IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

VERN T. WEISS, father and next friend of CARL WEISS, 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	FILED in the Trial Courts State of Alaska Fourth District JUN 10 1994

Case No. 4FA-82-2208 Civil

SETTLEMENT AGREEMENT
AND
STIPULATION TO TERMS OF DISMISSAL

WHEREAS, the state and the plaintiffs and plaintiff-intervenors have engaged in litigation since 1982 over numerous disputes relating to the trust established by the Alaska Mental Health Enabling Act of 1956, including litigation over proposed settlement terms incorporated in Ch. 66 SLA 1991; and

WHEREAS, third-party intervenors Alaska Center for the Environment, et al., and Marathon and UNOCAL have intervened

to challenge proposed settlement terms incorporated in Ch. 66 SLA 1991; and

WHEREAS, SCS CSHB 201 (FIN)("HB 201") and SCS CSHB 371 (FIN) ("HB371") include terms proposed as a settlement to resolve this litigation which do not become effective until dismissal of this action; and

WHEREAS, the state, plaintiffs, and intervenors (collectively "parties") seek to set forth the full terms of settlement and the manner in which they intend to implement it so as to obtain judicial approval of the settlement and dismissal of this action pursuant to Alaska Civil Rule 23(e);

NOW THEREFORE, the parties, through counsel, hereby stipulate and agree to the following terms of settlement of this action.

I

BASES OF SETTLEMENT

1. Dismissal with prejudice of the plaintiffs' claims as provided in part VI of this agreement is made in consideration of Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50 and 51, of HB 201, Sections 1 and 2 of HB 371, and the terms of this agreement, and form the bases of the settlement. The provisions of HB 291 and HB 371:

(a) reconstitute the trust established by the Alaska Mental Health Enabling Act of 1956 with a combination of original and substitute trust land totaling approximately 930,000 acres;

(b) provide a cash payment of $200 million dollars to be deposited into a newly created mental health trust fund which the plaintiffs consider as additional compensation for the land or interests in land not returned to trust status;

(c) establish a Trust Authority to oversee trust assets, administer the mental health trust income account, and ensure an integrated, comprehensive mental health program for the state;

(d) require the principal of the trust fund to be retained perpetually for investment, and sale proceeds, royalties, and other

income from the management of trust land which is attributable to principal to be deposited into the fund;

(e) authorize the Trust Authority to spend net income of the fund and income from the management of land not otherwise attributable to principal in fulfillment of the Authority's purpose to ensure an integrated, comprehensive, mental health program; and

(f) make effective certain improvements in the state's mental health program enacted under Ch 66 SLA 1991 including the process of establishing a coordinated and comprehensive mental health program for the state of Alaska.

II

IDENTIFICATION OF LAND PROVIDING FOR

TRUST RECONSTITUTEION

1. The parties agree that the land negotiated as land to be designated as mental health land pursuant to Section 40(a)(1)&(2) of HB 201 consists of approximately 930,000 acres of original and replacement trust land identified on the lists of "Original Mental Health Land To Be Designated As Trust Land, April 28, 1994" and lists of "Other State Land To Be Designated As Trust Land, April 28, 1994" attached hereto as Attachment A. This land is generally described as follows:

(a) Original Trust Land (Fee Estate):

Approximately 435,000 acres of original trust land, which include approximately 108,894 acres of unleased coal areas, approximately 119,213 acres thought to have mineral potential, approximately 48,244 acres of commercial forest resources in the Cape Yakataga area, and approximately 158,000 acres of land tracts of various sizes. Of the 435,000 acres, approximately 212 acres are subject to long term leases, approximately 36,440 acres are subject to existing mining claims, approximately 1,095 acres are derived from the unoccupied areas of state facilities, and approximately 4,634 acres will be reconveyed by municipalities. In addition to the 435,000

acres, there are more than 20,000 acres of Alaska Mental Health Enabling Act entitlements the federal government has yet to convey.

(b) Original Trust Land (Mineral Estate Only): The oil and gas interests in the mineral estate of approximately 78,566 acres within the Cook Inlet geologic basin, the surface of which has been conveyed to third parties or is within state legislatively designated areas; the mineral estate in 19,138 acres conveyed to municipalities; and the mineral estate of 35,771 acres in the Matanuska Valley Moose Range.

(c) Substitute Trust Land (Fee Estate): Approximately 4,252 acres in the Thorne Bay area selected for timber value; approximately 1,722 acres that are part of the Fort Knox mining project selected for its mineral value; approximately 65,000 acres selected for their mineral potential; and approximately 40,943 acres selected for their surface value, consisting of 1,169 acres of parcels within subdivisions and 39,774 acres of other land tracts of both small and large size.

(d) Substitute Land (Mineral Estate Only): Approximately 217,000 acres of mineral estate selected for their mineral potential near Fairbanks and Haines; and approximately 25,720 acres of oil and gas interests within the Cook Inlet geologic basin in the Kenai Peninsula and the lower Susitna Valley.

(e) The parties further agree that the reasons for selecting the lands as described in subsections (a) – (d) above are given merely to categorize and describe the lands. In so doing, neither party makes any representations as to the revenue producing capability of any parcel of such land.

III

PROVISIONS FOR TECHNICAL CORRECTIONS TO LIST OF LANDS

1. The parties agree that any omissions, overinclusions, inconsistencies or errors now known or discovered in the lists of original and substitute trust lands transferred to the trust

pursuant to Sections 40(a)(1)&(2) of HB 201 shall be resolved as follows:

(a) The State and the plaintiffs, and the State and the Trust Authority, once established, shall identify to the other party any omissions, overinclusions, inconsistencies or errors in the lists of original and substitute trust lands as soon as such problems are known or discovered, along with such information or other explanation as is necessary to determine the reason for the claimed omission or error.

(b) Any errors or omissions to the legal descriptions of the lists of original and substitute lands submitted pursuant to Sections 40(a)(1)&(2) of HB 201 necessary to accomplish the intent of the parties shall be corrected by Department of Natural Resources (DNR) pursuant to the authority granted DNR under Sec. 17 of HB 201.

(c) Any additions, deletions, or substitutions to the list of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1)&(2) necessary to accomplish the intent of the parties shall be obtained by legislative amendment or by transfer, exchange, or conveyance.

(d) As of the date of executing this agreement, the parties have identified in Attachment B the initial omissions, overinclusions, or substitutions to the lists of original and substitute lands transferred to the trust pursuant to Sections 40(a)(1)&(2) which they agree to correct pursuant to the terms of (b) and (c) above.

IV

PROVISIONS REGARDING TRANSFER OF LAND TO TRUST AUTHORITY

1. Transfer of Land by Quitclaim Deed And Delivery of Conveyances. Land and interests in land conveyed to the Trust Authority shall be granted in trust to the "Alaska Mental Health Trust Authority, trustee" by quitclaim deed. On or before the entry of any order for dismissal, the State shall tender to the

Superior Court the required deeds conveying to the Trust Authority the appropriate State interest in the lands designated as mental health lands pursuant to Sections 40(a)(1)&(2). Upon approval of this settlement by the court and dismissal of this action, the deeds will use parcel numbers which reference the State maps that describe the lands in Attachment A in lieu of full legal descriptions and, accordingly, may not be in recordable form at the time they are tendered to the court. The State agrees to use its best efforts and to work with the Authority to complete the preparation of recordable deeds for delivery to the Authority as soon as practicable after dismissal.

2. Authorization to Convey State Land as Substitute Land. The State warrants that it has the legal authorization necessary to convey the land or interest in land designated as mental health lands pursuant to Section 40 (a)(2) of HB 201. To the extent that such authorization is subject to a pending conveyance or patent from the federal government, and such conveyance or patent is different than that set forth in Section 40(a)(2) of HB 201, the State shall compensate the trust for the difference with other land (or interests in land) of similar type or character and equal value and similar revenue producing potential, unless otherwise agreed by the Authority and DNR.

3. Encumbrances. Land conveyed to the trust pursuant to Sections 40(a)(1)&(2) of HB 201 remains subject to valid existing encumbrances or valid existing interests as provided in Section 40(b) of HB 201. The Authority may challenge the validity of any encumbrance or interest. The Authority shall be bound by and be able to enforce the terms of valid encumbrances and valid interests.

4. Hazardous Substances. (a) If it is discovered that any hazardous substance or substances came to be located on or discharged from a parcel of land conveyed to the Trust Authority under Sections 40(a)(1)&(2) of HB 201 such that the affected parcel is not in compliance with any federal, state, or local environmental laws, the issue shall be resolved as provided in this section.

(b) If the hazardous substance came to be located on or discharged from a parcel of original mental health trust land af-

ter being conveyed to the state under the Enabling Act but prior to conveyance to the Trust Authority, or on a parcel of replacement land at any time prior to conveyance to the Trust Authority, the issue shall be resolved in such manner as the Trust Authority and DNR mutually agree. If the Trust Authority and DNR cannot reach agreement, the Trust Authority in its discretion may elect to retain the affected parcel as trust land or tender it back to DNR. If the Trust Authority tenders an affected parcel to DNR, the sole remedy is that DNR in its discretion shall either cause such affected parcel to be remediated to comply with such environmental law or laws or exchange the affected parcel for other land (or interests in land) of equal value and similar revenue-producing potential valuing and determining the revenue producing potential of the affected parcel without the hazardous substance. If such a replacement exchange occurs, the Trust Authority shall reconvey the affected parcel to the state. If the Trust Authority tenders an affected parcel to DNR under this subsection, the state shall, at its expense, appear for, defend, and hold harmless the Trust Authority from any claim or action asserted by a third party based on the presence of any hazardous substance located on the affected parcel prior to its remediation or the replacement exchange of such land.

(c) If the hazardous substance came to be located on or discharged from a parcel of original mental health trust land before being conveyed to the state under the Enabling act, or for both original mental health trust land and substitute land, after conveyance to the Trust Authority under Sections 40(a)(1)&(2) of HB 201, responsibility shall be allocated between the Trust Authority and the state as provided by applicable law.

(d) Nothing in this section is intended to limit the Trust Authority's or the state's rights to assert any claims or defenses available to them with respect to third parties.

5. Conveyances Recorded at State Expense. All conveyances, releases of interest, cancellation of lis pendens, or other documents required by the terms of this agreement shall be recorded at the state's expense in the recording district in which the land is located.

6. Land Closed to Mineral Entry. All parties to this agreement shall jointly move the court to continue the mineral closing order on original trust land and extend such order to substitute land, such order or orders to be effective until the regulations required by HB 201 become effective. Any interest claimed or granted in contravention of such an order or orders are void.

7. Access to Trust Land. The State has reserved or will reserve legal rights-of-way and easements for access and for utility services to trust land. The rights-of-way and easements shall be consistent with state and federal law, and shall be located to assure adequate and feasible access for the purposes for which the right-of-way or easement is intended. Costs associated with maintaining easements and rights-of-way will be addressed in the regulations promulgated under HB 201. Nothing in this section requires the state to provide access across non-state land.

8. Competing Native Allotments. In the event original mental health land to be returned to the trust under Section 40(a)(1) of HB 201 is conveyed to the BLM by the State because of a valid Native Allotment, DNR will convey to the Authority the land conveyed to the state by the federal government under the Enabling Act to replace the land subject to the Native allotment, consistent with the annual priority list filed with the BLM by DNR.

9. Conveyances of Remaining Mental Health Land Selections. The Trust Authority will prioritize remaining mental health selections and provide this listing to DNR for incorporation in the annual conveyance priority list filed with the Bureau of Land Management. DNR will consult with the Authority when it determines the appropriate ranking of the mental health selections among other state conveyance priorities. DNR shall assist the Authority in its efforts to ensure that annual conveyance priorities are completed in a timely manner by BLM.

V

TRUST FUND AND TRUST AUTHORITY

1. Trust Authority as Fiduciary. In exercising its powers, duties and responsibilities as trustee the Trust Authority is under a fiduciary obligation as set forth in AS 37.14.007 and 37.14.009, and may employ consultants, accountants, attorneys and staff in the exercise of its responsibilities. The Authority shall annually review the allocation of proceeds, income or other money received from the management of trust land to assure proper attribution to principal and shall annually report on the management of trust assets and the development of a comprehensive mental health program for the State.

2. Trust to Receive Gifts. The parties' intent in establishing the mental health trust fund and mental health trust income accounts under Sections 12, 15 & 16 of HB 201 is that the trust may receive and the trust income account may be properly used by the Authority for soliciting gifts, bequests and contributions for a purpose consistent with the funding of an integrated comprehensive mental health program for the State.

3. Records to be Available to Authority. The records, surveys, reports and other data regarding trust land and proposed substitute land accumulated by the plaintiffs' Mental Health Lands Project are the property of the state and shall be available for inspection by the Authority at all times, consistent with applicable law. The records, surveys, reports and other data of DNR regarding management of trust land shall be available for inspection by the Authority at all times, consistent with applicable law. Unless otherwise agreed by the Authority and DNR, all of the records discussed herein shall be located in the unit established to manage trust land pursuant to Section 22 of HB 201.

4. Administration of Trust Income. The transfer of the net income of the fund to the income account by the Permanent Fund Corporation is not discretionary and is required by HB 201. Similarly, the allocations and transfer of income from trust land to the trust fund and income account by DNR is not discretionary and is also required by HB 201. Except for the administrative expenses of the Authority subject to the Executive Budget Act under Section 16 of HB 201, and to the fullest extent consistent with the Alaska

Constitution, the Trust Authority may use the money in the income account for the purposes authorized in Section 16 of HB 201 without, and free of further legislative appropriation. The Trust Authority shall use the money in the income account in fulfillment of the Authority's purpose to ensure an integrated, comprehensive mental health program for the State.

5. Income and Proceeds Account. It is the intent of the parties that the money deposited in the mental health trust income and proceeds account prior to December 15 will be deposited in either the mental health trust fund or the mental health trust income account as appropriate. To the extent possible, the state will undertake this allocation administratively. If legislation is required to accomplish this result, the parties agree to use their best efforts to seek and obtain passage of such legislation.

5. Development of Contracts, Operational Procedures and Regulations. The Authority and DNR shall negotiate in good faith and shall contract for the management of trust assets upon terms that are mutually agreeable to the Authority and DNR, and which reflect the duties and responsibilities imposed on the Authority and DNR pursuant to HB 201. The parties recognize that the details of contracting procedure, management of trust land, and other operational policies are left to be resolved under HB 201 by the Authority, DNR and other entities through a cooperative and public rulemaking process. The parties' understanding and intent on how this process will work is set forth in Attachments C and D, which the parties acknowledge are not contractual but are expressions of intent and interpretation only. To facilitate the development of a management unit, and policies and procedures reflecting the intent of the parties in entering into this agreement prior to the effective operation of the Authority, DNR agrees to consult with a transition team of representatives from the beneficiary community to advise and deliberate with DNR and other affected state agencies.

VI

SETTLEMENT, DISMISSAL AND MODIFICATION

1. Seeking Approval of Settlement. The parties agree to expeditiously file any motions, memoranda, proposed orders or other papers and to participate in any hearings necessary or convenient to obtaining preliminary and final approval from the superior court of the settlement embodied in HB 201, HB 371 and this agreement.

2. Construction. All parties have participated in drafting this agreement and agree that any canon of construction construing ambiguities against the drafter does not apply.

3. Severability. If any provision of this agreement, or any settlement provision in HB 201 or HB 371, is declared invalid for any reason, such a finding does not affect the validity of other provisions herein.

4. Attorney Fees. Attorney fees and costs shall be awarded and paid as determined by the court. Paragraph 6(e) requires dismissal of appeals to the Supreme Court because they are moot. The parties request that attorney fees be awarded as if the orders had not been appealed.

5. Modification and Future Enforcement. By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, and acknowledge that the trust is reconstituted in accordance with State v. Weiss, 706 P.2d 681 (Alaska 1985). The provisions of Sections 2 through 9, 12 through 40 (a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and acknowledged that the trust is reconstituted. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such relief as may be appropriate in light of the plaintiffs' claims. In light of the dismissal of each parties' claims, no modification of this agreement may be made except in writing signed by all the parties. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

6. Settlement and Dismissal. Upon final approval of the settlement embodied in HB 201, HB 371 and this agreement by the court pursuant to Alaska Civil Rule 23, within the time frame set forth in HB 201 and HB 371 for the settlement provisions to become effective, the parties stipulate and agree to the entry of an order or orders:

(a) Approving the terms of this agreement and the settlement provisions of HB 201 and HB 371;

(b) Dismissing Weiss et al. v. State, 4FA-82-2208 Civil;

(c) Dismissing with prejudice all class claims, including without limitation those of plaintiffs and plaintiff-intervenors, known or unknown, asserted or unasserted, that arise on or before the date of dismissal and arise from or relate to the 1978 redesignation legislation, any other actions taken by the state since statehood in managing and administering the land granted to the state under the Mental Health Enabling Act or the proceeds generated from that land, or any other actions taken by the state since statehood in managing and administering the trust created by the Alaska Mental Health Enabling Act;

(d) Requiring plaintiffs to dismiss with prejudice all other claims asserted by them, whether in the form of intervention, consolidation, appeals, cross-appeals, or amicus, in all other pending litigation, arising out of the state's administration of the trust established by the Enabling Act since statehood including Richards v. State, 4FA-93-2195 Civ.; Kashwitna Farms, Harry and Consuelo Wassink v. State and Hawkins v. Wassink, 3AN-88-0056 Civ. consolidated; Snowcrest Farms, Ray Hendershot and Royce Johnson, Falcon Lake Dairy, Elvin and Dorothy Johnson, Kashwitna Farms, Harry and Consuelo Wassink, v. State, Department of Natural Resources, Supreme Court S-6042; James White v. Commissioner, Alaska Department of Natural Resources, 3AN-93-5470 Civ.; Vern T. Weiss et al. v. Usibelli Coal Mine Inc. and State of Alaska, Supreme Court No. S-6125; Appeal of Vern T. Weiss et al., IBLA No. 91-224 (Tyonek); Vern T. Weiss et al. v. Secretary of the Interior of the United States of America, Tyonek

Native Corporation, and Cook Inlet Region, Inc., A94-072 Civ. (D. Alaska);

(e) Approving this stipulation of plaintiffs, state and third-party intervenors Marathon and UNOCAL, and Alaska Center for the Environment, et al., to move for the dismissal, as moot, all pending appeals and cross appeals arising out of this action.

(f) Dissolving the preliminary injunction issued in this action on July 9, 1990; and

(g) Expunging the Renotice of Lis Pendens.

(h) The orders requiring dismissal of plaintiffs claims in subsections (b) through (g) above shall only be entered upon a finding that conveyances of land and payments of cash required by HB 201 and HB 371 have or will be made to the satisfaction of the court.

7. Relief from Judgment. By their terms, the settlement provisions in HB 201 and HB 371 do not become effective unless this action is first finally and timely dismissed, with any appeals timely resolved in favor of dismissal. If the court gives final approval of the settlement embodied in HB 201, HB 371 and this agreement, and enters the order or orders dismissing this action (as set forth in paragraph 65 (a)-(g) above) and if, thereafter, the timeliness requirements of HB 201 and HB 371 are not met, such that their settlement provisions do not become effective, any party may seek relief from such order or orders pursuant to Alaska Civil Rule 60(b)(6). The failure of the settlement provisions of HB 201 and HB 371 to become effective would justify seeking relief from judgment and no party shall oppose such a motion.

DATED this ____ day of June, 1994, at Anchorage, Alaska.

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Attorney for Plaintiffs
Vern Weiss and Earl Hilliker

Unsigned

LAW OFFICES OF
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By Philip Volland June 10, 1994

ADVOCACY SERVICES OF ALASKA
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By Jeffrey L. Jessee June 10, 1994

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By Nathaniel B. Atwood June 10, 1994

ATTACHMENT C
TO THE
SETTLEMENT AGREEMENT
AND
STIPULATION TO TERMS OF DISMISSAL

LAW OFFICES OF
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May 27, 1994

Via Fax to 277-8235
Julian L. Mason
Ashburn & Mason
1130 W. 6th Avenue, Suite 100
Anchorage, Alaska 99501

Re: Weiss v. State

Dear Julian:

Certain questions have arisen among beneficiaries which center on the functions and responsibilities of the Authority. Although you and I, and Mark Davis and Dick Thwaites have discussed these, it would be helpful if the state would respond to these questions so that beneficiaries can evaluate the proposed settlement.

1. What will be the nature of the contractual relationship between DNR and the Authority? We have assumed from the scheme of the legislation that the Authority will use a Reimburs-

able Services Agreement (RSA) to pay DNR's management costs from the trust income account. Is the Authority obligated to contract with DNR if it proposes fees and overhead which are not reasonable? Also, what remedy does the Authority have if it discovers that DNR fees or expenses are unreasonable? What is the process of enactment of regulations? Can the Authority itself propose regulations for DNR to consider? What are DNR's responsibilities when it "consults" with the Authority? Can DNR simply ignore the Authority's view of proper management of trust land? Can DNR propound regulations under the terms of HB 201 which are not supported by the Trust Authority?

2. What is the state's view of the contractual relationship between the Authority and the Permanent Fund Corporation (PFC)? We have also assumed that the costs of PFC management will be paid from the trust income account by the Authority through an RSA. Can the Authority require the PFC (Through its RSA, for example) to establish a special position dedicated to management of the trust fund who would report directly to the Authority? Is the Authority obligated to contract with the PFC if management fees are not reasonable in light of trust management fees in the private sector? If there is a showing that PFC fees are substantially above those in the private sector, does the Authority have the options of revising or terminating the contract? Can the Authority terminate a contract with the PFC if the Permanent Fund ceases to be a purely investment-oriented fund and adopts investment goals that are no longer compatible with trust management (e.g., high risk, speculative ventures that might nonetheless be seen as fuel for Alaska's economy)? Is it anticipated that the funds held by the PFC for the Authority will be commingled with other investments in the Permanent Fund? If this occurs, how can proper accounting be assured.

3. Will the Authority be able to review DNR and PFC records to assure that there has been proper attribution between income and principal? If the Authority were to discover improper attribution between income and principal, what remedies are available to the Authority? Does the state concur that the Authority might employ its own independent counsel to remedy such a situation?

4. Will the Authority be able to request from DNR and the PFC annual reports on the management of trust assets which can be given to beneficiaries, the legislature, and the governor to assure proper trust management? We presume such records would be public documents. Does the state concur with this?

5. Will the state defend, without charge to the Trust Authority unless otherwise agreed, challenges to DNR's rulemaking, and legal costs associated with trust ownership and with DNR land management?

6. Does the state agree that the land records generated by the plaintiffs' Mental Health Lands Project are properly the records of the Authority which can be used to assist proper land management decisions?

7. Does the state agree that the intent of Sec. 15 of SCHB 201 is to allow the trust fund to solicit gifts and bequests for a purpose "consistent with the funding of an integrated comprehensive mental health program"? As you may recall from Dick Thwaites' comments, this clarification makes it clear that the trust fund can be viewed as a "special needs trust" to which bequests can be made which allow beneficiaries to receive greater Medicaid benefits.

8. Is the state willing to propose a timetable for the nomination of Authority board members, selection of the DNR trust management unit, and promulgation of regulations, assuming approval of the settlement?

9. We also believe that the Authority is empowered, through its chief executive officer, to hire its own employees and consultants (see, AS 47.30.026 as enacted by Sec. 26 of Ch. 66 SLA 1991). Does the state concur that the size and composition of the Authority's staff is up to the Board of the Authority acting through its chief executive officer?

I believe that some of these questions can properly be addressed in a settlement agreement. Although I hoped to finish a draft of an agreement by today, I thought it would facilitate completion of the agreement to await the state's response to this letter. I hope the state's response can be given next week since it will as-

sist greatly in the ability of beneficiary representatives to assess the proposed settlement.

Sincerely,

RICE, VOLLAND and GLEASON P.C.

By: Philip R. Volland

ATTACHMENT D
TO THE
SETTLEMENT AGREEMENT AND STIPULATION TO
TERMS OF DISMISSAL

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June 3, 1994

Philip R. Volland, Esq.
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211 H Street
Anchorage, Alaska 99501

Re: Mental Health Lands

Dear Philip:

Commissioner Noah and Attorney General Botelho authorized me to respond to the questions in your letter dated May 27, 1994. Our intent is to tell you how we are preparing to interpret and administer HB 201. We are assuming that all of its provisions will become effective. We begin by outlining the conceptual approach that we are taking.

DNR's overall management principle is that it does not plan to take action concerning trust land without consultation with the Authority. While DNR is charged by statute with management responsibility and must exercise its independent judgment, it will make every reasonable attempt to obtain prior approval of the Authority before action is taken. DNR will view the Authority as a client agency and will develop a working relationship which per-

mits quick decisions by the Authority on routine matters and provides for appropriate deliberation on more complex questions.

This is consistent with our view that the settlement of this case will mark a dramatic change from the current adversarial relationship between the mental health community and the State. We have no intention of dealing with the Trust Authority with a litigation mentality. It is in all of our interests to approach the settlement as establishing a cooperative relationship between the State and the mental health community represented by a new state agency, the Trust Authority. While there are sometimes disputes between other state agencies, some of which have the power to sue and be sued, these disputes are almost always resolved without litigation. We anticipate the same will be true with the Trust Authority's relationship to the rest of state government. It is with that expectation and in that spirit that we answer your questions.

1. Nature of Contractual Relationship Between DNR and the Trust Authority.

A. Contract. The Authority is obligated by HB 201 to contract with DNR, but we do not believe that DNR can compel terms which are unreasonable. We agree with you that using an RSA or a substantially similar arrangement is appropriate.

DNR envisions a system in which each year the department will prepare a specific work plan outlining the tasks which will be undertaken in the coming year. A cost proposal will accompany the work program. DNR and the Authority will then work together to agree on the scope of work and the resulting cost. To the extent agreement cannot be reached, there are two opportunities to resolve the matter: (1) OMB makes up the governor's budget for submission to the legislature; and (2) the legislature enacts the State's budget, which includes both the Authority's and DNR's authorizations to pay administrative costs. Both provide an opportunity for the Authority to advocate its view of what would be appropriate staffing and costs for DNR's management services.

There is no need for a remedy with respect to the "reasonableness" of the costs and fees agreed to in an RSA because the RSA forms the basis for that year's budget, staffing pattern,

etc. A prior year's experience as to "reasonableness," however, will certainly play a role in determining the terms of the next year's RSA.

As to specific expenses, there is no obligation to pay for services not delivered or for expenses that exceed the scope of the RSA. If the Authority wants more or less work, DNR will comply. The normal practice with RSAs is that disputes are prevented by providing for prior approval of unusual or potentially arguable expenses (travel, etc.). If disputes do arise, they normally are negotiated between the two agencies involved. Litigation, of course, is a potential ultimate remedy, but it is very unlikely as the nature of RSAs and the associated reporting requirements minimize the potential for disputes and the dollar amounts that might be the subject of such disputes.

B. Regulations. In theory, DNR could propound regulations not supported by the Authority, but that would be confrontational and disputatious, and is not DNR's plan. DNR intends to work closely with the Trust Authority to develop the regulations. The regulations, of course, must in any event be consistent with the State's obligations under the Enabling Act.

C. Management. "Consult" means to seek the advice of and to deliberate with the Authority, and DNR intends to do those things in good faith. DNR cannot simply ignore the Authority's view of proper trust management. The best interest finding requirement of AS 38.05/035 will apply to management of trust land, a part of which will include addressing how the proposed action is consistent with the trust principles of the Enabling Act. The Authority's views will be discussed and taken into account as part of the finding. While DNR must ultimately exercise its independent judgment about management (just as a private trustee must exercise his or her best judgment despite the beneficiary's contrary views), DNR has no intention of ignoring the Authority's views.

2. The Authority and the Permanent Fund Corporation.

The Permanent Fund is a large, highly diversified trust fund managed conservatively. AS 37.13.300(b)(5) provides for the PFC to transfer to the Authority the "net income" attributable to the trust fund. The pro rata administrative cost attributable to the trust fund will already have been taken into account when the net income is transferred to the Authority, and the cost of management need not be addressed in the contract unless the Authority wants to pay the PFC to provide additional services. The PFC has informed us, however, that it does not contemplate contracting to provide services in addition to those required by the statute.

We do not believe that the PFC can compel the Authority to contract with it on unreasonable terms. We note, however, that for 1993, the Permanent Fund had average assets of approximately $14.8 billion and total expenses of approximately $14.9 million, for an expense ratio of only 0.10 percent.

Your question about termination of the contract with the PFC incorrectly assumes that the PFC may unilaterally change the fund's long-range investment policy. This is not correct. Legislation changing the statutes governing the utilization of the Permanent Fund would be required and, to the extent that would conflict with the State's trust obligation under the Enabling Act, would no doubt include removal of the trust fund from management by the PFC. In addition, HB 201 requires that the PFC consult with the Authority before the PFC changes its long-range investment policy. AS 37.13.300(b)(4). We view the problem suggested by this question as remote.

3. Attribution Between Income and Principal – DNR and PFC Records Review.

The Authority will be able to review DNR records and, we assume, PFC records for proper attribution of principal and income. That issue, however, is really an administrative adjustment to determine where trust account money should go – the trust fund or the income account. In either case, the money belongs to the trust. The practice in other contexts (e.g., the North Slope Bor-

ough/NPRA fund case) is that improper allocations are simply accounted for by subsequent adjustments to allocations as new income comes in. The Authority could employ independent counsel to remedy the situation, but that would not be necessary unless there were a fundamental disagreement about the governing law.

4. Annual Reports.

DNR envisions that it will give the Authority an annual report on management of trust assets which can be a public record subject to one caveat. Some types of land data (e.g., geologic data developed by third parties) are confidential by law. Various attorney general opinions establish the parameters for sharing such information with state agencies requiring access to the information. We believe, based on those attorney general opinions and Judge Greene's earlier decision, that the Authority would be an agency entitled to that information. If the Authority wants to make DNR's report public, it should be structured not to disclose statutorily confidential data.

The PFC contemplates providing monthly financial reports to the Authority and an audited annual report, similar to what it currently prepares for the Science and Technology Foundation, which is more than what is required under AS 37.13.300(b)(2) and (3).

5. Defense Costs.

There are too many variables to give a simple "yes" or "no" answer. In the absence of specific provisions in an RSA with DNR, however, we envision that general trust law principles would apply: If the costs are properly attributable to trust management, the trust pays; if not, the State pays.

Land Records.

We agree that the records are State records which can be used to assist in making proper land management decisions. Because we do not have the records, we cannot comment on their accuracy or the extent of their usefulness. The records will be fully available to the Authority, but our belief is that they should be maintained by the DNR trust unit.

6. Solicitation of Gifts and Bequests.

Yes.

7. Timetable for Authority Board Member Nominations, etc.

Yes. DNR has started setting up the trust unit and is beginning to develop the 1995 work program as described in answer No. 1.

8. Hiring of Staff by Authority.

Yes, but subject to gubernatorial and legislative oversight through application of the Executive Budget Act to the Authority's administrative expenses. The potential for trust income to be expended primarily on a large bureaucracy was a major concern of Senators Rieger and Kelly, and that oversight was the "price" of their support for the bill.

I believe these answers respond fully and fairly to your questions,, but we will be happy to elaborate if questions remain.

Very truly yours,

ASHBURN & MASON

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