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Chapter 66, and the terms of the grant or contract.

(b) The Legislature is under the obligation when performing functions related to the Trust to do so as provided in Chapter 66, including without limitation,

(i) when exercising any discretion under Chapter 66 pertaining to the Trust, to do so properly as provided in Chapter 66; and

(ii) appropriating Trust Funds solely for Trust Purposes properly as provided in Chapter 66, unless an excess is properly determined to exist under Chapter 66.

(c) The Governor and his or her Administration is under the obligation when performing functions related to the Trust to do so as provided in Chapter 66, including without limitation,

(i) when exercising any discretion under Chapter 66 pertaining to the Trust, to do so properly as provided in Chapter 66;

(ii) assuring that Trust Funds are spent solely for Trust purposes as provided for in Chapter 66, unless an excess is properly determined to exist under Chapter 66; and

(iii) assuring that grantees of and contractors being paid with Trust Funds spend Trust Funds in accordance with Chapter 66, and the terms of the grant or contract.

2. Sharing of Information. (a) Except as provided under Subsection (c), the parties agree that the Trust Authority is entitled to receive at its request all information in the State's possession or control relevant to:

(i) the preparation, revision, or amendment of the integrated comprehensive mental health program plan;

(ii) the planning of expenditures from the Mental Health Trust Account; and

(iii) the implementation of the integrated comprehensive system of care established under the Enabling Act, as determined by the plan.

(b) Information under (a) of this Section includes information that is confidential under state and federal law. To the extent that information provided under this Section is confidential, its confidentiality shall be so stated and provided subject to appropriate safeguards regarding maintenance of confidentiality.

(c) If the State asserts that disclosure of information requested by the Trust Authority is prohibited by law or otherwise need not be made, it shall provide the Trust Authority with the identity of the source and a description of the nature of the information withheld, and the Trust Authority may seek appropriate judicial relief to compel disclosure of the information.

3. Taxation of Trust Land. The parties agree that Trust Land is not subject to general taxation except that a private leasehold, contract, or other interest in the property is taxable to the extent of that interest.

4. Management of Other State Land. The parties agree that Reconstituted Trust Lands shall be treated as private land for purposes of the management of other State land, including without limitation, entitlements to preference rights and buffer zones.

5. Law Applicable to Management of Trust Lands. (a) Except for the notice required under AS 38.05.945 (b) and (c), the parties agree that Reconstituted Trust Land shall be managed by the Trust Authority free from all State laws that apply only to the sale, encumbrance, development or use of State lands not held in trust.

(b) If a claim is made challenging the validity of subsection (a), the State agrees to defend its validity on all appropriate grounds, including the ground that enforcement of the claim constitutes impairment of Plaintiffs' and Beneficiaries' contract rights under this Settlement Agreement.

6. Access to Trust Land. The parties agree that the State will reserve without charge legal rights-of-ways and easements for access and for utility services to each parcel of Reconstituted Trust Land. Consistent with state and federal law, a right-of-way or easement shall be located to assure adequate and feasible access for the purposes for which the right-of-way or easement is intended. Nothing in this Section requires the State to provide access across non-State land.

7. State Infrastructure on Trust Lands. The State may not exclude infrastructure or financial support to the Trust on the basis that such infrastructure or financial support would benefit Trust Land.

8. Compliance With Chapter 66 and this Settlement Agreement Is a Defense. In any action by the Beneficiaries in which it is alleged that any State action is inconsistent with the requirements of the Enabling Act, it is a complete and total

defense that the State is acting consistently with Chapter 66 and this Settlement Agreement.

9. State Amendment of Selection Priorities. The parties agree that timely conveyance of the Trust's remaining land entitlement under the Enabling Act is critical to the Trust. Accordingly, the State will provide the Plaintiffs with a complete listing of pending mental health selections and its analysis of selection conflicts, if any. The Plaintiffs will prioritize the remaining mental health selections and provide this listing to the State which shall incorporate such prioritization in the annual conveyance priority list filing with BLM. The State shall consult with the Plaintiffs when it determines the appropriate ranking of the mental health selections among the other State conveyance priorities. In those cases where mental health selections and general or community grant selections are coexistent: (1) the State and Plaintiffs will resolve the conflicts in a manner which ensures future Trust or State ownership, and (2) when requested by Plaintiffs, the State shall resolve conflicts in favor of the Trust.

10. Competing Native Allotments. (a) The State and the Plaintiffs support the prompt adjudication and approval of valid Native allotment applications. The State shall determine whether to challenge the validity of any Native allotment application on Original Trust Lands, Hypothecated Lands, and other State lands identified as Substitute Land or Proposed Substitute Land. The State shall notify Plaintiffs of the State's determinations, which shall be final and not reviewable by the court under Sec-

tions 55(h) and 57 of Chapter 66.

(b) Lands that have been approved for conveyance or patent under the Enabling Act that are determined to be subject to valid Native Allotment applications shall be treated as Non-Reconstituted Trust Lands for which compensation shall be made pursuant to Section 55 of Chapter 66 and Article III of this Settlement Agreement as follows:

(i) To the extent that remaining selections under the Enabling Act will result in conveyance of lands that are not as valuable as the Native Allotment Land, the State will compensate the Trust in the same manner as for Non-Reconstituted Trust Lands under Chapter 66 and this Settlement Agreement with land as comparable as practicable to the Native Allotment land, and equal in fair market value to the difference in fair market value between the land most likely to be conveyed and the Native Allotment land.

(ii) Since the actual conveyance by BLM of lands to replace the Native Allotment land may not occur for some time, the Plaintiffs and the State shall jointly determine those lands that are most likely to be conveyed under the Enabling Act instead of the Native Allotment land.

(iii) This Section only applies to Native Allotment Applications that are shown on the BLM Master Title Plats prior to conveyance of the relevant land to the Trust Authority. After such time, the Trust Authority shall be responsible for handling Native Allotment Applica-

tion conflicts.

11. Funding of Mental Health Program from General Fund. The parties agree that only when Trust Income exceeds the amount that is reasonably necessary to meet the projected operating and capital expenses of the integrated comprehensive mental health program that any Trust Funds may be transferred to the general fund. In the event that Trust Income is insufficient to fund the necessary operating and capital expenses of the integrated comprehensive mental health program, appropriations may be made from the general fund for that purpose. Nothing in Chapter 66 or this Settlement Agreement is intended to change any obligation the State may have under state and federal law to provide, from general fund revenue sources, for the health and welfare of Beneficiaries.

## ARTICLE V.
## INTERIM OBLIGATIONS TO THE TRUST AND THE BENEFICIARIES.

The parties recognize that Chapter 66 imposes certain interim obligations and responsibilities upon the State and Plaintiffs during the period of implementing the Trust reconstitution. In recognition of those interim obligations, the parties agree:

1. Plaintiffs Will Be Funded by the State. (a) Plaintiffs are entitled to receive from the State sufficient funds to adequately perform the responsibilities imposed upon the Plaintiffs in the reconstitution process under Chapter 66 and this Settlement Agreement. As a general principle, the State and the Plaintiffs shall receive equal funding for equal work effort to be performed under Chapter 66 and this Settlement Agreement. Equal funding

for equal work effort to be performed shall take into consideration the different types of work, the different amounts of work, the different costs associated with different types of personnel employed to perform the work, and similar considerations. The intent of this provision is to ensure that neither party obtains a financial advantage over the other. The parties recognize, however, that the scope of the work performed by one party may differ significantly from that performed by the other, and that different amounts of funds may be provided to the parties to reflect this fact.

(b) In the event of a dispute as to the amount of funding required for the Plaintiffs to accomplish their responsibilities under Chapter 66, the court will resolve the dispute under Section 57 of Chapter 66 and this Settlement Agreement.

(c) The parties recognize that the there may be some delay in obtaining approval of the settlement embodied in Chapter 66 and this Settlement Agreement, but that work to implement the settlement must begin immediately to ensure that the Trust is reconstituted in a timely manner. Funding for such work will be provided in accordance with this subsection. Before October 1, the parties will meet to seek agreement on funding for the following fiscal year. If agreement is not reached, or if the legislature appropriates less than the agreed upon amount, the Plaintiffs may apply to the court (1) to determine whether the amount appropriated is reasonable to permit Plaintiffs to perform their responsibilities under the settlement embodied in Chapter 66 and the Settlement Agreement, and (2) if it is not, to deter-

mine the appropriate remedy. Nothing in this subsection precludes the State from arguing that the amount appropriated is reasonable in light of all the circumstances. This Subsection is effective as of the date of this Settlement Agreement.

2. Interim Management of Original Trust Lands. Until such time as a conveyance to the Trust Authority has been completed with respect to each parcel of Original Trust Land which may be conveyed to the Trust under Chapter 66 and this Settlement Agreement:

(i) the State and the Plaintiffs may agree to sell, lease, exchange, or otherwise enter into transactions with respect to parcels of such land or any interest therein, provided, however, that prior to completing any such transaction, any notice required under AS 38.05.945 shall be given;

(ii) any transaction with respect to such parcel requires the written consent of the Plaintiffs, and any transaction consummated without such consent is void;

(iii) all revenue received beginning July 1, 1991 from each such parcel shall be separately accounted for, and all such revenue from each parcel ultimately conveyed to the Trust shall be deposited into the Mental Health Trust Fund or Mental Health Trust Income Account as either corpus or income pursuant to AS 13.38.010 et seq.; and

(iv) the State, after consultation with Plaintiffs, at its expense, shall take all practical steps to protect such

Original Trust Lands from trespass, damage, and waste to the same extent that it takes such steps with respect to State general grant land given the highest protection (For example, unless otherwise agreed to by the parties, and prior to conveying Original Trust Land to the Trust, the State shall undertake trespass enforcement actions. As another example, the State and Plaintiffs shall mutually agree upon the appropriate category for forest fire management purposes for Original Trust Land).

3. Management of Land After Conveyance. After a parcel of Original Trust Land or Substitute Land has been conveyed to the Trust Authority as provided in Article III, Section 15 hereof, all management authority for that parcel is transferred to the Trust Authority. After an exchange has been completed with respect to a parcel of Non-Reconstituted Trust Land for which the Trust is not to receive title, all management authority for that parcel of Non-Reconstituted Trust Land is transferred to the State. Nothing herein shall be deemed to prevent the Trust Authority from entering into one or more agreements with the State to manage Trust Lands after management authority has been transferred to the Trust Authority.

4. Land Closed to Mineral Entry. Until such time as a parcel of Original Trust Land has been conveyed to the Trust Authority, or an exchange has taken place with respect to such parcel of Original Trust Land, such parcels of Original Trust Land shall remain closed to mineral entry under State law, and

any interests claimed or granted in contravention of this Section are void.

5. Management of Hypothecated Land. Until such time as a conveyance to the Trust Authority has been completed with respect to each parcel of Hypothecated Land or the parcel has been released from hypothecation:

(i) any transaction with respect to such parcel will be subject to a finding that it is consistent with hypothecation of the parcel, which will include that no substantial devaluation of the parcel for purposes of Trust ownership will result; the draft finding will be given to the Plaintiffs at the time notice of the proposed action is circulated for agency review;

(ii) the State, at its expense, will take all practical steps to protect Hypothecated Lands from damage to the same extent that it takes such steps with respect to State general grant land; and

(iii) any disputes with respect to the management of Hypothecated Lands, including application of this section, shall be resolved by the court under Section 57 of Chapter 66.

6. Adherence to Settlement Agreement. The Commissioner shall ensure adherence to the provisions of Article V, Sections 2, 5, and 7 of this Settlement Agreement, including but not limited to noting to the record the status of Hypothecated Land and promulgating a Department Order in the form attached hereto as Exhibit I. The Hypothecated Lands List shall also be recorded

by the State at its expense. This Section is effective as of the date of this Settlement Agreement.

7. Management of Proposed Substitute Land. Proposed Substitute Land shall be segregated from entry or disposal, including closure to mineral entry, unless otherwise mutually agreed to by the parties.

## ARTICLE VI.
## EXERCISE OF REMEDIES FOR BREACH OR DEFAULT.

1. Remedies for Breach of Responsibilities and Obligations. The parties agree that each provision of Chapter 66 and this Settlement Agreement are of material importance to this settlement. In the event of:

(i) a breach by the State or Plaintiffs of any provision, term, or covenant of this Settlement Agreement;

(ii) a failure of a party or the Trust Authority to comply with any applicable provision of Chapter 66 or this Settlement Agreement; or

(iii) an amendment of any provision of Chapter 66 (or other law) that materially diminishes responsibilities and obligations of the State provided in Chapter 66 and this Settlement Agreement,

the parties shall be entitled to pursue, in addition to any specific remedies provided herein for breach of particular terms, covenants, or conditions, any remedies that may be available to them under this Settlement Agreement or otherwise in law or equity, including declaratory relief or injunctive relief and including specific performance of their rights and obligations

hereunder and under Chapter 66.

2. Remedies Are Not Exclusive and May Be Pursued in Any Order. Except as otherwise specifically provided, none of the remedies provided in this Settlement Agreement for breach or other inability to comply is exclusive, and Plaintiffs or the State may pursue any one or more remedies provided in this Settlement Agreement in any order, as may be applicable.

3. No Waiver of Remedies by Delay or Omission. A delay or omission by the Plaintiffs or the State in exercising any right or power arising from any breach of this Agreement does not prevent the Plaintiffs or the State from exercising that right or power if the breach continues. A waiver of breach, whether full or partial, by the Plaintiffs or the State, may not be taken to extend to any subsequent breach. The giving, taking, or enforcement of any particular security does not operate to prejudice, waive, or affect any other security, or any rights, powers or remedies exercised under it.

4. No Waiver of Remedies. No course of dealing on the part of the Plaintiffs or the State or any delay or failure on the part of Plaintiffs or the State to exercise any right is a waiver of such right or otherwise prejudices Plaintiffs' or the State's rights, powers, and remedies.

5. Court May Execute Instruments Necessary to Implement Orders. In the event that the State or the Plaintiffs fail to comply with any order of a court hereunder, the court may execute and deliver to Plaintiffs or the State, respectively, any instrument or document necessary or desirable to implement such order.

6. Who Can Exercise Rights and Remedies. With the exception of rights and remedies exercisable by the State, rights and remedies provided for herein are exercisable by the Plaintiffs, the Trust Authority, or the Beneficiaries of the Trust, or any combination thereof, as follows:

(a) Rights and remedies pertaining to the reconstitution of the Trust are exercisable only by the Plaintiffs now or hereafter executing this Settlement Agreement through counsel, until notice of reconstitution is given under Article III, Section 22, of this Settlement Agreement, except for malfeasance or misfeasance on the part of the Plaintiffs, in which event the Trust Authority, the non-signing Plaintiffs, or other Beneficiaries of the Trust may exercise such rights or remedies upon order of the court under Section 57 of Chapter 66.

(b) After notice of reconstitution of the Trust pursuant to Article III, Section 22, of this Settlement Agreement, any remaining responsibilities assigned to the Plaintiffs under this Settlement Agreement are transferred to the Trust Authority and the Trust Authority may exercise rights and remedies pertaining to the reconstitution of the Trust.

(c) Until the Trust Authority is appointed and notifies the Plaintiffs in writing that it is ready to assume its responsibilities hereunder, the Plaintiffs may exercise any rights and remedies pertaining to the Trust Authority under this Settlement Agreement. After the Trust Authority is appointed and notifies the Plaintiffs in writing that it is ready to assume its respon-

sibilities hereunder, the Trust Authority may exercise any rights and remedies pertaining to its responsibilities.

(d) In the event the Trust Authority fails or refuses to exercise any rights or remedies herein in appropriate circumstances, the Beneficiaries, including the Plaintiffs, may exercise any such rights and remedies. The Beneficiaries may otherwise exercise any remedies or rights provided herein under the circumstances beneficiaries may ordinarily enforce the terms of a trust, subject to the rights of the State, the Trust Authority, the Plaintiffs, or any combination thereof, to defend on the grounds of res judicata, collateral estoppel, or any other available legal or equitable defenses.

**ARTICLE VII.**
**INTERPRETATION.**

Both the State and the Plaintiffs participated equally through counsel in the drafting of this Settlement Agreement and agree that the canon of construction that ambiguities in an agreement be construed against the drafter does not apply.

**ARTICLE VIII.**
**AUTHORITY OF COUNSEL FOR PLAINTIFFS TO IMPLEMENT RECONSTITUTION OF THE TRUST.**

Counsel of record for the Plaintiffs shall designate one of their number as lead counsel and provide that designation to the Attorney General and the Commissioner. Plaintiffs warrant to the State that the designation of lead counsel confers upon lead counsel all authority necessary to implement the provisions of this Settlement Agreement relating to the reconstitution of the Trust under Chapter 66 and this Settlement Agreement on behalf of

all the Beneficiaries, and to sign documents on behalf of and binding upon all Beneficiaries. Plaintiffs' counsel may change the designation of lead counsel at any time, but such a change in designation will not become effective until served upon the Attorney General and the Commissioner. If lead counsel ceases to represent at least one Plaintiff, counsel for Plaintiffs shall immediately designate a new lead counsel and serve that designation on the Attorney General and the Commissioner. Lead counsel may designate one or more co-counsel to exercise specific authority under this Section and shall notify the Attorney General and the Commissioner of such designation.

**ARTICLE IX.**
**MODIFICATION; AMENDMENT.**

1. Settlement Agreement Incorporated into Consent Decree. The terms of this Settlement Agreement will be incorporated into a consent decree of a prospective nature that is binding upon the State, the Plaintiffs, and the Beneficiaries.

2. Modification in Form of Relief from Judgment. (a) The parties acknowledge that a change in circumstances may occur that would thwart or hinder the accomplishment of the purposes of the parties in entering into this Settlement Agreement by strict adherence to one or more of the specific provisions hereof. Recognizing, however, that the parties are releasing claims and defenses in exchange for the resolution of this dispute as provided in Chapter 66 and this Settlement Agreement, and that by releasing such claims and defenses, the parties may be prejudiced by any relief from the judgment incorporating Chapter 66 and this Settlement Agreement, the parties agree that nothing less than a

clear showing of new and unforeseen conditions that thwart or hinder accomplishment of the settlement may give rise to a request by only one party to this Settlement Agreement to be relieved from judgment that in any way modifies:

(i) the compensation to the Trust;

(ii) the obligations of the State with respect to providing services to the Beneficiaries from Trust Income under Chapter 66, or

(iii) the rights of the State, the Plaintiffs, the Trust Authority, and the Beneficiaries of the Trust to fully enforce the terms hereof.

(b) Other requests to modify judgment hereunder shall be governed by Civil Rule 60.

3. Agreement to Amend Settlement Agreement Prior to Reconstitution. Amendment to this Settlement Agreement by the parties is effective only as hereinafter provided. Prior to the giving of notice under Article III, Section 22 that reconstitution of the Trust has been completed, and notice thereof having been given by publication in newspapers of general circulation throughout the State, this Settlement Agreement may be amended only upon approval by the court under such conditions as may be ordered by the court, which may include notice to the Beneficiaries under Civil Rule 23.

4. Agreement to Amend Settlement Agreement After Reconstitution. After the giving of notice under Article III, Section 22 that reconstitution of the Trust has been completed, and except as provided in Article IX, Section 2 of this Settlement Agree-

ment, this Settlement Agreement may only be amended by the court with the approval of the Trust Authority or the Beneficiaries, and notice thereof having been given by publication in newspapers of general circulation throughout the State, and upon approval by the court under such conditions as may be ordered by the court, which may include notice to the Beneficiaries under Civil Rule 23.

**ARTICLE X.**
**INDEMNIFICATION.**

(a) The State shall indemnify, defend, and hold harmless:

(i) Plaintiffs and Beneficiaries from and against any liability (excluding liability for death, bodily injury, physical property damage, or punitive damages) for entering into this Settlement Agreement or from acts or omissions in performing Plaintiffs' and Beneficiaries' responsibilities and obligations under this Settlement Agreement; and

(ii) Plaintiffs, counsel for Plaintiffs, and Beneficiaries from and against any liability (excluding punitive damages) for death, bodily injury, or physical property damage in connection with Original Trust Land, Hypothecated Land or Proposed Substitute Land and arising from the entering into or implementing of this Settlement Agreement, PROVIDED, HOWEVER, that for lands over which Plaintiffs have concurrence authority under Article V, Section 2 of this Settlement Agreement, the State and Plaintiffs' counsel take all commercially reasonable

steps to obtain a similar indemnity and adequate evidence of financial responsibility from any private party seeking to use such land, which indemnity and financial responsibility shall be primary to the State's indemnity under this subsection;

and PROVIDED, FURTHER, that the State shall not indemnify, defend, nor hold harmless Plaintiffs, counsel for Plaintiffs, or Beneficiaries under Subsection (a)(i) or (a)(ii) from any liability arising from

A. grossly negligent or reckless acts or omissions, or intentional misconduct of the Plaintiffs, counsel for Plaintiffs, Beneficiaries, or their employees and agents,

B. the improper disclosure of confidential information;

C. workers' compensation or other insurance or workplace statutes or regulations;

D. employment disputes or other alleged civil rights violations under state or federal law, including, without limitation, claims for wrongful termination, claims under 42 U.S.C. Secs. 1983, 1985, 2000(e), AS 18.80, the Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327, the Age Discrimination and Employment Act, 29 U.S.C. Secs. 621 et. seq., and the Age Discrimination Act, 42 U.S.C Secs. 6101 et. seq.; or

E. claims or demands made by the State against the

Plaintiffs, counsel for Plaintiffs, or Beneficiaries under this Settlement Agreement.

(b) The State's indemnity obligation under this Article is in excess of and will not contribute with any other insurance, indemnity, or contractual transfer of responsibility. The Plaintiffs, counsel for the Plaintiffs, and Beneficiaries shall and hereby do assign any claims and defenses they may have with respect to liability under this Article and covenant to cooperate fully in the prosecution or defense of any action with respect to liability under this Article. Plaintiffs, counsel for Plaintiffs, and the Beneficiaries shall give the State notice of any claims that may result in liability under this Article in a timely manner so as to provide the State with an opportunity to defend against such claims or actions. Failure to notify the State within 30 days of first knowledge of a claim shall relieve the State of any obligation under this Article.

(c) Except for incidents or occurrences occurring (i) prior to conveyance of Reconstituted Trust Land to the Trust by interim conveyance or patent with respect to Reconstituted Trust Land, and (ii) the giving of notice of reconstitution under Article III, Section 22 with respect to Hypothecated Land and Proposed Substitute Land, the State's obligation under this Article shall terminate upon the giving of notice of reconstitution under Article III, Section 22 of this Settlement Agreement. This Article does not survive termination of this Settlement Agreement.

**ARTICLE XI.**

**GENERAL PROVISIONS.**

1. Time. Time is of the essence in each and every provision hereof.

2. Captions. The captions to the sections in this Settlement Agreement are solely for convenience of reference and do not in any way limit, amplify, or modify the provisions hereof.

3. Severability. Except as specifically provided herein, the invalidity or unenforceability of any particular provision of this Settlement Agreement does not affect the other provisions hereof, and such provision shall be construed to most closely match the intent of such provision to the extent that it may be valid and enforceable.

4. Entire Agreement. This is the entire agreement of the parties pertaining to the subject matter hereof and supersedes all or any other prior agreements and understandings between the parties, representing full and final disposition of the pending claims in this case.

5. Dispute Resolution. In the absence of an agreement for alternate resolution of a dispute and except for disputes to be resolved under section 57 of Chapter 66 (primarily concerning implementation of the reconstitution of the Trust), any suit to enforce the terms of this Settlement Agreement must be brought in the superior court for the State of Alaska.

**ARTICLE XII.**
**SETTLEMENT OF ACTION.**

Upon approval of this Settlement Agreement by the court and the issuance of an order or decree incorporating the provisions of this Settlement Agreement as a Consent Decree,

1. This action shall be dismissed and the parties' respective rights and obligations shall be determined under this Settlement Agreement,

2. The Preliminary Injunction issued in this action on July 9, 1990 shall be dissolved,

3. The Plaintiffs will be ordered to cancel the Re-Notices of Lis Pendens filed by Plaintiffs in the form attached hereto as Exhibit J, with recording charges borne by the State, and

4. The actions described in 1 -- 3 of this Article shall be stayed until Chapter 66 becomes effective.

DATED this _____ day of April, 1992.

PLAINTIFFS:

DAVID T. WALKER, ESQ., lead counsel, and Attorney for Plaintiffs VERN T. WEISS, father and next friend of CARL WEISS, a minor child, and EARL HILLIKER, on behalf of themselves and all others similarly situated

By: _____
David T. Walker

JAMES B. GOTTSTEIN, ESQ., Attorney for Intervening Plaintiffs ALASKA MENTAL HEALTH ASSOCIATION, MARY C. NANUWAK and JOHN MARTIN on behalf of themselves and all others similarly situated

By: _____
James B. Gottstein

JEFFREY L. JESSEE, ESQ., Attorney for Intervening Plaintiffs ANITA BOSEL,

FRANCES DOULIN, SHARON GOODWIN, and GABRIEL MAYOC

By: _____
Jeffrey L. Jessee

STATE:

CHARLES E. COLE
ATTORNEY GENERAL

By: _____
Charles E. Cole

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REMARKS BY PHILIP R. VOLLAND
March 19, 1992

I have asked for this opportunity to address you for two reasons.

First, I have been exceedingly troubled of late by the look of candor of those attorneys who have pushed a purported settlement to the Mental Health Lands case in a manner that I believe deceives the public and the mental health community into believing that there is a settlement when, in fact, there likely will not be one. But, I am also here out of a sense of responsibility that I must do something constructive to end this crisis. I wish not to cast blame, but to offer solutions. Were I not to do so; were I to sit idly by and wait for my opportunity to object through the courts, I would simply allow myself and my clients to become part of the problem.

Chapter 66 does not settle the Mental Health Lands issues. Chapter 66 was a hastily and secretly negotiated deal which at first blush may have appeared as an attractive and novel solution, but which now after a year of examination is clearly doomed to failure.

Chapter 66 does not settle the Mental Health Lands case. It was so hastily conceived in the waning days of the Legislature last year that its substantial legal questions have engendered separate litigation which will prevent the proposed settlement from even being presented to the court for approval for years to come -- and that's only the beginning. The land exchange issues involved in Chapter 66 are so far reaching that even if the public intervenors fails in their legal challenge to Chapter 66, the land exchange process will be a target of litigation for decades.

Chapter 66 does not free up the million acres of land that has been held under a cloud by the court's injunction and the plaintiffs' claims to title. Rather it adds an additional four million acres of land to a pool of state land which cannot be developed, encumbered, or transferred in any way until after the years that it takes to go through the process of land exchange.

Chapter 66 does not calm the uncertain atmosphere for mineral and resource development which the Mental Health Lands case originally created. In addition to the four million acres of hypothecated land that are now subject to legal claims and cannot be developed, Chapter 66 allows the Trust to choose replacement land from <u>any</u> state land. All

this accomplishes is placing additional uncertainty on state land which might be subject to private or public use.

Chapter 66 is neither speedy nor inexpensive. The law calls for a massive and complex land exchange process which itself will take years to complete. Because Chapter 66 is not law until the settlement is approved, this process of land exchange can't even begin until years after the intervenors' litigation is resolved.

Chapter 66 does nothing to ease the funding needs of the mental health recipients in the state. The only benefits the bill appears to offer are to the lawyers and land managers who will make a profit from years of involvement in a complex and massive land exchange. If this case was really "settled" by Chapter 66, why have hundreds of thousands of dollars been spent this year on attorneys and Department of Natural Resources' representatives meeting to prepare a settlement document that is not yet even complete? If this is a true settlement of litigation, why has the Department of Law added two new attorney positions to "implement" the settlement? If this is such an easy and inexpensive solution to the land crisis, why has the Department of Natural Resources budgeted for 27 new positions next year just to map and catalog the lands that are subject to exchange?

The most troubling aspect of this needless rush into yet another Alaskan land exchange debacle is that there is a simple, easy solution already in place which would free up land for development, satisfy the interests of the mental health community, and not create a bureaucracy of layers and land managers.

All one needs to do is to look at the laws that are already on the books to see that there is an effective, easy, and quick solution to the present crisis. First, there is original Mental Health Trust Land that can be returned to the Trust. This land has only minimal or modest development potential, and everyone seems to agree that it can remain in the Trust without creating difficulty. Simply leave it there.

Secondly, Chapter 210 has been on the books for a number of years. Under Chapter 210, the Legislature allocates 6% of unrestricted general revenues each year to mental health programs. This is approximately the same level of public funds that the state has spent on these programs for decades. It is no golden parachute to mental health programs. As income to the state declines, mental

health programs will have to tighten their belts like anyone else. Just leave Chapter 210 on the books.

Finally, Chapter 66 did have one important benefit, and that was the creation of an authority for deciding allocations among the various mental health programs. Leave these provisions of Chapter 66 in place. This takes the pressure off the Legislature and the Governor to decide funding priorities among mental health programs. Simply leave these provisions of Chapter 66 in place.

I have asked myself, and other members of the public have asked me, why this shouldn't form the basis of a solution to the Mental Health Lands crisis? It seems both reasoned and reasonable. It allows resource development to move forward and addresses the fundamental concerns of the plaintiffs, and the one thing that I can say, and can say for a certainty, is that had this concept been enacted last year instead of Chapter 66, the settlement would likely have already been presented to the court for approval, would already have been approved, and the lis pendens, injunctions, and other clouds of title on the million acres of state land would already have been resolved.

I fault not the parties or the administration for the idea of trying to reconstruct the Trust. Trying to put the Trust back together again looked like a good idea at the time. But, it is now evident that all the King's men and all of the King's horses simply can't put the Trust back together again, not without endless years of litigation, endless expense, and a continued cloud of title over millions of acres of state land. The true losers in this are the unnamed plaintiffs who still search for adequate mental health services in the state and the anonymous members of the public cannot understand why a simpler, expedient solution to the mental health crisis can't be achieved.

If nothing else, let this be my personal appeal to my colleagues who are lawyers in the case, to the Governor, and to the Administration, and to the intervenors, that you be wise enough to recognize that the solution you have crafted simply will not work and not so proud as to not embrace a simpler speedier more reasoned solution.

Philip R. Volland represents H.L., M.K. and Alaska Addiction Rehabilitation Services on behalf of the subclass of chronic alcoholics who are plaintiff beneficiaries in the Weiss case.

# MENTAL HEALTH LANDS TRUST
# PROPOSED ALTERNATIVE SETTLEMENT

The Chapter 66 proposal for settlement faces a lengthy and uncertain future in the courts. It is opposed by many Alaskans. The unavoidable delay in its approval will severely limit development on 5 million acres of land when oil revenues are declining. The goal of this alternative is to reach a settlement that is acceptable to all Alaskans. This would avoid further litigation and the resulting restriction on land use and provide a basic level of funding for the Mental Health Program. Most importantly, it would not require a cash payment from the State to settle this issue.

This new proposal is a mixed land/income stream approach which incorporates the Trust Authority developed for Chapter 66.

## THE LAND

In this new proposal, like Chapter 66, nearly half of the original Trust lands will be returned to the Trust. This is the least valuable of the original lands. The Trust would take these lands subject to all third party interests such as leases or rights of way.

Unlike Chapter 66, income from this land would be placed in a cash corpus account and invested like the Permanent Fund. The income from this principal would be deposited in the Trust income account and be available each year to support the Mental Health Program. This is the mechanism used in the University of Alaska Land Trust Settlement.

## INCOME STREAM

This new proposal incorporates existing law where 6% of unrestricted general fund revenue would continue to be allocated to the Trust income account. This would provide a continuing and dependable source of funds available for the Mental Health Program. It is tied directly to overall State income.

Each year the money available to fund the Mental Health Program would include this 6% plus any earnings from the cash corpus account. Any of this money not needed to meet the necessary expenses of the Mental Health Program will be returned to the State general fund.

## TRUST MANAGEMENT

As in Chapter 66, a Trust Authority appointed by the Governor would manage the land and cash corpus account. In addition, it would make recommendations to the Governor and the Legislature on how to spend available funds.

## NONRETURNED TRUST LANDS

When the new proposal is approved, all lands owned by third parties, including Municipalities, will be immediately and permanently released from claims by the Trust. Original Trust lands which are now in Legislatively Designated Areas, such as State parks, would serve as security for the State's promise to allocate the 6%. The State would still own these lands and continue to manage them according to their designation.

## ADVANTAGES

*The main advantage is that this proposal could build a consensus leading to the fastest final resolution possible.

*Each element of this new proposal is either in existing law or has universal acceptance as part of a Trust settlement. This dramatically reduces the possibility of a long and difficult approval process.

*It eliminates any restriction on the additional 4 million acres of State land held hostage by Chapter 66.

*This new proposal will generate wealth from two sources. First, the land will be used to generate money. Then this money will be invested like the Permanent Fund and would increase over the years. It is this capacity to increase earnings over time which may make the 6% income stream acceptable to the beneficiaries despite the coming reduction in State income.

*The cash corpus will grow over time and reduce the Mental Health Programs dependence on the General Fund. The massive land driven Trust envisioned in Chapter 66 would spend all that it earns every year and could never fund the Mental Health Program.

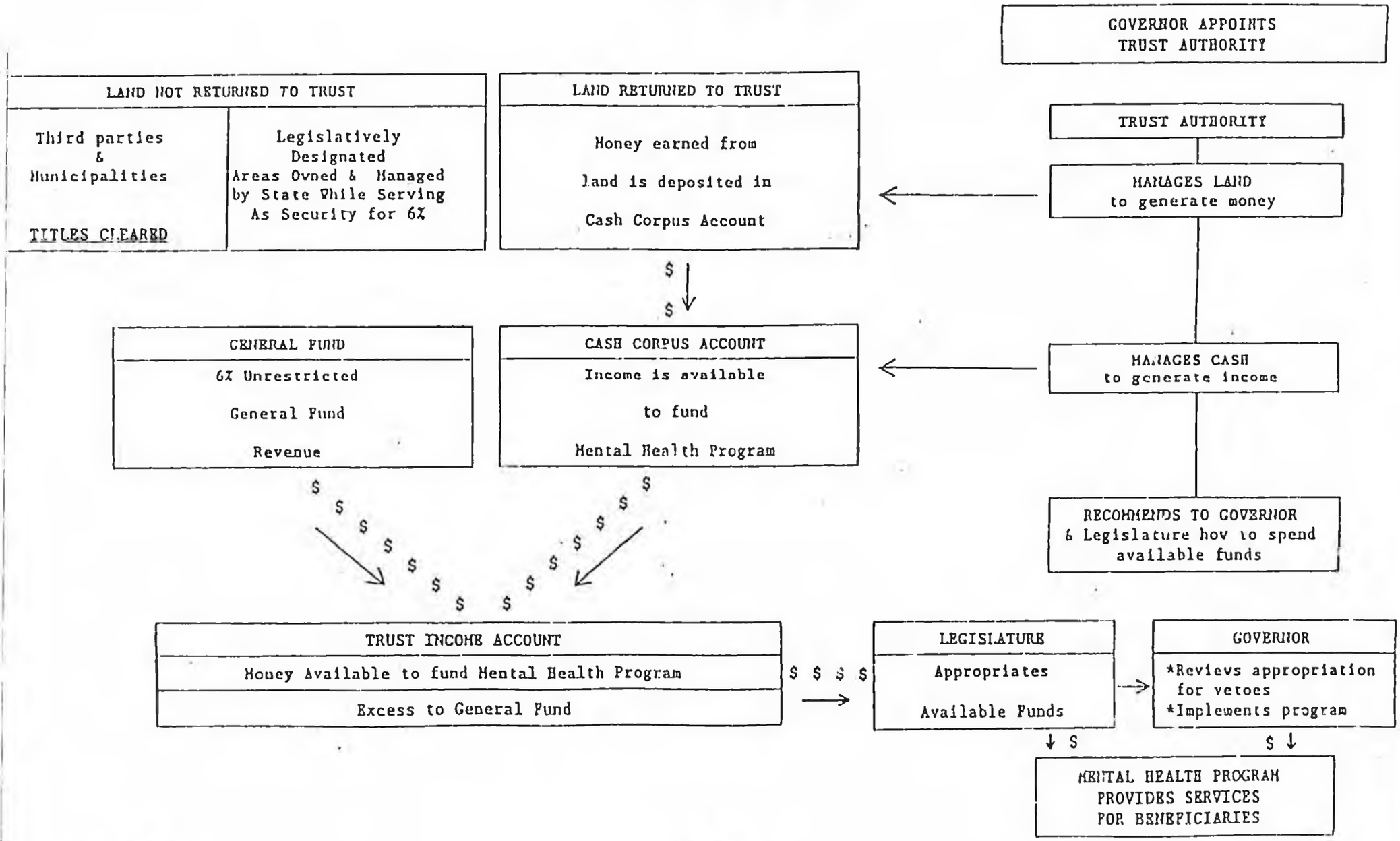
*The 6% allocation is currently in effect and is working. It goes down as State income goes down. The Office of Management and Budget (OMB) estimates the cost of the current Mental Health Program at $165 million. Although the 6% is estimated to generate only $142 million in FY 93, it will at least provide a base level for funding the Mental Health Program.

*25% of the earnings from the State land to be given to the Trust under Chapter 66 would continue to be placed in the Permanent Fund. This would avoid the reduction in Permanent Fund dividends which would result from Chapter 66.

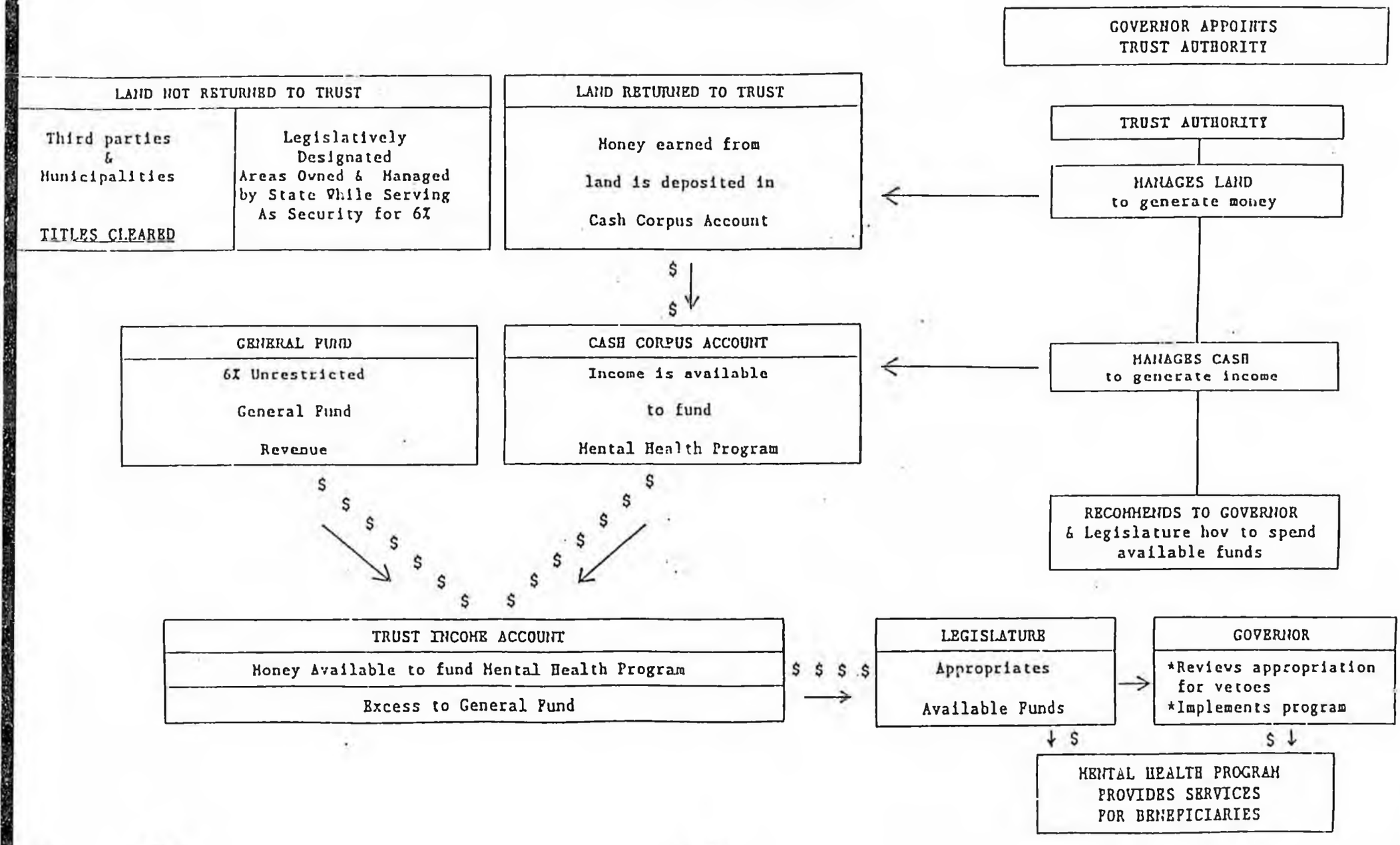
## CONCLUSION

This new proposal offers the quickest, least expensive and most acceptable solution to a problem that we must all put behind us.

# NEW PROPOSAL



# NEW PROPOSAL



# MENTAL HEALTH LANDS TRUST

## CHAPTER 66: OBSTACLE TO SETTLEMENT

The Chapter 66 proposal for settling the long standing Mental Health Lands Trust dispute was negotiated in ten days and passed by the Legislature in four. Despite the best of intentions on the part of the Governor and the attorneys for the plaintiffs, it now appears that portions of Chapter 66 will create more problems than they solve. It must be reevaluated as a settlement proposal.

### BASIC FRAMEWORK

Any Trust settlement must answer two questions. First, how is the Trust to be compensated for the valuable land which the State illegally took, sold, or gave to third parties? Second, how will the Trust be managed in the future?

Chapter 66 proposes to compensate the Trust by exchanging other comparable State land of similar income producing potential for the original land which cannot be returned to the Trust. While seemingly straight forward, it is this provision which will have unintended, unforeseen, and potentially devastating effects on all of us.

Chapter 66 also creates a comprehensive Trust management system. This provision is a major step forward in reaching a permanent settlement. It preserves Legislative and Executive control over the Trust while providing for proper Trust management. It also has virtually universal acceptance.

### LITIGATION OVER THE LAND EXCHANGE

In October of 1991 a coalition representing environmental, sportfishing and tourism interests sued to block the Chapter 66 proposal. Their complaint lists 11 counts against Chapter 66. There are two which best illustrate the problems with this proposal.

### THE "HYPOTHECATED" LANDS

Chapter 66 required that the State "hypothecate" or pledge as security specific lands which are comparable to the original Trust lands which cannot be returned to the Trust. Because of the valuable nature of the original Trust lands, over 4 million acres of other State land, including Cook Inlet oil and gas wells, were included on the hypothecated lands list. Unfortunately, due to the rush to pass the bill, this list was not available to the Legislature or the public prior to its enactment. One question is whether the Legislature could legally appropriate 4 million acres of land without knowing what it was.

## SECTION 6i OF THE STATEHOOD ACT

The original Trust lands came complete with the rights to the subsurface minerals. For the exchange contemplated under Chapter 66 to work, the replacement lands must also come to the Trust with the rights to the minerals.

However, Section 6i of the Statehood Act prohibits the State from granting away the mineral rights to State land. This provision was to ensure that Alaska's mineral wealth benefited all Alaskan's not just a few. This is why the State must lease or receive royalties for mineral development. Violation of Section 6i results in the forfeiture of the land back to the United States.

Obviously, no matter how certain the Governor and the plaintiff's attorneys are that the Chapter 66 exchange would not violate Section 6i, no actual exchanges can occur until the applicability of Section 6i is totally resolved.

## TIME FRAME FOR CHAPTER 66 LITIGATION

It is common knowledge that litigation is never fast. Even a "best case" scenario reveals that the implementation of Chapter 66 is years away.

First, the Superior Court in Fairbanks will be presented with the proposal and will be asked to address the 11 concerns raised by the lawsuit against the proposal. After a series of legal briefs have been filed and any oral argument scheduled and heard, the Court will consider the matter and prepare a written decision. It is reasonable to think that this could take 9 months to a year or more.

Next, the losing party will no doubt appeal to the Alaska Supreme Court where the briefing, oral argument and decision preparation process will be repeated. This is potentially another year or more.

Next, the losing party may file a petition for review to the U.S. Supreme Court since Section 6i is a federal issue. Even if the petition is denied this may take 6 months or more. If the petition is granted, Supreme Court review could take years.

## LAND STATUS DURING CHAPTER 66 LITIGATION

During these years of litigation, the original one million acres of Trust lands will continue to be tied up. In addition, the 4 million acres of hypothecated lands may not be managed in any way that diminishes their value as security. Alaska simply cannot afford to have 5 million acres of its most developable land tied up for years.

# STATE OF ALASKA

**DEPARTMENT OF LAW**

*OFFICE OF THE ATTORNEY GENERAL*

*WALTER J. HICKEL, GOVERNOR*

*P.O. BOX 110300 - STATE CAPITOL*
*JUNEAU, ALASKA 99811-0300*
*PHONE: (907) 465-3600*
*FAX: (907) 463-5295*


May 4, 1993

Hon. Ramona Barnes, Speaker
Alaska House of Representatives
Eighteenth Alaska Legislature, First Session
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear Speaker Barnes:

On April 26, 1993, Superior Court Judge Mary E. Greene ruled that the legislation settling the mental health trust lands litigation (Chapter 66, SLA 1991) was constitutional in all respects except one. In her view, the pledging of the land on the "Hypothecated Lands List" to the trust as security for the state's performance of its obligations under ch. 66 was not valid because it did not contain adequate standards to guide the commissioner of natural resources in negotiating the list with the plaintiffs.

Judge Greene went out of her way to point out, however, that the legislature could easily cure the problem:

> Obviously, it would be very easy for the legislature to remedy this problem. If the legislature amended section 56(a) to adopt a specific, known list or delegated the task of preparing a new list with adequate standards, the difficulty would be eliminated.

Memorandum Decision and Order Re: Intervenors' Complaint (April 26, 1993) at 82, n. 42 (emphasis added).

The attached proposed amendments to CSHB 201(RES) would implement Judge Greene's suggestion for curing ch. 66 by delegating to the commissioner of natural resources the task of preparing a new Hypothecated Lands List, to consist of (1) original mental health land that will be returned to the trust under sec. 54, ch. 66, and (2) up to 1.5 million acres of other state land, selected under the criteria set out in secs. 55(d) and (e), ch. 66, for identifying land to be exchanged to the trust in return for original mental health land not returned to the trust. (This will reduce the amount of state land hypothecated to the trust from the 6.7 million acres on the original Hypothecated Land List to no more than 1.5 million acres and, because the same standards will be used for hypothecation as for exchanges, make it likely that the same land that is hypothecated will ultimately be exchanged to the trust.)

The proposed amendments also make a technical amendment to ch. 66 by exempting the process for reconstituting the trust from the planning and classification requirements of AS 38.04 and AS 38.05, and substituting procedures by which the public may participate in the reconstitution of the mental health trust. Judge Greene found that the planning and classification requirements of AS 38.04 and AS 38.05 would apply to the reconstitution process under ch. 66 as currently written. The proposed amendments to CSHB 201(JUD) will result in substantial savings of both time and money in completing the reconstitution process and bringing this issue to final closure.

In effect, Judge Greene has determined that ch. 66, SLA 1991 is a constitutionally permissible means to settle this divisive and costly lawsuit that has adversely impacted many people in the state. Passage of the amended version of CSHB 201(JUD) that we are proposing will (1) significantly advance the final settlement of the case, and (2) free most of the land on the original Hypothecated Lands List for development.

If this legislation is not enacted before the legislature adjourns, the chances are strong that the settlement agreement reached with the Weiss plaintiffs under ch. 66 will be terminated and the headway we have made over the

past two years in settling the mental health lands mess will become a dead letter.

We urge your favorable consideration of the proposed amendments.

Very truly yours,

Charles E. Cole
Attorney General

CEC:cl

cc w/ enc.: Rep. Gail Phillips
Rep. Ron Larson
Rep. Eileen MacLean

Pat Ryan, Chief of Staff
Kris Lethin, Legislative Liaison
Office of the Governor

Hon. Glenn A. Olds, Commissioner
Dept. of Natural Resources

David T. Walker
James B. Gottstein
Jeffrey L. Jessee
Philip R. Volland
Richard M. Johannsen
Peter J. Maassen
G. Thomas Koester

Brian D. Bjorkquist, Assistant Attorney General
Wendy S. Feuer, Assistant Attorney General

93138

Rep. Larson

# STATE OF ALASKA

**DEPARTMENT OF LAW**

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May 4, 1993

Hon. Ramona Barnes, Speaker
Alaska House of Representatives
Eighteenth Alaska Legislature, First Session
State Capitol, Room 208
Juneau, Alaska 99801-1182

Dear Speaker Barnes:

After meeting with the settling plaintiffs in Weiss, we agree that two minor amendments should be made in the proposed language that was distributed to you earlier today to resolve Judge Greene's concerns in the mental health trust lands litigation. The amendments are reflected in the proposed language attached to this letter.

We are available to explain these proposed amendments. We urge your favorable consideration on this matter.

Very truly yours,

Charles E. Cole
Attorney General

CEC:cl

cc w/ enc.: Rep. Gail Phillips
Rep. Ron Larson
Rep. Eileen MacLean

Pat Ryan, Chief of Staff
Kris Lethin, Legislative Liaison
Office of the Governor

Hon. Glenn A. Olds, Commissioner
Dept. of Natural Resources

5/4/93

**REVISED**

Proposed Amendments to CSHB 201(RES) and CSSB 67(JUD)

Page 1, line 2:

Following "mental health trust":

Delete all material

Insert "; and providing for an effective date.""

Page 1, lines 3 - 7:

Delete all material

Page 1, line 9 - page 11, line 9:

Delete all material

Insert the following:

"* **Section 1.** Section 55(g), ch. 66, SLA 1991, is amended to read:

(g) **Except for public notice as provided under AS 38.05.945(b) and (c), the** [THE] provisions of **AS 38.04, AS 38.05, and** AS 38.50 do not apply to exchanges under this section.

* **Sec. 2.** Section 55(h), ch. 66, SLA 1991, is amended to read:

(h) If agreement cannot be reached between the plaintiffs in Weiss v. State of Alaska, 4FA-82-2208 Civil, and the commissioner of natural resources under (f) of this section as to appropriate lands to be conveyed to the trust as compensation or as to the

value of the original lands taken or of replacement lands, the Alaska Supreme Court shall resolve the disagreements using the criteria set out in this section, **but may not give deference to the commissioner's finding under (j) of this section**. The Alaska Supreme Court may order the commissioner of natural resources to convey appropriate state land to the trust without further legislative authorization.

* **Sec. 3.** Section 55, ch. 66, SLA 1991 is amended by adding new subsections to read:

(i) The commissioner of natural resources shall give public notice as provided under AS 38.05.945(b) and (c) of proposed exchanges negotiated under (f) of this section, or exchanges proposed by either the plaintiffs in Weiss v. State of Alaska (4FA-82-2208 Civil) or the commissioner of natural resources under (h) of this section. In the notice, the commissioner shall provide for a written comment period of at least 30 days. The commissioner shall hold a public hearing in the area of the land proposed to be conveyed to the trust under the proposed exchange.

(j) Following public notice of a proposed exchange under this section and the public hearing, the commissioner shall make, and give notice of, a written finding as to whether the proposed exchange meets the criteria of (b) - (e) of this section.

(k) In order to obtain judicial review of the commissioner's finding under (j) of this section and of the exchange, a person must

(1) have submitted written or oral comment in response

to a notice published under (i) of this section;

(2) demonstrate that the person has an interest that will be adversely affected by the exchange if the exchange becomes final; and

(3) within 30 days after the commissioner gives notice of the commissioner's finding, file a notice of appeal with the court with jurisdiction under sec. 57 of this Act.

* **Sec. 4.** Section 56(a), ch. 66, SLA 1991, is repealed and reenacted to read:

(a) To secure the reconstitution of the trust as provided in secs. 54 and 55 of this Act, the following land is hypothecated to the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709:

(1) original mental health land that will be returned to the trust under sec. 54 of this Act; and

(2) up to 1,500,000 acres of other state land as negotiated by the commissioner of natural resources and the plaintiffs in Weiss v. State of Alaska, 4FA-82-2208 Civil, using the criteria set out in secs. 55(d) and (e) of this Act, for the exchange of land to the trust in return for original mental health land not returned to the trust; the total amount of land hypothecated to the trust under this paragraph, in conjunction with land hypothecated to the trust under (1) of this subsection, shall be sufficient to reconstitute the trust.

* **Sec. 5.** Section 58, ch. 66, SLA 1991, is amended to read:

Sec. 58. **(a) Sections 56(a) and (b) of this Act take effect**

on the effective date of an Act passed by the Eighteenth Legislature amending provisions of ch. 66, SLA 1991 that relate to reconstitution of the corpus of the mental health trust.

(b) Sections 1 - 55, 56(c) and (d), and 57 of this [THIS] Act take [TAKES] effect upon entry of a final order dismissing Weiss v. State of Alaska, 4FA-82-2208 Civil, and the expiration of any time for appeal. The superior court shall advise the lieutenant governor and the revisor of statutes when the final settlement and order of Weiss v. State of Alaska has been approved.

* **Sec. 6.** If ch. 66, SLA 1991, is finally disapproved as a settlement of Weiss v. State, 4FA-82-2208 Civil, this Act is repealed.

* **Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

# NEWS RELEASE

STATE OF ALASKA

OFFICE OF THE GOVERNOR
Post Office Box 110001
Juneau, Alaska 99811-0001

WALTER J. HICKEL
Governor

JOSEF P. HOLBERT
Director of Communications

JOHN MANLY
Press Secretary

JOHN HENDRICKSON
Deputy Press Secretary
*Anchorage Office: 561-4228*

BRIAN HART
Assistant Press Secretary

907-465-3500
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FOR RELEASE: April 27, 1993
No. 93-094

## COURT DECIDES AGAINST MENTAL HEALTH INTERVENORS

JUNEAU--A Fairbanks judge has ruled that the Mental Health Trust agreement entered into by the state and the Weiss claimants two years ago does not violate the Alaska Constitution, as claimed by the Sierra Club Legal Defense Fund.

In ruling against the so-called public interest intervenors, Superior Court Judge Mary Greene granted partial summary judgment on Monday, April 26, to the state and the Weiss claimants on most of the counts brought forth by the Sierra Club, which represented a number of environmental organizations.

The one provision of the settlement Judge Greene found invalid was the pledging, or hypothecation, of certain state lands to the trust as security for the state's performance of its obligations under the settlement.

In the judge's view, the Legislature did not give the Commissioner of Natural Resources sufficient standards for determining which state lands should be included as part of the pledged land, and which should not.

Cole called the decision "a smashing success. We are very pleased with the decision. It vindicates our position to stand firm in the face of efforts to modify the settlement in ways that would have required the state to pay too much to settle this case."

Judge Greene gave the state and the claimants 70 days to fix the deficiency. Cole expected to meet with the claimant attorneys Tuesday afternoon to explore ways to do that.

####

# NEWS RELEASE

STATE OF ALASKA

OFFICE OF THE GOVERNOR
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Juneau, Alaska 99811-0001

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

## MENTAL HEALTH SETTLEMENT GIVEN 60 DAYS

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

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

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

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

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

####

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY
## STATE OF ALASKA

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*130 Seward Street, Suite 409*
*Juneau, Alaska 99801-2105*

**MEMORANDUM** March 11, 1993

**SUBJECT:** Measure amending provisions of ch. 66, SLA 1991 (relating to the reconstitution of the mental health trust); and providing for an effective date -- sectional analysis (Work Order No. 8-LS0728\E)

**TO:** Representative Bill Williams, Chair
House Resources Committee
Attn: Mary McDowell

**FROM:** Jack Chenoweth
Legislative Counsel

The measure, based on CSSB 469 (Resources) of the last legislature, sets out a series of proposed amendments to ch. 66, SLA 1991, the legislation reconstituting the mental health trust. Necessarily, I will discuss these provisions out of the order in which they appear in the bill.

I

Sec. 54 of existing ch. 66, SLA 1991, reconstitutes the corpus of the mental health trust by identifying specific land held by the state and that is to be conveyed by it in order to reconstitute the trust. Sec. 55, ch. 66, SLA 1991, authorizes substitution of other state land (i.e. "replacement land" as substitution for former mental health lands that now cannot be returned to the trust because it is unavailable to the state) to the reconstituted trust and sets out standards to guide the making of replacement land substitutions. Sec. 56, ch. 66, SLA 1991, is an enforcement mechanism in that it hypothecates or pledges certain state assets to secure the transfer of compensation due the reconstituted trust corpus. These provisions are proposed to be repealed by **bill section 8.**

In their place, **bill section 6** proposes to reconstitute the trust corpus in the permanent law. Some, but not all, of the land identified in sec. 54, ch. 66, SLA 1991, is carried over into this section. Omitted from the list approved in the 1991 Act is land identified in paragraph (5) (Tanana Valley State Forest and Haines State Forest Resource Management lands), paragraph (6) (other land satisfactory to the plaintiffs

drawn from legislatively-designated areas), and paragraph (7) (compensation land identified under former sec. 55). Added, in the enumeration set out in bill section 6, is land subject to "other lease" (proposed AS 38.05.800(2)(A)), land subject to mining claim or sale of materials (proposed AS 38.05.800(2)(D) and (E)), and land exclusive of that necessary to carry out purposes of an interagency land management agreement (proposed AS 38.05.800(3)).

In the 1991 legislation, existing AS 38.05.800 was to have been repealed. Since, in this bill, AS 38.05.800 would be modified and continued, the change set out in **bill section 7** drops that section from the list of sections repealed in the 1991 legislation.

II

This legislation also proposes to revise the mechanism by which to reconstitute an important element of the mental health trust, the mental health trust income account. Under current AS 37.14.036(c), the state obligates itself to pay to the mental health trust income account a declining percentage (six percent at inception declining to one percent in the last years) of unrestricted state revenue, the last payment to be made by June 30, 2003. The change proposed by **bill section 4**, a reenactment of AS 37.14.036(c), directs that a fixed annual payment of **three** percent of unrestricted state general fund revenue be allocated for an indefinite period "as compensation for land that constituted the [original] trust . . . and that is not reconstituted as part of the mental health trust corpus established under AS 38.05.800 . . . ." The payment, when made by the state and received by the trust, would be added to the balance of the mental health trust income account, the principal source of support for the programs and services to the trust beneficiaries.

However, payment of the allocation requires legislative appropriation. As a guarantee that the allocation will be made, **bill section 5** adds two subsections to AS 37.14.036. Under proposed subsection (d), land that came to the state under the mental health enabling act and that has been since placed in so-called "legislatively-designated" land status--state park, state forest, state game refuge, and the like--would be pledged as security. Under proposed subsection (e), the superior court is given the authority to determine the manner of the trust's foreclosure against those lands in the event the state fails to make the required allocation under subsection (c)

It was the decision to convert the payment obligation from one with a set termination date to one of indefinite duration that prompted the addition or revision of permanent law sections and the repeal or deletion of temporary law sections in this bill.

III

Two provisions, bill sections 2 and 3, change provisions of ch. 66, SLA 1991, that relate to the management of trust assets.

The language added in **bill section 2** revises the responsibility given the Alaska Mental Health Trust Authority as to management of the land assets of the trust. It would require that the land assets of the trust be managed by the state's Department of Natural Resources under an agreement between the department and the mental health trust authority unless the authority "determines that the best interests of trust beneficiaries would be served by other arrangements." The change would replace the current language providing the mental health trust authority the option to contract with the department for land management services.

Ch. 66, SLA 1991, reestablishes a mental health trust fund. That fund consists of the cash assets constituting part of the trust principal. The amendment made by **bill section 3** would direct that the earnings derived from management of the land that is within the trust corpus--that is, of the land identified in AS 38.05.800, reenacted in bill section 6--are to be constituted part of the trust principal (and not added to or made part of the mental health trust income account).

IV

The Alaska Court System had asked that several changes be made in the definition of the jurisdiction of a court to hear disputes arising under ch. 66. Accordingly, in **bill section 1**, the superior court is designated the court of original jurisdiction to hear and resolve disputes arising out of AS 37.14.036(c) (the subsection is reenacted in bill section 4) and out of AS 37.14.036(d) and (e) (these subsections would be added by bill section 5). Under **bill section 9**, a dispute to be heard by the superior court may be referred by a judge to a special master appointed for the purpose. Finally, under existing sec. 57, ch. 66, SLA 1991, original jurisdiction to hear disputes is vested in the Supreme Court. (Sec. 57, ch. 66, SLA 1991, is repealed as part of the series of repealers set out in **bill section 8**.) These changes have the effect of making the judicial examination and resolution of disputes involving reconstitution and payment of money due the reconstituted trust similar to the manner of examination and resolution of other disputes to which the state is a party.

*

Under the effective date clause of the bill, since the effective date of the principal measure, ch. 66, SLA 1991, is dependent on the outcome of judicial proceedings dismissing the litigation in Weiss v. State, the coming into effect of this bill is tied to it. I have added two related bill sections. The first one **bill section 10** -- is intended to give this measure retroactive effect if ch. 66, SLA 1991 takes effect before this one. The second -- **bill section 11** -- is a condition placed on this bill and intended to

operate if one or the other houses of the legislature fails to adopt the effective date clauses in this bill by the required two-thirds vote.

JBC:gc:lmb
93-067.lmb

WALTER J. HICKEL, GOVERNOR

**DEPARTMENT OF REVENUE**

*OFFICE OF THE COMMISSIONER*

P.O. BOX S
JUNEAU, ALASKA 99811-0400
PHONE: (907) 465-2300
TELEFAX: (907) 465-2389

March 15, 1993

The Honorable Bill Williams
Alaska State Legislature
State Capitol, Room 128
Juneau, Alaska 99801-1182

Dear Representative Williams:

The Department of Revenue (DOR) would like to propose certain amendments to HB 201, "An Act amending provisions of ch.66, SLA 1991, that relate to reconstitution of the corpus of the mental health trust, . . . date.". These amendments deal with the investment management of the Mental Health Trust Fund (MHTF). Section 2, subsection (a)(5) mandates that the Alaska Mental Health Authority (AMHA) establish the investment management of the MHTF with the Alaska Permanent Fund Corporation. Section 3 establishes the custody of the MHTF with the DOR - Treasury Division. For management efficiencies, DOR suggests that the investment management and custodial functions of the MHTF be kept together.

Using HB 201, version HB0201a, dated 3/5/93 as the base document, page 2, line 6 should be amended to read: "(5) shall contract with the Alaska Permanent Fund Corporation or Department of Revenue - Treasury for management . . . entity." Page 2, line 11 should be amended to read: "is established as a separate fund within the Alaska Permanent Fund Corporation or the state treasury."

These amendments will provide AMHA with the flexibility for establishing a sound investment management approach to the MHTF.

Sincerely,

Brian C. Andrews
Deputy Commissioner

BCA:sp
93-058

04-D2LH

APR 21 1993

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April 21, 1993

HAND DELIVERED

Senator Steve Frank, Co-Chairman
Senate Finance Committee
Capitol Building, Room 518
Juneau, Alaska 99811

Senator Drue Pearce, Co-Chairman
Senate Finance Committee
Capitol Building, Room 508
Juneau, Alaska 99811

Re: Proposed Mental Health
Trust Lands Legislation
SB 67/HB 201

Dear Senators Frank and Pearce:

As brief introduction, I represent Vern Weiss, the original named plaintiff in Weiss v. State, 4FA-82-2208 Civil. This letter is also written on behalf of Jim Gottstein who represents the Alaska Mental Health Association, et al, in Weiss. The litigation was begun by the Alaska Mental Health Association through Mr. Weiss and later the Association became a formal named plaintiff on behalf of trust beneficiaries. Mr. Weiss and the Alaska Mental Health Association then are the parties that originally commenced the Mental Health Trust Lands litigation and have had primary responsibility for prosecuting it for its ten year course. We are writing you with respect to SB 67, which has companion legislation in the House known as HB 201.

In 1991, Chapter 66 SLA 1991 was negotiated by the Administration and us[1] and passed as a proposed settlement of the class action lawsuit. Any such settlement must necessarily be a "proposed" one because under the rules applying in class actions any settlement has to be approved by the court as fair and equitable to the class (including that it is legal). The approval process is well under way for Chapter 66 with the court's initial rulings expected

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1/ Along with Jeff Jessee, representing mentally retarded and mentally defective beneficiaries who intervened later in the litigation.

within the next 60 days or so.[2] The basic structure of the Chapter 66 reconstitution of the Trust[3] is to return as much original Trust Land to the Trust as possible and replace the balance with state land as comparable as practicable and equal in value. All reconstituted Trust Land will then be managed for Trust purposes, i.e., generation of revenue for the mental health program.

As expected, Chapter 66 has been vigorously challenged in court by environmental and other organizations represented by the Sierra Club Legal Defense Fund. Recently, Unocal and Marathon Oil Companies entered the lawsuit to claim that the State has no right to transfer their oil and gas leases to the Trust. Some beneficiaries also object to Chapter 66 because it does not guarantee adequate funding for the mental health program. It is fair to say that the delay in settlement approval is related to these parties' challenges in court. In addition to the parties formally challenging the settlement in court, industry interests are unhappy with the delay in resolving this situation (as are we).

SB 67/HB 201 have been proposed by these interests as a way to resolve all their problems with Chapter 66 and immediately resolve the litigation. To do this it is proposed that SB 67/HB 201 substitute a percentage of unrestricted general fund revenues (6% in SB 67 and 3% in HB 201) for original Trust land not returned to the Trust. Unfortunately, passage of SB 67/HB 201 in their current form cannot resolve the litigation quickly and, in our view, cannot be approved as a settlement.

As mentioned, under judicial rules the court must approve any class action after notice and an opportunity to object is given to all class members. First, a proposed settlement is presented to the court for "preliminary approval." Preliminary approval is granted if the proposed settlement is "within the range of possible approval and has no obvious defects" (such as being illegal). If preliminary approval is granted, notice is given to the class[4], the court receives comments, holds one or more hearings and determines if the settlement should be granted final approval. The court can suggest changes, but may not force the parties to reach a different settlement. Of course, any trial court determinations are subject to appeal.

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2/ While in one sense the rulings are "initial," the issues have been so extensively briefed by the parties that the court's impending rulings should give a clear view of how the trial court will ultimately treat the proposed settlement. However, everyone expects the non-prevailing party(ies) to pursue all available appeals.

3/ Chapter 66 also provides detailed rules regarding how trust funds will be applied in support of the mental health program.

4/ A 90 day comment period may very well be a minimum.

As indicated previously, we believe the parties will soon receive the trial court's determinations regarding initial fairness and legality of the Chapter 66 settlement. If SB 67 or HB 201 were to pass, this process would have to start over and it has taken over a year to reach this stage with respect to Chapter 66, without including the time required for the settling parties to draft a basic settlement document to present to the court for consideration.

Substantively, there are two very serious legal questions associated with SB 67/HB 201. The first is whether a settlement in which the Trust gives up title to the bulk of its assets for an unenforceable under-secured promise to pay money can be approved as fair. While the proponents of SB 67/HB 201 have striven mightily to come up with techniques to minimize the chances of the State breaching (consistent with the proponents' unwillingness to put their interests on the line), the separation of powers doctrine and specifically Article IX, Section 13 of the Alaska Constitution prohibits the courts from enforcing any debt owed by the State. In our view, this attribute of SB 67/HB 201 means that such legislation will not be approved as a settlement.[5]

The second major problem with the proposed legislation is that it raises the question of whether the requirement that the State pay a fixed percentage of the general fund into the mental health trust income account amounts to a dedicated fund prohibited by Article IX, Section 7 of the Alaska Constitution. The only way this question can be answered is by the courts. The proponents of SB 67/HB 201 want the beneficiaries to ignore the potential dedicated fund problem and hope that nobody else will raise it. This would be imprudent because it would expose the beneficiaries to the unacceptable risk that they will have released all their claims to Trust property only to have the settlement challenged later by any citizen and declared illegal. There is virtually no chance that the dedicated fund issue will not be raised.

Thus, while we share everyone's frustration with the time being taken for resolution of the Chapter 66 settlement, there is absolutely no way that SB 67/HB 201 can resolve the litigation quickly. More importantly from our perspective, SB 67/HB 201 takes us significantly backward and, will most probably result in the original litigation being revived (including the claim to lands conveyed to third parties and lands placed in legislative

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5/ In fact, the 1978 legislation redesignating Mental Health Trust land as general grant land which was invalidated by the Alaska Supreme Court in Weiss v. State, 706 P.2d 681 (1985) included a promise to pay a percentage of funds earned from state lands to the Trust (albeit a smaller amount than currently proposed).

designations),[6] because, it suffers from substantially greater infirmities than Chapter 66. To aid in your understanding of this complex issue, we have enclosed a chart which analyzes the interest groups' goals vis a vis Chapter 66, litigation and SB 67/HB 201, as well as a brief description of these approaches. We believe that any unbiased review will confirm that at this point SB 67/HB 201 are extremely counter-productive.

All of this is not to say that the legislature can not be constructive in the current situation. In fact there is short, uncomplicated legislation that could be enacted which would be very productive.

The first element of the legislation would confirm, approve and ratify the April 6, 1992 settlement agreement filed in Weiss. In essence the legislation would enact the settlement agreement. By doing this all of the legal challenges to the current settlement are eliminated except those based upon the claim that the legislature does not have the constitutional authority to enter into the settlement.

A second element of the legislation would replace the approximately seven million acres of land currently hypothecated to the Trust with the approximately 550,000 acres of onshore land nominated by the Plaintiffs as Proposed Substitute Land plus the approximately 1.5 million acres of the existing collateral of last resort (offshore Cook Inlet oil and gas fields). The remaining currently hypothecated lands would be released. We have discussed this with our clients and they have agreed to this (although it would take court approval). The reason for this amendment to Chapter 66 is that a good deal of the opposition to Chapter 66 is related to the 7 million acres of land currently hypothecated to the Trust.

The third element of the legislation would direct the State to escrow receipts from new development on Proposed Substitute Land so that if such land is ultimately conveyed to the Trust, the funds received will be deposited into the Trust Fund.[7] After land is

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6/ The State has repeatedly attempted to have these claims dismissed to no avail. A legal memorandum issued in January 1990 describing these claims and their legal bases was widely distributed in 1990 and is available upon request. The State's disregarding of the legal principles described in that memorandum resulted in the imposition of the preliminary injunction against the State doing anything on Mental Health Trust Land without court approval and the placing of a cloud on all third party interests in Mental Health Trust Lands.

7/ The Department of Law has indicated there is no authority to place such funds in escrow under current law.

nominated as Proposed Substitute Land, in order to protect the Trust's future interest, the Plaintiffs must approve any transactions. If funds received from such new activity can never be deposited into the Trust fund, there are many fewer transactions that it makes sense for the Plaintiffs to approve.

We recognize that there has been intense pressure to pass SB 67/HB 201 as a way to immediately resolve the Mental Health Trust Lands litigation. Unfortunately, that route leads to calamity. We hope that in the rush to adjournment, you will find time to appraise the Weiss litigation and avoid limited - perspective fixes to Chapter 66 that will only exacerbate the situation. We also hope that you will accept our suggestions to enhance the acceptability of the Chapter 66 settlement to the court as a way to help all of us through this morass sooner than any other course of action presently under consideration by the legislature.

Very truly yours,

David T. Walker

Enclosure

cc: James B. Gottstein
Jeffrey L. Jessee
Philip R. Volland
Charles E. Cole
Charles P. Boddy
Robert B. Stiles
Walt Baldwin
Peter J. Maassen
G. Thomas Koester
Wendy S. Feuer
Brian D. Bjorkquist
Kent V. Dawson
Richard S. Thwaites, Jr.
Vern T. Weiss

## Comparison of Mental Health Trust Resolution Approaches

| PARTY/INTEREST GROUP | GOALS | CURRENT SETTLEMENT (Chapter 66)[1] | LITIGATED RESULT | SB67/HB201[2] |
|---|---|---|---|---|
| Beneficiaries | • Adequate funding for mental health program.<br>• Fair enforceable settlement.<br>• Appropriate Trust management, including expenditures. | • No guaranty of adequate funding.<br>• Receive land comparable in earning capacity to the most land that could be obtained in litigation.<br>• Appropriate Trust administration; exceeding what could be obtained in litigation agreed to by all parties. | • No guaranty of adequate funding.<br>• Receive what Trust is entitled to under Alaska Mental Health Enabling Act (whatever land can be recovered).[3] Trust will have what land earns.<br>• Whatever trust management can be forced upon the state. | • No guaranty of adequate funding.<br>• Small amount of high quality land encumbered with restrictions, inappropriate management, and excessive costs; better not to have it at all.<br>• Receipt of a debt that the Trust has no right to enforce and is inadequately secured. |
| Administration | • Release Trust's claims to third party interests.<br>• Minimize financial obligations<br>• Promote development (place land in the trust that will increase development). | • Trust's claims to third party interests are released.<br>• State's financial liability to Trust is minimized.<br>• Development is promoted for reconstituted Trust Land. | • Trust is likely to prevail on many claims. Trust's claims released only after appeals are exhausted.<br>• Financial liability to Trust minimized, unless Weiss overturned..<br>• Development will eventually be promoted, but not very effectively. | • Trust's claims eventually released.<br>• Financial obligation maximized (except that State can ignore it).<br>• Development is minimized. |
| Legislature | • Resolve problem quickly<br>• Release Trust's claims. | • All third party interests preserved.<br>• Resolved as soon as possible.[4] | • Maximum time to resolve.<br>• Trust's claims litigated. | • Private third party titles under a cloud for long time while approval litigated. |
| Industry | • Business as usual (pay less than fair value, non-Trust management).[5][6]<br>• Resolve problem quickly.<br>• Preserve rights. | • All rights preserved.<br>• Discretionary functions determined under trust management principles.<br>• Resolved as soon as possible. | • Current arrangements upset.<br>• Immediate interference with business likely.<br>• Long time to resolve. | • All rights preserved.<br>• Long time to resolve.<br>• Managed by DNR under current rules (except unencumbered land). |
| Environmental Intervenors | • Prevent/restrict development (minimize Trust land; maximize restrictions).<br>• Preserve 370,000 acres of land put into parks, etc.(legislative designations) | • Development promoted on reconstituted Trust Land.<br>• Legislative designations preserved.[7]. | • Development maximized on land returned to Trust.<br>• Legislative designations may or may not be ordered back into the trust to earn as much $ as possible.[8] | • Development minimized.<br>• Legislative designations preserved, but at risk upon default. |
| Private Third Party Purchasers | • Clear title ASAP. | • Private third party purchaser interests are protected. | • Land may be taken from third parties and returned to the Trust[9] | • Third party purchasers protected.<br>• Longer than current settlement. |
| Municipalities | • Retain Trust Land given to them. | • Municipalities' interests in Trust land is preserved. | • Municipalities' interests in Trust land almost certainly lost. | • Third party purchasers protected. Will take a long time. |

[1]It is possible that the current settlement may be disapproved or declared illegal. The court's initial rulings are expected within the next 60 days. If the settlement is disapproved or ruled illegal, it may very well be possible to fix identified problems. Perhaps the only potential problem that could not be fixed (except by Congressional action) is whether the transfer of the mineral estate to the Trust Authority violates Section 6(i) of the Statehood Act.

[2]Our view is that the proposed legislation cannot be approved by the court because of its unenforceability/lack of security, and illegality as a dedicated fund. It appears that it would take a constitutional amendment to fix both of these problems. **The SB67/HB201 approach ends up being the litigated result because it is believed the court will not** approve this legislation as a settlement. A new settlement is always possible, but the approval process will have to be started over. Keep in mind that people have been trying to fashion a settlement for over six years and it is hard to imagine that any fundamentally new proposal will be offered. A constitutional amendment would solve a lot of the problems with SB67/HB201 but their proponents are unwilling to wait the time such an approach requires. Similarly, the State could transfer sufficient assets to the Trust to guaranty payment, but that would require the court's confirmation of the State's right to place subsurface rights in the Trust.

[3]The setoff allowed by the Supreme Court for the State to deduct what it has spent on the Mental Health Program from the amount it owes is likely to eliminate any financial obligation for land lost from the trust. This issue will be vigorously re-argued by the plaintiffs if the litigation is resumed, and the United States Supreme Court will be the ultimate authority (although it does not have to hear the case).

[4]This is disputed by the opponents of the current settlement.

[5]By definition "fair value" is a price at which the landowner receives fair compensation and the land user does not pay more than will allow it to earn a reasonable profit.

[6]While industry will say they are concerned with funding for mental health programs, this is clearly driven by a desire to free up the land. Certainly individual industry representatives may have a sincere interest in adequate mental health program funding, but it is not what is driving industry's interests here.

[7]The current settlement returns to the Trust approximately 120,000 acres of land in the Tanana and Haines State Forests. These forest lands were already open to logging and mining, but with more restrictions than is anticipated under Trust management.

[8]The Trust should prevail on this issue. If not, however, the land may be lost and the State not owe any money because of the setoff.

[9]The Trust has excellent arguments on this issue, but public opinion may cause the courts to look for another result.

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APR 22 1993

*James B. Gottstein*
*Jill C. Wittenbrader*

April 22, 1993

Richard M. Johannsen
Perkins Coie
1029 West Third Avenue, Suite 300
Anchorage, Alaska 99501

Re: SB67/HB201

Dear Rick:

You and Jeff Jessee have asked us to address the language of SB67/HB201 for some time, most recently in connection with your April 15, 1993 proposed amendments. As you know, we have felt that SB67/HB201 have at least two serious legal problems which would likely lead to their rejection by the court. One of these problems is unenforceability. You have attempted to address enforceability in your recent proposed amendments. The other serious problem, whether the bills create a prohibited dedicated fund, is not perceived as a subject the legislature can address.[1] Because of these fundamental problems we are anxious to avoid the appearance that we are negotiating the terms of these bills.

In light of the effort your group has put into drafting this legislation we agree it is only fair to give you our thoughts. In doing so, we are not negotiating the terms of SB67/HB201, we are not endorsing SB67/HB201, even if our suggestions were accepted, and we have not changed our fundamental analysis that the SB67/HB201 approach is likely to fail as a settlement of the Weiss litigation for the reasons noted.[2]

Our comments will be directed to CSSB67(Jud) and CSHB201(Res) as if they were amended by your April 15 1993 transmittal.

Sec. 2.

We are opposed to requiring DNR to manage the lands. DNR is not equipped to manage the lands appropriately. The fiscal note

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[1]We frankly feel that the unenforceability issue is similarly incapable of legislative correction.

[2]We do understand that Usibelli prefers going back to the original litigation over consummating the Chapter 66 settlement. We think passage of SB67/HB201 will accomplish that goal of Usibelli.

prepared by DNR confirms this because no particular personnel are assigned to manage Trust land but rather a portion of DNR personnel expense is allocated to the Trust. This will lead to continued lack of attention to Trust lands, and, as will be discussed below, use of the Trust to fund general DNR functions.

We note that at line 15 of page 2, the addition of the words "and dispose of" appears to require disposal of the land and minerals. Simply using the word "manage" ought to be sufficient.

**Sec. 3.**

The imposition of AS 38.05.285 on the management of Trust land is inappropriate. Multiple use and other State constitutional provisions relating to management of general grant land do not apply to the management of Trust land. Providing that in case of conflicts, trust management principles apply does not solve this problem, because (1) it sets up an inappropriate management criteria in the first place, and (2) provides too much opportunity for legal challenges to actions on Trust land.

**Sec. 4.**

See, comments below regarding "802" lands.

**New Sec. 5.**

New Section 5 proposed in your April 15th transmittal amends AS 37.14.031, added by Section 11 of Chapter 66 to provide that the Trust fund will be a separate fund within the Permanent Fund or the Treasury. Which is it? Who decides? If it is the Permanent Fund, is that part of the Treasury? If not how can funds be removed from the treasury and deposited into the Permanent Fund without an appropriation without running afoul of Article 9, Section 13 of the Constitution.

**Sec. 5 (Old).**

This section which contains the compensation scheme, is the one with the fundamental problems. First, it is fundamentally unenforceable (we will address the remedy section where it comes up). Second, it raises the question of whether a binding commitment to pay or allocate a percentage of unrestricted general fund revenues is a constitutionally prohibited dedicated fund.

With respect to the former, Article 9, Section 13 of the Alaska Constitution provides that

> No money shall be withdrawn from the treasury except in accordance with appropriations made by law.

Similarly AS 09.50.270 provides in part, "No attachment or execution shall issue against the State." Article 9, Section 13 of the Constitution, makes any promise to pay or stated alternatively any debt based compensation to the trust (which is the essence of SB67/HB201) inherently unenforceable. We do not believe the court would approve a settlement wherein the beneficiaries release all of their rights to unreturned Trust land in exchange for an unenforceable promise to pay. Indeed, the 1978 legislation purporting to redesignate Mental Health Trust Land as general grant land that was invalidated in *State v. Weiss*, 706 P.2d 681 (Alaska 1985) contained a promise to pay a percentage of funds received from all State lands. It is very hard to see how SB67/HB201 are different in this material aspect from the legislation invalidated in *Weiss*.[3]

With respect to the dedicated fund issue, Article 9, Section 7 of the Alaska constitution prohibits dedicated funds except for (1) the permanent fund, (2) when required by the federal government for state participation in federal programs, and (3) dedications existing upon the date of ratification of the Constitution. The first and third exceptions clearly do not apply.[4] It is conceivable that the second exception applies which would make the dedication permissible. However, prudence requires that the issue be decided by the courts because the beneficiaries can not bear the risk that the dedication of a percentage of general fund revenues to the Trust is unconstitutional. You have suggested in conversation that this issue not be brought up by us and maybe no one else will. This would not be prudent because the issue could be raised after the beneficiaries had released their claim to Trust land, leaving them with nothing.

Frankly, we could live with the time involved to resolve this issue as long as the Chapter 66 option was preserved as a

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[3]The issue of enforceability does not impugn the intentions of the legislature. It simply reflects the undeniable fact that future legislatures may be faced with situations where, in their view, the public interest requires a breach, particularly if there are no penalties involved. In order to avoid any enforceability questions, it would be a simple matter to transfer sufficient income producing State assets to equal the anticipated payment requirement. For example, the recently identified Sunfish oil field in Cook Inlet is expected to generate royalties in the $130 million per year range. This is completely new revenue, not previously expected by the State. Of course, this would require resolution of the 6(i) issue. At least the trial court's ruling on this issue is imminent.

[4]The constitution was ratified in April of 1956 while the Alaska Mental Health Enabling Act was not passed until July of 1956.

backup[5], but believe the parties urging adoption of SB67/HB201 are unwilling to take the time involved. Similarly, a constitutional amendment could solve both the unenforceability and dedicated fund problems but we understand the proponents of SB67/HB201 are unwilling to consider such an approach.

The definition of unrestricted general fund revenues, while an improvement over no definition, is insufficient. The definition should list all current sources of revenues that are considered restricted (or not unrestricted). Otherwise, it will be quite easy to get into later disagreement over what was or was not restricted on the effective date. To say that "all categories of accounting for money accruing to the general fund that were not restricted" is too open-ended. First, I don't know what a "category of accounting" is. Second, new categories could be created. Also, since there will be some time before the effective date, new restrictions could be made to apply between now and the effective date.

**Sec 6 (Old - as amended).**

We recognize the effort that you and your group have put in to address the enforceability issue with your new proposed amendments to Section 6. We understand that the mandatory injunction approach (in the event the allocation is not made) was arrived at because you could not identify any other approach that would withstand constitutional scrutiny. In our view, the critical issue in evaluating the problem is to focus on "who's money is it?" In other words, are funds that have been "allocated" to the Mental Health Trust Income Account "owned" by the Trust. If so, it appears that a mandatory injunction transferring ownership of the funds from the State to the Trust would be unconstitutional under Article 9, Section 13 of the Alaska Constitution. If the Trust does not truly "own" the funds, then the hard won right of the beneficiaries to enforce the State's fiduciary obligations respecting expenditure of Trust funds would be nullified by Article 9, Section 13. This seems explicitly recognized in your amendment where it provides the mandatory injunction will issue "without regard to any difficulty of enforcement." The result seems to be that the payment obligation would still end up being unenforceable. Now, to the extent that you desired this to be tested in court, it would not

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[5]In this regard, my client, the Alaska Mental Health Association is probably much more willing to consider an enforceable percentage of general fund revenues than Mr. Weiss, who I understand to be convinced the State will never live up to a payment obligation, regardless of the enforceability provisions. Because of my belief that sufficient enforceability provisions are not likely to be achievable, Mr. Weiss's position and the Association's are probably not, as a practical matter, any different.

be objectionable to me as long as Chapter 66 is retained as an option.

With respect to inadequacy of security issues, clarifying that foreclosed LDA land is to be received by the Trust free and clear of any legislative restrictions has not been addressed. While proponents of SB67/HB201 can hypothesize that it may be better to leave that question open as a way to prevent a gung-ho development administration from breaching the payment obligation in order to open the LDAs to development, it simply is insufficient as a reason to deny the Trust an appropriate remedy.

In addition, the collateral is clearly insufficient (even with the addition of the subsurface of conveyed land) to secure the debt because only a small part of the original Trust land not to be returned is serving as collateral for all of the land not to be returned. Obvious additions to the collateral would be subjecting the "802" interest protections and any municipal land that has not been conveyed out of municipal ownership as of the date of enactment to foreclosure. Usibelli has indicated that it is sure the State won't breach the compensation obligation. If so, then it should not object to making its "802" interest protections subject to foreclosure in the event of default. The same is true with respect to the LDA management issue upon foreclosure. This brings up the concept of protection of the security. Under the proposed legislation, the State may do anything it wants on the pledged land, including reducing or eliminating its value as collateral. This substantially reduces its value as security.

Finally, the foreclosure procedures should specify more clearly, the rights upon foreclosure. Who conducts the sale? We assume non-judicial foreclosure rights are intended, but without elimination of the allocation obligation. It would appear that summary foreclosure of all parcels was intended. If so, it should be stated specifically. Since it would not appear that actual sales of the parcels to be foreclosed to third parties is contemplated, it seems a more direct approach could be taken. This is the rental or lease approach that we have previously indicated would be preferred to a security interest approach. Under this approach, title to the "pledged" land would remain in the Trust, with the State "leasing" or "renting" the right to use the land. If the allocation were not made the "lease" could be terminated and all rights returned to the Trust without going through a foreclosure proceeding. The notice periods required to exercise such rights need not change from your proposed amendments.

Sec. 7 (Old).

We have been advised by our consultants that the lack of a survey will substantially reduce if not completely eliminate the ability to manage Trust lands effectively. Without a survey it will not be possible to locate accurately which lands are Trust lands which are 802 lands and which are general grant lands. In addition, eliminating the requirement for survey for conveyances is completely contrary to property law as it has been consistently applied for centuries. Tentative Approval under the Statehood Act and Interim Conveyances under ANCSA were adopted solely as interim measures, with patents to follow after survey. Abandoning the requirement that property has to be sufficiently described to locate it on the ground in order to validly convey it for the sole purpose of saving survey costs is short-sighted and ill-advised.[6]

Sec. 8 (Old).

Trust land that has been disapproved for conveyance to municipalities (Subsection (C)) should not be exempt from conveyance to the Trust.

No Trust Land was purchased so that Subsection (D) is inapplicable.[7]

Just because land has been selected by a Native corporation (Subsection (E)) does not mean the corporation would receive the land even absent the Trust's selection. There is no reason for the Trust to give up land because of Native corporation selections where the Native corporations would not receive the land in any event.

The same is true of Native allotment applications (Subsection F).

Land identified for exchange but not yet conveyed (Subsection (G)) should, by definition be identifiable right now. DNR should do so and the lands be evaluated, rather than wait for later and end up in dispute.

Many ILMAs have been granted where the receiving agency does not use the land for direct public services and/or uses the land

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[6]DNR's calculation of the cost of surveys was based upon a full township and sections survey where much cheaper platted metes and bounds surveys would suffice. We estimate that the cost of the latter type of survey would reduce the cost to about 20% of that estimated by DNR.

[7]It is possible that existing Trust land was encumbered with restrictions because of conditions imposed by accepting grants relating to the improvement of those parcels.

to earn revenue. ILMAs and the like are susceptible to identification and, in fact, the various departments have been stonewalling on the "smallest practicable tract" determination that is being undertaken under the Settlement Agreement. Justification for continuation of each ILMA, including the necessary area should be required. If the departments have not complied with this process the land should be returned to the Trust.

**Sec. 9 (Old).**

The whole "802" process is clearly inappropriate as trust management. To the extent that the percentage is meant to compensate for this inappropriate management, the "802" provisions should be subject to continuing performance by the State of its obligations under the settlement. See above discussion regarding Section 6 (Old) as amended.

In any event the "802" lands should only include contracts as of the date of enactment, not the effective date.

We are not sure of the intent of subsection (f). If the idea is to validate all existing mining claims and leases on Trust land, it should say that. Continuation of management of these interests the same as general grant land should also depend upon the State's performance.

**Sec 10 (Old).**

Using Trust funds to pay for DNR's management is a raid on the Trust fund and undoubtedly will be used to fund non-Trust functions. This is particularly true because of the way DNR proposes to allocate a portion of individuals to the Trust. The cost of managing 802 interests should not be borne by the Trust.

**Sec 11 (Old).**

See comments on Section 10, above.

**Sec. 13 (Old).**

SB67/HB201 should not repeal Sections 54-57 of Chapter 66, except conditionally upon final approval, including exhaustion of appeals. In this way, if SB67/HB201 were to fail, Chapter 66 would be resurrected. In fact, it seems to us that the Chapter 66 and SB67/HB201 approaches could proceed contemporaneously in order to have some solution by the time of the effective date of approval.

Sec. 15 (Old).

The Trust's security interest in Trust Land should be recognized.

Sec. 16 (Old).

As discussed above, the land should be surveyed.

Secs. 17-19 (Old).

These effective date provisions are a whizzer-go-round. Literal reading of these sections requires approval of the current settlement (including rejection of legal challenges) before SB67/HB201 become effective. It does not appear that this is what is intended although your client's stated intention that it prefers the litigated approach to Chapter 66 makes us wonder if these effective date provisions are intended to make SB67/HB201 effective only if Chapter 66 would otherwise be approved. If the intent is that it becomes effective when Chapter 66 as amended by SB7/HB201 is approved by the courts as a final settlement including exhaustion of all appeals, that is what it should say.

Sec. 21 (New).

The grounds for modification of the consent decree should track those negotiated in the Settlement Agreement. It is also not clear what the intent is in saying that changes to unrestricted revenues are anticipated. Is the statement that the obligations are to place the Trust in the same position as if the State had not breached the Trust, an attempt to buttress the legislation against a citizen/taxpayer attack on the settlement as a giveaway?

As we indicated at the beginning, our addressing the proposed legislation should not be taken or expressed as an indication that we are negotiating on these bills. We think our comments make clear that SB67/HB201 as presently proposed are not viable vehicles for the settlement of the *Weiss* litigation. You know we also believe that whether it is us or someone else, legal challenges are almost certain to be raised and therefore the settlement consideration process under these bills will tend to be as long as the process under Chapter 66. With respect to the land returned to the Trust under the proposed legislation, and its management regime, it is our opinion that the Trust would be better off without it. That is why the enforceability/security provisions are so critical.

I know that you have worked very hard on this legislation including attempting to address our concerns. Unfortunately, in our view, the approach insisted upon by your group can not form the basis of a settlement of the Mental Health Trust Lands litigation.

Yours truly,

James B. Gottstein

cc: facsimile
Alaska Mental Health Association
Sen. Drue Pearce
Rep. Ron Larson
Thomas S. Waldo
Charles E. Cole
Jeffrey L. Jessee
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# EXPLANATION OF CS FOR SENATE BILL NO. 67 (JUD)

April 12, 1993

## BACKGROUND

CS for Senate Bill No. 67(JUD) amends Chapter 66, SLA 1991. Chapter 66 was intended to constitute a "settlement" of the mental health trust lands dispute but is now hopelessly embroiled in legal challenges being asserted in the Weiss litigation. A broad coalition of interests supports CSSB 67. The coalition includes two of the four named plaintiffs (beneficiary groups) in the Weiss litigation, the public interest intervenors and the oil company intervenors that are challenging Chapter 66 in the Weiss litigation, and representatives of the development community (the Alaska Coal Association, the Alaska Miners Association, and the Resource Development Council). The coalition is attempting to build a consensus for the amendments to Chapter 66 among the state and the two named plaintiffs who still support an unamended Chapter 66.

## THE BASIC STRUCTURE OF CHAPTER 66, SLA 1991

Chapter 66 establishes the Mental Health Trust Authority and contains significant "program" provisions that benefit the recipients of mental health services. Chapter 66 generally reconstitutes the land trust with original mental health trust lands (OMHTLs) which have not been conveyed by the state or placed by the legislature in legislatively designated areas (LDAs) such as parks and refuges. To compensate the trust for the conveyed and legislatively designated OMHTLs not being returned to the trust, Chapter 66 calls for a negotiated land exchange involving "substitute land" to be proposed by the plaintiffs' attorneys. Over 650,000 acres of "substitute land" have already been proposed. In addition, under Chapter 66 approximately 6.7 million acres of state land have become "hypothecated land" to be foreclosed upon if the land exchange is not completed by December 1, 1994.

The "substitute lands" are what has caused Chapter 66 to become hopelessly embroiled in litigation. The public interest intervenors (PIIs) have challenged Chapter 66 primarily because of issues involving the substitute lands. The oil company intervenors (Unocal and Marathon) have challenged Chapter 66 in court because they have leases on proposed substitute lands (PSLs). The attorneys for the state and the mental health beneficiaries have disagreements over the appropriateness of the plaintiffs' PSLs and the nature and

quantity of substitute land required to compensate the trust. Developmental interests are adversely affected by a land "freeze" that has been imposed on PSLs (in addition to the land "freeze" continuing to affect OMHTLs and "hypothecated lands").

Chapter 66 contains a "step down" funding provision requiring that a percentage of the "unrestricted revenue of the state" be allocated to the mental health trust income account in each fiscal year beginning with FYE 1992 and ending in FYE 2003.

**THE BASIC STRUCTURE OF CSSB 67(JUD)**

CSSB 67 retains the Mental Health Trust Authority and the significant "program" provisions that benefit the recipients of mental health services. In addition, CSSB 67 retains the concept of reconstituting the land trust with OMHTLs which have not been conveyed or are not within LDAs.

However, CSSB 67 amends Chapter 66 to remove the complicated land exchange provision from the settlement, thereby doing away with all of the legal problems and disputes that involve substitute lands and hypothecated lands. Instead, under CSSB 67 the trust receives monetary compensation for the OMHTL that is not being returned to the trust. Under CSSB 67 that compensation is an allocation to the mental health trust income account of 6% of the "unrestricted general fund revenue of the state" during each fiscal year. See AS 37.14.036(c) on pages 3-4 of CSSB 67. The money is intended to compensate the trust for the OMHTL that cannot be returned and for the land and mineral interests that have been carved out of OMHTL that is being returned. There is no cut-off date for this annual percentage allocation and the "step down" funding provision in Chapter 66 is eliminated.

Legislatively designated OMHTLs are pledged as collateral for the state's obligation to allocate the required percentage amount to the mental health trust income account each year. See AS 37.14.036(d) and (e) on page 4 of CSSB 67.

The reconstituted land trust will consist basically of the same OMHTLs that would have been returned to the trust under Chapter 66. Two differences are: (1) OMHTLs subject to mining claims will be returned to the trust (under Chapter 66, the plaintiffs had the option to accept or reject these lands); and (2) OMHTL contained in the Haines State Forest Resource Management Area and the Tanana Valley State Forest will not be returned to the trust.

## OTHER REFINEMENTS TO CHAPTER 66 MADE BY CSSB 67

### 1. Protection of Existing Third Party Interests or Appropriated Uses and Management of Such Interests and Uses by the Alaska Department of Natural Resources (DNR) Under AS 38.05.802

CSSB 67 amends Chapter 66 to specifically provide that the trust authority's title to the land being returned to the reconstituted trust remains subject to all existing third party interests (such as leases, contracts, permits, and mining claims) and appropriated uses (such as rights-of-way). See AS 38.05.802(a) and (b) on page 7 of CSSB 67.

Unlike third party interests such as leases, there is no legal document to reflect the terms of mining claims or leasehold locations and DNR normally makes no "validity" determination. The holders of mining claims and leasehold locations would therefore be subject to the status quo -- they would face whatever challenges they might face from the trust that they could face from DNR. The trust simply takes subject to the claimant's rights, if any. Unlike Chapter 66, CSSB 67 clarifies that for purposes of mining claims and mining leasehold locations, OMHTL is considered to have been open to mineral entry unless closed to mineral entry by a court or DNR order. See AS 38.05.802(f) on page 8 of CSSB 67. All OMHTL has been closed to mineral entry by court and DNR orders since November 5, 1985 and the provision is not intended to alter the effect of these closing orders.

In addition, CSSB 67 imposes a mandatory requirement that DNR manage all existing third party interests and appropriated uses under DNR's land management rules and standards for general grant land (as opposed to those rules and standards that will be applicable to mental health trust land). See AS 38.05.802(c) on page 7 of CSSB 67. For example, rental and royalty decisions for existing mineral leases on OMHTL would be made by DNR pursuant to DNR's normal regulations and without regard to the fact that the land is OMHTL. All income and proceeds from the management of these existing interests and uses must be deposited by DNR into the mental health trust income account. See AS 38.05.802(c) on page 7 of CSSB 67.

The bill further provides that a person who holds a protected interest may enter into an agreement with DNR and the trust authority to waive DNR's mandatory land management under general grant land standards. See AS 38.05.804 on page 8 of CSSB 67. This allows a third party interest holder to "opt in" to the trust authority land management system once the trust authority has established a stable land management program and a successful track record.

## 2. Management of Reconstituted Trust Land Under AS 37.14.009

Except for existing third party interests and appropriated uses (which must be managed by DNR under AS 38.05.802, as discussed above), the reconstituted land trust must be managed, as required by Chapter 66, under AS 37.14.009 in a fiduciary manner to fulfill the purposes of the trust. However, CSSB 67 amends Chapter 66 to require the trust authority to adopt regulations relating to land management and disposal. See AS 37.14.009(a)(4) on page 2 of CSSB 67. In addition, except for existing third party interests and appropriated uses (which must be managed by DNR under AS 38.05.802), CSSB 67 amends Chapter 66 to require the trust authority to contract with DNR to manage and dispose of reconstituted trust lands in accordance with the trust authority's regulations unless the trust authority determines that the best interests of the trust beneficiaries would be served by other arrangements (for example, by having the trust authority manage the land itself or through another contractor). See AS 37.14.009(a)(4) on page 2 of CSSB 67.

The potential for a conflict exists on any parcel of reconstituted trust land between DNR's management of a protected third party interest or appropriated use under AS 38.05.802 and management of the remainder of the land by the trust authority (or DNR as its contractor) under AS 37.14.009. Therefore, CSSB 67 contains a provision to require that any such conflicts are to be resolved in accordance with the many laws (including court decisions) that apply to conflicts between concurrent users of land. See AS 37.14.009(c) on page 3 of CSSB 67. This makes it clear that the trust authority's management is subject to these developed legal principles and that these principles are not to be distinguished or disregarded just because the trust is the landowner and the trust authority has an obligation to manage its assets in a fiduciary manner to fulfill the purposes of the trust. Of course, because the trust takes its land subject to existing third party interests, any contractual rights addressing whether other concurrent land uses are allowed must also be honored by the trust authority in its management of the remainder of any particular parcel of land under AS 37.14.009.

## 3. Public Interest Safeguards Applicable to Reconstituted Trust Land Managed Under AS 37.14.009

As under Chapter 66, under AS 37.14.009 reconstituted trust land is to be managed by the trust authority (or by DNR as the trust authority's contractor) without compliance with AS 38.04 or AS 38.05. But CSSB 67 amends Chapter 66 to

include a requirement designed to require that disposal and use of trust land under AS 37.14.009 comply with the state constitution and the principle of multiple purpose use consistent with the public interest. See AS 37.14.009(b)(1) on pages 2-3 of CSSB 67. However, the amendment also recognizes that the trust principles established in AS 37.14.007 and AS 37.14.009 must take priority if they conflict with multiple purpose use. In addition, CSSB 67 amends Chapter 66 to require public notice of any disposals of trust land under AS 37.14.009, a 30-day comment period, and a final public notice of any trust land disposals under AS 37.14.009. See AS 37.14.009(b)(2) on page 3 of CSSB 67. This ensures that trust beneficiaries, trust land developers, people who use trust lands for other purposes, and other members of the public have an opportunity to have their views considered by the trust authority. Existing third party interests or appropriated uses continue to be managed like general grant land under AS 38.05.802 and therefore remain subject to AS 38.04 and AS 38.05 unless the interest holder elects to "opt in" to the trust authority land management system governed by AS 37.14.009.

**4. Definition of Unrestricted General Fund Revenue**

CSSB 67 contains a definition of "unrestricted general fund revenue of the state" to be used for calculating the annual percentage allocation to be made by the state to the mental health trust income account. See AS 37.14.036(c) on pages 3-4 of CSSB 67. The definition ties the meaning of this phrase to the manner in which money is categorized under the statewide accounting system as of the effective date of Chapter 66. The purpose of this provision is to remove the possibility that future restrictions imposed by the legislature on general fund revenues will have a negative impact on the dollar amount used for calculating the percentage allocated to the trust. No limitation is placed on the legislature's ability to impose future restrictions, but for purposes of calculating the amount to be allocated to the trust, any such future restrictions would be disregarded.

**5. Clarification of Land Reconstitution Ambiguities Contained in Chapter 66**

CSSB 67 contains several provisions which are designed to clarify ambiguities in Chapter 66, such as what land is actually being returned to the reconstituted trust. Under Chapter 66 this is ambiguous and has been left open to negotiation between the state and the plaintiffs' attorneys. CSSB 67 amends Chapter 66 to clearly provide that all OMHTLs are to be returned to the reconstituted trust unless they have been "conveyed" or "reserved by law from the public domain."

See AS 38.05.800 on pages 5-6 of CSSB 67. The terms "conveyed" and "reserved by law from the public domain" are then specifically defined. See AS 38.05.800(a)(1) and (2) on pages 6-7 of CSSB 67. CSSB 67 also clarifies that if either the surface or the mineral estate of OMHTL has been "conveyed" or "reserved by law from the public domain," then neither estate is being returned to the reconstituted trust. See AS 38.05.800(b) on page 7 of CSSB 67.

CSSB 67 clarifies that those lands not being returned to the trust are permanently released from any claim of the trust. See Section 15 on page 10 of CSSB 67.

As under Chapter 66, CSSB 67 requires an actual conveyance of reconstituted trust land from DNR to the trust authority. But CSSB 67 clarifies Chapter 66 by providing that reconstituted trust land is to be conveyed to the trust authority by patent without a survey, resolving another matter that has been the subject of negotiations under Chapter 66. See Section 16 on pages 10-11 of CSSB 67. CSSB 67 amends the existing Alaska statute which arguably requires a survey before reconstituted trust lands could be conveyed to the trust authority. See AS 38.04.045(b) on pages 4-5 of CSSB 67.

**6. Funding of DNR Land Management Responsibilities**

Under Chapter 66, as amended by CSSB 67, DNR is required to manage all existing third party interests and appropriated uses. In addition, the trust authority is required to contract with DNR to manage reconstituted trust land unless the trust authority determines that the best interests of the trust beneficiaries would be served by other arrangements (direct trust authority management or a contractual arrangement with a private land manager). CSSB 67 amends Chapter 66 to allow the legislature to make appropriations from the mental health trust income account to fund DNR's land management duties. See AS 47.30.046(a) on page 9 of CSSB 67 and AS 47.30.056(a) on page 10 of CSSB 67. Of course, any revenue generated from DNR's management of the reconstituted trust must be deposited by DNR into the same mental health trust income account from which DNR can be funded.

**7. Resolution of Disputes Over Annual Percentage Allocation, Collateral, and Foreclosure of Collateral**

Under Chapter 66 the Alaska Supreme Court was given original and exclusive jurisdiction over any disputes arising out of reconstitution of the trust, the land exchange negotiations, and the collateral for reconstitution of the land trust. CSSB 67 amends Chapter 66 to return jurisdiction

over any such disputes to the superior court and to specifically provide that the superior court also has jurisdiction over any dispute pertaining to the annual percentage allocation required to be made to the mental health trust income account, the collateral for that allocation (the OMHTL LDAs), and any foreclosure of that collateral. See AS 22.10.020(j) on page 1 of CSSB 67. In addition, CSSB 67 specifically gives the superior court the power to refer any such disputes to a special master. See Section 14 on page 10 of CSSB 67.

* * * * * *

CSSB 67 is exactly the same as a companion bill in the House (CSHB 201) with the exception of the amount of the annual percentage allocation which is 3% in the House bill.

Sen. Pearce

# STATE OF ALASKA

**DEPARTMENT OF LAW**

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SB 67

May 4, 1993

Hon. Rick Halford, President
Alaska State Senate
Eighteenth Alaska Legislature, First Session
State Capitol, Room 111
Juneau, Alaska 99801-1182

Dear President Halford:

After meeting with the settling plaintiffs in Weiss, we agree that two minor amendments should be made in the proposed language that was distributed to you earlier today to resolve Judge Greene's concerns in the mental health trust lands litigation. The amendments are reflected in the proposed language attached to this letter.

We are available to explain these proposed amendments. We urge your favorable consideration on this matter.

Very truly yours,

Charles E. Cole
Attorney General

CEC:cl

cc w/ enc.: Sen. Robin Taylor
Sen. Steve Frank
Sen. Drue Pearce

Pat Ryan, Chief of Staff
Kris Lethin, Legislative Liaison
Office of the Governor

Hon. Glenn A. Olds, Commissioner
Dept. of Natural Resources

David T. Walker
James B. Gottstein
Jeffrey L. Jessee
Philip R. Volland
Richard M. Johannsen
Peter J. Maassen
G. Thomas Koester

Brian D. Bjorkquist, Assistant Attorney General
Wendy S. Feuer, Assistant Attorney General

5/4/93

**REVISED**

Proposed Amendments to CSHB 201(RES) and CSSB 67(JUD)

Page 1, line 2:

Following "mental health trust":

Delete all material

Insert "; and providing for an effective date.""

Page 1, lines 3 - 7:

Delete all material

Page 1, line 9 - page 11, line 9:

Delete all material

Insert the follcwing:

"* **Section 1.** Section 55(g), ch. 66, SLA 1991, is amended to read:

(g) **Except for public notice as provided under AS 38.05.945(b) and (c), the** [THE] provisions of **AS 38.04, AS 38.05, and** AS 38.50 do not apply to exchanges under this section.

* **Sec. 2.** Section 55(h), ch. 66, SLA 1991, is amended to read:

(h) If agreement cannot be reached between the plaintiffs in Weiss v. State of Alaska, 4FA-82-2208 Civil, and the commissioner of natural resources under (f) of this section as to appropriate lands to be conveyed to the trust as compensation or as to the

value of the original lands taken or of replacement lands, the Alaska Supreme Court shall resolve the disagreements using the criteria set out in this section, **but may not give deference to the commissioner's finding under (j) of this section**. The Alaska Supreme Court may order the commissioner of natural resources to convey appropriate state land to the trust without further legislative authorization.

*** Sec. 3.** Section 55, ch. 66, SLA 1991 is amended by adding new subsections to read:

(i) The commissioner of natural resources shall give public notice as provided under AS 38.05.945(b) and (c) of proposed exchanges negotiated under (f) of this section, or exchanges proposed by either the plaintiffs in Weiss v. State of Alaska (4FA-82-2208 Civil) or the commissioner of natural resources under (h) of this section. In the notice, the commissioner shall provide for a written comment period of at least 30 days. The commissioner shall hold a public hearing in the area of the land proposed to be conveyed to the trust under the proposed exchange.

(j) Following public notice of a proposed exchange under this section and the public hearing, the commissioner shall make, and give notice of, a written finding as to whether the proposed exchange meets the criteria of (b) - (e) of this section.

(k) In order to obtain judicial review of the commissioner's finding under (j) of this section and of the exchange, a person must

(1) have submitted written or oral comment in response

to a notice published under (i) of this section;

(2) demonstrate that the person has an interest that will be adversely affected by the exchange if the exchange becomes final; and

(3) within 30 days after the commissioner gives notice of the commissioner's finding, file a notice of appeal with the court with jurisdiction under sec. 57 of this Act.

* **Sec. 4.** Section 56(a), ch. 66, SLA 1991, is repealed and reenacted to read:

(a) To secure the reconstitution of the trust as provided in secs. 54 and 55 of this Act, the following land is hypothecated to the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709:

(1) original mental health land that will be returned to the trust under sec. 54 of this Act; and

(2) up to 1,500,000 acres of other state land as negotiated by the commissioner of natural resources and the plaintiffs in Weiss v. State of Alaska, 4FA-82-2208 Civil, using the criteria set out in secs. 55(d) and (e) of this Act, for the exchange of land to the trust in return for original mental health land not returned to the trust; the total amount of land hypothecated to the trust under this paragraph, in conjunction with land hypothecated to the trust under (1) of this subsection, shall be sufficient to reconstitute the trust.

* **Sec. 5.** Section 58, ch. 66, SLA 1991, is amended to read:

Sec. 58. **(a) Sections 56(a) and (b) of this Act take effect**

**on the effective date of an Act passed by the Eighteenth Legislature amending provisions of ch. 66, SLA 1991 that relate to reconstitution of the corpus of the mental health trust.**

**(b) Sections 1 - 55, 56(c) and (d), and 57 of this** [THIS] Act **take** [TAKES] effect upon entry of a final order dismissing Weiss v. State of Alaska, 4FA-82-2208 Civil, and the expiration of any time for appeal. The superior court shall advise the lieutenant governor and the revisor of statutes when the final settlement and order of Weiss v. State of Alaska has been approved.

* **Sec. 6.** If ch. 66, SLA 1991, is finally disapproved as a settlement of Weiss v. State, 4FA-82-2208 Civil, this Act is repealed.

* **Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

# STATE OF ALASKA

**DEPARTMENT OF LAW**

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SB 67

May 4, 1993

Hon. Rick Halford, President
Alaska State Senate
Eighteenth Alaska Legislature, First Session
State Capitol, Room 111
Juneau, Alaska 99801-1182

Dear President Halford:

On April 26, 1993, Superior Court Judge Mary E. Greene ruled that the legislation settling the mental health trust lands litigation (Chapter 66, SLA 1991) was constitutional in all respects except one. In her view, the pledging of the land on the "Hypothecated Lands List" to the trust as security for the state's performance of its obligations under ch. 66 was not valid because it did not contain adequate standards to guide the commissioner of natural resources in negotiating the list with the plaintiffs.

Judge Greene went out of her way to point out, however, that the legislature could easily cure the problem:

> Obviously, it would be very easy for the legislature to remedy this problem. If the legislature amended section 56(a) to adopt a specific, known list or <u>delegated the task of preparing a new list with adequate standards</u>, the difficulty would be eliminated.

Memorandum Decision and Order Re: Intervenors' Complaint (April 26, 1993) at 82, n. 42 (emphasis added).

The attached proposed amendments to CSSB 67(JUD) would implement Judge Greene's suggestion for curing ch. 66 by delegating to the commissioner of natural resources the task of preparing a new Hypothecated Lands List, to consist of (1) original mental health land that will be returned to the trust under sec. 54, ch. 66, and (2) up to 1.5 million acres of other state land, selected under the criteria set out in secs. 55(d) and (e), ch. 66, for identifying land to be exchanged to the trust in return for original mental health land not returned to the trust. (This will reduce the amount of state land hypothecated to the trust from the 6.7 million acres on the original Hypothecated Land List to no more than 1.5 million acres and, because the same standards will be used for hypothecation as for exchanges, make it likely that the same land that is hypothecated will ultimately be exchanged to the trust.)

The proposed amendments also make a technical amendment to ch. 66 by exempting the process for reconstituting the trust from the planning and classification requirements of AS 38.04 and AS 38.05, and substituting procedures by which the public may participate in the reconstitution of the mental health trust. Judge Greene found that the planning and classification requirements of AS 38.04 and AS 38.05 would apply to the reconstitution process under ch. 66 as currently written. The proposed amendments to CSSB 67(FIN) will result in substantial savings of both time and money in completing the reconstitution process and bringing this issue to final closure.

In effect, Judge Greene has determined that ch. 66, SLA 1991 is a constitutionally permissible means to settle this divisive and costly lawsuit that has adversely impacted many people in the state. Passage of the amended version of CSSB 67(FIN) that we are proposing will (1) significantly advance the final settlement of the case, and (2) free most of the land on the original Hypothecated Lands List for development.

If this legislation is not enacted before the legislature adjourns, the chances are strong that the settlement agreement reached with the Weiss plaintiffs under ch. 66 will be terminated and the headway we have made over the past two years in settling the mental health lands mess will become a dead letter.

We urge your favorable consideration of the proposed amendments.

Very truly yours,

Charles E. Cole
Attorney General

CEC:cl

cc w/ enc.: Sen. Robin Taylor
Sen. Steve Frank
Sen. Drue Pearce

Pat Ryan, Chief of Staff
Kris Lethin, Legislative Liaison
Office of the Governor

Hon. Glenn A. Olds, Commissioner
Dept. of Natural Resources

David T. Walker
James B. Gottstein
Jeffrey L. Jessee
Philip R. Volland
Richard M. Johannsen
Peter J. Maassen
G. Thomas Koester

Brian D. Bjorkquist, Assistant Attorney General
Wendy S. Feuer, Assistart Attorney General

Proposed Amendments to CSHB 201(RES) and CSSB 67(JUD)

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(g) **Except for AS 38.05.945(b) and (c), the** [THE] provisions of **AS 38.04, AS 38.05, and** AS 38.50 do not apply to exchanges under this section.

* **Sec. 2.** Section 55, ch. 66, SLA 1991 is amended by adding new subsections to read:

(i) The commissioner of natural resources shall give public notice as provided under AS 38.05.945(b) and (c) of proposed exchanges negotiated under (f) of this section, or exchanges proposed by either the plaintiffs in Weiss v. State of Alaska (4FA-82-2208 Civil) or the commissioner of natural resources under (h) of this section. In the notice, the commissioner shall provide for

a written comment period of at least 30 days. The commissioner shall hold a public hearing in the area of the land proposed to be conveyed to the trust under the proposed exchange.

(j) Following public notice of a proposed exchange under this section and the public hearing, the commissioner shall make, and give notice of, a written finding as to whether the proposed exchange meets the criteria of (b) - (e) of this section.

(k) In order to obtain judicial review of the commissioner's finding under (j) of this section and of the exchange, a person must

(1) have submitted written or oral comment in response to a notice published under (i) of this section;

(2) demonstrate that the person has an interest that will be adversely affected by the exchange if the exchange becomes final; and

(3) within 30 days after the commissioner gives notice of the commissioner's finding, file a notice of appeal with the court with jurisdiction under sec. 57 of this Act.

* **Sec. 3.** Section 56(a), ch. 66, SLA 1991, is repealed and reenacted to read:

(a) To secure the reconstitution of the trust as provided in secs. 54 and 55 of this Act, the following land is hypothecated to the trust established by the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709:

(1) original mental health land that will be returned to the trust under sec. 54 of this Act; and

(2) up to 1,500,000 acres of other state land as negotiated by the commissioner of natural resources and the plaintiffs in Weiss v. State of Alaska, 4FA-82-2208 Civil, using the criteria set out in secs. 55(d) and (e) of this Act, for the exchange of land to the trust in return for original mental health land not returned to the trust; the total amount of land hypothecated to the trust under this paragraph, in conjunction with land returned to the trust under (1) of this subsection, shall be sufficient to reconstitute the trust.

*** Sec. 4.** Section 58, ch. 66, SLA 1991, is amended to read:

Sec. 58. **(a) Sections 56(a) and (b) of this Act take effect on the effective date of an Act passed by the Eighteenth Legislature amending provisions of ch. 66, SLA 1991 that relate to reconstitution of the corpus of the mental health trust.**

**(b) Sections 1 - 55, 56(c) and (d), and 57 of this** [THIS] Act **take** [TAKES] effect upon entry of a final order dismissing Weiss v. State of Alaska, 4FA-82-2208 Civil, and the expiration of any time for appeal. The superior court shall advise the lieutenant governor and the revisor of statutes when the final settlement and order of Weiss v. State of Alaska has been approved.

*** Sec. 5.** If ch. 66, SLA 1991, is finally disapproved as a settlement of Weiss v. State, 4FA-82-2208 Civil, this Act is repealed.

*** Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

WALTER J. HICKEL, GOVERNOR

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March 12, 1993

Hon. Bill Williams, Chairman
House Resources Committee
Eighteenth Alaska State Legislature
State Capitol, Room 128
Juneau, Alaska 99801-1182

Re: House Resources Committee
Hearing on HB 201

Dear Chairman Williams:

While I was unable to attend all of the House Resources Committee meeting on HB 201 this morning, I have been told the substance of the testimony of some of the other witnesses. Because I have a marked disagreement with some of their representations, including the characterization of my position on several matters, I am compelled to respond.

First, there is no question but that the 1978 legislation removing mental health lands from trust status, coupled with the legislature's failure to appropriate any funds to compensate the trust for these lands, constituted a breach of trust. The Alaska Supreme Court decided that to be the case, and I agree with the decision. The plaintiffs' other claims of breach, as outlined by Representative Hudson, have not been resolved by the high court and, in light of the state's substantial financial commitment to mental health programs over the years, I am convinced that those claims for past damages have little merit.

What has eluded everyone to date is a final resolution to the entire controversy. As I stated this morning, my view is that resolution must bear a reasonable relationship to the remedy specified by the Alaska Supreme Court: (1) return to trust status of the original mental health lands still in state ownership; and (2) compensation to the trust for the fair market value of former mental health lands that have been sold subject to a set-off for state mental health expenditures.

One of plaintiffs' attorneys remarked that they should not be considered "greedy" because the six percent of the state's unrestricted general fund revenues that they are demanding -- an amount almost everyone agrees bears no relation to the earning capacity of the original land grant -- was taken from chapter 210, SLA 1990. While chapter 210 did allocate six percent of unrestricted general fund revenues to the mental health trust income account, it did not do a number of the things which the