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The "common use" clause provides:

> Wherever occurring in the natural state, fish, wildlife, and waters are reserved to the people for common use.

Alaska Constitution, Article VIII, §3.

Since Statehood, a host of decisions by the Alaska Supreme Court have recognized the force of the public trust doctrine in Alaska and have consistently expanded the scope of the public trust. SEE: e.g., Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 905 (Alaska, 1961); aff'd, 369 U.S. 45 (1962); Herscher v State, 568 P. 2d 996, 1003, 1005 (Alaska, 1977); Owsichek v State, 763 P. 2d 488, 492-496 (Alaska, 1988); CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1117-1121 (Alaska, 1988); McDowell v State, 785 P. 2d 1, 16-18 (Alaska, 1989); Gilbert v State, 803 P. 2d 391, 398-399 (Alaska, 1990).

Various decisions of the Alaska Supreme Court have established beyond debate that the public trust doctrine is implicit in the "common use" clause.

> We begin by examining the constitutional history to determine the framers' intent in enacting the common use clause. This was a unique provision, not modeled on any other state constitution. Its purpose was anti-monopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife, and waters. (footnote omitted)

Owsichek v State, 763 P. 2d 488, 493 (Alaska, 1988), citing 4 Proceedings of the Alaska Constitutional Convention 2492 (Jan. 18, 1956).

> ...title (to fish and wildlife) is reserved to the people, or the state on behalf of the people. (emphasis added)

Owsichek v State, 763 P. 2d 488, 493 (Alaska, 1988), citing 4 Alaska Constitutional Convention Papers, Folder 210.

> ...the power or control lodged in the state...is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Owsichek v State, 763 P. 2d 488, 494 (Alaska, 1988), citing Geer v Connecticut, 161 U.S. 519, 529 (1896)(emphasis added by the court in Owsichek).

In light of this historical review (e.g., Geer v Connecticut,

161 U.S. 519, 539 (1896), and Illinois Central Railroad Co. v Illinois, 146 U.S. 387 (1892)), we conclude that the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife, and water resources of the state.

Owsichek v State, 763 P. 2d 488, 496 (Alaska, 1988).

Thus, common law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife, and water resources of the state for the benefit of all the people. (footnote omitted)

Owsichek v State, 763 P. 2d 488, 495 (Alaska, 1988).

To recapitulate, the Alaska Supreme Court has recognized the constitutional stature of the public trust doctrine in Alaska and its integral role in Alaskan law in the preservation of our natural resources since the earliest days of Statehood. Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 905 (Alaska, 1961); aff'd, 369 U.S. 45 (1962).

2. The Public Trust Doctrine in the Alaska Statutes: The 1983 "Sagebrush Rebellion" Initiative, §5

The public trust doctrine has been enshrined in the Alaska Constitution and it has been repeatedly recognized by the Alaska Supreme Court. Perhaps in recognition of its status as the cynosure of Alaskan resource law, the public trust doctrine in Alaska has also been explicitly recognized by our State's electorate.

Through the constitutional process of the Initiative (Alaska Const., Art. XI, §§ 1-4), the voters of Alaska in 1983 proposed and adopted an Initiative[8] containing an express statutory statement of the public trust doctrine:

...all land in the state and all minerals not previously appropriated are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state.

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[8] The public trust doctrine was certainly not the focus of the 1983 Initiative. Most of the public debate regarding the Initiative dealt with tension between the respective rôles of the federal government and the State of Alaska in land management, in keeping with the general tenor of the "Sagebrush Rebellion."

AS 38.05.502 (1983 Initiative Proposal No. 5, §1). (emphasis added)[9]

This extraordinary Initiative--reiterating the most fundamental tenet of law regarding management of the main source of Alaska's current and future wealth--has not yet been the basis for a reported decision by the Alaska Supreme Court.

Legislative history for this Initiative is not helpful, either. Lacking judicial gloss as well as a reliable indication of the animus behind the trust portion of the Sagebrush Initiative, one must rely on other tools of statutory interpretation to explicate AS 38.05.502. Interpretation of AS 38.05.502 will call for judicial recourse to the rule of law that is most advisable in light of reason and public policy.

As a matter of statutory interpretation, courts should not assume that AS 38.05.502 is a mere redundancy. AS 38.05.502 must be seen as expanding the purview of the public trust doctrine beyond that which is contained in our State Constitution and strengthening the affirmative obligations of stewardship imposed upon the state qua trustee.

AS 38.05.502 enlarges the scope, and thereby also enlarges the purposes of the public trust in Alaska, by clearly applying the public trust doctrine to minerals and all publicly-owned land, regardless of the land's relationship to the ebb and flow of the tides. It remains for Alaska's judicial branch of government to recognize and interpret those additional purposes adumbrated in AS 38.05.502. SEE, e.g., National Audubon Society v. Superior Court of Alpine County, 658 P. 2d 709, 719 (California, 1983) (In Bank), citing Marks v Whitney, 491 P. 2d 374 (California, 1971) (In Bank).

The usual rule applied by the Alaska Supreme Court is to construe Initiatives broadly. Thomas v Bailey, 595 P. 2d 1, 3 (Alaska, 1979); City of Fairbanks v Fairbanks Convention and Visitors Bureau, ___ P. 2d ____ (Alaska, 1991), Supreme Court Opinion No. 3760, October 11, 1991.

It does not seem overly adventurous to hazard the supposition that a broad judicial construction of AS 38.05.502 would result in the conclusion that the statutory component of Alaska's public trust doctrine protects all State-owned land in Alaska, including the fish, wildlife, timber, and water resources found on the land, and all state-owned minerals not appropriated prior to adoption of the 1983 Initiative.

Although ambiguity is usually in the eyes of the beholder, it may be useful to make a few guesses how the Alaska Supreme Court would view AS 38.05.502. When a statute is unambiguous, legislative history is not generally used to determine the meaning of the statute. TVA v Hill, 437 U.S. 153, 184, n. 29 (1978); State

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[9] The public trust provision of the Initiative was renumbered by the Revisor of Statutes as AS 38.05.502.

v City of Haines, 627 P. 2d 1047, 1049 fn. 6 (Alaska, 1981).

The language of AS 38.05.502 appears unambiguous as to the fact that one purpose of this Initiative was to unequivocally state that all state-owned land in Alaska and all unappropriated minerals[10], are held in trust for the people of the State.

There is at least a latent ambiguity in AS 38.05.502 insofar as the meaning intended to be given to the term "land" as it was used in the Initiative. That ambiguity disappears, however, when AS 38.05.502 is construed in conjunction with Alaska's pre-existing statutory definition of "land" or "state land." AS 38.05.965 (19).

The term "land" has been given an extremely broad definition in Alaska:

> "state land" or "land" means all land, including shore, tide and submerged land, or resources belonging to or acquired by the state;

AS 38.05.965 (19) (emphasis added). SEE ALSO: A.G. Op. #166-136-85, February 21, 1985, pp. 6-7.

The 1983 Initiative's application of the public trust doctrine to all "land" therefore should be interpreted to mean that the public trust doctrine extends beyond tidewater and includes state-owned uplands and resources found thereon, such as fish, wildlife, timber, and water. AS 38.05.965 (19).

Although the precise contours of the public trust doctrine itself are not subject to "bright line" delineation, there is no ambiguity at the bedrock level: the public trust in Alaska is meant to apply to all State land and all unappropriated minerals.[11]

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[10] Under Alaska law, the mineral estate is the dominant estate and carries with it the right to make such use of the surface estate as is reasonably necessary to remove the minerals. Norkan Corp. v McGahan, ___ P. 2d ___ (Alaska, 1991) Supreme Court Opinion No. 3771, November 15, 1991, Slip Opinion at p. 13.

Nonetheless, the rights of the mineral estate are to be exercised with due regard for the rights of the owner of the servient estate. Norkan Corp. v McGahan, ___ P. 2d ___ (Alaska, 1991) Supreme Court Opinion No. 3771, November 15, 1991, Slip Opinion at p. 14. SEE ALSO: 70 ALR 3rd 383 (1976).

Where mineral extraction would be wholly incompatible with public trust uses of the land, a strong argument could be made that the mineral extraction is forbidden.

[11] Under Alaska law, gravel is not a mineral. Norkan Corp. v McGahan, ___ P. 2d ___ (Alaska, 1991) Supreme Court Opinion No. 37 1, November 15, 1991, Slip Opinion at p. 13.

Gravel is the essence of the surface estate, and its extraction can render land unsuited for public recreation or wildlife or fisheries habitat.

Courts are virtually unanimous in holding that gravel is not

Thus, in interpreting and applying AS 38.05.502, tne only interpretive tasks arguably presented for a court to determine are the extent of the State's fiduciary obligations under the public trust and the extent of the resources included within the ambit of the term "land."[12]

The fact that the public trust doctrine in Alaska emanates from our State Constitution and has also been embraced by the electorate as a whole, through the Initiative process, means that courts should sedulously protect the values embodied in the trust. It also means that courts should broadly construe the purposes of the public trust, since a narrow construction would risk the loss, through alienation of the jus privatum, of the inherently public resources that constitute the corpus of the trust.

The Alaska Legislature has plenary authority over state-owned resources, including lands conveyed to the state under the terms of the express, statutory, university trust, ch. 181, 38 State. 1214, and 45 Stat. 1091. The authority of the Legislature is not so great, however, as to enable it to ignore or violate its legal responsibilities as fiduciary for the public trust.

To summarize, the public trust doctrine in Alaska, including government's fiduciary role in management of trust resources, is one of the hallowed principles of Alaskan law. This tradition has been vigorously and repeatedly upheld in Alaska by our Constitutional Framers, by the Alaska Supreme Court, and by the

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a "mineral" in the legal sense of that word. e.g. Anchorage Sand & Gravel Co. v Schubert, 114 F. Supp. 436, 437-438 (D. Alaska, 1953); Miller Land & Mineral Co. v State Highway Commn., 757 P. 2d 1001, 1003-1004 (Wyoming, 1988); and cases cited in Norken Corp. v McGahan, ___ P. 2d ___ (Alaska, 1991) Supreme Court Opinion No. 3771, November 15, 1991, at fn 4.

[12] "state lands" or "lands" means all lands, including shore, tide, and submerged lands, or resources belonging to or acquired by the state. AS 38.05.365 (16), cited in Moore v State, 553 P. 2d 8, 25 (Alaska, 1976) (emphasis added by the court), renumbered as AS 38.05.960 (19).

Assuming that the word "resources" is not a mere redundancy, the conclusion seems reasonable that land-tied resources, such as timber, come within the ambit of the definition of "lands."

Title 38 of the Alaska Statutes contains an additional definition of "state lands" that reinforces the very broad sweep of the term. AS 38.50.170 defines "state land" as: "including shore, tide, and submerged land or unsevered resources belonging to or acquired by the state excluding interests in land severed or constructively severed from the land..."

Thus, a court should logically give an expansive definition to the term "land" as used in AS 38.05.502, so that it includes, inter alia, state-owned uplands, fish and wildlife habitat, waters, recreation, scientific, educational, scenic, and aesthetic values.

electorate at large.

The fact that the public trust doctrine in Alaska emanates from our State Constitution, and has been reiterated by the electorate through the Initiative process, means that courts should sedulously protect the values embodied in Alaska's public trust.

The public trust also imposes an affirmative duty on the executive branch of state government. State agencies must thoroughly consider the public trust ramifications of their actions, especially where disposal of state land, forest resources, water, or unappropriated minerals are concerned.

Any disposal of trust resources must be strictly pursuant to the obligatory nature of the trust. Illinois Central R. Co. v State of Illinois, 146 U.S. 387 (1892); Geer v Connecticut, 161 U.S. 519 (1896).

State agencies must communicate the potential impacts of actions that may harm those resources to the entire Alaskan public in a clear and intelligible manner. State agencies should also observe standards of prudent self-restraint where disposal or exchange of state resources are at issue in order to assure protection of public trust resources.

II. THE PURPOSES AND SCOPE OF THE PUBLIC TRUST

A. The Purposes of the Public Trust in the United States

As defined in the various courts of the United States, the objectives of the public trust have evolved in concert with changing public perceptions of the values and uses of the trust resources that are managed by State government.

In the context of state-owned lands, the public trust doctrine has most frequently been applied in the context of tidelands. SEE, e.g., Martin v Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842); Shively v Bowlby, 152 U.S. 1 (1894); CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115 (Alaska, 1988).

During the nineteenth century, the purposes of the tidelands trust were traditionally defined in terms of navigation, commerce, and access for commercial fisheries.

Yet the public trust doctrine has never been so constricted.

The public trust doctrine was never the exclusive creature of littoral states, and the purposes of the public trust have never been limited to the triad of commerce, navigation, and fishing.[13]

As society and its needs have evolved, the scope and purposes of the public trust doctrine have also evolved and expanded. This evolution should be expected to continue.

> There is a growing public recognition that one of the most important public uses of the tidelands--a use encompassed within the tidelands trust--is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

National Audubon Society v. Superior Court of Alpine County, 658 P. 2d 709, 719 (California, 1983) (In Bank), citing Marks v Whitney, 491 P. 2d 374 (California, 1971) (In Bank).

What has been the result of this doctrinal evolution?

Caveat: The list set out below does not purport to be complete. The Public Trust Doctrine almost certainly has been held to protect additional resources and uses thereof; this writer does not pretend to have exhausted all avenues of research. Also, the doctrine is likely to be expanded as the years go by and public habits and needs change. Nonetheless, this listing should provide the reader with an appreciation of the current status of the way in which the purposes of the public trust doctrine are expressed in different states.

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[13] As discussed infra, the public trust doctrine in Alaska does not lose its force at the mean high tide line; the scope of the public trust in Alaska stretches beyond the capacious mud flats of Bristol Bay or Cook Inlet.

With those caveats in mind, the purposes of the public trust doctrine in the United States have been held to include at least:

--protection of navigational and commercial fishing rights over tidelands, e.g., Martin v Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410 (1842);
--recreational fishing, boating, swimming, water skiing, and other related purposes, e.g., Wilbour v Gallagher, 462 P. 2d 232 (Washington, 1969) cert. denied, 400 U.S. 878 (1970);
--protection of the public's right to hunt, e.g., Opinion of the Justices, 424 N.E. 2d 1092 (Massachusetts, 1981); Delmarva Power & Light Co. of Maryland v Eberhard, 230 A. 2d 644 (Maryland, 1967); Bell v Town of Wells, 557 A 2d 168 (Maine, 1989); Hartford v Gilmanton, 146 A. 2d 851 (New Hampshire, 1958); Swan Island Club v White, 114 F. Supp. 95 (E.D.N.C., 1953), aff'd sub nom. Swan Island Club v Yarborough, 209 F. 2d 698 (4th Cir., 1954);
--protection of fish and wildlife habitat, e.g., Kootenai Environmental alliance v Panhandle Yacht Club, 671 P. 2d 1085 (Idaho, 1983); People of the Town of Smithtown v Poveromo, 336 N.Y.S. 2d 764 (New York, 1972); Just v Marinette County, 201 N.W. 2d 761 (Wisconsin, 1972); SEE ALSO: §2(c), ch. 82, S.L.A. 1985, Temporary and Special Acts and Resolves;
--recreational access to the ocean, e.g., County of Hawaii v Sotomura, 517 P. 2d 57 (Hawaii, 1973);
--sunbathing, swimming, other shore activities, and access to and use of shorelands and upland dry sand beaches, e.g., (Matthews v Bay Head Improvement Assn., 471 A. 2d 355, 365 (New Jersey, 1984), cert. denied, 469 U.S. 821 (1984),;
--enjoyment of scenic beauty, City of Madison v State, 83 NW 2d 674, 678 (Wisc. 1957); Obrecht v National Gypsum Co., 105 NW 2d. 143, 149, 151 (Michigan, 1960);
--conservation of fishery resources, e.g., Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 915 (Alaska, 1961); aff'd, 369 U.S. 45 (1962), Owsichek v State, 763 P. 2d 488, 492-496 (Alaska, 1988), Gilbert v State, 803 P. 2d 391, 398-399 (Alaska, 1990), and McDowell v State, 785 P. 2d 1, 12, 16, 18 (Alaska, 1989); Nathanson v State. 554 P. 2d 456, 458 fn. 9, (Alaska, 1976);
--conservation of wildlife resources, e.g., Herscher v State, 568 P. 2d 996, 1005 (Alaska, 1977); Owsichek v State, 763 P. 2d 488, 492-496 (Alaska, 1988), McDowell v State, 785 P. 2d 1, 12, 16, 18 (Alaska, 1989) Gilbert v State, 803 P. 2d 391, 398-399 (Alaska, 1990), and Arnold v Mundy, 6 N.J.L. 1, 86 (2d e.d 1875) cited in Matthews v Bay Head Improvement Assn., 471 A. 2d 355, 361 (New Jersey, 1984), cert. denied, 469 U.S. 821 (1984),;
--waters and minerals, e.g, Herscher v State, 568 P. 2d 996, 1003 (Alaska, 1977); and
--existing and future recreational uses Ch. 82, §1(c), SLA 1985 (Alaska Statutes, Temporary and Special Acts and

Resolves) .[14]

B. Alaska Law and the Public Trust

1. The Purposes of the Public Trust in Alaska

Like most common law doctrines, the public trust doctrine in Alaska is flexible.[15] As certain natural resources have become progressively more scarce, the purposes for which the public trust has been judicially invoked in Alaska have expanded. For example, in 1985, the Alaska Legislature recognized the necessity of endowing the public trust doctrine with sufficient flexibility to accommodate future uses in the context of recreational aspects of the public trust. SEE: ch. 82, §1(c), SLA 1985 (Alaska Statutes, Temporary and Special Acts and Resolves 1985).

The purposes of the public trust doctrine in Alaska have never been definitively established. The wisdom of not doing so is manifest.[16]

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[14] In Matthews, supra, the New Jersey Supreme Court found a public trust right of access to all municipally-owned beaches above and below the high tide line. The Court therein wrote: "Beaches are a unique resource and are irreplaceable." Matthews at 364.

The remaining unlogged, old growth rain forests of Southeast Alaska are no less unique a resource than the sandy beaches of New Jersey. Given the fact that once an Alaskan old-growth forest is logged, it may take roughly 300-500 years to regenerate old growth conditions, they too, are well-nigh "irreplaceable" subsistence and recreational resources.

[15] The Alaska Constitution, which is the source of the public trust doctrine in Alaska, has previously been described as a document that is adaptable to changing circumstances. SEE: Waarwick v State, 548 P. 2d 384 (Alaska, 1976). Alaska's Court would be likely to agree with this statement:

> Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit."

Matthews v Bay Head Improvement Assn., 471 A. 2d 355, 365 (New Jersey, 1984).

[16] Although it is unwise to attempt to create a single statement of the purposes of the public trust doctrine, the need to exercise wise stewardship over Alaska's natural resource patrimony commands, at a minimum, that attention be paid to the public trust purposes enunciated by the California Supreme Court, sitting en banc, in National Audubon Society v. Superior Court of Alpine County, 658 P. 2d at 719.

The precise contours of the public trust doctrine in Alaska may never be permanently set. It is to be expected that Alaskan courts will continue to recognize that new uses of public trust resources deserve the legal guaranty of the public trust.

It has been shown, supra, that the "common use" clause of the Alaska Constitution, Article VIII, §3, is the source of the public trust doctrine in Alaska. Yet, since the trust is only implicit in the "common use" clause, how can the purposes of the public trust under Alaska law be discerned?

In interpreting Article VIII (the Natural Resources Article) of the Alaska Constitution, the Alaska Supreme Court has recognized the value of the three volume series of Constitutional Studies prepared by the Public Administration Service on behalf of the Alaska Statehood Committee for the Alaska Constitutional Convention (cited as "A Report to the People of Alaska from the Alaska Constitutional Convention"). State v Lewis, 559 P. 2d 630, 637-638 (Alaska, 1977). Naturally, it is useful to refer to this document to discern the purposes of the public trust doctrine as it exists at the State constitutional level in Alaska.

Referring to the importance of "A Report to the People of Alaska from the Alaska Constitutional Convention" as a judicial tool for elucidating provisions of the Alaska Constitution (and Article VIII in particular), the Alaska Supreme Court wrote:

> We can envision no more cogent expression of the intent of the drafters and of those voting for ratification of the Constitution.

State v Lewis, 559 P. 2d 630, 638 (Alaska, 1977).

Let us then refer to Volume I, §III, of "A Report to the People of Alaska from the Alaska Constitutional Convention," for the portion titled "The State and its Patrimony" to aid in clarifying the constitutional dimension of the public trust doctrine in Alaska.

The portion of the Report cited below has particular poignancy when it is read in the context of the State of Alaska's recurring proposals to dispose of old growth forest lands of special value to fish and wildlife with the intention that the lands be developed at the expense of wildlife whose abundance depends on the forest.[17]

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[17] The following words were directed at private individuals who own forests, but they are just as appropriately applied to the State of Alaska as trustee of the public's forest wealth.

> It is a scurvy trick of Fortune when she gives large wealth to a man with no feeling for trees.

Rev. Hudson Stuck, (Archdeacon of the Yukon and the man who made the first ascent of Denali) Ten Thousand Miles with a Dog Sled, p. 154. Wolfe Publishing Co., Prescott, Arizona (1988), originally

On a constitutional level, the Public Trust Doctrine in Alaska was intended by the Framers to function as a safeguard against inappropriate sales or disposals of public resources.[18] In a subsection of "A Report to the People of Alaska from the Alaska Constitutional Convention," entitled "The Psychology of the Alaska Citizen and Resources Exploitation and Fraud," it was written:

> At no point is the need for thoughtful judgment more necessary than in establishing the basic policy for the management and disposal of the tremendous resources which have been given him (the Alaskan citizen) as his patrimony. (emphasis added)
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> In the first flush of statehood, the average Alaskan will react, and very justifiably so, against the unnecessary restrictions which have bound him for so many years. He will not take kindly to the substitution of state red tape for federal red tape, nor should he. But the Alaskan will, as he thinks over his situation, be aware that any state control over resources which his judgment tells him is necessary is his control, ordained by him through the political process and subject to control and change through the same media. (emphasis in original)
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> Psychologically, the emphasis in the first days of statehood, so far as land and resources policy is concerned, will be in the direction of disposing of the patrimony as rapidly as possible, to get it into private hands so that immediate, and long-delayed, development may commence at once. Yet precipitate action could easily result in a situation which the people would have cause to regret in a few years.
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> This will be the critical point in Alaskan development, not alone for resources policy but for the entire future of the State of Alaska. The stakes are huge, and they will attract persons and corporations interested in them. Some of the ventures will be legitimate, some speculative, and some insidious. If the drive is for slam-bang disposal, without discrimination in the choice of terms of sale or lease, the interests of all the people of Alaska will suffer. (emphasis in original) If disposition of the land and its resources is made at ridiculously low prices, the parable of Jacob, Esau, and the bowl of pottage will be repeated; Alaska's patrimony will have been dissipated for the small-benefit of exploitation, or the non-benefit of fraud.
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> Lord Acton in a rather indelicate but expressive and oft-quoted statement pointed out that "Where the body is, there will the vultures be gathered." The expression is aptly applied, in part, to the Alaskan resources picture. Fortunately, an alert and enlightened citizenry can serve as

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published in 1914.

[18] SEE GENERALLY: Owsichek v State, 763 P. 2d 488 (Alaska, 1988).

a counterbalance; fortunately, too, not all developmental interests operate solely on the exploitational level, but sincerely seek to benefit permanently the society of which they are a part as well as to take the profits which are a basic and recognized part of the American system.

No constitutional provisions can be devised which will present a perfect and complete barrier to the determined commission of land and resources fraud or to "giving away" the resources of the people to interests for the purpose of exploitation rather than orderly development. But provisions can be devised which will make it easier for the public officials of the state to carry their burdens. If there are constitutional provisions to which they can point when some lobby urges them to take action which they know full well is not to the ultimate benefit of the people, the strain of maintaining moral as well as strictly legal honesty is less.

"A Report to the People of Alaska from the Alaska Constitutional Convention," Volume I, §III., "The State and its Patrimony," pp. 54-56, (1955).

"The State and its Patrimony," supra, was an important part of the context out of which the "common use" clause, and Alaska's public trust doctrine, arose.

The foregoing quotation demonstrates that Alaska's Public Trust Doctrine was intended to function as a safeguard against ill-advised sales or disposals of public resources. It also implicitly recognizes the need for close judicial scrutiny of attempted alienation of public resources in order to protect long-term public interests.[19]

Courts should look with considerable skepticism on any state conduct calculated to transfer public resources to private hands. Illinois Central R. Co. v State of Illinois, 146 U.S. 387, 452 (1892).

The constitutional history of the Article VIII "common use" clause is by no means the only source to which one can turn to

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[19] Considering timber sales such as Icy Cape, or DNR's plan to trade old growth forest at Leask Lakes for the stumps at White River (ADL # 12555), one might well argue that, psychologically, Alaska is still in the risky, pro-disposal, stage which the above writers referred to as "the first flush of statehood." Id.

The duties of the public trust require a court to exercise a high level of scrutiny over the actions of the cestui que trust. Metlakatla Indian Community, Annette Island Reservation, 362 P. 2d 901 (Alaska, 1961).

The proposed Leask Lakes exchange (ADL #12555) demands close judicial scrutiny to prevent permanent loss of important public resources. SEE: Kootenai Environmental Alliance v Panhandle Yacht Club, Inc., 671 P. 2d 1085, 1091 (Idaho, 1983), cited with approval in CWC Fisheries, 755 P. 2d 1115, 1118 (Alaska, 1988).

discern the broad contours of the public trust doctrine in Alaska. Much useful case law and judicial gloss also exist.

In explication of the "common use" clause of Article VII, §3, the Alaska Supreme Court has favored a broad interpretation of the scope of protection afforded by the public trust doctrine in Alaska:

> ...the common use clause was intended to guarantee broad public access to natural resources (not merely wildlife, which was at issue in Owsichek).

Owsichek v State, 763 P. 2d 488, 493, see also pp. 494-496 (Alaska, 1988) (emphasis added); Herscher v State, 568 P. 2d 996, 1003 (Alaska 1977); McDowell v State, 785 P. 2d 1, 6 (Alaska, 1989).[20]

The pivotal importance of guaranteeing the right of public access to natural resources, and navigable or public waters in particular, was recognized by the Alaska Legislature in 1985:

> Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark are subject to the rights of the people of the State to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public interest.

§2(c), ch. 82, S.L.A. 1985, Temporary and Special Acts and Resolves.

One key purpose of the public trust doctrine in Alaska, then, is to serve as a safeguard against inappropriate sales, exchanges, or other disposals of public lands, natural resources, or other public trust resources. In particular, permanent impairment of public access to natural resources is forbidden by the public

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[20] ...the article VIII provisions were designed to ensure to the public the broadest possible access to wildlife...."the common use clause impose[s] upon the state a trust duty to manage the fish, wildlife, and water resources of the state for the benefit of all the people." (citation omitted) [A] minimum requirement of this duty is a prohibition against any...special privileges. (citation omitted)

McDowell v State, 785 P. 2d 1, 6 (Alaska, 1989) (emphasis in original).

The public trust's prohibition against "special privileges" is especially important in Alaska at this point in history due to the ongoing allocation battles between subsistence users, commercial users, recreational users, and non-consumptive users.

trust.[21]

As trustee, the State stands in a fiduciary relationship to all Alaskans--including future generations. As a fiduciary, the State must zealously protect the corpus of the trust from needless attrition. As a fiduciary, the State must also ensure that the options for future generations to use and manage trust resources are not unnecessarily diminished. SEE: SEACC v State, 665 P. 2d 544, 557 (Alaska, 1983) (Rabinowitz, dissenting, discussing the sustained yield concept).

What is a fiduciary relationship? The general law of trusts answers that question.

> Out of such a relation, the law raises the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust, or deal with the subject-matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other, business shrewdness, hard bargaining, and astuteness to take advantage of the forgetfulness or negligence of another being totally prohibited as between persons standing in such a relation to each other.

Black's Law Dictionary, (1968) p. 754.

Impairment of the corpus of the trust would be a violation of the most fundamental of the State's fiduciary duties.

Any disposal of state-owned natural resources must be closely scrutinized by courts to ensure that short-term, "small-benefit" resource exploitation is not the net result of the disposal.[22]

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[21] "...a state has constitutional power to insist that its natural advantages shall remain unimpaired..." Obrecht v National Gypsum Co., 105 NW 2d 143, 150 (Michigan, 1960).

In Owsichek v State, 763 P. 2d 488, 494 (Alaska, 1988), the Alaska Supreme Court, in dictum, approved leases and exclusive concessions on state land as not violating the public trust. The Court's dictum was premised on the principle that leases and concessions were of finite duration and were subject to competitive bidding. In contrast to Owsichek, exchanges of state land, e.g., Leask Lakes, bear neither of those indicia. Thus, the entire state land exchange program may be unconstitutional.

[22] Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary. ...this court will take a "hard look" at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action. In making such a determination, the court will

"A Report to the People of Alaska from the Alaska Constitutional Convention," Volume I, §III., "The State and its Patrimony," pp. 54-56, (1955); SEE ALSO: Matter of Stone Creek Channel Improvements, 424 N.W. 2d 894, 902-903 (North Dakota, 1988).

Whenever the state alienates resources subject to the public trust, the net result must not be a significant diminution of the public's patrimony. Otherwise, the public trust is violated; i.e., the State fails to fulfill its fiduciary duties as trustee.

This is not to imply that every violation of the public trust will be judicially enjoined; traditional equitable principles will always be applied to weigh the advisability of judicial invalidation of the legislative or executive act at issue. Constitutional provisions, including the public trust, are given a reasonable and practical interpretation in accordance with common sense. Kochutin v State, 739 P. 2d 170, 171 (Alaska, 1987).

Although the public trust doctrine in Alaska has strong constitutional underpinnings, it is undeniable that there is a potential for tension within the State Constitution between the public trust provisions and other provisions of Article VIII.

In particular, there is a potential for tension between the public trust provisions for minerals of AS 38.05.502 and Article VIII, §§ 11 and 12.

It is true that the different provisions of Article VIII should be interpreted in a manner that makes the sections consistent with one another. SEE: Abrams v State, 534 P. 2d 91, 95 (Alaska, 1975). Nonetheless, other sections of Article VIII might be viewed as having the potential to conflict with the public trust obligations of the "common use" clause of Article VIII, § 3.

> SECTION 8. The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing

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> examine, among other things, such factors as the degree of effect of the project on public trust uses...; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource...; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e., commerce, navigation, fishing, or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones. Kootenai Environmental Alliance v Panhandle Yacht Club, Inc., 671 P. 2d 1085, 1091 (Idaho, 1983), cited in CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1118 (Alaska, 1988).

concurrent use, and for forfeiture in the event of breach of conditions.

SECTION 9. Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

SECTION 10. No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

SECTION 11. Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface use of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.

SECTION 12. The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.

SECTION 13. All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters,

> are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

The Framers of Alaska's Constitution clearly foresaw that state-owned land could legitimately be conveyed out of the public domain by lease, sale, or grant. Alaska Const., Art. VIII, §§ 8, 9. All Alaskans must admit that development of State resources was high on the list of reasons for Statehood. Yet, at the same time, the Framers provided that conveyances by lease must be "subject to reasonable concurrent uses." Alaska Const., Art. VIII, § 8.

> The framers of our state constitution were united in the view that the lands and other natural resources of this abundant state are among its most prized assets. Although favoring productive use of these resources, the framers believed that development should proceed only when it benefitted the people of the state and only in compliance with applicable constitutional and statutory processes.

Moore v State, 553 P. 2d 8, 30 (Alaska, 1976).

Pursuant to Article VIII, § 8, the State of Alaska should make no disposal of public land into private hands that will result in preventing public use of those lands for purposes of navigation, fishing, and hunting, but should retain easements for those public uses. It is unclear to what extent the Framers intended public trust uses to be subsumed within this provision, but there is certainly no inherent conflict between the power to lease and the duty to safeguard trust resources.

The Framers also clearly authorized the Legislature to sell or grant State land. Alaska Const., Art. VIII, § 9. Yet that power is limited. All conveyances by sale or grant "shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources." Id. On its surface, this provision appears to complement the public trust doctrine rather than to diminish it.

Procedural protections against rash disposals or leases of State lands and interests in land appear in Alaska's Constitution, Art. VIII, § 10. Prior public notice must be given, and the legislature is expressly authorized to require "other safeguards of the public interest." Id.

The purpose of § 10's mandate is "to safeguard the public's interest in the disposition of state natural resources." Moore v State, 553 P. 2d at 25 (Alaska, 1976).

The constitutional history of § 10 does not explicitly tie it to the "common use" clause of § 3. The only explicit purpose of the public notice provisions was to ensure that the new State would receive top dollar for its land, timber, mineral, water, and other

resources if they were sold. SEE: pp. 2469-2470, Proceedings of the Alaska Constitutional Convention.

The constitutional requirement of prior public notice could easily complement the goals of the public trust by interpreting § 10 to protect the public's beneficial interest in state lands and resources.

In order to comply with its public trust responsibilities, Article VII, § 10 public notices for land disposals or exchanges should do more than has yet been articulated by the Legislature.

To comply with the State's fiduciary responsibilities, public notices under Article VIII, § 10 should examine, among other things, such factors as the degree of effect of the project on public trust uses; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, e.g., commerce, navigation, fisheries, wildlife, or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones. SEE: Kootenai Environmental Alliance v Panhandle Yacht Club, Inc., 671 P. 2d 1085, 1091 (Idaho, 1983), cited in CMC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1118 (Alaska, 1988).

Meaningful public participation in the land exchange process is thwarted where citizens lack key factual information. Alaska Survival v State, 723 P. 2d 1281, 1291 (Alaska, 1986). The State's failure to provide the information outlined in the preceding paragraph could rise to the level of seriousness implicating a Constitutional violation of Art. VIII, §10.

Water rights in Alaska's Constitution are shaped around the western states' common principle of prior appropriation. Alaska Const., Art. VIII, §§ 13. Yet private appropriation of water is expressly subordinated to "the general reservation of fish and wildlife." Id. There seems to be no reasonable debate as to whether this provision was intended to augment the power of the public trust doctrine or diminish it: it reinforces the public trust doctrine.

In conclusion, it seems fair to say that although there is a potential for conflict between the public trust responsibilities imposed by the "common use" clause of Article VIII, § 3, and several of the subsequent provisions of Article VIII, it is also possible to interpret the different clauses of Article VIII synergistically and harmonize those various sections so that they complement one another.

2. The Scope of the Public Trust in Alaska: What Resources and Uses Are Protected By the Public Trust?

The public trust was confined to tidelands and tidewaters in the original thirteen states during the early days of our Republic. Today, it is well settled in the United States generally that "the public trust is not limited by the reach of the tides, but encompasses all navigable lakes and streams." National Audubon Society v. Superior Court of Alpine County, 658 P. 2d 709, 719-720 (California, 1983) (In Bank) (citations omitted).

In Alaska, the scope of the resources covered by the umbrella of the public trust doctrine is far broader than in most other states. The Public Trust Doctrine in Alaska is not limited to tidelands and submerged lands. As befits its prerogative[23], Alaska has broadly defined its trust resources to include all state land and all unappropriated minerals. SEE: 1983 Initiative, §5, codified at AS 38.05.502.

Perhaps the Alaskan electorate's decision to extend the protection of the public trust doctrine in Alaska to all state land is due to the fact that Alaska is radically different from most other states in the Union in the extent of the natural resource wealth that is held by our state as sovereign.

In any event, in Alaska the resources protected by the public trust include, at a minimum:

a) wildlife and fish (ferae naturae), plus the habitat that supports those resources, and navigable and non-navigable waters, wherever occurring in the natural state (Alaska Constitution, Art. VIII, §3; Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 915 (Alaska, 1961); aff'd, 369 U.S. 45 (1962); Owsichek v State, 763 P. 2d 488, 492-496 (Alaska, 1988), Gilbert v State, 803 P. 2d 391, 398-399 (Alaska, 1990);

b) all state-owned land--including tidelands and uplands--and all minerals not previously appropriated (AS 38.05.502; CMC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1119 (Alaska, 1988); SEE ALSO: Informal A. G. Opinion,

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[23] The rights of the public in trust resources is a question of property law, and it is the general principle that "the law of real property is...left to the individual states to develop and administer." Davies Warehouse Co. v Bowles, 321 U.S. 144, 155 (1944).

Thus, state courts "have the authority to define the limits of the lands held in public trust and to recognize such private rights in such lands as they see fit." Phillips Petroleum v Mississippi, 484 U.S. 469, 475 (1988).

April 25, 1985, No. 566-230-85, p. 7.[24] It is critical to recognize that the public trust doctrine in Alaska is not limited to tidelands or submerged lands.

c) recreational uses of navigable or public waters or any other public purpose for which the water is used or is capable of being used consistent with the public trust, e.g., wildlife habitat, fishery habitat, scientific or educational value, scenic beauty, etc. ch. 82, §1(c), SLA 1985 (Alaska Statutes, Temporary and Special Acts and Resolves 1985).

This list of resources protected by the Alaskan public trust is not an exclusive compilation of all the resources or uses of those resources that come under the aegis of the public trust. In all likelihood, the umbrella of the public trust doctrine in Alaska extends beyond the foregoing list of resources. The resources cited above are at least the bare minimum corpus of the jus publicum in Alaska.

The Alaska Supreme Court may find protection for additional resources through judicial interpretation of the Alaska Constitution or statutes.

Case law from other jurisdictions is replete with holdings by state supreme courts that have extended the scope of the public trust doctrine to include protection for specific activities necessary and proper to the use and enjoyment of trust resources that have yet to be considered by the Alaska Supreme Court. In many instances, those state supreme courts have found public trust protection for resources and uses, viz, sunbathing, dry sand beach use and access. e.g., District of Columbia v Air Florida, 750 F. 2d 1077, 1083 (D.C. App., 1984).

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[24] The Alaska Supreme Court, referring to the Alaska Constitution, Article VIII, § 10, has noted several times the high value which the framers of the Alaska Constitution placed on the state's land resources. e.g., Alaska Survival v State, 723 P. 2d 1281, 1289 (Alaska, 1986); North Slope Borough v Lerascha, 581 P. 2d 1112, 1114 (Alaska, 1978); Moore v State, 553 P. 2d 8, 30-32 (Alaska, 1976); McCarrey v DNR, 526 P. 2d 1353, 1357 (Alaska, 1974); Alyeska Ski Club v Holdsworth, 426 P. 2d 1006, 1011 (Alaska, 1967).

3. The Duties of the State as Trustee For the Use and Benefit of the Public

a. General Principles of the Law of Trusts Define the State's Obligations as Trustee

Courts have historically exercised equitable jurisdiction over trusts. Clews v Jamieson, 182 U.S. 461, 479 (1901). Within this historic context, courts will decree the scope and extent of equitable rights and duties appurtenant to the Public Trust Doctrine. Courts may also define the nature of the state's fiduciary duties, and may create any remedy that furthers the cause of justice.

As with other aspects of the Public Trust Doctrine, each state, including Alaska, is free to develop its own unique body of law regarding the obligations of the state as trustee.[25]

Alaska's Supreme Court has yet to articulate the standard of care owed by the State as a trustee in the context of the public trust doctrine. Various fundamental questions have not yet been decided in Alaska, such as whether and how the State's fiduciary duties as trustee overseeing public resources differ from those of an ordinary trustee who oversees private resources.[26]

> The extent to which this public trust duty, as constitutionalized by the common use clause, limits a state's discretion in managing its resources is not clearly defined.

Owsichek v State, 763 P. 2d 488, 495 (Alaska, 1988).

Decisions from other jurisdictions are helpful in defining the obligations of the state as trustee of the public trust in Alaska. Also helpful is the immense body of common law on the traditional, equitable role of the judicial branch for supervision of a fiduciary's performance of his trust duties.

Slocum v Borough of Belmar, 569 A.2d 312 (Sup. Ct., New Jersey, 1989), considered a municipality's delegated duties as trustee over its beach area, and held that in the absence of a trust document which specifies the duties of a trustee, "a public

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[25] SEE: Phillips Petroleum v Mississippi, 484 U.S. 469 (1988).

[26] The law of private trusts has been applied to funds derived from lands held by the State in trust for schools, and university lands. SEE: State v University of Alaska, 624 P. 2d 807, 813, fn. 6 (Alaska, 1981).

The Alaska Supreme Court has also applied the general law of private trusts to mental health trust lands in Alaska. SEE: State v Weiss, 706 P. 2d 681, 683, and cases cited in fn. 3 (Alaska, 1985).

trustee is endowed with the same duties and obligations as an ordinary trustee." Id., at 317.

Although the Alaska Supreme Court has not yet confronted the precise problem of defining the limits of state discretion in management of public trust resources, it seems probable that the common law traditions of equity would provide the framework Alaska's Court would be most likely to adopt.

> In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice... Where a new condition exists, and the legal remedies afforded are inadequate or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary,...for that purpose.

Story, 1 Story's Equity Jurisprudence, §4 (14th ed. 1918), cited in ASEA v APEA, ___ P. 2d ___ (Alaska, 1991), Alaska Supreme Court Opinion No. 3779, Slip Opinion at p. 8.

For lack of a better benchmark, it is useful to refer to the "black letter" law of trusts to clarify the duties of the State of Alaska as trustee of public trust resources.

Briefly summarized, a trustee owes the following duties to the beneficiaries of the trust:

1. A duty of loyalty, i.e., no self-dealing;
2. A duty not to delegate;
3. a duty to furnish information;
4. a duty to take control and keep control of property;
5. a duty to preserve the trust property;
6. a duty to deal impartially with beneficiaries;
7. a duty to enforce the claims of beneficiaries;
8. a duty to make trust property productive.

Each of these duties is discussed separately below.

LOYALTY: "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." Restatement, Second, Trusts, § 170 (1).

The duty of loyalty, sometimes expressed as a prohibition against self-dealing, can be stated affirmatively: a trustee has a duty to act for the benefit of the beneficiaries of the trust.

For example, if a State exercises its authority as trustee for the particular benefit of the State itself by selling public trust lands primarily to increase tax revenues, or for the benefit of an individual or a small group of individuals; or by exchanging land or timber principally to benefit a private corporation, the State's action would violate the trustee's fiduciary duty of loyalty.

NON-DELEGATION: A fundamental duty owed by the trustee to the beneficiaries of the trust is the duty not to delegate to others

the job of administering the trust. SEE GENERALLY Scott, The Law of Trusts, (Fourth Ed., 1987) § 171. This duty is not absolute, however; certain, limited duties may properly be delegated by a trustee. Id., and § 171.1.

Under general principles of constitutional and administrative law, a legislature may not delegate its functions to an agency without establishing reasonably clear standards for the agency to follow. Nor may a legislature delegate powers it does not possess, or delegate certain "non-delegable" powers intended by the Constitution to be exercised only by the Legislature itself. SEE GENERALLY: Tribe, American Constitutional Law, §5-17 (1978).

While the Legislature may properly delegate administration of the public trust to executive branch agencies, it must do so with clear guidelines. Where the guidelines are insufficiently clear, or contravene the mandates of the public trust doctrine, a court of equity could intervene to clarify the trustee's obligations pursuant to the public trust.

PRODUCTIVITY: "The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive." Restatement, Second, Trusts, §§176, 181.

This responsibility competes to some extent with the trustee's duty of preservation (infra). These duties are not mutually exclusive, however, and do not diminish the trustee's obligations of resource conservation under the public trust doctrine. (SEE, for example, AS 38.04.005-.015)

PRESERVATION: "The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." Restatement, Second, Trusts §176; SEE ALSO: Scott, The Law of Trusts, (Fourth Ed., 1987) § 176; and State v Weiss, 706 P. 2d 681, 683 (Alaska, 1985). Where loss to the estate is the result of the trustee's failure to use proper care or skill, or is due to the trustee's negligence, the trustee is liable to the beneficiaries for the loss.

This black letter duty is similar to the public trust's mandate of "equitable and wise" management of public trust resources.

INFORMATION: "The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust." Restatement, Second, Trusts, §§ 172, 176, 181.

The law of trusts imposes upon a trustee a duty to supply complete and accurate information regarding the administration of the trust to the beneficiaries upon request and at reasonable times. 3 Scott on Trusts, § 173.

The State's duty as trustee to provide information to the public is an area where substantial activity may reasonably be expected in the future. Although Alaska case law on fiduciary duties is still sparse and undeveloped, a good idea of what the Alaska Supreme Court might say can be gained from recent statements

by courts in Oregon and Washington:

> ...the trustee's fiduciary duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests. (Citations omitted) If the beneficiaries are [to be] able to hold the trustee to proper standards of care and honesty and procure the benefits to which they are entitled, they must know of what the trust property consists and how it is being managed. (citation omitted)

Allard v Pacific National Bank, 663 P. 2d 104, 110-111 (Washington, 1983) (En Banc). SEE ALSO: Bogert, Trusts & Trustees, § 961 (2d ed., 1962).

One interpretation of this duty is that the State of Alaska is under a duty to provide the Alaskan public with regular reports assessing the extent, current status, and future of public trust resources. This may mean that an extensive information-gathering responsibility exists whereby the State would compile benchmark data upon which future public reports could be made. Pending completion of that information, most disposals and exchanges of public trust resources should probably be held in abeyance.

The wisdom of delaying alienation of Alaska's public trust resources until full information can be disclosed to the public and digested by them is simple: how can we be sure we are getting full value for our resources if we are unaware of what they are worth?

A trustee has the duty to determine, usually through appraisal, the fair market value of trust assets before any sale or other transfer of those trust assets. Hatcher v U.S. National Bank of Oregon, 643 P. 2d 359, 364-366.

To prevent impairment of the corpus of the trust, it is essential that no alienation of trust resources be permitted in the absence of a full and complete public disclosure of the full value of the trust resources involved. Allard v Pacific National Bank, 663 P. 2d 104, 110-111 (Washington, 1983) (En Banc); Bogert, Trusts & Trustees, § 961 (2d ed., 1962); Hatcher v U.S. National Bank of Oregon, 643 P. 2d 359, 364-366.

For example, in Alaska, there is generally a paucity of information that would constitute a fair and complete appraisal or inventory of all the public assets involved in a land sale or timber sale. Yet it seems clear under basic principles of trust law, that the State should not be able to alienate public trust resources unless and until it has made prior disclosure of the true value of those resources to the public, as beneficiaries of the public trust. Id.

Following these fiduciary duties and legal principles, the State of Alaska, through the Department of Natural Resources and Department of Fish and Game, should be making periodic reports to the Alaskan public regarding the value and extent of public trust resources. Also, before any sale or exchange of state land occurs, the State must work sedulously to ensure that it knows and

discloses the full extent and value of all of the resources involved in a land sale, land exchange, timber sale, or other transfer of public trust resources. Facets such as cumulative impacts of land disposals should not be ignored in this process.

If the Alaskan public is to be able to enforce its rights as beneficiary of the public trust, there must be a regular flow of information to the public from the State as trustee in order to enable the public to satisfy itself that administration of the trust's resources is proper.

It is in the State's best interests, under sound principles of trust administration, to gather and disseminate information regarding the value of public trust resources held by the State for the use and benefit of the people.

> Fraud can be established by silence or non-disclosure when a fiduciary relationship exists between the parties....The fiduciary has a duty to fully disclose information which might affect the other persons's rights and influence his action.

Carter v Hoblit, 755 P. 2d 1084, 1086 (Alaska, 1988).

> The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests.

Greater Area Inc. v Brookman, 657 P. 2d 828, 830 (Alaska, 1982).

IMPARTIALITY: When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them." Restatement, Second, Trusts, § 183.

This duty speaks for itself. The State clearly cannot prefer the interests of one segment of its population over those of another segment. The State's fiduciary duties require it at all times to act in favor of the interests of the State as a whole, not for the discrete advantage of one geographic region, ethnic group, or other faction.

This includes the fiduciary duty to avoid actions whose primary motivation is to benefit state government.

> The power lodged in the state...is to be exercised...as a trust for the benefit of the people and not as a prerogative for the advantage of the government as distinguished from the public good."

Geer v Connecticut, 161 U.S. 519, 529 (1896).

b. Common Law Obligations of the State of Alaska as Trustee

The essence of judicial enforcement of the Public Trust Doctrine is to guarantee that state government fulfills its fiduciary duties to current and future generations of Alaskans.

The fiduciary duties of trustees have been defined over centuries of experience by courts of equity. They provide safeguards that protect against dissipation of the natural resource wealth Alaskans are privileged to enjoy. The State's fiduciary duties as a trustee define the legal standard of wise stewardship over Alaska's common property resources.

What the law has labeled the "fiduciary duties" of trustees is, in many respects, nothing more than an attempt to codify some basic rules of common sense.

The Alaska Supreme Court has not yet given detailed attention to the State's common law obligations as trustee in the context of the Public Trust. Nonetheless, the Court has given some general guidance to the State's obligations as trustee.

The paramount duty of the State is to "equitably and wisely" regulate the harvest of Alaska's wildlife and fisheries resources. Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 915 (Alaska, 1961). An inescapable corollary of this mandate is the state's obligation to maintain the habitat it controls and on which the vitality and abundance of many public trust resources depend. The importance of habitat protection is, unfortunately, too often underrated.[27]

The State is obligated to "equitably and wisely" manage Alaska's wildlife and fisheries resources at all times, not merely during the public's limited harvest opportunities. In other words, the state as manager of the public lands on which wildlife and fisheries resources are found is under a public trust obligation to "equitably and wisely" manage its wildlife and fish at all times, under all circumstances, and for the benefit of "all the people of the state." Metlakatla, supra.

Although the Alaska Supreme Court has not yet directly addressed the issue, it seems reasonable to anticipate that the Court would apply the standard of "equitable and wise" management beyond the sphere of fish and wildlife to include all of the other

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[27] When game begins to get scarce, people generally think and act in the order of (1) preservation of breeding stock by means of game laws restricting the harvest; (2) artificial stocking; and (3) habitat improvement, which is sometimes unfortunate, since the third item is often more important than the first two. If suitable habitat is lacking, ...protection or stocking is useless.

E. Odum, H. Odum, Fundamentals of Ecology, p. 433 (2d Ed., 1959). SEE ALSO: Mathiesen, Wildlife in America, Penguin Books (1977) p. 205.

resources within the protection of the public trust doctrine in Alaska. In other words, whenever the State deals with fish, wildlife, timber, State land (regardless of whether or not the lands are washed by the tides), waters that occur in the natural state, or unappropriated minerals, the State owes public trust fiduciary duties of equitable and wise management.

What is meant by equitable and wise management? Although the Alaska Supreme Court's choice of terminology was probably deliberately general, and not susceptible of precise definition, some fundamental management principles can reasonably be imputed to the State as trustee under those broad standards. My research disclosed no specific guidance more useful than the following statements:

> ...fish and game resources are permitted to be harvested, but at the same time must be conserved to avoid depletion and extinction.

Herscher v State, 568 P. 2d 996, 1005 (Alaska, 1977).

> Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation or annihilation of one of the greatest natural food resources known to mankind, to equitable regulation of seasonal harvests for the greatest benefit to the greatest number, while conserving and rebuilding for posterity.

Metlakatla Indian Community, Annette Island Reservation, 362 P. 2d 901, 932 (Alaska, 1961).

The Alaska Supreme Court has ruled that the State does not have the right to manage natural resources as if it were a private, individual owner, seeking to maximize the income it can derive as quickly as possible. e.g., Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 915 (Alaska, 1961). SEE ALSO: Organized Village of Kake v Egan, 174 F. Supp. 500, 529, (D.C. Alaska, 1959).

The State of Alaska is required to manage its public, natural resource wealth not as an owner, but as a trustee. Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 915 (Alaska, 1961); aff'd, 369 U.S. 45 (1962); Herscher v State, 568 P. 2d 996, 1003, 1005 (Alaska, 1977); Owsichek v State, 763 P. 2d 488, 492-496 (Alaska, 1988); CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115 (Alaska, 1988); McDowell v State, 785 P. 2d 1, 12, 16, 18 (Alaska, 1989); Gilbert v State, 803 P. 2d 391, 398-399 (Alaska, 1990).

The state as trustee must manage its resources for the benefit of the beneficiary of the trust: all the people of the State of Alaska.

> Alaskans will not want, and above all else do not need, a resources policy which will prevent orderly development of the great treasures which will be theirs. But they will want, and

> demand, effective safeguards against the exploitation of the heritage by persons and corporations whose only aim is to skim the gravy and get out, leaving nothing that is permanent to the new state except, perhaps, a few scars in the earth which can never be healed...

E.L. Bartlett's Address to the delegates of the Alaska Constitutional Convention, Fairbanks, 1955.

The power to manage public trust resources lies with the state, as sovereign, but:

> ...it is to be exercised like all other powers of government as a trust for the benefit of the people, and not...for the benefit of private individuals as distinguished from the public good.

Owsichek v State, 763 P. 2d 488, 494 (Alaska, 1988), citing Geer v Connecticut, 161 U.S. 519, 529 (1896) (emphasis in original).[28]

Among the state's conservation and management duties as trustee must be the obligation to prevent impairment of options for future generations of Alaskans. This derives from the State's fiduciary duty to prevent impairment of the corpus of the public trust.

Although it arose in the context of discussion of the sustained yield requirement of Article VIII, § 4, rather than the common use clause of Art. VIII, § 3, the duty to prevent erosion of the quality of Alaska's public trust resources was well-expressed by Alaska Supreme Court Chief Justice Jay Rabinowitz:

> Quality as well as quantity of available resources must be considered in determining whether sustained yield requirements have been met. The framers and legislature must have intended that the level of timber available to future generations...be undiminished.

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[28] In a case nullifying a grant of a license to construct a hydroelectric power plant on the Snake River, the United States Supreme Court ruled as follows:

> The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including further power demand and supply, alternative sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.

Udall v Federal Power Commission, 387 U.S. 428, 450 (1967).

SEACC v State, 665 P. 2d 544, 557 (Alaska, 1983) (Rabinowitz, dissenting).

Governor Jay Hammond, the foremost conservationist among all Alaska's Governors, aptly stated the importance of considering the needs of future generations of Alaskans regarding public trust resources:

> ...While a particular species of...wildlife may have little relative value now, the future may find it suddenly in great demand. If the land is incapable of producing it to the demand level, an important land management option is lost, to the detriment of the public welfare.

Governor Jay S. Hammond's transmittal letter, April 8, 1978, accompanying SS SB 59, cited in SEACC v State, 665 P. 2d 544, 556-557, fn. 6 (Alaska, 1983) (Rabinowitz, dissenting).

It would be a violation of the public trust if any one of the public uses of public trust property would be destroyed or greatly impaired as a result of State action. SEE: City of Madison v State, 83 NW 2d 674, 678 (Wisc. 1957), (regarding potential permanent impairment of Lake Monona).

c. Who Are the Beneficiaries of the Public Trust in Alaska?

The beneficiaries of Alaska's public trust doctrine are all the people of the State of Alaska, including future generations. First and foremost, the state has a fiduciary obligation to manage public trust resources for the benefit of "all the people of the state" of Alaska. Metlakatla Indian Community, Annette Island Reserve v Egan, 362 P. 2d 901, 915 (Alaska, 1961).

> ...the pub[l]ic trust doctrine dictates that...(public trust resources) must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible. (emphasis supplied in original)
>
> ...in order to exercise rights guaranteed by the public trust doctrine, the public must have access...

Slocum v Borough of Belmar, 569 A. 2d 312, 316 (Sup. Ct., New Jersey, 1989).

The class of people who are properly seen as comprising the beneficiaries of the public trust in Alaska includes all Alaska citizens, as well as future generations of Alaskans. SEACC v State, 665 P. 2d 544, 557 (Alaska, 1983) (Rabinowitz, dissenting); SEE ALSO: Shively v Bowlby, 152 U.S. 331, 337 (1894), referred to as the "seminal case in American public trust jurisprudence" in Phillips Petroleum v Mississippi, 484 U.S. 469, 473 (1988).

> The public trust doctrine maintains that government holds untaken wildlife in trust for public use, and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.

McDowell v State, 785 P. 2d 1, 16, fn 9, and 18 (Rabinowitz dissenting) (Alaska, 1989); SEE ALSO: Gilbert v State, 803 P. 2d 391, 398 (Alaska, 1990) (citations omitted).

In summary, the State must manage all public trust resources for the benefit of the entire State, without disregarding the needs of future generations of Alaskans.

d. Exchange or Disposal of State Land and the Continuing Obligations of the Public Trust

Can the government of the State of Alaska free itself of its obligations under the public trust doctrine by selling or exchanging public trust resources to private parties?

The answer in almost all circumstances is "No." The public trust entails governmental responsibilities that cannot be disregarded, delegated, sold, or otherwise alienated.

> The public trust doctrine...requires the state to maintain its dominion in trust for the people. (citation omitted)

Orion Corp v State, 747 P. 2d 1062, 1072 (Washington, 1987) (en banc), cited with approval in CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1118 (Alaska, 1988).

> The State can no more abdicate its trust over property in which the whole people are interested...than it can abdicate its police powers in the administration of government and the preservation of peace.

Illinois Central R.R. v Illinois, 146 U.S. 387, 453 (1892).

Although the State may convey a jus privatum interest in trust resources, the public's jus publicum (public trust) interest cannot ordinarily be alienated. Illinois Central R.R. v Illinois, 146 U.S. 387, 453 (1892).[29]

The State has an affirmative fiduciary obligation to prevent unnecessary diminutions in the corpus of the public trust. The State must ensure that there is no avoidable, significant reduction of the rights of the public to resources held by the State in trust

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[29] Brusco Towboat Co. v State, By and Through [illegible] 567 P. 2d 1037, 1043-1044 (Oregon, 1978). SEE ALSO: Ca[illegible] Superior Court v Lyon, 29 Cal. 3d 210, 226 (1981): "It is ve[illegible]led that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust."

for the benefit of the public. SEE: Bean, The Evolution of National Wildlife Law, p. 41 (1983), quoting State v Jersey Central Power & Light Co., 351 A. 2d 337 (New Jersey, 1976).

> Under the public trust doctrine, the State...[has] the right and the duty to protect and preserve the public's interest in wildlife resources.

In re Steuart Transportation Co. 495 F. Supp. 38, 40 (E.D. Virginia, 1980).

Briefly summarized, the public trust imposes the following limitations on the power of the State to convey public trust resources free of the public trust:

1. Clear legislative authority and intent are required. Conveyances of public trust resources are interpreted strictly against the grantee.
2. The conveyance should not be made to further private interests; it should further the public's trust interests.
3. There should be no substantial impairment of the public's use of the remaining trust resources.
4. A private owner's use of trust resources may be restricted or prohibited in order to protect public uses of public trust resources.
5. Conveyances of public trust resources are revocable by the State.

A more detailed analysis of these points of law follows.

In Alaska there are many procedural safeguards regarding the disposal, sale, or lease of state land. e.g., Alyeska Ski Corp. v Holdsworth, 426 P. 2d 1006, 1114 (Alaska, 1967); Moore v State, 553 P. 2d 8, 30 (Alaska, 1976); Alaska Constitution, Article VIII, §10. Special, additional, protections govern disposal of state-owned timber resources. SEE: AS 38.

In accordance with the mandate of the Alaska Constitution, Article VIII, §10, the first Alaska Legislature enacted the Alaska Land Act, AS 38.05, which contains at least two provisions requiring that any disposition of State-owned land must be consistent with the best interests of current and future generations of Alaskans. AS 38.05.035; AS 38.05.285.

One of the procedural prerequisites of a best interests finding is "a reasoned evaluation of the wisdom of a proposed disposition of land..." Moore v State, 553 P. 2d 8, 31 (Alaska, 1976). DNR's record of decision for any land disposal or land exchange must demonstrate that the agency made a reasoned evaluation of the available evidence, otherwise its decision will be arbitrary and capricious. Moore v State, 553 P. 2d 8, 36 (Alaska, 1976).

No Alaska Supreme Court case yet applied a public trust analysis to a state land disposal or exchange. The following

analysis is one way in which the Court could approach such a problem.

The public trust doctrine is the source of additional safeguards, substantive in nature, that apply to disposals of the State's natural resource patrimony.

> ...the ownership and dominion and sovereignty over lands...within the limits of the several states, belong to the respective states...to use or dispose of any portion thereof, when that can be done <u>without substantial impairment of the interest of the public</u>...[30]
>
> ...
>
> This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested.
>
> ...
>
> There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

(emphasis added) <u>Illinois Central R. Co. v State of Illinois</u>, 146 U.S. 387 (1892). SEE ALSO: <u>Golden Feather Community Association v Thermalito Irrigation District</u>, 244 Cal. Rptr. 830 (1988).

Many state supreme courts that have considered the effect of the public trust doctrine on attempts by a state to alienate public lands have concluded that the state has continuing obligations under the public trust from which the state can only be freed under rare circumstances.[31]

> Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale

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[30] The proposed conveyance of public trust resources at Leask Lakes (ADL #12555) would violate the rule of "no substantial impairment." The proposed conveyance would result in a substantial net loss and impairment of wildlife habitat by trading unlogged land for largely cut-over land at White River. The proposed exchange would also promote fragmentation of wildlife habitat and substantially reduce the wildlife habitat value of public trust land at George River, adjacent to the Leask Lakes tract. SEE: ADF&G Memorandum, May 14, 1991, from Richard Reed to Andy Pekovich, DNR; ADF&G Memorandum, September 17, 1991, from Matt Kirchoff to Dave Anderson.

[31] As with most aspects of the public trust doctrine, individual states are free to formulate the rule they deem most appropriate.

promotes a valid public purpose. (specific public trust purposes appear in the Hawaiian Admission Act, 31 Stat 141.)

State by Kobayashi v Zimring, 566 P. 2d 725, 737 (Hawaii, 1977).

...in the exercise of...[the public] trust the state may dispose of a partial interest in such lands, in the interest of all the people of the state, provided the primary purposes of the trust are not unduly abridged or burdened thereby.

[the state]...cannot parcel or alienate them or otherwise interfere with the public purposes of the trust in which they are held.

State v Longyear Holding Co., 29 N.W. 2d 657, 669-670 (Minnesota, 1947). (emphasis added); compare Gould v Greylock, 215 N.E. 2d 114, 121-123 (Massachusetts, 1966).

When lands are c[illegible] by the State for the public trust, it is the State's du[illegible] protect the trust and not surrender the rights thereto. [illegible]itation omitted) It is thus the public policy of this Sta[illegible]e with respect to...(public trust submerged lands) that they may be disposed of only when the Department of Conservation determines that such lands are of no substantial public value for hunting, fishing, swimming, pleasure boating, or navigation, and that the general public interest will not be impaired. (citation omitted)

People ex rel. MacMullan v Babcock, 196 N.W. 2d 489, 497 (Michigan, 1972).

The formulation of the State's public trust duties in Michigan was based on interpretation of the public trust set forth in Michigan's State Constitution. People ex rel. MacMullan v Babcock, 196 N.W. 2d 489, 497 (Michigan, 1972). The Alaska Constitution's public trust, augmented by the popular Initiative of 1983, cannot reasonably be said to impose obligations that are any weaker than Michigan's.

A decision by the State to trade public lands cannot stand unless the trade is clearly in the public interest. A determination (pursuant to AS 38.50) that a land exchange is in the public interest can only be made after evaluating and making known to the public a reasonable quantum of information to enable the public to reach rational conclusions about the value of the respective parcels of land to be exchanged.[32]

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[32] Examples of the type of information that should be made public prior to an AS 38.50 land exchange would include (but not necessarily be limited to) supply and demand data, including current value, for all of the timber, fisheries, wildlife, water, recreational, and other resources present on the lands to be

One of the fundamental o[illegible]gations of a trustee under centuries of equitable tradition is that a trustee must not permit the wasting away of the corpus of the trust. Restatement, Second, Trusts, §§ 176, 181.

The Trustee must exercise discretion in making day-to-day management decisions, and in order to be responsible, the discretion must be exercised on the basis of reliable and reasonably complete information. Hatcher v U.S. National Bank of Oregon 643 P. 2d 359, 364-366.

Although some modicum of impairment of public trust uses is probably permissible when it is appurtenant to a land transfer, courts should apply the "hard look" doctrine in assessing infringements on public trust values to determine whether or not the land transfer requires judicial invalidation in order to conform state action to the overriding duties of the public trust.

"Hard look" judicial review of State efforts to alienate public trust resources ensures that arbitrary decisions will be overturned, i.e., decisions where the agency has not "genuinely engaged in reasoned decision making" of all the salient issues. Gilbert v State, 803 P. 2d 391, 398 (Alaska, 1990) (citations omitted).

One key purpose of the public trust doctrine is to police attempted dispositions of public lands by State Legislatures. If courts were simply to rubber stamp legislative decisions that a proposed disposition is in the public interest, the public trust doctrine would have no teeth. Consequently, there is a longstanding judicial policy of closely scrutinizing legislative declarations that a proposed disposition of public land is "in the public interest." Martin v Waddell, 41 U.S. 366, 411 (1842).

Alaskan courts should adopt this salutary policy of judicial skepticism and should strictly scrutinize all proposed exchanges and disposals of public trust resources.

> ...the self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such a purpose.

City of Salem v McMackin, 291 N.E. 2d 807 (Illinois, 1972).[33]

The Trustee is at all times accountable to the beneficiaries

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exchanged. This is a hefty informational burden. The alternative--making a decision to trade away state land and resources in the absence of this sort of fundamental information describing the parcels' respective values--would certainly be a breach of the state's fiduciary duties to manage the public lands.

[33] SEE ALSO: Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention," 68 Mich. L. Rev. 489-491.

of the trust. Restatement, Second, Trusts, §§172, 176, 181; 3 Scott on Trusts, § 173.

A decision to alienate public trust resources, including land, should be preceded by a thorough governmental assessment of all the public values affected. Public notice should include the degree of effect of the project on public trust uses, the impact of the individual project on the public trust resource, the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource, the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e., commerce, navigation, fishing, or recreation, the degree to which broad public uses are set aside in favor of more limited or private ones, and clear, advance public disclosure of the pertinent facts and data. SEE GENERALLY: Kootenai Environmental Alliance v Panhandle Yacht Club, Inc., 671 P. 2d 1085, 1091 (Idaho, 1983), cited in CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1118 (Alaska, 1988).

A decision to exchange public land for private land pursuant to AS 38.50 would therefore have to be based on reasonably complete information about the range, quantity, and quality of resources wrapped up in the parcels to be exchanged, with all such information timely communicated to the public in a manner satisfying the safeguards of the Alaska Constitution, Article VIII, §§ 9 and 10.[34] Allard v Pacific National Bank, 663 P. 2d 104, 110-111 (Washington, 1983) (En Banc); Bogert, Trusts & Trustees, § 961 (2d ed., 1962); Hatcher v U.S. National Bank of Oregon, 643 P. 2d 359, 364-366.

A decision by the State to trade public lands cannot stand unless the trade is clearly in the public interest. That determination can only be made after evaluating and making known to the public supply and demand data, including current value, for all

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[34] Alaska Constitution, Art. VIII, §9 provides:

> Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservations of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages. (emphasis added)

Alaska Constitution, Art. VIII, §10 provides:

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

of the timber, fisheries, wildlife, water, recreational, and other resources present on the lands to be exchanged.

To summarize, a State cannot normally convey public trust land unless it can be disposed of without any substantial impairment of the public's trust rights. Illinois Central Railroad Co. v Illinois, 146 U.S. 387 (1892); CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1119 (Alaska, 1988); Morse v Oregon Div. of State Lands, 590 P. 2d 709-711 (Oregon, 1979); Orange County v Heim, 106 Cal. Rptr. 825, 849-852 (Cal. App. 1973); Riviera Association v Town of North Hempstead, 276 N.Y.S. 2d 249, 256-257 (Sup. Ct. Nass. Co. 1967), aff'd sub nom Manor Marina Realty v Wachtler, 22 NY 2d 825 (1968).

Only in rare instances may a grantee acquire a right to use former trust property free of trust restrictions. National Audubon Society v. Superior Court of Alpine County, 658 P. 2d 709, 723 (California, 1983) (In Bank), cited in CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1121 (Alaska, 1988).

According to the Alaska Supreme Court, the key factor to consider in determining the significance of a conveyance is not the size or location of the particular parcel, but the scope of the authorizing legislation and the potential for all conveyances made pursuant to those statutes.[35] Id.

It is nonetheless possible for the State to pass title to a parcel of State-owned land free of any public trust obligations. Such instances are, admittedly, quite rare.

The test announced by the Alaska Supreme Court for permitting alienation of land subject to the public trust, free of trust duties, is twofold:

> ...we must ask, first, whether the conveyance was made in furtherance of some specific public trust purpose and, second, whether the conveyance can be made without substantial impairment of the public's interest...(citations omitted) If either of these questions can be answered in the affirmative, conveyance free of the public trust would be permissible. (citation omitted)

CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1119 (Alaska, 1988).

In applying the two-pronged test announced in CWC Fisheries, Inc. v Bunker, the Alaska Supreme Court specifically rejected the argument made by CWC that since the State's conveyance was made in furtherance of navigation and commerce, the conveyance should be free of the public trust. Id., at 1119.

Before any tideland grant may be found to be free of the

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[35] The federal rule is somewhat more lenient. It allows transfers of small parcels that advance public trust purposes, such as the small amount needed for piers, wharves, docks, etc. Illinois Central, at 452.

> public trust under the "public trust purposes" theory, the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. (citations omitted) If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such and interpretation. (citations omitted)

CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1119 (Alaska, 1988) (emphasis added).

In evaluating a proposed conveyance of state-owned resources subject to the public trust to determine whether or not the conveyance may be made free of the burdens of the public trust, one must also apply the other facet of the two-pronged test announced in Illinois Central, supra, at 453, and embraced by the Alaska Supreme Court in CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1118 (Alaska, 1988): can the property be disposed of without any substantial impairment of the public interest?

The Alaska Legislature has not clearly indicated that the trust is not to be considered in land exchanges. SEE: AS 38.50 and COMPARE AS 38.08.060 where the Legislature specified conveyance of "unencumbered title." Hence, the public trust must continue to be integrated in exchanges of state land.

AS 38.50.010 provides the statutory authority under which DNR effects land exchanges. The Alaska Legislature did not clearly authorize land exchanges free of the public trust; it merely authorized land exchanges:

> Subject to the requirements of this chapter, the director, with the concurrence of the commissioner, is authorized to dispose of state land or interest (sic) in land by exchanging it for land, interest (sic) in land, or other consideration. Exchanges shall be for the purpose of consolidating state land holdings, creating land ownership and use patterns which will permit more effective administration of the state public domain, facilitating the objectives of state programs, or other public purposes.

AS 38.50.010.

Any exchange of state lands under AS 38.50 should include an explicit retention of public trust easements for jus publicum purposes, including but not limited to fishing, hunting, recreation, wildlife viewing, etc. However, as a result of the Public Trust Doctrine, the public retains those rights by implication even if the State fails to make an express reservation.

By implication, the Legislature intended that the public trust be integrated into land exchanges. When the Alaska Legislature adopted AS 38.50.060, it provided general authority for reservation of public trust easements.

> Conveyances...by the state under this chapter are subject to

valid existing rights...

AS 38.50.070.

The public trust doctrine does not prevent the state from making policy choices between trust uses. National Audubon Society v. Superior Court of Alpine County, 658 P. 2d 709, 723 (California, 1983) (In Bank), cited in CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1121, fn 15 (Alaska, 1988). In Alaska, in such cases, the Legislature will generally be afforded broad authority to favor one trust use over another. Id.

The exception for legislative policy decisions, however, is not intended to swallow the rule of non-impairment of public trust uses. An overly-broad conception of State authority would result in no practical restrictions on the State's ability to alienate public trust property so long as the State can articulate some public trust-related benefit associated with a proposed conveyance.

No authority supports such broad governmental discretion, even if the proposed conveyance is alleged to produce some alternative public trust benefit in the vicinity of the conveyance at issue.

> ...no one could contend that the state could grant tidelands free of the trust merely because the grant served some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use.
>
> Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1121, fn 15 (Alaska, 1988), citing National Audubon Society v. Superior Court of Alpine County, 658 P. 2d 709, 724 (California, 1983) (In Bank).

The identical reasons cited by the Alaska Supreme Court, supra, are applicable to land exchanges under AS 38.50. Thus, the State may not exchange uplands or minerals to any private grantee free of the public trust merely because the exchange may serve "some public purpose, such as increasing tax revenues, or because the grantee might put the property to a commercial use." Id.

For example, where the principal "public benefit" supporting a land exchange is favoring private, commercial logging, no valid public purpose would support the exchange, nor would fostering private, commercial logging be a purpose consistent with the

State's trust responsibilities.[36]

The public trust includes the State's duty to protect the common heritage of all Alaskans in ancient, old growth forests together with the wildlife, fisheries, waters, and mineral resources found thereon. AS 38.05.502.

The State may not surrender the public's right of protection for old growth forest lands of high value to fish and wildlife if the land to be received in exchange is of substantially inferior quality from the standpoints of wildlife habitat, fishery habitat, scenic value, and recreational potential. These public trust values cannot be abandoned without specific Legislative language of cession. CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115 (Alaska, 1988).

In other words, before a conveyance of State-owned land will fall into the "in furtherance of some specific public trust purpose" exception, there must be clear evidence that the Legislature intended to take action which, on its face, would be inconsistent with the plain wording of the Alaska Constitution's mandate regarding "common use" and the public trust. CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1120 (Alaska, 1988); Alaska Constitution, Art. VIII, §3.

There is no reason for courts to treat uplands differently from tidelands insofar as the burdens of the public trust are concerned. All state-owned land in Alaska--tideland and upland--is subject to the public trust. AS 38.05.502.

The executive branch of government in Alaska, through the Department of Law, reached a similar conclusion prior to the Alaska Supreme Court's holding in CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115 (Alaska, 1988).

> ...it is clear that any state agency with the power to dispose of land must attempt to secure as consideration for such disposal the maximum benefit for the citizens of the state as a whole. A transfer which may benefit the citizens of one community may nevertheless violate the public trust doctrine where the state receives less than adequate consideration on behalf of the citizens of the state as a whole. Absent some showing that a land transfer would benefit the state as a whole, even legislation authorizing a transfer would be invalid. On the other hand, a transfer which may specifically benefit citizens of a particular area will not be invalid if it is also demonstrated that the transfer represents the "most desirable and advantageous solution to multiple issues

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[36] The primary motive of the State, DNR, in support of its proposal to convey the forest of Leask Lakes to the Cape Fox Corporation is that it will directly benefit the Ketchikan timber industry and thereby increase local tax revenues, with an appurtenant benefit to local recreation being that ten years after the exchange, a road may be built at White River that would allow public access.

confronting the state as a whole," State v Lewis, 559 P. 2d 630 (Alaska, 1977), cert. denied, 432 U.S. 901.

Informal A. G. Opinion, April 25, 1985, No. 566-230-85, pp. 4-5.

Arguably, it is only where state-owned land subject to the public trust is more or less useless to the public, small in area, and part of an overall scheme dominated by a true "public purpose" that the Legislature may remove the public trust burdens. SEE, e.g., City of Long Beach v Mansell, 476 P. 2d 423 (California, 1970); County of Range v Heim, 106 Cal. Rptr. 825 (Cal. App. 1973).

As stated by the Oregon Supreme Court:

> These resources...can only be spent once. Therefore the law has historically and consistently recognized that rivers and estuaries, once destroyed or diminished, may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.

Morse v Oregon Division of Lands, 581 P. 2d 520, 524 (Or. App. 1978).

Ancient, old growth, forest lands "can only be spent once." Their value as extraordinarily productive wildlife habitat depends on unique properties which a Southeastern Alaska forest only begins to acquire after approximately 300 years. SEE GENERALLY: Schoen, J.W., M.D, Kirchoff, and J.H. Hughes (1988) "Wildlife and Old Growth Forests in Southeastern Alaska," Natural Areas Journal, Vol. 8, No. 3, pp. 138-145.

To actively promote private clearcutting of old growth forests would, for all practical purposes, destroy their unique value to the public as wildlife habitat. Such a result would be diametrically opposed to the Public Trust Doctrine.

What is the extent of the public's retained equitable rights in uplands exchanged or otherwise conveyed by the State?

Where uplands are concerned, the public's rights deriving from the public trust will necessarily be broader than the rights appurtenant to tidelands. For example, the public trust on uplands extends beyond purposes of navigation, commerce, and fishery to protect public use of and access to the wildlife, recreation, minerals, and all waters occurring on the public lands.

Before the State of Alaska may make any substantial disposition of its public trust resources, the State must meet a stiff, two-pronged test: First, the State must show that the lands it wishes to dispose of are of no substantial value for Alaskan public trust purposes. Second, the State must show that the disposition will not impair the general public interest.

It is important to keep in mind that a grant of state land is probably not ipso facto illegal merely because the grant causes a reduction in traditional, public trust uses. It is the opinion of this author that courts who face public trust doctrine issues retain considerable discretion within the historical context of

courts of equity to decide how significant an impairment of public trust uses must be present to require judicial invalidation of the state's land grant or other land use decision.[37]

e. The Public Is Entitled to an Easement Protecting Public Trust Rights in State Lands That Are Alienated

The public trust resembles "a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife." Reed, "The Public Trust Doctrine: Is It Amphibious?, 1 Envtl. L. & Litigation 107, 118 (1986) (emphasis added) cited in Orion Corp v State, 747 P. 2d 1062, 1072-1073 (Washington, 1987) (en banc).

The United States Supreme Court has noted that, concerning lands which a state holds in trust, a state is entitled to convey such lands to private parties, free of the public trust, only under very limited circumstances. The Court stated:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1118 (Alaska, 1988), citing Illinois Central R.R. v Illinois, 146 U.S. 387, 453 (1892).

If the public trust doctrine forbids alienating public trust resources of an entire harbor, bay, or lake, as in Illinois Central, the trust just as surely forbids alienating public trust resources of an entire drainage, too. SEE: Illinois Central, supra, 146 U.S. 387, 406, fn 1 (1892).

> The rights of the private owner extend only as far as will allow the public to have full benefit of its trust uses of the privately held land.

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[37] For example, the Alaska Constitution, Article VIII, §4, requires the Alaska Legislature to utilize, develop, and maintain all:

> ...replenishable resources belonging to the State...on the sustained yield principle, subject to preferences among beneficial uses. (emphasis added)

There is an inherent tension among competing beneficial uses which necessarily requires payment of some opportunity cost almost every time a resource use decision is made. It would be absurd to posit that no legally valid diminution of public trust uses or resources can occur in light of Article VIII, §4.

Putting the Public Trust Doctrine to Work, November, 1990, p. 181, citing Marks v Whitney, 491 P. 2d 374 (California, 1971).

The Alaska Supreme Court has adopted the federal rule regarding conveyances of public trust property and the enduring rights of the public that emanate from the public trust. CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115 (Alaska, 1988).

CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115 (Alaska, 1988) involved a conveyance by the state of tidelands. Tidelands, like all other state lands, are subject to the public trust. Id., AS 38.05.502. The Alaska Supreme Court in CWC Fisheries held that any state conveyance of tidelands which fails to satisfy the requirements of Illinois Central, supra, at 453, will be viewed as a valid conveyance of title "subject to continuing public easements for purposes of navigation, commerce, and fishery." CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1118, 1121 (Alaska, 1988).

Unless there is specific legislative language abjuring the public trust integrated in a conveyance of public land, the State of Alaska may not convey public land--tideland or upland--free of continuing public easements that protect and guarantee the exercise of the full bundle of public rights appropriate to the qualities of the land in question. This conclusion follows from examining AS 38.50 (land exchanges) and AS 38.05 (Alaska Land Act), neither one of which contains explicit language freeing such conveyances of public trust lands from ongoing public trust easements. SEE: CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1119-1120 (Alaska, 1988).

Without legislative language abjuring the public trust, the State may convey public trust land, but the grantee will hold the property subject to the public trust, and while the grantee may assert a vested right of use subject to the trust, and to any improvements he may erect, the grantee can claim no vested right to bar recognition of the trust or state action to carry out the purposes of the public trust. SEE: National Audubon Society v. Superior Court of Alpine County, 658 P. 2d 709, 723 (California, 1983) (In Bank), cited in CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1121 (Alaska, 1988).

The Alaska Supreme Court has not yet considered the impact of the public trust doctrine on uplands or minerals, but there is no clear reason for Alaska's Court to rule that a conveyance of uplands or minerals may be made free of the dominant public trust responsibilities the State owes its citizens.

It would amount to a substantial impairment of the public's interest and rights to permit persons receiving title to state land--be it tideland, submerged land, or upland--to hold their fee free of public trust obligations.

Thus, any State conveyance of land--tidelands as well as uplands--must include a reservation of public easements of use and access for continued enjoyment of the jus publicum.

The argument that a conveyance of land is so small as to be de minimis has been expressly rejected by the Alaska Supreme Court. CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1120 (Alaska, 1988).

If public trust property is sold, exchanged, or alienated, the

property so disposed of remains subject to the paramount public rights embodied in the public trust. Orion Corp v State, 747 P. 2d 1062, 1072 (Washington, 1987) (en banc).

Alaska's Supreme Court has not yet considered the impact of the public trust's duties on upland resources. It is certain, however, that all state-owned land in the State of Alaska is impressed with public trust responsibilities. AS 38.05.502.

In the context of tideland grants, the Alaska Supreme Court has clearly stated that the State may not easily escape the duties of the public trust:

> Before any tideland grant may be found to be free of the public trust under the "public trust purposes" theory, the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer. (citations omitted) If any interpretation of the statute which would retain the public's interest in the tidelands is reasonably possible, we must give the statute such an interpretation.

CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1119 (Alaska, 1988).

The public trust doctrine in Alaska requires that all tidelands must be conveyed subject to the public's rights to use them for navigation, commerce, and fishery. CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1121 (Alaska, 1988).

Since the public trust applies equally to tidelands, submerged lands, uplands, and their fish, wildlife, and mineral resources, the state may only convey uplands, including timber and water, subject to the public's rights use them for public trust purposes.

In other words, if tidelands or any other public trust lands are alienated,

> ...they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein.

Borough of Neptune City v Borough of Avon-by-the-Sea, 294 A. 2d 47, 54-55 (1972).

> At least in the absence of some clear evidence to the contrary, we [the Alaska Supreme Court] will not presume that the legislature intended to take action which would, on its face, appear inconsistent with the plain wording of this constitutional mandate (Art. VIII, § 3 "common use" clause).
> ...
> To hold that persons receiving title...hold the fee free of any public trust obligations would, we believe, amount to a substantial impairment of the public's interest in state tidelands as a whole.

CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1120 (Alaska, 1988).

A recipient of State-owned land may not enjoin the public from utilizing the property for public trust purposes. CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1118 (Alaska, 1988), citing People v California Fish Co., 138 P. 79, 83 (California, 1913), and Orion Corp. v State, 747 P. 2d 1062, 1072-1073 (Washington, 1987).

It is critical for the State to maintain public rights of access for the continued exercise of public trust purposes whenever the State exchanges, sells, or otherwise disposes of the alienable portion of its interest in public trust lands. CWC Fisheries, Inc. v Bunker, 755 P. 2d 1115, 1120 (Alaska, 1988).

To say the public trust doctrine entitles the public to use the fish, wildlife, water, and other public trust resources of the land without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public. c.f. (Matthews v Bay Head Improvement Assn., 471 A. 2d 355, 364 (New Jersey, 1984), cert. denied, 469 U.S. 821 (1984).

This does not mean the public must have an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied by "reasonable access."

There is clearly a tension, if not an irreconcilable conflict, between AS 38.50.050 and AS 38.05.502 regarding the State's responsibilities regarding attempted disposal of publicly-owned mineral resources.

According to the canon of statutory construction that the more recently-adopted of two conflicting statutes will control, the public trust responsibilities of AS 38.05.502 must take precedence. Thus, DNR's ability to alienate publicly-owned, unappropriated mineral resources is far more limited than appears from AS 38.50.050.[38]

> ...any state agency with the power to dispose of land must attempt to secure as consideration for such disposal the maximum benefit for the citizens of the state as a whole. A transfer which may benefit the citizens of one community may nevertheless violate the public trust doctrine where the state receives less than adequate consideration on behalf of the citizens of the state as a whole. Absent some showing that a land transfer would benefit the state as a whole, even legislation authorizing a transfer would be invalid. On the other hand,. a transfer which may specifically benefit citizens of a particular area will not be invalid if it is also demonstrated that the transfer represents "the most desirable and advantageous solution to multiple issues confronting the state as a whole."

Informal Attorney General Opinion 566-230-85, April 25, 1985, p. 4, citing State v Lewis, 559 P. 2d 630 (Alaska, 1977), cert denied,

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[38] Assuming, arguendo, that the State of Alaska has any legal ability at all to alienate publicly-owned mineral resources in the face of its trust responsibilities.

432 U.S. 901.[39]

C. Principles of Republican Government and Enforcement of the Public Trust

As with any trust, the strength of the public trust is largely a function of the vigilance, good judgment, and integrity of the trustee. It is only when a trustee behaves in a manner inimical to the interests of the beneficiaries that courts of equity are historically called on to intervene in the management of trusts.

The effectiveness of the public trust doctrine requires that the judiciary be willing to vigorously assert its traditional rôle in equity as supervisor of trusts and, consequently, as an overseer of the legislative and executive branches' administration of the common property resources comprising the public trust. Without strong judicial oversight, the public trust is a sham.

There is a tendency in current American political rhetoric to decry "judicial activism." The current cant holds that the judiciary should be subordinate to the legislative and executive branches. Such a political perspective would minimize or deny the judicial branch's duty to grant relief from infringement of the public's beneficial interest in public trust resources.

Examination of the roots of republican political philosophy in America indicate that the appropriate role for the judicial branch is one of coequal importance with the legislative and executive branches of government.[40] The Framers of the United States Constitution saw the republican form of government as requiring a blending of powers between the different branches of government so that each branch could serve as a check on the others.

The accumulation of all powers, legislative, executive, and

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[39] "Opinions of the Attorney General, while not controlling on matters of statutory interpretation, are entitled to some deference." State, DNR v City of Haines, 627 P. 2d 1047, 1049, fn 6-7 (Alaska, 1981) and Carney v State, Board of Fisheries, 785 P. 2d 544, 548 (Alaska, 1990).

"While attorney general opinions are entitled to some deference in matters of statutory construction, they are not always correct." NBA v Univentures 1231, and State, ___ P. 2d ___ (Alaska, 1992) Supreme Court Opinion No. 3799, January 24, 1992, Slip Opinion, p. 11.

[40] The need for the judicial branch to act as a "check," "balance," or "brake" on the legislative and executive branches is a recurring theme in The Federalist Papers. SEE, e.g., Number X: "And what are the different classes of legislators but advocates and parties to the causes which they determine?...Enlightened statesmen will not always be at the helm." Madison, Hamilton, Jay, The Federalist Papers, (1788) (Penguin Classics, 1987 ed.), pp. 124-125.

> judiciary, in the same hands, whether one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[41]

Madison, Hamilton, Jay, The Federalist Papers, (1788) (Penguin Classics, 1987 ed.), Number XLVII, p. 303.

Beyond any doubt, one of the most important powers and duties of the judicial branch is to serve as a check and balance against over-reaching by the executive or the legislative branch.

Like all powers, the power of the executive and legislative branches to transfer common property resources is only a limited power. The practical limits to this power are defined principally through our common law heritage; they are enforced by the judicial branch in response to citizens' formal complaint. The supervisory power of the judicial branch exercised in the name of the public trust doctrine is firmly within the classic mold of American separation of powers philosophy.

> ...the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.

Thomas Jefferson, Notes on the State of Virginia, p. 195, quoted in The Federalist Papers, Number LXVIII Kramnick, ed., Penguin Books Edition (1987), p. 311.

Members of the legislative and executive branches who complain of judicial interference in their management of Alaska's resources may complain that unelected judges have no place in a republican government, but such a complaint flies in the face of history. SEE: The Federalist Papers, Number XXXIX, Kramnick, ed., Penguin Books Edition (1987), p. 256.

America's Founding Fathers did not intend to create a system of government in which the three branches of government would be absolutely separate and distinct. The system of Montesquieu, which served as our Founders' model, provided for each branch of government to have a partial agency in and control over the acts of the others. It is fundamental to the American system of government that there be a partial mixture of powers among the coordinate branches. SEE: The Federalist Papers, Number LXVII, pp. 304-305; Number LI, pp. 318-322.

> ...the political apothegm [of separation of powers] does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each

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[41] Madison, Hamilton, Jay, The Federalist Papers, (1788) (Penguin Classics, 1987 ed.), Number XLVII, p. 303. SEE ALSO: Numbers XLVIII- LI, pp. 308-322.

> other....[U]nless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be fully maintained. (emphasis added)

The Federalist Papers, Number LXVIII, p. 308.

The judicial branch has historically been seen as the most effective bulwark against excess by the legislative and the executive branches of government. The Federalist Papers, Number LXXVIII, p. 437. The more transient tenure of legislators and members of the executive branch naturally makes those officials subject to different interests, more focussed on short-term benefits, and more easily affected by the risk of a diminution in their emoluments by way of political retaliation for failure to take a particular action.

Courts exist to guard against encroachments and oppressions of the other two bodies of government. Effective limits on the acts of the other two branches may only be set by the courts:

> ...whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.

The Federalist Papers, Number LXXVIII, p. 438.

America's Founding Fathers recognized that judges are less likely to be swayed by the winds of politics than are legislators or members of the executive. Constitutional principles like Alaska's Public Trust Doctrine should not be overridden by the Legislature or the Executive branch.

> ...where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

The Federalist Papers, Number LXXVIII, p. 439; SEE ALSO Number LXXXI.

The State of Alaska and all its employees, including the entire legislative and executive branches, are required to act as "trustees" for the benefit of all the people of Alaska, including future generations of Alaskans.

III. CONCLUSION

No individual and no branch of government enjoys a monopoly on wisdom or foresight. It is necessary and proper that the American system of checks and balances should apply to and restrain transfer of Alaska's publicly-owned wealth into private hands. In its purest essence, this is the meaning of the Public Trust Doctrine.

The Public Trust Doctrine is merely the name given to the rationale relied on by a republican government to limit the power of those who temporarily occupy the seats of governmental power when the governors seek to transfer the common wealth of the governed into private hands.[42]

Properly understood, the Public Trust Doctrine should act as a restraining influence on the executive and legislative branches of government. By appreciating their fiduciary duties as guardians of the long-term public interest, the legislative and executive branches should voluntarily moderate their behavior and make procedurally and substantively proper decisions.

It is human nature to tend to exaggerate the importance of current events and thoughts. For example, there are many people today who believe that the "Owner State" philosophy is essential to the economic and spiritual development of Alaska. There are perhaps an equal number who abhor the "Owner State" and claim it suffers from a monomaniacal obsession with development that ignores the long-term effects on renewable resources.

It is not the purpose of this paper to embrace either of those positions in the current political spectrum.

The purpose of this paper has been to explain the legal foundation of the Public Trust Doctrine in Alaska. In particular, it has been the goal of this paper to demonstrate that the principles of the Public Trust Doctrine in Alaska are so important that they have been enshrined in our State Constitution, as well as our statutes and the decisions of our Supreme Court. These principles of conservation and wise use have been handed down to us since the Magna Carta. These principles should not be casually discarded in the course of popular political debate over how to achieve the chimera of permanent material wealth.

In large measure, the judicial branch must serve as trustee of the public resources subsumed within the rubric of the Public Trust Doctrine because of the longer duration of the tenure of the

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[42] The sovereignty of the state does not reside in the persons who fill the different departments of its government; but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the federal and state governments.

Spooner v McConnel, 22 Fed. Cas. 939, 943 (D. Ohio, 1838).

judiciary. Since the persons who serve in the executive and legislative branches are generally present in government for fewer years, the focus of their outlook is often shorter. A short-term outlook is good, but the leavening effect of a long-term view is just as necessary to the health and welfare of society.

There is political boldness in advocating rapidly placing Alaska's public wealth into private hands. Yet there is also an unknown opportunity cost incurred by transferring public resources into private hands.

Viewed in the context of the never-ending debate over the advisability of transferring publicly-owned resources into private hands, the Public Trust Doctrine is the polestar that enables the judicial branch to keep the course of government a moderate one, and to prevent extremism.[43]

> Private rights and interests are in constant danger if the judicial power does not grow more extensive and stronger to keep pace with the growing equality of conditions.

Tocqueville, Democracy in America, Vol. 2, Book IV, Ch. VII.

The best protection which the public enjoys against improvident transfer of public resources into private hands is the power of the judicial branch to void actions that violate the Public Trust. Imperfect though it may be, we must rely on the collective wisdom, experience, and procedural safeguards of the judicial process to protect the vast and multifarious natural wealth constituting Alaska's patrimony from being sold or traded for short-term advantages that will leave all Alaskans poorer.

At the same time, a free and adequate flow of information regarding the extent and value of public trust resources between State agencies and the public is crucial. Without this information, the State will be incapable of preserving the public's trust assets. Without this information, the State will also be unable to assure that it obtains full value for any sale, lease, or exchange of trust assets. Finally, information is critical to enable the public, as beneficiaries, to enforce its rights and hold the State to the appropriate highest, fiduciary, standard of care.

It has been shown that the public trust explicitly and implicitly limits the power of the State of Alaska to dispose of public lands and resources. Many of the requirements of the Public Trust Doctrine that have been set forth in this paper have not yet been recognized by the Executive branch.

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[43] SEE: Machiavelli, The Discourses, Book One, "The Development of Rome's Constitution," §53 ("The populace, misled by the false appearance of advantage, often seeks its own ruin, and is easily moved by splendid hopes and rash promises.")

It is hoped that in the future, the considerations set forth in this paper will help State government more effectively perform its job as trustee. The State and all Alaskans will benefit from improving the quality and quantity of information exchanged regarding the extent and value of Alaska's public trust resources.

The Public Trust Doctrine will be most effective when it serves as a rule of self-restraint whereby State government checks its plans before acting to ensure that the mandates of the public trust are met and the State fulfills its fiduciary duties.

The Public Trust Doctrine offers a legal framework to enhance the quality of state government by establishing management standards for various public resources. The Public Trust Doctrine provides the best safeguard yet known to preserving the natural resources and the quality of life that make Alaska unique. All three branches of government, together with the public at large, must cooperate in good faith to ensure that the Public Trust Doctrine is used with success for the benefit of all current and future generations of Alaskans.

FAX to: 465-3444

Tongass Tourism & Recreation Business Association
740 Fifth St. • Juneau, Alaska 99801

May 3, 1992

Representative Cliff Davidson
Capital Building
Juneau, AK 99801

Dear Representative Davidson:

The Tongass Tourism and Recreation Business Association (TTRBA) strongly opposes HB 578, giving legislative approval to DNR's proposed trade of 2300 acres of virgin state forest land (Leask Lakes) for 4300 acres of logged private lands (White River), near Ketchikan. This legislation is an unfair trade, put forth in a non-public process (out of compliance with AS 38.50) and would establish a regressive precedent we would suffer from for years to come.

TTRBA is about 120 businesses (and growing) involved in outdoor recreation and tourism primarily in southeast Alaska. The outfitters, guides, tour operators, wilderness lodges, fishing charters, retailers and other businesses we represent depend on the wild lands of Alaska for our livelihoods. Much of the allure of our state is derived from the excellent fishing and wildlife viewing opportunities and unspoiled scenery which exist in the wild lands of Alaska. HB 578 stands to trade some of those lands in a "quick and dirty" proposal which, if approved, would leave all state lands at risk for similar swaps of valuable forests for stumps.

Forested state lands are an important resource that are in such short supply in the lower 48 that an increasing number of visitors come to Alaska solely for the opportunity to see these lands and the wildlife they support. The Leask Lakes land, some 958 acres, is valued at only $72 per acre. This trade would be not only a substantial economic loss for the state, but a needless recreational and habitat loss that the Ketchikan area can ill afford. One only has to realize that tourism is the #2 industry in Alaska, until the Oil runs out and it becomes #1! I hope we can count on you to help protect the growing outdoor recreation and tourism industry by stopping this poorly conceived bill.

Sincerely yours,

Jeff Sloss

Jeffrey Sloss
Executive Director

Issues in TCS's appeal

1. **Appraisal.** There is no final appraisal of the lands to be traded. (DNR's chief appraiser has rejected the single appraisal in this case. Of four review appraisers, three have not signed off and one has approved only a portion of the appraisal.)

2. **Roads.** DNR used a road upgrading project to equalize the values of the trade. The law contemplates cash equalization. DNR awarded a sole-source contract to Cape Fox for this work, bypassing AS 36.30.

3. **Sustained yield.** DNR evaded sustained yield by failing to consider a timber sale before trading state land, as required by AS 38.50.

4. **Mini-EIS.** DNR failed to adequately depict or discuss the impacts of the trade, as required by AS 38.50.

5. **Conflict of interest.** DNR failed to check up on the timber cruise (basis for the appraisal), which may have been subject to a conflict of interest.

6. **Unclassified lands.** DNR is disposing of land without doing an area plan. Their regulation allowing this is not backed up by the statute.

Other pertinent issues

Capital projects. DNR traded resources it manages for a capital project, bypassing capital budgeting procedures.

Fiscal notes/operating budget. There is no solid maintenance provision for the roads the state will acquire. The Ketchikan Gateway Borough does not have road powers. DOT says it will not maintain the road. Once the state acquires the road, it will be pressured to maintain it. There is presently a $0 fiscal note.

Double dipping/appraisal. The appraisal of the post-logging land value was based on public road accessibility. Without road access, the appraised values are invalid. Additionally, the announced public benefit of the trade -- recreational road access -- evaporates. The state pays Cape Fox to upgrade its logging roads, then values the land with resulting public access.

Contact: Dave Katz, 463-3366

LEASK LAKES STATE PARCEL -- STATE PARK OR LAND TRADE?

Cape Fox Corporation, an Alaska native corporation located in Saxman, just outside of Ketchikan, is nearly finished cutting the timberlands it received from the federal government under the Alaska Native Claims Settlement Act (ANCSA). Cape Fox now wishes to trade those cut-over lands for more prime timberland. The corporation has proposed a land trade to the Alaska Department of Natural Resources (DNR) in which Cape Fox would trade around 4,000 acres, much of which has been heavily clearcut, to the state, in return for which Cape Fox would receive around 2,400 acres of pristine, state-owned old-growth forest in the Leask Lake area, north of Ketchikan. Cape Fox's purpose in obtaining these lands is to clearcut them extensively. At present market conditions, the Leask Lake timber is worth around $15 million.

Cape Fox has been proposing this trade or variants of it for over 10 years. And for that long DNR has been avoiding the trade as not in the state's best interest. But under Governor Walter Hickel, the state has changed its tune. DNR is now poised to proceed with this trade. The public "benefits" to be captured are said to to be recreational use of the logging roads Cape Fox will leave behind, and economic development. Timber obtained by Cape Fox through this trade will be shipped without processing, as round logs, probably to Japan.

The $15 million giveaway. The state will get little in return for its valuable Leask Lake resources. The state will lose high-value wildlife habitat, recreational opportunity, and timber. The state will acquire only the surface estate of the Cape Fox lands -- Sealaska will continue to own the rock, sand, gravel, and minerals. The state will gerrymander its remaining ownership to accommodate Cape Fox's interest in only high value timberland. The state will acquire Cape Fox logging roads and easements on logging roads -- with the expectation from the local government that the state will then upgrade and/or maintain these roads. ADOT has stated that it doesn't have the funds to do so. The existing Cape Fox logging roads are unsafe for public use. The state will acquire Cape Fox lands of limited recreational and habitat value, to much of which the public already has access (the public gains little). Finally, public economic gains will be small and short-term. Timber wages will equal $2 million over two years -- less than 1/2 of 1 percent of the Ketchikan Borough's expected wage and salary total over that time.

Habitat loss. The Leask Lakes parcel is 5,000 acres of old-growth timber, abundant water, low-altitude lakes, moderate relief, and salt-water shoreline. The state-owned area supports a rich array of wildlife species including trumpeter swans, plus coho and sockeye salmon, cutthroat trout, and Dolly Varden char. ADFG predicts that Cape Fox timber harvest will reduce the deer population in the high-value Leask Lakes area by 68%, and other wildlife numbers similarly. These numbers will not support significant hunting and viewing demand.

Recreational loss. The US Forest Service recently stated publicly that if the Cape Fox land trade "ran into problems," the Forest Service would propose building a recreational road into Leask Lakes. The state should keep its high value land and encourage the Forest Service to build (and maintain) that road. This unroaded area apparently receives a surprising amount of use currently. In a recent McDowell Group survey, 20% of respondents said they had been to the area -- a very high number. The Leask Lakes parcel is large and can accommodate a wide variety of high-quality recreational uses -- from family picnicking to hiking to hunting. The Cape Fox lands are of lower [illegible] have been heavily impacted by clearcutting, and would

not be accessible to the public until after timber harvest and/or road upgrading -- should that occur.

Local opposition. There is substantial local opposition to this trade. At hearings before the Ketchikan Borough Assembly, 33 people testified against the trade and in favor of a state park. Only 26 favored the trade. (The Assembly then voted 6-1 for the trade.) The Planning and Zoning Commission was split, 3-3. The City Council only narrowly favored the trade, 4-3. These votes all came before the Forest Service announced its willingness to build a different road. In the recent McDowell Group random survey of Ketchikanites' opinions regarding outdoor recreation, the value most important to Ketchikanites was habitat protection -- both in general and with respect to land trades in particular. Increasing recreational activities on the road system was second. This trade would destroy both habitat and recreational opportunity.

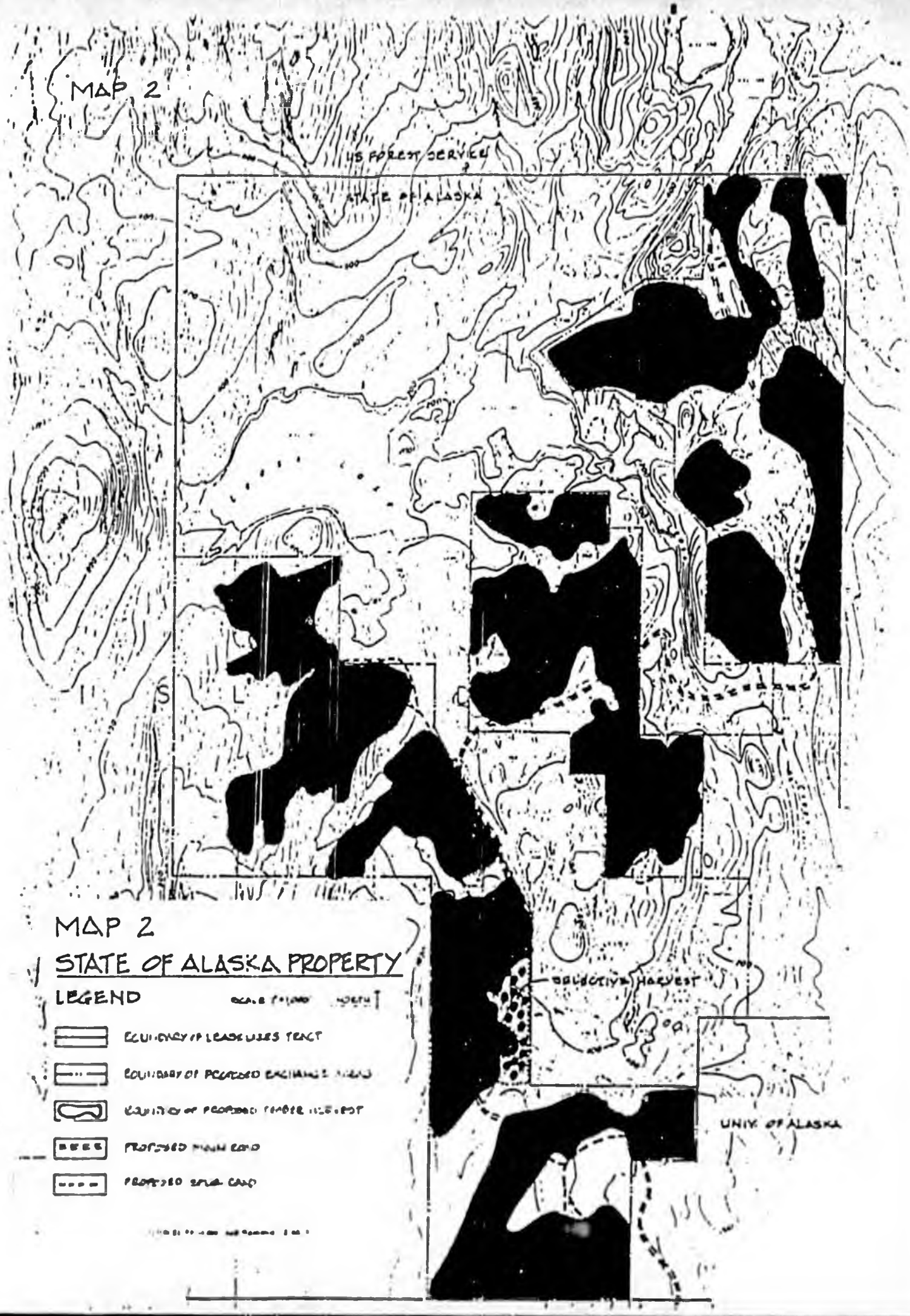
The Better Choice -- Leask Lakes State Park. Ketchikan is almost devoid of state parklands, and is genuinely recreational destination-poor. For reasons of size, location, recreational and habitat value, road-access achievability, and ownership status, an outstanding use of this state parcel would be as a park. A park would also have spinoff economic benefits as an attraction to independent tourists. Outstanding native stone fish traps and petroglyphs exist on the site.

Summary. The state has avoided this trade for over 10 years, and with good reason. It will give $15 million in state resources to a private corporation, while creating new state liabilities and diminishing the value of remaining state resources. It will destroy valuable habitat and diminish recreational opportunity. Moreover, the local community is split as to the trade's desirability. The trade should be rejected and a state park designation supported.

Briefing from Tongass Conservation Society
PO Box 3377
Ketchikan, Alaska 99901
225-5827

Contact persons: David Katz, TCS Staff 225-5827
Marna Schwartz, Alaska Environmental Lobby 463-3366

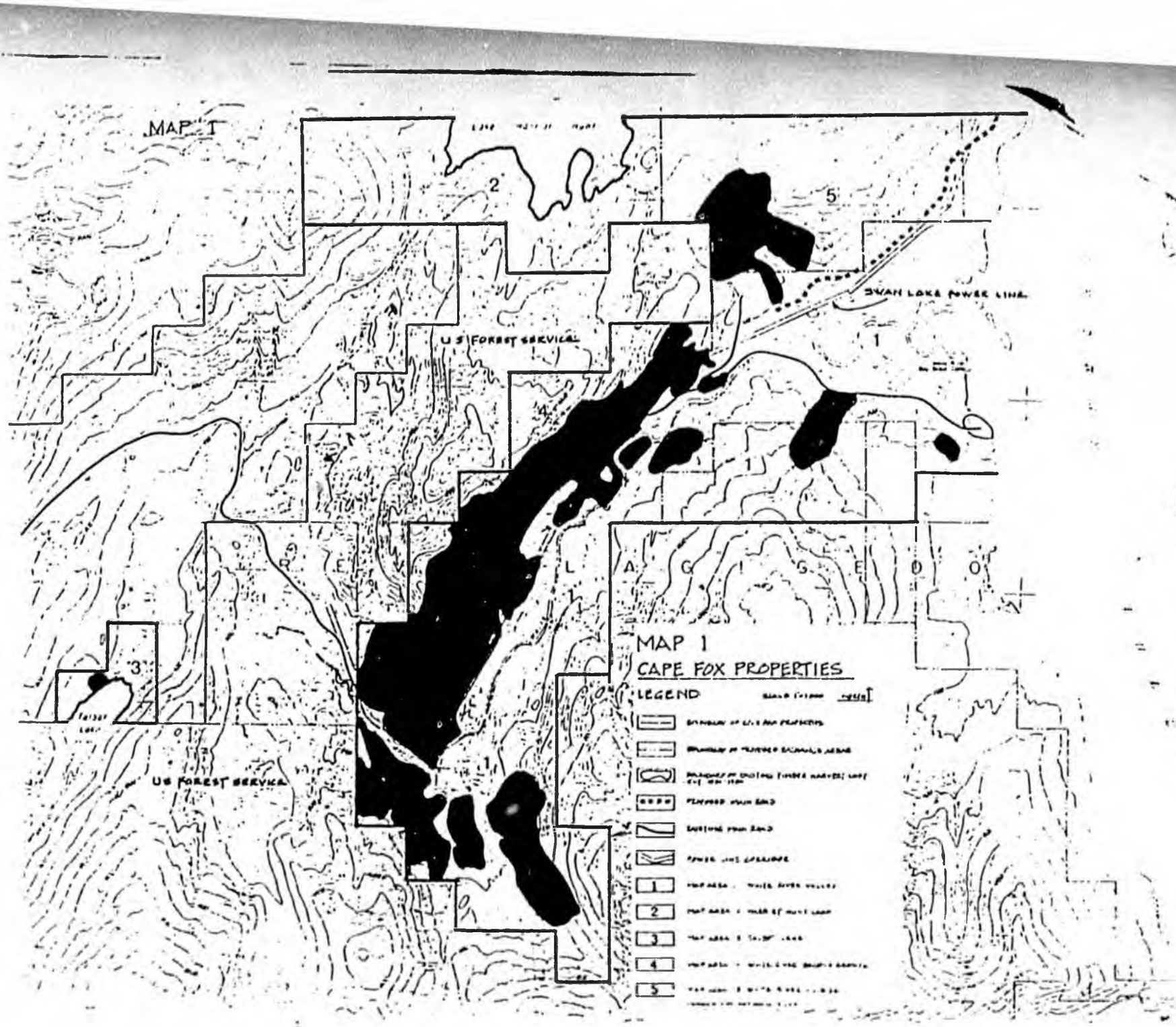
LEASK LAKES AERIAL VIEW



MAP 2

STATE OF ALASKA PROPERTY

LEGEND


MAP 1
SWAN LAKE POWER LINE
U S FOREST SERVICE
U S FOREST SERVICE
MAP 1
CAPE FOX PROPERTIES
LEGEND

HARRIET HUNT PROPOSAL

All road locations must be verified on the ground to determine final location and feasibility. The routes shown would access an area approximately 285 acres in size of which 140 would be cut in the first entry. This would represent 4 million bdft of timber harvested in the first entry. If timber is to cover road building costs, approximately 1.5 million bdft/mile is required, If this cannot be met then suplementary sources of funding will be needed.

3-5.5 Miles

Attachment F 11/27/91 Ketchikan Daily N

Leask Lakes roac

By JANIE LAWLEY
Daily News Staff Writer

If a proposed land swap between the state and Cape Fox Corp. falls through, the U.S. Forest Service will pursue a road project to the Leask Lakes area if the community desires it, according to a Forest Service official.

On Tuesday, Dave Fletcher, timber management assistant with the Ketchikan Ranger District, said the federal agency will pursue the road project if the Ketchikan Gateway Borough and the City of Ketchikan desire it.

At the request of Dave Katz, staff person for the Tongass Conservation Society, Fletcher addressed the Ketchikan City Council last week to let councilmembers know of the recreational opportunities in the area.

Katz said he wanted the council to know of the recreation potential before reaffirming its support of the land swap.

"I only bring this out to show you that there is an opportunity here should there be some problem with the land exchange," Fletcher said at the meeting.

According to Ketchikan District Ranger Steve Segovia, the project is not being pursued now because the Forest Service wants to remain neutral in the land swap decision.

The proposed trade includes Cape Fox's land in White River, Harriet Hunt Lake and Talbot Lake in exchange for state land in the Leask Lakes tract.

According to Andy Pekovich, Southeast Regional Manager for the Department of Natural Resource's Division of Land, the state is waiting for an appraisal on the lands.

He said it is expected sometime this week.

In an article printed earlier in the Daily News, Katz reported that he doesn't believe it is the Forest Service's responsibility to remain neutral.

In an interview Tuesday, Katz the land swap goes through, ar lent recreational area for Ketchik dents will be lost.

He said the land swap call logging road to be built that c expanded to allow residents t Revillagigedo Island.

However, he said, if a road w into the Leask Lakes area, a con road could also be built that wou

'I only bring this to show you that there is an opportunity here should there be some problem with the land exchange.'
— Dave Fletcher

the same thing.

"This road accesses an excellent recreational area and we don't need to clearcut the area to get that access. This road provides us with all of the benefits of the land swap without clearcutting," he said.

The bottom line, Katz said, is that the land swap will cost Ketchikan the recreational opportunities in the Leask Lakes area because it will be undesirable after logging.

It is Katz' hopes to inform the public

essary, Fletcher said, [illegible]
lion board feet of timber available in the area would not cover the cost of the road.

The road would be between three miles and five and a half miles in length. He said it takes about one and a half million board feet of timber to build one mile of road.

Fletcher estimated that 6.3 million board feet will be needed to pay for the road into the Leask Lakes area.

This means additional funding, Fletcher said.

"The timber won't pay for all of the road," he said.

Fletcher said it would take between two and three years to get a road into the area.

Katz said he is pursuing the project because he hopes it will eventually mean additional roaded recreation for the First City.

"This road is very easy and attainable for roaded recreation for Ketchikan," he said.

RECEIVED MAR 2 1992

Alaska Environmental Lobby, Inc.

P.O. Box 22151 Juneau, Alaska 99802 907-463-3366

February 28, 1992

Representative Cliff Davidson
P. O. Box V
Juneau, Alaska 99801

Dear Representative Davidson,

The Alaska Environmental Lobby would like to alert you to a pending land exchange between the State of Alaska and the Cape Fox Corporation (CFC) which would result in the loss of valuable timber, wildlife habitat and recreational resources to the people of Alaska. The proposed exchange is described in a Report on Proposed Land Exchange recently released by the Department of Natural Resources.

DNR proposes to exchange 2400 acres of old growth forest for 4300 acres of CFC land which has been extensively clearcut. Both properties are north of Ketchikan. CFC will clearcut 1500 acres of the land it receives from the state. DNR maintains that the Ketchikan residents would benefit from recreational access to the area provided by upgraded logging roads.

The Cape Fox Corporation has been proposing this land exchange since 1977. Until this past year, DNR has rejected the proposal as not being in the public interest. Nothing has changed; the public still looses by this trade.

The Alaska Environmental Lobby opposes this land exchange on the following grounds:

1) It is not in the public interest to exchange land with high quality, high value old growth forest for land that has been clear cut. Any gain in recreational values by the greater access provided by upgraded logging roads is more than offset by the diminished recreational values caused by clearcuts and by the destruction of wildlife habitat .

2) DNR's evaluation of this exchange is seriously flawed, for example:

* DNR has accepted an appraisal which assumes that the "highest and best use" of the land is to log the timber; there has been no consideration of park, habitat, or other non-economic values.

* 39% of the state lands were appraised at only 10% of fair market value.

* The State of Alaska is paying CFC to upgrade the logging roads, by subtracting the cost of the upgrade from the value of the state lands.

* DNR has relied on a deer study done by Cape Fox and slighted a projection by the Alaska Department of Fish and Game that there will be a 68% decline in the deer population as a result of logging the state land.

ALASKA CENTER FOR THE ENVIRONMENT • ALASKA CHAPTER SIERRA CLUB • ALASKA FRIENDS OF THE EARTH
ANCHORAGE AUDUBON SOCIETY • ARCTIC AUDUBON SOCIETY • CLEAN AIR COALITION • DENALI CITIZENS COUNCIL
DENALI GROUP, SIERRA CLUB • HAINES AUDUBON SOCIETY • JUNEAU GROUP, SIERRA CLUB
KACHEMAK BAY CONSERVATION SOCIETY • KENAI PENINSULA AUDUBON SOCIETY • KNIK CANNERS AND RANGERS
KNIK GROUP, SIERRA CLUB • KODIAK AUDUBON SOCIETY • LYNN CANAL CONSERVATION • NORTHERN ALASKA ENVIRONMENTAL CENTER
PRINCE WILLIAM SOUND CONSERVATION ALLIANCE • SITKA CONSERVATION SOCIETY • SOUTHEAST ALASKA CONSERVATION COUNCIL

* The value of the state land was reduced by questionable accounting procedures; for example, all state timber was discounted 12% over a two year period, while only some of the CFC timber was discounted and then for a period less than a year.

3) This exchange will set a precedent for future private/state land trades and must be considered carefully. However the Department of Natural Resouces is pursuing possibly illegal practices to force the public and the legislature into making a rapid decision on this issue. Alaska statute requires that a comprehensible explanation of the appraisal process be provided to the public thirty days before any public hearings. The current appraisal has been rejected as incomprehensible to the public by DNR itself, yet public hearings are scheduled for early March.

4) Finally, Alaska's timber resources must be managed as a renewable resource. If private corporations are able to exchange lands that can no longer provide revenue, for valuable state land, then no corporation will have the incentive to manage their resources for the long term. Alaska's corporations must be encouraged to follow prudent business practices.

AEL would like to reiterate that careful consideration must be made of the precedents that will be established if this exchange proceeds. These precedents include the assumptions under which state land is appraised; the type of goods or services the state receives in compensation; who and how the public interest is determined and the public process used to facilitate such exchanges.

Sincerely,

Russell Heath
Volunteer Lobbyist

RECEIVED MAR 1 2 1992

KETCHIKAN GATEWAY BOROUGH

OFFICE OF THE MAYOR
Ralph M. Bartholomew
344 Front Street
Ketchikan, AK 99901-6494
Phone 228-6605 Fax 225-7282

March 9, 1992

The Honorable Cliff Davidson
House of Representatives
P.O. Box V
Juneau, AK 99801

THE LAND TRADE BETWEEN THE STATE OF ALASKA AND CAPE FOX CORPORATION

Dear Representative Davidson:

You will soon review legislation proposing a land trade between the State of Alaska and the Cape Fox Corporation (Saxman Village Corporation) which must be adopted during this session of the Legislature.

The Ketchikan Gateway Borough Assembly supports this exchange (resolution enclosed) and recently endorsed this letter and my testimony at any future hearings.

The State Department of Natural Resources has completed its review and documentation supporting the Exchange Agreement and is now in the public comment phase of the process. Commissioner Harold Heinze unequivocally promotes the land trade as a no-cost, win-win settlement which will benefit not only the people of Southeast but also the people of the entire State of Alaska.

Cape Fox Corporation owns the timber and the land in the White River, Harriet Hunt Lake, and Talbot Lake areas immediately adjacent to Ketchikan. The Corporation is willing to pass title to the State without cutting the multi-million board feet of timber in the valley and surrounding areas. The river is presently followed on one side by a timber road that will be upgraded for public use by Cape Fox Corporation as a condition of the Land Exchange Agreement.

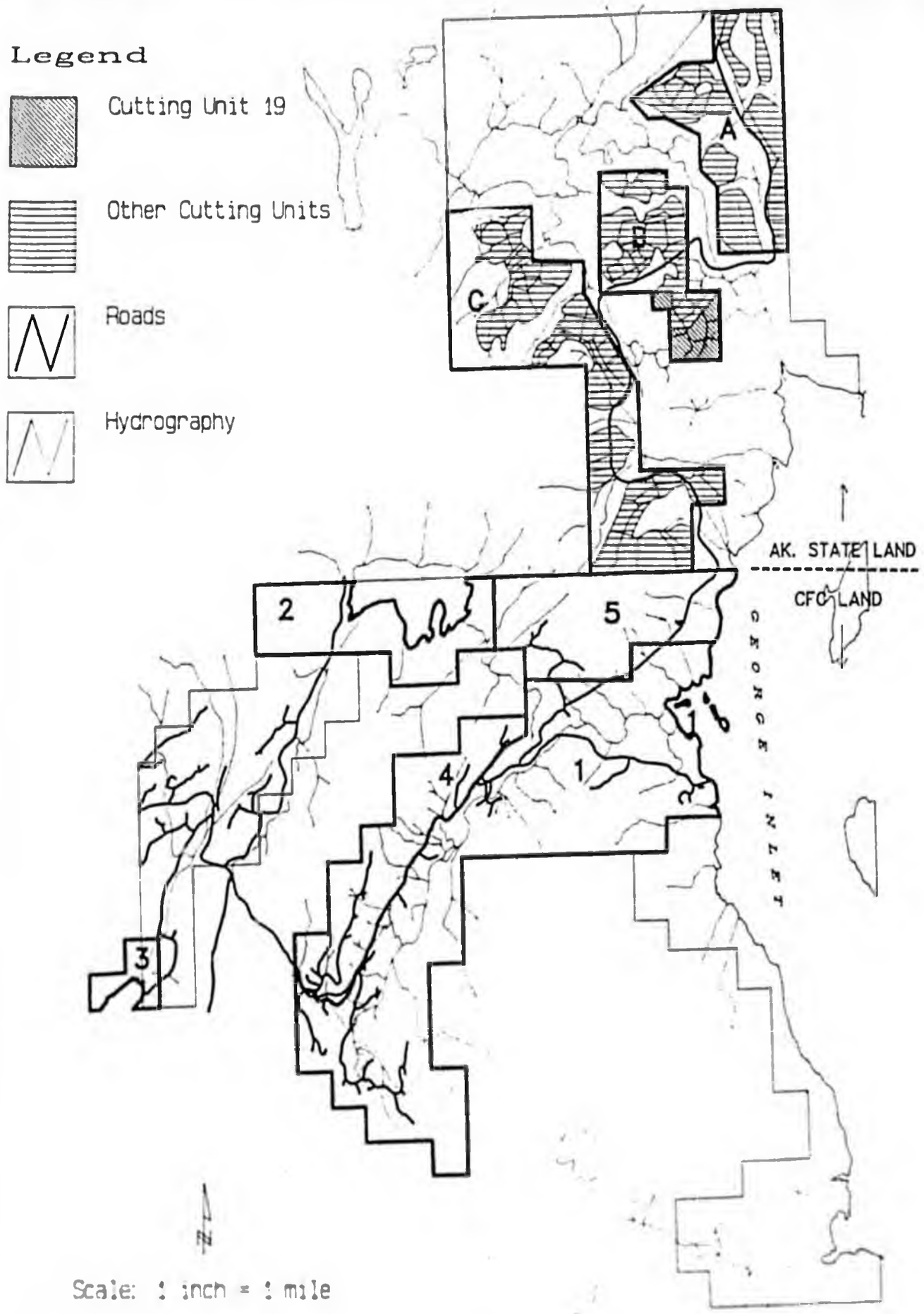
As a result of the land exchange, the public will inherit three prime areas with future unlimited availability for recreation with roaded access. Cape Fox Corporation has committed to a logging plan in the Leask Lake parcel which minimizes environmental impacts and preserves the view corridors from adjacent lakes and roads. The community gains all of this plus the economic benefits from the timber contracts, road building contracts, and future visitor attraction and site use by the public.

Thank you for your consideration, support and assistance in moving this important proposal during this legislative session. It will be a model for the rest of the State.

Sincerely,

Ralph M. Bartholomew
Mayor

Mayor/Business Address: 015 Stedman Street, Ketchikan, AK 99901
Phone 225-2121 or 225-3001 Fax 225-0727



Proposed Land Exchange Areas

K E T C H I K A N G A T E W A Y B O R O U G H

RESOLUTION NO. 954

A RESOLUTION OF THE ASSEMBLY OF THE KETCHIKAN GATEWAY BOROUGH, ALASKA, SUPPORTING THE CONCEPT OF A LAND EXCHANGE OF CAPE FOX CORPORATION PROPERTIES IN THE LAKE HARRIET HUNT AND WHITE RIVER AREAS FOR STATE OF ALASKA PROPERTIES IN THE LEASK LAKES AREA, REVILLAGIGEDO ISLAND, ALASKA; AND ESTABLISHING AN EFFECTIVE DATE.

R E C I T A L S

A. The Cape Fox Corporation owns properties in the White River drainage and at Lake Harriet Hunt, and the State of Alaska owns a large, contiguous tract of 5,140 acres in the area known as Leask Lakes.

B. The Cape Fox Corporation has proposed a land exchange between the Corporation and the State of Alaska. This exchange involves the selection of some 2,450 acres of State land in the Leask Lakes area in exchange for 2,941 acres within the White River and Lake Harriet Hunt areas.

C. A community survey was conducted in the summer of 1990 by a Juneau consulting firm that identified a strong need for additional outdoor recreational opportunities for the residents of Ketchikan. This survey also determined that such recreation was desired along the road system and that the preservation of sport fisheries and maintenance of wildlife were important considerations in any provision of additional outdoor recreational opportunities. The survey also found significant community support for recreational opportunities in areas where timber clear-cutting was visible from the road system.

D. A community workshop conducted in November, 1990, on the creation of a Leask Lakes State Park or White River/Leask Lakes Land exchange reconfirmed the importance of habitat protection and the need for additional recreational opportunities on the roaded system. This workshop also established the importance of the provision of a utility/transportation corridor designed to provide intra-island and inter-island accessibility.

E. Research performed by the Ketchikan Gateway Borough Department of Planning and Community Development evaluated a series of alternative ways that the Leask Lakes/White River/Lake Harriet Hunt areas could be developed and managed, and identified significant additional outdoor recreation and habitat values in the Leask Lakes, White River, and Lake Harriet Hunt areas.

F. Public hearings were held before the Planning Commission and Borough Assembly addressing the values and issues associated with the creation of Leask Lakes State Park or a Leask Lakes/White River/Lake Harriet Hunt land exchange, and evidenced public interest in and support for a proposed land exchange.

G. A proposed land exchange involving the Lake Harriet Hunt and White River areas of the Cape Fox Corporation for selected State of Alaska properties in the Leask Lakes area should provide greatly augmented outdoor recreation opportunities accessible by vehicle, protect important habitat values in the White River and Lake Harriet Hunt areas, and allow for the eventual provision of an inter-island or intra-island road/utility corridor(s).

NOW, THEREFORE, IT IS RESOLVED BY THE ASSEMBLY OF THE KETCHIKAN GATEWAY BOROUGH, ALASKA, as follows:

Section 1: Support of Proposed Land Exchange. The Ketchikan Gateway Borough approves, in concept, the proposed land exchange between the Cape Fox Corporation and the State of Alaska involving the Corporation's properties in the White River and Lake Harriet Hunt areas (approximately 2,941 acres) and the State's properties (2,450 acres) in the Leask Lakes area, generally as depicted on Map 1, attached.

Section 2: Support of "Environmental/Timber" Alternative. The Ketchikan Gateway Borough Assembly approves a variant of the land exchange proposal described as the "Environment/Timber Alternative" in the "Report on Proposed Land Exchange/Leask Lakes State Park", dated November 1, 1990, prepared and retained for public review by the Borough Department of Planning and Community Development. This alternative is intended to provide an additional level of habitat protection over the "Cape Fox Proposal", also described in that report, while retaining significant recreational and visual attributes identified in the Department of Planning and Community Development maps on Recreational Opportunity Spectrum and Visual Quality Objectives.

Section 3: Specific Conditions of Approval. In order to provide proper management of the White River-Leask Lakes area, to ensure adequate utility and transportation access, to provide optimum levels of outdoor recreational opportunities, and both habitat and natural resource protection, the following conditions of approval, affecting the "Environment/Timber" Alternative, are recommended in any subsequent land exchange entered into by the State of Alaska and Cape Fox Corporation, and in any actions required of or involving the Ketchikan Gateway Borough:

a. The White River Land Exchange area include the existing Cape Fox Corporation logging road, and the upgrading of this road to provide for safe public access be included in the evaluation of the proposed exchange.

b. A public access easement be provided by the Cape Fox Corporation within and through private corporation lands involving access between Leask Lakes and White River.

c. The mainline section of new logging roads between the existing terminus of the spur road within the White River area and the probable terminus at or generally near the "ponds" southeast of Leask Lakes be designed to provide horizontal control sufficient to meet United States Forest Service standards for a public access road, that the road have a width of at least 16', and that it utilize a design speed of at least 25 miles per hour.

d. The development of a road/utility corridor(s) for inter-island or intra-island access be explicitly recognized within the White River and Leask Lakes area as being necessary and desirable, and that sufficient right-of-way be reserved for eventual construction.

e. A conservation easement be agreed to by the Cape Fox Corporation on all land transferred to the Corporation from the State that is not to be logged, ensuring that these lands are not

logged.

f. Any portion of the mainline logging road crossing Cape Fox Corporation property within the Leask Lakes area have a public access easement, and pedestrian public access easements be provided for all "put-to-bed" spur logging roads that provide access to the remaining state lands of significant size within Leask Lakes or where recreational use is expected to occur.

g. A logging management plan be developed by the Cape Fox Corporation prior to any logging of the Leask Lakes area, and this plan be reviewed by the Ketchikan Gateway Borough Planning Department prior to the commencement of logging by the Corporation. The purpose of this review will be to ensure conformance with the conditions of approval stated in this Resolution, and to ensure that proposed timber harvest areas generally conform to the intent of the "Environmental/Logging Alternative".

h. The clear-cut area within the White River area, consisting of 725 acres located west of the current logging road, be considered for inclusion in the State-Corporation land appraisal in order to determine the value/worth of including this area within the proposed area of land exchange between the State and the Cape Fox Corporation.

i. A master development plan will be prepared by the Ketchikan Gateway Borough for the properties affected by the proposed land exchange in order to properly assess near-range and long-range planning objectives and consequences. This plan will guide the use and the management of properties involved in the Land Exchange and the remaining State properties in the Leask Lakes area.

j. State land within the "Leask Lakes Area" not affected by the land exchange between the State and the Cape Fox Corporation be retained under state ownership and management, and be classified as "public use" lands subject to the terms and conditions of an approved master development plan.

Section 4: Effective Date. This resolution is effective upon adoption.

BOROUGH MAYOR

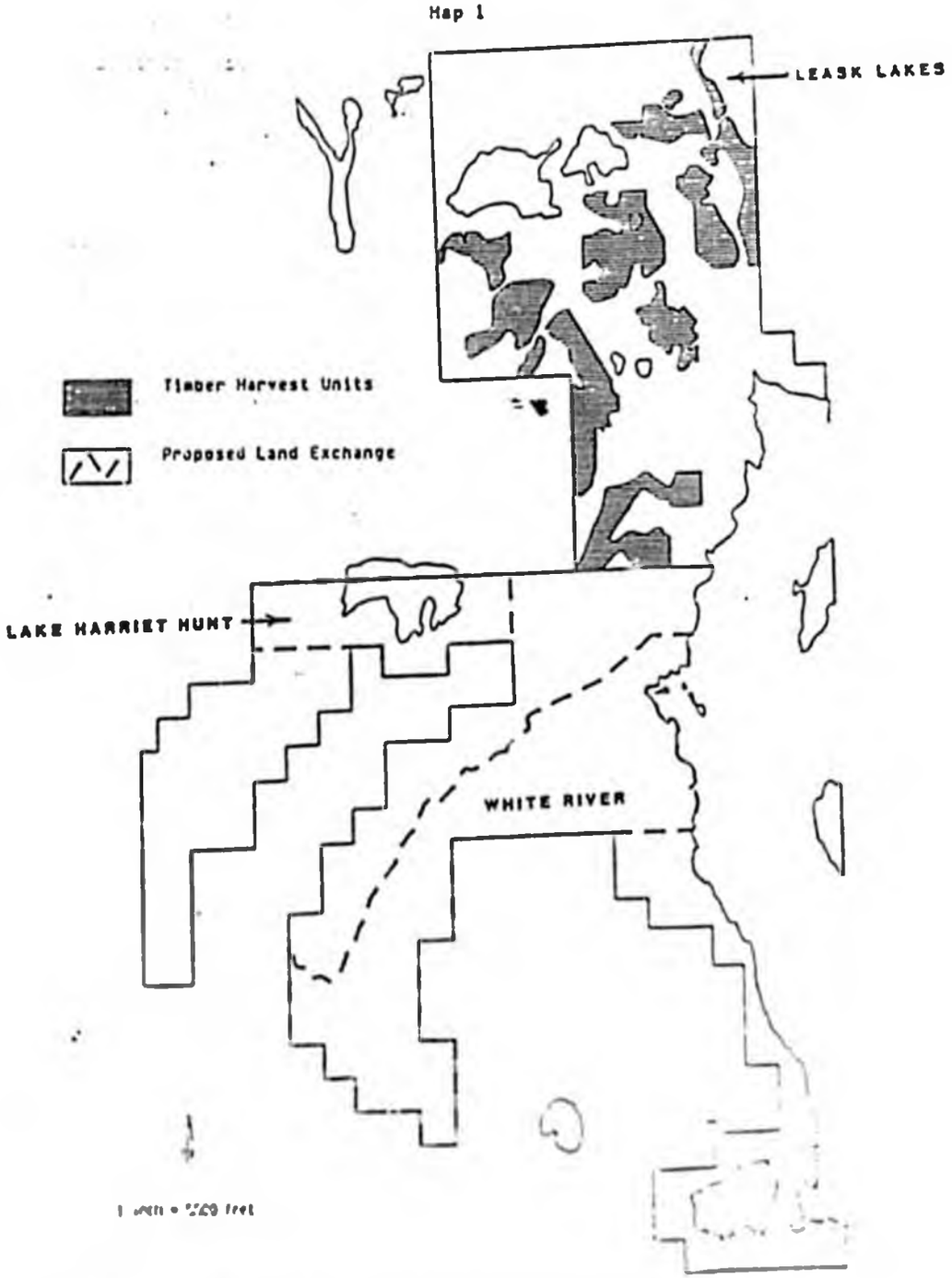
ATTEST:

BOROUGH CLERK

Approved as to form:

INTERIM BOROUGH ATTORNEY

Map 1



Environmental/Timber Alternative

Prepared by Resource Data, Inc.

Lynn Canal Conservation, Inc.

Post Office Box 964
Haines, Alaska 99827

RECEIVED MAR

March 20, 1992

Representative Cliff Davidson
P. O. Box V
Juneau, Alaska 99801

Dear Representative Davidson,

Lynn Canal Conservation opposes the pending land exchange between the State of Alaska and the Cape Fox Corporation which would result in the loss of valuable timber, wildlife habitat and recreational resources to the people of Alaska.

DNR proposes to exchange 2400 acres of old growth forest near Leask Lakes for 4300 acres of extensively clearcut land owed by Cape Fox in the White River area. Both properties are north of Ketchikan. Cape Fox would clearcut 1445 acres of the land it receives from the state. DNR maintains that the Ketchikan residents would benefit from recreational access to the area provided by upgraded logging roads.

Lynn Canal Conservation believes this trade would be bad public policy.

1) Cape Fox and other private corporations must not be rewarded for non-sustainable resource mangement by being able to trade land that no longer produces revenue for valuable state land. Access to state lands will encourage short term, non-sustainable management. Alaska's timber resources must be managed as a renewable resource.

2) The public process is being slighted. Alaska Statute requires that a description of the appraisal process that is comprehensible to the public be made available prior to any public hearing. Such a description is not available, yet public hearings were held in mid-March. We believe that any transfer of public lands must be carefully considered by the public. This trade must not be railroaded past the people of Alaska.

3) DNR is circumventing state procurement laws, by contracting with Cape Fox to upgrade logging roads without soliciting competitive bids. The appraised value of the Leask Lakes property was reduced by 2.5 million dollars to compensate Cape Fox for the cost of upgrading the roads to recreational quality.

4) The state lands were appraised under the assumption that the "highest and best use of the land is to log the timber." (Quoted from DNR's Report on Proposed Land Exchange). The public interest can not always be defined as that which produces the greatest economic return. Lesser values or non-economic uses, such as parkland or wildlife habitat, must also be considered. The public must determine the "highest and best use of the land", not DNR or DNR's appraiser.

5) There are already plenty of unlogged recreational areas accessible in the Ketchikan area. The logged White River area is not needed for additional recreation.

KETCHIKAN AREA STATE PARKS ADVISORY BOARD
9883 N. Tongass " Ketchikan, AK 99901

At the March 9th, 1992 meeting, the Ketchikan Area State Parks Advisory Board passed the following resolution:

The Ketchikan Area State Parks Advisory Board recommends that after the state of Alaska makes a decision on the proposed Cape Fox Corporation Land Exchange all lands retained by the state should be designated by legislative action to be protected for recreational purposes only.

William Rotecki

Advisory Board Chair

KONCOR FOREST PRODUCTS CO.
3501 DENALI, SUITE 202
ANCHORAGE, ALASKA 99503
(907) 562-3335 FAX (907) 562-0539

Memo

FAX

TO: Representative Cliff Davidson

DATE: April 16, 1992

SUBJECT: HB - 578 - Cape Fox Trade Bill

Hi Cliff:

I would like to encourage you to quickly move HB-578 through your committee. I have been told that some House members are holding this Bill hostage for Kaohemak. I would not like to be put in a position of hindering the efforts of a fellow native corporation (Cape Fox) for our benefit. This may be politically naive but I would hope each bill could stand on its own. Your cooperation is appreciated. Thank you.

John L. Sturgeon

RECEIVED

April 14, 1992

Representative Cliff Davidson
Chair, House Resource Committee

Dear Representative MacLean:

We at Alaska Travel Adventures, Inc. would like to register our support for the proposed land exchange between the State and the Cape Fox Corporation.

Through agreements with Cape Fox Corporation, Alaska Travel Adventures, Inc. has operated a canoe tour at Harriet Hunt Lake during the past five years. In 1991 we serviced roughly 10,000 Alaska Visitors. We firmly believe the secluded, scenic location afforded us by Harriet Hunt Lake is a large reason for the success of our program. There are very few areas that provide accessibility and attractiveness of Harriet Hunt Lake. Passengers taking the tour rate it very high and are pleased with this site.

The lake is not only an excellent spot for tours such as ours, but is also a natural spot for accessible recreation use. Aside from boating, the area offers trout fishing, a large population of deer, and excellent areas for hiking. It has been a popular local recreation location for many years.

We believe that the Harriet Hunt portion of the proposed exchange is an asset the State would be very fortunate to obtain and Alaska recreation users would be well served. We urge you to proceed with this exchange.

Sincerely,

Robert M. Dindinger
President

cc: House Resource Committee

AlaskA
TRAVEL ADVENTURES

9085 Glacier Highway, Suite 204, Juneau, Alaska 99801 (907) 789-0052 Fax: (907) 789-1749

Tongass Conservation Society

News

4/21/92 For immediate release
Contact: Dave Katz, 463-3366 or 586-1841
Marna Schwartz at Alaska Environmental Lobby, 463-3366

Environmentalists go to court to stop trees-for-stumps trade

Tongass Conservation Society today filed an appeal in Juneau Superior Court to overturn an April 6, 1992 decision of the Alaska Department of Natural Resources trading old growth forest for clearcut land near Ketchikan. TCS is an environmental public interest group located in Ketchikan.

DNR's decision would give Cape Fox Corporation 2,335 acres of pristine, old growth forest owned by the state in the Leask Lakes area, north of Ketchikan. In return, the state would get 4,336 acres of nearby clearcut and lower value land owned by the native corporation. Over 1,000 acres of the Cape Fox lands have been clearcut.

The heart of the Cape Fox lands, the White River Valley, has been heavily logged by the corporation, and is now dominated by a massive, 2-1/2 mile-long clearcut. Under DNR's decision, the state would inherit the White River, and Cape Fox would heavily log the now-pristine Leask Lakes lands, clearcutting over 1,300 acres of the best timber. DNR's stated rationale for proceeding with the trade that Ketchikan residents can recreate on the logging roads Cape Fox leaves behind.

"This trade of the public's forest for private clearcuts is nothing less than a ripoff of Alaska's lands," said TCS spokesperson Dave Katz. "DNR is setting the banquet table for every private corporation hungry to load up on prime state resources. What's really frightening is DNR Commissioner Heinze's Senate Resources testimony that he wants to make trades like this his menu for the future. It's cut-and-run forest devastation at its worst."

He continued, "Not only are we accepting 1,000 acres of Cape Fox clearcuts, at the same time we're actually giving them 1,000 acres of our own lands for just $72 an acre. That's worse than a bad deal. It's a travesty."

According to Katz, more than half of those testifying at public hearings in Ketchikan opposed the trade. "There is no consensus of support for this trade in Ketchikan," he said.

"Now DNR is trying to muscle this trade through the legislature this session, before anyone catches on to what a bad deal it really is. The agency was supposed to have a final appraisal over two months ago. They've been through two review appraisers, and they still don't have a final appraisal on these lands.

-MORE-

P.O. Box 3377 • Ketchikan, AK 99901 • 907-225-5TCS

"This trees-for-stumps deal is a scam, and DNR is violating the state's land trade law."

TCS is represented in its appeal by the Sierra Club Legal Defense Fund. According to SCLDF attorney Tom Waldo, the appeal alleges numerous procedural and substantive problems.
"In trying to gain legislative approval for the trade this session," he said, "DNR cut procedural corners and violated public safeguards. DNR has given little more than a cursory analysis to the environmental and economic impacts of the trade. The public has yet to see a final, complete appraisal.

"The appeal alleges that the timber cruise on which the appraisal rests was marred by a conflict of interest, in that the company cruising the timber was also Cape Fox's long-time timber buyer."

The final exchange agreement calls for Cape Fox to upgrade its logging roads to public access standards. This $2 million-plus project was identified by DNR, which will trade state timber to pay for it -- bypassing normal state capital budgeting and procurement procedures. The cost of the road project was used to balance the books on the trade, by subtracting the cost of the road upgrade from the higher value of the state's lands.

According to Waldo, the appeal alleges that this approach is also fundamentally flawed. "We believe the law contemplates cash -- not capital projects like roads -- to equalize values in land trades," he said.

A coalition of environmental groups is opposing the trade, including the Alaska Environmental Lobby and the Southeast Alaska Conservation Council, as well as TCS. Recently, AEL distributed wooden nickels to legislators, symbolizing the trade's lack of public value.

"This trade would declare open season on Alaska's public lands," said John Sisk, SEACC executive director. Marna Schwartz of AEL concurs. "This would remove any incentive for private corporations to manage their land sustainably," she said. "In fact, it would reward unsustainable management."

-END-

Quality black and white photos available

Thomas S. Waldo
SIERRA CLUB LEGAL DEFENSE FUND, INC.
325 Fourth Street
Juneau, Alaska 99801
(907)586-2751

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

TONGASS CONSERVATION SOCIETY, Appellant, v. STATE OF ALASKA, DEPARTMENT OF NATURAL RESOURCES, Appellee.	Case No. _____ STATEMENT OF POINTS ON APPEAL

Appellant Tongass Conservation Society intends to rely on the following points on appeal:

1. The agency relied on an appraisal that was incomplete at the time the decision was executed and at the time the notice of proposed exchange was issued, in violation of AS 38.50.020, AS 38.50.130 and 11 AAC 67.240.

2. The agency relied on the acquisition of road upgrades to equalize the values of the state land and Cape Fox Corporation land, in violation of AS 36.30 and 11 AAC 67.260.

3. The agency failed to consider the alternatives of selling or leasing the state land or interest in land and did not discuss those alternatives in the report on proposed exchange, in violation of AS 38.50.100 and AS 38.50.130.

4. The agency did not include an adequate discussion of the social, economic and environmental impacts of the exchange in the report on proposed exchange, in violation of AS 38.50.130.

5. The agency abused its discretion by relying on an incomplete appraisal that is marred by a conflict of interest in the timber cruise, improperly discounts open space land values, and fails to adequately consider public interest use values.

6. The agency failed to include a map of the tracts proposed for exchange in the notice published in the newspapers, in violation of AS 38.50.110.

7. The agency failed to classify the land or to complete a regional or site-specific land use plan for the land proposed for exchange, in violation of AS 38.04.065. Any regulations permitting the agency to execute land exchanges without complying with these requirements are invalid as inconsistent with the statute.

Respectfully submitted,

SIERRA CLUB LEGAL DEFENSE FUND, INC.
Attorneys for Appellant

DATED: April 21, 1992

By _____
Thomas S. Waldo

Tongass Conservation Society

HEARING BEFORE SENATE FINANCE COMMITTEE 4/27/92 - 9AM

PLEASE OPPOSE SB 465 & HB 578 (LEASK LAKES LAND TRADE): DON'T TRADE OUR TREES FOR THEIR STUMPS!

SB 465 and HB 578 would give legislative approval to DNR's proposed trade of 2,300 acres of prime, undeveloped state forest land (Leask Lakes) for 4,300 acres of heavily-logged private lands (White River), near Ketchikan. This proposal offers you a *bad deal*, developed by a *bad process*, and establishing a *bad precedent* we will doubly regret when lines form for similar deals in the future.

BAD DEAL

In order to make this trade look like a fair deal for the state, DNR resorted to "creative accounting." For example:

- DNR assigned almost 1000 acres of the state lands in the proposed trade an absurdly low value of *only $72 per acre!* No land anywhere in Alaska sells for that low a price.
- DNR used *an excessive 12% discount* rate to artificially lower the value of the Leask Lakes land.
- DNR vastly understated the impact to fish and wildlife from logging the pristine Leask Lakes land. The Alaska Department of Fish and Game predicts *a 71% drop in deer populations on the Leask Lakes trade lands* if the trade goes through.
- DNR vastly overstated the recreation value of the White River clearcuts. *More than half the people testifying in Ketchikan opposed this trade!*

BAD PROCESS

Alaska law requires DNR to propose land trades only after a professional appraisal considers the values of the tracts. Despite this law, DNR went to the public with a draft appraisal its own reviewers rejected as "incomprehensible." *DNR has still not presented either the public or the Legislature with a completed, certified appraisal.* DNR also proposes to violate the law by trading state-owned timber for road construction by the private landowner -- bypassing the state's timber sales and road construction bidding processes.

BAD PRECEDENT

In Southeast Alaska alone, there are over 500,000 acres of private timberlands, most of which have been clearcut over the last ten years -- without consideration to sustained yield. *If this proposed land trade goes through, all other state lands will be fair bait for similar trades and the public will be left with a legacy of stumps.*

KETCHIKAN GATEWAY BOROUGH
Office of the Borough Manager
344 Front Street
Ketchikan, Alaska 99901
(907) 228-6625

April 24, 1992

Representative Cliff Davidson
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Representative Davidson:

RE: HB 578

Thank you for the opportunity for the Borough to visit with you yesterday concerning the proposed State/Cape Fox Land Exchange. You asked what the Ketchikan community will receive out of the proposed land exchange. The following represents a summation of the public benefits:

1. When the trade is approved, Cape Fox Corporation will get 2,335 acres of land at Leask Lakes, but the public will get 4,366 acres in the White River drainage, the Harriet Hunt Lake area, and the Talbot Lake area.

2. Cape Fox Corporation will get about 40 million board feet of timber. The public will get about 38 million board feet of timber.

3. The public will get more than 11 miles of recreation roads. This is an important and significant increase of roads in the Borough.

4. The public will get over five miles of ocean-front and lake-front property that has commercial, residential and recreational value.

5. The public will get over seven miles of river-front property on the White River with no loss of river-front on Leask Creek.

SAD:Projects\LandExch\Davidson

6. The public will get access to the White River, a wide, low-gradient river with high recreation value.

7. This trade will protect the important fish spawning and rearing areas of the White River.

8. The harvested area in the White River (about 24%) was not in the original trade proposal from Cape Fox. The Borough asked for that parcel for long-term recreation land management purposes.

I hope you will find this information useful. The Borough appreciates your commitment to scheduling HB 578 for a hearing before the Senate Resources Committee. If you find that there are other questions or issues that you would like to have addressed, please let me know.

Sincerely,

David G. Crow
Borough Manager

DGC/GBM/JMF

SAD:Projects\Landexch\Davidson

RECEIVED APR 23 '92

20 1971-1991

Alaska Center for the Environment

519 West 8th Ave. #201 • Anchorage, Alaska 99501 • (907) 274-3621

April 20,1992

Rep. Cliff Davidson
Alaska State Legislature
P.O.Box V (MS 3100)
Juneau, AK 99811

Re: Proposed Leask Lakes Land Exchange

Dear Representative Cliff Davidson:

The Alaska Center for the Environment would like to express its strong opposition to legislation (SB 465/HB 578) that would approve the proposed Leask Lakes land exchange with the Cape Fox Corporation. This trade certainly provides very substantial benefits to the corporation, but it is just as clearly not in the state's best interest.

The State of Alaska would trade important old growth habitat for lands that have been heavily clearcut. These lands have not only lower commercial timber value but lower fish and wildlife and recreational values as well. ADF&G has said both that species diversity is substantially greater at Leask Lakes than at White River, and that logging Leask Lakes could result in a 68% reduction in deer numbers in the area. Additionally, since unroaded recreation opportunities will become increasingly scarce in Southeast in future years they should be protected, not lost.

We hope you will vote "no" on this legislation, which is not only a bad deal in itself for Alaskans, but sets a dangerous precedent favoring individual corporate economic interests over the welfare of the general public.

Sincerely,

Cliff

Cliff Eames
Issues Director

Marine Adventure Sailing Tours

Senators
Alaska State Legislature
Box V
Juneau, Alaska 99811

April 30, 1992

Dear Senators:

I understand that the Cape Fox land trade (SB 465) is moving through the legislature. Now that the bill is in rules and may be before you soon, I am spurred to write and tell you that I oppose the trade.

I operate a charter business and use the area in spring and fall. Already the clear-cutting prompts remarks from my clients about how irresponsible we are to cut down the forests we depend on for our tourist trade. The "golden goose" so-to-speak. This area is the first thing many tourists see when they enter Alaska and it gives them their first and lasting impression of Alaska and Alaskans. It doesn't take a big study to know that folks who visit here do so because they want to see among other things trees in the upright position. In my business and many like it, we sell the opportunity to see the natural and pristine beauty of the forest. We do this many times each season so the forest still produces for our economy. People come here and pay me to show them what they have lost not a bunch of roads running through a stump forest. They can see that at home. Alaska is different and I hope it stays that way.

Now that many of you will be running for office this fall. I'm sure that if asked, you will say that you are for "responsible development" or "environmentally sound" development. Please show your voters that you mean it and vote against SB 465, the Cape Fox land trade.

Thank you for your consideration.

Sincerely Yours,

Andrew M. Spear

Andrew M. Spear

945 Fritz Cove Road, Juneau, Alaska 99801 (907) 789-0919

Tongass Conservation Society

Legal issues surrounding SB 465

SB 465 has just passed the Senate and will be moving to the House. SB 465 (HB 578) ratifies a land trade between the state and Cape Fox Corporation. Cape Fox is a village corporation located outside Ketchikan. Cape Fox wants to trade land it has logged, plus other land of lower value, to the state. In return, the state would give Cape Fox prime forest land, high in recreation, habitat, and tourism value, which the corporation would then log. DNR has approved the trade. AS 38.50 requires legislative ratification of the trade before DNR can finalize the deal.

1. Present litigation.

Tongass Conservation Society has appealed DNR's decision in Juneau superior court.

The appeal alleges violations of both process and substance in DNR's decision. Most violations are of AS 38.50, the state's land trade law. (Please see page 2 for a summary of appeal issues.)

2. Further litigation anticipated; new Senate Rules CS.

A Senate Rules CS amended the bill. The citizens of the Ketchikan Gateway Borough will decide by referendum whether to approve this legislative appropriation. The amendment has a severability clause: if the citizens vote the trade down, and a judge finds the referendum illegal, the trade stands. No other Senate Committee has examined this amendment.

3. Constitutional issues.

An attorney familiar with the trade has written an article on the public trust doctrine in Alaska to be published in the University of Oregon's Journal of Environmental Law and Litigation. The article mentions the proposed trade, questioning its constitutionality and urging close judicial scrutiny.

P.O. Box 3377 • Ketchikan, AK 99901 • 907-225-5TCS

TONGASS SPORTFISHING ASSOCIATION

P.O. Box 5898, Ketchikan, AK (907) 247-2427

The Honorable Cliff Davidson
Chairman, House Resources Committee
Fax: 465-3444, Ph: 465-2487

The following position was submitted to D.N.R. by the Tongass Sportfishing Association during the public comment period for the Leask Lakes land trade. Our position on the trade has remained essentially the same. We still question the objectivity and methods used in the "value for value" assessment and doubt that the goal of "roaded recreation" will be achieved given the finances and powers of the State and Borough. The highest and best use of the Leask Lakes area lies in its recreational and habitat value. Recent U.S. Forest Service proposals to improve access to this area are vastly superior to what is proposed in this trade.

Thank you for your consideration of this issue.

Sincerely,

Jack Lee, Vice-Chairman,
Tongass Sportfishing Association,
Chapter 573 of Trout Unlimited

TONGASS SPORTFISHING ASSOCIATION

PO Box 5898, Ketchikan, AK (907) 247-2427

Andy Pekovitch
Division of Land
Alaska Dept. of Natural Resources
Suite 400
Juneau, Ak. 99801

This is to restate Tongass Sportfishing Associations opposition to the proposed Leask Lakes land trade. Our previous opposition centered on the recreation and habitat value of the Leask Lakes area. We did not feel that the trade adequately considered these values and did not consider all possible trade scenarios and options to further open up the Leask Lakes area for recreation.

The trade proposal as it now stands does nothing to answer any of our previous concerns. Two more concerns have been raised in addition, however. The first is with the objectivity and accuracy of the assessment of the value of the two parcels. The "value for value" rating given to this trade leaves much in question as to the equity of this trade to the people of Ketchikan and the State.

We also have grave doubts about the goal of "roaded recreation" ever being attained in this trade proposal as it stands. Neither the State nor the local government have the resources to upgrade or maintain the road, especially given that Cape Fox will not be finishing the roads with D-1, (crushed rock) when they complete logging. This will leave us with an unusable logging road to an undeveloped area with no recreation facilities. Essentially a road to a clearcut.

For these reasons, Tongass Sportfishing Association does not support the proposed Leask Lakes land trade.

Sincerely,

Jack Lee, Vice-Chair,
Tongass Sportfishing Assoc.

RECEIVED MAR 9 1992

David Hoeft
764 E. Ft. Higgins Rd
Ketchikan, AK 99901

Representative Cliff Davidson
Chair House Resources Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Rep. Davidson,

I am writing to you in order to express my strong opposition to the proposed land swap involving the White River- Leask Lakes areas near Ketchikan. This trade seems to be a bad idea in every way to me; giving up an area of scenic beauty, with prime old-growth stands of trees, watersheds, and wildlife for a barren, blasted moonscape that is good only for driving through on the way to somewhere else. I have hiked for rather, tried to hike through that cut-over area and it is nearly useless recreationally, whatever supporters of the trade may say. Once Cape Fox has had its way with the Leask Lakes area there is no way it will be worth getting back, once clearcut it will only be an eyesore like the White River clearcuts are, and all the timber torn off of it will have only delayed the day when Cape Fox Corporation will have to give up its rape and run logging techniques.

Please don't allow this valuable (in so many ways) resource to be lost or squandered for the short term gain of a few dollars or a few short term jobs, the Leask Lakes area will be worth a lot more, to a lot more people, for a lot longer time, if it is developed and used wisely and sustainably.

Sincerely yours,

David Hoeft