low, but they average themselves out. This theory was given credibility when the IMHTC conducted a check of the results of an earlier opinion of value process (one panel of three appraisers for all three regions of the state with only one appraiser representing each region) on all original mental health land that had been selected by the state or conveyed to municipalities. The IMHTC selected parcels, in the Northern, Southcentral and Southeast regions, that it felt were most likely to be valued too low, and had them appraised under standard appraisal procedures. The result of this exercise was that, on total, the actual appraised values and the opinions of value for the parcels the IMHTC believed were the most undervalued were within 4 percent. While some differences were dramatic--the IMHTC majority report notes one 800 percent difference (interestingly, the high value was produced by the opinion of value process) they balanced out overall as expected. This is contrary to the IMHTC majority report which infers that the opinion of value process produces values which are uniformly too low.

As soon as contracts were awarded, the department convened the three opinion of value panels for each region to render their best collective professional opinions of fair market value for each parcel. The opinion of value panels were instructed to determine fair market value using the definition found in the American Institute of Real Estate Appraisers/Society of Real Estate Appraisers, Real Estate Appraisal Terminology, adopted by the IMHTC at its September, 1987 meeting. The opinion of value panels also were instructed to consider reparcelizing if, in their best professional judgement, reparcelization was necessary to enable them to determine the land's fair market value.

The panel's findings were recorded on forms provided by the department and approved by the IMHTC and attorneys for the plaintiffs and intervenors. The forms contained all available information relative to the parcels and were supplemented by land status plats and maps. At least two members of each three member panel signed signature blocks on each form indicating panel concurrence with the specific value for each parcel.

The IMHTC had, in the RFP, provided that the plaintiffs and intervenors could review and challenge any of the values established by the panels. The lawyers for the plaintiffs and intervenors independently hired their own "appraisal review consultants" to review the work of the opinion of value panels (paid for by the state as court-ordered costs in the Weiss case).

The appraisal consultants hired by the lawyers for the plaintiffs and intervenors were directed to determine "the highest value supported by market data." (Walker letter to Mac Swain, Olson, et.al., dated July 19, 1988). They were not instructed to determine what, in their best professional opinion, they considered to be fair market value (using the definition adopted by the IMHTC). Under their instructions, they valued the surface estate at $833,280,096 compared to the opinion of value panels' initial value of $392,000,000.

Their review took approximately nine months and resulted in approximately two-thirds of the values of original mental health trust parcels being questioned.

Due to the large number of questioned values by the appraisal consultants and limited funding, the department proposed a sampling strategy which was adopted by the IMHTC. Certain groups of disputed values along with a computer-generated random sample of the remaining disputed values, were identified and returned to the Southeast panel for review. A representative sampling of large (over 1,000 acres) parcels was submitted to the Southcentral panel for review. The review of these disputed values by the panels resulted in a small increase in the value of some of the parcels. This occurred only after the lawyers for the plaintiffs and intervenors and the chairman of the IMHTC instructed the panels on how to value certain classes of parcels.

The method of applying the sampling results to all three regions resulted in a 30 percent increase in the opinion of value panels' initial $392 million value for the surface estate, thus increasing it to a final value of $511,949,467. The value determined by the plaintiffs' and intervenors' review appraisers, however, was not similarly revised downward, but instead was held at $833,280,096; no downward adjustment in their value was made.

The IMHTC, acting without a recommendation from the Commissioner, adopted the procedure to determine the value of the surface estate by simply splitting the difference between the revised value determined by the opinion of value panels (which was

increased by 30 percent over the initially determined value) and the unadjusted total determined by the appraisal consultants retained by the lawyers for the plaintiffs. This resulted in an arbitrary value of $672,614,782., halfway between the panels' final recommended surface value of $511,949,467. and the review appraisers' initial value of $833,280,096.

The basic flaw in the procedures adopted by the IMHTC majority is that those procedures incorporate, in large measure, the values determined by the plaintiffs' and intervenors' review appraisers. The appraisal consultants were instructed to determine the "highest value that can be supported in the market," a value which is not the same as fair market value. Using the value those procedures produce is not consistent with fair market value specified in Chapter 48. Instead it is simply the average of the fair market value determined by the opinion of value panels as the Legislature contemplated and "the highest value supported by market data" as determined by the review appraiser. The fair market value of the surface estate should be the final value determined by the opinion of value panels, which was $511,949,467.

Hard Rock Mineral Evaluation

The procedures proposed and adopted by the IMHTC to assess and value hard rock mineral resources (MDA Report) produced a value which is substantially greater than the facts support.

The initial hardrock mineral assessment was completed, using available information, by the department's Division of Geological and Geophysical Survey (DGGS). However, DGGS did qualify their assessment with the observation that there are inadequate data to perform a comprehensive mineral assessment. In addition, the parcels being studied were too scattered and too varied in size to make any very specific quantitative determinations without a great deal of expense. The department also sought assistance from the U.S. Bureau of Mines, WGM (a private mineral consulting firm), and the department's Division of Mining to quantify these resources. These sources also indicated that there are insufficient data and the parcels are too scattered.

The DGGS did, however, identify the potential for mineral occurrences on mental health trust lands and the pool of potential replacement lands by ranking them from 1 (low potential) to 5 (high potential), with category 5 subsequently broken down by DGGS at the request of the IMHTC to identify the lands with the highest high potential ("Super 5s"). No consideration was given, however, to quantity of potential mineral resources or the economic feasibility of their development. The Super 5 category identified only the highest potential for occurrence of a mineral deposit, not the highest probability of a commercial discovery.

The IMHTC, at a March 17 - 18, 1988 meeting, determined that it was impracticable to determine mineral value in light of the information from DGGS, the U.S. Bureau of Mines, WGM, and the Division of Mining. The department was, therefore, originally instructed by the IMHTC to consider the potential of the land (according to the DGGS assessment) only for replacement purposes.

The department continued, however, to seek procedures to present to the IMHTC that would reflect, to the extent possible, the fair market value of the hardrock minerals on both the original mental health land and the potential replacement land. Eventually, a small number of comparable sales of patented and unpatented mining claims in the state were identified for that purpose.

When presented to the IMHTC, however, the comparable sales approach was rejected. The initial value determined --$16 million--admittedly seemed quite low.

Unknown to the IMHTC minority, the lawyers for the plaintiffs and intervenors retained two consultants, Paul Metz and Colin Dixon, to estimate the value of the hardrock minerals on the original one million acre grant using a discounted cash flow methodology. Employing a variety of assumptions and probability analyses, Metz and Dixon concluded that the hardrock mineral value of the original grant was $1.51 billion. The lawyers for the plaintiffs and intervenors presented this information to the IMHTC in the form of a report ("MDA Report").

The MDA Report was criticized by a variety of expert analysts.

The department's natural resource economist, Ed Phillips of the Division of Oil and Gas, reviewed the MDA Report from an economic standpoint and concluded that the methodology, assumptions and judgments were so manipulated that the values are excessively high.

The DGGS geologists responsible for developing the geological data reviewed the MDA report. Their review raised substantive questions relating to the assumed probabilities of discovery and the range of estimated deposit sizes.

The University of Alaska's Institute for Social and Economic Research (ISER) conducted a thorough review and analysis of the MDA Report. Their analysis concluded that <u>if</u> the geologic assumptions, probabilities and costs in the MDA Report are found to be valid, the economic considerations are not. The ISER economists (Dr. Bradford H. Tuck and Dr. Matthew Berman) who reviewed the MDA Report estimated that the net present value of the original one million acre grant would not exceed between 10 and 30 ($177,000,000. and $460,000,000. respectively) of the value contained in the MDA Report, and would be in the 10 to 30 percent range <u>only</u> if the geologic assumptions, probabilities and costs are valid. Thus, only under the optimum set of circumstances--i.e., all of the analysts' expectations are realized--would the values even approach one-third of the total estimate in the MDA Report?

The following is the "<u>Summary</u>" from the ISER report (dated March 22, 1989):

"In summary, our review has identified a number of points that question some of the assumptions underlying the Metz appraisal. The three that are critical relate to the assumed probabilities of discovery, the assumed net smelter return, and the timing of the income stream. The assumed values in the appraisal result in projected revenue and production estimates that do not currently exist and are highly improbable in the future.

"The test of an appraisal, as mentioned above, is whether it approximates fair market value. Fair market value is what the asset would bring in a competitive market disposal held today. The historic levels of mining industry activity in Alaska, coupled with long term trends in world mineral markets, simply do not support the notion that the mineral rights on the Mental Health Trust Lands would command 1.5 billion dollars today, or at any time in the foreseeable future."

Perhaps more telling, the MDA Report used a number of works by Dr. DeVerle P. Harris of the University of Arizona for its methodological basis and to justify the numbers that were produced. Dr. Harris was recognized by the IMHTC as one of the leading authorities in the nation in the area of discounted case flow valuation methodology. To determine if the MDA report properly interpreted his own works, the department entered into a contract with Dr. Harris to review and analyze the report. In his critique of the MDA Report, Dr. Harris found numerous problems with the report and its ultimate value estimate.

Because of Dr. Harris's preeminence in the field, I have included extensive excerpts from his summary as follows:

"The least equivocal judgment that can be made about the analysis performed by MDA is that there can be little confidence that the fair market value of the Alaska Mental Health lands is $\$1.5 \times 10^9$ because of (1) great uncertainties that exist about critical factors, e.g., mineral endowment, probability for discovery, costs of development and production, and future markets, (2) subjective judgments made, and (3) rough approximations employed in computation of fair market value..."

"Those who use the number, particularly when uninformed about evaluation and estimation practices, ascribe to it much greater confidence than it deserves. Intelligent decision making requires a description of uncertainties about the estimate of a highly uncertain quantity. Clearly, the fair market value of Alaska Mental Health Lands is a highly uncertain quantity. Representing so uncertain a quantity as the fair market value of unseen mineral deposits by a single-point estimate (1.5×10^9) begs some explanation, for such analysis clearly is not best practice, nor even usual practice, in evaluation of a complex and uncertain quantity.

"There is another dimension to the neglect of uncertainty besides that of information to the user, namely, the implication of uncertainty to fair market value as perceived by those who would purchase the rights to explore for and exploit the mineral resources. In this case, these buyers are private corporations. Corporations behave generally as though they are risk averse, meaning that the investment value (fair market value) of a highly uncertain venture is less than its expected monetary value. The greater the uncertainty about the outcome, the greater the expected value is discounted by the investor. Thus, <u>fair market value</u> to a private corporation of a highly uncertain venture, such as exploration, development, and exploitation of unseen mineral deposits, is not independent of the magnitude of uncertainty; consequently, a comprehensive evaluation itself requires a probability distribution of the uncertain quantity, which in this case is the fair market value of MHL.

"One may agree with the foregoing but still press the question of whether or not $\$1.5 \times 10^9$ is a "reasonable" single-point estimate of fair market value when risk is not explicitly accounted for. Responding to this question in an absolute sense is nearly impossible because of the great uncertainties mentioned above, the subjective judgments made, and the approximations employed.

"A more answerable question is whether within the context of the approach used by MDA there were judgments made or procedures employed which, everything

else being equal, tend to over or underestimate fair market value. Clearly, as indicated in the body of the report, such can be identified. The most obvious of these is the ignoring of lead times in the computation of net present value. This neglect leads to overestimation by a factor of 2 or 3. Similarly, neglect of market impacts leads to overestimation. Ascribing to every discovery the 90th percentile tonnage and grade also leads to overestimation, perhaps a large overestimation, unless compensating adjustments are made in discovery probabilities. There is no documentation of such adjustment, but the selection of discovery probabilities by MDA is heavily subjective and especially vague, making it difficult to draw firm conclusions. If, as suggested by the MDA report, the discovery probabilities selected were predicated in part upon the CRA analysis of regions in Alaska that were appraised by the U.S. Geological Survey, then the discovery probabilities probably are considerably too large, because these (CRA) numbers of deposits are expectations for occurrence (not discovery) of deposits of all sizes and grades (not just 90th percentile value).

"The treatment of exploration and mineral potential is particularly vague and unrationalized. This is a serious deficiency of the report, because analysis of value is so sensitive to the treatment of these factors. The effect of this neglect is to create low confidence in the specified probabilities for discovery and in the computed expectations for fair market value. The fact that discovery probabilities were estimated directly using exploration outcomes from other regions, and that these were subjectively adjusted to reflect mineral potential rankings, makes a careful description of the estimation even more important and necessary if the resulting estimate of fair market value is to be credible, because the very foundation upon which the process rests (exploration outcomes) is very difficult to interpret. This is especially the case when these outcomes are to serve as the basis for discovery probabilities for a host of different mineral commodities and different deposit types. The use of constant discovery probabilities for all deposit types and all metals for a given mineral potential ranking is at best a crude approximation and lacks credibility when the objective is fair market value.

"Finally, a fair market value as large as 1.5×10^9 does not seem consistent with economic conditions and factors. As fair market value, 1.5×10^9 represents an estimate of the net present value of profits (net of all costs, royalties, and taxes) that firms could earn by acquiring rights to exploration for and exploitation of minerals on the Alaska Mental Health Lands. Such a large value, if correct, would be a strong incentive for acquisition of tenure and exploration of these lands. While the author has little first-hand knowledge about recent metal resource development on the Mental Health Lands, or in Alaska in general, it is his understanding that such activity is and has been at a low level (Tuck and Berman, March 22, 1989; Paul Metz, May 20, 1989, personal communication). Such circumstances challenge a value as large as 1.5×10^9 as a credible estimate of the fair market value of metal resources of the 1×10^6 acres of Mental Health Lands. Moreover, rationalizing inactivity by institutional impediments or by stringent tenure requirements does not lend credence to such a high value. Unless such impediments and stringent tenure provisions are to be altered, fair market value appropriately reflects the impact of current conditions on profitability of resource development."

The foregoing expert critiques, questioning the credibility of the MDA Report's $1.51 billion estimate for the value of the original one million acre grant, are supported by a number of objective considerations. WGM, a private mineral consulting firm, determined in March, 1988 that the market value of 2.2 million acres of Bering Straits Native Corporation land in Northwest Alaska was $343 million, an average of $156 per acre. That land is located in the vicinity of the Seward Peninsula, historically the most productive mineral province in the state. While some mental health land was specifically selected for its mineral potential (as was a considerable portion of the Bering Straits Native Corporation's selections), more was selected for other values (e.g., residential, timber, etc.). Given those facts, I cannot accept the MDA Report's average mineral estate value of $1,510 per acre for mental health lands. This is particularly true as the Bering Straits Native Corporation lands are in large continuous tracts, which a prospective purchaser could evaluate through appropriate and efficient exploration

strategies. The mental health lands are generally in much smaller parcels scattered throughout the state and could not be explored in as cost-effective a manner.

Furthermore, the MDA Report's conclusions regarding total mineral production from mental health lands appears extremely optimistic in light of existing mineral production in Alaska. The MDA Report used the following formula to estimate the mineral estate value of the original one million acre grant: net present value (NPV) equals the gross value of annual production (GVAP) times the landowner's royalty, measured as a percentage of the net smelter return (NSR), times a uniform series present worth factor (PWF) to discount future income to present value:

NPV = GVAP x NSR x PWF (see MDA Report, p. C-1)

Working backwards, the gross value of annual production necessary to produce a given net present value can be determined as follows:

GVAP = NPV ÷ (NSR X PWF)

Under the assumptions in the MDA Report (4 percent NSR, 10 percent discount rate for 20 years for a PWF of 8.514), the gross value of annual production required to produce the MDA Report's $1.51 billion net present value is more than $4.43 billion:

GVAP = $1.51 billion ÷ (0.04 x 8.514) = $4.43 + billion

Total mineral production for the entire state in 1987 was $202,389,898. A production increase of 14.7 percent was seen in 1988, and further development of projects such as Greens Creek and Red Dog (none of which, incidentally, are on state or mental health land; furthermore, a third "world-class" deposit, Quartz Hill, also not on state or mental health land, is not commercially viable at this time) undoubtedly will result in further annual increases. However, $4.43 billion in gross value of annual production statewide is unrealistic given the current status and most optimistic projection by the mining industry in this state. I simply cannot accept that the gross annual value of production from mental health lands alone (one-third of one percent of the state's land mass) would exceed $4.43 billion.

A survey of fifteen other states with trust lands (including Texas, where the Texas Railroad Commission administers a substantial quantity of oil-rich lands for the University of Texas' benefit) reveals that the subsurface income from those

lands averages $4.57 per acre per year based on 1987 returns. Under the analysis in the MDA Report, the mental health lands would produce $120.80 per acre per year based on the eight percent per year rental provision of AS 37.14.011(c) although differences certainly exist between Alaska and other states. I cannot accept that even the most aggressive trust management could produce results so dramatically different from those in other states, including even those states with substantial known subsurface resources (unlike the Alaska mental health land situation) and where transportation and infrastructure systems are much more developed and extensive than in Alaska.

In responding to the various expert critiques of the MDA Report, Metz and Dixon argue that the current lack of mineral production from mental health lands is not a consequence of a lack of interest on the part of industry but instead is the result of state mismanagement. Their report states that, "The failure of the State of Alaska to fully implement a mineral location/leasing system and the various types of land withdrawal and restrictions, have acted as a major disincentive to investment in prospecting and exploration on state land in general and the mental health land (MHL) in particular."

The fact, of course, is that most mental health lands have been available for claim-staking--i.e., the mineral rights were available <u>for free</u> from the time they were selected until they were closed to mineral entry by order of the Commissioner following the <u>Weiss</u> decision in 1985. While some claims were staked, industry interest in mental health lands was not great. It is hard to imagine that a vigorous state leasing program, where industry would have to <u>pay</u> for mineral rights, would result in increased industry interest, particularly where (as Dr. Harris noted) there is a world market in rights to mineral lands and substantial amounts of state and federal land would continue to be open to claim-staking for free.

At the request of the department, Dr. Harris also outlined the activities required to produce a credible estimation of the market value of the mineral resources using the discounted cash flow analysis and the costs of these activities. Dr. Harris estimated that the costs of estimating the market value of the original mental health land and replacement land would be about $350,000, plus funding for additional DGGS work.

Given the amount of time and money expanded to date in an effort to value mental health lands has taken to date, I cannot recommend that additional funds be requested from the Legislature to continue the process.

As an alternative, department staff have suggested employing a comparable sales approach to determine the value of the mineral estate of both the original one million acre mental health land grant and the pool of potential replacement land. The department has received information regarding sales of the mineral rights to certain lands in DGGS's classes 4, 5, and Super 5s for which the mineral endowment is unknown (although suspected), which is the case with the land to be valued. Those sales revealed the following per acre market values:

Super 5	$2,000/acr
5	1,135/ac
4	108/acre

Using those figures, the value of the mineral estate of the original grant would equal $73,403,459.

In my opinion, this is a more than reasonable value for the mineral estate. Under the MDA Report assumptions (four percent net smelter return, ten percent discount rate for 20 years), the gross value of annual production from mental health lands would have to exceed $215 million to produce a net present value of $73 + million. That is more than the total of statewide mineral production in 1987. In addition, the eight percent annual rent required under AS 37.14.011(c) would result in the subsurface income from mental health lands equalling $5.87 per acre, substantially greater (more than 28 percent) than the $4.57 per acre earned on average by trust lands in the 15 lower 48 states surveyed.

The IMHTC majority has made it clear they do not believe a comparable sales approach is a valid method for determining the value of the mineral estate. Even though I believe the foregoing comparisons to current statewide mineral production and subsurface income from trust lands in other states reveal that the result of this approach is eminently fair to the trust, it has been suggested that a panel of Alaska mineral consultants could quickly and inexpensively provide an additional review of both the MDA Report and this comparable sales approach. You may wish to consider that option.

In my opinion, however, the final value of the mineral estate should be that produced by the comparable sales approach which is $73,403,459.

Timber Valuation

A timber resource valuation was prepared at the request of the IMHTC and the Commissioner. The valuation considered all original mental health trust lands, which total approximately one million acres, and all legislatively designated replacement pool lands, which encompass over six and one half million acres.

A detailed process to delineate and value lands suitable for commercial timber activities was developed in concert with the IMHTC and the consultants hired by the plaintiffs and intervenors. The results of this process are a series of 123 forestry potential maps, published as overlays to the USGS one inch-per-mile quadrangles, inventory estimates of commercial standing crop on these lands, and estimates of timber resource values reported on a parcel-by-parcel basis.

The conclusion of this process was that the one million acres of original mental health trust land contained $36,243,253. in commercial timber. I agree with the timber valuation procedures employed and the value derived.

Oil and Gas Valuation

At the request of the IMHTC, a report was written to describe the geology and exploration activity pertinent to establishing a "best estimate" of the oil and gas potential of the legislatively designated replacement pool lands and the original mental health trust lands within Alaska.

For general evaluation, the state was divided into four regions: (1) Gulf of Alaska (including Southeast, Prince William Sound, and the Kodiak area), (2) Alaska Peninsula and Southwestern Alaska, (3) Central and East-Central Interior, and (4) Cook Inlet and Susitna Basins (including the Talkeetna and Chugach Mountains and a portion of the Copper River Basin). Each of these was assigned to a petroleum geologist or geophysicist. These four regions were further subdivided in order to produce a more precise and detailed evaluation. Information from surface geologic mapping and from nonconfidential drilling well logs was utilized. Confidential well log information and data from proprietary seismic surveys were not included in this study.

Of the four areas studied, only the Cook Inlet Basin contains known natural gas fields which underlie some of the mental health and legislatively designated parcels. Where sufficient data were available, an economic analysis was completed for those parcels.

There are no known oil fields beneath any of the parcels.

This process concluded that the oil and gas value of the one million acres of original mental health trust land was $495,998. I concur with the oil and gas valuation procedures employed and the value derived.

Coal Value

At the request of the IMHTC, a coal valuation was prepared by the department. The valuation considered all original mental health trust land and all legislatively designated replacement pool land.

The conclusion of this process was that, although coal is present in a number of areas, it is currently economic to produce in only two areas (Nenana and Wishbone Hill). The value of this coal on original mental health trust land was determined by the department to be $432,866.

The IMHTC proposed and adopted the MDA Report as its procedures and resultant value. The MDA Report states that a current market does not exist for coal other than that identified in the DNR coal valuation. The authors then hypothesize that "several large scale open pit metal mines" in the railbelt and Kenai Peninsula areas could serve to diminish the "current excess electrical generating capacity" and provide additional coal marketing opportunities, with similar opportunities arising elsewhere. The MDA Report then makes a number of assumptions about the mines to produce figures for a cash flow analysis. One of these assumptions is that "The entire production would come from the subject land (i.e. mental health trust land)."

Using the hypothetical developments and related assumptions, the MDA Report concludes that "the net present value of the cash flow" from coal on mental health land would be $3,200,000. The MDA Report then states: "With the large quantities of coal on adjacent state and federal land in Alaska, it is probably unrealistic to expect more than 10 percent of the model production to come from trust lands."

This statement from the MDA Report infers that under that analysis, the best estimate of net present value is $320,000. I believe $432,866. should be used as the value for coal on the original one million acres.

Material Sources

The DGGS conducted a review of all mental health trust land and replacement pool land in order to assess potential mineral sources. Unfortunately, there is little detailed inventory information available. The DGGS estimated the cost of data gathering sufficient to enable them to determine material sources volumes and quality to be between $65.4 and $85.2 million. However, this would still be inadequate data upon which to base a value determination because material source values are heavily influenced upon their proximity to the market. Also, prices fluctuate upon demand. If there is no demand, then there is no value.

At a June, 1989 meeting of the IMHTC, Dick Rieger of DGGS presented three options available for material source valuation. At that meeting, the IMHTC determined that the valuation of material sources was simply not a fruitful exercise, given the uncertainty over material source location, quality and volume. As a result, the IMHTC approved a process whereby the value of the material sources on mental health land would be addressed through the designation of equal potential replacement lands.

However, the IMHTC reversed itself when it adopted the MDA Report. The MDA Report established a range of value between $2.5 million and $25.4 million for material sources, with a most likely value of $13 million. This value was based upon an average of 14 million cubic yards consumption per year statewide, with the original mental health trust land producing 24 percent, or 3.5 million cubic yards. Unfortunately, these assumptions cannot be substantiated since, in reality, only 1.275 million cubic yards were produced in that timeframe (425,000 cubic yards/year) from mental health lands. In fact, if the average annual production level of 425,000 cubic yards were to be maintained into the future, the discounted cash flow for 20 years would be approximately $0,000/year.

For the above reasons, I reject the MDA Report as a basis for material source value determination. However, I also conclude that we do not presently have sufficient data to produce a meaningful value for this resource. Because there are

insufficient funds available to produce these data, at least at this time, it is impossible to produce fair market value for this resource. Alternately, the trust should be protected if lands of equal material source potential are designated as replacement lands.

Integration Procedure and Valuation

On October 21, 1987, the full IMHTC approved the department's recommendation for integrating the various land values (e.g., surface estate value, timber value, mineral value, etc.). Under those approved procedures, values for compatible uses--e.g., a subdivision for residential or commercial use and oil and gas development (i.e. North Kenai area--would be simply added together. Where uses would be incompatible--e.g. subdivision for residential use and coal development (i.e. Beluga area)--the highest value (i.e., the value for the highest and best use) would be used. Generally, those initially approved procedures could result in one of three possible values being selected: (1) the sum of the surface value and the resource value, where extraction or removal of the resource would not affect the surface value; or (2) the resource value where it exceeds the surface value and extraction or removal would diminish the surface value; or (3) the surface value where it exceeds the resource value and extraction or removal of the resource would diminish the surface value.

The IMHTC majority, however, substituted an integration process which simply adds the various value elements, with no consideration given to whether the various uses are compatible or not.

I initially went along with this revised integration procedure, despite objections by department staff, in the spirit of compromise and my desire to achieve consensus. It is well-recognized, however, that a proper valuation procedure cannot simply add separate value elements where use of the property to exploit one element is incompatible with use of the property to exploit another. See, e.g., W. Mason, Jr., M. Azar, and G. Anderson, "Condemnation Value: The Taking of Mineral Bearing Lands," Mining Engineering 10986 (November 1989).

In my opinion, the integration procedures first determined by the IMHTC are the only ones which can produce a credible integrated value. I therefore believe that the following procedures should be used:

(1) Add the surface value and the oil and gas value;

(2) Add the mineral value, timber value, oil and gas value, coal value, and material source value; and

(3) for each parcel, select the highest value developed under (1) and (2) as the fair market value for that parcel.

Using those integration procedures and the per parcel values for each value element as outlined above, the total integrated fair market value for the original one million acre grant equals $564,700,728. Using the same integration procedures, the pool of potential replacement lands would have a fair market value of $910,103,205.

Replacement Pool Lands

As stated earlier, the IMHTC majority report failed to address the replacement land valuation requirements altogether. Using the procedures included in the majority report, the trust simply cannot be reconstituted by the Commissioner as contemplated by the Legislature and required by AS 38.05.800(b) and (c).

The procedures that I recommend will allow the trust to be reconstituted with equal value land from the replacement pool of legislative designations. Each of the procedures that I recommend has been followed for the replacement pool land on a parcel by parcel basis (with exception of material sources).

Redetermination of Values

AS 37.14.011(c) provides for the redetermination of the fair market value of the land constituting the mental health corpus at least every five years. The statute does not provide any further guidance on how this revaluation shall be accomplished.

This requirement can be fulfilled in any number of ways. I feel that the least desireable is to repeat a valuation process modeled on the one that we have just finished. I feel that the time, effort, and continual disagreement with the results would not be productive for all concerned.

I therefore recommend the following revaluation process.

1. Valuation of mental health corpus land will be conducted on an 18 month basis by region. Each of three regions, Northern, Southcentral and Southeast will be valued during successive 19-month periods. The same criteria previously recommended will be used to integrate values and to determine the fair market value of the parcels and the trust corpus as a whole.

2. Surface valuation will consist of an indexing of value increases, or decreases, within each region and application of the appropriate increase or decrease in market value occurring in each area since the previous valuation. Municipal property assessment records (for lands within municipalities) and paired market sales data (for lands outside municipalities or where property taxes are not levied) will be used to determine land value increases or decreases in each area.

3. Mineral values will be indexed to the mineral production in Alaska with the appropriate increases or decreases made for each region on a parcel-by-parcel basis.

4. Coal and oil and gas values will be indexed to the world market with appropriate increases or decreases made statewide on a parcel-by-parcel basis.

5. Timber values will be indexed to the market and conditions for the region with appropriate increases or decreases made regionally on a parcel-by-parcel basis.

3. **The procedures proposed and adopted by the IMHTC create substantial problems with respect to reconstituting the trust and periodically redetermining its value.**

AS 38.05.800(b) specifically states:

> "The Commissioner of natural resources, with the approval of the Interim Mental Health Trust Commission, shall identify land within legislative designations that is equal in value to all land selected by and patented to the state under Sec. 202 of the Alaska Mental Health Enabling Act that is not in legislative designation."

The value of the original mental health land trust is so high under the procedures specified in the majority report of the

IMHTC, that the trust cannot be reconstituted as contemplated by the Legislature. The value of the mental health trust, as established in the majority report, exceeds the value of all possible replacement lands.

Under AS 38.05.800(b) and (c), moreover, the trust is to be reconstituted with land in legislatively designated areas (e.g., parks, wildlife refuges, etc.) which is equal in value to the original mental health land grant. To do this, both the original grant and the pool of potential replacement land must be valued under the same procedures. The majority report of the IMHTC fails to address the replacement land valuation requirement altogether.

Because it is unnecessary to replace every parcel of original trust land (since some trust lands are already within legislative areas), and because the procedures proposed and adopted by the IMHTC make no attempt to value parcels individually, the trust simply cannot be reconstituted through the majority report approach.

Under AS 37.14.011(c), moreover, the trust as reconstituted under AS 38.05.800(b) and (c) must be periodically revalued at least once every five years. Therefore, because the pool of potential replacement land has not been valued under the same procedures used to value the original grant and therefore cannot be reconstituted, it also cannot be periodically revalued as contemplated by the Legislature.

CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, I have concluded that the Commissioner simply cannot comply with the applicable provisions of law at this time. The valuation procedures set out in the IMHTC majority report were adopted over my objection on behalf of the department, and therefore are not the product of consensus as contemplated by the Legislature and specified by law. The procedures that I believe should be employed, on the other hand, have not been approved by the IMHTC as required by the Legislature and specified by law.

I therefore recommend that the Commissioner send letters to both the Speaker of the House of Representatives and the President of the Senate explaining that she is unable to comply with the law as currently written, enclose copies of both the IMHTC majority and minority reports, and list three options for legislative consideration: (1) change the law and accept the $2.2 + billion value determined under the procedures adopted by the IMHTC majority; or (2) change the law and accept the $564 + million value determined under the procedures I believe should be used to comply with Chapter 48; or (3) appropriate additional funds to permit the IMHTC to continue seeking consensus.

I believe that the Commissioner should recommend to the Legislature that they adopt option (2) and accept the 564 + million value for the original one million acre mental health trust land grant. The procedures used to determine that value have been subject to review by outside professional experts and developed, reviewed, and approved by department staff who have a wide variety of expertise in valuing the various resources found on mental health lands. Furthermore, the Attorney General's Office advises that such a procedure would be legally defensible since the United States Supreme Court ruled that it is permissible to use "procedures established by the Commissioner's rules, or any other procedures reasonably calculated to assure the integrity of the trust and to prevent misapplication of its lands and funds." Lassen V. Arizona Highway Department, 385 U.S. 758, 465 (1967).

It also would be eminently fair to both the trust and the state. It would establish the various elements of value as follows:

Surface Estate	$511,949,467.00
Hardrock Minerals	73,403,459.00
Timber	36,243,253.00
Oil and Gas	495,998.00
Coal	432,866.00
Material Sources	undetermined

Following the integration procedures outlined above, the total integrated fair market value of the original one million acre grant would equal $564,700,782.82.

As an objective measure of the fairness of this value to the trust, the eight percent of this amount which the Commissioner of Revenue annually must allocate to the mental health trust income account under AS 37.14.011(c) until revaluation takes place equals $45,176,058. or $45.18 per acre per year; this compares very favorable to the national average of $8.97 per acre per year returned for trust lands in other states.

At first blush, this figure might appear unfair to the state. After all, it is more than five times the national average, and exceeds even Washington which, at $45.68 per acre (as a consequence of its prime and easily accessible timber resources), has the highest average in the nation. At the same time, it must be remembered that, following the exchange contemplated by Chapter 48, all of the newly reconstituted mental health trust will consist of land within legislatively designated areas which the state will continue to administer for legislatively designated purposes. In other words, unlike the case in most states, the state here will be using every acre of the newly constituted mental health trust for its own purposes. It therefore is only fair that the state compensate the trust for that use. One consequence of this is that, unlike the case in other states, every acre of the mental health trust will be productive in terms of generating revenue. That has the effect of raising the per acre earnings of the entire trust, a result which I believe is not inappropriate.

I recognize that many in the mental health community will find fault with the approach I have recommended and its result. I did my best, as a Commission member, to be cooperative and strive toward achieving consensus. Unfortunately, it was simply not possible to reach agreement on all of the difficult issues that required decisions. It should not go unnoticed that the IMHTC was able to reach agreement on many issues. I believe the facts and information presented in this report support my recommended approach and the resultant values. While further litigation may be inevitable as a consequence of my recommendation, I cannot

accede to the values determined under the procedures adopted by the IMHTC majority since they significantly overstate the value of the original one million acre mental health trust land grant as of September 7, 1987. Accordingly, for the reasons stated, I dissent from the report filed by the IMHTC majority.

February 1, 1990
Date

Rod Swope, Designee
Interim Mental Health Trust
Commission

March 20, 1990

Mrs. Lennie Gorsuch
Commissioner of Natural Resources
State of Alaska
Willoughby Center, 5th Floor
Juneau, Alaska 99801

Dear Commissioner Gorsuch:

With this letter I am transmitting the Interim Mental Health Trust Commission's response to Rod Swope's Minority Report. I wanted to get this response to you earlier, but I was hospitalized resulting in the delay.

I suggest we meet, at the earliest possible time, to discuss where the Commission should go from this juncture. We have yet to finalize the reevaluation and the replacement lands.

If you agree with the minority report, and are unable to follow the Commission's procedures, then there may be reason for us not to proceed with the rest of our task. We do need to discuss these options.

A process for reevaluation was suggested to the Commission by David Walker and Jim Gottstein. Tom Koester was to review this suggestion and give the Commission his recommendation. It would be helpful to have his response.

Sincerely,

Dr. George Rogers
Chairman
Interim Mental Health
Commission

INTERIM MENTAL HEALTH TRUST COMMISSION (IMHTC)
RESPONSE TO
MINORITY RECOMMENDATION TO THE COMMISSIONER OF NATURAL RESOURCES

March 20, 1990

George Rogers, Ph.D.
Chair

Lidia Selkregg, Ph.D.
Commissioner

K.J. Metcalf
Alternate

Dennis Scholl, Ph.D.
Alternate

Introduction:

The Commission members and alternates have reviewed the "Minority Recommendation to the Commissioner of Natural Resources" (Minority Report) submitted February 1, 1990 by Rod Swope, the Commission member serving as the Designee for the Commissioner, Department of Natural Resources (DNR). The review of the Minority Report by the Commission majority produced no basis for modification or revision of the "Interim Mental Health Trust Commission Draft Final Report" (Commission Report) of December 20, 1989. The Commission Report stands as the final report on the "Approved Procedures for Determining the Fair Market Value of Alaska's Mental Health Trust Lands." The public members of the Commission and their alternates re-affirm their recommendations.

General Nature and Character of the Minority Report:

The nature of the Minority Report was a significant disappointment to the other members of the Commission. While failing to substantiate DNR's findings and conclusions, the Minority Report attempted to discredit the Commission's work by portraying the public members as unprofessional, not acting in the public interest and in fact acting illegally. These are serious personal allegations that require a personal response.

The Minority Report opens on the first page by asserting that the Commission exceeded its authority and adopted,

> *"...valuation procedures urged by the attorneys for the plaintiffs and intervenors in the Weiss case, procedures designed to maximize value and not to produce fair market value as required by Chapter 48."*

The Minority Report is laced with similar implications of professional misconduct by the public members of the Commission. Designee Swope portrays himself as the lone champion of reason and legality, and by implication, and sometimes directly, portrays the public members as being the reverse. On page 6, for example, Swope claims

> *"I strived toward achieving consensus and a common resolution...*[On the other hand] *it became apparent that the majority of the IMHTC was dissatisfied with the results of the initially approved procedures and began amending them to produce higher values."*

It is extremely unfortunate that the Minority Report personally attacked two professionally respected, long time Alaskans who have dedicated their lives to public service, by

implying they would put their professional and personal reputations on the line for the benefit of an interest group.

The public members of the Commission volunteered over three years of their time without compensation to develop a legitimate process for arriving at the "fair market value" of the original Mental Health Trust. The process is legitimate and the Commission Report accurately documents the effort.

Another tactic used at the outset of the Minority Report has nothing to do with the Commission recommendations as such, but is designed to create an attitude in the mind of the reader that would be antagonistic to the Commission and favorable to the Minority Report. At the top of the second page the Minority Report introduces a half truth to portray the dire consequences to the State budget of following the Commission's recommendations.

> *"The importance of the value determination used to determine fair market value cannot be overstated because of the dramatic effect they will have on the overall state budget. Under the valuation procedures adopted by the majority of the IMHTC...this would result in more than $178 million in otherwise unrestricted state general funds being restricted in the Mental Health Trust Income Account."*

The omitted half of the whole truth is that the restriction to the Mental Health Trust Income Account is only a temporary accounting transaction required by Chapter 48 in an attempt to comply with the 1956 Congressional Alaska Mental Health Enabling Act which created the Trust. After payment from the account of only the necessary expenses (not the unnecessary expenses) of the Mental Health Program, the balance of the income is transferred to the General Fund for other public purposes. The value of the land corpus (whether it be high or low) does not determine the Mental Health Program budget as Designee Swope states. The Program budget is determined by Legislative appropriation after consideration of the recommendations of the Alaska Mental Health Board. In short, the effect of the valuation procedure upon the overall State budget is neutral, not "dramatic" as alleged.

The public member majority of the Commission do not feel resolution of the issue is served by trying to alarm Alaskans, rightfully concerned with fiscal solvency of the State, by painting a fiscal horror story not supported by facts. They further believe that the tactic was used to justify DNR's own fanatical efforts throughout the process to drive down the estimated value of the original Trust Lands.

The personal attacks in the Minority Report are distressing and had to be addressed. But, to belabor this does not serve the purpose of resolving the complex Mental Health Lands Trust issue. The technical questions raised in the Minority Report are more appropriate to address.

Technical Questions Raised by the Minority Report:

The Minority Report fails to address directly the Commission Report. Instead, Designee Swope's dissent is based upon two charges, (1) that the Commission exceeded its statutory authority, and (2) that the Commission adopted "procedures designed to maximize value and not to produce fair market value."

> Minority Report Finding 1: "**The IMHTC exceeded its statutory authority by proposing and adopting its own valuation procedures instead of reviewing and approving procedures proposed by the Commissioner**."

The long and arduous task of developing a procedure for identifying fair market value was undertaken by the Commission in an atmosphere of cooperation and trust. We, the public members, assumed all parties were working toward a solution. This enormous task was made difficult by shortages of data, time, and funds and by the limited expertise of DNR staff. The Commission Report adequately details the process. The Commission followed the advice and counsel of the Attorney General's office in developing the fair market value procedures. It therefore came as a shock to find DNR and/or the Attorney General's office, in the Minority Report, creating a new interpretation of the Commission task in an apparent attempt to invalidate our years of effort. It is all too apparent this new interpretation evolved because DNR disagreed with the Commission's approved procedures. This unfortunate "eleventh hour" tactic suggests the Commission's assumption of trust and good faith was ill-founded.

Chapter 48, SLA 1987 revised and replaced certain sections of Chapter 132, SLA 1986 which created the Commission to oversee interim management of the Trust lands and work with the Legislature in establishing a statutory basis for resolving the Trust land issues. The Commission membership was reduced from five (5) to three (3) -- the Commissioner of DNR and two public members -- and its mission redefined in terms of the negotiated settlement framework. The reduced Commission assumed sections of Chapter 132 not replaced or revised were still in effect and for more than two years continued operations much as it had in its original form without question or challenges.

Throughout this period the Commissioner of DNR participated continuously (through various designees) and the Attorney General was represented by Tom Koester. It came as a surprise, therefore, to be informed three months after the Commission submitted its final approved procedures and two months after forwarding its draft final report that the Commission had "exceeded its statutory authority."

The Minority Report further alleges,

> *"By proposing and adopting valuation procedures over the department's objections, the IMHTC has ignored the legislative requirement that, in effect, there be consensus as to the valuation procedures to be employed. ... In my opinion, the failure of the IMHTC to reach consensus on valuation procedures makes it impossible for the Commissioner to comply with Chapter 48."*

Consensus was not a "legislative requirement". Chapter 132, SLA 1986 provided that motions could be adopted by majority vote and, in fact, many of the "action items" treated by the present Commission were resolved by a two yea vote (the other member voting nay or abstaining). The actions resulting in the final approved procedures and the Commission Report were carried out, at the suggestion of Designee Swope, as a means of bringing the whole issue of valuation to a close. He also stated, and it was agreed, there might also be a minority report.

In the Minority Report Designee Swope also charges the Commission improperly changed the originally approved procedures and he implies this was a frequent practice aimed at producing a value substantially greater than fair market value. In fact, the originally "accepted and approved" procedures were observed to the very end of the Commission deliberations adjusted only when required by lack of funds or data. This is more fully discussed in the final section of this reply (page 10, below).

> Minority Report Finding 2: "The procedures proposed and adopted by the IMHTC in the majority report do not produce fair market value, as required by Chapter 48; instead they produce a value substantially greater than fair market value."

The bulk of the Minority Report attempts to discredit the Commission's fair market procedures. After careful review of the Minority Report, the Commission determined there is no reason to alter its conclusions. The Commission Report sets forth the final approved procedures in detail. Rather than

repeat that substantial information, a summary response is given to key challenges in the Minority Report.

Given the limitations of budget, time, data and staff the final approved procedures are appropriate, legal and lead to a mid-range value, not a high value. This is summarized in the text of the resolution adopted November 7, 1989 (see Appendix A in the Commission Report of December 20, 1989).

The largest differences between DNR's preferred values and the values arrived at by the Commission's final approved procedures are in the surface estate and the mineral resources. Further clarification on surface estate valuation and procedure for valuing mineral resources follows.

Surface Estate Valuation Procedures

Because of time and financial constraints the Commission could not use "best practices" (i.e. appraisals). Instead, three geo-panels of appraisers were selected to give opinions of value for parcels in their regions. At best the process was highly judgmental and subjective, but in addition only an estimated seven to ten minutes was spent on each parcel and data was limited to that provided by DNR or brought to the meetings by the appraisers. Because of inevitable differences of opinion between appraisers and the probability of error due to time and data limitations, the approved procedures provided for a review and discussion of questioned values. In the event the review step did not resolve differences, the Commission could utilize a mediator to recommend resolution.

The review stage was never completed and the mediation stage never reached.

Although problems arose in connection with the operations of the geo-panels, it was with the initiation of the review stage of the approved procedures that the surface estate valuation process began to break down. Through various tactics the DNR staff attempted to thwart the proper implementation of this stage of the surface valuation with the justification that the approved procedure might result in increases in values. After several bitterly fought meetings, the process was allowed to continue with modifications. The Minority Report chose to ignore the review aspects of the approved procedures and wrongfully portrays the role of the review appraisers as something added later at the insistence of attorneys for the plaintiff and intervener.

The Southeast geo-panel was provided a random sampling of the questioned surface estate values. On the basis of the geo-panel's accepted adjustments the initial geo-panel value for

Southeast parcels was increased by 30%. However, of the 387 sample parcels reviewed more than half (207) were recommended for further mediation, a step of the originally approved procedures that never came to fruition.

The Southcentral geo-panel was called into review session, but DNR staff neglected to invite the review appraiser. Although an apology was made to the Commission, the end result was the reviewer could only be present for a few hours of one morning. At that time he did present comparable sales for large parcels which the geo-panel did not know existed. Once provided this useful large parcel information, the Southcentral geo-panel recommended five of six large parcels re-examined be increased in value by 68%. If the southcentral review had been possible, as provided by the approved procedures, there was a high probability other similar adjustments would have been made.

A review of the Northern geo-panel was never even initiated. At this point the Commission was informed by the DNR staff that funds had been exhausted.

In the course of carrying out the approved procedures it became apparent the opinion of value approach was seriously flawed. The State's appraiser provided the geo-panels during their deliberations with interpretation of the valuation instructions for application to actual cases. The review step disclosed the State's interpretations as not totally unbiased. During the geo-panels' deliberations the State appraiser reported to the Commission problems between members of the Southeast panel in coming to agreement. Additionally, the members of the Southcentral geo-panel submitted a memorandum to the Commission designed to protect their professional reputations. The memo stated the product of the abbreviated valuation process was "not even 'preliminary opinions of value' as commonly understood in the appraisal profession" and listed other limitations such as time and funding and the manner in which the State had parcelized the land for appraisal(see Commission Report, Appendix B, page B4).

The unfinished process of carrying out the approved procedures left the Commission with a wide range of surface estate values -- the adjusted values of the geo-panels advocated by DNR and the values presented by the review appraisers advocated by the plaintiffs. The Commission chose a procedure leading to a mid-level value between these extremes.

Procedures for Valuing Mineral Resources -- A Question of Most Appropriate Methodology

The National Appraisers Association Standards for determining fair market value recognized three general approaches: market (comparable sales), income (capitalization of income stream from the property) and replacement cost. From the beginning the public member majority of the Commission have insisted the methodology most appropriate to the type of estate being valued would be employed and the various Commissioners of DNR and designees understood this requirement. On September 29, 1987, for example, the then Commissioner of DNR directed the Division of Geological and Geophysical Surveys (DGGS) to "assess the quantity and quality of known and potential hard rock minerals...followed by a resource valuation." This value was to "be determined by an independent entity, likely retained under contract to the department."

In April 1988 DGGS maps reflecting mineral potentials and favorability of mineral occurrence on Trust Land were presented to the Commission. In preparing for the next phase, the Commission was informed

> *"assuming it proves impossible to complete an in-house mineral valuation (for whatever reason), we will be prepared to proceed with contract solicitation to complete the work."*

The Commission assumed it had approved procedures that included mineral valuation by outside consultants using the income approach. This is the point at which DNR decided to depart from the previously approved procedures and to use instead the comparable sales approach. The comparable sales approach was considered totally inappropriate by the public members as well as the State's own professional consultant, (Dr. Harris). Using the wrong approach, DNR first set the mineral value at zero and later at $16 million. In commenting on the Commission's rejection of this value, the Minority Report author agrees, "The initial value determined--$16 million--admittedly seemed quite low." (see Minority Report, page 16).

To bring these mineral valuation procedures to a conclusion, therefore, the plaintiffs and interveners entered into a contract with independent consultants as provided in the originally approved procedures. The Minority Report asserts wrongfully that the consultants used "a procedure not previously recommended by the Commissioner or formally discussed or approved by the Commission." This statement is an outrageous distortion of the truth. From the very beginning the Commission has distinguished between procedures and the methodology selected to implement the procedures and also has always held the most appropriate methodology would

be used in implementing the procedures. This was formally reiterated by the Commission and agreed upon by all members at the July 12, 1989 meeting. "Fair market value for purposes of Chapter 48 means utilization of the best information and methodology available." (see Commission Report, page 5, emphasis added).

Designee Swope and the DNR staff, however, have overlooked this Commission direction. Instead, at the September 5, 1989 meeting the lead DNR staff member emotionally exclaimed

> *"we have been faithful to the market approach because that is what the Legislature required."*

(Commission Report, page 5). We have searched the statute in vain for any such requirement! Stonewalled by DNR staff the Commission was left with two mineral values ranging from the unacceptable "comparable sales" value of $16 million and the $1.5 billion value arrived at by employing an appropriate "income" methodology.

DNR staff have consistently insisted on or returned inappropriately to reliance upon only one methodology -- comparable sales -- and have gone to the extreme of insisting this and nothing else results in fair market value. This entrenchment is clearly because their valuation experience has been primarily in "condemnation litigation" (the Minority Report at least twice, pages 10 and 27, admits these are the DNR standards). This is the methodology DNR has always used and they are most comfortable with. But, the present transaction is not a condemnation valuation and comparable sales are totally inappropriate to determining fair market value of a mineral endowment.

This view of limitations of DNR experience and capability was shared by DNR's own expert consultant, Professor Harris, who also provided possible explanation for DNR's very narrow interpretation. Dr. Harris diplomatically worded an evaluation of the technical expertise of the DNR staff (see Harris, September 1989, pages 8-9). Of the types of expertise required for the mineral estate valuation estimates attempted, he found the DNR staff qualified "as to certain types of deposits...especially well qualified as to regional knowledge...[but] not highly experienced in estimation methodology." He also noted the possibility of bias or at least the "appearance of conflict of interest," due to the State being defendant in litigation.

In his conclusion as to the requirements for a process following "best practices," Harris reiterated his evaluation of the in-house expertise by stating the DGGS work on mineral endowment would have to be redone. He recommended this work and the estimation of value not be done in-house. Instead,

the mineral endowment should be done by contract with the U.S. Geological Survey (he confirmed USGS could and were willing to do the work) and the valuation work should be done by independent economic consultants such as the Center for Mineral Resource Science in Arizona (Ibid. page 10). Ironically, these recommendations by DNR's mineral valuation expert consultant coincide with the recommendations of the Commission Chairman made in a memo over two years previously, June 19, 1987.

In Search of a Resolution:

The task of valuation was far more complex, controversial and time consuming than anyone had contemplated beforehand. The public Commission members entered the effort, more than three years ago, with the belief that fair resolution of the Trust valuation was in the best interests of Alaska. To not resolve the issue and continue the legal battle could be disastrous to the well-being of all Alaskans, not just the primary beneficiaries of the trust. The Commission believed at the outset that it had the latitude to craft a resolution that could be recommended to the Legislature. This goal was pursued until mid-1989 when it became apparent DNR and the public members of the Commission could not achieve accord on the methodology to be used in implementing the approved procedures.

Only at this point did the Commission contemplate amending the originally approved procedures. At its May 16, 1989 meeting the Commission discussed (but did not adopt) a draft report submitted by the three lawyers in the case which noted "Continuing with the Commission's currently approved valuation procedures no longer appears possible" and also recommending amended procedures. These would attempt to narrow the range of values calculated by use of the two sets of methodology and the Commissioner of DNR would determine a value within the narrowed ranges.

No progress was made toward narrowing the range and a team composed of the three lawyers in the Weiss case and a DNR staff member explored the possibility of using negotiation to arrive at an acceptable value for purposes of settlement. The defendants made a token increase (mineral value from $16 to $73 million) and the plaintiffs decreased their value by $200 million. At the October 1989 Commission meeting the team announced an impasse leaving a difference of more than $1.5 billion.

At this point Designee Swope agreed that a resolution setting forth procedures should be placed before the Commission for a vote. This was done on November 7th, 1989. The public members and their alternates stand firm on their final approved recommendations. We followed the law. We recognize a divergence of opinion exists. We see it as unfortunate complete consensus was not achieved. However, complete consensus may never be reached. We feel it is essential to complete the task of reconstituting the Trust and removing the threat of continued litigation and resulting disruption.

We urge the Commissioner of the Department of Natural Resources to use the Commission procedures in establishing a fair market value for the Mental Health Trust.

HB

554

HOUSE COMMITTEE REPORT

(9)
Date Referred: February 12, 1990 FURTHER REFERRALS:
FINANCE

Date of Committee Action: 4-9-90

The RESOURCES Committee considered: HB 554

HOUSE BILL NO. 554 DISCLOSURE OF CORPORATE TAX RECORDS

"An Act relating to disclosure of the records of corporate taxpayers."

RECOMMENDATIONS:
[X] be replaced with CS HB 554 (RES) [ ] the same title [X] a new title
[ ] have attached amendment(s)
[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[X] zero fiscal note OOR
[X] zero with analysis LAW

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____
[ ] zero fn/analysis _____

SIGNING DO PASS:

Cliff Davidson DAVIDSON
MENARD
DAVIS
Mike Navarre NAVARRE

SIGNING: (Check appropr. column)

	Do Not Pass	No Rec	Amend
Bill Hudson AUDSON		✓	
Rick Sharp SHARP		—	
FURNACE	X		

Cliff Davidson
Chairman's Signature

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: "An Act relating to disclosure of the records of corporate taxpayers."
Sponsor: Repr. Koponen
Requestor: House Resources

Agency Affected: Department of Law
BRU: Oil and Gas Special Projects
Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: March 21, 1990

Richard L. Pegues/FOR/

Approved by Commissioner: Douglas B. Baily, Attorney General
Date: March 21, 1990
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

This bill amends AS 09.25.100, which currently makes information about the particulars of the business or affairs of a taxpayer or other person in possession of the Department of Revenue confidential, to allow the commissioner of revenue to prepare and issue summaries of information relating to the business income of and the taxes paid by a taxpayer engaged in the production of oil and gas from a lease or property in the state or engaged in the transportation of oil or gas by a pipeline in the state taxable under the Multistate Tax Compact.

Because this bill deals with information keeping on the part of the Department of Revenue, it will not have a fiscal impact on the Department of Law.

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An act relating to disclosure of records of corporate taxpayers
Sponsor: Koconer
Requestor: _____

Agency Affected: _____
BRU: _____
_____
Component: _____
_____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING						
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No identifiable impact on State revenue..

Prepared by: Charles L. Logsdon
Division: Oil and Gas Audit
Phone: 277-5627
Date: March 22, 1990

Approved by Commissioner: T. E. Mallott
Agency: _____
Date: 3/26/90

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

page ____ of ____

AMENDMENT TO CSHB554 (Res) (6-2197H)

Page 1, line 29

After "taxes", delete the period insert a semicolon and insert (3) disclosure of information that is otherwise available to the public.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

MEMORANDUM March 9, 1990

SUBJECT: House Bill 554 - sectional analysis

TO: Representative Cliff Davidson, Co-Chair
House Resources Committee

FROM: Jack Chenoweth
Legislative Counsel

The measure liberalizes the limitations against disclosure of certain tax information by the Department of Revenue.

Bill section 1: The amendment made by the addition of the material as subsection (b)(1) of AS 09.25.100 [page 1, lines 17 - 24] permits the commissioner of revenue to issue "summaries of information relating to the business income of and the tax paid" by two groups of taxpayers:

-- taxpayers "engaged in the production of oil or gas from a lease or property in the state"; and

-- taxpayers "engaged in the transportation of oil or gas by pipeline."

The amendment to AS 43.05.230(a) made by bill section 2 adds to the exceptions for disclosures of confidential tax information the summaries of information whose preparation and release is authorized under the change made by bill section 1.

JBC:lmb
L10/008

Disclosure of Records of Corporate Taxpayers

The current AS 09.25.100 and AS 43.05.230 establish taxpayer confidentiality as one of approximately 100 statutory exceptions to Alaska's sunshine laws. This measure adds new subsections to both statutes allowing the Commissioner of Revenue to prepare and issue summaries of information relating to income and tax paid by a producer of oil or gas in Alaska.

Disclosure is at the Commissioner's discretion and is not required.

— [Statute References: AS 09.25.100; AS 43.05.230(a)]

PROPOSED AMENDMENT BY REP. KOPONEN 3/21/90

AMENDMENT TO HB554

Line 20, after the words "relating to" insert taxes levied under AS 43.55, AS 43.56, AS 43.57 and former AS 43.21 or to

H B

558

HOUSE COMMITTEE REPORT

(9)
Date Referred: February 12, 1990 FURTHER REFERRALS:
JUDICIARY

Date of Committee Action: 3/26/90

The RESOURCES Committee considered: HB 558

HOUSE BILL NO. 558 SUITS TO ENFORCE ENVIRONMENTAL LAWS

"An Act authorizing suits to enforce environmental laws; and having the effect of amending Rules 24 and 82 of the Alaska Rules of Civil Procedure."

RECOMMENDATIONS:
[ ] be replaced with _____ [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Date/Dept)

[ ] fiscal impact_____ [ ] fiscal note(s) _____
[ ] zero fiscal note_____ [ ] zero fiscal note(s)_____
[ ] zero with analysis_____ [ ] zero fn/analysis _____

SIGNING DO PASS:

Mike D
Scott McDonald

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Cliff Davidson		↘	
Mike Navarre		✓	
Bert Sharp	←		
Bill Hudson	✓		

Cliff Davidson
Chairman's Signature

1990 LEGISLATIVE SESSION

BILL VERSION: HB 558
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Suits To Enforce Environmental Laws
Sponsor: Rep. Koponen
Requestor: House Resources Committee

Agency Affected: All Agencies
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: House Resources Committee — Phone: 465-4944
Division: Representative Curt Menard — Date: 3/26/90

Approved by Commissioner: _____ Date: _____
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Alaska State Legislature

Representative Niilo Koponen

Pouch V
Juneau, Alaska 99811
(907) 465-4992

House District 21

119 N. Cushman, Suite 207
Fairbanks, Alaska 99701
(907) 456-8172

*** Position Paper ***

HB 558

House Bill 558 is intended to give citizens the right to bring polluters to justice when the state lacks either the resources or the will to do so. This measure is patterned after federal law, which has been in effect since the early 70's and has proven both judicially acceptable and practical.

The philosophy behind citizen suits is simple. Governments are not able to prosecute all violations of law, nor seek injunctive relief. People facing environmental pollution and its daily threat to human health and well-being nonetheless deserve the protection of the law. House Bill 558 would complement the Department's enforcement procedures and afford citizens the protection they currently do not have. In an era of limited or declining state revenues, the ability of citizens to have direct access to the courts is especially appropriate.

New Jersey

CHAPTER 35A. ENVIRONMENTAL RIGHTS

Law Review Commentaries

A thumbnail sketch of the Environmental Rights Act. Lewis Goldshore (Winter 1975) No. 70 N.J State Bar J. 18.

Analysis of environmental legislation from 1970 to 1975 in New Jersey. Lewis Goldshore (Summer 1976) 1 Seton Hall Legis.J. 1.

Environmental protection: Perspective 1978. Lewis Goldshore (Fall 1978) No. 86 N.J. State Bar J. 44.

2A:35A-1. Short title

This act shall be known and may be cited as the "Environmental Rights Act."

L.1974, c. 169, § 1, eff. Dec. 9, 1974.

Title of Act:

An Act concerning the commencement of actions for the protection of the environment and the public interest therein. L.1974, c. 169.

Administrative Code References

Environmental health standards of administrative procedure, see N.J.A.C. 7:1H-2.1 et seq.

Law Review Commentaries

1985 environmental protection case law (second in a series). Lewis Goldshore and Marsha Wolf, 117 N.J.L.J. 375 (1986).

1985 environmental protection legislation (first in a series). Lewis Goldshore and Marsha Wolf, 117 N.J.L.J. 335 (1986).

Notes of Decisions

1. Jurisdiction

Issue of whether United States Army Corps of Engineers had subject matter jurisdiction over validity of water diversion project was not ripe for adjudication, in light of fact that engineers were being selected to engage in feasibility study to help establish specifics of construction for the project; it would be only after such information was gathered that submission could be made to Army Corps so that it might determine whether it should assert jurisdiction. Application of North Jersey Dist. Water Supply Commission, 175 N.J. Super. 167, 417 A.2d 1095 (A.D.1980).

2A:35A-2. Legislative findings and determinations

The Legislature finds and determines that the integrity of the State's environment is continually threatened by pollution, impairment and destruction, that every person has a substantial interest in minimizing this condition, and that it is therefore in the public interest to enable ready access to the courts for the remedy of such abuses.

L.1974, c. 169, § 2, eff. Dec. 9, 1974.

Notes of Decisions

1. Construction and application

Policy of protecting state's environment from pollution, impairment and destruction is properly effectuated through the zoning power and may influence local zoning decisions. Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 430 A.2d 881 (1981).

Section 2A:35A-4 granting standing to any person to maintain action to enforce or restrain the violation of any statute, regulation or ordinance designed to prevent or minimize impairment or destruction of the environment is limited to destruction of the natural environment as opposed to destruction of historical buildings. Hoboken Environment Committee, Inc. v. German Seaman's Mission of New York, 161 N.J.Super. 256, 391 A.2d 577 (Ch.1978).

2A:35A-3. Definitions

For the purposes of this act, the following words and phrases shall have the following meanings:

a. "Person" includes corporations, companies, associations, societies, firms, partnerships and joint stock companies, individuals, the State, any political subdivision of the State and any agency or instrumentality of the State or of any political subdivision of the State.

b. "Pollution, impairment or destruction of the environment" means any actual pollution, impairment or destruction to any of the natural resources of the State or parts thereof. It shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper disposal of refuse, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic areas.

L.1974, c. 169, § 3, eff. Dec. 9, 1974.

Law Review Commentaries

Environmental protection: Perspective 1978. Lewis Goldshore (Fall 1978) No. 85 N.J. State Bar J. 44.

Library References

Words and Phrases (Perm.Ed.)

2A:35A-4. Actions to enforce laws on pollution, impairment or destruction of environment, or to protect environment; dismissal of frivolous actions

a. Any person may maintain an action in a court of competent jurisdiction against any other person to enforce, or to restrain the violation of, any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment.

b. Except in those instances where the conduct complained of constitutes a violation of a statute, regulation or ordinance which establishes a more specific standard for the control of pollution, impairment or destruction of the environment, any person may maintain an action in any court of competent jurisdiction for declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment or destruction.

c. The court may, on the motion of any party, or on its own motion, dismiss any action brought pursuant to this act which on its face appears to be patently frivolous, harassing or wholly lacking in merit.

L.1974, c. 169, § 4, eff. Dec. 9, 1974.

Library References

Health and Environment ⇐25.5.
Injunction ⇐114(1).
C.J.S. Health and Environment §§ 61 to 66, 69, 71 to 73, 78 to 80, 82 to 86, 88 to 90, 94, 104, 110, 115 to 126, 128, 129, 132, 133, 135, 137 to 140, 142, 144 to 153.
C.J.S. Injunctions § 173 et seq.

Notes of Decisions

1. Construction and application

Action plan applied as "a more specific standard" to interstate highway construction project

Trustees for ALASKA

A Non-Profit, Public Interest, Environmental Law Firm

Jan. 25, 1990

Kate Tesar
Staff Assistant
for Rep. Ulmer
P.O. Box V
Juneau, Ak. 99811
(Mail Stop: 3100)

re: Citizen Suit Legislation

Dear Ms. Tesar:

Per your request, we have made a survey of other states to assess the prevalence of provisions for citizen enforcement of state environmental laws.[1] The states surveyed are: Arizona, California, Colorado, Idaho, Illinois, Florida, Massachusets, Minnesota, Montana, New York, Oregon, Washington, and Wyoming.

Two of these thirteen states--Illinois and Wyoming--have broad based provisions allowing citizens to enforce state environmental laws. See Ill. Rev. Stat. 1/2 SS 1045(b); and Wy. Rev. Stat. 35-11-901. Idaho allows citizens to enforce that state's hazardous waste laws. I.C. 39-4416 Finally, California allows citizens to enforce that state's coastal protection statute. Cal. Health Code 30803 and 30804.

Prof. Smith is currently compiling a review of literature regarding the pros and cons of citizen enforcement suits. We will send you the results of Prof. Smith's work as soon as it is completed.

Please call me if you have any questions.

Sincerely,

Mike Wenig

Mike Wenig
Staff Attorney

cc. Karen Wood, ACE

---

[1] The survey was conducted for Trustees by Willamette College of Law Prof. Susan L. Smith.

725 Christensen Drive, Suite 4 Anchorage, Alaska 99501 (907) 276-4244

H B 565

HOUSE COMMITTEE REPORT

(9)
Date Referred: February 22, 1990 FURTHER REFERRALS:

JUDICIARY
FINANCE

Date of Committee Action: 3/28/90

The RESOURCES Committee considered: HB 565

HOUSE BILL NO. 565 OIL & OTHER ENVIRONMENTAL LAWS/PENALTIES

"An Act relating to strengthening the civil penalty and damage provisions concerning the discharge of oil and other environmental violations; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date."

RECOMMENDATIONS:
[ ] be replaced with CS HB 565 (RES) [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[✓] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[2] zero fiscal note(s) DEC 2/22/90 AGF+G 2604
[ ] zero fn/analysis _____

SIGNING DO PASS:

Grant Macdonald
Cliff Davidson
Mike Davis
Mike Navarre
Georgianna Lott

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Bill Hudson		✓	
Scott Ogan		—	
Vic Kohring	X		

Grant Macdonald
Chairman's Signature

STEVE COWPER
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 21, 1990

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting three bills implementing recommendations made by the Alaska Oil Spill Commission.

One bill authorizes the governor to use the oil and hazardous substance release response fund, established under AS 46.08.010, to respond to declared disaster emergencies under AS 26.23.020(c). The bill also repeals the exception in AS 46.04.080(a) that requires the Department of Environmental Conservation (DEC) to perform the duties of the Division of Emergency Services during a catastrophic oil discharge. Finally, the bill creates in statute the State Emergency Response Commission, presently established by an administrative order.

Another bill extensively revises AS 46.03.758 - 46.03.763, which deals with civil penalties for oil spills. In general, the bill increases penalties for spills and eliminates unwarranted exemptions and defenses.

The third bill strengthens DEC's authority to require compliance with oil discharge contingency plans. Of particular significance is the requirement that applicants for contingency plans must maintain sufficient resources to contain and remove, within the shortest possible time, a realistic maximum oil discharge. Next, this bill increases the financial responsibility requirements for offshore oil exploration and production activities, to guarantee that in the event of another spill, significant financial resources will exist to compensate damaged parties, including the state. Finally, this bill authorizes DEC to inspect oil industry facilities and tankers to guarantee compliance with contingency plans and to assure structural integrity of the equipment.

Sectional analyses of each bill, describing the bills in detail, will be provided by my staff.

As you know, the Oil Spill Commission "Executive Summary," issued last month, includes over 50 recommendations. Through this legislation, as well as other bills already under consideration by the legislature (House Bill 409, Senate Bills 359, 421, and 497), most of those recommendations are being addressed. Furthermore, additional legislative proposals based upon these recommendations are still under consideration, and, after review of the full commission report, just released, additional proposals might be forthcoming.

The Oil Spill Commission, after extensive study, has identified several ways for the state to improve its ability to prevent future spills and to better respond if a serious bill occurs again. These bills are critical to prevent another disaster like the Exxon Valdez spill. I therefore urge your serious discussion, consideration, and passage of these measures.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 565 No. 1
PUBLISH DATE: HOUSE 2/22/90

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Environ Conservation
Title: An Act relating to the strengthening of DEC's civil penalty and damage provisions.
BRU: Environ. Quality
Sponsor: Rules Committee
Components: Environ. Quality
Requestor: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND&STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS,CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	0.0	0.0	0.0	0.0	0.0	0.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME	0.0	0.0	0.0	0.0	0.0	0.0
TEMPORARY	0.0	0.0	0.0	0.0	0.0	0.0

ANALYSIS: (Attach a separate page if necessary)
This bill revises the schedule of penalties for the discharge of oil.

Prepared by: David Bruce
Division: Environmental Quality
Phone: 465-2630
Date: 2/12/90

Approved by Commissioner:
Date: 2/19/90
Agency: Department of Environmental Conservation

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 565 - corrected
PUBLISH DATE: HOUSE 2/22/90

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to strengthening civil penalty...
Sponsor: Rules Committee
Requestor: Governor

Agency Affected: Fish and Game
BRU: _____
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0					
REVENUE	0					

FUNDING: (Thousands of Dollars)

GENERAL FUND	0					
FEDERAL FUNDS	0					
OTHER	0					
TOTAL	0					

POSITIONS:

FULL-TIME	0					
PART-TIME	0					
TEMPORARY	0					

ANALYSIS: (Attach a separate page if necessary)

No FY 90 Impact.

Prepared by: _____ Phone: _____
Division: _____ Date: _____

Approved by Commissioner: Donald D. Gilmore Date: 2 27 90
Agency: Fish and Game

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 565 (cc) No. 2
PUBLISH DATE: HOUSE 2/22/90

FISCAL NOTE

REQUEST:

Revision Date:
Title: An act strengthening DEC's contingency plan and inspection requirements
Sponsor: Governor Rules Committee
Requestor: Governor

Agency Affected: Department of Fish and Ga
BRU: Habitat Division
Components: Habitat

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	135.9					
TRAVEL	6.0					
CONTRACTUAL	13.6					
SUPPLIES	1.0					
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	156.5					
CAPITAL	0					
REVENUE	0					

FUNDING: (Thousands of Dollars)

GENERAL FUND	156.5						
FEDERAL FUNDS	0						
OTHER	0						
TOTAL	156.5						

POSITIONS:

FULL-TIME	2						
PART-TIME	1						
TEMPORARY	0						

ANALYSIS: (Attach a separate page if necessary) (Explanation Attached)

FY 90 Impact: (3/24-6/30/90

Personal Services	51.9
Travel	2.0
Contractual	4.0
Supplies	1.0
Equipment	7.0
TOTAL	65.9

Prepared by: Frank Rue
Phone: 465-4105
Division: Habitat
Date: 2/14/90

Approved by Commissioner:
Date: 2/14/90
Agency: ADF&G

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Continuation of fiscal note analysis

FY91 Line Itemization -

PCN/NEW	RANGE/STEP	CLASSIFICATION	NO. MONTHS (COST)	LOCATION
New	18C	Habitat Biologist III	12 (54.0)	Anchorage
New	18C	Habitat Biologist III	12 (61.1)	Fairbanks
6118	16J	Cartographer III	3 (13.5)	Anchorage
New	8C	Clerk/Typist III	1.5 (3.8)	Anchorage
6131	7A	Clerk/Typist III	1.5 (3.5)	Fairbanks
TOTAL			$135.9	

EXPLANATION

As a result of the Exxon Valdez oil spill, it has become apparent that existing oil spill contingency plans are inadequate. Consequently, the U.S. Coast Guard (USCG) is reviewing and updating its regional contingency plans, and the state intends to re-evaluate the adequacy of at least the major nongovernmental contingency plans. This effort has already been initiated and we anticipate that, at a minimum, the state will participate in planning projects for Prince William Sound, Cook Inlet, the Beaufort Sea, and possibly other areas such as the Chukchi Sea. the state will also be involved in re-evaluating and potentially expanding the Dispersant Use Guidelines and Wildlife Protection Guidelines, which have incorporated into the USCG Alaska Region spill contingency plan. In order to protect the state's interests in fish and wildlife populations, habitats, and public uses of these resources, ADF&G will require additional staff to dedicate specifically to contingency planning.

The principal resources at risk because of oil and other hazardous substance releases are fish and wildlife, and the ADF&G is the state agency with the expertise and statutory mandate to provide information and recommendations regarding these resources. The department must compile and provide information on the distribution, abundance, and critical life function needs of fish and wildlife populations that may be affected by a spill or other release. Based on this information, the department must recommend mitigation measures that will afford the highest possible level of fish and wildlife protection. Examples of mitigation decisions are

Continuation of Explanation

the identification of areas that are biologically suitable for oil dispersant use, identification of areas of highest priority for containment or defensive booming, identification of criteria for deploying shoreline cleanup equipment and crews, and the selection of shoreline cleanup techniques that will maximize biological benefits and minimize biological costs.

At present, ADF&G has no funding allocated to perform this function. Between February 16 and June 30 of FY90, ADF&G will need: 9 months of HBIII, 2.25 months of CTIII, and 1.0 month of CartIII. ADF&G will also require two computers and funding for other support services as noted above.

MENARD

go0510hH
Lauterbach
3/17/90

Original sponsor(s): Rules/Governor

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR HOUSE BILL NO. 565 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil penalty, damages, costs, and attorney fee provisions concerning the discharge of oil and other environmental violations; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date."

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

* Section 1. AS 46.03.758(a) is amended to read:

(a) The legislature finds that

(1) recent information discloses that the discharge of oil may cause significant short and long-term damage to the state's environment; even [. EVEN] minute quantities of oil released to the environment may cause high mortalities among larval and juvenile forms of important commercial species, may affect salmon migration patterns, and may otherwise degrade and diminish the renewable resources of the state;

(2) the exact nature and extent of oil pollution can be neither documented with certainty nor precisely quantified on a spill-by-spill basis; however, in light of the magnitude of harm that [WHICH] may be caused by oil discharges, and the vital importance of commercial, sport and subsistence fishing, tourism, and Alaska's natural abundance and beauty to the economic future of the state and its quality of life, it is the judgment of the legislature that substantial civil penalties should be imposed for the discharge of oil in order to provide a meaningful incentive for the safe handling of oil

and to ensure [INSURE] that the public does not bear substantial losses from oil pollution for which, because of its subtle, long-term or unquantifiable nature, compensation would not otherwise be received; and

(3) the handling of oil in large quantities is a hazardous undertaking that [WHICH] poses a significant threat to the economy and environment of the state, that [WHICH] can be substantially reduced only by the taking of rigorous safety precautions involving considerable expense; conversely, persons handling oil in smaller amounts might pose a correspondingly lower risk to the economy and environment of the state, and might be [ARE] capable of safe oil handling practices at correspondingly lower costs [; IN ORDER TO PROVIDE AN INCENTIVE WHICH IS EFFECTIVE, BUT NOT PUNITIVE, IT IS NECESSARY AND APPROPRIATE THAT THE ASSESSMENT OF CIVIL PENALTIES FOR DISCHARGES OF SMALL QUANTITIES OF OIL BE LEFT FOR CASE-BY-CASE JUDICIAL DETERMINATION, WHILE INSURING, THROUGH THE PENALTY PROVISIONS OF THIS SECTION, THAT THE HANDLING OF OIL IN LARGE QUANTITIES OCCURS IN A MANNER WHICH WILL NOT IMPAIR THE RENEWABLE RESOURCES OF THE STATE].

* Sec. 2. AS 46.03.758(b) is repealed and reenacted to read:

(b) In order to promote the safe handling of oil, the department shall adopt regulations that establish a schedule of penalties for discharges of oil into the receiving environments described in (1) - (3) of this subsection. Subject to AS 46.08.761 and (m) of this section, the penalties may not exceed

(1) $12.50 per gallon of oil that enters a surface or subsurface freshwater environment;

(2) $8.00 per gallon of oil that enters an estuarine, intertidal, or confined saltwater environment;

(3) $6.00 per gallon of oil that enters an unconfined

saltwater environment or onto the land or subsurface land of the state.

* Sec. 3. AS 46.03.758(d) is amended to read:

(d) The schedule must [SHALL] vary according to the toxicity, degradability, and dispersal characteristics of the oil. The schedule must [SHALL] also vary according to the sensitivity and productivity of the receiving environment. Variations under this subsection may be by subcategories of receiving environments, specific receiving environments, or both. The maximum penalties established in (b) of this section must [SHALL] apply to discharges in the most sensitive and productive of receiving environments within each category of receiving environment, and the penalty must [SHALL] decrease for less productive or sensitive receiving environments. If oil is discharged into multiple receiving environments, the penalty must be based upon the schedule penalty value applicable to the most sensitive and productive receiving environment unless the defendant proves how much oil entered each receiving environment by clear and convincing evidence.

* Sec. 4. AS 46.03.758(e) is amended to read:

(e) If a discharge of oil [IN EXCESS OF 18,000 GALLONS] not permitted under applicable state and federal law occurs within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state, the following persons, in addition to the person causing or permitting the discharge, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established under this section and in the regulations adopted under this section:

(1) if the discharge occurs from a [ANY] commercial or industrial facility other than a vessel or offshore platform, the owner, lessee or permittee, and operator of the facility;

(2) if the discharge occurs from a vessel,

(A) the owner and operator of the vessel; and

(B) the owner of the oil carried as cargo on the vessel at the time the vessel was loaded, if the loading occurred within the territorial jurisdiction of the state, or at a deep-water port or other offshore storage facility adjacent to the state; however, if the owner of the oil temporarily transfers ownership of the oil to another person, and the transfer has the purpose or effect of evading the vicarious liability imposed by this section, the transferor will be considered the owner of the oil for the purposes of this subsection; and

(3) if the discharge occurs from an offshore platform, the lessee or permittee of the tract or acreage upon which the platform is situated, and the operator of the platform.

* Sec. 5. AS 46.03.758(f) is repealed and reenacted to read:

(f) For purposes of assessing a penalty under (b) of this section, in determining how many gallons of oil have been discharged onto a surface freshwater or saltwater environment or onto the surface land of the state, the court shall deduct the number of discharged gallons of oil that the defendant proves were removed by the defendant from the environment within the first 36 hours after the discharge as a result of a cleanup operation undertaken in conformity with applicable state and federal law. The dispersal of oil through burning, the use of chemical agents, biological additives, sinking agents, or other means is not considered removal for purposes of this subsection.

* Sec. 6. AS 46.03.758(i) is repealed and reenacted to read:

(i) The imposition of a civil penalty under this section does not limit or otherwise affect the authority of the department to enforce a provision of this chapter, AS 46.04, or AS 46.09, or to

recover damages, restoration expenses, investigation costs, court costs, and attorney fees. A person who pays a civil penalty imposed under this section is entitled to set off the penalty amount paid against a civil penalty awarded by a court against the person for the same discharge under AS 46.03.760(a).

* Sec. 7. AS 46.03.758 is amended by adding a new subsection to read:

(m) The penalty that would otherwise be assessed under (b) of this section shall be multiplied by a factor of five if a court determines that

(1) the discharge was caused by the gross negligence or intentional act of the discharger;

(2) the discharger did not take reasonable measures to contain and cleanup the discharged oil; or

(3) the defendant did not respond in accordance with an approved oil discharge contingency plan.

* Sec. 8. AS 46.03.759(a) is amended to read: CRUDE

(a) A person who is found to be liable under any other state law for an unpermitted discharge of crude oil [IN EXCESS OF 18,000 GALLONS] is, in addition to liability for any other penalties or for damages or the cost of containment and cleanup, liable to the state in a civil action for a civil penalty, up to a maximum of $500,000,000, subject to adjustment under AS 46.03.761, in the amount of

(1) $8 per gallon of crude oil discharged for the first 420,000 gallons discharged, subject to adjustment under AS 46.03.761; and

(2) $12.50 per gallon of crude oil discharged for amounts discharged in excess of 420,000 gallons, subject to adjustment under AS 46.03.761.

* Sec. 9. AS 46.03.759(c) is amended to read:

(c) Subject to the [$500,000,000] maximum set under (a) of this section the court shall assess five [FOUR] times the penalty amounts set out in (a) of this section if the court finds

(1) the discharge was caused by the gross negligence or intentional act of the defendant;

(2) the defendant did not take reasonable measures to contain and clean up the discharged oil; or

(3) the defendant did not respond in accordance with an approved oil discharge contingency plan.

* Sec. 10. AS 46.03.759(d) is repealed and reenacted to read:

(d) The imposition of a civil penalty under this section does not affect the authority of the department to enforce a provision of this chapter, AS 46.04, or AS 46.09, or to recover damages, restoration expenses, investigation costs, court costs, and attorney fees. A person who pays a civil penalty imposed under this section is entitled to set off the penalty amount paid against a civil penalty awarded by a court against the person for the same discharge under AS 46.03.760(a).

* Sec. 11. AS 46.03.760(a) is repealed and reenacted to read:

(a) A person who violates or causes or permits to be violated a provision of this chapter, AS 46.04, AS 46.09, or a regulation, order of the department, permit, approval, or certificate issued under this chapter, AS 46.04, or AS 46.09, is liable to the state in a civil action for a sum to be assessed by the court of not less than $2,500 nor more than $100,000 a day for each violation, subject to adjustment under AS 46.03.761. Each violation is a separate and distinct offense, and where a violation continues from day to day each day constitutes a separate violation. The amount assessed by the court under this subsection must reflect, as applicable,

Oil Bill

JUDGE TAKES THESE PTS INTO CONSIDERATION IN MAKING FINE.

(1) reasonable compensation for adverse environmental effects of the violation;

(2) reasonable costs incurred by the state in the detection, investigation, and attempted correction of the violation;

(3) the economic savings realized by the person in not complying with the requirement for which the violation is charged;

(4) the prior history of violations committed by the person;

JUDGE DISCRETION

(5) the need for an enhanced civil penalty to deter future violations;

(6) the extent and seriousness of the violation;

(7) the person's attainment of compliance, within the shortest feasible time, with the requirement for which the violation is shown;

(8) the person's ability to pay; and

(9) other factors that the court determines are in the interest of justice.

* Sec. 12. AS 46.03.760(e) is amended to read:

(e) In addition to liability under (a) [- (d)] of this section, a person who violates or causes or permits to be violated a provision of AS 46.03.740 - 46.03.750 is liable to the state, in a civil action brought under AS 46.03.822, for the full amount of actual damages caused to the state by the violation, including direct and indirect costs associated with the abatement, containment and [OR] removal of the pollutant, restoration of the environment to its former state, and all incidental administrative costs.

* Sec. 13. AS 46.03 is amended by adding a new section to read:

Sec. 46.03.761. ADJUSTMENT OF DOLLAR AMOUNTS. (a) The dollar amounts in AS 46.03.758, 46.03.759, and 46.03.760 and in the

CONSUMER PRICE INDEX

regulations adopted under AS 46.03.758 change, as provided in this section, according to and to the extent of changes in the Consumer Price Index for all urban consumers for the Anchorage metropolitan area compiled by the Bureau of Labor Statistics, United States Department of Labor (the index). The index for January of the year in which this section becomes effective is the reference base index.

(b) The dollar amounts change on October 1 of each year. After calculation of the new amounts, the resulting amounts shall be rounded to the nearest cent.

(c) If the index is revised, the percentage of change is calculated on the basis of the revised index. If a revision of the index changes the reference base index, a revised reference base index is determined by multiplying the reference base index applicable by the rebasing factor furnished by the United States Bureau of Labor Statistics. If the index is superseded, the index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for Alaskan consumers.

(d) The department shall adopt a regulation

(1) announcing, on or before June 30 of each year, the changes in dollar amounts required by (b) of this section;

(2) amending, on or before June 30 of each year, the regulations adopted under AS 46.03.758(b) to reflect the changes in dollar amounts required by (b) of this section; and

(3) announcing, promptly after the changes occur, changes in the index required by (c) of this section, including, if applicable, the numerical equivalent of the reference base index under a revised reference base index and the designation or title of any index superseding the index.

(e) The department shall also provide notification of a change in dollar amounts required under (b) of this section to the clerks of court in each judicial district of the state.

* Sec. 14. AS 46.03.763 is amended to read:

Sec. 46.03.763. ATTORNEY FEES AND COSTS. In an action [TO IMPOSE CIVIL PENALTIES] under AS 46.03.758, 46.03.759, [OR] 46.03.760, 46.03.765, 46.03.780, or 46.03.822 [FOR A DISCHARGE OF OIL], the state may recover full reasonable attorney fees and costs incurred by the state in maintaining the action.

* Sec. 15. AS 46.03.758(c), 46.03.758(g), 46.03.760(b), 46.03.760(c), and 46.03.760(f) are repealed.

* Sec. 16. AS 46.03.763, as amended by sec. 14 of this Act, has the effect of amending Rule 82, Alaska Rules of Civil Procedure, by allowing the recovery of full reasonable attorney fees and costs in certain additional actions.

* Sec. 17. This Act takes effect immediately under AS 01.10.070(c).

go0510hJ
Lauterbach
3/27/90

Original sponsor(s): Rules/Governor

IN THE HOUSE BY THE RESOURCES COMMITTEE

CS FOR HOUSE BILL NO. 565 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to civil penalty, damages, costs, and attorney fee provisions concerning the discharge of oil and other environmental violations; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date."

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

* Section 1. AS 46.03.758(a) is amended to read:

(a) The legislature finds that

(1) recent information discloses that the discharge of oil may cause significant short and long-term damage to the state's environment; even [. EVEN] minute quantities of oil released to the environment may cause high mortalities among larval and juvenile forms of important commercial species, may affect salmon migration patterns, and may otherwise degrade and diminish the renewable resources of the state;

(2) the exact nature and extent of oil pollution can be neither documented with certainty nor precisely quantified on a spill-by-spill basis; however, in light of the magnitude of harm that [WHICH] may be caused by oil discharges, and the vital importance of commercial, sport and subsistence fishing, tourism, and Alaska's natural abundance and beauty to the economic future of the state and its quality of life, it is the judgment of the legislature that substantial civil penalties should be imposed for the illegal discharge of oil in order to provide a meaningful incentive for the safe handling of oil

and to ensure [INSURE] that the public does not bear substantial losses from oil pollution for which, because of its subtle, long-term or unquantifiable nature, compensation would not otherwise be received; and

(3) the handling of oil in large quantities is a hazardous undertaking that [WHICH] poses a significant threat to the economy and environment of the state, that [WHICH] can be substantially reduced only by the taking of rigorous safety precautions involving considerable expense; conversely, persons handling oil in smaller amounts might pose a correspondingly lower risk to the economy and environment of the state, and might be [ARE] capable of safe oil handling practices at correspondingly lower costs [; IN ORDER TO PROVIDE AN INCENTIVE WHICH IS EFFECTIVE, BUT NOT PUNITIVE, IT IS NECESSARY AND APPROPRIATE THAT THE ASSESSMENT OF CIVIL PENALTIES FOR DISCHARGES OF SMALL QUANTITIES OF OIL BE LEFT FOR CASE-BY-CASE JUDICIAL DETERMINATION, WHILE INSURING, THROUGH THE PENALTY PROVISIONS OF THIS SECTION, THAT THE HANDLING OF OIL IN LARGE QUANTITIES OCCURS IN A MANNER WHICH WILL NOT IMPAIR THE RENEWABLE RESOURCES OF THE STATE].

* Sec. 2. AS 46.03.758(b) is repealed and reenacted to read:

(b) In order to promote the safe handling of oil, the department shall adopt regulations that establish a schedule of penalties for discharges of oil into the receiving environments described in (1) - (3) of this subsection. Subject to AS 46.08.761 and (m) of this section, the penalties may not exceed

(1) $12.50 per gallon of oil that enters an anadromous stream or other freshwater environment with significant aquatic resources;

(2) $8.00 per gallon of oil that enters an estuarine, intertidal, or confined saltwater environment;

(3) $6.00 per gallon of oil that enters an unconfined saltwater environment, public land, or a freshwater environment without significant aquatic resources.

* Sec. 3. AS 46.03.758(d) is amended to read:

(d) The schedule must [SHALL] vary according to the toxicity, degradability, and dispersal characteristics of the oil. The schedule must [SHALL] also vary according to the sensitivity and productivity of the receiving environment. Variations under this subsection may be by subcategories of receiving environments, specific receiving environments, or both. The maximum penalties established in (b) of this section must [SHALL] apply to discharges in the most sensitive and productive of receiving environments within each category of receiving environment, and the penalty must [SHALL] decrease for less productive or sensitive receiving environments. If oil is discharged into multiple receiving environments, the penalty must be based upon the schedule penalty value applicable to the most sensitive and productive receiving environment unless the defendant proves how much oil entered each receiving environment by clear and convincing evidence. — Gene Pourdier

* Sec. 4. AS 46.03.758(e) is amended to read:

(e) If a discharge of oil in excess of 500 [18,000] gallons not permitted under applicable state and federal law occurs within the territorial jurisdiction of the state, or into or upon the adjacent outer continental shelf of the state, the following persons, in addition to the person causing or permitting the discharge, are jointly and severally liable to the state, in a civil action, for the full amount of penalties established under this section and in the regulations adopted under this section:

(1) if the discharge occurs from a [ANY] commercial or industrial facility other than a vessel or offshore platform, the