

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

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HOUSE RESOURCES

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plaintiffs now are demanding: (1) the creation of a new, independent Mental Health Trust Authority; (2) the return of 500,000 acres of original mental health lands to trust status (this, of course, in addition to the six percent of the unrestricted general fund); (3) establishment of a separate process for mental health appropriations under which the legislature's discretion would be substantially diminished and the plaintiffs would be given significant "influence" (and which would no doubt result in new litigation over mental health appropriations if the plaintiffs' recommendations are not followed in toto); and (4) the state's mental health program would be modified substantially in the manner desired by the plaintiffs. Those are all new demands by the plaintiffs which, if agreed to by the State, would be unfair to all other Alaskans.

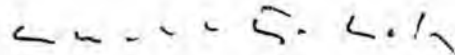
The State, it was suggested this morning, has a history of "backing out of" deals once it decides that they were not in the State's best interests. Two examples were cited: Chapter 48, SLA 1987, and the recent nomination by the plaintiffs of producing oil and gas leases as proposed substitute lands under the chapter 66 Settlement Agreement. Chapter 48, however, mandated an approach based on "fair market value." Agreement could not be reached on the appropriate procedures for determining fair market value, and the Commissioner of Natural Resources properly declared impasse. If that action had violated chapter 48, plaintiffs could easily have obtained a court order to compel the Commissioner to go forward with the alleged agreement. The fact that they did not try to obtain such an order demonstrates that, in declaring impasse, the State did not "back out of" any agreement embodied in chapter 48.

With respect to the recent Cook Inlet nominations under Chapter 66, Mr. Jessee presented a list of original mental health lands that plaintiffs' consultants had identified as having "significant oil and gas potential." Chapter 66 and the Settlement Agreement, however, expressly provided that the trust would be reconstituted with "land of comparable character" to the original mental health lands not returned to trust status. Land with merely oil and gas potential, of course, is not comparable to producing oil and gas properties in Cook Inlet.

As reported to me, several lesser points were made in others' testimony with which I disagree, but I will await another opportunity to address them. At this juncture, suffice it to say that I find it unfortunate that the legislative process has now been clouded with inaccuracies, distortions, and misrepresentations, and that some apparently now believe it advantageous to attack me personally and to point the finger of blame at me for the present state of affairs. This problem is too complex and the stakes are too great, however, to get lost travelling down such unproductive paths.

Let me simply say that I am fully familiar with the issues surrounding this controversy and I have listened intently to a broad range of views expressed by Alaskans, including those of plaintiffs' counsel. My goal remains what it has always been, and that is to get us all back on track and together to move toward a resolution that is just and fair to all Alaskans, both those that are plaintiffs in the Weiss litigation and those that are not. I and the Department of Law look forward to working with the legislature and all of the parties to achieve that end.

Very truly yours,



Charles E. Cole
Attorney General

cc: House Resources Committee
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James B. Gottstein
Jeffrey L. Jessee
Philip R. Volland
Richard M. Johannsen
Peter J. Maassen

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DEPARTMENT OF LAW

March 23, 1993

OFFICE OF THE ATTORNEY GENERAL

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

Re: Comments on Proposed Amendments to HB 201

Dear Chairman Williams:

Pursuant to your request, the state (Departments of Law and Natural Resources) offer the following comments regarding amendments to HB 201 that have been proposed by the coalition that consists of dissenting plaintiffs in Weiss, certain coal companies, and the environmental intervenors (Alaska Center for the Environment et al.). Our comments are strictly limited to the proposed amendments as requested. The state continues to have grave reservations concerning the approach to settlement contained in HB 201.

As a preliminary matter, we were uncertain about what the coalition intended to implement with certain proposed amendments. We discussed several of these issues with the coalition's drafting counsel, Richard Johannsen, and base several comments on our understanding derived from those conversations. If we have misinterpreted the coalition's intent, we may need to modify certain comments.

1. Who has management authority?

We believe the proposed amendments are ambiguous as to whether the Trust Authority or the Department of Natural Resources ("DNR") would (1) make each land disposal decision, and (2) establish the specific "fiduciary" standards and procedures by which trust land would be managed under AS 37.14.009¹ (the coalition refers to this as "Section 9" land -- it is trust land that is now generally "vacant and undeveloped"). We understand that the coalition's intent is that (1) the Trust Authority would make each land disposal decision, but could delegate that duty to DNR, and (2) that the Trust Authority would establish by regulation the specific "fiduciary" standards and procedures by which trust land would be managed. The following comments are based upon these understandings.

¹ In contrast, we believe that management guidelines are more clearly established for lands to be managed under AS 38.05.802.

a. If the Trust Authority will either make or delegate to DNR the duty to make land disposal decisions, the following modifications should be made:

i) The proposed amendment in E.6 to page 1, line 11 should be deleted. The Trust Authority will "manage the assets of the trust in a fiduciary manner" whether it does so directly through its own land office or indirectly through a contract with DNR under AS 37.14.009(a)(4).

ii) Furthermore, deleting that proposed amendment in E.6 would eliminate ambiguity as to whether trust lands DNR would manage under AS 37.14.009(a)(4) may be sold, leased, exchanged or otherwise disposed. The ambiguity arises because the only express authorization for leases or disposals of trust lands is found in what would become AS 37.14.009(a)(2).² If that section were to be amended as suggested in E.6, it would authorize the Trust Authority to dispose only the trust land it manages and there arguably would be no authority for disposals when the Trust Authority contracts for DNR to manage trust lands.

b. If the Trust Authority will establish the standards and procedures by which trust lands will be managed in a fiduciary manner, regardless of whether the Trust Authority or DNR actually manages those lands, the following modifications could be made:

i) In each place where HB 201 provides that DNR would manage the land assets of the trust, clarify that such management would be pursuant to standards and procedures adopted by the Trust Authority (or jointly adopted by the Trust Authority and DNR). The Trust Authority would adopt the standards and procedures as regulations. See AS 47.30.031(b)(2), to be enacted by § 26, ch. 66, SLA 1991. These regulations would then, presumably, be incorporated as part of the contract with DNR to manage land assets of the trust under what would become AS 37.14.009(a)(4). Our review revealed only one place for such clarification that the Trust Authority (alone or jointly with DNR) would establish fiduciary standards and procedures by regulation -- Modify proposed amendment E.6, the insert regarding page 2, line 5 of HB 201, to read (suggested modification underlined):

"the Department of Natural Resources shall manage
the land assets of the trust in a fiduciary manner

² This is because any disposal under (a)(2) must be "consistent with (1) of [subsection (a)]" and subsection (a)(1) would exclude lands DNR would manage under (a)(4) if proposed amendment E.6 were adopted.

pursuant to standards and procedures adopted by the authority under AS 47.30.031(b) to fulfill the purposes of the trust"

c. The following modifications are suggested to section 3 of E.5.

i) Modify proposed amendment E.5, the insert at page 1 which would add a new Section 3 to HB 201, regarding what would become AS 37.14.009(b)(1): after "set out in AS 37.14.007" insert "or AS 37.14.009." The reason for this revision is that subsection (b)(1) imposes AS 38.05.285 multiple use standards on management of trust land assets, except if a conflict with trust management arises. The Trust Authority's "power, duty, or responsibility" with respect to managing trust land is set forth in AS 37.14.009 in addition to AS 37.14.007. At a minimum, both of those sections should be listed if the "trust management" exception to multiple use management under AS 38.05.285 is limited to statutory powers, duties, and responsibilities of the trustee.

ii) The requirement that trust land be managed in accordance with multiple use requirements unless a conflict with a power, duty, or responsibility of the trustee arises creates a situation ripe for litigation. The state anticipates constant challenges to whether the proper management is under section 285 or something else. The possibility that section 285 may not need to be complied with creates uncertainty as to how the land will be managed. This absence of predictability will lessen private sector interest in developing trust land. We suggest that the proposed subsection (b)(1) to AS 37.14.009 be deleted in its entirety.

iii) We suggest a minor wording change to subsection (b)(2)(A) of proposed AS 37.14.009:

(A) of a preliminary decision to dispose of trust land and consider any written comments submitted within 30 days of such [THE GIVING OF THE] public notice before making a final decision; and

2. Management of trust lands within legislative designated areas.

The proposed amendment E.1 to page 2, line 31 is intended by the coalition to eliminate the state's concern that trust interests in original trust lands within legislative designated areas will impair the state's ability to develop those lands. In what may be an "excess of caution," we suggest that the proposed amendment be modified as follows to clarify that the "activities on this land that are authorized by law" is made without regard to restrictions that might arise out of the Alaska Mental Health

Enabling Act:

"(1) notwithstanding the pledge of security or that the land was granted to the state under the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, the state may continue to conduct all activities on this land that are authorized by law; and"

3. Categories of Land Reconstituted into the Mental Health Trust Corpus.

a. Proposed E.5 at page 2 would amend proposed AS 38.05.800 of HB 201 to define the phrase "conveyed or encumbered by the state." If an interest is listed in that amendment that means land conveyed by that interest will not be returned to the trust. It is the coalition's intent that land necessary to carry out the purposes of an interagency land management agreement or similar authorization³ will not be returned to the trust as it is encumbered. Because this is the case, the definition of conveyed or encumbered should be revised and a new subsection (F) added:

(F) is subject to an interagency land management agreement, interagency land management transfer, management agreement or management right but does not include land unnecessary to carry out the purpose of the interagency land management agreement, interagency land management transfer, management agreement or management right.

If this change is made then subsection 3 of AS 38.05.800(HB 201, page 3 of lines 20-21) should be deleted.

b. In general proposed AS 38.05.800 and E.5's amendment to the definition of lands "conveyed or encumbered" omits a category of lands that should not be reconstituted - - "land leases issued with conversion rights to sale." Because these leases give the lessee the right to purchase the land, the lands should be considered "conveyed or encumbered." We offer the following conforming amendments:

(i) Add a new subsection (F) to the definition of "conveyed or encumbered" contained at page 2 of E.5:

³ DNR also uses documents called interagency land management transfer, management agreement or management right to transfer the control of state land to another agency.

"(F) is subject to a land lease issued with conversion rights to sale."

(ii) Revise proposed AS 38.05.800 subparagraph 2(A) to read: "(A) leases, but not including land leases with rights of conversion to sale."

(iii) Revise AS 38.05.809(3) to read: "lease" means an oil and gas lease, coal lease, mining lease, land lease without conversion rights to sale, and any other surface or mineral lease."

c. Finally we suggest the following minor change to the definition of conveyed or encumbered contained in E.5 to subsection (c): "has been selected by a native corporation under 43 USC 1611."

4. Management under AS 38.05.802.

a. The proposed amendment F.5 would add a new Sec. 38.05.802 which would govern the administration of lands returned to the trust that have certain third party interests or appropriated uses. We note the following ambiguities in this section. Under its authority to manage the "section 802" lands, may DNR create new interests in these lands (i.e. issue a lease, approve the assignment of a lease, change the royalty rate, convert a mining claim to a mining lease) which new interest arguably would be a disposal of trust land? Nothing in HB 201 expressly gives DNR the authority to dispose of interests in section 802 trust land. While some may consider the assignment of a lease, for example, a mere management function, beneficiaries of the trust may consider it a disposal of an interest in trust land. Perhaps a definition of manage should be added to section 802:

(f) for purposes of this section "manage" includes the right to dispose of interests in land in the trust.

b. The management of lands under AS 38.05.802 as if it were general grant land could be deemed to be in breach of trust (i.e., the failure to manage the land under trust principles breaches the state's trust obligations. We understand the intent of the proposed amendments is that no breach of trust results because the percentage of unrestricted general fund revenues paid the trust would compensate for the diminishment in value, if any, from management under AS 38.05.802 rather than under trust principles. Section 4 of SB 67 should be amended as follows to clarify this point.

(c) As compensation for the land or interests

therein that constituted the trust established by the enabling Act and that is not reconstituted as part of the mental health trust corpus established under AS 38.05.800, including any interests in land not conveyed due to management imposed under AS 38.05.802, the state shall make an annual payment of three percent of the unrestricted general fund revenue of the state during each fiscal year. The commissioner of revenue shall annually allocate that amount from the general fund to the mental health trust income account established in (a) of this section.

5. Costs of management under AS 38.05.802.

Another ambiguity in the proposed section AS 38.05.802 concerns the costs of managing the trust land under section 802. The proposed amendment E.5 to page 3, line 24 would add Section 8 that would have DNR continue to manage trust lands on which any third party interest exists, and that "the proceeds of the management of the land managed under this section shall be deposited into the mental health trust income account under AS 37.14.036(a)(1)." See the last sentence of what would become AS 38.05.802(c). We interpret the intent of that provision to require that DNR's costs associated with managing lands would be borne by DNR -- a result that is contrary to fundamental trust law principles that the trust, not the trustee, bears the costs associated with managing trust assets. To insure that the reconstituted trust would be managed pursuant to fundamental trust principles, the last sentence of what would become AS 38.05.802(c) should be modified to read "However, the proceeds of the management of the land managed under this section shall be deposited into the mental health trust income account under AS 37.14.036(a)(1) and the department shall be funded from the Mental Health Income Account for the management of trust land."

6. Transfer of Land To Trust.

Section 13 of the proposed amendment E.5 concerns how land will actually be transferred to the trust. This section is ambiguous as to the manner of transfer. If the transfer is to occur by patent then a survey complying with AS 38.04.045 would be required prior to issuance of the patent. That section would require that land located within a municipality comply with all local planning, platting, and zoning requirements. DNR has previously estimated that it will cost \$30 to \$35 million and take about 20 years to survey the land that would be reconstituted to the trust. It is neither in the state's nor trust's interest to convey land to the trust by patent or deed. There is no point in

undertaking the detailed surveying and platting exercises required by law to transfer the land to the trust when DNR will be managing the land in any event. Further, because much of the land that will be returned to the trust is undeveloped, there is no point in having it surveyed and platted prior to someone actually seeking to develop the land. This way when a person seeks to develop the land, that person will have more flexibility in developing and platting and that person can help defray the cost of survey. If conveyance is required, it would be expected that local platting authorities will impose restrictions on development that would not arise if the land is simply redesignated. The conveyance to the trust should occur by means of "redesignating" the land. Not only will transfer by redesignation avoid the cumbersome and costly survey process it will also avoid the need for researching and preparing thousands of title documents for each parcel of land to be returned. Redesignation could be accomplished quickly and result in prompt, active management of the land. We suggest revising section 13 as follows:

On or after the effective date of this section, after giving public notice in the manner provided under AS 38.05.945(b) and (c), the commissioner of natural resources shall promptly redesignate as mental health trust land [CONVEY TO THE ALASKA MENTAL HEALTH TRUST AUTHORITY ESTABLISHED BY SEC. 26, CH 66, SLA 1991, TITLE TO] land, including both the surface and mineral estate, that is includable within the corpus of the reconstituted mental health trust under AS 38.05.800(a), repealed and reenacted by sec. 7 of this Act.

7. The proposed amendments may not remove the potential legal challenges to HB 201 as the coalition suggests.

The coalition suggests that HB 201, as amended, removes concerns set forth in sections V, VI, VIII, X.3, and X.4 of the Attorney General's February 3, 1993 letter to Senator Mike Miller. See Document from coalition titled "Explanation of Proposed Revisions to SB 67/HB 201. We are not convinced that the amendments satisfy and remove the challenges to Chapter 66 raised by intervenors Alaska Center for the Environment, et. al., with respect to providing "other safeguards of the public interest" for land management as intervenors claim is mandated under Art. VIII, § 10 of the Alaska Constitution. See Section X.3 of letter to Senator Miller. (February 3, 1993). Intervenors Alaska Center for the Environment, et al. should explain on the record how the proposed amendments fully satisfy their constitutional challenges regarding management of trust lands.

Hon. Bill Williams, Chairman
Re: Comments on Proposed Amendments to HB 201

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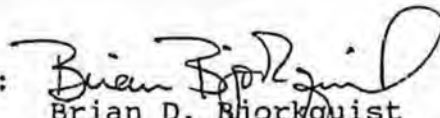
8. Definition of "land."

The definition of "land" set out in what would become AS 38.05.809(2)(A) does not clarify that the trust may not receive the surface estate or mineral estate if the other has been encumbered. We suggest that definition be amended to read: "(A) includes both the surface estate and the mineral estate, neither of which have been severed.

We hope that these comments are helpful to the committee in its further deliberations on HB 201. Please contact us if we can answer any question.

Very Truly Yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: 
Brian D. Bjorkquist
Assistant Attorney General

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Jeff Jessee	Richard Johannsen
Philip Volland	Peter Maassen
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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

February 25, 1993

David T. Walker, Esq.
Law Office of David T. Walker
417 Harris Street
Juneau, AK 99801

Law Offices of

MAR 1 1993

Re: Proposed Substitute Lands. ^{file - PSLC} ^{general file} ^{WALTER J. HICKEL, GOVERNOR}

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Dear David:

This letter is in response to your request that the state articulate its position with respect to how proposed substitute land (PSL) becomes a PSL before chapter 66 becomes effective. This letter also describes why the state believes Cook Inlet oil and gas tracts currently are not PSLs, and why parcels are not automatically closed to mineral entry when a PSL nomination is made.

Proposed Substitute Lands. At this time, the mere nomination of a parcel as a PSL by plaintiffs does not create a PSL until the state accepts that nomination. Art. III, § 11 of the settlement agreement provides for the result plaintiffs apparently believe is occurring now (i.e. that the mere nomination transforms the parcel into a PSL). That section¹ of the settlement agreement, however, does not become effective until both chapter 66 and the settlement agreement are approved by the court, as section 11 merely implements the land exchange provision of chapter 66. Only those provisions that explicitly state that they become immediately effective upon the signing of the settlement agreement are now effective, except as the parties mutually agree in anticipation of chapter 66 becoming effective.²

¹ Article III, Section 11 also provides for removal of inappropriate PSL nominations by the Alaska Supreme Court or special master.

² See, e.g., Settlement Agreement, Art. III, § 31 (cancellation of renote of lis pendens and modification to remove preliminary injunction with respect to certain third party transactions); Art. V, § 1(c) (plaintiffs' will be funded by the state); and Article V, § (adherence to Settlement Agreement).

The state is committed to making the chapter 66 reconstitution work to resolve Weiss v. State. As a demonstration of its good faith,³ the state has now accepted a very substantial portion of plaintiffs' PSL nominations. Accepting PSL nominations in order to assure that these parcels are available to reconstitute into the trust is often in the state's best interest. Before chapter 66 becomes effective, however, it would be inappropriate⁴ for the state to agree to impose the substantial burdens of a parcel becoming a PSL in those limited situations where it is contrary to the best interests of the state, such as where private rights to the parcel are at stake, where the parcel is not comparable to original trust land and there is substantial question whether the parcel should ever be reconstituted into the trust, or where the benefit to the state in retaining the parcel overwhelms the possible benefits to the trust in obtaining the parcel. This is particularly true given the fact that chapter 66 and the settlement agreement are not yet effective and there consequently is no dispute resolution mechanism by which the state may challenge what it believes to be inappropriate nominations.

That plaintiffs do not have unlimited discretion to have any parcel of state land treated as PSL until chapter 66 becomes effective does not jeopardize beneficiaries' interests in obtaining a fully reconstituted trust. We understand that Meg Hayes and Bruce Phelps currently are working to reach a mutually agreeable approach to certain suggested PSL parcels consisting of tidelands leases, hydropower facilities (where it appears the parcel has little or no income generating potential), state facilities, state campgrounds/recreation sites, and other potential problem areas. A review of the Cook Inlet oil and gas tracts which the state has not accepted as PSLs also demonstrates that the reconstitution is not jeopardized by plaintiffs not having unlimited discretion under the settlement agreement to nominate PSLs before chapter 66 becomes effective.

Cook Inlet Oil and Gas Tracts. The state did not accept the PSL nominations of oil and gas tracts because they are not comparable to any original trust parcels. The state understands

³ The state's good faith efforts are extended not only to mental health trust beneficiaries, but also to the people of Alaska who now rely on the reconstitution under chapter 66 to resolve the mental health trust litigation.

⁴ As you know, the oil company intervenors allege that reconstitution efforts (e.g. accepting PSL nominations) before chapter 66 becomes effective is not only inappropriate, but also "unlawful, ineffectual, and void."

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that plaintiffs made these nominations because they believe non-comparable, high income producing substitute land may eventually be necessary to reconstitute the trust. The time to even consider imposing the substantial PSL burdens on non-comparable land, however, only arises after the reconstitution analysis identifies the original trust parcels (and income generating potential) for which there is insufficient comparable land to reconstitute the trust.

Furthermore, there is no justification to rush the nomination of non-comparable potential substitute land where there is absolutely no danger that reconstitution of the trust could be jeopardized by the state disposing of the oil and gas interests in the Cook Inlet basin because §6(i) of the Alaska Statehood Act prohibits any such disposal of the mineral estate. Not only are the oil and gas tracts plaintiffs sought to nominate also collateral of last resort, but plaintiffs have always agreed that state management of oil and gas leases has been appropriate even when viewed under trust principles. That these parcels are not accepted as PSLs does not adversely affect the beneficiaries' interests in the reconstitution of the trust.

The state further believes that the facts being developed in the reconstitution process will demonstrate that Cook Inlet oil and gas tracts will be not necessary to reconstitute the trust, and may be inappropriate substitute land under the chapter 66 criteria. First, non-comparable land may not be necessary to reconstitute the trust. Second, if exchanges of non-comparable land with comparable income generating potential is necessary to reconstitute the trust, oil and gas tracts may not be the most appropriate parcels. Such exchanges must still consider the additional factors listed in section 55(e) of chapter 66, (e.g. ensuring an appropriate diversity in the character of land in the trust corpus; the benefits to the trust resulting from the exchange; and the efficiency of land management resulting from the exchange). The selection of a non-renewable, depleting resource (i.e. oil and gas tracts) may not be in the trust's interest when compared to an alternative selection of a renewable, non-depleting resource (e.g. timber lands with very high income producing potential). While some non-comparable land may eventually be necessary to reconstitute the trust, there are several reasons why the Cook Inlet tracts should be among the last of those non-comparable lands considered for reconstitution into the trust. At this early date, it simply is not in either the state's or trust's interests to do so.

Segregation/Mineral Closures. Parcels are not automatically segregated from entry or disposal, including closure to mineral entry, merely upon nomination or even upon acceptance of

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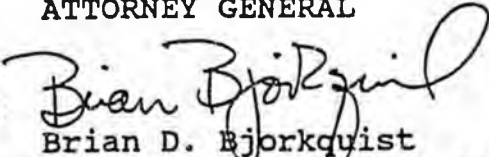
nomination as PSLs. As you know, the state must follow statutes and regulations to segregate land and close it to mineral entry. These statutory and regulatory procedures include public notice and other steps which necessarily take time to implement. No mineral closure can become effective until all appropriate procedures are satisfied. There are no provisions that automatically segregate land and close it to mineral entry.

Please contact me, if you desire to discuss this matter any further.

Very Truly Yours,

CHARLES E. COLE
ATTORNEY GENERAL

By:


Brian D. Bjorkquist
Assistant Attorney General

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BDB4/DW-PSL.LTR

cc: James Gottstein
Jeff Jessee
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Ron Swanson
Bruce Phelps
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MEMORANDUM

TO: All Counsel for main parties in Weiss v. State

FROM: Judge Greene *MEG*

RE: Weiss v. State
4PA-82-2208 Civil

DATE: April 26, 1993

The decision on the Public Interest Intervenor's action is final today. I have asked my secretary to fax each of you the "Conclusions and Order" portion. Since the decision is more than 200 pages long, we will not fax the entire decision. Copies have been mailed to you today. Copies are available in my chambers if you want someone to pick one up for you and send it more expeditiously.

My secretary, Barb Woods, will be calling all counsel except counsel for the Public Intervenor in two days to ascertain whether you want me to continue with the decisions on the oil companies' intervention action and the preliminary approval.

I understand that failure of hypothecation is a potential "deal-breaker" under the Proposed Settlement Agreement, art. III, sec. 27. I have held that the preparation of the Hypothecated Land List was the result of an unconstitutional delegation. Therefore, I propose to stay action on the decision re: preliminary approval for 70 days to allow time for the parties to decide what to do. Objections are welcome. If anyone objects, I will proceed with the decision. At that point, anyone wanting a stay should move for a stay.

I propose continuing with the oil companies' intervention action. If anyone objects, they should file an expedited motion for stay.

MEG:bsw

cc: File

CONCLUSION AND ORDER

Part I. The court has concluded that Article VIII, Section 10 of the Alaska Constitution requires the legislature to "provide safeguards of the public interest" in addition to public notice. The court has concluded that the legislature provided constitutionally adequate safeguards for the disposal of lands by the Alaska Mental Health Trust Authority. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment with respect to Count I of the Public Interest Intervenors' complaint, consistent with this decision.

Part II. The court has concluded that section 202(e) of the Mental Health Enabling Act preempts application of the Permanent Fund Amendment, Article IX, Section 15, to mineral revenues received from use of original or substitute lands in the mental health lands trust to the extent the revenues are used for the mental health program of Alaska. Article IX, Section 15 will apply to excess revenues designated for other uses. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment with respect to Count II of the Public Interest Intervenors' complaint, consistent with this decision.

Part III. The court has concluded that Chapter 66, as supplemented by the Proposed Settlement Agreement, does not violate section 6(1) of the Alaska Statehood Act. Accordingly, the State and Settling

Plaintiffs are granted partial summary judgment with respect to Count III of the Public Interest Interveners' complaint, consistent with this decision.

Part IV. The court has concluded that Chapter 65 does not violate Article II, Section 13 of the Alaska Constitution. The court has concluded that "appropriations" in that section refers only to money, not land. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment with respect to Count V of the Public Interest Interveners' complaint, consistent with this decision.

Part V. The court has concluded that the hypothecation provision did not result in a violation of the "three-readings" requirement of Article II, Section 14 of the Alaska Constitution. The court has concluded that the legislature intended to delegate the task of preparing the Hypothecated Lands List to the Department of Natural Resources. The court has concluded that the delegation is unconstitutional because Chapter 66 does not contain constitutionally required standards and/or procedural safeguards applicable to the delegation. The court has concluded that the hypothecation of state lands to the mental health trust was not subject to Article VIII, Section 10 of the Alaska Constitution. The court has concluded that the public trust doctrine is not applicable to the public lands. Accordingly the State and Settling

Plaintiffs are granted partial summary judgment on Counts VI, VIII, and IX of the Public Interest Intervenors' complaint, consistent with this decision. The Public Interest Intervenors are granted partial summary judgment on Count VII (alternative portion) of their complaint, consistent with this decision.

Part VI. The court has concluded that the conveyance of substitute land selected under section 55 of Chapter 66 to the Alaska Mental Health Trust Authority is subject to the planning and classification provisions of AS 38.04 and AS 38.05. Accordingly, the Public Interest Intervenors are granted partial summary judgment on Count X of their complaint, consistent with this decision.

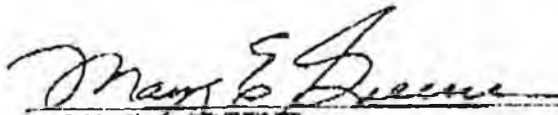
Part VII. The court has concluded that even if the planning and classification provisions of AS 38.04 and AS 38.05 were not applied to the reconstitution of substitute lands, the reconstitution would not violate Article VIII, Section 10 of the Alaska Constitution. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment on Count IV of the Public Interest Intervenors' complaint, consistent with this decision.

Part VIII. The court has concluded that the original mental health lands in the Baines and Tanana Valley State Forests will not be subject to the provisions of AS 41 applicable only to the

general grant lands of the state. Accordingly, the State and Settling Plaintiffs are granted partial summary judgment on count XI of the Public Interest Intervenors' complaint, consistent with this decision.

IT IS SO ORDERED. If any party desires a final judgment with respect to the allegations of the Public Interest Intervenors' complaint, they must file a motion in compliance with Alaska Civil Rule 54(b).

DATED at Fairbanks, Alaska this 26 day of April, 1993.



MARY E. GREENE
Superior Court Judge

Alaska State Legislature



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Representative Ronald L. Larson
District 27

April 22, 1993

David T. Walker
417 Harris Street
Juneau, Alaska 99801

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

Dear Mr. Walker:

Responding briefly to your letter of yesterday, suggesting that "short, uncomplicated legislation could be enacted which would be very productive" in resolving the Chapter 66, Mental Health Land Trust issue. Your suggestions and my comments follow:

Amend SB 67/HB 201 to enact the April 6, 1992 settlement agreement. It rarely occurs to the Legislature to enact regulations or agreements especially when the Attorney General has given notice of intention to withdraw the State from an agreement. But, if it were done, it would only follow full discussion, review and recommended approval by either Judiciary Committee of the Legislature. No such recommendation exists and to my knowledge, your suggestion was never raised during the two months SB 67 was in Senate Judiciary Committee.

Replace the hypothecated land with 550,000 acres of substitute Trust lands selected by the plaintiffs and designate as collateral, lands in Cook Inlet oil and gas fields. If the Finance Committee were to consider the appropriation of specific lands of the State to any given public purpose it would only do so at the recommendation of the Resource Committee. Again, no such, committee recommendation exists.

Direct the escrow of receipts from the above substitute lands so they might ultimately be conveyed to the Trust. For better or for worse Chapter 66 SLA 1991 has a floating effective date - when the Weiss case is dismissed, the law takes effect. Until such time the State continues to set aside each year six percent of the General Fund in the Mental Health Trust Income Account. And, appropriations will continue to be made from that account to adequately fund mental health programs.



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April 21, 1993

HAND DELIVERED

Representative Ronald L. Larson
Co-Chairman
House Finance Committee
Capitol Building, Room 502
Juneau, Alaska 99811

Representative Eileen MacLean
Co-Chairman
House Finance Committee
Capitol Building, Room 507
Juneau, Alaska 99811

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

Dear Representatives Larson and MacLean:

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 us¹ 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

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 Trust³ 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, 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.

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

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).

Representatives Larson and MacLean
April 21, 1993
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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

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.

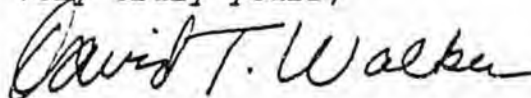
7/ The Department of Law has indicated there is no authority to place such funds in escrow under current law.

Representatives Larson and MacLean
April 21, 1993
Page 5

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

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March 10, 1993

HAND DELIVERED

The Honorable Charles E. Cole
Attorney General
State of Alaska
P. O. Box 11300
Juneau, Alaska 99811

Re: Plaintiffs' Nomination of
Proposed Substitute Land

Dear Attorney General Cole:

This is in response to your letter dated February 25, 1993 pertaining to implementation of the proposed settlement of Weiss et al v. State, 4FA-82-2208 Civ., with respect to Proposed Substitute Land nominations, the Cook Inlet Oil and Gas Proposed Substitute Land nominations, and mineral closing orders on Proposed Substitute Land.

Your letter asserts that until the proposed settlement has been finally approved by the court, nominations of Proposed Substitute Land¹ are subject to acceptance or rejection by the State. This assertion is incorrect. Article V, Sections 6 and 7, provide:

1/ Article III, Section 11 provides:

11. Nomination of Substitute Land. (a) Except for lands in Legislative Designated Areas, the Plaintiffs may nominate any land owned by the State and meeting the criteria of Section 55 of Chapter 66 as Proposed Substitute Land for conveyance to the Trust. For the purpose of this section, land which has been or may be selected under the Alaska Statehood Act, as amended, may be proposed as Substitute Land.

(b) If the Commissioner objects that the land so nominated does not meet the criteria of Section 55 of Chapter 66 or that the total amount of land nominated as Proposed Substitute Land greatly exceeds the amount of land foreseeably required to reconstitute the Trust, then the Commissioner shall notify the Plaintiffs of his or her objection. The Plaintiffs and the State shall then have 60 days to resolve the issue. If the issue is not resolved within such 60 day period, the Commissioner may refer the matter to the court for resolution under Section 57 of Chapter 66. If the Commissioner's objection is to the amount of Proposed Substitute Land and the court

The Honorable Charles E. Cole
March 10, 1993
Page 2

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, * * * 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.

The Settlement Agreement clearly contemplated and provided that the Plaintiffs could nominate Proposed Substitute Land prior to court approval and that once nominated, such lands were to be segregated from entry or disposal and closed to mineral entry unless the parties agreed otherwise.

Your letter suggests that the remedy provided to the State for improper nomination under Article III, Section 11(b) is not available until final court approval and therefore the State has the right to unilaterally rewrite the terms of the Settlement Agreement to allow the State to reject nominations of Proposed Substitute Land. We have never taken the position that the 11(b) procedure is unavailable to the State prior to final approval, in fact we have notified your offices that we believe the State does have the right to exercise the 11(b) procedure and remedy.

Under the procedures of Article III, Section 11 (b) of the settlement agreement (set forth in footnote 1), if the State believes a nomination does not meet the criteria of Section 55 of Chapter 66 or that the total amount of land nominated as Proposed Substitute Land greatly exceeds the amount of land foreseeably required to reconstitute the trust, the parties have 60 days to resolve the issue, following which the State may, if it chooses to do so, seek a court determination of whether the nomination stands. We are therefore treating your February 25, 1993 letter as commencing the 60-day period. If at the end of the 60 days, the State continues to maintain that the nominations are improper, it must follow the agreement and return to court, not take unilateral action in violation of the settlement agreement.

Your letter's assertion that "the state did not accept the PSL nominations of oil and gas tracts because they are not comparable to any original trust parcels" reflects the Department of Law's refusal to acknowledge the Trust's loss of significant oil and gas properties for which there must be compensation under the settlement. We have advised the State that under the settlement there is significant acreage of Non-Reconstituted Trust Land with oil and gas potential for which the Trust must be compensated. Frankly, I thought we had

agrees, the Plaintiffs have the right to select which Proposed Substitute Land shall be removed.

The Honorable Charles E. Cole
March 10, 1993
Page 3

resolved this issue of the propriety of the nominations last fall when we met. In any event, by letter dated October 15, 1992, from our project manager, Meg Hayes, to the State's project manager, Bruce Phelps, we provided the State with a list of Non-Reconstituted Trust Land parcels that we believed had oil and gas value (copy attached). We also know that millions of dollars have been received over the years from leases on Original Trust Lands.

The Settlement Agreement is quite clear that the Plaintiffs can nominate any land for inclusion in the Trust and that a process is then followed to determine if it should ultimately be conveyed to the Trust. On March 4, 1993, we received a March 2, 1993 letter from Ron Swanson "rejecting" additional nominations. The same analysis applies to the parcels purported to be "rejected" in that letter. One of the procedures, as outlined above, is the right of the State to challenge the nomination in court after a 60-day notice period. We are confident that our nominations can sustain such a challenge because of their comparability to Non-Reconstituted Trust land. We insist that the State follow the agreed-upon procedures and segregate all nominations from entry or disposal and close them to mineral entry.² While we are willing to continue to work with the State with respect to voluntarily denominating Proposed Substitute Land in appropriate circumstances we cannot accept the State's attempt to unilaterally reject nominations in violation of the Settlement Agreement.

I urge you to reconsider your position in this matter, and, in the case of a continuing dispute over the correct interpretation of the language of our agreement to seek the court's guidance as contemplated by the parties and provided under the settlement agreement.

Very truly yours,



David T. Walker

DTW:ndp

cc: James B. Gottstein
Jeffrey L. Jessee
Philip R. Volland
Margaret J. Hayes
Brian D. Bjorkquist

Ron Swanson
Bruce Phelps
G. Thomas Koester
Wendy S. Feuer

2/ We have been working with DNR on a way to encourage mineral development on Proposed Substitute Lands but have been told that current statutes and regulations do not allow sufficient flexibility to accomplish this.

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Attorney General of the
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Attorney for Plaintiffs,
the Alaska Mental Health
Association, et al.

Attorney for Plaintiffs
Anita Bosel, et al.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

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; the)
ALASKA MENTAL HEALTH ASSOCIATION,)
MARY C. NANUWAK and JOHN MARTIN,)
on behalf of themselves and all)
others similarly situated;)
ANITA BOSEL, FRANCES DOULIN,)
SHARON GOODWIN, AND GABRIEL)
MAYOC; and H.L., M.K. and ALASKA)
ADDICTION REHABILITATION SERVICES,)

Plaintiffs,)

vs.)

STATE OF ALASKA,)

Defendant.)

Case No. 4FA-82-2208 CIVIL)

SETTLEMENT AGREEMENT

(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.

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

DEPARTMENT OF FISH AND GAME POSITION PAPER

BILL NO: HB201

SPONSOR: House Resources Committee

DIVISION: Habitat and Restoration

DEPARTMENT POSITION: Support HB201 with amendments.

HB201 is an improvement over existing Mental Health Trust legislation because ADNR management of trust lands, if governed by state land management statutes and negotiations would provide greater consideration of public resources and interests in the use and disposal of trust lands, and would offer the trust land management services at lower cost than they could obtain as an independent organization. HB201 limits state land in legislatively designated areas held as collateral to old Mental Health Trust lands, rather than all lands as required in existing statutes. HB201 would not prevent money from wildlife stamps, fees, etc., for use of special areas managed by ADF&G from being allocated to the department for special areas management. HB201 does not allow the Mental Health Trust to select lands in legislatively designated areas.

HB201 is an improvement over SB67 and existing Mental Health Trust legislation in that it only requires 3% of the general state revenue be deposited in the Mental Health Trust. This is a much more reasonable amount than SB67 or AS 38.05.800 which require a 6% deposit.

The meaning of the new AS 38.05.800 subsection (2) is not as clear as it could be. Apparently this subsection means that the existence of an oil and gas lease, mining claim, etc., would not prevent land from being transferred to the Mental Health Trust. This subsection should be rewritten to simply say that state lands with existing mining claims, leases, oil and gas leases, and unconveyed municipal selections may be transferred to the Mental Health Trust.

Rewrite AS 38.05.800 (2) to say land that is subject to any or all of the following may be transferred to the trust. Add a section 5 which says: land purchased with Wallop-Breaux or Pittman Robinson funds for public purposes in legislatively designated special areas which fall within original Mental Health Trust lands may not be transferred to the trust.

COMMISSIONER'S SIGNATURE



DATE

3/24/93

EXPLANATION OF DIFFERENCES BETWEEN
PREVIOUSLY PROPOSED AMENDMENTS AND CSHB 201 (R38)

Prepared for House Resources Committee Hearing

March 29, 1993

Management of Section 802 Land

As previously proposed, if a parcel of land qualified as "Section 802" land because of the existence of a third-party interest or appropriated use, then the amendments would have required the Department of Natural Resources to manage all of that land under Section 802 (general grant land management standards). For example, in the case of a CMHTL covered by a surface lease, DNR would have been required to not only administer the surface lease under Section 802, but DNR would also be required to administer the mineral estate under Section 802.

CSHB 201 changes this by providing that only the qualifying interest or interests (e.g., the surface lease) will be administered by DNR under Section 802. Each of the remaining unappropriated "sticks" in the "bundle" of property rights will be managed under Section 9 (AS 37.14.009).

This creates the potential for a conflict between DNR's management of a qualifying (e.g., preexisting) interest under Section 802 standards, and management of the other "sticks" by the trust authority (or DNR as its contractor) under Section 9 standards. A new section has been added to CSHB 201 (Section 4 on page 3) to require that any such conflicts are to be resolved in accordance with the many laws (including court decisions) that apply to conflicts between surface and mineral users. The reason this new section has been included is to make 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 a obligation to manage its assets in a fiduciary manner to fulfill the purposes of the trust. Of course, because the trust takes its land and mineral assets 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 other "sticks" under Section 9.

Transfer of Title to Trust Authority

As previously proposed, the amendments required DNR to "convey title" to the reconstituted trust land to the trust authority. CSHB 201 now clarifies that DNR shall convey title "by patent without survey" to the trust authority (Section 16 on page 10). A new section has been added to CSHB 201 (Section 7 on page 4) to clarify that these conveyances are exempt from the existing requirements of the Alaska statute which arguably requires that these lands be surveyed prior to conveyance. This is a reasonable compromise because it allows the trust authority to actually take title by patent while at the same time delaying the expense of surveys until there is a real reason to survey a particular parcel of reconstituted trust land.

Identification of Property to be Returned to Reconstituted Trust

In CSHB 201, AS 38.05.800 (contained in Section 8 on page 5) has been rewritten to clarify exactly what OMHTL is being returned to the reconstituted trust. What was previously defined as "conveyed or encumbered" land is now defined as "conveyed" land. The word "encumbered" has been deleted from the definition because conveyed land is generally being removed from the trust while encumbered land is generally being returned to the trust (subject to existing third-party interests and appropriated uses).

At the request of DNR, additional categories of lands have been added to the list of "conveyed" OMHT lands that are not being returned to the reconstituted trust.

In CSHB 201 "reserved by law from the public domain" has now also been defined (page 6). The term covers the OMHTL in legislatively designated areas (LDAs) that are not being returned to the reconstituted trust.

Finally, a provision has been added to CSHB 201 (AS 38.05.800(b) at the bottom of page 6) to clarify that if either the surface or the mineral estate of OMHTL has been "conveyed," then neither estate is being returned to the reconstituted trust.

Protected Third-Party Interests in OMHTL

With the assistance of DNR, Section 802 of AS 38.05 (AS 38.05.802 starting at the top of page 7 of CSHB 201) has been revised to broaden the list of protected third-party interests so that all third-party rights are protected. New definitions have been added to cover "land use permits" and "land rights convertible to title." The later term covers land interests (such as leases and homestead rights) that may be converted to title. A new subsection (e) added to AS 38.05.802 (on page 8 of CSHB 201) provides that these "land rights convertible to title" are treated as protected third-party interests until title is issued, at which time the trust is divested of its interest in the property. This allows the trust to receive the lease payments or other revenues generated from these OMHTL lands unless and until they are converted to fee interests.

Additional language has also been added to CSHB 201 (subsection (f) to AS 38.05.802 on page 8) to clarify 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. 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 affect of these closing orders.

Funding of DNR Land Management Responsibilities

Under the bill DNR is required to manage all Section 802 interests. In addition, the trust authority is required to contract with DNR to manage the rest of the reconstituted trust as well, unless the trust authority determines that the best interests of the trust beneficiaries would be served by other arrangements (for example, direct trust authority management, or a contractual arrangement with a private land management contractor). CSHB 201 has been revised to include two new sections (Sections 10 and 11 on pages 9 and 10) which allow the legislature to make appropriations from the mental health trust income account to fund DNR's management duties. Of course, the bill already provides that any revenue generated from DNR's management of OMHTL must be deposited by DNR into the same mental health trust income account from which DNR can be funded.

CLERK'S OFFICE
 AMENDED AND APPROVED
 Date: 3-23-93

Submitted by: Assemblymember Barnett
 Prepared by: Assembly Policy and Budget
 Office

For reading:

ANCHORAGE, ALASKA
AR NO. 93- 71 (As Amended)

**A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING AN
 EXPEDIENT AND FINAL RESOLUTION TO THE MENTAL HEALTH LAND TRUST
 LITIGATION**

WHEREAS, an expedient and final resolution of the Mental Health Land Trust litigation and establishment of funding guidelines for mental health programs, is important for the residents of the Municipality of Anchorage and the State of Alaska; and

WHEREAS, orderly acquisition, management, and conveyance of lands for municipal purposes is vital to the continued and orderly development of the Municipality; and

WHEREAS, continuation of existing multiple-use land-use patterns on lands within or adjacent to the Municipality is important for industry, recreation, and tourism; and

WHEREAS, in 1991, the Legislature adopted Chapter 66, SLA which proposed a resolution of the Mental Health Land Trust dispute that would return as much of the original Trust Land as possible and exchange other State land for original Trust land that could not be returned, that would provide a series of cash payments to be made over a twelve year period, and which pledged 6.7 million acres of State land to be held as security to insure completion of the land reconstitution and the cash payments; and

WHEREAS, subsequent efforts to implement Chapter 66, SLA 1991 have encountered significant and protracted litigation involving multiple affected parties, frustrating a final resolution to the Trust settlement for an indeterminate number of years; and

WHEREAS, until all litigation is resolved, the uncertainties regarding land ownership and management restrictions will continue to hamper land-use activities on (1) the 6.7 million acres of State land being held as security, (2) the one million acres of original Mental Health Trust land, some of which has been transferred, or tentatively approved for transfer, to the Municipality, (3) the hundreds of thousands of acres of land being nominated as exchange land, including certain lands located within the Municipality, and (4) any other State land, including State land located within and adjacent to the Municipality which may be proposed for development; and

WHEREAS, the Assembly has concluded that continued attempts to implement Chapter 66 would result in significant disruption to public and private development within the Municipality and adjacent areas; an

Post-It™ brand fax transmittal memo 7671 # of pages 3

TO <u>REP. BILL WILLIAMS</u>	From <u>JIM BARNETT</u>
CO. <u>CHAIR - HOUSE</u>	Co. <u>ANCH ASSEMBLY</u>
Dept. <u>RESOURCE COMM.</u>	Phone # <u>343-4750</u>
Fax # <u>415 3002</u>	Fax # <u>212 1100</u>

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2 Page 2

3
4
5 WHEREAS, continuing uncertainty regarding the disposition of those Municipal
6 entitlements that were once original Mental Health Trust lands has frustrated Municipal planning
7 and development activities; and
8

9 WHEREAS, the land reconstitution as proposed in Chapter 66 would have the potential
10 to create financial hardships and uncertainty for already marginal resource development because
11 the Trust would be required by law to maximize money it gets from business in order to meet
12 its responsibility to the Trust beneficiaries; and
13

14 WHEREAS, ongoing efforts to plan for and develop a four season ski resort in the upper
15 Girdwood Valley will be frustrated or halted by land claims made by certain mental health
16 litigants to that land pursuant to Chapter 66; and
17

18 WHEREAS, the State Superior Court concluded on January 14, 1993, that, "at this point
19 in time... the likelihood of final approval [of Chapter 66] is speculative, at best"; and
20

21 WHEREAS, the basic provisions necessary for an appropriate and reasonable settlement
22 responsive to the mental health community's concerns regarding dependable long-term funding,
23 establishment of an integrated comprehensive Mental Health Program, and Trust reconstitution,
24 as well as responsive to the Assembly's concerns regarding the Municipal lands, have already
25 been agreed to in previously adopted legislation.
26

27 NOW, THEREFORE, the Anchorage Assembly resolves:

28
29 Section 1: That the Anchorage Municipal Assembly supports alternative settlement
30 options to the Mental Health Trust litigation, such as those introduced by the Senate and House
31 Resources Committees in SB 67 and HB 201, which:
32

- 33 1. return to the Trust approximately half the original Trust lands which still have
34 clear title, including lands with certain encumbrances which would be compatible
35 with the Trust management, and which have not been placed in legislatively
36 designated areas or transferred to municipalities;
37
- 38 2. in place of those lands which cannot be returned to the Trust, provide an annual
39 allocation of a percentage of the unrestricted general fund to the Mental Health
40 Trust Income Account, for subsequent appropriation by the Legislature, as is
41 currently required by law (SLA 210, 1990), thereby providing for continuing and
42 dependable financial support for the State's mental health programs and
43 eliminating the need for the litigious land exchanges;
44
- 45 3. retain provisions for trust management and mental health program priorities that
46 have previously been agreed to and adopted (Chapter 66, SLA 1991); and

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2 Page 3

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4. identify those original Trust lands which are located in legislatively designated areas to be held by the State as security, but managed consistent with their legislative designations, to insure that the annual allocations to the Mental Health Trust Income Account are made in accordance with the agreement.

Section 2: That this resolution presents a reasonable, responsible, and more timely solution which positively addresses the Assembly's concerns identified above.

Section 3: That a copy of this resolution be submitted to each member of the Eighteenth Alaska State Legislature and to the Governor.

Section 4: That this resolution becomes effective upon passage and approval.

PASSED AND APPROVED by the Anchorage Assembly this ____ day of _____, 1993.

Chair

ATTEST:

Municipal Clerk

LR/law:DOCE/AR15

DRAFT - DRAFT - DRAFT - DRAFT - DRAFT - DRAFT - DRAFT - DRAFT

POSITION STATEMENT

MENTAL HEALTH TRUST LANDS SETTLEMENT

Representative Jeannette James

March 19, 1993

Today Alaska finds itself locked up, with most resource development on hold and many residents unclear about title to their land. As legislators we are being bombarded with pressure from our voters to solve the Mental Health Lands issue and many of us feel obligated to do this. However, it appears that we have allowed ourselves to be forced into a no-win situation. We are not even party to the lawsuit, yet we are expected to have the same powers as the court to find a solution. This we simply cannot do. Here are my ideas:

(First, A THOUGHT - should we perhaps enter the lawsuit as interveners?)

I am not willing to support any agreement or legislation which alters the Legislature's ability to appropriate funds for mental health expenses or to use excess funds held by the mental health authority for other purposes or which alters the original intent of the original mental health enabling act. I cannot support the provision on Page 8 of Chapter 66 which requires the legislature to submit "findings" if their appropriations vary from the Mental Health Authority's request.

I concur with paragraph #3 in Mr. Cole's March 12 letter:
"....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."

I believe that NO legislation of any kind will solve the problem. The problem must be solved by an agreement of 100% of the involved parties and approved by the court. Legislation can only make law out of a previously-agreed-upon settlement.

The following figures are only estimates, but please consider them:

**ESTIMATED STATE EXPENDITURES ON
MENTAL HEALTH**

(since 1979, in 1991 dollars)

Attorney Costs 1987 - 1993		
Plaintiffs	\$2,592,900	
State	999,700	\$ 3,592,600
Operating Expenses 1979 - 1991		
Est. operating exp. 1992 - 1993		200,000,000
Capital Expenses 1979 - 1993		
38,251,500 x 2.44 ("1991 factor")		\$ 93,333,660
(NOTE: This does NOT include 1993 building replacement costs OR land.)		
		\$1,425,425,260
 TOTAL		

Total surveyed Mental Health Trust Lands	997,900	acres
Unencumbered lands	- 352,386	acres
Encumbered lands	645,514	acres

$$\frac{1425425260}{645514} = \$2208/\text{acre paid by state}$$

If these figures are valid, the state has already paid over \$2000 an acre to the Trust. We need to consider the original intent of the enabling act. Is this intent being met? If not, what can we as legislators do to help the parties refocus on the original intent? How can we exert political pressure on the involved parties to respond positively? I for one do not appreciate the burden on my back of something I cannot solve.

CALCULATIONS

(Estimates based on actual figures)

Representative Jeannette James

March 29, 1993

CURRENT STATUS OF THE ORIGINAL MENTAL HEALTH TRUST LANDS:

Conveyed to third parties	46,000 acres
Conveyed to municipalities	43,000 acres
Land Settlements	
conveyed to Native corporations	36,000 acres
conveyed to University of Alaska	3,000 acres
Condemned	5,000 acres
Leased to third parties	89,225 acres
Material sales	1,900 acres
Mining claims	60,000 acres
Legislatively designated areas	
State forests	113,289 acres
Parks, wildlife refuges, etc.	243,600 acres
Inter-agency land mgmt agreements	4,500 acres
Unencumbered	<u>352,386 acres</u>
 TOTAL surveyed lands	 997,900 acres

Unencumbered	352,386	Third party	46,000
Condemned	5,000	Municipalities	43,000
Leased	89,225	Native corp	36,000
Material sales	1,900	U of A	3,000
Mining claims	60,000	Legislatively des.	113,289
Land mgmt agreements	4,500		243,600
	<hr/>		<hr/>
Keep as Trust Lands	513,011	Keep as State Lands	484,889

ESTIMATED STATE EXPENDITURES ON
MENTAL HEALTH
 (since 1979. in 1991 dollars)

Attorney Costs 1987 - 1993		
Plaintiffs \$2,592,900		
State 999,700	\$	3,592,600
Operating Expenses 1979 - 1991		\$1,128,499,000
Est. operating exp. 1992 - 1993		200,000,000
Capital Expenses 1979 - 1993		
(1979-1990 total x 1.2625 "1991 factor"		44,149,186
plus 1991, 92, 93 w/o factor)		
 TOTAL		 \$1,376,240,786

SB48 & 493 \$2.243 updated to 1991
 for total value of Mental Health Lands.....\$2,402,253,000

Total land value	\$2402253000				
Total acres	997900	=		\$2408 / acre	

Money state has spent	\$1,376,240,786
Value of land state keeps	-\$1,167,612,712 @ \$2408/ac
 SURPLUS state has paid Trust	 \$ 208,628,074

State fails in Mental Health Trust controversy

The million-acre chess board on which Mental Health Trust controversy is played out has 3,162 special "pawns" on the state's side.

As we all know, pawns are coldly sacrificed to create positional advantage for the more powerful and important pieces behind them.

The pawns on the white side are the unfortunate beneficiaries of the trust. The black pawns are the people who bought trust land from the state and now have title to their land frozen because of the state's illegal action in seizing the trust's assets 15 years ago.

The state of Alaska, the "black king" in this game, is weeping a bucket of crocodile tears on behalf of its pawns. In January, state attorneys tried to get Fairbanks Superior Court Judge Mary Greene to lift a three-year-old injunction barring sale of these lands, which total almost 60,000 acres.

The state failed. Before the third-party landholders blame Judge Greene or the Mental Health Trust beneficiaries, they should look at why the state failed.



Fred
Pratt

The Legislature and former Gov. Jay Hammond dissolved the Mental Health Trust in 1978 and took the land. They later leased, gave, sold or exchanged about one-third of it to outside parties.

In 1985 the Alaska Supreme Court ruled this action illegal. The court clearly made the point that trustees managing a trust, which is what the Legislature is, cannot just appropriate the assets of the trust for their own use.

The management of the Mental Health Trust was an obligation willingly taken on by the state of Alaska in the Alaska Statehood Act. If any other trustee outside government had done such a thing, he would go to jail.

The people who acquired Mental Health Trust land from the state unwittingly forced stolen property. If they lose their land back to the trust, they have a great case for a lawsuit against the state for selling them such land in the first place.

After the 1985 decision the state and the trust beneficiaries tried to settle the case without having to take back all this land and expose the state to thousands of expensive lawsuits. The state, however, blocked earlier settlements and now seeks to turn the fire of the third-party landholders on the court or the plaintiffs in the lawsuits, rather than own up to its own sins.

The motion to have Judge Greene lift the injunction on the third-party landholder "pawns" was an empty gesture, as Judge Greene's order clearly shows.

She notes that she can modify or cancel a standing injunction only for certain reasons. She can do it if it can be shown to be no longer necessary. If it creates an undue

hardship, if the plaintiffs have been delaying a reasonable resolution, or if the state has a substantial likelihood of winning its case.

Judge Greene clearly disposed of each of these matters in a nine-page decision.

She pointed out that plaintiffs agreed to the first settlement only two years after the 1985 ruling, but it was the state that torpedoed that settlement process in 1990, not the beneficiaries. Second and third settlement bills passed the Legislature in 1990 and 1991, but these "solutions" are mired deeply in new problems.

Judge Greene also raised the question of whether she could clear land title to these parcels by simply lifting the injunction.

That could just shift legal questions to another court. Judge Greene pointed out that if this happened, lifting the injunction would be "nothing more than a cruel hoax visited on the third parties."

"They get no relief; they would receive a worthless piece of paper and unmarketable title," she noted. "If they transferred their in-

terest in the land, they would be selling a lawsuit and both they and the purchasers would ultimately have to litigate."

State attorneys suggested if trust could be compensated by a change of other state land of comparable value for the land grant the third party buyers. Judge Greene notes correctly that the state's inability to work within past agreements on determining value of land killed the first settlement.

She also notes that the state likelihood in prevailing is weak at time when two of the four plaintiff groups refuse to accept his current settlement; and when its strong opposition by environmental group hunting clubs, fishing organizations and outdoor recreation interests, as well as coal developers and major oil companies.

State attorneys appealed Judge Greene's decision to the Alaska Supreme Court. Two weeks ago the Alaska Supreme Court rejects that appeal, without comment.

Free-lance journalist Fred Pratt has been covering Alaska business and politics for the past 18 years.

Voice of The Times

The Anchorage Times

Publisher: BILL J. ALLEN

"Believing in Alaskans, putting Alaska first"

Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN

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Tossing in the towel

THE APPARENT failure of the mental health trust settlement agreement probably is being greeted with some cheers across the state. Most people who have followed the issue are frustrated by all the legal tangles and delays that have come with efforts to rebuild the original land trust set up by the federal government almost 40 years ago. The rebuilding is necessary because of a 1985 court order which said the state had no business dissolving the trust in 1978, an action which followed years of neglect and non-management of the mental health lands.

Putting the trust back together, however, has become as complicated as unscrambling eggs. Two years ago, it appeared Attorney General Charlie Cole and then Resource Commissioner Harold Heinze had come up with a solution. They reached agreement in 1991 with attorneys for the mental health groups and won approval by the Legislature to replace land originally held in trust with state lands of equal value and comparable in character.

It was an involved plan, one that permitted mental health lawyers and trustees to identify state public lands on a tentative basis pending final approval by the court of the whole agreement. And identify lands they did: oil leases in Cook Inlet, coal fields, ski resorts, gold mines and anything else of potential value. Each piece of land selected, however, meant planned development activities there were put in limbo, making developers more and more disenchanted with the plan. That wasn't the only problem.

AS PART OF the 1991 settlement agreement, the state was to be free to issue patents on previously purchased small tracts of mental health lands. Alaskans who own these so-called "mom and pop" lands are now prohibited from selling, exchanging or otherwise developing the land until the legal cloud is lifted.

The agreement was supposed to make that possible. It didn't.

A Superior Court judge rejected releasing any of the original trust lands until the whole agreement is finalized. Last week, the Supreme Court backed the decision. That prompted Gov. Walter Hickel to give notice that the state would back out of the agreement — unless lawyers can figure out another way to free up the so-called mom and pop lands. That's not likely to happen. More likely, the issue will now go back to the Legislature for resolution.

Bills are moving in both houses which abandon the idea of replacing trust with state lands to generate revenue. Instead, the new legislative proposals would commit annual funding from the state treasury to cover mental health needs. A Senate bill would earmark 6 percent of general revenue each year for the mental health trust, while a House bill would commit 3 percent.

This alternative is bad policy and would set a bad precedent. But given that the best alternative just fell apart, it may be the only politically possible resolution.

Lands trust ruling hits oil companies

By BRIAN S. AKRE

THE ASSOCIATED PRESS

A judge has ruled that Cook Inlet oil and gas leases may be transferred to a new mental-health lands trust without violating the lease terms, but the issue is far from resolved, attorneys said Tuesday.

Oil companies oppose the possible transfer because the trust might look to increase its revenues for mental-health programs by collecting higher royalties on oil and gas production.

The ruling by state Superior Court Judge Mary Greene of Fairbanks is an initial defeat for the oil companies that hold the state leases. They plan to appeal to the Alaska Supreme Court.

"This is just the first round in the fight," said Peter Maassen, an attorney for the companies. "Nothing's over yet."

Greene also ruled Friday that a state administrative order dealing with management of lands being considered for the trust is invalid because it was not adopted in compliance with the state Administrative Procedures Act.

The ruling is the latest chapter in the long legal saga over the trust. It follows another ruling late last month in which Greene struck down a key part of the proposed trust settlement as unconstitutional.

The Hickel administration persuaded the Legislature to approve

The oil industry opposes the possible transfer of oil and gas leases to a new mental-health lands trust because the trust might try to collect higher royalties.

the settlement two years ago. It was seen as a relatively quick way to end the costly, decade-old lawsuit challenging the Legislature's illegal dissolution of the trust in 1978.

Congress created the 1 million-acre trust in 1956, designating proceeds from development and management of the lands to fund programs for mentally ill Alaskans.

Advocates for the mentally ill sued the state over the dissolution, and the Alaska Supreme Court in 1985 ordered the state to recreate the trust. The settlement proposes to do that with original trust land and substitute land for those trust parcels that were sold or otherwise obligated.

As security, the state agreed to designate 6.7 million acres that the trust could foreclose upon if the exchange is not completed by December 1994. But Greene ruled last month that the Legislature improperly delegated the task of preparing the list of security lands to a state agency without the proper standards and procedural safeguards.

Gov. Walter J. Hickel tried to persuade lawmakers to pass a bill to correct that problem in the final days of the recent legislative session, but failed.

Attorney General Charlie Cole said he has not yet talked to Hickel about the possibility of a special session to address the issues Greene has raised.

On Friday, Greene ruled on challenges to the settlement brought by Marathon and Unocal oil companies.

The companies say they want to keep the state as their landlords because it must consider the broader public interest in managing the leases. The trust, on the other hand, would be interested solely in getting the most money from the leases, Maassen said.

Greene ruled that the assignment of the leases to the trust would not harm the companies, as they had claimed.

But she did not rule on the broader issue of whether the lucrative leases are comparable to former trust lands.

The state has maintained that

they are not comparable because none of the original trust lands were in Cook Inlet or capable of producing oil and gas. Cole told lawmakers earlier this month that he would not support transferring the leases to the trust.

But Cole indicated Tuesday that he might back down from that stand.

The judge ruled in favor of the companies on another issue. She said the state may not release confidential production and revenue records on the leases to the mental-health plaintiffs until the settlement takes effect.

Meanwhile, Cole said Greene's rejection of the administrative order dealing with management of lands considered for the new trust can be fixed without legislation.

"That can be easily cured by simply redoing the process" so it complies with the Administrative Procedures Act, he said. That will require putting the regulations through public review, with hearings.

Philip Volland, an attorney for mental-health advocates who have not endorsed the settlement, said Cole was minimizing the effect of doing that. Developers, environmental groups and other interests can be expected to fight the restrictions and conditions the order places on the use of the security and substitute lands, some of which have strong recreation and development potential, he said.

CHAPTER 66 BACKFIRES

(continued from page one)

their lawsuit against Chapter 66. It seems they don't appreciate having their multi-million dollar investment tied up in this debacle. They, too, have a few more reasons why they think the Settlement is illegal. Last week, the Court let them into the lawsuit too.

It's not surprising then that those concerned with economic development, coal and other mining interests have also weighed in against Chapter 66. They don't want to deal with a land management bureaucracy whose only interest is making money for the beneficiaries, instead of economic activity and jobs. The continuing stream of litigation is viewed as an Arctic blast of cold wind that discourages investment and development of any state Land.

Chapter 66 was supposed to give clear title to the innocent Alaskans who thought they purchased and owned "state" lands. Assuming that Chapter 66 would be approved by the Court and because it looked like all this was going to take a lot longer than anticipated, the State filed a motion to get these "Moms and Pops" released from the lawsuit. Last week, the Judge denied the State's request, stating that the "relief" requested could be considered "nothing more than a cruel hoax" because "the likelihood of final approval [of Chapter 66] is speculative, at best."

Deciding who is right will take time, in fact, years. The challenges to Chapter 66 will first be decided in the Superior Court and appealed to the Alaska Supreme Court. Some issues will even go to the U.S. Supreme Court. All this has to happen before Chapter 66 receives final approval.

So, instead of a one million acre "spill" we have over eight million acres tied up in this and counting. Instead of a settlement agreement, we are faced with additional lawsuits and years of costly litigation before we get a decision on Chapter 66. Oh, by the way, it doesn't look like the land will

make enough money to even start to pay for the Mental Health Program. So much for the beneficiaries.

It was my hope that Chapter 66 would lead to a better life for people who are beneficiaries of this Trust. I thought it would free the thousands of innocent third party hostages caught in the middle. Since Chapter 66 has proven to present far more difficulties than anticipated, my clients withdrew their support of Chapter 66.

Now, what are our options? We could stay on course with Chapter 66 until the bitter end. We could return to the original lawsuit and litigate the 8,000 illegal transactions the State made with Trust lands. Or we can look for another solution. A strange coalition of developers, environmentalists, miners and dissenting plaintiffs think they may have one. Since we can withdraw our support of Chapter 66, but not from this case, we are sure going to look hard at this alternative. We hope everyone else will too.

KEYNOTES is a publication of the Alaska State Association on Developmental Disabilities (ADD). The views expressed within these pages are those of the editors and should not be construed to represent the opinions or policies of the Association. KeyNotes welcomes any comments on articles, suggestions for future articles and recommendations for making this newsletter as responsive as possible to the needs and desires of individuals experiencing developmental disabilities.

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Handwritten signature

MENTAL HEALTH LANDS TRUST BRIEFING PAPER

**PACKET
FROM
USIBELLI
COAL**



March 1, 1993

This information is provided by the Alaska Coal Association, the Alaska Center for the Environment and Advocacy Services of Alaska

1956 - THE FEDERAL GRANT

During territorial days, the federal government imposed a barbaric mental health system on Alaskans. People who experienced mental disabilities such as Alzheimer's disease, mental retardation and mental illnesses were tried and convicted of the crime of being an "insane person at large". After conviction, they were sent to Morningside Hospital in Oregon where the federal government paid the bill.

Over time, Alaskans became more and more outraged over this treatment. In addition, impending Statehood meant that Alaska would need to assume responsibility for administering and funding its own mental health program. Finally, in 1956, Congress passed the Alaska Mental Health Enabling Act, granting authority to the Territory of Alaska to administer its own mental health program. To provide funds to operate the program, Alaska was granted the right to select *one million acres of land* to be administered as a *public Trust*.

Recognizing that the purpose of the Trust was to earn income, the Territory, and then the State of Alaska selected land that was believed to be the most valuable property in the State. These included urban and suburban lands in Anchorage, Fairbanks, Juneau, Sitka, Ketchikan, Petersburg, Wrangell, Haines, Homer, Kodiak and Skagway. Also selected were lands on the Kenai peninsula, in the Matanuska and Susitna Valleys and in Kachemak Bay. High value resource lands were also selected, such as 60% of what is now known as the Haines State Forest, forest lands at Cape Yakataga, a significant percentage of the known coal resources, oil and gas prospects, and prime mineral districts of the State. These lands were selected because they were best suited to the production of income in perpetuity.

Although the land was selected for the Trust, and was supposed to earn money in support of the mental health

program, the State Division of Lands received no direction on managing the Trust lands as a Trustee. As a result, no Trust administration was established, and no trust fund was created. In this vacuum some of the land was improperly disposed of and no proper accounting of Trust funds was made.

1978 - THE GREAT LAND THEFT

Due to the valuable nature of the land, there was tremendous pressure by municipalities and individuals to make Mental Health Trust Lands available for other purposes. In response to this pressure, in 1978 the Alaska Legislature attempted to abolish the Trust by "re-designating" Mental Health Trust Lands as general grant lands. In exchange, the legislature was supposed to compensate the Trust with 1.5% of revenues from *all* State lands. However, not a single payment to the Trust account was ever made.

1982 - THE ORIGINAL LAWSUIT

An attempt was made to get the legislature to correct this blatant violation of federal law and the State's obligation as a Trustee. After being told "we don't care if it is illegal - sue us", the Alaska Mental Health Association sponsored the beginning of the litigation in 1982. Vern Weiss, on behalf of his son Carl, and Earl Hilliker, on behalf of themselves and the class of people entitled to benefits under the Trust (beneficiaries of the Trust) were named as plaintiffs in the lawsuit. Since that time, the Alaska Mental Health Association, representatives of the mentally retarded and mentally defective (developmentally disabled), and representatives of chronic alcoholics with psychosis have formally intervened to participate with the original plaintiffs in the lawsuit. Elderly people with dementias, such as Alzheimer's disease, are also beneficiaries of the Trust.

1985 - THE ALASKA SUPREME COURT DECISION

In 1985, in what is known as the Weiss Decision, the Alaska Supreme Court rejected the State's arguments that there really was no Trust. The Court ordered that the "trust must be reconstituted to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective"

At the time of the Weiss Decision, the following legally questionable actions had been taken by the State with respect to Mental Health Trust Lands:

370,000 acres	Designated as state parks, refuges, etc.
83,000 acres	To Municipalities
36,000 acres	To Native corporations
50,000 acres	To individuals ("Moms & Pops")
3,000 acres	To the University of Alaska, and
<u>150,000 acres</u>	Encumbered land
692,000 acres	Total

Obviously, determining which of these lands could be returned to the Trust would involve years of litigation. Returning these lands would create incredible hardship for thousands of innocent third parties and disrupt decades of land use planning efforts. This began what has become years of unsuccessful efforts to reach a settlement as a way to avoid this court ordered mandate to return the original land to the Trust.

1987 - SETTLEMENT ATTEMPT #1 CHAPTER 48

Chapter 48 would have determined the fair market value of the original one million acres under procedures approved by the Interim Mental Health Trust Commission set up by the State. The State would then "rent" the Trust lands in perpetuity for 8% of their value. As security, the Trust would have been made whole with legislatively designated lands of equal value to those Trust lands illegally disposed of by the State. The Alaska Mental Health Board was created to determine the needs of the mental health program and make recommendations regarding necessary funding for the mental health programs to the Governor and Legislature.

1990 - THE OBSTRUCTION TO IMPLEMENTATION OF CHAPTER 48

The Interim Mental Health Trust Commission worked from the passage of Chapter 48 until January of 1990 to determine and approve the appropriate valuation procedures to implement Chapter 48. On November 7, 1989, the Commission adopted by a two to one vote (the State's

representative dissenting) its final approved procedures for determining the value of the original Mental Health Trust Lands. Utilizing these approved procedures the value of the Mental Health Trust Lands, as of September 7, 1987, is \$2.243 billion. However, on January 23, 1990, the State Department of Natural Resources announced a creative interpretation of Chapter 48 that the Commission could not approve any valuation procedures that the Commissioner of Natural Resources did not accept. On February 1, 1990, the Department of Natural Resources issued its Minority Recommendations, indicating it believed the value of the Trust Lands was only \$565 million. The Commissioner of Natural Resources then declared an "impasse".

1990 - SETTLEMENT ATTEMPT #2 SENATE BILL 493

During the 1990 legislative session, a bill was introduced which would have adopted the \$2.243 billion value for the Trust lands and implemented Chapter 48. However, in the closing hours of the session, a Finance Committee substitute was passed which changed the compensation from 8% of the value of the Trust lands to a permanent 6% of unrestricted general fund revenue.

The Beneficiaries commissioned an economic analysis of changing the form of compensation from the value of the land to a percentage of declining state revenues. Not surprisingly, the Beneficiaries believed that this change seriously under compensated the Trust.

This, together with the lack of security for the promise to pay and the lack of an adequate Trustee, led the beneficiaries to reject this unilateral attempt to settle the litigation.

1990 - THE LAND FREEZE AND ITS CONSEQUENCES

Faced with yet another example of the State breaking its promises and breaching its responsibilities as a Trustee, the Beneficiaries went back to court for an injunction that would prohibit the State from transferring or issuing any permits or leases on Mental Health Trust lands. The Court granted the injunction which held that the Beneficiaries were entitled to challenge the status of previous dispositions of Mental Health Trust lands.

The Beneficiaries' attorneys believe that a third party does not receive good title to Mental Health Trust Lands unless that party *paid value* for the land and *had no reason to know of the breach of trust*. They believe that all persons will be found to have "constructive knowledge" of the breach of trust because it was a matter of public record.

The difficulties that third parties are now experiencing are the difficulties the State, the Beneficiaries and others have tried to avoid by continuing to look for a settlement to this issue.

THE INNOCENT THIRD PARTIES CAUGHT IN THE CROSSFIRE

There are over 6,000 questionable actions that have occurred on Mental Health Trust Lands that are open for reversal. Prospective activities on Mental Health Trust Lands have been suspended, or are in limbo. For example, the Wishbone Hill Coal Mining Project has been put on hold pending determination of certain legal questions. Usibelli Coal Mine operates substantially on Mental Health Trust Lands and its future operations are planned to be substantially on Mental Health Trust Lands. The Diamond Chuitna Coal Project in the Beluga Coal Field is also on hold. People who have received patents to Mental Health Trust Lands, like the Moms and Pops, may lose their land¹. Lessees of Trust lands may have their leases declared invalid. Municipalities which received Trust lands face the possibility of losing the land despite the fact that they've already spent time and money in planning for its use.

1991 - SETTLEMENT ATTEMPT #3 CHAPTER 66

During the 1991 session, legislation was once again introduced in an effort to reach a settlement. Lengthy negotiations with the Legislature resulted in the agreement to create a Mental Health Trust Authority to serve as a Trustee. However, the Administration refused to consider a cash based settlement. With less than two weeks left in the session, the Administration and three of the four plaintiff groups began negotiating what would become Chapter 66. Chapter 66, if approved, would:

- 1) Create the Mental Health Trust Authority as Trustee,
- 2) Return as much of the original Trust land as possible to the Trust,
- 3) Exchange other comparable state land for original Trust land that cannot be returned,
- 4) Begin the exchange process before Chapter 66 is approved by the courts pursuant to a Settlement Agreement negotiated by the parties after the session,
- 5) Hypothecate (pledge as security) 6.7 million acres of State land to be foreclosed upon in the event the land exchange is not completed before December of 1994.
- 6) Become effective only after the settlement is finally approved by the courts, the Weiss case is dismissed, and the time for any appeals has expired.

¹ On the other hand, the Beneficiaries have tried to eliminate unnecessary hardship, and when no harm to the trust is apparent, the Beneficiaries have uniformly agreed to modify the injunction to allow things to proceed.

1991 - LAWSUITS OVER CHAPTER 66

In October of 1991, a group representing tourism, sport fishing, environmental and other public interests sued to intervene in the lawsuit. They believe that Chapter 66 violates State law, the State Constitution, and the Statehood Act. They object to transferring to the Trust hundreds of thousands of acres of multiple use public lands that were never in the original Trust. They also object to nullifying numerous state land use planning processes in which thousands of Alaskans participated in good faith. The intervention was expected and initially welcomed by the settling parties as they believed that favorable decisions on these issues would "bulletproof" the settlement against challenges after approval. Unfortunately, the settling parties failed to understand how long these issues would take to resolve and the consequences in the meantime.

After over a year and a half, these challenges are still pending in the Superior Court. A decision is not expected until the spring or summer of 1993. The losing party will then, no doubt, appeal to the Alaska Supreme Court. After that appeal, the losing party can then ask the U.S. Supreme Court to review the Statehood Act issue relating to the ability of the State to transfer the mineral estate to the Trust as a part of the exchange. Only after all of this litigation is concluded can the courts finally approve or disapprove Chapter 66. While nobody can predict how long this will all take, it is safe to assume that it will be measured in years not months.

To make matters worse, during the exchange process, the plaintiffs discovered that the *State did not have lands comparable to those which would be lost*. Therefore, they were forced to look to income producing lands which the State had not anticipated would become involved in the exchange process. The Cook Inlet oil and gas fields, Glacier/Winner Creek in Girdwood, Leask Lakes in Ketchikan, hydroelectric sites throughout Southeast Alaska, airport lands and the proposed site for the new Capital building in Juneau are just a few of the lands which may have to be placed into the Trust.

Most recently, in response to these actions, the Cook Inlet oil and gas producers, Marathon and Unocal entered the litigation to protect their interests. They do not believe that the State has the right to transfer their leases to the Trust and that the Settlement Agreement is illegal. Despite the objections of the State, the court has allowed the oil companies to intervene and the litigation over their claims is just beginning. Other affected parties such as Municipal governments and coal producers have also considered intervention.

In the meantime, the *injunction and lis pendens² on the original one million acres* of Trust land remains. In addition, *title to the 6.7 million acres of hypothecated*

² A lis pendens is a notice filed in the record of title that a claim has been made against the land

lands is clouded by the prospect that foreclosure may occur anytime after 1994. Further, under the terms of the Settlement Agreement the *plaintiffs have already selected 550,000 acres of other State land* for possible exchange. This land must be segregated and closed to mineral entry or disposal. Finally, since these *additional selections can continue to be made from any State land, virtually the entire inventory of State land outside of Legislatively Designated Areas is subject to being brought into the litigation* at any time.

EFFECTS ON DEVELOPMENT

This cloud on millions of acres of State land will remain for years to come while lawsuits over Chapter 66 continue. This has created an international perception that Alaskan land and natural resources are off limits to development. This perception is widely held in both the natural resource investment community and international markets for Alaskan resources and is fostered by Alaska's competitors.

This perception of a land "freeze" is not limited to specific projects, resources, or problems like Wishbone Hill, expansion of the Girdwood ski resort or the consequences of higher utility rates in Southeast Alaska. The length of and uncertain results from the lawsuits, together with the potential for more land to be selected and therefore tied up at any time, combine to create a global stigma about development in Alaska at a time when we can least afford it.

Both the State and the Settling Plaintiffs justifiably claim that they are willing to work with affected parties on specific problems. However, the belief in this freeze will continue because of the possibility, even probability, that any valuable mineral deposit, transportation or pipeline corridor, or strategic surface estate will be tied up in this dispute.

FAILED ATTEMPT TO RELEASE THE "MOMS & POPS"

When the State realized how long the litigation over Chapter 66 would take and the hardship that would be suffered by innocent third parties, it realized the need to ask the Superior Court for "relief" for the over 3,000 so-called Moms and Pops. The State's plan, agreed to by the Settling Plaintiffs, would have modified the injunction and removed the cloud in the record of title. The Settling Plaintiffs could agree to this only with the condition that if Chapter 66 was not approved, *the Trust would be able to reassert its claims to the land.* The court rejected this "relief" last month stating that it could be considered nothing more than a "cruel hoax visited on the third parties" because at this point in time "the likelihood of final approval [of Chapter 66] is speculative, at best".

THE "UNHOLY ALLIANCE"

By early 1992, a number of diverse interest groups normally at odds found that they were united in their opposition to pursuing the land exchange portion of the proposed settlement. The Resource Development Council, Alaska Center for the Environment, Alaska Miners Association, Susitna Valley Association, Sierra Club Legal Defense Fund, Alaska Coal Association, Non-settling plaintiffs and now Marathon and Unocal realized that an amendment to Chapter 66 is needed. These groups all agree that the settlement must be within the State's ability to pay and offer fair compensation to the Trust.

1993 - AMENDMENTS TO CHAPTER 66 SENATE BILL 67

Last session, the members of this unusual coalition united behind an amendment to Chapter 66 which could finally settle the Mental Health Lands Trust litigation. Reintroduced this session by the Senate Resources Committee, Senate Bill 67 would:

- 1) Retain the portion of Chapter 66 that creates the Mental Health Trust Authority as the Trustee while maintaining the Legislature's ability to appropriate Trust funds,
- 2) Retain the portion of Chapter 66 which returns as much of the original Trust land as possible to the Trust,
- 3) Eliminate the land exchange which has led to the litigation over Chapter 66,
- 4) Instead of the land exchange, continue the current allocation of 6% of the State's unrestricted General Fund Revenue to the Trust income account in place since 1990,
- 5) Hypothecate (pledge as security) only those original Trust lands that are now in Legislatively Designated Areas (370,000 acres) to insure that the 6% allocation is made. This would free up the 6.7 million acres currently pledged as security.

WHERE DO WE GO FROM HERE?

There is unprecedented and widespread support for amending Chapter 66. Development and environmental interests, local governments, the majority of the Beneficiaries, the thousands of third party hostages, Chambers of Commerce, and many legislators realize the necessity of amending Chapter 66 now.

Unfortunately, the current administration has refused to consider any amendments to Chapter 66. Unless Alaskans become informed and communicate directly with the Governor and their legislators, we face years of litigation while development is discouraged on millions of acres of land. Alaska cannot afford such a divisive, expensive, and lengthy attempt at a settlement.

MENTAL HEALTH LANDS TRUST THE OFFSET

Attorney General Cole has stated that in Chapter 66 "the state gave up a \$1.3 billion offset which the Alaska Supreme Court held that the state is entitled to". (Letter to Senator Mike Miller dated February 3, 1993).

However, the *Supreme Court actually said* that "To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that the expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution." (State v. Weiss, 706 P. 2nd 681 at 684.) (emphasis added).

SO, WHAT IS THE OFFSET?

The value of the offset would depend on the outcome of lengthy litigation over how much the State has actually spent on mental health and whether any of the land was legally "sold".



The Interim Mental Health Trust Commission estimated the offset at only \$200 million.

The State has inflated the offset to \$1.3 billion by including expenditures of the Dept. of Law, D.N.R., Dept. of Administration, etc. *in addition to* program costs. (At the same time the State claims the entire 1,000,000 acres of land is worth only \$565 million.)

"SOLD"?

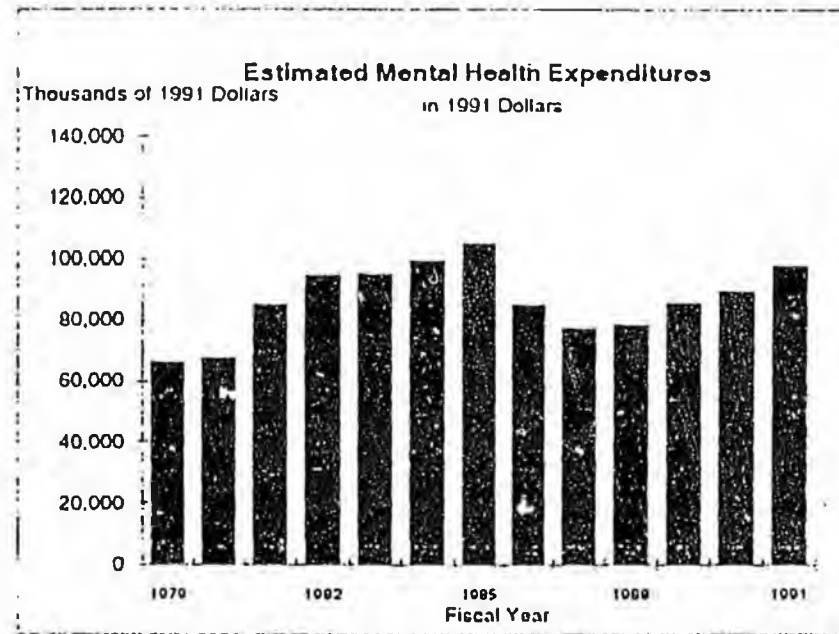
Returnable Land 315,000 acres	Must be returned to the trust.
Encumbered 150,000 acres	Can be returned subject to encumbrances.
Legislatively Designated Areas (LDAs) 370,000 acres	Set aside by legislature for parks, wilderness, forests, etc.
Municipalities 83,000 acres	Paid nothing. Had actual notice of breach of trust.
Settlement 40,000 acres	Traceable land to be returned to trust.
Moms & Pops 50,000 acres	Paid value. Notice of trust status in record of title.

Estimated Mental Health Expenditures from Unrestricted General Fund Revenue

(in Thousands of Dollars)

Fiscal Year

Agency/Budget Request Unit	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991
Department of Administration	530	586	754	1,119	1,154	1,184	1,217	1,683	1,680	1,682	1,847	1,953	1,588
Department of Law	13	30	44	48	43	40	38	73	42	54	52	59	67
Department of Education	3,147	3,550	4,155	4,803	5,493	5,017	6,715	1,844	1,694	1,676	1,751	1,859	2,226
Dept. of Health and Social Services	29,881	33,246	46,619	53,391	55,193	59,019	64,822	62,501	59,528	63,452	72,779	80,009	92,990
Department of Public Safety	1,095	2,418	3,595	3,972	3,511	3,278	3,152	826	483	619	587	673	0
Department of Corrections	2,042	2,222	2,479	3,320	3,981	5,955	7,043	966	952	1,039	1,178	1,195	1,222
Total Estimated Expenditure	36,708	42,062	57,646	66,655	69,374	75,494	82,987	67,892	64,380	68,521	78,195	85,749	98,092
Cumulative Estimated Expenditure	36,708	78,770	136,416	203,071	272,445	347,939	430,926	498,819	553,198	631,720	709,914	795,663	893,755
FY 79 - FY 85	36,708	78,770	136,416	203,071	272,445	347,939	430,926						
FY 86 - FY 91								67,892	132,272	200,793	278,988	364,737	462,829
Total Estimated Expenditure in 1991 Dollars	66,340	67,632	85,083	94,714	94,972	99,419	105,317	85,197	77,377	78,869	85,881	89,607	98,092
Cumulative Estimated Expenditure in 1991 Dollars	66,340	133,972	219,055	313,769	408,740	508,160	613,476	698,673	775,050	854,919	940,799	1,030,407	1,128,499
Mental Health Expenditures As Percentage of General Fund Unrestricted Revenues	3.24%	1.68%	1.55%	1.62%	1.91%	2.23%	2.55%	2.21%	3.58%	2.97%	3.58%	3.42%	3.47%



Prepared by the Legislative Research Agency (91.242)

Source: Mental Health Lands Trust Review. Summary Schedule and Analysis - Potential State Mental Health Expenditures
 State of Alaska, Office of Management and Budget - Division of Budget Review, Operating Budget Funding Summary, All Funds, By Agency, BRU & Component, January 28, 1991
 Note: Program Receipts have been removed from totals given.

Sunday March 21/1993 D.N. Miner

State fails in Mental Health Trust controversy

The million-acre chess board on which Mental Health Trust controversy is played out has 3,162 special "pawns" on the state's side.

As we all know, pawns are coldly sacrificed to create positional advantage for the more powerful and important pieces behind them.

The pawns on the white side are the unfortunate beneficiaries of the trust. The black pawns are the people who bought trust land from the state and now have title to their land frozen because of the state's illegal action in seizing the trust's assets 15 years ago.

The state of Alaska, the "black king" in this game, is weeping a bucket of crocodile tears on behalf of its pawns. In January, state attorneys tried to get Fairbanks Superior Court Judge Mary Greene to lift a three-year-old injunction barring sale of these lands, which total almost 50,000 acres.

The state failed. Before the third-party landholders blame Judge Greene or the Mental Health Trust beneficiaries, they should look at why the state failed.



Fred Pratt

The Legislature and former Gov. Jay Hammond dissolved the Mental Health Trust in 1978 and took the land. They later leased, gave, sold or exchanged about one-third of it to outside parties.

In 1985 the Alaska Supreme Court ruled this action illegal. The court clearly made the point that trustees managing a trust, which is what the Legislature is, cannot just appropriate the assets of the trust for their own use.

The management of the Mental Health Trust was an obligation willingly taken on by the state of Alaska in the Alaska Statehood Act. If any other trustee outside government had done such a thing, he would go to jail.

The people who acquired Mental Health Trust land from the state unwittingly fenced stolen property. If they lose their land back to the trust, they have a great case for a lawsuit against the state for selling them such land in the first place.

After the 1985 decision the state and the trust beneficiaries tried to settle the case without having to take back all this land and expose the state to thousands of expensive lawsuits. The state, however, blocked earlier settlements and now seeks to turn the ire of the third-party landholders on the court or the plaintiffs in the lawsuits, rather than own up to its own sins.

The motion to have Judge Greene lift the injunction on the third-party landholder "pawns" was an empty gesture, as Judge Greene's order clearly shows.

She notes that she can modify or cancel a standing injunction only for certain reasons. She can do it if it can be shown to be no longer necessary, if it creates an undue

hardship, if the plaintiffs have been delaying a reasonable resolution, or if the state has a substantial likelihood of winning its case.

Judge Greene clearly disposed of each of these matters in a nine-page decision.

She pointed out that plaintiffs agreed to the first settlement only two years after the 1985 ruling, but it was the state that torpedoed that settlement process in 1990, not the beneficiaries. Second and third settlement bills passed the Legislature in 1990 and 1991, but these "solutions" are mired deeply in new problems.

Judge Greene also raised the question of whether she could clear land title to these parcels by simply lifting the injunction.

That could just shift legal questions to another court. Judge Greene pointed out that if this happened, lifting the injunction would be "nothing more than a cruel hoax visited on the third parties."

"They get no relief; they would receive a worthless piece of paper and unmarketable title," she noted. "If they transferred their in-

terest in the land, they would be selling a lawsuit and both they and the purchasers would ultimately have to litigate."

State attorneys suggested the trust could be compensated by exchange of other state land of comparable value for the land granted the third party buyers. Judge Greene notes correctly that the state's inability to work within past agreements on determining value of land killed the first settlement.

She also notes that the state's likelihood in prevailing is weak at a time when two of the four plaintiffs' groups refuse to accept its current settlement, and when its strongly opposed by environmental groups, hunting clubs, fishing organizations and outdoor recreation interests, as well as coal developers and major oil companies.

State attorneys appealed Judge Greene's decision to the Alaska Supreme Court. Two weeks ago the Alaska Supreme Court rejected that appeal, without comment.

Free-lance journalist Fred Pratt has been covering Alaska business and politics for the past 18 years.

Voice of The Times

The Anchorage Times

Publisher: BILL J. ALLEN

"Believing in Alaskans, putting Alaska first"

Editors: DENNIS FRADLEY, PAUL JENKINS, WILLIAM J. TOBIN

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Tossing in the towel

THE APPARENT failure of the mental health trust settlement agreement probably is being greeted with some cheers across the state. Most people who have followed the issue are frustrated by all the legal tangles and delays that have come with efforts to rebuild the original land trust set up by the federal government almost 40 years ago. The rebuilding is necessary because of a 1985 court order which said the state had no business dissolving the trust in 1978, an action which followed years of neglect and non-management of the mental health lands.

Putting the trust back together, however, has become as complicated as unscrambling eggs. Two years ago, it appeared Attorney General Charlie Cole and then Resource Commissioner Harold Heinze had come up with a solution. They reached agreement in 1991 with attorneys for the mental health groups and won approval by the Legislature to replace land originally held in trust with state lands of equal value and comparable in character.

It was an involved plan, one that permitted mental health lawyers and trustees to identify state public lands on a tentative basis pending final approval by the court of the whole agreement. And identify lands they did: oil leases in Cook Inlet, coal fields, ski resorts, gold mines and anything else of potential value. Each piece of land selected, however, meant planned development activities there were put in limbo, making developers more and more disenchanted with the plan. That wasn't the only problem.

AS PART OF the 1991 settlement agreement, the state was to be free to issue patents on previously purchased small tracts of mental health lands. Alaskans who own these so-called "mom and pop" lands are now prohibited from selling, exchanging or otherwise developing the land until the legal cloud is lifted.

The agreement was supposed to make that possible. It didn't.

A Superior Court judge rejected releasing any of the original trust lands until the whole agreement is finalized. Last week, the Supreme Court backed the decision. That prompted Gov. Walter Hickel to give notice that the state would back out of the agreement — unless lawyers can figure out another way to free up the so-called mom and pop lands. That's not likely to happen. More likely, the issue will now go back to the Legislature for resolution.

Bills are moving in both houses which abandon the idea of replacing trust with state lands to generate revenue. Instead, the new legislative proposals would commit annual funding from the state treasury to cover mental health needs. A Senate bill would earmark 6 percent of general revenue each year for the mental health trust, while a House bill would commit 3 percent.

This alternative is bad policy and would set a bad precedent. But given that the best alternative just fell apart, it may be the only politically possible resolution.

NEWS RELEASE

STATE OF ALASKA

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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 January 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.

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PRESS ADVISORY

March 24, 1993

FOR IMMEDIATE RELEASE

FOR MORE INFORMATION CONTACT: Walt Baldwin, 276-4849

STATE REFUSES TO LIVE UP TO LATEST PROPOSED SETTLEMENT OF MENTAL HEALTH LANDS TRUST

With little fanfare, a press release issued by Governor Walter J. Hickel on March 15, 1993 signaled the State's intention to withdraw from the latest attempt to settle the Mental Health Lands Trust litigation.

While giving the impression that this action is based on the State's failure to gain the release of the third party land owners known as "Moms & Pops", in fact, the State had already refused to comply with the terms of the Settlement Agreement (see attachments 1 and 2).

"Of course I knew it was in trouble when the State wrote a letter on February 25, 1993, refusing to allow the Settling Plaintiffs' Attorneys to pick the land needed, as agreed to in the Settlement Agreement, to replace land that the State stole from the original Trust", said Walt Baldwin.

In light of these developments a number of groups representing Trust beneficiaries agreed upon a resolution calling attention to the real reason the State has threatened to withdraw from the settlement (see attached Resolution).

STATE of Alaska,
Appellant/Cross-Appellee,

v.

Vern T. WEISS, et al.,
Appellee/Cross-Appellant.

Nos. S-653, S-678.

Supreme Court of Alaska.

Oct. 4, 1985.

Class action was brought against State for breach of public trust in enacting legislation redesignating federal mental health grant lands as general grant lands. The Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., ruled the legislation could not be invalidated, but that the State breached its duties as trustee by removing federal grant lands from the trust. The state appealed, and plaintiffs cross-appealed. The Supreme Court, Compton, J., held that: (1) the State breached its duties as trustee in redesignating the land, and (2) the redesignation legislation was invalid.

Affirmed in part, reversed in part and remanded.

1. Public Lands ⇄62

In passing the Alaska Mental Health Enabling Act, the United States Congress intended to create a trust, to be based on a corpus of one million acres of federal land, to help effectuate the creation and operation of mental health care facilities in the state, and the state, as trustee, had no power to alter the status of the property grant, thereby effectively terminating the trust. Alaska Mental Health Enabling Act, § 101 et seq., 70 Stat. 709; Laws 1978, c. 181, § 3(a).

2. Public Lands ⇄62

In passing act [Laws 1978, c. 181, § 3(a)] redesignating trust lands given state by United States Congress under Alaska Mental Health Enabling Act as general grant land, the State went beyond the power which had been granted it with re-

spect to the land by Congress and the redesignation act was therefore invalid. Alaska Mental Health Enabling Act, § 101 et seq., 70 Stat. 709.

G. Thomas Koester, Asst. Atty. Gen.,
Norman C. Gorsuch, Atty. Gen., Juneau,
for appellant/cross-appellee.

Stephen C. Cowper, Fairbanks, for appel-
lee/cross-appellant.

Russ Winner, McGrath & Associates, An-
chorage, for amicus curiae Cook Inlet Re-
gion, Inc.

Before RABINOWITZ, C.J., and
BURKE, MATTHEWS and COMPTON, JJ.

OPINION

COMPTON, Justice.

The State of Alaska ("state") appeals from a judgment of the superior court holding that the state breached its duty as trustee of federal mental health grant lands when the legislature redesignated the property as "general grant land." For the reasons set forth below, we affirm the holding to this extent, but reverse the superior court's conclusion that the redesignation legislation was valid.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1956 the United States Congress passed the Alaska Mental Health Enabling Act (AMHEA) which, insofar as it concerns this case, granted the Territory of Alaska one million acres of federal land to be held in public trust to help effectuate the creation and operation of mental health care facilities in Alaska. Pub.L. No. 84-830, 70 Stat. 709 (1956). Section 202(e) of the Act specifically provides:

All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds

and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act. (emphasis added)

The state managed these lands without maintaining a separate account until 1978. The Alaska State Legislature made its practice law in 1978 when it passed the following statutory provision:

REDESIGNATION AND DISPOSAL OF MENTAL HEALTH LAND

(a) Land granted to the state under the Mental Health Enabling Act of 1956, 70 Stat. 709, and patented to or approved for patent to the state on July 1, 1978 and land designated as mental health land which was received by the state in exchange for land granted under that federal land grant is redesignated as general grant land and shall be managed and disposed of by the Department of Natural Resources under applicable provisions of law.

Ch. 181, § 3(a), SLA (1978).

Alaska has provided continuous mental health care since statehood. The record indicates that between 1959 and 1982 the state spent over \$222,000,000 on mental health care. Generally speaking, there has been a constant increase from 1959 to the present in mental health expenditures: slightly less than \$1,200,000 was expended in 1959, and slightly more than \$29,000,000 was expended in 1982. The record does not

indicate how much of the trust land at issue has been disposed of, nor the total value of such disposed land. In the state's answer to the complaint, it alleges that "state expenditures for mental health purposes exceeded revenues from mental health grant lands in all years for which revenues from those lands were tabulated separately." The record does indicate that as of 1973, total revenues from these mental health trust lands amounted to \$19,555,582. The state's total expenditures to that point amounted to \$66,726,176.

Weiss *et al.* filed a class action in 1982 alleging that the state breached the public trust by 1) failing to account for revenues realized, 2) using revenues for purposes other than mental health care and 3) passing legislation redesignating the property "general grant land." Plaintiffs sought declaratory relief invalidating the redesignation legislation; injunctive relief compelling the state to administer the trust according to the law; general relief establishing a trust account "for the receipt of funds generated from all lands selected by the State of Alaska under the aforesaid mental health land grant...."

The superior court ruled that invalidation of the redesignation legislation was not an available remedy, based on *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981). However, the court did hold that the state breached its duties as trustee by removing the federal grant lands from the trust. As a remedy, the court ordered that

[t]he public trust established by P.L. 84-830, 70 Stat. 709, shall recover from the defendant State of Alaska an amount equal to the fair market value of all lands conveyed from the trust as of the date of conveyance, plus prejudgment interest from the date of each conveyance. For the purposes of this judgment, all lands remaining in the trust as of July 19, 1978, shall be considered as having been removed from trust status by the State of Alaska on that date....

The court also ordered a set-off for all monies spent by the state on mental health care.

The state appeals from the judgment, except the holding that the redesignation legislation was valid. Weiss *et al.* cross-appealed the trial court's failure to rule the legislation invalid.

II. DID THE STATE BREACH THE PUBLIC TRUST CREATED BY CONGRESS WHEN IT REDESIGNATED PROPERTY IN THE TRUST AS "GENERAL GRANT LAND?"

A. Nature of the Trust.

The state argues, essentially, that the redesignation is of no legal consequence because the state has always provided public mental health programs in the past and, implicitly, will provide them in the future. The state maintains that providing such programs fulfills its obligations according to AMHEA, freeing the grant lands for other public purposes. Textual support for this position comes from the portion of Section 202(e) which states that "proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska." It is suggested that this language means Congress intended that the land grant serve as a revenue base guarantee. Great emphasis is placed on the legislative history of AMHEA which establishes that Congress did

1. The debates in the House and Senate are too lengthy to reproduce in their entirety here, but certain remarks are representative of the discussions. Senator Jackson commented that "[t]he income from sales or leases will be used to support the mental health program in Alaska. The income will be held in trust for that purpose. Any money received over and above the need for the mental health program may be used for other public purposes." He further noted that the language change was not of a fundamental nature, and thus said that, "[t]he purpose of granting 1 million acres is the same as in all other similar grants, such as the public school land-grant program." 102 Cong.Rec. 9761 (June 7, 1956).

We note that the language in the federal grant was changed from designating the proceeds of the land grant to be used as a public trust for Alaska's mental health program, to saying that the proceeds "shall first be applied to meet the necessary expenses of the mental health program" only because of worry among members of Congress that the land may actually have a

not wish to limit the use of grant lands *exclusively* to mental health programs.¹

[1] Despite these observations, we think it irrefutable that Congress intended to create a trust, to be based on a corpus of one million acres of federal land. It is a commonplace of the law that without trust property there can be no trust. Restatement (Second) of Trusts § 74 (1959).² When the state, through the legislature, altered the status of the property grant the trust was thereby effectively terminated. The state, as trustee, had no power to do this and consequently breached its duty to preserve the corpus.³ The fact that the state has provided mental health care in the past and will most likely do so in the future is no justification for termination of the trust. Whether a beneficiary can rely on the *bona fides* of a trustee to continue voluntarily to uphold the terms of a defunct trust is quite beside the point. We decline the opportunity to encourage the state, or any trustee for that matter, to determine unilaterally when to terminate a trust without specific authority to do so.

B. Remedy.

[2] Having concluded that the state breached the trust, we find it necessary on the facts of this case to invalidate the redesignation statute, Ch. 181, § 3(a), SLA (1978). *State v. University of Alaska*, 624

value far in excess of the necessary health care expenses. The record in this case shows that income from the land grant was actually less than state expenditures for mental health programs.

2. Section 74 provides: "A trust cannot be created unless there is trust property."

3. Our reliance upon basic trust law principles finds ample support in the precedents of this court and the United States Supreme Court. See *Lassen v. Arizona*, 385 U.S. 458, 27 S.Ct. 584, 17 L.Ed.2d 515 (1967); *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981). Both *Lassen* and *University of Alaska* involved federal grants to be used by states for school purposes. Those cases stand for the proposition "that the same private trust law principles are to apply to federal land granted to the states for school purposes." *University of Alaska*, 624 P.2d at 813. There is no reason to treat federal lands granted for mental health purposes differently.

P.2d 807, 815 (Alaska 1981) does not compel a different result. In that case, the federal government had granted 100,000 acres to the state "for the exclusive use and benefit" of the University. *Id.* at 811. Years after the grant, the state included 5,040 acres of the trust land in a state park. This action was not in itself a breach of the trust so long as the University was paid fair market value for the land. We inferred that the legislature intended to pay the University for this disposition, stating:

It is also logical to assume that the legislature intended to compensate the University for the loss of its land. This view gives the statute creating [the park] a reading that is in accord with the well recognized canon of statutory construction that, when possible, legislation should be construed in a way that upholds its validity.

524 P.2d at 816.

Unlike the situation in *University of Alaska*, the present case does not involve a disposition of a portion of trust lands for a specific use. Instead, the entire corpus of the trust is intermingled with the general grant lands of the state. No particular use of the trust lands is specified and it may be years before much of the land is used. While it was reasonable to infer a legislative intent to pay for 5,040 acres for which there was a present park land use in *University of Alaska*, it is not reasonable to infer that the legislature meant to pay for a quantity of trust land approaching one million acres for which in large part there is no present use. Thus, the payment remedy imposed in *University of Alaska* is not appropriate here. Because the state in passing the redesignation act went beyond the power which had been granted it with respect to the trust lands by Congress, the redesignation act must be declared invalid.

It follows from our conclusion that the redesignation legislation is invalid that the trust must be reconstituted to match as nearly as possible the holdings which com-

prised the trust when the 1978 law became effective. The case is remanded so that requisite findings can be made. We take this opportunity to provide some guidance to the trial court to simplify its task.

Those general grant lands which were once mental health lands will return to their former trust status. In the event exchanges have been made, those properties which can be traced to an exchange involving mental health lands will also be included in the trust. To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution. The goal is to restore the trust to its position just prior to the conveyance effected by the redesignation legislation.⁴

AFFIRMED in part, **REVERSED** in part and **REMANDED** for further proceedings consistent with this opinion.

MOORE, J., *not participating.*



In the Matter of the Application of: John L. McKAY, Jr., An Applicant for admission to the Practice of Law in Alaska and Membership in the Alaska Bar Association.

No. S-667.

Supreme Court of Alaska.

Sept. 27, 1985.

Applicant for Bar filed an appeal with Board of Governors of the Alaska Bar As-

4. Amicus raises questions regarding the title held by conveyancees and bona fide purchasers of mental health lands. In view of our disposi-

tion of this case, we deem it unnecessary to address those issues at the present time.

PROPOSED REVISIONS TO SB 67/HB 201

Page 1, line 9:

Delete "(a)".

Page 1, line 10:

Change entire line to read:

"(a) Except as provided in AS 38.05.800, the Alaska Mental Health Trust Authority"

Page 2, after line 8:

Insert:

"(b) In exercising its power under (a)(1), (2) or (3) of this section, the authority or its contractor under (a)(4) of this section is not bound by the provisions of AS 38.04 or AS 38.05, except that it shall

(1) comply with AS 38.05.285 subject to its obligations under AS 37.17.007:

(2) give public notice in the manner provided under AS 38.05.945(b) and (c) [BUT IS NOT OTHERWISE BOUND BY THE PROVISIONS OF AS 38.04 OR AS 38.05] of a preliminary decision to dispose of trust land and consider any written comments submitted within 30 days of such notice prior to making a final decision; and

(3) give public notice in the manner provided under AS 38.05.945(b) and (c) of any final decision to dispose of trust land."

Page 2, line 21:

After "section" insert:

"In this section, "unrestricted general fund revenue of the state" means all the categories of accounting for money accruing to the state general fund that,

under the statewide accounting system as established on the effective date of this Act, were identified as revenue that was not restricted by law to a specific use."

Page 3, lines 8-24:

Make this subsection (b) of AS 38.05.800

Page 3, line 8:

Insert a new subsection (a) to read:

"(a) For purposes of this section:

(1) "conveyed or encumbered" means (A) covered by a land sale contract issued by the state or a municipality; (B) covered by a patent executed in favor of any person, entity, native corporation, municipality, or the University of Alaska; (C) selected by a native corporation under 43 U.S.C. § 1611; (D) covered by a claim of a native for an allotment under 43 U.S.C. § 1634 or by a certificate of allotment issued under applicable federal law; and (E) identified for conveyance pursuant to a land exchange agreement between the state and a native corporation, but not yet covered by a patent;

(2) "department" means the Department of Natural Resources;

(3) "land" includes both the surface estate and the mineral estate;

(4) "lease" means any oil and gas lease, coal lease, mining lease, land lease, and any other mineral or surface lease; and

(5) "right-of-way" means any right-of-way permit or easement, or any road, utilities, or

other improvements constructed pursuant to an approved land use application or permit or letter of entry issued by the department and for which no right-of-way permit has yet been issued."

Page 3, line 14:

Change entire line to read: "(A) a lease;"

Page 3, line 24:

Insert new subsections to read:

"(c) any land included in the corpus of the mental health trust shall be subject to the terms, conditions, and provisions of any lease, timber contract, material sale contract, land use permit, right-of-way, prospecting permit, exploration permit, or water right issued by the United States or the state on or before the effective date of this Act;

(d) any land included in the corpus of the mental health trust shall be subject to any mining claim or mining leasehold location that was acquired and continued in compliance with applicable laws and regulations on or before the effective date of this Act and that is continued in compliance with applicable laws and regulations thereafter;

(e) the department shall manage all land that is subject to any interest identified in (c) and (d) of this section for as long as such interest remains in effect;

(f) all land that is subject to any interest identified in (c) and (d) of this section shall be governed only by and managed by the department only pursuant to the laws and regulations applicable to

general grant land and not pursuant to any laws or regulations applicable to the other land of the trust except that the proceeds from the management of such land shall be included in the mental health trust income account in accordance with AS 37.14.036;

(g) with respect to any particular lease, timber contract, material sale contract, land use permit, right-of-way, prospecting permit, exploration permit, water right, mining claim, or mining leasehold location, the owner of such interest, the department, and the mental health trust authority established under AS 47.30.011 may agree to waive the provisions of (e) and (f) of this section in which case the land involved will then be governed only by the laws and regulations applicable to the other land of the trust and will be managed like the other land of the trust;

(h) all land granted to the state under the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, that is not included in the corpus of the mental health trust under (b) of this section is released and removed from the trust and shall no longer be subject to any of the provisions of the Alaska Mental Health Enabling Act of 1956, P.L. 84-830, 70 Stat. 709, or any claim of the trust;

(i) after giving public notice in the manner provided under AS 38.05.945(b) and (c), all land included in the corpus of the mental health trust under (b) of this section shall be conveyed by patent by the commissioner of the department to the mental health trust authority established under AS 47.30.011 and the trust authority takes its title

subject to any interest described in (c) and (d) of
this section and subject to all of the provisions of
this section."

EXPLANATION OF PROPOSED REVISIONS TO SB 67/HB 201

1. The amendment to AS 37.14.009(a) is a cross-reference to the overriding provisions of AS 38.05.800 which divest the trust authority of land management authority over trust lands that are currently subject to third party interests (discussed more fully in paragraph 6 below).

2. To the extent that the trust authority is not divested of land management authority over trust lands by virtue of AS 38.05.800, the amendments to AS 37.14.009(b) add two safeguards of the public interest applicable to management of trust lands in lieu of AS 38.04 and AS 38.05. These amendments are intended to establish a public process for trust land management decisions and to insulate the bill from legal challenges under Article VIII, Section 10 of the Alaska Constitution.

2.1 Subsection (b)(1) requires land management decisions to comply with the state constitution and the principles of multiple purpose use consistent with the public interest. However, this subsection also recognizes that the trust principles established in AS 37.14.007, added by Chapter 66, SLA 1991, must take priority if they conflict with multiple purpose use.

2.2 Subsection (b)(2) provides a 30-day public comment period to precede final land disposal decisions. This period is intended to ensure 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.

2.3 Subsection (b)(3) requires public notice of final decisions to dispose of trust lands.

3. The proposed revision to AS 37.14.036(c) adds a definition of "unrestricted general fund revenue of the state" to the bill.

4. A new subsection (a) containing key definitions is added to AS 38.05.800.

4.1 In order to clarify that the land in the trust corpus will include both surface and mineral estates, "land" is so defined.

4.2 In order to make the entire section read more easily, and to specifically cover as many types of leasehold estates as possible, "lease" is now a defined term.

4.3 The Department of Law has expressed concern over the ambiguity inherent in stating that "conveyed or encumbered" land is not being returned to the trust. To satisfy this concern, "conveyed or encumbered" is now defined. Conveyances to native corporations, municipalities, and the University of Alaska are now specifically included as "conveyed or encumbered" land. In addition, ANCSA selections are now defined as being "conveyed or encumbered." Finally, the Department of Law had concluded that under SB 67/HB 201 land with native allotment claims would go back to the trust and that the trust would be compelled to challenge these claims. To avoid this problem, lands covered by native allotment claims are now also defined as "conveyed or encumbered."

4.4 A definition of "right-of-way" is included to reflect the fact that roads and other improvements are constructed pursuant to land use permits and letters of entry. In some cases these valid rights have never been reflected in a right-of-way permit because the issuance of such permits has been barred by the superior court's preliminary injunction since July 9, 1990.

5. The existing language in AS 38.05.800 would become new subsection (b) of the section.

6. New subsections (c) through (i) would be added to AS 38.05.800.

6.1 New subsection (c) clarifies that any land remaining in the corpus of the trust remains subject to the terms, conditions, and provisions of all third party rights. This new subsection validates such third party interests, thus satisfying another concern of the Department of Law. (Chapter 66 currently contains no such provision, although the settling plaintiffs did agree in the Chapter 66 settlement agreement that the trust would take all of its land subject to third party interests.) Subsection (c) is not intended to validate or question the validity of RS 2477 rights-of-way which may or may not exist.

6.2 New subsection (d) clarifies that trust land will also remain subject to any mining claims or leasehold locations that were acquired and continued in compliance with current applicable law. Unlike the third party interests covered by subsection (c), there is no legal document to reflect the terms of mining claims or leasehold locations

(unless they are subsequently converted to a mining lease, which is covered by subsection (c)) and DNR normally makes no "validity" determination. The holders of mining claims and leasehold locations would therefore be subject to the status quo under SB 67/HB 201 -- they would face the same challenges from the trust that they could face from the state -- the trust simply takes subject to the claimant's rights, if any. If the claimant can satisfy the legal requirements of a valid claim, the claim will be valid. Original mental health trust land has been closed to mineral entry since November 5, 1985 pursuant to court and DNR orders so the only mining claims or leasehold locations of concern will be those that were validly located prior to that date.

6.3 Neither subsection (c) nor (d) use the common legal term "valid existing rights," because the Weiss plaintiffs have asserted that there are no valid third party rights in mental health trust land. Therefore, the revisions provide that the trust takes subject to any of the mentioned interests, whether or not they are valid from the point of view of the Weiss plaintiffs. As previously mentioned, the one exception is that the trust would stand in the state's shoes in being able to challenge any mining claim or leasehold location that has not been acquired and continued in accordance with existing applicable law.

6.4 New subsection (e) is a mandatory provision requiring DNR to manage all land that is subject to any third party interest enumerated in subsections (c) and (d) for as long as the enumerated interest remains in effect. This provision eliminates the possibility of litigation by third parties against the trust and the state on the ground that third parties have a contractual right to have DNR as their land manager.

6.5 New subsection (f) further provides that DNR will manage all land covered by third party interests pursuant to the laws and regulations applicable to general grant land, except that all proceeds from such lands shall be placed in the mental health trust income account. Again, this provision is necessary to prevent litigation by third parties against the trust and the state for breach of their contract rights.

6.6 By defining "land" in subsection (a) as both the surface and mineral estates, the proposed revisions clarify that if any interest has been carved out of either estate, then DNR must manage the entire estate like general grant land for as long as the third party interest remains in effect. This provision is necessary to avoid "split estate" problems that are likely to cause litigation. For example, in the case of an oil and gas lease, if DNR manages the

subsurface estate but the trust authority manages the surface estate, the trust authority might attempt to take action to impair the contract rights of the oil and gas lessee (such as by charging a surface use fee for the lessee's drilling rigs and equipment).

6.7 New subsection (g) allows a third party contract holder, the trust authority, and DNR to waive DNR's management of the land in question. This gives any affected third party the option to seek a three-way agreement with DNR and the trust to have the land subject to the third party's interest managed by the trust authority pursuant to whatever land management regulations and standards the trust authority eventually adopts for normal (unencumbered) trust lands.

6.3 New subsection (h) specifically states that all original mental health trust land not included in the corpus of the trust pursuant to AS 38.05.800 is released and removed from the trust and is no longer subject to any of the provisions of the original 1956 act. (Again, this is a provision which is implied, but is not explicitly stated, in Chapter 66.)

6.9 New subsection (i) specifically provides that DNR will actually convey the land that is being returned to the trust to the trust authority and that the trust authority takes its title subject to all protected third party interests and the restrictions of AS 38.05.800. The same public notice process (a 30-day public comment period) contemplated for conveyances of land under Chapter 66 from DNR to the trust authority will apply to reconstitution of the trust under SB 67/HB 201.

7. These revisions remove the concerns set forth in Sections V, VI, VIII, X.3, and X.4 of Charlie Cole's February 3, 1993 letter to Senator Mike Miller. The proposed revisions to SB 67/HB 201 are, like Chapter 66 itself, a "settlement" of the dispute different from that mandated by the Alaska Supreme Court in 1985. Although there is nothing in that 1985 decision indicating that the state has a "fiduciary duty" to manage trust lands solely to maximize revenue to the trust, even if this were true, this would be in direct conflict with third party contract rights. The proposed revisions protect these third party rights as long as the particular land interest remains in effect. When the third party land interest expires, terminates, or is surrendered, the subject land reverts to the trust for management pursuant to whatever standards have been adopted by the trust authority.

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VIA FACSIMILE TO NO. 465-2864

May 5, 1993

Senator Drue Pearce
Senator Steve Frank
Co-Chairs, Senate Finance Committee
State Capitol Building
Juneau, Alaska 99811

Re: Mental Health Lands Legislation
Our File No. 2686-1

Dear Senators Pearce and Frank:

I represent Marathon Oil Company and Union Oil Company of California in Weiss v. State, 4FA-82-2208 Civil. Marathon and Unocal intervened in that lawsuit last fall in order to challenge various aspects of the land exchange process currently under way by the State and the settling plaintiffs pursuant to the terms of Chapter 66, SLA 1991, and their settlement agreement. As you are well aware, Judge Greene has recently ruled that certain aspects of Chapter 66 are unlawful. The State and the settling plaintiffs have proposed last-minute amendments to SB 67 and HB 201 which they contend will fix the legal problems. Unfortunately, they will not.

One aspect of the proposed amendments is a reduction of the hypothecated list from 6.7 million acres to 1.5 million acres, to be selected by the Department of Natural Resources "using the criteria set out in secs. 55(d) and (e) of this Act" (Chapter 66). See Sec. 4(a)(2). Although the proposed amendments do not say so, the settling plaintiffs have made it plain that they intend the hypothecated list to be comprised of Cook Inlet oil and gas leases. In a letter to Representatives Larson and MacLean dated April 21, 1993, in which the idea of the current amendments was first raised, settling plaintiffs'

Senator Drue Pearce
Senator Steve Frank
May 5, 1993
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counsel David Walker explained (at p. 4) that the proposed amendments "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)."

Besides the legal challenges that Marathon and Unocal have already mounted against hypothecation of the Cook Inlet oil and gas leases, you should be aware that the proposed amendments will create further conflict between the State and the settling plaintiffs and give Marathon and Unocal a wholly new ground for judicial challenge. Ever since the settling plaintiffs nominated the Cook Inlet leases as Proposed Substitute Land in July 1992, the State has maintained that the leases are not in fact comparable under sections 55(d) and (e) of Chapter 66. Director Ron Swanson of the Division of Lands wrote to the settling plaintiffs on August 20, 1992: "The state does not believe that the oil and gas lease tracts are appropriate for nomination as Proposed Substitute Land at this point in the reconstitution process because the oil and gas lease tracts are not comparable to non-reconstituted trust land." On February 25, 1993, the Department of Law reconfirmed the State's position that the leases were "non-comparable land" in a letter from Assistant Attorney General Brian Bjorkquist to Mr. Walker: "While some non-comparable land may eventually be necessary to reconstitute the trust, there are several reasons why the Cook Inlet tracts should be among the last of those non-comparable lands considered for reconstitution into the trust."

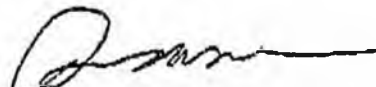
In short, while the settling plaintiffs are apparently assuming that the Cook Inlet leases will be on the reduced Hypothecated List, the State cannot allow those leases to be hypothecated under the "comparability" criteria of Chapter 66 without making a direct and drastic turn-about in its previously consistent position. Thus, these amendments merely give the State and the settling plaintiffs one more thing to fight about. Not only that, but if the State does reverse itself and hypothecate the leases, it will give Marathon and Unocal additional grounds for judicial challenge -- that, as the State itself has maintained, the hypothecated list does not comply with the comparability provisions of Chapter 66.

Senator Drue Pearce
Senator Steve Frank
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On behalf of Marathon and Unocal, I urge you to
reject these last-minute amendments.

Very truly yours,

BURR, PEASE & KURTZ



Peter J. Maassen

PJM/3



Alaska Environmental Lobby, Inc.

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DO NOT PASS ADMINISTRATION AMENDMENTS TO SB 67/HB 201

-Judge Greene on April 26 handed down a decision on the public interest intervenors' claims. The public interest intervenors prevailed on two out of eleven claims. They will appeal on several of the other claims.

-The judge held that: 1) the hypothecated lands list was illegally compiled, and 2) as a matter of statutory interpretation of Chapter 66, Alaska's land planning and classification laws (38.04/38.05) do apply to the reconstitution of the Trust.

-The administration is asking the legislature to adopt two amendments to "fix" problems identified by the court in Chapter 66: Re-hypothecating 1.5 million acres using acceptable standards, and exempting land exchanges in Ch. 66 from 38.04/38.05 and instead establishing procedural guidelines in lieu of 38.04/38.05.

-These amendments are two separate items. **They do not need to pass in tandem.**

-These "fixes" won't solve the problem. They will instead intensify the substantial opposition to Ch. 66, and they will do nothing to prevent continued litigation. **Massive land exchanges are the problem with Ch. 66.** In the 1990's, there are too many differing interests in public lands to make these massive land exchanges feasible.

-**The public and the legislature still won't know which public lands will be pledged as security (i.e. hypothecated) for the performance of the state's obligations under Ch. 66.** The legislature and the public should be able to participate fully in this decision.

-The massive land trust would not adequately meet the needs of the mental health programs. The legislature would still need to appropriate funds for mental health programs.

-**Let's avoid a quick fix approach.** The oil company's claims will be considered by the judge in the next few months. The public intervenors will appeal their claims. Other legal challenges are sure to follow. The legislature should not rush through quick fix amendments after each court ruling.

-**Let's learn from experience and not rush through last minute amendments without adequate public and legislative consideration.**

-**The solution instead is found in SB 67/ HB201 in their current version: the return of 500,000 acres of original unencumbered trust land, and a percentage of general fund revenues for the land that can't be returned.**

5/5/93



THE PUBLIC PROCESS IN THE PROPOSED AMENDMENTS IS A FARCE

- * The proposed amendments provide for no public process until after the plaintiffs and DNR have negotiated their deal. This belated, abbreviated public participation comes too late to influence the land selections.
- * Thousands of Alaskans have devoted years of effort to the land use planning and classification process. The existing plans are the result of consensus that has emerged from diverse interests participating in this open, public process.
- * Alaska Statute 38.04.065 requires "meaningful participation" by the public in decisions affecting state lands. The proposed amendments would repeal this fundamental public policy.
- * The proposed amendments would arbitrarily restrict judicial review to those who submitted comments during the period provided after the deals are made, even if a person is adversely affected and is otherwise entitled to judicial review under settled law.
- * Who supports the existing planning process?
 - Resource developers
 - Small businesses in the tourism industry
 - Sport fishing organizations
 - Home-grown Alaska environmental groups
 - Alaskans who care about the public lands
- * Who opposes the proposed amendments to Chapter 66?
 - ALL OF THE ABOVE.
- * Why?
 - Alaskans of all stripes have benefitted from a consensus-building public process and built their expectations around the decisions made in these plans.

Don't throw years of effort out the window.

PLEASE VOTE AGAINST THE ADMINISTRATION AMENDMENTS TO CHAPTER 66.



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ATTORNEY GENERAL SAYS CHAPTER 66 AMENDMENTS MAY NOT BE NECESSARY

In a brief filed Wednesday, May 5, in superior court, the Attorney General said that legislation to amend Chapter 66 may not be necessary:

"Even if the legislature does not pass the settling parties' proposed legislation, however, there are other options that the parties can explore."

See pages 2-3 of the State's opposition brief (attached).

For more information, contact Jeff Jessee, 344-1002.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

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; the
ALASKA MENTAL HEALTH ASSOCIATION,
MARY C. NANUWAK, and JOHN MARTIN,
on behalf of themselves and all
others similarly situated;
ANITA BOSEL, FRANCES DOULIN,
SHARON GOODWIN, AND GABRIEL MAYOC;
and B.L., M.K., and ALASKA
ADDICTION REHABILITATION SERVICES,

Plaintiffs,

v.

STATE OF ALASKA,

Defendant.

Case No. 4FA-82-2208 Civil

OPPOSITION TO MOTION TO
STAY PROCEEDINGS

Defendant State of Alaska ("state") opposes Marathon
Oil Company and Union Oil Company of California's ("oil company
intervenor-lessees") Motion to Stay Proceedings. Contrary to oil
company intervenor-lessees' allegations, the termination of the
settlement agreement on May 11, 1993 is not a certainty. It
would prejudice the other parties to this litigation, as well as
the public, to stay proceedings on issues this court has found
"crucial to the issues before the court." See Order re
Intervention of Marathon and Union Oil Companies (January 22,
1993).

STATE'S OPPOSITION TO MOTION TO STAY PROCEEDINGS

PAGE 1

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1 Oil company intervenor-lessees give the impression that
 2 the settlement agreement will automatically terminate on May 11,
 3 1993, the 60th day following the state's letter invoking Article
 4 III, section 31(c) of the Settlement Agreement. This is not
 5 true. Section 31(c) gives the parties at least sixty days to try
 6 to reach another agreement for relief to third-parties, however,
 7 nothing in that section prohibits the parties from jointly
 8 agreeing to extend the time within which to reach another
 9 agreement.

10 Prior to the court's April 26, 1993 Memorandum Decision
 11 and Order Re: Intervenor's Complaint ("Memorandum Decision") the
 12 state and settling plaintiffs had been exploring a variety of
 13 ways to provide relief to the affected third-parties. The
 14 Memorandum Decision, however, suggested a straightforward
 15 legislative resolution of the settlement's legal problems that
 16 would make it more likely that the court would ultimately approve
 17 the settlement and, as a result, provide relief to those third-
 18 parties. Since April 26, as oil company intervenor-lessees'
 19 noted, the parties have devoted their energies toward a
 20 legislative solution. See oil company intervenor-lessees'
 21 Memorandum in Support of Motion to Stay Proceedings at 3 n.1
 22 ("oil company intervenor-lessees' memorandum"); See also B.
 23 Arke, "Hickel puts priority on mental health lands bill,"
 24 Anchorage Daily News, at E-2 (May 4, 1993) (copy attached).

25 Even if the legislature does not pass the settling
 26 parties' proposed legislation, however, there are other options

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1 that the parties can explore. With all indications pointing
2 toward chapter 66 being a legal and constitutional vehicle to
3 settle this litigation and, thereby, providing the relief to
4 affected third-parties, it is less likely the state would
5 terminate the settlement agreement because of concerns about
6 providing relief to third-parties. Indeed, approval of chapter
7 66 as settlement may provide the most expeditious relief to
8 affected third-parties.

9
10 The court has stayed the proceedings on preliminary
11 approval for seventy days to give the state and settling parties
12 time to try to reach agreement concerning the hypothecated land
13 list and the application of AS 38.04 and 38.05 to the
14 reconstitution. A prompt decision by the court with respect to
15 the oil company intervenor-lessees' complaint would assist the
16 parties in their negotiations. If the court granted summary
17 judgment in favor of the state and settling plaintiffs, the
18 parties would be even more inclined to reach agreement to "save"
19 the settlement. If the court granted summary judgment in favor
20 of the oil companies, either in whole or in part, the parties
21 would then have the opportunity to respond to that decision at
22 the same time they are negotiating over the two other problems.
23 It would prejudice the state, settling plaintiffs, and the
24 public, for the parties to spend substantial amounts of time and
25 money to attempt to resolve two problems with the settlement, if
26 several months later the settlement were to fail because the
court were to find that oil and gas leases may not be transferred

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1 to the trust authority.

2 Moreover, it should be pointed out that the possibility
3 of the termination of the settlement agreement is nothing new and
4 has not been a compelling reason in the past for any of the
5 court's decisions. The possibility of termination was obvious on
6 January 14, 1993 when the court denied the state and settling
7 plaintiffs' joint motion for relief for third-parties. The court
8 issued that decision a week before granting the oil companies
9 intervention, conditioned upon expedited discovery and briefing,
10 so that their issues could be promptly addressed. See Order Re:
11 Intervention of Marathon and Union Oil Companies at 2 (January
12 22, 1993). This court, in denying the re-filed joint motion on
13 April 19, 1993, again recognized the obvious possibility that
14 either party might terminate the settlement agreement,¹ yet such
15 possibility did not result in this court piecemealing its recent
16 Memorandum Decision addressing environmental intervenors'
17 challenges to chapter 66.

18 Staying the proceedings on oil company intervenor-
19 leasees' complaint will only serve to further the strategy of
20 opponents to chapter 66 who have brought challenges to chapter 66
21 seriatim so as to perpetually extend the preliminary approval
22 process. The issues related to the oil company intervenor-
23 leasees' complaint have been fully briefed and will be ripe for
24 decision as soon as oral argument is concluded. It will further
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¹ See Order at 2 (April 19, 1993) (The state's notice of termination "is merely the exercise of a right which the court knew the State had and could use").

1 the interests of judicial economy to conduct the oral argument
2 and render the decision now while the issues are still fresh in
3 both the court's and the parties' attorneys' minds.

4 That the court should render a prompt decision on oil
5 company intervenor-lessees' claims holds true even if the
6 settlement embodied in chapter 66 and the settlement agreement is
7 "terminated." This is because the issues raised by oil company
8 intervenor-lessees' complaint in intervention will not
9 necessarily become mooted by termination of the settlement
10 agreement. These issues are: "(1) lease assignability, (2)
11 applicability of the Administrative Procedure Act ("APA") to DNR
12 order 135 and the broad land-use provisions of the Settlement
13 Agreement, and (3) the legality of the Agreement's provision
14 regarding sharing of confidential materials." Oil company
15 intervenor-lessees' memorandum at 2.

16 With respect to the first issue, the parties to this
17 litigation will be faced with the issue of whether oil and gas
18 leases may be transferred from DNR to "trust status" even if
19 there is no settlement and the state and plaintiffs are back in
20 litigation. There are at least three active oil and gas leases
21 on original trust land.² Pursuant to the Alaska Supreme Court's
22

23 ² In the affidavit of Carol Wilkinson attached as exhibit 1 to
24 the state's Reply to Opposition of Marathon and Unocal to Summary
25 Judgment Motions of State and Settling Plaintiffs (April 17,
26 1993), the state identified leases ADL numbers 21129 and 359150
as active oil and gas leases containing original mineral rights
on trust land still owned by the state. In preparing this
opposition the state re-reviewed file 359150 and determined that
that lease had been terminated in December 1990.

(continued...)

1 direction in Weiss v. State, all original trust lands that have
2 not been sold must be returned to trust status. In any
3 reconstitution of the trust, the court will almost certainly need
4 to resolve the issue of whether oil and gas leases on original
5 trust land may be returned to trust status, either by conveyance
6 to the Trust Authority under chapter 66 or otherwise.

7 Although there would be no "trust authority" in a
8 litigated reconstitution, it is undisputed that the reconstituted
9 trust lands will be administered as trust lands rather than as
10 general grant lands. This means that the objections oil company
11 intervenor-lessees' raise with respect to the proposed Trust
12 Authority managing oil and gas leases would apply with equal
13 force to the state managing oil and gas leases returned to
14 reconstituted trust status. See a.g., oil company intervenor

15
16
17 ² (...continued)

18 The settling plaintiffs have identified oil and gas leases
19 ADL numbers 21129 (lessee: Shell), 60553 (lessee: Chugach
20 Electric), 319688 (lessee: Chugach Electric), 359157 (lessee:
21 Micallef), 359159 (lessee: Danco) as active leases containing
22 original trust land still owned by the state (compare tables I
23 and II of the affidavit of David L. Thomas attached as exhibit R
24 to Memorandum in Support of Motion of Settling Plaintiffs for
25 Summary Judgment Dismissing Complaint in Intervention of Oil
26 Companies (March 22, 1993)). The state terminated leases 359157
and 359159; however, that termination is being appealed. C.f.
James W. White's Motion to Amend Preliminary Injunction filed in
this case on July 30, 1992; State's Opposition to James W.
White's Motion to Amend Preliminary Injunction dated August 17,
1992; Orders Denying James W. White's Motion to Amend Preliminary
Injunction, Denying J. White's request for Hearing, and Denying
Intervention of J. White all dated September 1, 1992.

It appears then, that there are at least three active oil
and gas leases containing original trust land still owned by the
state - - ADL numbers 21129, 60553 and 319688.

1 lessees' Memorandum in Support of Motion for Summary Judgment,
2 16-32 (March 22, 1993); Reply of Marathon and Unocal to State and
3 Settling Plaintiffs' Oppositions to Motion for Summary Judgment,
4 16-12, 27 (April 19, 1993).

5 While none of the three remaining original trust land
6 leases are Marathon or Union leases, the arguments raised by oil
7 company intervenor-lessees against the transfer of their leases
8 also apply to oil and gas leases held by other persons and
9 companies. Indeed, oil company intervenor-lessees, in all their
10 briefing, have not once drawn a distinction between an oil and
11 gas leases issued on original trust land and an oil and gas
12 leases issued on general grant land.³ The state used the same
13 standard lease forms for leasing original mental health trust
14 lands and general grant lands. See State's Nonopposition to
15 Settling Plaintiffs' Summary Judgment Motion and Opposition to
16 Marathon and Unocal's Summary Judgment Motion at 13 and Exhibit
17 2 thereto (April 8, 1993); State's Memorandum in Support of
18 Motion for Summary Judgment with Respect to Issues Raised in
19 Marathon and Unocal's Complaint, Exhibit 14 at 34-38 (March 22,
20 1993) ("state's memorandum"); and Memorandum in Support of Motion
21 of Settling Plaintiffs for Summary Judgment Dismissing Complaint
22 in Intervention of Oil Companies, Affidavit of David Thomas,
23 Exhibit E at 5-7 (March 22, 1993) ("settling plaintiffs'
24
25

26 ³ Table II of David Thomas' affidavit referenced in footnote 2
identifies ten oil and gas leases containing both original trust
land and general grant land where either Union or Marathon was,
or is, the lessee.

1 memorandum"). Just because "[a] 'strict reconstitution' of the
 2 trust pursuant to Waive is not of direct concern to Marathon and
 3 Unocal" that does not mean that a strict reconstitution is of
 4 no concern to the state or the public. Either the oil and gas
 5 leases can be transferred to trust status or they cannot be
 6 transferred. Having had the issue of the transferability of the
 7 leases raised, and having fully briefed it, the state is not
 8 willing to drop this issue and risk later litigation by other oil
 9 and gas lessees challenging the return of their leases to trust
 10 status.

11 With respect to the second and third issues, the
 12 applicability of the APA to the negotiating and drafting of a
 13 settlement agreement and department order, and the sharing of
 14 confidential information between the state and settling
 15 plaintiffs, these issues are almost certain to arise in any
 16 future proposed settlement of this litigation. The settling
 17 plaintiffs have been adamant that any settlement of this case
 18 must be accompanied by a settlement agreement. Both the state and
 19 settling plaintiffs have articulated their strong beliefs that a
 20 settlement agreement cannot be and should not be promulgated as
 21 a regulation. See e.g. state's memorandum at 45-49; settling
 22 plaintiffs' memorandum at 68-74. The state and settling
 23 plaintiffs have also explained why a department order such as
 24 Department Order #135 is not a regulation and need not be
 25 promulgated like one. State's memorandum at 49-54; settling
 26

6 Oil company intervenor-lessees' memorandum at 5.

1 plaintiffs' memorandum at 53-68. Similarly, the state and
 2 settling plaintiffs negotiated a procedure in the settlement
 3 agreement for the sharing of confidential information between
 4 them that the parties strongly believe is legal and
 5 constitutional. They would likely use the same procedure again
 6 in any future settlement agreement that includes a land exchange
 7 as part of the compensation provided.

8 Thus, even if the parties terminate the current
 9 settlement agreement, should they enter into any future
 10 settlement agreement, the APA and confidentiality issues will
 11 likely rise again. Therefore, it is important to the settling
 12 parties for the court rule on the cross motions for summary
 13 judgment. Even if the APA and confidentiality issue become
 14 technically moot in the event the parties decide to terminate the
 15 proposed settlement agreement (of course, these issues are not
 16 now moot as the settlement agreement is very much alive), a court
 17 may still resolve disputes that are "moot" under the public
 18 interest exception to the mootness doctrine. Alaska Fish
 19 Spotters Assoc. v. State, 830 P.2d 798, 800 n.1 (Alaska 1992)
 20 (regulation that was the subject of appeal was withdrawn after
 21 briefs submitted to court, court decided case under public
 22 interest exception to the mootness doctrine). The public
 23 interest exception involves consideration of three main factors:

24 (1) whether the disputed issues are capable
 25 of repetition, (2) whether the mootness
 26 doctrine, if applied, may repeatedly
 circumvent review of the issues, and (3)
 whether the issues presented are so
 important to the public interest as to