Overview
Men. Health
Lands Trust
Settlement
1-27-93

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 respect 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 appellee/cross-appellant.

Russ Winner, McGrath & Associates, Anchorage, for amicus curiae Cook Inlet Region, 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 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

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 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, 87 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 comprised the trust when the 1973 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.

4. Amicus raises questions regarding the title held by conveyancees and bona fide purchasers of mental health lands. In view of our disposition of this case, we deem it unnecessary to address those issues at the present time.

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-

Firms may protest lands case

By BRUCE MELZER
Daily News business reporter

Two oil companies won a judge's approval Friday to contest a controversial settlement of the contentious mental health land case.

Superior Court Judge Meg Green ruled that Marathon Oil Co. and Union Oil Co. of California can protest the state's ability to give away Cook Inlet oil and gas leases to help settle the 11-year-old case, according to Peter Maassen, the companies' attorney.

Mental health lawyers say the settlement allows a new mental health land trust to take over the leases. Indeed, Jim Gottstein, one of the mental health lawyers supporting the settlement, said he can't find a million valuable acres without the oil and gas properties.

But the oil companies don't want a new landlord to step in, Maassen said. The chance that leases might be transferred wasn't part of the deal when the leases were first negotiated, Maassen said.

If the oil companies win their argument, it could send the proposed settlement down the tubes, Gottstein said. He argues the state has

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LAND: Oil companies get OK to contest settlement

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as much right to transfer oil and gas leases as it does mining claims or any other land or leases.

The case centers around attempts to remake a million-acre land trust set up by the federal government 30 years ago to pay for mental health programs for Alaskans. Courts have ruled that the state illegally wiped out that first trust and have ordered a new one created.

That led to a controversial 1991 settlement to re-create the trust by transferring state land into a new trust.

The settlement has been opposed in court by environmental groups, some of the lawyers representing the mentally ill and now the oil companies.

A group representing people with Alzheimer's disease had doubts about the settlement and tried to intervene in the case late last year with their own lawyer. Judge Green rejected that intervention earlier this month, saying the settlement was too far along, according to Traeger Machetanz, lawyer for the group.

Oil and gas leases aren't the only high profile land picks the mental health lawyers have sought. Past choices included land slated for ski resort expansion in Girdwood and Alaska's only working coal mine.

In a recent round of land nominations, the mental health lawyers also have claimed the land under and around three hydroelectric dams in South Alaska: Tyee Lake, near Petersburg; Swan Lake, outside of Ketchikan; and Snettisham, outside Juneau. That's according to Bruce Phelps, of the state Department of Natural Resources, and Craig Lindh, a consultant to the mental health lawyers.

Other recent land picks include Dorothy Lake, an area proposed for expanding the Snettisham project if Juneau's electrical demand increases, Lindh said.

If the mental health trust gains title to the land, whoever owns the dams gets to keep them, Lindh said. They would just have to pay some type of lease fee or royalty to the trust, he said.

Mental health lawyers also have claimed downtown Juneau land on Telephone Hill slated for state office expansion. Meg Hayes, project manager for the mental health lawyers, said they would want the site only if the state chooses not to build there.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

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,

and

ALASKA CENTER FOR THE ENVIRONMENT, ALASKA SPORTFISHING ASSOCIATION, LYNN CANAL CONSERVATION, NORTHERN ALASKA ENVIRONMENTAL CENTER, SIERRA CLUB, SOUTHEAST ALASKA CONSERVATION COUNCIL, SUSITNA VALLEY ASSOCIATION and TROUT UNLIMITED,

Intervenor-Plaintiffs,

vs.

STATE OF ALASKA,

Case No. 4FA-82-2208 Civil

SUMMARY DECISION AND ORDER RE:
JOINT MOTION TO MODIFY 7/9/90 PRELIMINARY INJUNCTION AND TO CANCEL LIS PENDENS

The State and the then-settling plaintiffs, Weiss and Hilliker; Alaska Mental Health Association, Nanuwak and Martin;

and Bosel, Doulin, Goodwin and Mayoc ("Movants"), filed a joint motion to modify the preliminary injunction issued July 9, 1990, and to cancel the lis pendens with respect to lands patented to or subject to contracts to convey title to certain third parties. The joint motion was made in accordance with Article III, ¶ 31 of the proposed settlement agreement. Specifically, the relief sought is stated by the movants as follows:

> The undersigned parties . . . jointly move and recommend to the court, with respect to parcels of land wherein a third party has received or has entered a contract to receive patent or title to land from the State of Alaska ("State") or a municipality, subject to protection of the trust's interests as set forth below, that the Re-Notices of Lis Pendens, and prior Lis Pendens to the extent they have any continued validity, recorded in various recording districts within the State and identified in the attached Exhibit A ("Lis Pendens"), be canceled, and that the preliminary injunction dated July 9, 1990 ("Preliminary Injunction"), be modified to allow the State and municipalities to administer the contacts and when a third party has paid in full any amounts owed under the contact and is otherwise eligible under the contract, issue patent or convey title. For purposes of this joint motion, a conveyance or agreement to convey by the State to a municipality is not one to a third party.

The dissenting plaintiffs, H.L., M.K., and AARS, and the public interest intervenors, Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited, have opposed.

The State and settling plaintiffs argue that the

preliminary injunction should be modified and the lis pendens canceled as to these lands because (1) the proposed settlement agreement and the relief offered by the motion provide sufficient protection of the class's rights, and (2) principles of equity favor such action. If the proposed settlement agreement obtains final approval, any land that was mental health trust land at the time of the legislature's redesignation in 1978 which was conveyed to the type of third parties designated in this motion will remain in the hands of those third parties. Stated more simply, if the proposed settlement agreement is approved, the rights of third party owners of this former mental health trust land will not be effected. In this motion, the State and the settling plaintiffs have agreed to the following, if the proposed settlement agreement is not accepted:

> 1. The plaintiffs may reassert claims to such Affected Trust Land and interests therein.
>
> 2. If enforceable rights to have any Affected Trust Land or interests therein returned to trust status are cut off by virtue of or after the date the applicable Lis Pendens is canceled herein, the State shall compensate the Mental Health Trust for the fair market value of any such Affected Trust Land or interests therein not returned to trust status as follows:
>
> a. The fair market value of such Affected Trust Land or interests therein snall be determined as of April 6, 1992.
>
> b. The State may compensate the Mental Health Trust through a land exchange under AS 38.50 or other applicable law, with land of equal fair market value and as comparable in character as practicable to the Affected Trust Land or interests therein for which the Mental Health Trust's enforceable rights

were cut off. The comparability of each such parcel of Affected Trust Land or interest therein and any land to be exchanged therefor shall be determined by using the criteria set forth in Sec. 55, Ch. 66, SLA 1991.

3. The court shall resolve any disputes and shall approve any resolutions arising from this joint motion and any related order.

The State and settling plaintiffs maintain that this agreement provides sufficient protection to the class to make the preliminary injunction and lis pendens unnecessary.

The dissenting plaintiffs urge the court to deny the joint motion. They argue that the legal prerequisite for modification of a preliminary injunction, changed circumstances, has not been shown by the movants. They assert that modification of the injunction must await resolution of the public interest intervenor's challenge to the legality of the settlement legislation, Chapter 66, SLA 1991. They assert that the court has no authority to cancel the lis pendens until final approval of the settlement. They argue that the relief sought in the motion provides no real relief to the affected third parties.

The public interest intervenors argue that the motion is premature and should await resolution of their claims. They argue that the equities favor the status quo.

A preliminary injunction may be modified or canceled if the injunctive relief is no longer necessary, changed circumstances eviscerate the justification for the preliminary injunction, or failure to dissolve the injunction would occasion severe hardship.

See Kocher Coal Co. v. Marshall, 505 F.Supp. 156 (E.D. Pa. 1981). The decision whether to modify an injunction is committed to the discretion of the court; the court should be guided by general equitable principles in the exercise of that discretion. See Merrell-National Laboratories, Inc. v. Zenith Laboratories, Inc., 579 F.2d 786, 790-91; Kocher Coal Co., 505 F.Supp. at 158.

Lis pendens may be terminated by the court before judgment. See 7 R. Powell & P. Rohan, Powell on Real Property ¶ 907.5[1], at 82A-26 (1992 rev.). The court may cancel a lis pendens if a plaintiff unreasonably fails to pursue an action with due diligence or if the operation of the lis pendens will prove to be harsh or arbitrary. See White v. Wensauer, 702 P.2d 15, 18 (Okla. 1985); Dice v. Bender, 117 A.2d 725, 727 (Pa. 1955). The court must apply equitable principles in deciding whether to terminate a lis pendens.

The State asserts that the lis pendens should be terminated because the plaintiffs have not pursued this case with due diligence. The court disagrees. The State correctly points out that this case is now ten years old. However, the court must consider the activity that has occurred in those years.

The case was initially prosecuted in a timely manner in the superior court. The decision was appealed and the Alaska Supreme Court issued its decision near the end of 1985. State v. Weiss, 706 P.2d 681 (Alaska 1985). After remand, the parties engaged in complex negotiations which led to a legislatively-

adopted mechanism to settle this lawsuit, Chapter 48, SLA 1987. The parties continued with the implementation of that settlement mechanism until April 17, 1990, when the Commissioner of Natural Resources wrote to the Chair of the Alaska Mental Health Board declaring an impasse and announcing that the Department would not follow the procedures adopted by the Interim Mental Health Trust Commission in its final report of December 20, 1989. The parties then litigated the issue of the preliminary injunction and lis pendens at issue here and the court entered its decision on July 9, 1990. The plaintiffs continued efforts to reach a negotiated settlement and ultimately the legislature passed this settlement vehicle in Chapter 66, SLA 1991. After passage, the parties negotiated the proposed settlement agreement which was signed April 6, 1992. This motion was filed four days later.

The court could only find unreasonable delay on these facts if the court concluded that seeking a negotiated resolution was unreasonable. Clearly, it was not. The reconstitution of the trust, as mandated by the Supreme Court, is a herculean task. It will involve litigation in every judicial district in this state. It will necessitate adjudicating private third party rights to up to 3162 parcels of land, involving almost 50,000 acres of land which have been conveyed by the State. It will involve litigation regarding over 83,000+ acres of land conveyed to municipalities in 888 conveyances. The time, money, and effort spent at reaching a negotiated settlement is not unreasonable. It is a fraction of

what it would take to litigate this case.

In resolving this motion the court must be guided by equitable principles. Can the plaintiffs be adequately protected if the court grants the motion? Does the proposal alleviate the harm suffered by the third parties? Would the rights of the public be adversely impacted by granting the relief?

The court concludes that the equities in this situation vary greatly with the likelihood that the court will grant final approval of the proposed settlement agreement.

At one end of the spectrum, where the likelihood of final approval approaches 100%, the equities clearly favor granting the motion, modifying the preliminary injunction and terminating the lis pendens. If the proposed settlement agreement is approved, the land held by individuals affected by this motion will remain in their hands without challenge. If final approval was certain, there would be no reason not to give those individuals relief now.

At the other end of the spectrum, where the likelihood of final approval approaches 0%, the equities favor denying the motion and maintaining the status quo. If the proposed settlement is not approved, the plaintiffs are free to reassert all claims against the lands affected by this decision. The rights of the plaintiffs to the land would not change, except where new bona fide purchasers for value took title as a result of a conveyance made as a result of modification of the preliminary injunction and the cancellation of the lis pendens.

The State and the settling plaintiffs disagree regarding whether it is possible to create bona fide purchasers in this situation. If the settling plaintiffs are correct and no bona fide purchasers can be created, the "relief" in this motion becomes 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. They would not get any better title than they have now. If they transferred their interest in the land, they would be selling a lawsuit and both they and the purchasers would ultimately have to litigate. This would only further complicate this litigation by adding yet another layer of subsequent title holder whose rights would have to be adjudicated.

If the State is correct that bona fide purchasers can be created in this situation, it is reasonable to presume that a significant number of bona fide purchasers will be created. In that instance, the mental health lands trust will lose substantial land which it is presently entitled to receive. In exchange, the trust will get the fair market value of the land as of April 6, 1992, or an exchange of "comparable land." At first glance, it might appear that this is adequate relief. However, on closer inspection it is not. There are very real, very practical problems with valuation of the land. These valuation difficulties led to the impasse which destroyed the first settlement attempt. It was this problem, in part, that led the court to conclude that money damages were not an adequate remedy when the preliminary injunction

was issued. There are also difficulties in determining what is "comparable land." If the public interest intervenors are correct that the trust will not receive mineral rights to replacement lands in the reconstituted trust, replacement with "comparable land" is virtually impossible. Moreover, even assuming that plaintiffs are adequately protected, the public interest may be adversely affected by the transfer of additional public lands over and above the original trust lands. Additionally, the reconstitution of trust is made more difficult by the addition of another layer of complexity.

The court concludes that at this point in time, before preliminary approval is obtained, before resolution of the public interest intervenors claims,[1] before notice to the class and without any response from class members, the likelihood of final approval is speculative, at best. The court, then, further concludes that the equities favor denying the motion, without prejudice. If it becomes much more likely that the settlement will achieve final approval, the motion should be refiled and would, at

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[1] The court had hoped that the issues of preliminary approval and the intervenors claims would be resolved before it was necessary to act on this motion. However, because of the time necessary to brief these complex issues, the briefing on the intervenors claims concluded in late December. The earliest time when all attorneys were available to complete the evidentiary hearing on preliminary approval and for argument on the intervenors claims was January 21 and 22. The court's time to decide this motion under AS 22.10.190(b) expires January 29, 1993. The questions presented in the request for preliminary approval and the motions on the intervenors claims will not be decided by that date.

that time be granted.

IT IS SO ORDERED.

DATED at Fairbanks, Alaska this 14th day of January, 1993.

MARY E. GREENE
Superior Court Judge

I certify that on 1-14-93
copies of this form were sent to: Walker
CLERK: [illegible] Gottstein
Jessee
Volland
Bjorkquist
Johannsen
Morford
Bublmi
Koester
Mackentony
Jorgensen
Rehbock

PUBLIC LAW 830 - July 28, 1956

TITLE I - AUTHORITY OF THE TERRITORY OF ALASKA IN THE FIELD OF MENTAL HEALTH

Powers of the Territorial Government

Sec. 101. For the purpose of vesting in the Territory of Alaska authority comparable in scope to that of the States and other Territories of the United States in the field of mental health, the Territorial legislature is hereby authorized to enact such laws on the subject of mental health as it may deem appropriate, and such legislation may supersede any of the Acts cited in section 301.

LAND GRANT

Sec. 202. (a) The Territory of Alaska is hereby granted and shall be entitled to select, within ten years from the effective date of this Act, not to exceed one million acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection ...

(c) All grants made or confirmed under this section shall include mineral deposits: . . .

(d) Following the selection of lands by the Territory pursuant to subsection (b), but prior to the issuance of final patent, the Territory shall be authorized to lease and to make conditional sales of such selected lands.

(e) 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.

Senate Report No. 2053, May 25, 1956 (To accompany H.R. 6376)

THE GRANTS-IN-AID PROVISION

Under the Senate amendment, the grants-in-aid are identical, in substance, to those approved by the House. That is, three different grants for different purposes are provided:

(1) **$6 1/2 million is authorized to be appropriated for construction of mental health facilities in Alaska.** At present, there are none of any kind. Persons "convicted" by the mandatory jury trial are held in jail until arrangements can be made for transporting them away from Alaska to the private institution in Oregon.

(2) **$6 million is authorized to be appropriated over a 10-year period to assist the Territory in developing a rounded mental health program for its people until it can itself assume full financial responsibility.** This amount would be available, subject to approval of appropriations bills for the purpose, as follows:

Fiscal year ---		Fiscal year -- Continued	
1958	$1,000,000	1963	$600,000
1959	1,000,000	1964	400,000
1960	800,000	1965	400,000
1961	800,000	1966	200,000
1962	600,000	1967	200,000

(3) **One million acres of the "vacant, unappropriated, and unreserved" public lands of Alaska, to be selected by the Territory within a 10-year period. The income and proceeds from disposition of these lands must be administered as a public trust, with the expenses of the mental health program having first call on such funds. Amounts not needed for the mental health program can be used for other public purposes as the legislature may determine.**

. . .

Public land grants for public purposes in the Territory of the United States are, of course, older than the Constitution itself, dating from at least the Northwest Ordinance of the Continental Congress in 1787. (See 1 Stat. 50, 51.) **In all of the public land States of the West the Federal Government has made grants of the public lands in order to provide funds for schools or other public purposes.** In five States, namely, Idaho, Oklahoma, South Dakota, Utah, and Wyoming, grants of public lands have been made specifically to provide means for the care of the insane.

. . .

The purpose of the grant is to afford revenues to the Territory for support of its mental-health program. If such revenues are in excess of needs for the program, they may be used, as a public trust, for other public purposes.

During Congressional markup of the 1956 Alaska mental health enabling legislation Alaska Delegate E.L. "Bob" Bartlett said in opposition to proposed "earmarking" of land proceeds exclusively for mental health purposes:

> MR. BARTLETT. When previous legislation on this matter was being considered words substantially the same as those proposed by the gentleman were offered. My understanding is that they were not incorporated in this bill for this reason: **No one knows what the land is going to be worth** - 500,000 acres. It might have very slight value, it might be of average value; or again, we hope it might be enormously rich land containing oil. **You might arrive at a situation where, if it did have oil, you would have revenues piled up there far in excess of the needs of any mental institution. The thought was that in any case the Territory of Alaska will have an obligation to appropriate money required for the care of the mentally ill**, and it was thought it would not be desirable to hobble us possibly in that manner.
>
> MR. DAWSON. Then I am to understand that the gift of this land is not for the purpose of the mentally ill alone, but you are to use it for any purpose you want in Alaska? Is that right?
>
> MR. BARTLETT. **It might very well be, Mr. Dawson, that the land would never provide more than a fraction of the funds required for the mentally ill.**

Hearing before the Subcommittee of the Interior and Insular Affairs Committee of the House of Representatives April - July 1955 on bills providing for the care of Alaskan mentally ill.

ALASKA MENTAL HEALTH ENABLING ACT

Senate Report No. 2053, May 25, 1956 (To accompany H.R.6376)

LETTERS TO THE SENATE COMMITTEE

United States Department of the Interior,
Office of the Secretary,
Washington 25, D.C., January 9, 1956

Hon. James E. Murray,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D.C.

MY DEAR SENATOR MURRAY: This will refer further to your request for the views of the Department on S.2518, a bill to provide for the hospitalization and care of the mentally ill of Alaska, and for other purposes.

. . .

Finally, section 202 (e) was amended by the House committee to provide for the earmarking of funds derived from the land grants to the sole purpose of the hospitalization and care of the mentally ill. While it is, of course, anticipated that the land revenues will be used for this purpose, we are inclined to believe that it would be wiser not to restrict them in this manner. It is impossible at this time to predict accurately the cost to the Territory of the program envisaged by S. 2518. It is equally difficult to predict the amount of revenue that will accrue to the Territory under the land grant. It is possible that revenue resulting from the land grant will substantially exceed the costs of the program, in which case the Territory ought to be free to use such revenues for other purposes. It is also possible, however, that the land grant may be insufficient to sustain the Territory's financial responsibility under the program, and if that is so, the Territory should not be deterred from using funds from other sources to sustain it. We believe that it might be deterred if the earmarking requirement remains in the bill.

. . .

Wesley A. D'Ewart,
Assistant Secretary of the Interior

MENTAL HEALTH LANDS TRUST RECONSTITUTION
PROJECT OVERVIEW

This briefing paper summarizes the central aspects of the Mental Health Trust Project. It also includes a discussion of the 1991 enacting legislation, a summary of the Settlement Agreement, the status of associated legal efforts, and a short description of the Department Order. A project management timeline is also included.

1. Chapter 66, SLA 1991

This legislation provides the conceptual basis for the settlement of the mental health trust litigation through reconstitution of the Mental Health Trust. Although passed by the 1991 Legislature, Chapter 66 must be approved by the courts before it becomes effective. At its heart, Chapter 66 provides for the following:

a. The establishment of a Mental Health Trust Authority (Trust Authority) to oversee the state's mental health programs and to manage the reconstituted land trust.

b. The reconveyance to the Trust Authority of as much Original Trust land as possible, including approximately 35,000 acres of unencumbered Original Trust Land and approximately 300,00 acres of conveyable, encumbered Original Trust Land. The conveyable encumbered Original Trust Land remains subject to the encumbrance (e.g. rights-of-way, leases) and the state compensates the Trust with additional land equal in value to the value of the "interest in the land" not returned to the Trust because of the encumbrance.

c. The conveyance of other state land to the Trust Authority, to compensate for the inability of the State to reconvey encumbered Original Trust land or interests therein. There is about 665,000 acres of non-conveyable encumbered Original Trust Land which will not be conveyed to the Trust Authority.

d. The conveyance is, however, subject to certain restrictions; that is, to the extent practicable, the other state land should be comparable in characteristics to the encumbered Original Trust land, equal in fair market value, and generally be in the public interest for conveyance to the Trust Authority.

e. The hypothecation of land as security to the Trust for successful reconstitution of the Trust under Chapter 66. If the reconstitution is otherwise unsuccessful, an appropriate amount of Hypothecated Land may be foreclosed under the direction of the Alaska Supreme Court or special master to complete the reconstitution.

2. Settlement Agreement

Chapter 66 becomes effective once the mental health lands trust litigation is dismissed by the courts and the time for appeal has run. Because the litigation is a class action and because Chapter 66 contains only the framework of the reconstitution process, the state and three of the four mental health plaintiff groups negotiated and drafted a Settlement Agreement. (The remaining plaintiff group opposes the settlement in large part because they believe it provides too much land and not enough money to the reconstituted trust). The Settlement Agreement is before the Superior Court for review and approval.

The Settlement Agreement is built around the structure of Chapter 66 and provides for specific procedures and requirements in the Trust reconstitution process to be met by the State and Plaintiffs. It also establishes processes for the interim management of state land affected by the settlement, provides for the funding of the Plaintiffs efforts, establishes remedies in the event of failure of the Trust reconstitution process under Chapter 66, and

establishes principles governing long term state/trust relations. A selection of its more important aspects as it relates to this Project includes the following:

a. The parties will work together to develop exchanges and will jointly share information.

b. A process similar to the "smallest practicable tract" determinations under the Alaska Native Claims Settlement Act will be followed for Original Trust lands, the intent being to convey as much of these Original Trust lands as possible.

c. Procedures are laid out for the valuation of lands, and a specific process is described for the exchange of properties involving the mineral estate.

d. Hazardous materials are covered, with specific procedures to be followed in the event such materials are found on properties to be conveyed to the Trust Authority.

e. The State will survey the lands to be conveyed to the Trust Authority within a time-frame determined by available funding.

f. The State will convey state land by patent after survey is completed and through interim conveyance documents prior to survey and platting.

If further information is required on the Settlement Agreement, contact the Department.

3. Mental Health Project

The Mental Health Project (Project) is that process of technical, legal, and administrative work conducted by ADNR and the Plaintiffs that will successfully implement the Settlement Agreement and Chapter 66 (the Legislation) by the legislatively imposed deadline of December, 1994. It is important to recognize that this is a joint, interactive project involving the Department and the Plaintiffs. The Project began in earnest in October, 1991. Substantial work has already been accomplished, and large amounts of work are now underway.

The Project is structured around the requirements of the Legislation, the Settlement Agreement, the needs of the upcoming 1993 legislative session, and the legislative deadline of December, 1994.

For ease in understanding, the Project can be broken into separate work components. Although these components are described separately, they are functionally interrelated.

a. Title Research

The Title Research process identifies all Original Trust land, categorizes this land into the types established in the Settlement Agreement, identifies title encumbrances related to the establishment of value, performs title analyses of replacement land, and creates the conveyance documents for conveyable Original Trust land and replacement land. This work is done by the Mental Health Project staff of Contracts and Title, Division of Land.

A more specific listing of this Unit's major activities includes:

• The identification of non-conveyable Original Trust land. This is important because it tells us the lands for which we must provide other state land in exchange.

• The identification of "elective" Original Trust land. This is land that the Plaintiffs may or may not wish to be conveyed to the Trust Authority.

• The identification of conveyable Original Trust land. This is land that must, under the Settlement Agreement and Legislation, be conveyed to the Trust Authority.

• The identification of encumbrances (right-of-ways, easements, etc.) on Original Trust land and replacement land. This is done to support the appraisal analyses of Original Trust land and replacement land since the State must compensate the Trust for any diminishment in value created by the State.

b. Comparable Characteristics Analyses

The Comparable Characteristics Analyses are performed to identify the attributes of non-conveyable Original Trust land and replacement land. Under the terms of the Legislation and Settlement Agreement, replacement land should be comparable in character to that land that was previously part of the Trust. The idea behind Chapter 66 is to re-establish the Mental Health Trust with land that matches the original inventory of Mental Health Trust properties to the greatest extent possible.

To accomplish this, the non-conveyable Original Trust land and replacement land have been separated into their principal resource attributes. Since 'land' refers to the fee estate, the resource attributes include oil and gas, coal, and minerals of the mineral estate. The surface estate includes land, as well as aggregate and forestry resources. Comparable Characteristics Analyses are to be performed for the following resource attributes: surface land, extraction sites, commercial forest tracts, coal, oil and gas, and minerals. These evaluations are for both the non-conveyable Original Trust land and replacement land. In terms of responsibility, DNR is to prepare the surface land, forest tract, oil and gas, and coal evaluations. The Plaintiffs are responsible for preparing the comparable characteristics analyses for mineralized areas. It should be noted that the surface land evaluations have or will be prepared by consultants under contract to DNR.

The results of these analyses are to be incorporated within a relational data base accessible to both parties through a third party, independent vendor. The data is structured for ease of manipulation through a specific software language; this flexibility should prove critical to developing land exchanges, as required under the Settlement Agreement and Legislation.

c. Value Analyses

Valuation analyses are required to identify the (fair market) value of the resources associated with each parcel of conveyable Original Trust land and replacement land. The type of evaluation and whether an evaluation is required varies with the type of resource.

• The estimates of value for 'surface land' are to be made by independent appraisers jointly selected by the parties, with value to be established through the review of comparable sales parcels by three panels that cover specific areas of the state.

• Valuations of forest resources are also to be made by independent contractors jointly selected by the two parties, with the evaluations to follow typical industry standards and methods.

•Valuations of mineral resources will be required if, based upon the results of the comparable characteristics analyses, satisfactory alternative replacement land cannot be found. The Settlement Agreement provides for the development of a valuation method but does not specify who will conduct such analyses. The procedures and responsibility for methodology development have yet to be determined.

The results of these valuations should establish the resource value of each non-conveyable Original Trust land and replacement land parcel. This data, on a per parcel basis, will be incorporated within the aforementioned, jointly accessible computer system.

d. Replacement Land Identification

Each party has the ability to select replacement land or interests in land, and this selection can be for either the mineral or land estate. The intention is to select the entire fee estate (land and mineral estates)..

The Plaintiffs have selected about 550,000 acres of the fee estate.[1] Of this amount, DNR estimates that about 40,000 acres were nominated for their commercial forest resources, about 200,000 for their mineral potential, and about 310,000 acres for their land or mix of resource values. The Department is in the process of reviewing these nominations and it is certain that some of the nominations may be opposed by the Department. The Department has already opposed the nomination of oil and gas tracts by the Plaintiffs in the Cook Inlet Basin, and certain other land selections. Processes are underway to resolve these contested selections. These nominations of replacement land by the Plaintiff should represent the overwhelming bulk of their nominations.

e. Land Exchange Analysis

The legislation provides for a 'land exchange' process wherein replacement land is exchanged for comparable non-conveyable Original Trust land. If the criteria of comparability and value are satisfied between the non-conveyable Original Trust land and the replacement land, then an 'exchange' is recognized and the replacement land will be eventually conveyed to the Trust Authority. The 'exchange' must also be in the overall public interest.

The exchange analysis is to be based upon the results of the valuation and comparable characteristics analysis. Essentially, this process will involve a comparison, largely using the aforementioned information system, of sets of non-conveyable Original Trust land and replacement land of generally similar resource attributes. For example, the commercial forest tracts of non-conveyable Original Trust land are to be compared to similar tracts of replacement land. A similar matching approach will be used for surface land, extraction sites, and mineral areas. These comparisons will involve large groupings of parcels having generally similar attributes, and the subsequent matches will be comprised of parcels within those groups. The software system (FoxPro) is designed to readily manipulate the vast amounts of attribute data in a convenient, rapid manner.

It can be expected that not all the 'matched' non-conveyable Original Trust land parcels will be comparable in value to that of the replacement land parcels. The differences in value will be identified, and subsequently used as the basis for the selection of certain replacement land by the Plaintiffs.

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[1] There is about 665,000 acres of non-conveyable Original Trust Land that the Department must replace. This replacement is in terms of value, not necessarily acreage.

f. Surveying and Platting

Under the terms of the Settlement Agreement, the State must survey all parcels that are to be conveyed to the Trust Authority. The level of survey would be that required to meet established State and local government standards. Because of inadequate funding by the Legislature, survey and platting activities are not underway. They could begin next fiscal year. Because of the amount of land to be conveyed, we expect survey and platting activities to extend many years beyond the end of the Project.

g. Support Functions

(1) Mapping. To properly manage state land affected by the Legislation, standard 1:63360 scale U.S. Geologic Survey maps depicting Original Trust land, hypothecated land, and replacement land, must be prepared. Maps showing Original Trust land and hypothecated land have already been prepared. Maps depicting replacement land are under preparation.

(2) Information Systems. There are three information sub-systems to support the Project: that accommodating title research information, including a project management capability; another holding all comparable characteristics and appraisal data; and another that comprises all exchange data. The data within these systems is to be centralized at an independent data repository. The repository, which is a contractor to DNR, will provide all Project data to the Plaintiffs and the public. The data repository is in the process of being established. All of the requisite information systems have been developed by DNR and are available for data upload.

(3) Revenue Reporting. Revenue on Original Trust land and hypothecated land must, under the Settlement Agreement, be reported to the Plaintiffs at periodic intervals. These systems have been set up and are operational.

h. Public Review Functions

There are two sets of regional public meetings scheduled to review proposed replacement land: the first is scheduled in July, 1993, and the second, in March, 1994. These meetings are to be used to establish the overall public interest in conveying (or retaining) proposed replacement land. These meetings, at a minimum, will occur in Fairbanks, the Anchorage area, and Juneau.

i. <u>Project Status</u>

Since the initiation of the Project in October, 1991, much has been accomplished and significant progress is being made currently on various aspects of the Project. For ease of understanding, these tasks are organized according to the previously described project components. Activities that are scheduled to occur between January and June, 1993, are also identified. A Project time frame is included as an attachment.

(1) Activities Accomplished

Title

- Identified non-conveyable and elective Original Trust land parcels.
- Identified native allotments and smallest practicable tract affected parcels, and started appraisal and other reviews on these.

- Identified title encumbrances on replacement land; this supports the valuation process.
- Performed title review of all replacement land.

Comparable Characteristics

- Identified comparable characteristics attributes for surface land, forestry tracts, oil and gas, coal, and mineral areason all non-conveyable Original Trust Land.
- Initiated contracts to identify the characteristics on surface land nominated as replacement land.

Valuation Analyses - Surface and Commercial Forest

- Completed surface appraisals of 11(a)(2) affected land, totaling in excess of 30,000 acres.
- Identified process and methods for surface appraisal analyses.
- Initiated RFP's and contracts for the valuation of land resources and commercial forest tracts. (Contract deadline: April, 1993).

Replacement Land

- Performed title and resource review of 421,000 acres of replacement land..

Support Functions

- Mapping of Original Trust land on Hypothecated Land.
- Developed the title research, comparability-appraisal, and land exchange sub-systems.
- Established the Original Trust land and Hypothecated Land revenue reporting systems.

(2) Activities Underway or About to be Underway (January-May, 1993)

Title

- Identify encumbrances on conveyable Original Trust Land to support the appraisal process. Deadline: May, 1993.
- Identify conveyable Original Trust land, with requisite information on title stipulations necessary to the preparation of conveyance documents.

Comparable Characteristics Analysis

- Complete comparable characteristics analyses for replacement land, including surface land, forest tracts, and mineralized areas. The surface land and forestry evaluations will be done by contractors to DNR. Contract deadline: April, 1993.

Valuation Analyses

- Initiate surface land valuations of replacement land, to be performed by three geographic area panels. Deadline: May, 1993.

Replacement Land

- Review proposed replacement land nominations by Plaintiffs. Deadline: January, 1993.
- Nominate proposed replacement land by DNR. Deadline: February, 1993.

Land Exchange

- Identify (tentative) land exchanges for surface land, commercial forest tracts, and coal and mineralized areas.

Support Functions

- Prepare map(s) showing replacement land.
- Upload data into the Title Research and Comparability/Appraisal Sub-systems.

J. Project Management Time-Frame

A Project Time-Frame is attached that identifies the principal Project tasks by time period. This is our best estimate of the time it will take to do the work associated with the tasks of this complex Project. It bears repeating that this is an interdependent project between the Plaintiffs and the Department of Natural Resources, and each party is reliant upon the efforts of the other.

4. 11(a)(2) Replacement Land Process

A side agreement to the Settlement Agreement requires the state to convey additional land to the trust to replace Original Trust Land withdrawn by 11(a)(2) of the Alaska Native Claims Settlement Act and selected by Native Corporations. There are three areas, totaling some 9,270 acres, that are affected by this side agreement: tracts selected by the Tyonek, Knik, and Toghottle Native Corporations. Under the terms of the side agreement, the State will compensate the Trust Authority with other, similar state land that is equal in value to the Original Trust land tracts, discounting for the value of state land that would be ordinarily selected by the Trust under their remaining Mental Health Enabling Act Entitlement Act (over-selection land). This process requires the identification of the 11(a)(2) affected land, the over-selection land, and the replacement land; the valuation of the fee estate of the 11(a)(2) affected land, the over-selected land, and the surface estate of the replacement land; and the eventual conveyance of the replacement land to the Trust Authority through AS 38.05.810(a) (Public and Charitable conveyance). This process is to be completed within six months, and began in May, 1992. This process has been completed and action on this by the Commissioner and Plaintiffs is expected momentarily.

5. Department Order

Department order #135 was developed by the Department of Natural Resources and the Plaintiffs, and is designed to provide DNR staff with guidelines for the management of state land affected by the Settlement Agreement and the Legislation. A copy is attached. Essentially, it establishes separate procedures for each category of affected land:

- Original Trust land; all departmental actions on such land must be reviewed by the Plaintiffs and there must be written concurrence to any proposed action. This is a formalization of the court imposed requirements for review.

• Hypothecated land; all departmental actions on such land must be reviewed by the Plaintiffs, although they have only the right to review and comment on proposed actions; they do not have concurrence authority.

• Replacement land; all departmental actions on such land must be reviewed by the Plaintiffs and there must be written concurrencee to any proposed action.

If further information is needed on the Department Order, please contact DNR.

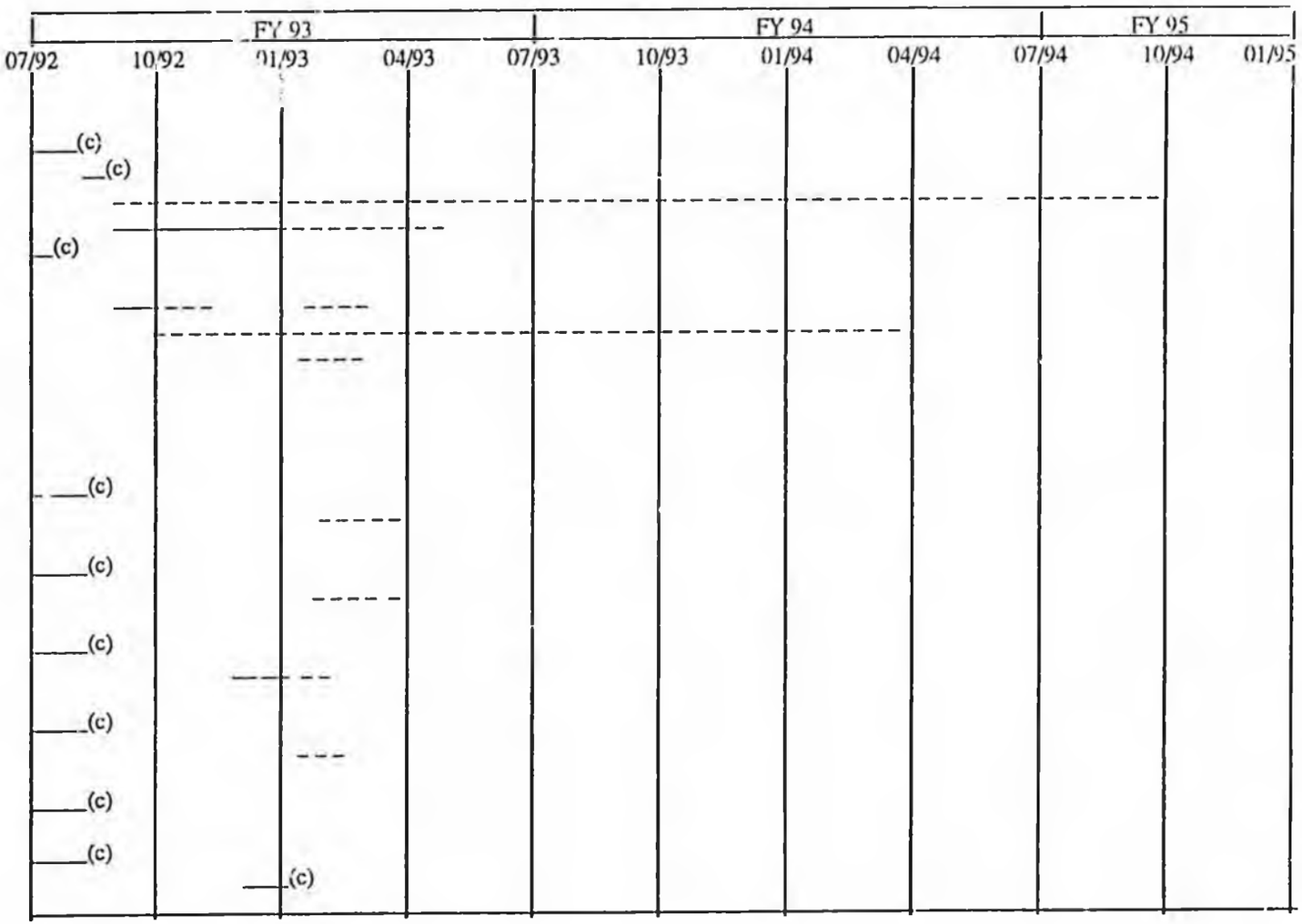
5. Summary

Much has been accomplished by both the Plaintiffs and the State in developing this Project, in defending and promoting the Settlement Agreement before the court, and in establishing procedures for the interim management of state land affected by the Settlement Agreement.

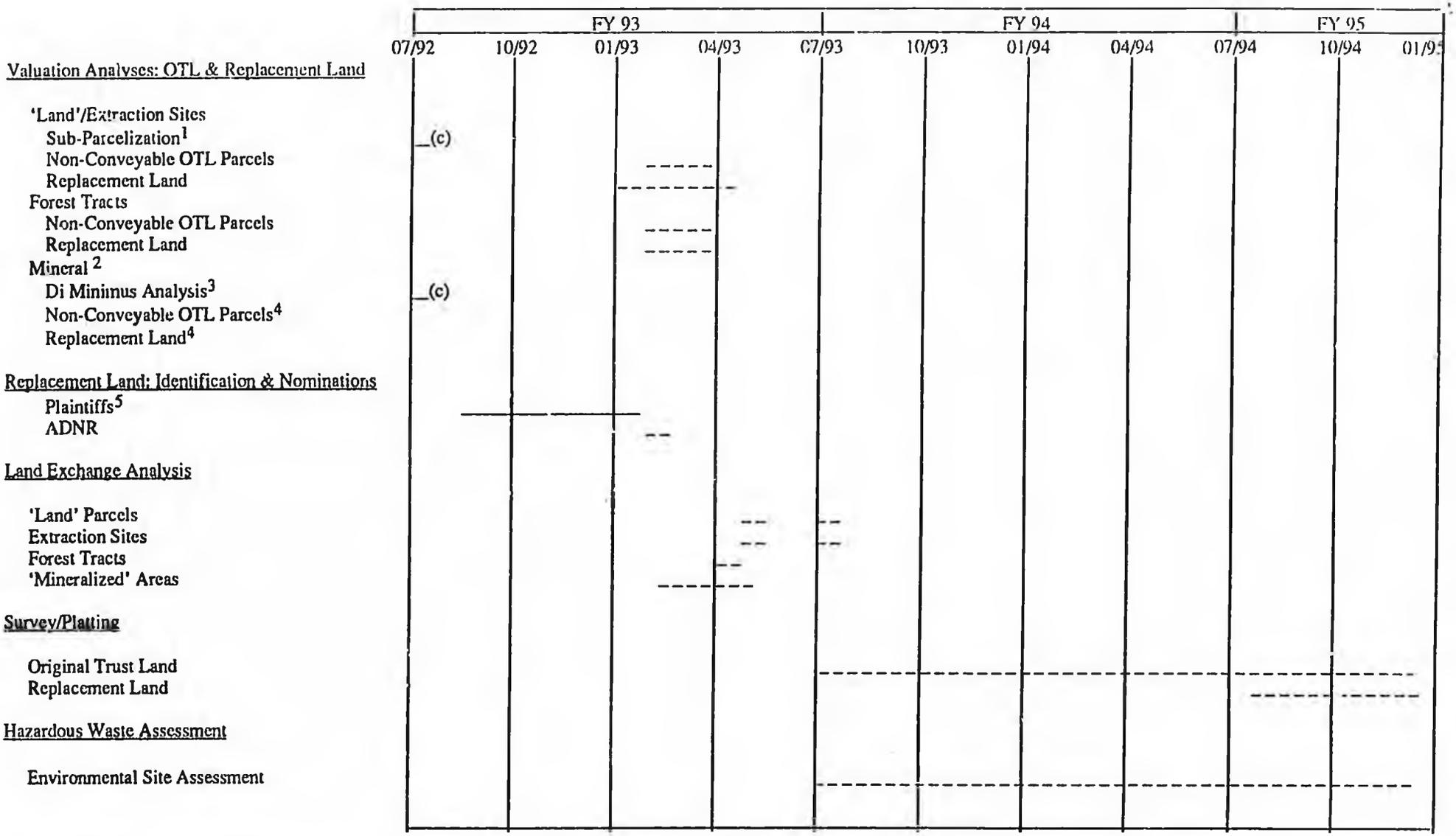
The period between January through May, 1993, will be a critical time for the Project and, therefore, for the successful resolution of the Mental Health Trust lands dilemma that has affected the State for so many years.

The Project will initiate and complete the evaluation of comparable characteristics and value on replacement land (surface land, commercial forest tracts, coal, and mineralized areas) and will be able to compare this data with similar data on non-conveyable Original Trust Land. This will (tentatively) complete the 'land exchange' analysis required by Chapter 66. Accordingly, the State will then have a very good idea as to what lands and/or interests in land will/should be eventually conveyed to the Trust Authority. Given general concurrence on these 'exchanges' by the Plaintiffs and the Department, the remainder on the project can largely focus on the completion of actual land conveyance of Original Trust Land and replacement land.

GENERALIZED TIME FRAME
MENTAL HEALTH PROJECT



Legend: (c): Completed
_____ : Work performed
- - - - - : Work scheduled or underway
OTL: Original Trust Land



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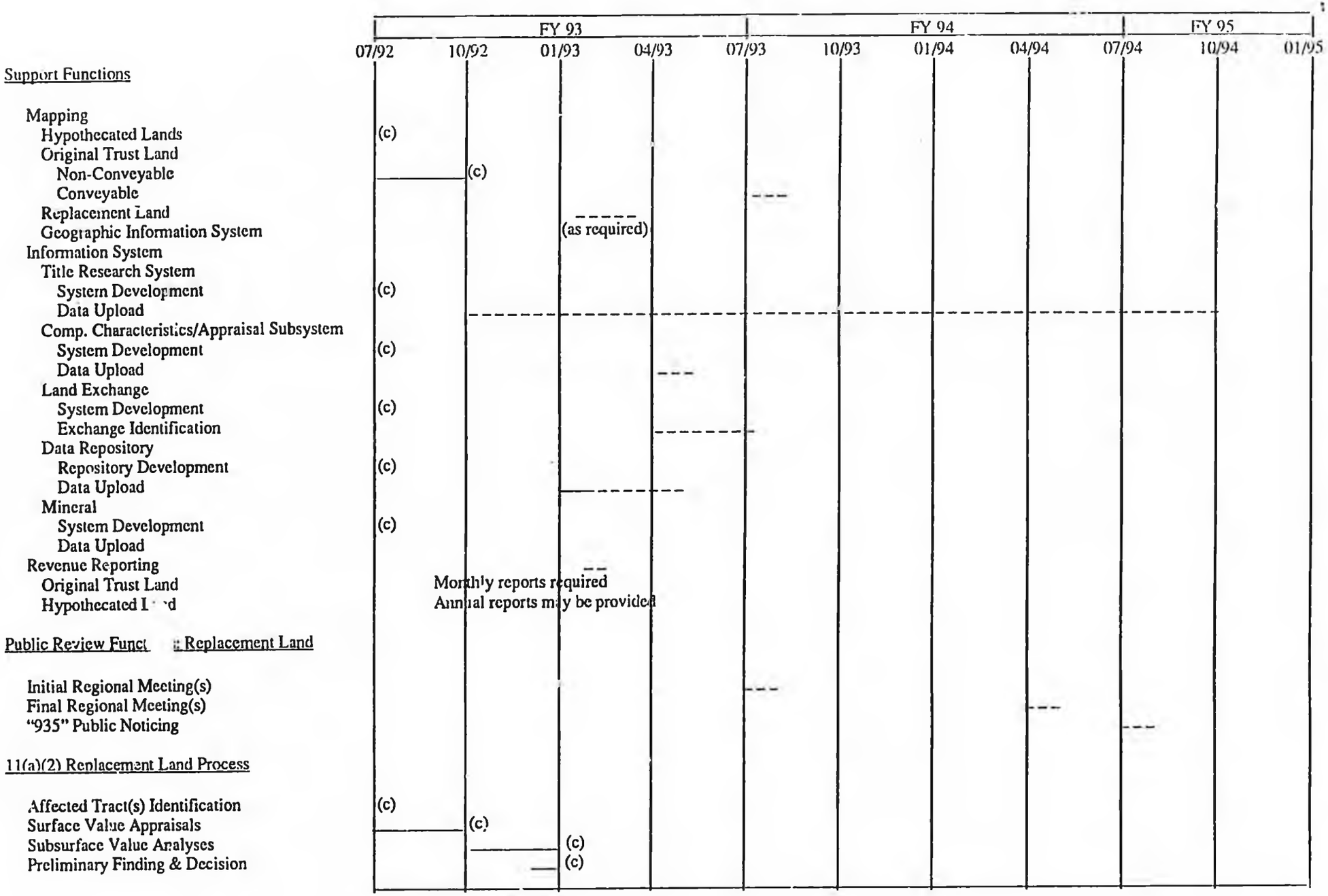
[1] Sub-parcelization refers to the creation of smaller parcels within larger tracts for purposes of identifying a general unit area of development or of sale.

[2] "Minerals' includes coal, oil and gas, and mineralized areas.

[3] A 'di minimus' sub-surface analysis is that assessment intended to establish the absence of potential mineral value and, by inference, to identify tracts with some value.

[4] Mineral evaluations are only required if comparable analyses fail to identify a comparable geologic unit to non-conveyable Original Trust land.

[5] The Plaintiffs have largely completed their nomination of replacement land, although a few more can be expected.


FY 93
FY 94
FY 95
07/92
10/92
01/93
04/93
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01/95
Support Functions
Mapping
Hypothecated Lands
Original Trust Land
Non-Conveyable
Conveyable
Replacement Land
Geographic Information System
Information System
Title Research System
System Development
Data Upload
Comp. Characteristics/Appraisal Subsystem
System Development
Data Upload
Land Exchange
System Development
Exchange Identification
Data Repository
Repository Development
Data Upload
Mineral
System Development
Data Upload
Revenue Reporting
Original Trust Land
Hypothecated Land
(c)
(as required)
Monthly reports required
Annual reports may be provided
Public Review Function: Replacement Land
Initial Regional Meeting(s)
Final Regional Meeting(s)
"935" Public Noticing
11(a)(2) Replacement Land Process
Affected Tract(s) Identification
Surface Value Appraisals
Subsurface Value Analyses
Preliminary Finding & Decision

Outline for DNR Presentation

MENTAL HEALTH TRUST PROJECT

1. Overview

This briefing summarizes and describes:

- Chapter 66, SLA 1991
- Settlement Agreement
- Mental Health Project

2. Settlement Agreement

Built around structure of Chapter 66, the Settlement Agreement:

- Establishes basis for interim management of land;
- Provides specific and requirements for the trust reconstitution process;

  Example: Survey, valuation, title processes

- Establishes principles governing long-term State-Trust relationships.

3. Mental Health Settlement Act; Chapter 66

Act provides basis for Project, Settlement Agreement, Department Order.

- Establishes MHTA;
- Conveys Original Trust Land, comprising 35,000 acres of unencumbered Original Trust Land and 300,000 acres of encumbered Original Trust Land;

- Conueys other state land, to compensate for the 665,000 acres of non-conveyable Original Trust Land;

- Conveyance requires 'comparable characteristics' and equal value;

- Hypothecates (pledges) land as security for successful trust reconstitution.

4. Mental Health Project

MHP is that process of technical, legal, and administrative work conducted by DNR and the Plaintiffs that will successfully implement the Settlement Agreement and Chapter 66 by December, 1994.

TITLE

- Identifies non-conveyable Original Trust Land;

- Identifies ' elective' Original Trust Land;

- Identifies encumbrances (rights-of-way, easements) on Original Trust Land and replacement land;

- Prepares conueyable documents (interim and patent) for Original Trust Land and replacement land;

COMPARABLE CHARACTERISTICS ANALYSIS

The Comparable Characteristic Analysis identifies the 'characteristics', or attributes of non-conueyable Original Trust Land and replacement land. Examples of characteristics include parcel location, access, development potential, and environmental features.

- To accomplish this, 'land' has been separated into its main resource attributes:

    * Surface resources: surface land, extraction sites, commercial forest tracts;

    * Sub-surface resources: oil and gas, coal, and minerals;

- There has been an agreement between parties as to what constitutes an attribute;

- Evaluations performed by DNR or Plaintiffs to describe the various resources by their attributes;

    * Data is pre-formatted into a jointly accessible data base.

VALUE ANALYSES

Valuation analyses are required to establish the Fair Market Value of the various resources of non-conveyable Original Trust Land and replacement land.

- Surface land valuations require the use of independent geographic panels (310,000 acres);

- Commercial forest valuations require the use of independent forestry consultants (50,000 acres);

- Sub-surface (mineral and coal) evaluations require the use of a mineral value model (200,000 acres);

- The results of the resource valuations are contained within a common data base;

REPLACEMENT LAND

Each party has the ability to nominate land or interests in land, and can involve the land estate, mineral estate, or fee estate.

- These nominations undergo the foregoing comparability and valuation analyses;

- Plaintiffs nominations: 550,000 acres scattered throughout the state (SE, SC, Northern) with the following resource selections:

  40,000 acres forest
  200,000 acres mineral/coal potential
  310,000 acres either land or mineral

- DNR nominations/review. DNR is reviewing Plaintiffs nominations presently, and should agree or disagree with Plaintiffs nominations within the next several weeks. DNR may nominate additional land, as a result of this review.

LAND EXCHANGE

The Chapter 66 legislation provides for an 'exchange' of non-conveyable Original Trust Land and replacement land subject to the general comparability of characteristics and equal value.

- This exchange will, essentially, involve the comparison of these resource attributes using a database program;

- If the attributes are similar, a 'match' occurs and an 'exchange' results;

- This comparison process occurs for each of the general categories of resources (coal, mineral, land, forest, etc.) and occurs iteratiuely for these general resource types until whole groupings of parcels are matched;

- When all the resource matches have occurred, the value of the non-conveyable Original Trust Land is compared with the value of replacement land;

- The Plaintiffs are allowed those replacement land nominations that are equal to the value of the non-conueyable land, subject to a public interest finding.

PUBLIC REVIEW PROCESS

Legislation requires that 'public interest' be established; this may provide the basis for retaining the replacement land in state ownership.

- Occurs through two sets of regional meeting:

  - July, 1993
  - June, 1994

5. Activities Accomplished

TITLE

- Identified non-conveyable, conveyable, and elective Original Trust Land;

- Performed title review of all replacement land.

COMPARABLE CHARACTERISTICS

- Identified comparable characteristics attributes for surface land, forestry tracts, oil and gas, coal, and mineral areas on all non-conveyable Original Trust Land;

- Identified Comparable characteristics attributes for commercial forest tracts and mineralized aeas on replacement land;

- Iniated contracts to identify the attributes of surface areas of replacement land.

VALUATION ANALYSES - SURFACE AND COMMERCIAL LAND

- Completed surface appraisals of 11(a)(2) affected land (30,000 acres);

- Developed process and methods for surface valuations;

- Initiated RFPs and contracts to value land and commercial forest resources.

LAND EXCHANGE

- Developed data bases and data structures for the land exchange process.

SUPPORT

- Mapping developed for Original Trust Land, Hypothecated Land and replacement land;

- Data bases/systems developed to support the title, comparability, valuation, and land exchange functions.

6. Activities Underway (January-May, 1993)

TITLE

- Identify encumbrances on conveyable Original Trust Land;

- Develop patents/interim conveyance documents for Original Trust Land.

COMPARABLE CHARACTERISTICS ANALYSES

- Complete all comparable characteristics analyses.

VALUATION ANALYSES

- Complete all (or most) land valuations of replacement land, to be performed by three review panels (500,000 acres);

- Complete all commercial forest tract valuations (40,000 acres);

- Complete all (or most) valuations of mineralized areas.

LAND EXCHANGE

- Develop, using the joint data base, tentative land exchanges of surface, forest, and mineral/coal resources;

- Identify replacement land necessary to equal the value of non-conveyable Original Trust Land.

7. Summary

The following will have been completed:

- Title work to identify encumbrances and the various types of Original Trust Land;

- Comparability evaluations of non-conveyable Original Trust Land (forest, surface, coal, and mineral);

- Land exchange identifications of the various resource types (forest, surface, coal, and mineral);

- Replacement land identification, sufficient to reconstitute the Mental Health Trust.

8. Conclusion

By June, 1993, the Project will, essentially, identified conveyable Original Trust Land, completed all substantive evaluations related to land exchanges, and identified the amounts and locations of replacement land.

Alaska State Legislature

Official Business

HOUSE RESOURCES COMMITTEE

State Capitol
Juneau, Alaska 99801-1182

TO: Legislators who attended House Resources Committee meeting this morning on the Mental Health Lands Trust Settlement

FROM: Rep. Bill William, Chairman

DATE: Wednesday, January 27, 1993

Following today's Resources Committee overview on the Mental Health Lands Trust Settlement, Attorney General Charlie Cole pro ded my office with the attached document entitled, "Weiss V. State: An Overview." He asked that it be distributed to all legislators who attended today's meeting.

WEISS v. STATE: AN OVERVIEW

January 27, 1993

The mental health trust litigation, Weiss v. State, has been pending for more than ten years and has been the subject of much discussion in the legislature and throughout the state. To understand the issues, this memorandum reviews the history of the case and its current status.

The federal law

Prior to 1956, the Territory of Alaska was precluded from legislating with respect to mental health. The federal government -- as distinct from the territorial government -- had that responsibility. The mental health program administered by the federal government was barbaric. The United States Attorney would file a complaint in court alleging that there was an "insane person at large." The person would be jailed, and then tried by a jury. If found "not insane," the person would be released back into the community. If found "insane," the person would be shipped to Morningside Hospital in Portland, Oregon, and institutionalized in a custodial (as opposed to therapeutic) setting.

Alaskans were dismayed by this approach to mental illness, and continually petitioned Congress to be given the authority to deal with the issue. They succeeded when Congress enacted the Alaska Mental Health Enabling Act ("the Enabling Act"), P.L. 84-830, 70 Stat. 709 (1956), which granted the Territory of Alaska the same authority with respect to mental health that the other states and territories had.

Since the territory had no taxing power, the Act included two forms of grants-in-aid. The first was a temporary transitional grant of decreasing amounts of money, and required that the territory meet certain program minimums. The second was a one million acre land grant and requiring that "[a]ll 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." The land grant to the territory was confirmed to the state in sec. 6(k) of the Alaska Statehood Act.

State administration of the land grant

Initially, the state did not establish and maintain a separate account for proceeds from the lands. A record of trust land income was kept until 1973, however, and a board was set up to oversee management of the lands. As a rule, mental health expenditures greatly exceeded revenues from the lands.

the value of the lands.[2] The state appealed the first holding to the Alaska Supreme Court, and the plaintiffs cross-appealed the second holding.

In the meantime, the plaintiffs filed lis pendens[3] on all mental health lands, including those which the state had conveyed to third parties. The state moved to remove the lis pendens on the grounds that (1) title to mental health lands was not at issue in the case; and (2) the lis pendens were over broad in that (i) they reached lands the state had conveyed away, and (ii) they affected the rights of innocent third parties. The plaintiffs opposed, as did the Alaska Mental Health Association and two individuals (collectively "the Association"), even though at that time they were not parties to the action. The Association also moved to intervene on the ground that the original plaintiffs were not providing the class with adequate representation. Cook Inlet Region, Inc. ("CIRI"), filed an amicus brief in support of the state's motion to expunge the lis pendens and in opposition to the Association's motion to intervene. On October 31, 1984, Judge Taylor granted the state's motion to remove the lis pendens on the ground that the plaintiffs' remedy was money and not title to the land, and denied the Association's motion to intervene on the ground that they had delayed too long before moving to intervene. The Association appealed the denial of the motion to intervene.

In State v. Weiss, 706 P.2d 681 (Alaska 1985), the Alaska Supreme Court affirmed the trial court's finding that the 1978 legislation was a breach of trust, but reversed the monetary compensation remedy and invalidated the 1978 legislation. The Court distinguished the University of Alaska case on the ground that one could infer a legislative intent to compensate the trust in that case, which involved including university trust lands in Chugach State Park, but such an intent could not be inferred from the 1978 mental health lands redesignation legislation. The Court remanded the case to the superior court to reconstitute the mental health trust with those original mental health lands still in state

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[2] For this holding, the superior court relied on State v. University of Alaska, 624 P.2d 807 (Alaska 1981), in which the Alaska Supreme Court held that the legislature has plenary authority over state lands, including trust lands, and that the proper remedy for a legislative removal of trust lands from trust status for a specific purpose is monetary compensation and not invalidation of the law removing the lands from trust status if a legislative intent to compensate the trust can be inferred.

[3] Lis pendens are notices filed with the state recorder's office, giving notice that the lands are the subject of litigation. The filing of a lis pendens on a particular parcel of land makes it difficult to sell the land or use it as collateral to obtain a loan.

include (1) those traditionally thought of as mentally ill, (2) the mentally retarded and defective, (3) chronic alcoholics with psychoses, and (4) the senile elderly who, as a result of their senility, suffer major mental illness.

Chapter 48, SLA 1987 was thought to be a giant step toward settlement. It provided for a four-step settlement: (1) the commissioner of natural resources would value the original one million acre land grant as of the effective date of September 7, 1987 under procedures proposed by the commissioner and approved by the commission;[5] (2) the original lands would be exchanged for lands within legislatively designated areas (parks, wildlife refuges, etc.) of equal value which would then comprise the reconstituted mental health trust corpus; (3) the state would rent the reconstituted corpus for eight percent of its fair market value annually, adjusted at least every five years; and (4) pending conclusion of the valuation and exchange process, the state would pay five percent of unrestricted general fund revenues as a transitional measure. The payments would go into a mental health trust income account in the general fund (AS 37.14.011), and the legislature would be required to first make appropriations from the fund to meet the necessary expenses of the state's mental health program before it could appropriate any money in the account for other purposes.

The process broke down when the commissioner and the commission could not agree on procedures to determine the value of the one million acre land grant. The commissioner proposed procedures that produced a value of $574 million; the commission approved procedures proposed by the plaintiffs that produced a value of $2.243 billion. The commissioner then declared impasse and suggested that the matter would have to be resolved by the legislature.

The plaintiffs' attorneys wrote letters to a number of third parties to whom the state had conveyed mental health lands, threatening to file title challenges and suggesting that, in order to avoid such litigation, they urge their legislators to accept the plaintiffs' value of the original land grant. The state moved to enjoin the plaintiffs from filing such actions on the grounds that (1) filing quiet title actions in an effort to influence the political process was an abuse of the legal process, (2) the state would be irreparably harmed by that abuse of the legal process, (3) the plaintiffs could be adequately protected under the University of Alaska and Weiss cases' monetary compensation remedy, (4) the state would prevail on the monetary compensation theory, and (5) the public interest would be harmed if the preliminary injunction was not granted. No decision was immediately

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[5] The commission also was reduced to three: the commissioner and two plaintiffs' representatives.

The plaintiffs then moved for leave to file new lis pendens. Judge Greene granted the motion on August 12, 1990.

Usibelli Coal Mine, Inc. and Idemitsu Alaska, Inc. (operator of the Wishbone Hill coal project) moved to intervene in order to seek modifications of the preliminary injunction. Usibelli wanted to do some exploratory drilling on mental health lands it has under lease, which Judge Greene allowed; Idemitusu needed a mining plan approved,[7] but Judge Greene denied the motion.

The plaintiffs also filed a motion for a preliminary injunction to prevent the transfer to the general fund of the unappropriated balance in the mental health trust income account for FY 1990 -- that is, the portion of the five percent of unrestricted general fund revenues allocated to that account under the transitional provision of chapter 48 which was not appropriated to fund the state's mental health program.[8] The state opposed on the grounds that (1) the FY 1991 budget was predicated on the transfer of those funds, and preventing the transfer had the potential to unbalance the budget, and (2) preparation of the FY 1991 budget began in the fall of 1989 and was concluded with legislative passage of the operating budget at the end of the 1990 session, and it was unfair to allow the plaintiffs to challenge the transfer of funds on which the budget was predicated after it already had been enacted. Following oral argument on August 6, 1990, Judge Greene denied the plaintiffs' preliminary injunction motion to prevent the transfer of funds on the ground that the potential harm to the state of an unbalanced budget outweighed any potential harm to the plaintiffs. Judge Greene cautioned, however, that the state should not rely on such transfers to balance the budget in the future unless the state could show that the necessary expenses of the state's mental health program had been met.

The plaintiffs also moved for a declaratory judgment that the Enabling Act requires that the legislature consider the state's mental health needs independently of any other state needs and, to the extent that mental health trust revenues are available, must fund programs to meet those needs regardless of any other needs which might exist. That motion is still pending.

Legislation to deal with the case was introduced at the beginning of the 1991 legislative session (SB 65 and HB 79). As initially introduced, it would have (1) returned unencumbered

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[7] The Matanuska-Susitna Borough moved for leave to file an amicus brief in support of Idemitsu; the Wishbone Hill coal project would create approximately 200 new jobs in the Mat-Su Borough.

[8] The five percent totaled $125 million; $44 million was appropriated for the state's mental health program, leaving an unappropriated balance of $81 million.

thereafter.

On October 26, 1991, eight environmental and fishing organizations challenged chapter 66 on a number of grounds: (1) that article VIII, section 10 of the Alaska Constitution requires "other safeguards of the public interest" beyond public notice prior to disposal of state lands and chapter 66 did not include such safeguards either before conveyances to the Trust Authority or disposal by the Trust Authority and therefore is unconstitutional; (2) that chapter 66 does not provide for deposit of any mineral revenues from the reconstituted trust in the permanent fund and therefore is unconstitutional; (3) that the conveyance of the mineral estate in exchange lands to the Trust Authority would violate section 6(i) of the Alaska Statehood Act; (4) that requiring the conveyance of lands to the Trust Authority is an appropriation of lands and chapter 66 therefore includes an appropriation in a substantive bill in violation of article II, section 13; (5) the pledging of lands as security for performance through the hypothecation provisions of chapter 66 was unconstitutional as violating the three readings requirement of article II, section 14, being too broad a delegation to the Department of Natural Resources, violating the "other safeguards" provision of article VIII, section 10, and violating the "public trust;" (6) that the planning and classification provisions of AS 38.04 and 38.05 would have to be followed in reconstituting the mental health trust; and (7) that the forest management plans governing the Haines State Forest and the Tanana Valley State Forest would continue to govern management of the original mental health lands within their boundaries even though conveyed to the trust.

The administration and the settling plaintiffs negotiated and entered into a comprehensive settlement agreement to implement chapter 66 on April 6, 1992, and the state moved for preliminary court approval of the proposed settlement[9] on April 10, 1992. On May 4, 1992, the state and the settling plaintiffs jointly moved to modify the July 9, 1990 preliminary injunction and to remove the lis pendens on original mental health lands the state had conveyed to private third parties (the "moms and pops"). The settling plaintiffs moved for preliminary approval of the proposed

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[9] Because this is a class action, court approval is required before the case can be dismissed. The court process involves (1) preliminary approval of the proposed settlement as within the range of possible judicial approval, (2) notice to members of the class that a settlement has been proposed, and (3) a formal hearing at which all class members may express their views of the proposed settlement to the court. The court may only approve the settlement if it finds that it is fair, reasonable, and adequate. The primary criterion for making that determination is to compare the proposed settlement with the probable outcome of continued litigation.