ALASKA MENTAL HEALTH LANDS: A LEGAL HISTORY & ANALYSIS

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HISTORY

The Organic Act (37 Stat. 512, August 24, 1912, ch. 387) was the first legislation to affect the mentally ill in Alaska. The territorial legislature reserved the care of the mentally ill to a U.S. Department of Interior marshal, prohibiting the territory from becoming involved. No Alaska mental health facilities were built until the late 1950's. The result was that the mentally ill were shipped away to Oregon's Morningside Hospital, 2000 miles away from family and friends, but only if found to be "an insane person at large." One could only get help if he was found to be an extreme case by a citizen jury; no one else qualified for services.

This "archaic, if not barbaric system" (Coping #2, 1986, Gottstein, p.6) improved a little in the early 1950's when Congress developed a basic grant program for each state to upgrade mental health services. Alaska got a $25,000 grant to initiate a Division of Mental Health under the Territorial Department of Health. This three person division roamed the state, from Ketchikan to Barrow attempting to solve the entire state's mental health problems. They served as advocates to "insane persons at large," promoting the need for inpatient services in Alaska (Coping #2, 1986, Parsons, p.14).

During 1954, the Anchorage Mental Health Association was formed, and affiliated with the National Association for Mental Health. They lobbied for federal legislation to give the Territory the authority to deal with its own need for mental health services. The National Federation of Women's Clubs also joined the cause and gave Congress a memorably intense campaign (Coping #2, 1986, Parsons, p.15).

As a result, on July 26, 1956, Congress passed the Alaska Mental Health Enabling Act, Pub. L. No. 84-830, 70 Stat. 709 (1956), which was essentially comprised of two components: 1) it vested authority with the Territory to enact legislation regarding mental health programs and their administration and 2) it provided a source of funding for these programs. The funding included a $6,000,000 grant over a ten year period, a $6,300,000 appropriation for building the Alaska Psychiatric Institute (API), and the selection of 1,000,000 acres of land for the establishment of a public trust, the proceeds and income from which was to "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."

The mental health land selections soon began in 1957 and were completed by 1966. The land selected has been described by many as some of the most valuable land near the larger centers of population (Anchorage, Southeast, Fairbanks, Kenai areas), with income potential from subsurface resources. Subsurface rights were included in the grant (Congress OTA, p.107) and the state could choose to make lease or conditional sale of selected grant lands and retain all mineral rights. The 80 acres which is now the site of API was the first selection on November 18, 1957. Selections were completed on July 27, 1966, one day before the congressional deadline (DNR, Promised Land, p.8).

While these lands were begin chosen, the territory was becoming more populated and eventually the territory became a state. Succeeding legislation often conflicted with the mental health trust lands legislation.

In 1958, the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (July 7, 1958) was enacted. Section 6(k) of the act provided that "grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission" and that they were to be used "for the purposes for which they were reserved." The Statehood Act also authorized the newstate to select 103,500,000 acres for settlement, economic development, and revenue generation. This land was selected around the same time as the ongoing mental health lands selections and by the same land officers, which presented a conflict in two areas: 1) the choice of desirable parcels and 2) a management/ownership conflict (Joint Federal-State Land Use Comm. # 30, p.12).

Right from the very beginning, communities and individuals began to exert great political pressure to "free up" these lands for community expansion, especially from the Southeastern communities. The communities needed to select lands for community expansion under AS 07.10.150 (the 1972 Municipal Entitlements Act) for which they were to choose from vacant, unappropriated lands within their boundaries. Since some of the most desirable land within many community boundaries was mental health land, this created a dilemma which resulted in a request by DNR for an attorney general opinion on whether the mental health lands could be selected by boroughs. Warren Culver, assistant attorney general, on September 14, 1964 warned that mental health lands were not subject to selection under this act, because they were not vacant and unappropriated.

The Alaska Omnibus Act, P.L. 86-70, 73 Stat. 148 (June 25, 1959) section 31(b)(1) repealed federal monetary grants for mental health treatment, but did not affect the land grant program.

In 1967, the Attorney General's office modified its stance, determining that mental health lands could be exchanged for general grant land if the following three conditions were

satisfied: 1) it was in furtherance of a legitimate state purpose, such as the borough selection program; 2) the integrity of the mental health trust was preserved; and 3) the exchange supports the mental health program. In the forthcoming years, about 43,000 acres of the mental health trust were approved for patent to municipalities (Edward J. Reason, February 10, 1967).

During the 1960's and 1970's mental health lands continued to be conveyed at less than fair market value (or for free as in municipal selections), and often without compensation or exchange. The lands were used for roads, the Juneau airport, Hiland Correctional Center, etc. (Coping, 1986, Gottstein, p. 7). According to Gottstein, this violated the state's trust responsibility and the grant's prohibition against sale of mental health lands to third parties.

Other interested groups, such as the Joint Federal-State Land Use Planning Commission (JFSLUP), involved themselves in the controversy. JFSLUP came up with the following determinations in their Findings and Recommendations regarding State Trust Lands:

a) the state had a trust responsibility and it is normally incumbent upon the state to handle trust transactions on the basis of fair market value

b) the state had never created a special fund; instead, revenues were placed in the general fund

c) the mental health trust lands comprise prime real estate around communities and in valuable waterfront locations

d) trust lands impact community development, leaving trust lands as windows of open space in heavily settled areas, or forcing communities to grow in a costly "leapfrog" pattern

e) the Division of Lands has a built-in conflict of interest when if manages more than one trust in the same location (JF-SLUC, #29, p.7-8).

Despite various attempts to "talk sense" into the state regarding their trust responsibility, DNR responded to the political stress by developing proposals to abolish mental health trust lands. This can be better understood in terms of DNR's mandate. DNR manages public lands in accordance with multiple use principals of maximum benefit for all Alaskans. The highest and best use for the public was inconsistent with the principal of highest monetary yield for the mental health trust. Also, DNR had administrative difficulty in managing lands to be revenue producing (Interim, C-7).

The political pressure was augmented by the public when the "Beirne Initiative" (as it was called) occurred. In 1977 and 1978, Beirne circulated a petition to make 50,000 acres of unappropriated land available to the public per year for 50 years, until 30% of all state land was in private hands. Although the initiative was declared unconstitutional in 1979, the 1978 legislature got the message: "Get the land out!" The legislature enacted a land disposal program (ch. 181, SLA 1978) under the open-to-entry and homesite entry programs; the

redesignation of mental health trust lands to general grant lands (ch. 182, SLA 1978); and amended the Municipal Entitlement Act in 1978 to allow municipalities to select trust properties, provided equivalent land was identified in advance of conveyance and transferred to the trust (ch. 190, SLA 1978). The problem was that very few transfers were made (Interim, C-6).

Robert LeResche, in a December 7, 1978 informal attorney general opinion following this legislation, explained that the Mental Health Enabling Act "neither required a dedicated or permanent fund nor created a true trust..." The state's apparent position, was according to Gottstein, "just because Congress created a trust, it doesn't mean we have to run it like a trust." This is reinforced by a February 8, 1982 AG opinion from Laura L. Davis to Hugh Malone, where she states that "the Alaska Mental Health Enabling Act does not provide any mechanism for enforcement of the trust. Therefore, the state may be immune from any action to enforce the terms of the trust...This is an issue which should be explored more thoroughly if litigation appears likely."

The Redesgnation Act (ch. 182, SLA 1978) also mandated the deposit of 1.5% of all revenues from state lands into a newly created special trust account, called the Mental Health Fund (AS 37.14.010) to be overseen by the newly created Mental Health Fund Advisory Board (AS 37.14.020), under the Department of Revenue.

Between 1956 and 1977, a total of only $23 million was generated by the trust, all of which went into the general fund, since there was no special trust fund. This is a paltry sum when measured against the cost of mental health in Alaska. In FY 1978 alone, the cost of mental health exceeded $10 million (Interim, C-5). Since the income from the trust lands was meant to be "applied to meet the necessary expenses of the mental health program of Alaska" it was already falling far short of this goal.

After creating the special trust fund and the new board, the board failed to meet after initial organizational meetings. The 1.5% of all state public land revenue was "subject to legislative appropriation of sufficient funds" but no money was ever appropriated by the legislature or deposited in the fund. According to one estimate, by January 1987, $164,138,000 should have been deposited, and would have grown to $271,068,000 with 10.5% interest. This source speculates that had this been done, there would have been no lawsuit alleging breach of the trust (Interim, C-7).

The Alaska Mental Health Association was convinced of the illegality of the 1978 legislation to redesignate mental health land as general trust land and lobbied the Alaska Legislature until they realized that the legislature's general attitude was "we don't care if it's illegal, you will have to sue us." (Coping, 1986, #2, Gottstein, p.8). In November 1982, attorney (now Governor) Steve Cowper filed a lawsuit naming Vern Weiss

and others. These litigants were people who would normally have benefitted from the mental health trust; in other words, mentally ill people (Albert, verbatim, 1988). In September 1984, the Alaska Mental Health Association successfully moved to join the plaintiffs. Although virtually every previous Attorney General opinion had expressed support of maintaining the integrity of the trust, the AG, in defending the state's position, maintained that the trust need not necessarily be managed as a public trust, and that as long as the state had a satisfactory mental health program, it was fulfilling the trust responsibility.

On October 4, 1985, after an appeal to the Alaska Supreme Court, State v. Weiss, 706 P.2d 681 (Alaska, 1985), resulted in a decision, the remedy for which is still being worked out to this day. The Supreme Court decided that the state had breached the trust, that the redesignation was invalid, and that the trust be reconstituted, "to match as nearly as possible the holdings which comprised the trust when the 1978 law became effective." As a remedy, the trust was to be reimbursed fair market value for lands sold since the redesignation, the amount to be offset by mental health expenditures made during the same period. All land still remaining unencumbered in state ownership was to be returned to the trust. This case is also notable because it was the first Alaska Supreme Court case in which the Court alluded to the common law public trust doctrine (Class Notes, 11/28/88).

The same day, DNR Commissioner Esther Wunnicke, suspended all actions on mental health trust lands until the department could promulgate rules. In December 1985, Wunnicke issued Department Order 121. That document outlined which activities must cease and which may continue on mental health lands. It also had an "accounting" section which listed all revenues that must be deposited in the newly established mental health account, but it did nothing to set up programs which would affirmatively generate revenue (Coping, 1986, #2, Gottstein, p.8).

Realizing the controversial and complex nature of the remedy, the Alaska Mental Health Association, the Alaska Alliance for the Mentally Ill, and the original plaintiffs again lobbied the Legislature to attempt to establish interim oversight, and requested money and a process to gather information needed to reconstitute the trust, all without having to again resort to litigation. In response to Weiss, the legislature had already formed a Joint Special Committee on Mental Health Trust Land which was to develop a proposal for resolving the litigation (1986 Legislative Resolve No. 53). Now the legislature established the Interim Mental Health Trust commission (ch. 132, SLA 1986). This commission is charged with: oversight of trust land management; oversight of appraisal and audits relating to the reconstitution; recommendations regarding mental health programs; recommendations regarding future trust management; recommendation related to resolution of the litigation;

reporting to the legislature regarding these matters.

During the 1987 Legislature, CSHB 92 (fin am) was introduced and was supported by Attorney General Grace Berg Schaible in a June 5, 1987 opinion. The bill's purpose, according to Schaible, was 1) to implement the intent of Congress regarding mental health land and to make the funds available to mental health programs; 2) to eliminate the need for more litigation; 3) to redirect focus from mental health land management to mental health programs; 4) to reconstitute the trust; 5) to remove land originally received under the act from trust status; 6) to validate all transactions that had previously taken place under the Act; 7) to establish a funding mechanism for mental health programs; and 8) to create a strong mental health advisory board (ch. 48, SLA 1987).

The bill created a new section to AS 38.05 directing the Commissioner of Natural Resources to work with the Interim Mental Health Trust Commission to reconstitute the trust (AS 38.05.800). It also created a new Alaska Mental Health Board, to replace the Interim Board, after the latter had resolved the reconstitution issue.

THE PRESENT

The Interim Mental Health Trust Commission is still at work and the reconstitution is far from settled. The most complex issue is the fair market value for lands conveyed since the 1978 redesignation. The Alaska Mental Health Association adamantly believes that those lands which are now encumbered but are not actually sold still belong to the trust. They also believe that any land that was sold to persons who were unaware that the trust would not be benefitted should be restored to the trust probably on the premise that they would not have agreed to purchase knowing the arrangement).

Another fair market value issue is the land conveyances before the 1978 redesignation. Only the redesignation was found invalid and the Weiss court ordered the trust restored only to the 1978 pre-redesignation status. In April 1986 DNR completed its audit of state land selected under the Mental Health Enabling Act, but according to the oral testimony I heard from both sides, this audit is in dispute.

Of the original 1,000,000 acre selection, there is little remaining. Two different sources paint similar bleak pictures of the conveyances:

acreage	status
195,000	unencumbered
291,000	encumbered with less than fair market value
47,000	habitat protection
486,000	state parks
30,000	CIRI selections

(Source: Interim Mental Health Trust Commission, February 1987)

51,286	sales to third
34,269	parties exchanges
43,088	municipalities
372,268	legislatively designated non-trust purposes
281,000	encumbered
212,000	unencumbered

(Source: DNR "black notebook" on mental health trust lands)

These two main players have not yet been able to agree on how much land is involved, let alone the extremely complex issue of fair market value, involving at least 10,000 individual tracts.

In 1986, The U.S. District Court handed down a decision in the case of Tvonek Native Corporation v. Secretary of the Interior, in which the court found Tyonek was not allowed to select mental health lands under ANCSA. The court has since allowed these selections to take place (Gottstein, verbatim, 1988).

Judge Meg Green on April 27, 1988 issued a memorandum opinion regarding parties in the case. She decided that other groups of people fit the description of "mentally ill" in order to benefit from the trust. These groups include chronic alcoholics and the developmentally disabled. According to the Alaska Mental Health Association, this is unfortunate, because these programs are well supported by other funding.

State/Federal Relations:
Separation of Powers

The Alaska Mental Health Enabling Act resulted because of disfavor with the pre-Statehood arrangement of federal control of the mentally ill. Alaska has apparently always had a large mental health problem, due to isolation and other factors, which needs to be controlled close to home. Alaska willingly sought the responsibility to take care of its own in 1956, and has continually done so.

The trust was legislatively created by the federal government to directly benefit Alaska, but the feds no doubt expected the Alaska legislature and the executive branch to work together in administering the trust. The legislative branch breached the trust by not overseeing the trust or having the foresight to create an executive branch mechanism by which the trust could be managed. The executive branch of the state breached the trust in order to assert its management mandate and because it didn't have the skills to manage a revenue producing trust. It took the third branch of government, the

judiciary, to remind the other branches of their responsibilities regarding the trust.

SOURCES

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